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FROM

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A DIGEST

OF

THE REPORTED CASES

DETERMINED IN THE

Courts of Common Law and Equity

IN THE NOW

PROVINCE OF ONTARIO,

FROM THE COMMENCEMENT OF THE REPORTS IN TRINITY TERM, 1823,

TO AND INCLUDING VOLUMES

44 QUEEN'S BENCH,
30 COMMON PLEAS,
26 CHANCERY,
4 APPEAL REPORTS,
2 SUPREME COURT REPORTS,
7 PRACTICE REPORTS,
15 LAW JOURNAL N. S.

WITH SOME DECISIONS FROM COUNTY COURTS, AND REFERENCES TO STATUTES.

BY

CHRISTOPHER ROBINSON, ESQ.,

ONE OF HER MAJESTY'S COUNSEL,

AND

F. J. JOSEPH, ESQ.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

In Two Volumes.

VOL. I.

CONTAINING THE TITLES

ABANDONMENT TO NEWSPAPERS.

TORONTO:

ROWSELL AND HUTCHISON.

1880.

ENTERED according to the Act of the Parliament of Canada, in the year of our Lord one thousand eight hundred and eighty, by CHRISTOPHER ROBINSON and FRANK JOHN JOSEPH, in the Office of the Minister of Agriculture.

ROWSELL & HUTCHISON, PRINTERS, TORONTO.

To

THE HONOURABLE

JOHN HAWKINS HAGARTY,

CHIEF JUSTICE OF HER MAJESTY'S COURT OF QUEEN'S BENCH
FOR THE PROVINCE OF ONTARIO,

This Work

IS INSCRIBED

IN RECOGNITION OF MUCH PERSONAL KINDNESS,

AND AS A TRIBUTE OF RESPECT

FOR HIS

HIGH JUDICIAL CHARACTER AND LEGAL ATTAINMENTS.

PREFACE.

This Digest, with the Addenda, embraces all the reported cases in the Superior Courts of the present Province of Ontario from the commencement of the Reports, in 1822, to the present time—or to the end of the Volumes mentioned in the title page, with some cases taken from the numbers of the subsequent current Volumes.

When the prospectus of the Work issued in 1874, it was designed to publish a digest up to that time only; but as it was to be issued in numbers, and would take some time in going through the press, the plan was enlarged, and it was decided to include in each number all the cases reported up to the time of its issue, and by means of a Supplement to bring up the whole Work to the time of completing the last number. As the result, the size of the book has been materially increased, and it contains the decisions of six years more than was at first contemplated. Advantage has also been taken of the change of plan to include in the Supplement some additional cross references which it was thought might be useful, and to correct such errors as have been discovered in the progress of the work. It now includes about 125 Volumes, exclusive of the Law Journal, more than treble the matter contained in the two previous Digests; and to effect the compression thus rendered necessary the head notes have been to a large extent shortened and re-arranged.

It was at first intended to omit all obsolete law, but upon consideration this was abandoned, and it was thought better to include every case, so that in the one Digest all decisions might be found. In many instances, however, where the law has been so changed as to make the decisions useless even as bearing by analogy on any

questions likely to arise now, a reference to the names of the cases only has been given, as, for example, in the cases with regard to negative pregnant and colour in pleading, and to the exclusion of witnesses by reason of interest.

The arrangement adopted has been that of Mr. FISHER, which, founded upon that of Mr. HARRISON, has become familiar to the Profession, and is believed to be the most generally approved.

The Editors are much indebted to Mr. T. W. TAYLOR, Q.C., the Master in Chancery, who has been kind enough to peruse the subjects with which his experience had made him more especially familiar, such as Mortgage, and Pleading and Practice in Equity; to Mr. HUSON W. M. MURRAY, and Mr. H. J. SCOTT, who have read most of the proof sheets; and to Mr. TREVELYAN RIDOUT, who, with the late Mr. WETHEY, has rendered valuable assistance in the passage of the work through the Press.

TORONTO,
December, 1880.

Chief Justices and Judges

OF THE

SUPREME COURT OF THE DOMINION OF CANADA;

AND OF

THE SUPERIOR COURTS

OF THE

PROVINCE OF ONTARIO, FORMERLY UPPER CANADA,

FROM THE CONSTITUTION OF THE PROVINCE UNDER 31 GEO. III., c. 31 (1790-1),
TO THE PRESENT TIME.

SUPREME COURT AND EXCHEQUER COURT.

CHIEF JUSTICES.

HON. SIR WILLIAM BUELL RICHARDS, KNT.	Appointed 8th of October, 1875.
HON. WILLIAM JOHNSTONE RITCHIE	" 11th of January, 1879.

JUDGES.

HON. WILLIAM JOHNSTONE RITCHIE	Appointed 8th of October, 1875.
HON. SAMUEL HENRY STRONG	" 8th of October, 1875.
HON. JEAN THOMAS TASCHEREAU	" 8th of October, 1875.
HON. TÉLÉSPHORE FOURNIER	" 8th of October, 1875.
HON. WILLIAM ALEXANDER HENRY	" 8tn of October, 1875.
HON. HENRI ELZÉAR TASCHEREAU	" 7th of October, 1878.
HON. JOHN WELLINGTON GWYNNE	" 14th of January, 1879.

COURT OF ERROR AND APPEAL.

PRESIDING JUDGES AND CHIEF JUSTICES.

HON. SIR JOHN BEVERLEY ROBINSON, BART., C.B	Appointed 18th of March, 1862.
HON. ARCHIBALD MCLEAN	" 22nd of July, 1863.
HON. WILLIAM HENRY DRAPER, C.B.	" 20th of October, 1868.
HON. THOMAS MOSS	" 30th of November, 1877.

JUDGES.

Hon. Sir James Buchanan Macaulay, Knt.	Appointed	23rd of July, 1857.
Hon. William Hume Blake	"	12th of March, 1864.
Hon. Samuel Henry Strong	"	27th of May, 1874.
Hon. George William Burton	"	30th of May, 1874.
Hon. Christopher Salmon Patterson	"	6th of June, 1874.
Hon. Thomas Moss	"	8th of October, 1875.
Hon. Joseph Curran Morrison	"	30th of November, 1877.

Note.—By 34 Geo. III. c. 2, and 7 Will. IV. c. 2, appeals were allowed from the Court of King's Bench and Chancery, to the Governor and Council, who composed a Court of Appeal.

By 12 Vict. c. 63, a new appellate Court was established, called the "Court of Error and Appeal," composed of the Judges of the Courts of Queen's Bench, Common Pleas, and Chancery.

By 20 Vict. c. 5, the Governor might appoint any retired Judge of those Courts as an additional Judge in Appeal. (See Consol. Stat. U. C. c. 13. See also 24 V. c. 36, 25 V. c. 18.)

The present Court of Appeal was established by the 37 Vict. c. 7, O., now R. S. O. c. 38.

By 39 Vict. c. 7, s. 22, the style of the Court was changed to "The Court of Appeal."

The presiding Judge, by 32 Vict. c. 24, s. 1, O., was styled "Chief Justice of Appeal" until the death of Chief Justice Harrison, 1st of November, 1878, since which date he is styled "Chief Justice of Ontario." (R. S. O. c. 38, s. 5.)

COURT OF KING'S (NOW QUEEN'S) BENCH.

CHIEF JUSTICES.*

Hon. William Osgoode	Appointed	29th of July, 1792.
Hon. John Elmsley	"	21st of November, 1796.
Hon. Henry Alcock	"	7th of October, 1802.
Hon. Thomas Scott	"	6th of August, 1806.
Hon. William Dummer Powell	"	1st of October, 1816.
Hon. Sir William Campbell, Knt.	"	8th of December, 1825.
Hon. Sir John Beverley Robinson, Bart., C.B	"	13th of July, 1829.
Hon. Archibald McLean	"	18th of March, 1862.
Hon. William Henry Draper, C.B.	"	22nd of July, 1863.
Hon. William Buell Richards	"	12th of November, 1868.
Hon. Robert Alexander Harrison	"	8th of October, 1875.
Hon. John Hawkins Hagarty	"	13th of November, 1878.

JUDGES.

Hon. William Dummer Powell	Appointed	9th of July, 1794.
Hon. Henry Alcock	"	30th of November, 1798.†
Hon. Thomas Cochrane	"	25th of June, 1803.

* The Chief Justice of this Court, until 1878, was styled "Chief Justice of Upper Canada" or "of Ontario."

† The Hon. Peter Russell, Administrator of the Government, received several commissions between the 15th of July, 1795, and the 17th of March, 1798, to act in the absence of other Judges.

Hon. Robert Thorpe	Appointed	24th of July, 1805.
Hon. William Campbell	"	18th of November, 1811.
Hon. D'Arcy Boulton	"	12th of February, 1818.
Hon. Levius Peters Sherwood	"	17th of October, 1825.
Hon. John Walpole Willis	"	26th of September, 1827.
Hon. James Buchanan Macaulay (*a*)	"	13th of July, 1829.
Hon. Archibald McLean	"	23rd of March, 1837.
Hon. Jonas Jones	"	23rd of March, 1837.
Hon. Christopher Alex. Hagerman (*b*)	"	15th of February, 1840.
Hon. William Henry Draper	"	12th of June, 1847.
Hon. Robert Baldwin Sullivan	"	15th of September, 1848.
Hon. Robert Easton Burns	"	21st of January, 1850.
Hon. Archibald McLean	"	5th of February, 1856.
Hon. John Hawkins Hagarty	"	19th of March, 1862.
Hon. Skeffington Connor	"	31st of January, 1863.
Hon. Joseph Curran Morrison	"	24th of August, 1863.
Hon. Adam Wilson	"	12th of November, 1868.
Hon. John Douglas Armour	"	30th of November, 1877.
Hon. Matthew Crooks Cameron	"	15th of November, 1878.

COURT OF COMMON PLEAS.

CHIEF JUSTICES.

Hon. James Buchanan Macaulay	Appointed	15th of December, 1849.
Hon. William Henry Draper, C.B.	"	5th of February, 1856.
Hon. William Buell Richards	"	22nd of July, 1863.
Hon. John Hawkins Hagarty	"	12th of November, 1868.
Hon. Adam Wilson	"	13th of November, 1878.

JUDGES.

Hon. Archibald McLean	Appointed	19th of January, 1850.
Hon. Robert Baldwin Sullivan	"	21st of January, 1850.
Hon. William Buell Richards	"	22nd of June, 1853.
Hon. John Hawkins Hagarty	"	5th of February, 1856.
Hon. Joseph Curran Morrison	"	19th of March, 1862.
Hon. John Wilson	"	22nd of July, 1863.
Hon. Adam Wilson	"	24th of August, 1863.
Hon. John Wellington Gwynne	"	12th of November, 1868.
Hon. Thomas Galt	"	7th of June, 1869.
Hon. Featherston Osler	"	5th of March, 1879.

(*a*) The Hon. J. B. Macaulay was on the 3rd of July, 1827, temporarily appointed a Judge of the Court of King's Bench, in the room of the Hon. D'Arcy Boulton.

(*b*) The Hon. C. A. Hagerman was on the 26th of June, 1828, temporarily appointed a Judge of the Court of King's Bench, in the room of the Hon. J. W. Willis.

CLERK OF THE CROWN AND PLEAS OF THE COURT OF QUEEN'S BENCH.

(R. S. O. c. 39, s. 29.)

ROBERT GLADSTONE DALTON, Q.C. .... Appointed by R. G. T. T. 1870, (29 Q. B. 623,) 21st of February, 1870.

COURT OF CHANCERY.

CHANCELLORS.

HON. WILLIAM HUME BLAKE	Appointed	29th of September, 1849.
HON. PHILIP M. M. S. VANKOUGHNET..	"	19th of March, 1862.
HON. JOHN GODFREY SPRAGGE.....	"	27th of December, 1869.

VICE-CHANCELLORS.

HON. ROBERT SYMPSON JAMESON.....	Appointed	23rd of March, 1837.
HON. JAMES C. P. ESTEN.....	"	29th of September, 1849.
HON. JOHN GODFREY SPRAGGE.....	"	27th of December, 1850.
HON. OLIVER MOWAT	"	14th of November, 1864.
HON. SAMUEL HENRY STRONG	"	27th of December, 1869.
HON. SAMUEL HUME BLAKE.....	"	2nd of December, 1872.
HON. WILLIAM PROUDFOOT	"	30th of May, 1874.

MASTERS, REFEREES, AND SECRETARY.

JOHN GODFREY SPRAGGE	Appointed	Master 20th of June, 1837.
ANDREW NORTON BUELL	"	Master 27th of December, 1850.
THOMAS WARDLAW TAYLOR, Q.C.....	Appointed	Secretary 5th of September, 1866; Appointed Referee 21st of February, 1871; Appointed Master 16th of December, 1872.
JOHN ALEXANDER BOYD	Appointed	Master 31st of October, 1870.
GEORGE SMITH HOLMESTED	"	Referee 16th of December, 1872.
RICHARD PORTER STEPHENS.....	"	Referee 1st of April, 1876.

NOTE.—By 7 Will. IV. ch. 2, a Court of Chancery was established for the Province of Upper Canada, of which the Governor of the Province was Chancellor, and the Judicial power whereof were exercised by a Judge, known as the Vice-Chancellor of Upper Canada. By 12 Vict. ch. 64 (C. S. U. C. ch. 12), the appointment of a Chancellor and two Vice-Chancellors was authorized.

MARITIME COURT.

(ESTABLISHED BY 40 VICT. C. 21, C.)

JUDGE.

KENNETH MACKENZIE, ESQ., Q.C. .... Appointed 12th of July, 1877.

Ministers of Justice and Attorneys-General

OF THE

DOMINION OF CANADA

AND

Attorneys-General and Solicitors-General

FOR THE

PROVINCE OF ONTARIO, FORMERLY UPPER CANADA,

FROM THE CONSTITUTION OF THE PROVINCE UNDER 31 GEO. III. C. 31,
TO THE PRESENT TIME.

DOMINION OF CANADA.

MINISTERS OF JUSTICE AND ATTORNEYS-GENERAL.

RT. HON. SIR JOHN ALEXANDER MACDONALD, K.C.B.	Appointed 1st of July, 1867.
HON. ANTOINE AIMÉ DORION	" 7th of November, 1873.
HON. TÉLESPHORE FOURNIER	" 8th of July, 1874.
HON. EDWARD BLAKE	" 19th of May, 1875.
HON. RODOLPHE LAFLAMME	" 8th of June, 1877.
HON. JAMES MCDONALD	" 17th of October, 1878.

PROVINCE OF UPPER CANADA.

ATTORNEYS-GENERAL.

HON. JOHN WHITE	Appointed 29th of July, 1792.
HON. THOMAS SCOTT	" , 1801.
HON. WILLIAM FIRTH	" 3rd of November, 1807.
HON. JOHN MACDONELL	" 28th of September, 1811.
HON. JOHN BEVERLEY ROBINSON	" 19th of November, 1812. Acting Attorney-General.
HON. D'ARCY BOULTON	" 31st of December, 1814.
HON. JOHN BEVERLEY ROBINSON	" 11th of February, 1818.
HON. HENRY JOHN BOULTON	" 13th of July, 1829.
HON. ROBERT SYMPSON JAMESON	" 21st of June, 1833.
HON. CHRISTOPHER ALEX. HAGERMAN	" 23rd of March, 1837.

Hon. William Henry Draper	Appointed	14th of February, 1840.
Hon. Robert Baldwin	"	16th of September, 1842.
Hon. William Henry Draper	"	2nd of September, 1844.
Hon. Henry Sherwood	"	29th of May, 1847.
Hon. Robert Baldwin	"	11th of March, 1848.
Hon. William Buell Richards	"	28th of October, 1851.
Hon. John Ross	"	22nd of June, 1853.
Hon. John Alex. Macdonald	"	11th of September, 1854.
Hon. John Sandfield Macdonald ..	"	2nd of August, 1858.
Hon. John Alex. Macdonald	"	7th of August, 1858.
Hon. John Sandfield Macdonald ..	"	24th of May, 1862.
Hon. John Alex. Macdonald	"	30th of March, 1864.

SOLICITORS-GENERAL.

Hon. Robert Isaac Dey Gray	Appointed	21st of March, 1797.
Hon. D'Arcy Boulton	"	6th of November, 1805.
Hon. John Beverley Robinson.....	"	6th of February, 1815.
Hon. Henry John Boulton	"	11th of March, 1818. Acting Solicitor-General.
Hon. Henry John Boulton	"	26th of July, 1820.
Hon. Christopher Alex. Hagerman..	"	13th of July, 1829.
Hon. William Henry Draper	"	23rd of March, 1837.
Hon. Robert Baldwin	"	14th of February, 1840.
Hon. Henry Sherwood	"	23rd of July, 1842.
Hon. James E. Small	"	26th of September, 1842.
Hon. Henry Sherwood	"	7th of October, 1844.
Hon. John Hillyard Cameron.....	"	27th of June, 1846.
Hon. William Hume Blake	"	22nd of April, 1848.
Hon. John Sandfield Macdonald ..	"	14th of December, 1849.
Hon. John Ross	"	12th of November, 1841.
Hon. Joseph C. Morrison	"	22nd of June, 1853.
Hon. Henry Smith	"	11th of September, 1854.
Hon. Skeffington Connor.....	"	2nd of August, 1858.
Hon. Joseph C. Morrison	"	22nd of February, 1860.
Hon. James Patton.....	"	27th of March, 1862.
Hon. Adam Wilson.....	"	24th of May, 1862.
Hon. Lewis Wallbridge.....	"	16th of May, 1863.
Hon. Albert Norton Richards	"	26th of December, 1863.
Hon. James Cockburn	"	30th of March, 1864.

PROVINCE OF ONTARIO.

ATTORNEYS-GENERAL.

Hon. John Sandfield Macdonald ..	Appointed	16th of July, 1867.
Hon. Adam Crooks	"	20th of December, 1871.
Hon. Oliver Mowat	"	31st of October, 1872.

Editor and Reporters

OF THE

SUPREME COURT OF THE DOMINION OF CANADA,

AND OF

THE SUPERIOR COURTS

OF THE

PROVINCE OF ONTARIO, FORMERLY UPPER CANADA,

FROM THE FIRST APPOINTMENT UNDER 4 GEO. IV. c. 3, TO THE PRESENT TIME, WITH THE VOLUMES PUBLISHED BY EACH.

EDITOR OF THE ONTARIO REPORTS.

CHRISTOPHER ROBINSON, Q. C..... Appointed 30th May, 1872.
33 Q. B. to present time; 22 C. P. to present time; 19 Chy. to present time; 7 P. R. to present time.

REPORTERS.

SUPREME COURT.

(SEE 38 VICT. c. 11, ss. 71, 73, D.)

ROBERT CASSELS, JR..... Appointed Registrar 8th of October, 1875.
Vols. 1 Sup. Ct. R. to present time.

GEORGE DUVAL ..... Appointed 19th January, 1876.
Vols. 1 Sup. Ct. R. to present time.

COURT OF APPEAL.

ALEXANDER GRANT..... Appointed 14th of February, 1861.
Vols. 1 to 3—E. & A.

JAMES STEWART TUPPER ..... Appointed 27th of November, 1876. *(a)*.
Vols. 1 App. R. to present time.

(a) The Reports of the cases decided by the Court of Error and Appeal from 1866 to 1876 are to be found in the Reports of the Courts below from which they were appealed.

COURT OF KING'S (NOW QUEEN'S) BENCH.

THOMAS TAYLOR..... Appointed E. T. 4 Geo. IV., 1823.
Taylor's Reports, 1 Vol., from Trinity Term, 4 Geo. IV., 1823, to Trinity Term, 8 Geo. IV., 1827. inclusive.

SIMON E. WASHBURN ..... Appointed 4th of May, 1829.
No Reports.

WILLIAM HENRY DRAPER..... Appointed 12th of November, 1829.
Draper's Reports, 1 Vol., from Michaelmas Term, 10 Geo. IV., 1829, to Easter Term, 1 Will. IV., 1831, inclusive.

HENRY SHERWOOD..... Appointed 1837.
MSS. Reports, Vols. 2 to 6, from Trinity Term, 1 & 2 Will. IV., to Hilary Term, 7 Will. IV.*

JOHN HILLYARD CAMERON ..... Appointed 7th of November, 1840.
MSS. Reports, 2 Vols., and Vols. 1 and 2 Q. B.

JAMES LUKIN ROBINSON ..... Appointed 6th of August, 1846.
Vols. 2 to 5 O. S. inclusive; Vols. 3 to 13 Q. B., inclusive.

CHRISTOPHER ROBINSON, Q.C. ..... Appointed 29th of November, 1856.
Vols. 6 O. S. and Vols. 14 to 32 Q. B., inclusive.

HENRY C. W. WETHEY ..... Appointed 30th May, 1872.
Vols. 33 to 42 Q. B. inclusive.

SALTER J. VANKOUGHNET ..... Appointed 25th of June, 1878.
Vol. 43 Q. B. to the present time.

COURT OF COMMON PLEAS.

EDWARD C. JONES..... Appointed 5th of September, 1850.
Vols. 1 to 14 C. P. inclusive.

SALTER J. VANKOUGHNET ..... Appointed 27th of August, 1864.
Vols. 15 to 21 C. P. inclusive, and part of Vol. 22 C. P.

GEORGE FREDERICK HARMAN ..... Appointed 7th of December, 1872.
Part of Vol. 22 C. P. to the present time

COURT OF CHANCERY.

ALEXANDER GRANT..... Appointed 19th of June, 1845.
Cases reported in 1 O. S. (2 U. C. Jurist). Vols. 1 Chy. to the present time.

* Most of these MSS. Reports are to be found in Vols. 2 to 6, O. S., and 1 Q. B.

COMMON LAW CHAMBERS.

HENRY O'BRIEN.....	Appointed 8th of September, 1866. Vols. 4 to 6 P. R.
JAMES STEWART TUPPER	Appointed 27th of June, 1876. Vol. 7 P. R.
WILLIAM EGERTON PERDUE	Appointed 1st of March, 1879. Vol. 8 P. R. to the present time.

NOTE.—Vols. 1 and 2 C. L. Chamb. and Vol. 1 P. R. were published by J. L. ROBINSON, and Vols. 2 and 3 P. R. by CHRISTOPHER ROBINSON, during the time they were Reporters to the Court of Queen's Bench, there being then no authorized Reporter to the Practice Court or Common Law Chambers.

CHANCERY CHAMBERS.

CHARLES W. COOPER.....	Appointed 12th of February, 1867. Vols. 1 to 4 Chy. Chamb. inclusive.
HENRY O'BRIEN.....	Appointed 14th of February, 1873. Vol. 6 P. R.
JAMES STEWART TUPPER	Appointed 27th of June, 1876. Vol. 7 P. R.
THOMAS TAYLOR ROLPH.....	Appointed 1st of March, 1879. Vol. 8 P. R. to present time.

ABBREVIATIONS.

A. J. Act.	Administration of Justice Act.
App. R.	Appeal Reports.
C. C.	County Court.
C. C. & P.	Clerk of the Crown and Pleas.
C. L. Chamb.	Common Law Chambers—Common Law Chambers Reports.
C. L. P. Act.	Common Law Procedure Act.
C. P.	Common Pleas—Common Pleas Reports.
C. S. C.	Consolidated Statutes of Canada.
C. S. U. C.	Consolidated Statutes of Upper Canada.
Chy.	Court of Chancery—Chancery Reports, (Grant).
Chy. Chamb.	Chancery Chambers—Chancery Chambers Reports.
D.	Dominion Statutes.
D. C.	Division Court.
Dra.	Draper's Reports.
E. & A.	Error and Appeal Reports.
E. C.	Contested Election Court.
L. J.	Upper Canada Law Journal.
L. J. N. S.	Upper Canada Law Journal, New Series.
M. C.	Maritime Court.
M. O.	Master's Office.
Ont.	Ontario Statutes.
O. S.	*Old Series of King's and Queen's Bench Reports.
P. R.	Practice Reports.
Q. B.	Queen's Bench—Queen's Bench Reports (generally quoted U. C. R.)
Q. S.	Quarter Sessions.
R. & H. Dig.	Robinson & Harrison's Digest.
R. G.	Rules of Court.
R. S. O.	Revised Statutes of Ontario.
S. C.	Same Case.
Sup. Ct. R.	Supreme Court Reports.
Tay.	Taylor's Reports.

*Cases referred to merely as of the Term in which they were decided, *e. g.* "*Totten* v. *Fletcher*, T. T. 2 & 3 Vict.," p. 3, have never been published.

Vol. 1 O. S. embraces Vols. 1 and 2 Upper Canada Jurist, which contain decisions of the Court of Chancery. Vols. 2 to 6 O. S. contain cases decided in the King's (now Queen's) Bench, and Practice Court.

AN

ANALYTICAL DIGEST

OF THE

COMMON LAW AND EQUITY REPORTS

OF THE

PROVINCE OF ONTARIO.

ABANDONMENT.

I. Of Contract—*See* Contract.
II. Of Execution—*See* Execution.
III. Of Ships or Cargo—*See* Insurance.
IV. Lapsed or Abandoned Rules—*See* Practice at Law.
V. Of Purchase of Land—*See* Sale of Land.

ABATEMENT.

I. Of Rent—*See* Landlord and Tenant.
II. Of Nuisances—*See* Injunction—Nuisance.
III. Of Suits—*See* Action and Suit—Practice in Equity.
IV. Pleas in—*See* Pleading at Law.
V. Of Purchase Money on Sale of Land—*See* Specific Performance.

ABSCONDING DEBTOR.

I. Attachment.
1. *Generally*, 2.
2. *Affidavit for*, 3.
3. *Service of*, 3.
II. Sureties, 4.
III. Proceedings after Attachment, 4.
IV. Priority as between Attaching Creditors and others, 6.
V. Setting aside Attachment, 8.
VI. Proceedings against Debtor of Absconding Debtor, 8.
VII. Miscellaneous Cases, 9.
VIII. Proceedings in Arrest—*See* Arrest.
IX. Service of Bill—*See* Pleading in Equity.
X. Obtaining Decree and Orders pro confesso against—*See* Practice in Equity.

I. Attachment.

1. *Generally.*

[*The original Acts, 2 Will. IV. ch. 5, and 5 Will. IV. ch. 5, are amended and consolidated by C. S. U. C. ch. 25, which was formerly part of the C. L. P. Act, 1856. The changes then made are stated in Harrison's notes to that Statute.*]

Form of attachment under 2 Will. IV. ch. 5. *Meighan* v. *Pinder*, 2 O. S. 292.

The court will only grant an attachment for sums certain, and where such an affidavit could be made as would enable a plaintiff without a judge's order to sue out bailable process. *Clock* v. *Alfield*, 5 O. S. 504.

The property of a person usually residing in the United States, but who employs persons here and comes frequently to superintend their work, may be attached under 2 Will. IV., c. 5. *Ford* v. *Lusher*, 3 O. S. 428.

Where a person usually residing in Scotland, while here, to settle some affairs, referred some disputes concerning them, and an award was made against him, not payable until nearly two years after he had returned to Scotland:—Held, that he did not come within the Act. *Taylor* v. *Nicholl*, 1 Q. B. 416.

Semble, that a debtor whose family resided in the United States, but who for several months was in this Province purchasing horses for the U. S. army, and contracting debts therefor, with

the declared intention of moving permanently into Canada, was sufficiently a resident of Upper Canada to be within the Act. *Higgins* v. *Brady*, 10 L. J. 268.—C. L. Chamb.—A. Wilson.

Semble, that under sec. 31 of C. S. U. C., c. 25, a judgment the execution upon which has been set aside as fraudulent, under sec. 22, may be used as a foundation for a writ of attachment, and thus share ratably with the other creditors. *White* v. *Lord*, 13 C. P. 289.

A writ of attachment is properly issued by the clerk of the process. *Wakefield* v. *Bruce*, 5 P. R. 77.—Chamb.—Gwynne.

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2. *Affidavit for.*

An attachment was refused where only one person besides the creditor swore to the absconding or concealment. *Anon.* 2 O. S. 292.

Affidavits should follow as nearly as possible the common affidavits of debt. *Ib.*

Where deponents reside far from the debtor, they should state the grounds of their belief. *Bank of Upper Canada* v. *Spafford*, 2 O. S. 373.

An attachment was set aside, the affidavit being for money lent, and not stating by whom. *McKenzie* v. *Bussell*, 3 O. S. 343.

A certified copy of an affidavit filed in the office of the clerk of the crown:—Held, sufficient to move upon. *Ib.*

"Has left the Province, or is concealed within the same":—Held sufficient. *Totten* v. *Fletcher*, T. T. 2 & 3 Vict.

The affidavit must on the face of it shew that the debtor is or was a resident of Upper Canada. *Higgins* v. *Brady*, 10 L. J. 268.—C. L. Chamb.—A. Wilson.

It is not sufficient to describe the debtor as "lately doing business" in Upper Canada; nor to describe him as having "departed from Canada," &c. *Ib.*

Held, that an affidavit concluding that "Patrick Brady hath departed from Upper Canada, and hath gone to the United States, with intent to defraud (*omitting* 'me') of my just debts, *or* to avoid being arrested or served with process," so far as the conclusion was concerned, was sufficient—the Act as well as the affidavit being in the alternative, and the latter alternative alone being sufficient. *Ib.*

The plaintiff need not swear that the debtor was residing within Upper Canada, if that fact is sworn to by others. *Wakefield* v. *Bruce*, 5 P. R. 77.—Chamb.—Gwynne.

It is sufficient to shew that the debtor intends to defraud the plaintiffs, without shewing an intention to defraud creditors generally. *Ib.*

The affidavits are not vitiated by being intituled before the issue of the writ. *Ib.*

The promissory notes, or the cause of action, being set out fully, the indebtedness of defendant is alleged with sufficient certainty. *Ib.*

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3. *Service of.*

7 Vict., c. 16, s. 54,—Held binding on the courts in Upper Canada as well as upon the courts in Lower Canada. *McPherson* v. *McMillan*, 3 Q. B. 34.

Service of an attachment on the wife of the debtor will be allowed as good, upon affidavit that after diligent enquiry plaintiff is unable to ascertain the debtor's whereabouts. *McDougall* v. *Gilchrist*, 3 L. J. 28.—C. L. Chamb.—Burns.

An affidavit for the allowance of service of attachment should, among other things, state what efforts have been made to effect personal service. *Stephen* v. *Dennie*, 3 L. J. 69.—C. L. Chamb.—Richards.

II. Sureties.

The sureties required from the plaintiff before sale under 2 Will. IV. c. 5, rejected because not inhabitants of this Province. *Bradbury* v. *Lowry*, 3 O. S. 439.

The affidavit of justification by the sureties required before execution, must be made by themselves. *Mowat* v. *Forshee*, E. T. 2 Vict.

III. Proceedings after Attachment.

A plaintiff cannot take a step in a cause founded on the attachment until the three months allowed for the defendant to put in bail have expired. *Banker* v. *Griffin*, 3 O. S. 163.

Quære: When an attaching creditor purchases at sheriff's sale, and sues for trespass to the property purchased, should he prove a debt to support his attachment? *Haydon* v. *Crawford*, 3 O. S. 583.

After an attachment has issued, a rule will be granted against any one in possession of the debtor's property, to deliver it up to the sheriff to whom the attachment is directed. *Mullens* v. *Armstrong*, M. T. 2 Vict.

In trespass against sheriff for seizing goods of the plaintiff under an attachment issued against the goods of a third party by whom they had been sold to the plaintiff before the attachment, the defence was that the sale was fraudulent and void as against creditors under 13 Eliz. c. 5, but the sheriff did not prove any debt from the absconding debtor to the attachment creditor:—Held, that without this his justification was incomplete. *Grant* v. *McLean*, 3 O. S. 443. See also, *Powers* v. *Ruttan*, 4 O. S. 58.

The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Stover*, T. T. 3 & 4 Vict.

When real estate is attached, the sheriff must enter and keep possession, to give operation to the attachment against strangers. *Doe* d. *Crew* v. *Clarke*, M. T. 4 Vict.

A debtor returning after trial and before judgment:—Held entitled to a new trial, under 2 Will. IV., c. 5. *Robertson* v. *Burk*, 5 O. S. 75.

Proof of debtor's signature to a note, without proof of plaintiffs being the payees, considered sufficient proof of the debt. *Appleton* v. *Dwyer*, 4 Q. B. 247.

Omission to put up in the crown office a copy of the process under 2 Will. IV., c. 5, s. 6, and file the affidavit required by 5 Will. IV., c. 5 s. 7,

before taking out execution:—Held, irregularities only, not making void what was done under the execution. *Doe* d. *Boulton* v. *Fergusson*, 5 Q. B. 515.

Leave granted to serve absconding defendant with writ of summons by mailing it to his address. *Lyman* v. *Smith*, 3 L. J. 107.—C. L. Chamb.—Burns.

When an attachment has been served upon the wife of a debtor, who has fled to parts where personal service cannot be effected, the plaintiff's damages may be ascertained by the clerk of the court, under sec. 161 C. L. P. Act, 1856. *Chapman* v. *DeLorme*, 5 L. J. 138.—C. L. Chamb.—Burns.

The plaintiff had sued out an attachment against defendant, and went down to the County Court to prove his claim, upon a record shewing interlocutory judgment signed for want of a plea. Defendant applied to plead never indebted, on the ground that such plea had been filed before signing the judgment:—Held, that the application was rightly refused, for defendant should have moved against the judgment if irregular, and could not plead until he had put in special bail. *Offay* v. *Offay*, 26 Q. B. 363.

Held, also—Draper, C. J., doubting—that although defendant had not put in special bail, his counsel should have been allowed to cross-examine the plaintiff's witness, and give evidence in mitigation of damages. *Ib.*

A judge at nisi prius may allow the counsel for another creditor to cross-examine the plaintiff's witnesses and to address the jury against the plaintiff. *Lavis* v. *Baker*, 13 C. P. 506.

In an action under the Absconding Debtors' Act, upon a motion by an attaching creditor, upon affidavits which shewed fraud and collusion between the plaintiff and defendant to the prejudice of the other creditors of the defendant, a new trial was granted. *Ib.*

One M., an attaching creditor of defendant, applied for a new trial of this cause, which was granted on payment of costs. The rule was taken out but never served, and subsequently M. gave plaintiff notice that he had abandoned same. On application by plaintiff, on notice to M., to shew cause why said rule should not be discharged with costs to be paid by M.:—Held, that the application by M. was in the nature of a collateral proceeding, and though he might, when voluntarily seeking the aid of the court, have been ordered to pay the costs of opposing the rule which he had obtained, he could not now be ordered to pay the same when brought before the court by compulsion, and not being a party to the record. *Lavis* v. *Baker*, 14 C. P. 336.

Form of interpleader issue between claimant and attaching creditor. *Doyle* v. *Lasher*, 16 C. P. 263.

The fact that a simple contract creditor has sued out an attachment, does not afford any ground for coming to the Court of Chancery to have a conveyance alleged to be fraudulent against the creditors of the debtor set aside. The creditor must first establish his right to recover at law. *Whiting* v. *Lawrason*, 7 Chy. 603.

IV. Priority as between Attaching Creditors and others.

A cognovit given by an absconding debtor to defeat claims of creditors was set aside on application of bonâ fide creditors, and the money made on execution under it ordered to be divided. *Bergin* v. *Pimlar*, 3 O. S. 574.

The 2 Will. IV. c. 5, gave priority to the creditor suing out the first attachment under which the sheriff seized, to have his debt satisfied out of the goods in preference to other attachment creditors who might obtain judgment and execution before him, where there were no laches on his part in the proceeding to judgment. *Gamble* v. *Jarvis*, 5 O. S. 272.

Where a debtor assigned to a creditor property, which was seized by the sheriff on several executions received on the same day, and these writs were subsequently satisfied by the sale of other property of the debtor, but before they were satisfied, and a fortnight after the assignment, an attachment against the debtor's property came also into the hands of the sheriff:—Held, that the property assigned was secured to the assignee against the attachment, although it had been liable to the preceding executions. *Hooker* v. *Jarvis*, 6 O. S. 439.

Where a party serves process on the debtor personally before attachments issue, and obtains judgment before the attaching creditor, his execution has priority. *Bank of British North America* v. *Jarvis*, 1 Q. B. 182.

Semble, per Robinson, C. J., that a writ of attachment has relation to the time of its being issued, or perhaps to the teste. Per Macaulay, C. J. C. P., Burns, J., Esten, V. C., Spragge, V. C., that it only takes effect from the time of seizure. *Kingsmill* v. *Warrener*, 13 Q. B. 18.

The placing of a writ of attachment in the sheriff's hands does not of itself bind the goods; the writ must be levied on. *Potter* v. *Carroll*, 9 C. P. 442.

Where the creditor at whose suit the property is first attached fails in his action, or is satisfied his debt, and the goods are restored to the debtor's possession, who disposes of them:—Semble, that a second attachment will not defeat such disposition. *Howell* v. *McFarlane*, 16 Q. B. 469.

The plaintiff obtained execution against A., whose goods were then under seizure upon an attachment. The sheriff, under C. L. P. Act, 1856, s. 53, having sued and obtained payment of a sum due by one of A's debtors:—Held, that such money was not liable to the plaintiff's execution, but went to the attaching creditors. *Cann* v. *Thomas*, 17 Q. B. 9.

A. sued out a writ of summons against an absconding debtor as residing out of the jurisdiction, served the writ on him in New York on the same day that an attachment issued against him here, and obtained judgment and execution before the first attaching creditor:—Held, that to entitle him to priority, he must also shew that his writ was served before the attachment issued, and no evidence being given to shew at what time of the day either event took place, that the attaching creditor's claim must prevail. Quære, whether a service out of the jurisdiction would be sufficient, even if made before the

attachment issued. *Daniel* v. *Fitzell*, 17 Q. B. 369.

An attachment was issued against defendant on the 6th July, and on the same day a summons was served upon him abroad, at the suit of one G. Within six months the plaintiffs sued out another attachment. It did not appear whether the plaintiffs in the first attachment had obtained judgment, or whether that writ was issued or G.'s summons served first, but G. first obtained execution:—Held, that so far as appeared, G. was entitled to the benefit of his fi. fa. as against these plaintiffs. *Caird* v. *Fitzell*, 2 P. R. 262.—Chamb.—Burns.

Held, also, that the mere fact that defendant withdrew his plea, and allowed G. to get judgment by default, was no ground for imputing collusion in obtaining such judgment. *Ib.*

Where goods have been attached, a creditor obtaining a confession of judgment from the debtor without service of process, and execution upon it before the attaching creditors, does not obtain priority. *Bird* v. *Folger*, 17 Q. B. 536.

Held, that on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion. *Ib.*

To entitle an execution creditor to priority over an attachment, he must not only obtain execution before the attaching creditor, but his action must have been commenced by process served before the attachment issued. Therefore, where the execution issued upon a confession given before the debtor absconded, without process served:—Held that the attachment must prevail. *The Bank of Upper Canada* v. *Glass*, 21 Q. B. 39.

On application by an attaching creditor under C. S. U. C., c. 25, s. 22, to set aside the judgment and execution of the plaintiff for fraud and collusion:—Semble, that the plaintiff's claim need not be unfounded or fraudulent; a bonâ fide debt may be sued for, and the action brought in collusion, &c. *White* v. *Lord*, 13 C. P. 289. See also *Beran* v. *Wheat*, 14 C. P. 51; *Dickson* v. *McMahon*, *Ib.* 521.

C., a sheriff, between the 7th of May and the 4th of August, received several fi. fas. against the goods of defendant. On the 16th of August he received one upon which this action was founded. Between the 4th and 16th of August, two attachments were placed in his hands, and after the 16th several more. The sheriff treated the plaintiff's fi. fa. as subsequent to the attachments, and returned it nulla bona, upon which this action was brought for a false return:—Held, that the writ of the 16th of August having come into the defendant's hands while the goods of plaintiff were in custodiâ legis, it attached prior to the attachments, and ought to have been paid first. *Potter* v. *Carroll*, 9 C. P. 442. See also, *Carrall* v. *Potter*, 19 Q. B. 346.

Held, affirming the above judgment of the C. P. that an execution against an absconding debtor, issued upon a judgment entered up prior to his absconding, was entitled to priority over attachments placed in the sheriff's hands before such execution; notwithstanding the judgment was entered up upon a cognovit in a cause in which no process had been served or executed before the attachments issued. Robinson, C. J., McLean, J., and Spragge, V. C., diss. *Carrall* v. *Potter*, 1 E. & A. 341; 7 L. J. 42.

When it is necessary, in order to settle the priority of incumbrancers, to enquire whether a party sued was an absconding debtor within the Act, this court will do so; and that, too, although defendant in the action may not have taken any steps to set aside the attachment at law. *Bank of Montreal* v. *Baker*, 9 Chy. 97.

Held, on rehearing, affirming the decree, that the bona fides of proceedings taken against an absconding debtor to obtain priority, could be questioned in this court at the suit of a creditor or third party. *Ib.* 298.

V. Setting aside Attachment.

The court refused to set aside the attachment upon the ground that the debtor had been previously held to bail for the same cause of action, and the bail had been discharged by a reference to arbitration. *Mosier* v. *McCan*, 3 O. S. 77.

Where a plaintiff proceeded after more than a year from issuing his attachment, the proceedings were set aside and a supersedeas ordered. *Bank of U. C.* v. *Spafford*, 3 O. S. 78.

A debtor having returned, and given the bond required by 2 Will. IV. c. 5, and put in special bail, a supersedeas was ordered. *Clark et al.* v. *Mallery*, 3 O. S. 157.

Motion to set aside attachment and subsequent proceedings, under 2 Will. IV. c. 5, because plaintiffs were not inhabitants of the Province, refused for delay in moving and insufficiency of affidavit.—*Fisher et al.* v. *Beach*, 4 O. S. 118.

Bonds to obtain supersedeas under 2 Will. IV. c. 5, and 5 Will. IV. c. 3. Amount of penalty. *Heather* v. *Wallace*, 4 O. S. 131.

A person seeking to set aside an attachment against him, on the ground that he never lived nor was in this country so as to make him come under the Absconding Debtors' Act, should make those facts appear clearly; and the court discharged the rule where those facts were not distinctly made out, and the party had not described himself in his affidavit as the defendant in the suit. *Smith* v. *The Niagara Harbour and Dock Co.*, 6 O. S. 555.

Proceedings had in suits against an absconding debtor, contrary to the statutes, may be set aside at the instance of other creditors. *Bank of Montreal* v. *Burnham*, 1 Q. B. 131.

An attachment issued by the order of a judge in Chambers may be set aside by another judge. *Howland* v. *Rowe*, 25 Q. B. 467.

VI. Proceedings against Debtor of Absconding Debtor.

Proceedings under 2 Will. IV., c. 5 by the creditor of an absconding debtor. Averments necessary in the declaration. Amount recoverable. *Thompson* v. *Farr*, 6 Q. B. 387.

In an action by a sheriff, under the absconding debtors' act, for rent due on a lease to the debtor, the evidence shewed an assignment of the reversion by the debtor, and receipt of all and half a year's more rent than was due thereon, and the jury found that the transaction was bonâ fide as between the debtor and

his assignee. Upon motion for a new trial:—Held, that although ordinarily the court would require a stronger case against the verdict than was made out here, yet, the plaintiff suing in right of his office, and knowing nothing of the transactions between the defendant and the debtor, and the circumstances appearing somewhat suspicious, a new trial was ordered on payment of costs. *Reynolds* v. *Pearce*, 14 C. P. 369.

Held, that the first count of the declaration, which was by a sheriff against a partner of the absconding debtor, for converting the joint property, was bad; 1. For not stating that the plaintiff sued under that Act, as required by sec. 26, though it did state that he had under sec. 25 obtained the order of a judge to bring the action; and, 2. For not shewing that notice of the attachment had been served on defendant, or that the goods had been attached by the former sheriff during whose tenure of office the attachment had issued, or by the plaintiff, his successor, the averment being merely that defendant having property in his possession (which the sheriff might have seized, but did not seize, whilst the property was liable to seizure), converted it to his own use. *Taylor* v. *Brown*, 17 C. P. 387.

Semble, that the limitation under the statute of the defence to matters available against the debtor at the date of the attachment, refers to the prosecution of claims arising before the issue of the writ:—But Held, that the count was not bad for not stating that the attaching creditor had proved his debt before judgment, or filed an affidavit of the sum justly due before the issue of execution, for that the maxim omnia rite esse acta, &c., applied. *Ib.*

Held, also, not necessary to allege that the property attached was insufficient to satisfy the execution, or what return the sheriff had made, for the suit having been brought by order of a judge, it must be presumed that he was satisfied as to this. *Ib.*

Semble, that it was unnecessary to allege more than the fact of conversion, leaving it to to be shewn that there was such a destruction of the joint property as would make it between co-partners a conversion. *Ib.*

Held, also, that it must be assumed, if there was any sheriff having the execution of the writ in this cause, that it was the plaintiff. *Ib.*

VII. Miscellaneous Cases.

The payee of two promissory notes for £25 each, having absconded, is not thereby disabled from suing the maker upon them on his return, because in his absence an attachment has been taken out against him by A., a creditor, for £21. *Slattery* v. *Turney*, 7 Q. B. 578.

The plaintiff contracted to build a mill dam for defendants. H. and P. were his sureties. While carrying on the work, he assigned to them the contract, and he afterwards absconded, and an attachment was issued against him. The assignees carried out the contract, and then sued in his name for the money due. After action brought this attachment was withdrawn, and defendants released by the attaching creditors from any claim by them to the money that might be recovered in this action. Within six months another attachment was placed in the sheriff's hands, of which defendants were duly notified:—Held, that the assignees were entitled to recover as well for the work done by the plaintiff before as since his departure; and that the defendants paying would not be liable to the creditors of the plaintiff. *Clarke* v. *Proudfoot et al.*, 9 Q. B. 290.

A security taken for a bonâ fide loan of money to enable the borrower to leave the country in order to escape his creditors, is not fraudulent and void. *Hall* v. *Kissock*, 11 Q. B. 9.

C., one of the obligors in a bond of indemnity to the sheriff for seizing under an attachment, obtained a final order for protection from process. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that under 19 & 20 Vict. c. 93, C. was not discharged by such final order. Held, also, that the obligees were not entitled to set off against the sheriff's claim money which the sheriff had applied from the sale under the attachment to pay executions prior to such attachment. *Moody* v. *Bull et al.*, 7 C. P. 15.

Semble, the 23 Vict., c. 25, exempting certain articles from seizure, does not apply where the debtor has absconded leaving the goods with his family. *Regina* v. *Davidson*, 21 Q. B. 41.

If defendant be held to bail in too large a sum, this can be amended. *Wakefield* v. *Bruce*, 5 P. R. 77.—Chamb.—Gwynne.

ABSENT DEFENDANTS.

I. Absconding Debtor—*See* Absconding Debtor.

II. Service of Writ on—*See* Ejectment.—Practice at Law.

III. Service of Bill on, and other Proceedings against.

1. *In Foreclosure Suits*—*See* Mortgage.

2. *In Other Cases*—*See* Pleading in Equity—Practice in Equity.

For the practice in proceeding against absent defendants, under 14 & 15 Vict. ch. 10, repealed by the C. L. P. Act: See *Hunt* v. *Ford*, 2 C. L. Chamb. 202; *Canniff* v. *Taylor*, 2 Chy. 617; *Doremus* v. *Kennedy*, 2 Chy. 657; *Legge* v. *Winstanley*, 3 Chy. 106.

ABSTRACT OF TITLE.

I. Duties and Liabilities of Registrars—*See* Registry Laws.

II. On Sale of Land—*See* Sale of Land.

Effect of registrar's abstract as evidence of title. *Reed* v. *Ranks*, 10 C. P. 202.

Before an abstract was asked for the purchaser had sold small portions of the land, and he and his vendee had cut down some of the wood thereon; but the vendor notwithstanding promised afterwards to give an abstract as demanded, and delivered an abstract accordingly:—Held, that the plaintiff was entitled to have this abstract verified. *Gordon* v. *Harnden*, 18 Chy. 231.

On receiving an abstract of title upon a sale of land by order of the Court the purchaser has seven days within which to object to the completeness of the abstract, and after any question of its completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title. If, however, he takes his objections to the title in the first instance, the Master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title. No objections other than those specifically taken will be entertained by the Master. The indorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the late registry act. *McManus* v. *Little*, 3 Chy. Chamb. R. 263.—Boyd, *Master*.

ACCEPTANCE.

I. Of Bills of Exchange—*See* Bills of Exchange and Promissory Notes.

II. Of Office—*See* Municipal Corporations.

III. Of Goods—*See* Sale of Goods.

IV. Of Title—*See* Sale of Land—Sale of Land by Order of the Court.

ACCIDENT.

I. Liability of Carriers—*See* Carriers—Railways and Railway Companies—Ship.

II. From Fire—*See* Fire.

III. From Negligence—*See* Negligence.

IV. From Defective Roads—*See* Way.

Death by "accident caused by intoxication"—meaning of. See *Bobier* v. *Clay*, 27 Q. B. 438.

ACCOMPLICE.

See Criminal Law.

ACCORD AND SATISFACTION.

I. New or Substituted Agreement, 11.

II. By Bills of Exchange and Promissory Notes, 14.

III. By a Stranger, 19.

IV. Pleading, 19.

V. Miscellaneous Cases, 21.

VI. By Cheque—*See* Payment.

VII. Satisfaction of Dower—*See* Dower.

VIII. By Payment—*See* Payment.

I. New or Substituted Agreement.

Semble, that a plaintiff may, after breach of a simple contract, legally agree to take a new agreement to deliver goods, &c., in full satisfaction of the former promise, and of the damages accruing from the breach. *Thomas* v. *Mallory*, 6 Q. B. 521.

Held, that the deed as set out in the pleadings in this case shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes sued on. *Bank of British North America* v. *Sherwood*, 6 Q. B. 552.

Defendants admitted the plaintiff's demand, but set up as a defence an agreement after action between them and their creditors, the plaintiff being one, by which the creditors agreed to take certain property of defendants, which was to be managed by assignees appointed by the creditors; and that they were ready and willing to make such assignment, but that sufficient time had not yet been allowed to complete the same. The plaintiff replied, that he and the other creditors did not agree to take the assignment, &c., in satisfaction of their respective debts, nor that the plaintiff was not to proceed against defendants for his debts:—Held, that a composition where lands are not concerned, or an assignment of goods, which would not fall within the Statute of Frauds, is valid by parol: that it was no objection that the satisfaction had not been given at the time of the plea: that an agreement as an accord was good by parol, though acceptance was not shewn, there being no default on the part of the debtors; and that the plea after verdict must be held good, because it was in the nature of the circumstances that the mutual promises were (provisionally) a satisfaction for the debt. *Brunskill* v. *Metcalf et al.*, 2 C. P. 431.

Action on the common counts. Plea, that after the promises, and before this suit, it was agreed that defendant should sell to plaintiffs, and plaintiffs then and there bought of defendants, twenty shares of certain stock, which defendant should hold for plaintiffs' use, and transfer to them when required; and that the plaintiffs should then and there accept defendant's said agreement, and the said shares so to be transferred, in full satisfaction of the said promises: that in pursuance of, and ever since such agreement, defendant had held, and still holds, such shares for the plaintiffs, and hath been and is ready to transfer them when required:—Held, plea bad, because it was not shewn whether the alleged agreement was before or after the breach of the promise sued on. *Ross et al.* v. *Heron*, 12 Q. B. 467.

Case, for injury to plaintiff's reversionary interest in land leased by him to defendant. Plea, that it was agreed between them that if defendant would agree to pay him £62 15s. for the use of certain premises of his for one year, the plaintiff would accept such agreement in full satisfaction of the grievances complained of; that in pursuance of such agreement defendant agreed to pay, and plaintiff then accepted the said agreement in such satisfaction as aforesaid:—Held, a good plea of accord and satisfaction. *Clark* v. *Ring*, 13 Q. B. 185.

Covenant on a mortgage. Plea, that defendant conveyed to the plaintiff his equity of redemption in the land mortgaged, which the plaintiff accepted in satisfaction of the claim. It appeared that when the plaintiff commenced

this action, defendant offered to convey the land in full satisfaction of the debt, but the plaintiff declined. Plaintiff's attorney afterwards, hearing that one G. would buy the land and pay the mortgage, told the plaintiff, who said it was all the same to him from whom the money came, and at G.'s wish the deed was made by defendant to the plaintiff instead of to G., and left with the attorney. Afterwards, however, it appeared that G. had referred to another lot owned by defendant, and he refused, therefore, to carry out the agreement:—Held, that the plea was not proved. *Haar* v. *Henley*, 18 Q. B. 494.

To an action on the common counts by plaintiffs as executors defendant pleaded, on equitable grounds, that defendant and testator were partners in the purchase of certain lands in the United States of America, and also in some shares in a certain railway company for which they were to pay in equal proportions and were to share equally in the profits and losses, and that being so interested, it was after the death of the testator agreed between plaintiff and defendant that if defendant would assume and pay the calls on the railway shares, take the stock as his own, and relieve the plaintiff from all liability thereon, no claim should be made upon him for the balance due on the lands, but that plaintiffs should pay the same and the payments so made should become as first charge upon the lands. The plea then averred performance of the agreement on the defendant's part:—Held, on demurrer, a good plea both as a legal and equitable defence, and that if it was necessary to the validity of the agreement that there should have been a writing it must be assumed on demurrer that there was one. *Clarke et al.* v. *Carroll*, 17 C. P. 538.

To an action by husband and wife on a note for $600 made to the wife before marriage, defendant pleaded that the wife was formerly the widow of one C., to whom defendant had been indebted in $400, that she subsequently took out letters of administration to his personal estate, and that afterwards the defendant became indebted to her in $200: that the note declared on was for these two sums; and that after its maturity, with the knowledge and assent of her husband and co-plaintiff, she agreed with defendant to accept from him a conveyance in fee of certain lands in full satisfaction and discharge of her claim on said note: that defendant accordingly executed a proper deed of said lands to her, duly registered, and tendered the same to her before action, and that she never expressed any dissent from said agreement until after said tender:—Held, on demurrer, a bad plea; 1. as not averring that there was no marriage settlement, so as to bring the case under the provisions of C. S. U. C. c. 73. 2. Because the accord and satisfaction attempted to be set up being, as to two thirds of the amount, in respect of a sum due to the wife in her representative character, was not pleaded as having been made with her husband. 3. Because what was pleaded was the agreement to accept a deed in satisfaction, but the acceptance in satisfaction was not only not pleaded, but was shewn by the plea not to have taken place. *Balsam et al.*, v. *Robinson*, 19 C. P. 263.

Sci. fa. upon a judgment for $2000 against defendant as administrator of M. on a bond in that sum, conditioned for the payment of $1200 by instalments, with a suggestion that two instalments were due and unpaid. Plea, on equitable grounds, that before the sci. fa. issued it was agreed between the plaintiff and defendant, with several others the heirs at law of M., that they should convey to the plaintiff their interest in certain land of which as such heirs they were seized in fee, that the consideration therefor should be $2000, and their interest should be treated as so much in cash, which should be applied as a payment by the estate of M. to the plaintiff; that the defendant and others accordingly conveyed their interest in the land to the plaintiff, and the plaintiff accepted such conveyance as representing $2000, and credited the estate of M. with that sum; that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amount then due and accruing due was less than $2000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance:—Held, on demurrer, that the plea shewed a good defence. *Whiteford* v. *McLeod*, 28 Q. B. 349.

The plaintiff sold to defendant by deed the right to manufacture and sell their patent right, for "Kinney's Metallic Waggon Seat," for the time in the patent mentioned. Defendant covenanted to manufacture at least twenty per day, and as many more as the demand should require, paying each of the plaintiffs one-half of a royalty of twenty-five cents on each seat, and further, to supply McK. & Co. with at least 200 seats per month at 95c. each, pursuant to an agreement between them and the plaintiffs, paying on these a royalty of 20c. to the plaintiffs. There were other covenants by defendant to manufacture in a workman-like manner, &c., and to make use of all means to introduce the seats and make them known. The declaration set out the deed and assigned breaches of all the covenants. The third plea was, that after breach it was agreed between the plaintiffs and defendant that they should release each other from the performance of their respective covenants, and all rights of action in respect thereof, and in consideration thereof defendant agreed to manufacture thenceforth only so many seats as would supply the demand, and the plaintiffs accepted such agreement in satisfaction of the cause of action declared on:—Held bad, as pleaded to the whole cause of action, whereas it could only be an answer to the breaches of the covenant and not to the covenant itself, for it shewed no release, but only an agreement for one, and no satisfaction by deed; and because the satisfaction was insufficient, the new agreement being merely to manufacture a less number of the same article in the same way, and on the same terms. *McGiverin et al.* v. *Turnbull*, 32 Q. B. 407.

Seduction—Plea, in effect, that it was agreed between plaintiff and defendant, that if defendant would agree to take and support the child, the plaintiff would accept the same in satisfaction: that defendant did so agree, and plaintiff accepted said agreement in full satisfaction:—Held, plea good, without shewing performance of the agreement. *McHugh* v *Grear*, 18 C. P. 488.

II. By Bills of Exchange and Promissory Notes.

Where an action is for tort, and the damages in the discretion of the jury:—Semble, that a

promissory note may be taken in satisfaction; the principle that a less sum of money cannot be taken in satisfaction of a greater not applying. *Lane* v. *Kingsmill*, 6 Q. B. 579.

The note of one of two joint debtors is no satisfaction of the debt:—Held, plea bad on that ground, and as attempting to shew liability to a third party, an indorsee, when the note as pleaded was evidently not negotiable. *Leonard* v. *Atcheson*, 7 Q. B. 32.

Assumpsit on a note for £75. Plea, as to £50, another note taken on account, endorsed by plaintiffs and outstanding. Replication held bad in form, on special demurrer. *Thompson et ux.* v. *Wilson*, 1 C. P. 57.

Assumpsit for goods sold and delivered, and on account stated. Plea, that before suit defendant made and delivered three negotiable notes to the plaintiffs, "who then accepted and received the same in full satisfaction and discharge of the sum of money and causes of action in the said declaration mentioned." Replication, that the notes were dishonoured at maturity, and still remain in plaintiffs' hands unpaid. Held, bad, for the plaintiffs having accepted the notes in full satisfaction and discharge of the original causes of action, had lost their remedy upon the latter. *Loomer et al.* v. *Marks*, 11 Q. B. 16.

The delivery and acceptance of the negotiable promissory notes of a third person in satisfaction, though for a less sum in amount, is a good satisfaction. *Hanscombe* v. *Macdonald*, 4 C. P. 190.

Defendant leased to F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendant on account of rent, for which defendant gave receipts as for premises leased to F. On plea of *rien en arriere* from F.:—Held, that the plaintiff could not insist upon the taking of the note as a discharge of the rent due from F. *McLeod* v. *Darch* 7 C. P. 35.

A plea to an action on an agreement alleged that defendant entered into a new agreement with the plaintiff, that defendant would pay a certain sum, and secure the same by his endorsed note, and that the plaintiff accepted same upon certain terms, and alleged a tender of such note by defendant, and a refusal by plaintiff:—Held, bad, on the ground that the delivery of the note was an essential part of the consideration; that the plaintiff was not bound by the agreement until he had accepted the note; and therefore he had retracted before he became bound. *Stewart* v. *Hawson*, 7 C. P. 168.

Plaintiff holding defendant's note (not negotiable) payable on demand, for £500, in transactions with one Reed (a partner of defendant), gave it to Reed, taking in return his note for £1000, for this and other transactions. In dissolving partnership, it was agreed that this £1000, or note of Reed's, should be paid by defendant. Reed being subsequently called upon for payment, obtained defendant's cheque for £500, and returned defendant's original note for £500 to plaintiff in payment of the note for £1000. Upon an action brought for the amount of the note of £500, the defendant pleaded satisfaction thereof by taking Reed's note for £1000:—Held, that the facts did not amount to a payment, and that defendant was liable. *Booth* v. *Ridley*, 8 C. P. 464.

Plea, satisfaction and discharge, "by delivering to the plaintiff, according to agreement, a certain promissory note," &c.:—Held, bad, for not averring that the plaintiff accepted the note in satisfaction. *Brown* v. *Jones*, 17 Q. B. 50.

To an action against two partners for wharfage and warehouse-room of goods, defendants pleaded the delivery and acceptance of the promissory note of one of them in satisfaction. At the trial the plaintiffs' book-keeper said that he presented the account, and took the note made by one defendant in settlement, writing at the foot of the account, "received payment by note." The learned judge thereupon directed a verdict for defendants:—Held, that the plea was good, but that it should have been left to the jury to find whether the note was accepted by the plaintiffs in satisfaction. *Port Darlington Harbour Co.* v. *Squair et al.*, 18 Q. B. 533.

Action on a policy of insurance, alleging a total loss by fire, and that defendants had by resolution admitted the claim at £500, promised to pay it. Plea, that after the accruing of the cause of action declared upon, it was agreed between defendants and the plaintiff, that the plaintiff should draw upon one C., requiring him to pay to the plaintiff's order £500 at the Bank of Upper Canada, at Niagara, and that the plaintiff would accept and receive C.'s acceptance of said bill in full satisfaction and discharge of the said cause of action: that the plaintiff accordingly drew and C. accepted such bill; and the plaintiff then received the same from defendants in full satisfaction of said cause of action, and afterwards endorsed the same to the said bank, who then held the same. The plaintiff replied that neither defendants nor C. paid the bill, and that the bank before this suit delivered the same to the plaintiff, who still held it:—Held, on demurrer, plea good, for it alleged a simple contract given in satisfaction, not of an undertaking under seal before breach, but of the "cause of action," or damages accrued after, which did not arise from the deed only, but from the fire and compliance with the conditions of the policy:—Held, also, replication clearly bad. *Brown* v. *The Erie and Ontario Insurance Co.*, 21 Q. B. 425.

First count, for goods sold and delivered, &c., second count, on a promissory note made by B. & S. payable to defendant or order, and by defendant endorsed and delivered to plaintiffs. Plea, that before action defendant "delivered the note in second count mentioned to the plaintiffs in full satisfaction and discharge of the causes of action in the said first count mentioned, and the plaintiffs then accepted and received the said note in full satisfaction and discharge of the said money, and the causes of action in respect thereof in the first count mentioned." Demurrer, because the note in question was payable to the order of defendant, and the plea does not aver that he endorsed it to plaintiffs:—Held, plea good, as the delivery and acceptance by plaintiffs of the note in question, though not endorsed, was, under the authority of Hanscombe *v.* Macdonald, 4 C. P. 190, a good answer to the action. *Jacques et al.* v. *Beaty*, 13 C. P. 327.

Declaration by P.'s administrator on a note made by defendant, payable to P. Defendant pleaded, by way of accord and satisfaction, a certain proposition made to the plaintiff and D. as curators of P.'s estate in Montreal, which was, in effect, that one R. would endorse defendant's notes for 17s. 6d. in the £, payable at certain dates, on getting a full discharge; and the defendant averred that the plaintiff and D. as such creditors "agreed to and accepted the terms of the said proposition," and defendant made and R. endorsed his notes accordingly, and delivered the same to the agent of the said curators in full satisfaction and discharge, and as a composition of the causes of action sued for:—Held, plea bad, for not averring either that the notes or the agreement were accepted in satisfaction or discharge. *Macfarlane* v. *Ryan*, 24 Q. B. 474.

Declaration, that on an accounting between them defendant's indebtedness to plaintiff was fixed at a certain sum, to be paid off as stipulated, one of which payments defendant undertook to make to A. & Co., to whom plaintiff was liable, it being also agreed that plaintiff should towards that liability provide an additional sum by a day named, to be repaid by defendant to him; and further, that any error in said accounting should be corrected, and plaintiff should give up to defendant all notes and securities belonging to defendant, which plaintiff before and at the time of the accounting held, except, &c. Breach, that although a reasonable time had elapsed, &c., defendant had not paid A. & Co. Plea—after alleging error in the said accounting, (specifying it) and that the sum agreed to be paid to A. & Co. was composed of various notes made by defendant to plaintiff—that after said accounting, and before action, plaintiff endorsed said notes to A. & Co., in settlement of their claim, of which A. & Co. had given defendant notice:—Held, plea bad, as not shewing that the notes, which had been endorsed away, had been given for the cause of action declared on. *Jones* v. *Cameron*, 16 C. P. 271.

Declaration by administratrix of A. on a note for $140, made by defendant, payable to A. or bearer. Plea, that at the making of the note, defendant owed A. $150, and said note was by mistake made for $140: that to correct the error, defendant immediately made a second note for $150 at A.'s request, who received it in full satisfaction of the note sued on, which was inadvertently left with A., and after his death came into the plaintiff's hands; that the plaintiff also got the note for $150, which she transferred to one F., who sued defendant on it, in the Division Court, which is still pending:—Held, on demurrer, a good plea, notwithstanding that the $150 note was not averred to be negotiable. *McHenry* v. *Crysdale*, 25 Q. B. 460.

To an action for goods sold and delivered, defendant pleaded, in effect, that upon an accounting $60 and no more was found due on such accounts; and it was then agreed that defendant should, and he did deliver to plaintiff, who then accepted and received from defendant a certain note for $60, in full satisfaction and discharge of the several causes of action, and of all the plaintiff's costs of suit:—Held, a good plea in accord and satisfaction. *Freeman* v. *McCarthy*, 19 C. P. 229.

Action for goods sold. It appeared that defendant, on application for payment, sent to the plaintiff his own note, with two endorsers; the plaintiff wrote acknowledging that it was received, and "placed to your credit, with thanks; the endorsers are not known to us, but on your stating that each one is good for the amount, we accept the note in settlement of your account to date." At the maturity of the note, defendant wrote expressing regret at his inability to meet it, and requesting plaintiff to draw upon him, and that he could hold the note until payment of the draft: he subsequently telegraphed him that he would remit in a few days:—Held, a question, on the evidence, for a judge or jury, whether plaintiff had accepted the note in satisfaction or discharge, or not, and it having been found that he had not, the court refused to interfere. *Greenwood* v. *Foley*, 22 C. P. 352.

Declaration against R. & H. for goods sold. Plea by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership: that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim; and that the plaintiff, being aware of this arrangement, took the note of the new firm, R. & W., for his debt:—Held, a good plea. *Watts* v. *Robinson et al.*, 32 Q. B. 362.

The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea; and that, in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H.:—Held, good. *Ib.*

The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W.:—Held, clearly good. *Ib.*

Declaration on a special contract under seal, by which plaintiff was to do all the work on an extension of defendants' railway, alleging non-payment for work done, &c. Plea, as to $15,000, parcel, &c., that before action, at plaintiff's request, defendants delivered to plaintiff their acceptance of his bill of exchange for said sum, which bill was current at the commencement of this suit, and was afterwards paid:—Held, on demurrer, plea good, following Henry *v.* Earl, 8 M. & W. 228, and Homer *v.* Denham, 12 Q. B. 813, note. *Shanly* v. *The Midland R. W. Co.*, 33 Q. B. 604.

A mortgage was made for £1196, payable by instalments. The third instalment was paid. For the first and second instalment the mortgagor gave two promissory notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W. his notes for £200 at four months, and £200 at eight months from the first of June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following endorsement was made on the mortgage: "Received from R. B. W. two notes of hand, endorsed by L., for £200 each, to complete the two first payments on the within mortgage." The notes were not paid at maturity, and in a suit by the assignee of the mortgagee to foreclose in default of payment of the first and second instalments:—Held, that the right to recover upon the mortgage was only

suspended, and not discharged, by the taking of the notes. *Gibb* v. *Warren*, 7 Chy. 496.

III. By a Stranger.

To an action against attorneys for negligence in not registering a mortgage from D. for £750 to plaintiffs within a reasonable time, and so permitting a subsequent mortgage to be registered before it, the defendant pleaded that after breach the plaintiff accepted another mortgage from D. on other land of D. for £750 in full satisfaction and discharge of defendants' promise and all damages accrued to the plaintiff from the breach thereof:—Held, a good plea, it being no objection that the accord was by a third person, a stranger to the action. *Lynch* v. *Wilson*, 22 Q. B. 226.

IV. Pleading.

Accord with satisfaction, Held to be a good plea in covenant. *Bayard et al.* v. *Partridge*, Tay. 558.

Accord and satisfaction cannot be pleaded to a deed before breach. *Robison* v. *Flanigan*, 22 Q. B. 417.

In trespass q. cl. fr. defendant pleaded a reference after action, and payment and acceptance of 5s. in pursuance of the award, in full satisfaction of the damages and costs:—Held, a good plea of accord and satisfaction, all about the reference being surplusage. *Hall* v. *Warner*, 2 Q. B. 392.

Declaration on common counts, claiming under one promise £500, and laying the damages at £200. Plea, payment of £250 in full satisfaction of the said promise, and also of all damages by reason of the non-performance thereof:—Held, bad. *Thompson* v. *Armstrong*, 3 Q. B. 153.

Declaration on common counts, laying the damages at £200. Plea, accord and satisfaction by payment of £3:—Held bad. *O'Beirne* v. *Gowin*, 5 Q. B. 582.

Plea of payment and acceptance of a less in satisfaction of a larger sum held bad:—Quære, whether a plea that the demand was unliquidated and disputed, and that it was agreed that plaintiff should receive a less sum in satisfaction of his alleged cause of action, could be supported. *Holmes* v. *McDonell*, 12 Q. B. 469.

The plaintiff declares in debt for £1000 upon three counts, £500 work done, £100 money paid, and £400 account stated. Plea, that the plaintiff agreed under seal to build a house for defendants according to specifications: that any extra work should be done under, and valued by their architect: that certain extra work was done and valued by him, as provided, at £355; that "such extra work is the cause of action in the declaration alleged, and for which this action was brought;" and that before action they paid to the plaintiff the said sum of £355 "in full satisfaction and discharge of the said extra work, and of all damages and demands in respect thereof, being the said causes of action in the declaration mentioned:"—Held, plea bad, as amounting to a less sum being pleaded in satisfaction of a greater. *Ritchey* v. *The Bank of Montreal*, 4 Q. B. 222.

A loan of money cannot be pleaded in satisfaction and discharge of a bond and condition. *Prindle* v. *McCan*, 4 Q. B. 228.

In an action on the common counts, defendant, A., pleads that it was agreed between the plaintiff, B., and the defendant, A., and a third party, C., that C. should sell to B. all the claim, title and right of preemption which C. had to certain land, and that C. should execute a deed at B.'s request to D. in satisfaction of B.'s claim, and then avers that C. did by the procurement of A., at B.'s request, execute a deed to D. of all the title C. had to the land:—Held, plea bad, in not averring that A. had a certain right and interest in the land, and of a certain value, and that the conveyance to D. was accepted in satisfaction. *Fralick* v. *Lafferty*, 3 Q. B. 159.

Covenant—Plea, that on, &c., defendant made to the infant son of the plaintiff a good and sufficient deed in fee of certain land, which the plaintiff accepted in full satisfaction, &c.:—Semble, that it should have been averred that defendant had some interest in the land conveyed in satisfaction. *Phelan* v. *Fraser*, 11 Q. B. 94.

After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of the action on the lease. *McIntyre* v. *The City of Kingston*, 4 Q. B. 471.

Covenant for non-payment of £300 by instalments. Pleas, as to £50, parcel, &c., payment and acceptance of £50 in full satisfaction thereof; Held, good. *Fralick* v. *Huffman*, 5 Q. B. 562.

Plea held bad, on special demurrer, for inconsistency of dates, in averring satisfaction in 1851, of a demand alleged to be due in 1852, and this though the dates were alleged under a scilicet, and the satisfaction averred to have been after breach. *Phelan* v. *Fraser*, 11 Q. B. 94.

The pleas set up an account stated between plaintiff and defendant, and an acceptance by plaintiff of defendant's agreement to pay the sum found due:—Held, that the plaintiff, in his replications, might traverse both the accounting and the acceptance by plaintiff in satisfaction. *Light* v. *Woodstock and Lake Erie Railway & Harbour Co.*, 13 Q. B. 201. See *Hanscomb* v. *Macdonald*, 4 C. P. 190.

Action on defendants' covenant to make a sufficient crossing on plaintiff's land. Defendant pleaded a former action on the same covenant, alleging that after issue joined therein it was agreed that defendants should pay and the plaintiff accept £125, in full satisfaction of the cause of action, and that the £125 was thereupon paid and accepted, &c.; to which the plaintiff replied, traversing the payment and acceptance in satisfaction, &c. The plaintiff wished to shew that besides paying the £125, defendants were to make the ditch to the lake:—Held, that under the replication the only question in issue was the payment of the £125, not the agreement to accept it in satisfaction. *Utter* v. *Great Western R. W. Co.*, 17 Q. B. 392.

Quære, whether a surrender, besides necessarily discharging all undue rents, may not also be pleaded equitably by way of accord and satisfaction of rents over due. *Bradfield* v. *Hopkins*, 16 C. P. 298.

V. Miscellaneous Cases.

Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors :—Held, that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

Defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed that in default he would give up the property, and plaintiff should sell it to pay himself, and give the overplus, if any, to defendant, and at the same time defendant gave the plaintiff his notes for the purchase money, which were not to be acted on if the property were given up. On default the property was given up and sold by plaintiff for less than the mortgage money, and an action was then brought on one of the notes to recover the difference :—Held, that it would not lie, the notes having been satisfied by the surrender of the property, according to the agreement. *Smith* v. *Judson*, 4 O. S. 134.

Goods agreed to be accepted in satisfaction, must be actually delivered; readiness to deliver will not do. *Thomas* v. *Mallory*, 6 Q. B. 521.

S. conveys lands to R. with full covenants. R. conveys by a similar deed to plaintiff. S. dies leaving a wife, who demands her dower. R. pays plaintiff a certain sum in accord and satisfaction :—Held, that payment in accord and satisfaction by R., and acceptance, discharged plaintiff's claim against defendant, executor of S. *Cuthbert* v. *Street*, 9 C. P. 115.

A. having taken a likeness for B. agrees to take in payment $20 in cash, and a cognovit for $70, payable at a future date. After receipt of the $20 and tender of the cognovit, defendant refused to deliver the picture. The plaintiff brought replevin :—Held, that the agreement for payment was a waiver of the right of lien, but did not amount to an accord and satisfaction. *Dempsey* v. *Carson*, 11 C. P. 462.

It is the duty of a party setting up that a settlement of a claim for injuries has been obtained by misrepresentation, to establish not only that the settlement has been so obtained, but, also, that the amount paid is inadequate; and where there was an entire failure of evidence on this latter point, a new trial was granted, on payment of costs. *Rowe* v. *Grand Trunk Railway Co.*, 16 C. P. 500.

Declaration in seduction, by the father. Plea, in effect, that after the seduction it was agreed between plaintiff and defendant that if defendant would agree to support the child at his own costs, &c., plaintiff would accept the same in full satisfaction and discharge; and that defendant did agree so to do, and plaintiff accepted said agreement in full satisfaction, &c. :—Held, on demurrer, plea good, as setting out an agreement on defendant's part, for which a sufficient consideration appeared in his undertaking a liability which he was not bound to assume, and that defendant was not obliged to shew that he had actually performed his agreement, as this was unnecessary to support the accord set up by the plea. *McHugh* v. *Grear*, 18 C. P. 488.

Agreement to purchase land leased—Construction of. Satisfaction of rent by payment of purchase money. *Forge* v. *Reynolds*, 18 C. P. 110.

M. executed a mortgage in Y.'s favour for £50, over lot No. 11, he then also holding a lease renewable in perpetuity of lot A. at a rental of £4 per annum. The rent being in arrear, judgment was obtained, and execution issued by the lessor against M. therefor; Y. then agreed with M. to pay this execution, M. to assign to him the lease of lot A.; and further, it was agreed that if the lessors "will give to the party of the first part (Y.) a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and release a mortgage," &c., being that above mentioned. Y. afterwards obtained a conveyance from the lessors of lot A., but it did not appear that such was made for the sum contemplated at the time of the agreement between Y. and M. Y. afterwards pressed for payment of the mortgage debt, when M. made excuses for delay, and did not rely on the agreement as a bar to Y.'s claim. Y. having commenced an action of ejectment on his mortgage, M.'s bill to stay it and to have the agreement and subsequent purchase by Y. construed into a satisfaction of the mortgage debt, was dismissed with costs. *McKenzie* v. *Yielding*, 11 Chy. 406.

A man by an informal instrument assigned to a trustee all his estate and effects, on condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200 :—Held, that the trustee could not set this up as a part satisfaction of the $400, mentioned in the first deed, and that declarations of the father made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew that the conveyance was made and intended to be in part satisfaction of the sum so secured to the son. *Mulholland* v. *Merriam*, 20 Chy. 152.

ACCOUNT.

I. Action of Account, 22.

II. Bill for an Account, 23.

III. Miscellaneous Cases, 23.

IV. In Administration Suits—*See* Administration Suit.

V. Referring Matters of—*See* Arbitration and Award.

VI. Jurisdiction of Division Court—*See* Division Court.

VII. Computation of Interest—*See* Interest.

VIII. Account Stated—*See* Money Counts.

IX. Taking Accounts—*See* Mortgage—Partnership—Practice in Equity.

X. Appropriation of Payments—*See* Payment.

I. Action of Account.

The exception in the Statute of Limitations extends only to actions of *account*, not to actions

of assumpsit on *open accounts*. *Russell* v. *Robertson*, 1 Q. B. 235.

Will not lie at common law between tenants at common or joint tenants, unless there has been an appointment of one by the other as bailiff. *Gregory* v. *Connolly*, 7 Q. B. 500.

But under 5 Anne, c. 16, it will lie against one tenant in common, or joint tenant, as bailiff, whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not. *Ib.*

Semble, coparceners cannot sue each other in an action of account. *Ib.*

II. Bill for an Account.

Ordinarily, a bill for an account will not lie by an agent against a principal. *James* v. *Snarr*, 15 Chy. 229.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *Corporation of the Township of East Zorra* v. *Douglas*, 17 Chy. 462.

The bill in this case alleged that under a yearly engagement the plaintiff agreed to discharge the duties of deputy sheriff for the defendant, for which he was to be compensated by a proportion of the fees payable on certain services performed by the sheriff; that shortly before the expiration of the second year the defendant discharged the plaintiff, and, as alleged, refused to account to the plaintiff for his portion of the fees—whereupon the plaintiff filed his bill, claiming that he was entitled to share in the fees for three years, that the items upon which he was entitled to a share of the fees numbered over one thousand, and that he had no means of shewing the amount due him except by a discovery from the defendant, and praying an account and relief consequent thereon. A demurrer thereto for want of equity was overruled; although had the plaintiff seen fit to institute proceedings at law to enforce payment of his demand, this court would not have withdrawn it from that jurisdiction by granting an injunction to stay proceedings. *Falls* v. *Powell*, 20 Chy. 454.

III. Miscellaneous Cases.

A plaintiff is not bound by credits given by him in account on the mere statement of the defendant, but may reject such credits unless the defendant can shew that they ought to be allowed. *Gorden* v. *Fuller*, 5 O. S. 576.

Where the plaintiff and defendant have had open accounts for a long period, and have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, and the jury find more or less upon conjecture what the court may think excessive damages for the plaintiff, the court will very rarely indeed, on that ground, assist the defendant by granting a new trial. *Corner* v. *McKinnon*, 4 Q. B. 350.

Quære: When can an account be considered an open unsettled account, so as to defeat the Statute of Limitations by the later items drawing the others with them. *Hamilton* v. *Matthews*, 5 Q. B. 148.

The rendering an account by plaintiffs' attorney in this Province (the plaintiffs residing abroad) is not binding on the plaintiffs as to the mode of calculation, and even when the plaintiffs themselves in the first instance incorrectly state an account, they may have it legally adjusted at any time before a final settlement. *McGregor et al.* v. *Gaulin*, 4 Q. B. 378.

Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that his payments be applied in the first place, to keeping down the interest. *Ib.*

The proper mode of calculating interest on an account explained. *Ib.*

A sale of books of account by sheriff, under an execution, does not pass the property in the debts or accounts therein charged:—Semble, that books of account and open accounts cannot be seized by the sheriff, under 20 Vict., c. 57, s. 22; at least they cannot be sold or transferred, but if seizable at all, must be held by the sheriff in security for the judgment debtor, and collected as such in his own name. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb.—Draper.

It is the duty of a trustee to use reasonable diligence to have the accounts of the trust ready, and to render them within a reasonable time after they are asked for on behalf of the cestuis que trustent; and where a trustee wholly neglected this duty, though he offered his books for inspection by the parties interested, he was charged with the costs of suit up to the hearing. *Randall* v. *Burrowes*, 11 Chy. 364.

When the defendant, by his answer, sets up a stated account, the plaintiff does not admit the defence by bringing on the cause by way of motion for decree, and the proper decree in such a case is a reference as to such alleged account. *Neil* v. *Neil*, 15 Chy. 110.

Accounts were delivered in 1862 and 1865, by a trustee and agent to his principal, and the confidential relationship existed for upwards of two years after the latter account had been rendered:—Held, under the circumstances, that these accounts were not binding on the principal as stated accounts. *Smith* v. *Redford*, 19 Chy. 274.

ACCOUNT STATED.

See Money Counts.

ACCRETION.

See Water and Water Courses.

ACKNOWLEDGMENT.

I. Of Married Women—*See* Husband and Wife.

II. Of Debts or Demands to bar Statute—*See* Limitation of Actions and Suits.

III. Of Title to Land—*See* Limitation of Actions and Suits.

ACQUIESCENCE.

See Estoppel.

ACT OF PARLIAMENT.

See STATUTES.

ACTION AND SUIT.

I. FORM OF.
1. *Assumpsit, Debt, and Covenant*, 26.
2. *Case and Trespass*, 26.

II. BY AND AGAINST WHOM MAINTAINABLE, 27.
1. *Judges.*
(a) *Of County Court — See* COUNTY COURT.
(b) *Of Division Court — See* DIVISION COURT.
(c) *Recorders—See* RECORDER'S COURT.
2. *Justices of the Peace—See* JUSTICES OF THE PEACE.
3. *Clerks and Bailiffs of Division Courts and Sureties—See* DIVISION COURT.
4. *By Assignee of Chose in Action—See* CHOSE IN ACTION.
5. *By and against other Persons—See* THE SEVERAL TITLES.

III. FOR WHAT MAINTAINABLE.
1. *Suspension of Action in Cases of Felony*, 28.
2. *In Avoidance of Circuity*, 29.
3. *Other Cases*, 29.
4. *Another Suit depending—See* PLEADING AT LAW.
5. *Former Recovery—See* BILLS OF EXCHANGE AND PROMISSORY NOTES—EJECTMENT—FORMER RECOVERY.
6. *In other cases—See* THE SEVERAL TITLES.

IV. NOTICE OF ACTION.
1. *Form and requisites of.*
(a) *Name and residence of Plaintiff and Attorney*, 30.
(b) *Statement of Cause of Action*, 30.
(c) *Statement of Time and Place*, 31.
(d) *Time of Service*, 32.
(e) *Other Cases*, 32.
2. *Proof of*, 33.
3. *To Municipal Corporations*, 33.
4. *To Justices of the Peace*, 33.
5. *To Bailiffs and their Sureties*, 34.
6. *To Constables*, 35.
7. *To other Persons*, 36.
8. *Other cases*, 37.

V. PARTIES.
1. *Plaintiffs*, 38.
2. *Defendants*, 39.
3. *In Administration Suits See* ADMINISTRATION SUITS.
4. *In Suits on Mortgages—See* MORTGAGE.
5. *In Ejectment—See* EJECTMENT.
6. *In Partition Suits—See* PARTITION.
7. *In Suits for Specific Performance—See* SPECIFIC PERFORMANCE.
8. *Pleading — See* PLEADING AT LAW — PLEADING IN EQUITY.
9. *Several defendants in Trespass — See* TRESPASS.
10. *Amendment of Parties—See* AMENDMENT AT LAW. — PLEADING IN EQUITY.

VI. ABATEMENT OF ACTION, 39.
1. *In Seduction—See* SEDUCTION.
2. *In Equity—See* PRACTICE IN EQUITY.
3. *Pleas in Abatement—See* PLEADING AT LAW.
4. *Entering Judgment, nunc pro tunc—See* JUDGMENT.

VII. LIMITATION OF ACTIONS AND SUITS—*See* LIMITATION OF ACTIONS AND SUITS.

VIII. CONSOLIDATION OF ACTIONS AND SUITS—*See* PRACTICE AT LAW—PRACTICE IN EQUITY.

IX. PENAL ACTIONS—*See* PENAL ACTIONS.

X. COMPOUNDING PENAL ACTIONS—*See* CRIMINAL LAW.

XI. RESTRAINING BY INJUNCTION — *See* INJUNCTION.

I. FORM OF.

1. *Assumpsit, Debt, and Covenant.*

A. having a claim on the government for certain wild lands, gave a bond to B. to procure a patent for the same in B.'s name, for a certain sum. A. did so, and informed B. of it, who refused payment:—Held, that A. could maintain assumpsit for the value of the land sold, and for services rendered in procuring the letters patent to B. Macaulay, J., diss. *Kilborn* v *Forester*, Dra. 332.

Where A. and B. entered into an agreement under seal for the sale and purchase of land, and B. paid £35, but afterwards refused to complete the purchase, as the title could not be made good, and requested A. to pay back the money advanced, which he then promised, but afterwards refused to do, and B. brought an action of assumpsit against him in a district court and recovered judgment:—Held, on error from the district court, that the action would not lie, the remedy being on the sealed instrument. *Clarke* v. *Anderson*, E. T., 3 Vict.

Indebitatus assumpsit will lie for chattels, if their value be set forth in the declaration. *Lister* v. *Warren*, 6 O. S. 256.

For the non-payment of money awarded in accordance with a deed, the plaintiff should sue in covenant, not assumpsit. *Tait* v. *Atkinson*, 3 Q. B. 152.

Under 11 Vict. c. 14, the Consumers' Gas Co. of Toronto may sue in assumpsit for calls, not in debt only. *Consumers Gas Co.* v. *Nicolls*, 7 Q. B. 91.

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2. *Case and Trespass.*

Case, not trespass, lies against a sheriff for selling goods within the eight days. *Moore* v. *Malcolm*, Tay. 273.

Trespass, not case, lies for malicious prosecution, where the magistrate, who was put in motion by defendant, acted wholly without jurisdiction. *Hunt* v. *McArthur*, 24 Q. B. 254.

Though a capias be set aside for irregularity, case will lie against the parties suing out the same maliciously, but against the party making the arrest it should be trespass. *Cameron* v. *Playter et al.*, 3 Q. B. 138.

An objection, that trespass and not case should have been brought, because defendant's act was wholly illegal :—Held, not tenable. *Higson* v. *Thompson*, 8 Q. B. 561.

Amendment to convert an action of case into one of trespass refused. *Emrick* v. *Sullivan*, 25 Q. B. 105.

Case held maintainable against a bailiff of a court of requests for falsely swearing to the service of a summons, whereby judgment was given against the plaintiff; and this remedy is not taken away by the action given on defendant's covenant, under the Court of Requests Act. *Cline* v. *McDonald*, E. T. 2 Vict.

The plaintiff declared in case for an injury done to his horse by falling into a hole made in a public highway, by the water overflowing a mill dam of the defendants, and tearing up the road, alleging that it was the duty of the defendants to fill up the hole, or fence it around, so as to prevent accidents. The declaration was held insufficient, as it ought to have been framed for the malfeazance in erecting or continuing the dam, &c., and not for the nonfeazance complained of, in not filling up or fencing around the hole. *Nellis* v. *Wilkes et al.*, 1 Q. B. 46.

Case will lie for collusively obtaining from defendant's debtor a confession for more than is due to him, under which the debtor's property has been sold in execution; and it may be maintained by any creditor injured by these collusive proceedings. *Ley* v. *Madill*, 1 Q. B. 546.

A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and repair, the lessor sues the lessee, who sues the assignee :—Held, that case would lie for the rent and damages the plaintiff had been obliged to pay the lessor. *Ashford* v. *Hack*, 6 Q. B. 541.

Case, not covenant on an agreement between the parties :—Held, the proper form of action for penning back water. *Eastwood* v. *Helliwell*, 4 O. S. 38.

II. By and against whom maintainable.

By police magistrate, against town council for salary; 12 Vict., c. 81. *Wilkes* v. *The Town Council of Brantford*, 3 C. P. 470.

By mortgagee of goods, against persons selling or seizing them. *McLeod* v. *Mercer*, 6 C. P. 197; *Brodie* v. *Ruttan*, 16 Q. B. 207.

By mortgagor of chattels against mortgagee, for seizure before default. *McAulay* v. *Allen*, 20 C. P. 417.

By treasurer as obligee of bond directed by statute to be taken to municipality. *Todd* v. *Perry*, 20 Q. B. 649.

Action by municipal corporation against one of its members, or against another municipal corporation—when it will lie. *Corporation of the Town of Chatham* v. *Houston*, 27 Q. B. 550; *Municipality of the Township of East Nissouri* v. *Horseman*, 16 Q. B. 556; *Huron District Council* v. *London District Council*, 4 Q. B. 302.

Action by executors under C. S. C. cap. 78, against an innkeeper, under the Temperance Act of 1864, for furnishing liquor to third party, who became intoxicated and killed intestate. *McCurdy* v. *Swift*, 17 C. P. 126.

The owner of a horse hired out to another may sue for injury to it, caused by negligence of an innkeeper employed by the person hiring it. *Walker* v. *Sharpe*, 31 Q. B. 340.

Action will lie by county attorney against county council, for breach of duty imposed by statute to provide him with office accommodation. *Lees* v. *The Corporation of the County of Carlton*, 33 Q. B. 409.

III. For What Maintainable.

1. *Suspension of Action in Cases of Felony.*

The plaintiff's horse had been stolen, and sold at public auction, but *the thief was unknown*. The plaintiff afterwards seeing the horse took possession of it, and the purchaser retook it from him :—Held, that the plaintiff might maintain trespass against the purchaser, without shewing a prosecution to conviction. *Bowman* v. *Yielding*, M. T. 3 Vict.

In an action for money had and received :—Held, that an exemplification of an indictment upon which defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible to shew that defendant had been acquitted of the felony, so that the civil action would lie. *Macdonald* v. *Ketchum*, 7 C. P. 484.

In an action against a carrier for the non-delivery of a package of money, where the evidence sufficiently shewed a felony a nonsuit was ordered. Hagarty, J., dissenting, as to the sufficiency of the evidence. *Livingstone* v. *Massey*, 23 Q. B. 156. [See, however, *Wells* v. *Abrahams*, L. R. 7 Q. B. 554, as to the propriety of nonsuiting in such a case.]

The rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded does not apply where the crown and not a private person is the plaintiff. *Regina* v. *Reiffenstein*, 5 P. R. 175.—Chamb.—Galt.

Under the Temperance Act of 1864, where the deceased had been assaulted and killed by a person who became intoxicated by drinking to excess in defendant's inn, it was held that the legal representative might maintain an action under C. S. C., c. 78, before prosecution for felony. *McCurdy* v. *Swift*, 17 C. P. 126.

As to the right of action for seduction when the evidence proves a rape : see *Hayle* v. *Hayle*, 3 O. S. 295; *Vincent* v. *Sprague*, 3 Q. B. 283; *Brown* v. *Dalby*, 7 Q. B. 160; *Walsh* v. *Nattrass*, 19 C. P. 453; *Williams* v. *Robinson*, 20 C. P. 255.

2. In avoidance of Circuity.

It is not necessary to plead a special plea of circuity of action; whenever this appears by the record it is an answer to the action. *Koster* v. *Holden*, 17 C. P. 650. See *Carroll* v. *Robertson*, 15 Chy. 173.

Action for not accepting a conveyance of land or paying $1000 as agreed, claiming $300 as liquidated damages under the contract. Defendant, after two trials of the case, pleaded that the plaintiff had not at the time of the alleged breach, or at any time before this suit, a good title to the land, and was not able to convey the same as agreed, and the issue on this was found for defendant:—Held, that as plaintiff had not sued till after the time for payment by defendant, and had not title, he was as much in default at the commencement of the suit as defendant, and as the damages would be the same against both parties, the defence was a good answer, in avoidance of circuity of action. *Koster* v. *Holden*, 17 C. P. 650.

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3. Other Cases.

Not maintainable against Welland Canal Co., for overflowing plaintiff's land by letting surplus water out to preserve the canal, as authorized by their charter. *Griffiths* v. *Welland Canal Co.*, 5 O. S. 686.

Upon a contract to do certain work within a specified time, with a penalty of £4 per week in case of default as rent of the premises:—Held, that an action would lie at the suit of the plaintiff to recover this sum from defendant, though by the agreement it was to be deducted from the last payment. Richards, J., diss. *Gaskin* v. *Wales*, 9 C. P. 314.

Quære:—Can the Gas Company of Toronto, under their act and their lease from the city, carry on their work without liability for nuisances injurious to private rights, which they could, by due care, have avoided? *Watson* v. *Gas Company*, 5 Q. B. 262.

Action will lie for injury to a right, though no appreciable damage. *Mitchell* v. *Barry*, 26 Q. B. 416; *Plumb* v. *McGannon*, 32 Q. B. 8. *Warren* v. *Deslippes*, 33 Q. B. 59.

Action for obstructing or not maintaining public highways. Proof of injury peculiar to plaintiff. See *Hamilton and Brock Road Co.* v. *G. W. R. Co.*, 17 Q. B. 567; *Plewes* v. *Hall*, 29 Q. B. 472; *Baird* v. *Wilson*, 22 C. P. 491.

As to when a right given by statute may be enforced by action, and when a particular remedy given by the statute excludes the right to sue. *Little* v. *Ince*, 3 C. P. 528; *The Corporation of the County of Frontenac* v. *The Corporation of the City of Kingston*, 30 Q. B. 584; *S. C.* 20 C. P. 49; *Municipal Council of Wellington* v. *Municipality of Wilmot*, 17 Q. B. 82; *Murray* v. *Dawson*, 17 C. P. 588; *President, &c., of the Bronte Harbour* v. *White*, 23 C. P. 164.

Where the party before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue. *Dullea* v. *Taylor*, 34 Q. B. 12.

IV. Notice of Action.

1. Form and Requisites of.

(a) *Name and Residence of Plaintiff and Attorney.*

It is sufficient if notice of action under the Division Courts' Act, 4 & 5 Vict., c. 3, s. 61, be signed by the attorney of the party complaining. *Kemble* v. *McHarry*, 6 O. S. 570.

It must declare the place of residence of the attorney. The subscription therefore of the attorney at the bottom of the notice, "A. B., attorney for the said C. D., Simcoe, Talbot District," was held insufficient. *Bates* v. *Walsh*, 6 Q. B. 498.

Held, that in the notice set out in this case, the residence of plaintiff's attorney was sufficiently stated. *Gillespie* v. *Wright* 14 Q. B. 52.

The name and place of residence of the plaintiff's attorney were not endorsed on the notice, but added inside at the foot of it:—Held, sufficient; and that, at all events, such objection, not having been taken at the trial, could not be made in banc. *Bross* v. *Huber*, 15 Q. B. 625.

A notice of action given to a J. P. as follows: "To John G. Bowes, of the city of Toronto, Esquire,—I, Annie Armstrong of the city of Toronto, in the Province of Canada, spinster, residing with my father, James Armstrong, at No. 148 Duchess street, in the said city of Toronto," &c., signed by the plaintiff, and endorsed "C. P. Armstrong v. Bowes.—Notice of Annie Armstrong to John G. Bowes. —The within named Annie Armstrong resides at No. 148 Duchess street, in the city of Toronto. Cameron & McMichael, for the plaintiff": — Held, insufficient, not having the place of abode, or business, of the attorney endorsed, nor the court in which the action was to be brought stated. *Armstrong* v. *Bowes*, 12 C. P. 539.

A notice describing plaintiff's place of abode as "of the township of Garafraxa, in the county of Wellington, laborer," without giving the lot and concession:—Held, sufficient. *Neill* v. *McMillan*, 25 Q. B. 485; followed in *McDonald* v. *Stuckey*, 31 Q. B. 577.

(b) *Statement of Cause of Action.*

In the notice for an act done under the Petty Trespass Act, it is necessary to specify the form of action intended. *Wadsworth* v. *Mewburn*, 6 O. S. 432.

Held, that the following notice of action:—"And also for that you, on," &c., "at," &c., did cause the horse upon which the said J. U. was then riding to be seized, taken, and led away, and the said J. U. to be obliged to dismount, and give up the said horse, and converted and disposed of the said horse to your own use; and also, for that you caused the saddle and bridle and halter then on the said horse to be seized, taken and carried away, and to be converted and disposed of to your own use, and other wrongs to the said J. U. then and there did," &c., was sufficient to enable the plaintiff to recover the value of the horse as being his property. Robinson, C. J., diss. *Upper* v. *McFarland et al.*, 5 Q. B. 101.

Trespass against magistrates for false imprisonment. The notice set out in the case held sufficient as to form of action to be brought. *Connolly* v. *Adams et al.*, 11 Q. B. 327.

"For that you (the defendant) on," &c., "at," &c., "seized and took away divers goods and chattels of the plaintiff," stating the value, "and converted and disposed thereof to your own use, and other wrongs to the said (the plaintiff) did, to his great damage of £50, and against the peace of our lady the Queen":—Held, sufficient. *Gillespie* v. *Wright*, 14 Q. B. 52.

(c) *Statement of Time and Place.*

Notice of action must contain a statement of the place where the trespass or injury was committed. *Kemble* v. *McGarry*, 6 O. S. 570.

A notice of action against a magistrate must distinctly specify the place where the action complained of was done. *Madden* v. *Shewer*, 2 Q. B. 115.

The place where the plaintiff was imprisoned must be correctly stated; the fact that the injury took place in the same district, though not at the exact place named in the writ, will not make the variance less fatal. *Cronkhite* v. *Sommerville*, 3 Q. B. 129.

The notice of action in this case against magistrates for false imprisonment was held sufficient as to statement of place where injury committed. *Connolly* v. *Adams et al.*, 11 Q. B. 327.

Semble, a notice to a magistrate is bad if it omit the time and place of alleged trepass. *Friel* v. *Ferguson*, 15 C. P. 584.

The notice stated a trespass on the 18th of October, and on divers other days. The goods were seized on that day, but returned, and seized on the 18th November and sold:—Held, notice sufficient. *Oliphant* v. *Leslie*, 24 Q. B. 398.

In an action against a J. P. the notice stated that defendant assaulted plaintiff, imprisoned him for four days, and caused him to be illegally arrested, and gave him into the custody of a constable, and illegally committed and sent him in such custody to the goal at the town of Lindsay, and caused him there to be confined for a long time:—Held, insufficient, as omitting to state where and when the assault took place, and the evidence not being confined to the imprisonment at Lindsay. *Parkyn* v. *Staples*, 19 C. P. 240.

Notice of action held insufficient in stating no time when the grievance complained of was committed. *Sprung* v. *Ande*, 23 C. P. 152.

The first count and the notice alleged that defendant, on the 30th April, 1872, assaulted and imprisoned the plaintiff. The plaintiff's evidence, on which he obtained a verdict, shewed that about the 25th April he was brought before defendant, a J. P., on defendant's warrant, requiring his appearance and ordered to find sureties for the peace, and that on the 30th he was again arrested and confined in gaol, under defendant's warrant issued on that day for disobedience of the previous order:—Held, that for the cause of action proved the notice was clearly insufficient; but Semble, that the plaintiff might have met the objection by confining his evidence and claim to the imprisonment on the 30th. *Ib.*

A notice of action in trespass under the Division Courts' Act, C. S. U. C. c. 19, s. 193: Held, insufficient for not stating the time and place of the alleged trespass. There is no substantial difference in this respect between the form of notice required under that Act, and under C. S. U. C. c. 126. *Moore* v. *Gidley*, 32 Q. B. 233.

(d) *Time of Service.*

The notice required under 4 & 5 Vict. c. 26, s. 40, "one calendar month, at least," before action, means a clear month's notice, exclusive of the first and last days. *Dempsey* v. *Dougherty*, 7 Q. B. 313.

Notice of action served on the 28th March, and writ sued out on 29th April: Held, sufficient, as being at least one calendar month's notice. *McIntosh* v. *Vansteenburgh*, 8 Q. B. 248.

(e) *Other Cases.*

It is no objection that the plaintiff declares by a different attorney from the one by whom the notice was given and process issued. *McKenzie* v. *Mewburn*, 6 O. S. 486.

In a notice of Action to a J. P. under 24 Geo. II., c. 44, the date of the warrant as stated in the notice varied from the date as proved:—Held, not fatal. *Higson* v. *Ward*, 8 Q. B. 502.

In the notice the warrant was stated to have been directed to William Thompson, whereas it was really directed to William H. Thompson:—Held, not a fatal variance. *Ib.*

The warrant directed Thompson to levy £1 11*s.* 6*d.*, together with the charges of distress and sale. The notice of action described the warrant as one directing Thompson to levy a certain large sum of money, to wit, the sum of £4:—Held, no variance. *Ib.*

A notice that the suit will be brought in the Court of Q. B. or C. P. is insufficient; the particular court intended must be specified. Where this objection had not been taken at the first trial, and a new trial was granted on other grounds:—Held, that defendant could urge it at the second trial. *Bross* v. *Huber*, 18 Q. B. 282. *Nerill* v. *The Corporation of Ross*, 22 C. P. 487.

Such a defect could not be amended under the Administration of Justice Act, 1873. *McCrum* v. *Foley*, 10 L. J. N. S. 105.—C. L. Chamb.—Dalton, *C. C. & P.*

A notice to a Division Court bailiff under C. S. U. C., c. 19, s. 193, stated that the writ would be sued out of the County Court of Brant, but it was issued from the County Court of Wentworth:—Held, notice insufficient. *Buck* v. *Hunter*, 20 Q. B. 436.

A defendant, after accepting service of an informal notice added, "and agree to accept the same as a sufficient notice of action to me under the statute:"—Held, that he could not afterwards rely on a defect in the notice. *Donaldson* v. *Haley*, 13 C. P. 87.

No particular addition or description of the magistrate need be given in the notice. *Haack* v. *Adamson*, 14 C. P. 201.

2. *Proof of.*

In trespass against a magistrate for false imprisonment and seizing and selling goods and chattels, where he suffers judgment by default, it is unnecessary for the plaintiff to prove that he gave notice of action or commenced his suit within six months. *Mills* v. *Conger*, 4 O. S. 383.

It is sufficient if it appear by the nisi prius record that a month had elapsed between the service of notice and filing of the declaration, and if the writ were really sued out too soon, it must be shewn by defendant. *Haight* v. *Ballard*, 2 Q. B. 29.

Held:—That the following evidence of a bailiff, as to the service of the notice—"He and two others held the respective papers while they were read and compared, but having allowed plaintiff's attorney to keep in the meantime the original, with which the copies were thus compared, and not having marked it, he could not swear with certainty that the papers served were copies of that document,"—was sufficient to go to the jury. *Byrnes* v. *Wild*, 7 Q. B. 104. See also *Gardner* v. *Burwell*, Tay. 54.

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3. *To Municipal Corporations.*

Held—Richards, C. J., Wilson, J., and Mowat, V. C., dissenting—that municipal corporations are not within C. S. U. C., c. 126, and therefore not entitled to notice of action. *Hodgins* v. *The Corporation of the United Counties of Huron and Bruce*, 3 E. & A. 169.

The courts of Q. B. and C. P. had previously differed as to the right of municipal corporations to notice of action; the Q. B. holding that they were not, the C. P. that they were, entitled to notice. See in Q. B. *Brown* v. *Municipal Council of Sarnia*, 11 Q. B. 215; *Snook* v. *The Town Council of Brantford*, 13 Q. B. 621; *Magrath* v. *Municipality of Brock*, *Ib.* 629; *Perdue* v. *Corporation of Chinguacousy*, 25 Q. B. 61. See in C. P. *Croft* v. *Town Council of Peterborough*, 5 C. P. 141; *Reid* v. *Corporation of Hamilton*, *Ib.* 269; *Barclay* v. *Municipality of Darlington*, *Ib.* 432; *Allen* v. *City of Toronto*, 6 C. P. 334. See, also, *Prouse* v. *Glenny*, 13 C. P. 560; *Harrold* v. *Corporation of Simcoe*, 16 C. P. 43.

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4. *Justices of the Peace.*

If it be doubtful whether defendant was acting in the execution of his duty, it should be left to the jury to say whether they believed he was acting as a magistrate or not; and if they find in his favor on that point notice must be proved. *Carswell* v. *Huffman*, 1 Q. B. 381.

Where the plaintiff's evidence shews that the defendant sued in trespass was acting bonâ fide as a justice of the peace, and the jury so find, the plaintiff must prove notice of action; and this though defendant has pleaded only the general issue, without adding "by statute," in the margin. *Marsh* v. *Boulton*, 4 Q. B. 354.

Held, that in this case the evidence fully warranted a finding that defendants were not acting or intending to act as magistrates or peace officers, but as interested parties; and that this was a question properly left to the jury to determine. *Cusick* v. *McRae et al.*, 11 Q. B. 509.

A magistrate is entitled to notice, though he has acted without jurisdiction. Where it was clear that defendant had acted as a justice, and there was no evidence of malice except the want of jurisdiction:—Held, not necessary, to entitle him to notice, to leave it to the jury to say whether he acted in good faith. *Bross* v. *Huber*, 18 Q. B. 282.

Where a magistrate acts clearly in excess of or without jurisdiction, he is nevertheless entitled to notice, unless the bona fides of his conduct be disproved; but the plaintiff may require that question to be left to the jury, and if they find that he did not honestly believe he was acting as a magistrate, he has no claim to notice. *Neill* v. *McMillan*, 25 Q. B. 485.

The magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information, or even a verbal charge against the plaintiff, and there being no evidence of bona fides on his part, the court held that he was not entitled to notice. *Friel* v. *Ferguson*, 15 C. P. 584.

Semble, that the fact of a magistrate issuing a warrant without the limits of the county for which he acts, does not necessarily disentitle him to notice. *Ib.*

In an action for wrongful arrest, though the conviction made by defendant is void, he is entitled to notice of action if he was acting in his official capacity as a magistrate, and had jurisdiction over the plaintiff in the subject matter. *Haacke* v. *Adamson*, 14 C. P. 201.

In an action for a penalty for acting as a justice of the peace without qualification, &c., defendant is not entitled to notice. *Crabb* q. t. v. *Longworth*, 4 C. P. 283.

Nor in an action for not returning a conviction. *Grant* q. t. v. *McFadden*, 11 C. P. 122.

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5. *Bailiffs and their Sureties.*

Want of notice to a bailiff of a Division Court, acting under 4 & 5 Vict. c. 3, must be pleaded specially. But where a bailiff, seizing goods under an execution, is entitled to notice, the plaintiff in the execution is not, as he is not a "person acting in the execution of the act." *Timon* v. *Stubbs*, 1 Q. B. 347; *Fowke* v. *Robertson*, 6 O. S. 572.

The plaintiff declares in trespass for breaking and entering his close in the *Niagara District* &c. Defendant pleads that, being bailiff of a Division Court in the *District of Brock*, he committed the alleged trespass in discharge of his duty as such, and that no notice was given to him of the action one month before it was brought. Demurrer to the plea, on the ground that it is not shewn by what authority the defendant, through a bailiff in the District of Brock, acted in the District of Niagara, where the trespass is laid:—Held, plea bad. *Davis* v. *Moore*, 4 Q. B. 209.

The statement of a bailiff, that "he believed the cattle to be the plaintiff's," but that he was indemnified and had to sell when he seized

them in execution against the person in possession, does not make a notice unnecessary. Jones, J., diss. *Sanderson* v. *Coleman*, 4 Q. B. 119.

The bailiff of a Division Court, acting in the discharge of his duty as such, is entitled to notice; and that objection is open to him under the plea of not guilty by statute. *Dale* v. *Cool*, 4 C. P. 460.

A bailiff of a Division Court was held not entitled to notice, under 13 & 14 Vict. c. 53, s. 107, of an action to recover the excess of money levied under an execution. *Dale* v. *Cool*, 6 C. P. 544.

Bailiffs of a Division Court are entitled to notice of action for seizing goods, although acting under a warrant without seal. *Anderson* v. *Grace*, 17 Q. B. 96.

A bailiff is entitled to notice of an action upon the statutory covenant, for execution, seizure, and sacrifice of plaintiff's goods. Such action must be brought within six months; and the defence may be raised under the general issue by statute. *Pearson* v. *Rutton et al.*, 15 C. P. 79.

Quære—1. Are the sureties of a Division Court bailiff, in a joint action against principal and sureties, entitled to notice of action to themselves? 2. Can they plead the want of notice to the bailiff in their own protection? 3. Can they, in an action against *themselves*, take advantage of the want of notice to the *bailiff*, or of any other defence that would have been open to the latter? But:—Held, in this case, as the recovery must be against all or none, that the discharge of the principal involved that of the sureties. *Ib.*

A Division Court bailiff is entitled, under C. S. U. C. c. 19, s. 193, to notice of action for seizure and sale of goods under execution, although he is indemnified and directed to sell by the execution creditor. *Lough* v. *Coleman*, 29 Q. B. 367. See also *McCance* v. *Bateman*, 12 C. P. 469.

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6. *To Constables.*

A warrant to arrest the plaintiff was directed to one S. and all other peace officers of the county. Defendant was sworn in as a special constable to assist S., and he went alone, not having the warrant with him, and made the arrest. On action brought, the jury found that defendant believed he was acting in the execution of his duty:—Held, that under 14 & 15 Vict. c. 54, he was entitled to notice. *Sage* v. *Duffy*, 11 Q. B. 30.

Where the defendant, a constable, had had no notice of action, it was left to the jury to say whether a constable who had arrested a man without a warrant acted under a fair and reasonable supposition that he was performing a public duty:—Held, a proper direction, and a verdict for plaintiff was sustained. *Cottrell* v. *Hueston*, 7 C. P. 277.

The Imperial Statute 21 Jac. I. c. 12, does not entitle constables to notice, or limit the period within which they may be sued. *Belch* v. *Arnott*, 9 C. P. 68.

7. *Other Persons.*

Notice of action to surveyor of streets, under 24 Geo. II. c. 44:—Held, not necessary. *McFarlane* v. *McDougall*, 3 O. S. 73.

A party who, acting as a revenue officer, or conceiving that he has authority so to act, seizes goods, is entitled to notice without the necessity of proving his commission or appointment. *Wadsworth* v. *Murphy*, 1 Q. B. 190.

Where the seizure was by a person not then authorized, but whose act was subsequently adopted and sanctioned by the collector, he was held entitled to notice under the customs Acts. *Wadsworth* v. *Murphy*, 2 Q. B. 120.

A party arresting another while engaged in the act of stealing his property, is entitled to notice under 4 & 5 Vict. c. 25, s. 67. *McDonald* v. *Cameron*, 2 Q. B. 406.

Where an action was commenced after 14 & 15 Vict. c. 54, for a trespass committed before, against an officer protected by this Act but not previously:—Held, that the statute would not apply, and that the defendant was therefore not entitled to notice. Draper, J., diss. *White* v. *Clark—Parsill* v. *Clark*, 11 Q. B. 137. See, also, *White* v. *Clark*, 10 Q. B. 490.

16 Vict. c. 180:—Held, not retrospective, so as to make the notice of action required by it applicable to causes of action accrued before the Act, or to compel the party injured to sue in case and not in trespass. *Cusick* v. *McRae*, 11 Q. B. 509.

Case for maliciously suing out an attachment in a Division Court:—Held, that defendant was not entitled to notice, for the statute was intended to protect persons acting under it in the discharge of some duty, not for their own benefit. *Pall* v. *Kenney*, 11 Q. B. 350.

A sheriff is not entitled to notice of an action against him arising out of his execution of a fi. fa. in a private suit. *McWhirter* v. *Corbett*, 4 C. P. 203.

The defendant being path-master, and assuming to act as such, moved the plaintiff's fences, the effect of which was to take off land from the plaintiff's lot and add it to defendant's. No notice having been given, it was left to the jury to say whether defendant acted bonâ fide in the execution of his duty, and they having found that he did, the court refused to disturb the verdict. *Hellivell* v. *Taylor*, 16 Q. B. 279.

Notice of action for acts done under a by-law. *Carmichael* v. *Slater*, 9 C. P. 423.

Notice of action to registrar for negligent omission in certificate:—Held, unnecessary. *Harrison* v. *Brega*, 20 Q. B. 324.

Held, in deference to former decisions of this court, that a school trustee sued for any act done in his corporate capacity, is entitled to notice; and this notwithstanding he may have signed a warrant individually instead of in his corporate capacity, if he was acting in the discharge of his duty as trustee. *Spry* v. *Mumby*, 11 C. P. 285.

A collector of school taxes, who committed a trespass while acting under a warrant issued by the trustees' authority, was held entitled to notice of action. *Ib.*

Held, that a plaintiff in a Division Court suit who, on an execution against the goods of A., indemnified the bailiff for seizing and selling the goods of B., was not entitled to notice, or to the protection as to venue. *Dollery* v. *Whaley*, 12 C. P. 105.

Held, following Kennedy *v.* Burgess, 15 Q. B. 487, that arbitrators between school trustees and a teacher, under the Common School Act, acting within their jurisdiction, are entitled to protection under C. S. U. C. c. 126, as persons fulfilling a public duty. *Hughes* v. *Pake et al.*, 25 Q. B. 95.

A pound-keeper, acting as such, is entitled to notice of action under C. S. U. C., c. 126, and it must be averred in the declaration that in discharging his duty he acted maliciously and without reasonable and probable cause. *Davis* v. *Williams*, 13 C. P. 365.

Defendant was sued as mayor of a town for refusing to sign an order to enable plaintiff to obtain a saloon license. The notice of action was signed by plaintiff, with the name of plaintiff's attorney endorsed thereon:—Held, 1. That as it must be presumed defendant, in refusing to sign the order, intended to act in the discharge of his official duty, he was entitled to notice. 2. That the notice was insufficient, not being endorsed with the name and place of abode of the plaintiff and of his attorney or agent who served it. 3. That the question of the bona fides of defendant in refusing to sign the order, not having been raised at the trial, could not be raised in term. *Moran* v. *Palmer*, 13 C. P. 528.

Semble, that notice to a Division Court clerk is sufficient if it complies with C. S. U. C. c. 19, ss. 193, 194, though it may not contain all that is required by c. 126, for the latter act does not overrule the former, but they establish rules for distinct cases. *McPhatter* v. *Leslie*, 23 Q. B. 573.

To municipal councillors, in action for defrauding the corporation:—Held, not necessary. *Corporation of the Town of Chatham* v. *Houston*, 27 Q. B. 550.

An official assignee in insolvency sued for trespass in taking and selling goods, is not entitled to notice. *Archibald* v. *Haldan*, 30 Q. 30.

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8. *Other Cases.*

In an action against a justice of the peace a plaintiff need not prove every trespass described in his notice; he may prove what he can, and recover for what he proves, provided it be an injury stated in the notice. *Byrnes* v. *Wild*, 7 Q. B. 104.

Notice of action is not necessary in replevin. *Folger* v. *Minton*, 10 Q. B. 423; *Kennedy* v. *Hall*, 7 C. P. 218; *Applegarth* v. *Graham*, 7 C. P. 171; *Lewis* v. *Teale*, 32 Q. B. 108.

The objection that no notice of action was necessary not having been taken at the trial:—Held, that it could not be raised in term. *Armstrong* v. *Bowes*, 12 C. P. 539. See, also, *Moran* v. *Palmer*, supra.

Notice is unnecessary where the action is for an omission, not an act done. *Harrison* v. *Brega*, 20 Q. B. 324; *Harrold* v. *Corporation of Simcoe*, 16 C. P. 43.

V. PARTIES.

1. *Plaintiffs.*

Where an agreement under seal, for the completion of certain work, had been entered into by one of two plaintiffs, and the other, who was not mentioned in it, signed and sealed it also, and afterwards assisted in the work, and was recognized and paid by defendant, for whose benefit the work was done, as a joint contractor with the plaintiff mentioned in the instrument:—Held, that assumpsit was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal. *Ross et al.* v. *Tait*, H. T. 7 Will. IV.

Two of three plaintiffs contracted under seal to do certain work, which was done by three, but not according to the agreement. The three having sued were nonsuited on production of the contract. The nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused. *Briker et al.* v. *Ancell*, 23 Q. B. 481.

Where a tenant leased premises at one entire rent, and his landlord died, having devised the premises among several persons:—Held, that those persons might bring separate actions against the tenant for such part of the rent as each would be entitled to according to his respective share, without any other apportionment than that which a jury might make in each suit. *Hare* v. *Proudfoot*, 6 O. S. 617.

A. leases goods to B., which the sheriff seizes under an execution against B., but does not sell or remove them:—Held, that if any trespass was committed by the seizure, B. should sue, and not A. *Henderson* v. *Moodie*, 3 Q. B. 348.

Defendant signed a written retainer of D. & E. as his attorneys, to prosecute one M. While the suit was pending their partnership was dissolved, and E. retired, assigning to D. all his rights. D. alone appeared as plaintiff's attorney on the record:—Held, that D. might sue alone for the costs. *Dougall* v. *Ockerman*, 9 Q. B. 354.

An agreement was made between defendant and the plaintiff, described as "President of the Port Burwell Harbour Company, on behalf of the said President, Directors, and Company of Port Burwell Harbour," and under the seals of defendant and plaintiff:—Held, that the plaintiff could sue in his own name. *Saxton* v. *Ridley*, 13 Q. B. 522.

Agreement with two plaintiffs; separate actions by each:—Held, not maintainable. *Pew* v. *Buffalo and Lake Huron R. W. Co.*, 17 Q. B. 282.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period, B., with D., a stranger to A., make advances to C.:—Held, that B. individually cannot recover from A. the amount of the advances so made. *Stevenson* v. *McLean*, 11 C. P. 208.

Defendants, by a policy dated 25th August, 1870, insured the life of J. C. for $1000, to be paid at his death to the plaintiff and two others, children of said J. C., and to his wife, if living,

otherwise to the representatives and assignees of said wife and children:—Held, under 29 Vict. c. 17, D., and 33 Vict. c. 21, O., that the plaintiff, on the death of J. C., might sue for his, the plaintiff's, one-fourth share separately, without joining the others interested in the policy. *Campbell* v. *The National Life Assurance Co. of the United States*, 34 Q. B. 35.

Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the Attorney General was a defendant) to have the lease declared void. *Hinckley* v. *Gildersleeve*, 19 Chy. 212.

2. *Defendants.*

An agreement was entered into under seal between A., B., and C., for the advance of certain moneys by A. to B. and C., who were partners in a mill business, and who, from the assets arising from the business, were to repay such advances. D. afterwards became a partner with B. and C.:—Held, that A. could not maintain an action of assumpsit against B., C., and D., jointly for the recovery of the balance of such advances. *Mittleberger et al.* v. *Merritt et al.*, 1 Q. B. 330.

On a joint contract by three, all must be sued, if within the jurisdiction. If one is without, the other two must be sued. One alone cannot be sued if there are two remaining within the jurisdiction, because all three cannot be sued. *Corbett* v. *Calvin*, 4 Q. B. 123.

Semble, per Draper, C. J., that when the tort alleged is the non-performance of a joint duty, e. g., to repair a bridge, if the joint duty be not proved, the plaintiff must fail in toto, and cannot recover against the defendant on whom alone the duty is imposed. *Woods* v. *The Municipality of Wentworth*, 6 C. P. 101.

Misjoinder of defendants in a joint action of assumpsit cannot be cured either by a nolle prosequi or by a nonsuit as to some of the defendants. A nonsuit as to some is a nonsuit as to all, and a verdict returned for some of the defendants is null and void. *Commercial Bank* v. *Hughes et al.*, 4 Q. B. 167.

The crown may have sci. fa. against one or against all of the joint and several obligors of a bond, but the proceeding must be against *all* or *each one*. *Regina* v. *McPherson*, 15 C. P. 17.

VI. Abatement of Action.

Plaintiff, a passenger in defendant's steamer, sued defendant for not safely carrying him, whereby he was seriously injured, &c. There was a second count, charging neglect of defendant's duty in not stopping at a wharf and not providing safe and proper gangways, in consequence of which plaintiff, in landing at said wharf, was thrown down and injured, &c. After the commencement of the action defendant died, and plaintiff entered a suggestion on the record, but—Held, that the action died with defendant, and could not be revived against the executor. *Cameron* v. *Milloy*, 22 C. P. 331.

Bankruptcy of sole plaintiff causes an abatement of a suit. *Cameron* v. *Eager*, 9 L. J. N. S. 363.—Chy. Chamb.—Holmested, *Referee*.

ADDING PARTIES.

I. In Foreclosure Suits—*See* Mortgage.

II. In other Cases—*See* Amendment at Law—Pleading in Equity.

ADDITION.

In Affidavits—*See* Affidavits.

Held, under 9 Vict., c. 34, that registry in accordance with the Act was imperative; and a deed registered upon a memorial in which the addition of the witness to the deed was omitted, was held fraudulent and void as against a subsequent mortgagee. *Robson* v. *Waddell*, 24 Q. B. 574.

[See now 36 Vict. c. 17, O.]

ADMINISTRATION BOND.

See Executors and Administrators.

ADMINISTRATION, LETTERS OF.

See Executors and Administrators.

ADMINISTRATION OF JUSTICE ACT, 1873.

Held, that under secs. 59 and 64 of this Act, there should be no County Court sitting in May, 1873. *Dain* v. *Gossage*, 9 L. J. N. S. 193.—C. L. Chamb.—Dalton, *C. C. & P.*—Richards.

The word "section" does not necessarily mean one of the divisions of an Act numbered as such, but may refer, if the context requires it, to any distinct enactment, of which there may be several included under one numbering. Consideration of conflicting clauses in same Act. Application of the maxim, "expressio unius est exclusio alterius." *Ib.*

The chief engineer held an officer of defendants' company under sec. 24. *Oakley* v. *Toronto Grey and Bruce R. W. Co.*, 10 L. J. N. S. 46.—Dalton, *C. C. & P.*

An affidavit for an order to examine defendant under sec. 29, made by the partner of plaintiff's attorney,—Held, sufficient. *Lloyd* v. *Henderson*, 10 L. J. N. S. 46.—Dalton, *C. C. & P.*

So also when made by the managing clerk. *Hamilton* v. *The Great Western R. W. Co.*, 10 L. J. N. S. 46—Dalton, *C. C. & P.*

The words, "action at law," in sec. 24, include an interpleader proceeding. *Canada Permanent Building and Savings Society* v. *Forest*, 10 L. J. N. S. 78.—Dalton, *C. C. & P.*

Plaintiff sued on a promissory note. Defendant was examined under the Administration of Justice Act, and admitted that his plea of payment was false. The plea was struck out, under 34 Vict. c. 12, s. 8. O., and leave given to sign final judgment. *McMaster* v. *Beattie*, 10 L. J. N. S. 103.—C. L. Chamb.—Dalton, *C. C. & P.*

In this case the affidavit for an order to examine under the Administration of Justice Act was made by the managing clerk of the attorney,

and stated, "I am familiar with all the proceedings in this suit:"—Held, that although a managing clerk's affidavit is sufficient under the statute, still it must state that he has some particular charge of the suit. *Elmsley* v. *Cosgrave*, 10 L. J. N. S. 105.—C. L. Chamb.—Dalton, *C. C. & P.*

In a penal action against a magistrate the notice required by C. S. U. C. c. 126, stated that the plaintiff intended bringing his action in one of the superior courts, while the writ was issued in the other. On an application to amend under the Administration of Justice Act:—Held, that under the statute these forms could not be departed from, and that it could not be amended as if merely formal. *McCrum* v. *Foley*, 10 L. J. N. S. 105.—C. L. Chamb.—Dalton, *C. C. & P.*

In this case the fact of the relator being a candidate, or a voter who had voted or tendered his vote, as required by sec. 131 of 36 Vict. c. 48, was omitted in the relation, but was contained in one of the affidavits filed:—Held, that the fact being already before the court, the relation could be amended under the Administration of Justice Act. *Regina ex rel. O'Reilly* v. *Charlton*, 10 L. J. N. S. 105.—C. L. Chamb.—Dalton, *C. C. & P.*

The Administration of Justice Act (36 Vict. c. 8, O.,) may be considered as a Legislative recognition of the principle which has always prevailed in this court, that the fitness of forum is the test upon the question, whether a suit brought in this court should be retained and adjudicated upon here, or transferred to a court of law. *Falls* v. *Powell*, 20 Chy. 454.

ADMINISTRATION SUIT.

I. APPLICATION FOR.
1. *When Granted or Refused*, 41.
2. *By Bill or Order*, 43.
3. *In Cases of Small Estates or Claims*, 43.

II. PRACTICE AND PLEADINGS.
1. *Parties*, 44.
2. *Other Cases*, 45.

III. EVIDENCE.
1. *Proof of Defendant being Administrator*, 47.
2. *Other Cases*, 48.

IV. COSTS.
1. *To Executors and Trustees*, 48.
2. *Other Cases*, 50.

V. ADMINISTRATION AD LITEM, 51.
VI. MISCELLANEOUS CASES, 51.
VII. CREDITOR'S SUIT—*See* CREDITOR'S SUIT.

I. APPLICATION FOR.

1. *When Granted or Refused.*

The personal representative may file a bill *as a creditor simply* upon the testator's estate against a devisee of lands under the will, after the personal estate is exhausted, and obtain a decree as an ordinary creditor. *Tiffany* v. *Tiffany*, 9 Chy. 158.

Where the plaintiff had, at the request of the mother and natural guardian of infant heirs, advanced money to pay debts of their ancestor to save the costs of suits therefor:—Held, that he was entitled to sustain a suit for administration as a creditor. *Glass* v. *Munsen*, 12 Chy. 77.

Trustees and executors stand in a different position from creditors or cestui que trustent as to the right to have the estate administered in this court, and cannot, without experiencing some difficulty in carrying out the trusts or administering the estate, file a bill for that purpose. *Cole* v. *Glover*, 16 Chy. 392. See also *McGill* v. *Courtice*, 17 Chy. 271.

Where one of the legatees was absent from the jurisdiction, and the executors had been unable to discover him, this was held a sufficient ground for the executors obtaining an administration of the estate. *In re Wade, Dee* v. *Wade*, 18 Chy. 485.

Although the court can protect the estate of a testator by charging the executor with the costs of a suit for administration unnecessarily brought by him, it will refuse an application for administration made by the executor if no sufficient ground exists for it. *Barry* v. *Barry*, 19 Chy. 458.

An application for an administration order was made within a year from the death of the testator, by a legatee who claimed to be also a creditor of the estate, but whose claim, as such, had always been disputed by the executors and was only supported by the uncorroborated affidavit of the claimant. The Court, under the circumstances, refused the application with costs. *Vivian* v. *Westbrooke*, 19 Chy. 461.

An administration order applied for against a person named as executor in the will, but who had not taken out letters probate, was refused, there being no duly appointed personal representative before the court. (See Rowsell *v.* Morris, L. R. 17 Eq.): *Outram* v. *Wyckhoff*, 10 L. J. N. S. 135.—Holmested, *Referee.*

The fact of there being a deficiency of assets in an intestate's estate, by which all creditors become entitled to share pari passu, is sufficient to justify an application by an administrator for an administration order, notwithstanding that the estate consists solely of personalty. *Swetnam* v. *Swetnam*, 10 L. J. N. S. 135.—Chy. Chamb.—Strong.

Where, on a motion for an administration order, it appeared that the application was by a party claiming for the support and maintenance of the wife and children of the deceased, and the questions raised were substantially the same as would be raised had a suit been brought by the wife for alimony, the court refused the order, and directed a bill for the purpose to be filed, and made the costs of the application costs in the cause. *In re Foster and Griffith* v. *Patterson*, 20 Chy. 345. See also, *Fenwick* v. *Fenwick*, *Ib.* 381; *Goodfellow* v. *Rannie*, *Ib.* 425.

Where a party, in addition to a declaration of the true construction of a will, is entitled to ask as consequential relief the administration of the estate, the case is within general order 538, and the court will make a decree declaring the proper construction of the will, without directing the administration of the estate. *Murphy* v. *Murphy*, 20 Chy. 575.

2. By Bill or Order.

Where the executors are charged with misconduct, a bill must be filed; an order for administration cannot be obtained on summary application. *Re Babcock's Estate*, 8 Chy. 409.

The order (15) providing for the administration of the estates without bill, applies to simple cases only, and under it the court will not grant an order containing special directions to enquire as to what should be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of infant children. *Barry* v. *Brazill*, 1 Chy. Chamb. 248.—Spragge.

Where a married woman applied, as devisee and legatee, for an administration order, by motion, without bill, and it appeared that an award had been made, professing to determine all matters between the executor and the legatees, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied:—Held, that the validity of the award could not be tried on the motion, and that a bill must be filed; more especially as other legatees, not parties to the motion, were interested in maintaining the award. *Nudell* v. *Elliott*, 1 Chy. Chamb. 326.—Mowat.

An administration order was refused where the grounds on which it was claimed were properly the subject for a bill. *Cameron* v. *Macdonald*, *In re Macdonald*, 2 Chy. Chamb. 29.—Spragge.

The control of the court ceases with the death of the lunatic, and an order for the distribution of a lunatic's estate will not be made under proceedings in lunacy. Under such circumstances the committee of a lunatic took, under authority of the court, proceedings for the administration of the estate of a deceased lunatic, by applying for an administration order, which was granted; the proceedings being directed to be as inexpensive as possible.—*Re Brillinger*, 3 Chy. Chamb. 290.—Taylor, *Referee*.

3. In the Case of Small Estates.

The facts, that an estate is small, that no imputation is made against the executors, and that it is unadvisable to incur legal expenses, are no answer to a motion by a legatee against the executors, for the usual administration order. *In re Falconer*, 1 Chy. Chamb. 273.—VanKoughnet.

In the case of small estates an administration suit can only be justified where every possible means of avoiding the suit had been exhausted before suit brought. *McAndrew* v. *LaFlamme*, 19 Chy. 193.

Where a next friend had filed a bill for a minor without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs. *Ib.*

When one of the executors swore that the personal estate had not exceeded $50, the court, before it would make an administration order, required the applicant to file an affidavit stating that he had reason to believe, and did believe, that the proceedings would shew a substantial balance of personal estate to be divided among the legatees. *Foster* v. *Foster*, 19 Chy. 463.

The court refused to make a decree for the administration of an estate, at the instance of a legatee, whose claim, including interest, amounted to only $28; and that although it was alleged there were other legacies remaining unpaid, amounting in the aggregate to a considerable sum. *Reynolds* v. *Coppin*, 19 Chy. 627.

II. Practice and Pleading.

1. Parties.

In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party. *Fenny* v. *Priestman*, 1 Chy. 133.

The personal representative may file a bill *as a creditor simply* upon the testator's estate against a devisee of lands under the will, after the personal estate is exhausted, and obtain a decree as an ordinary creditor. *Tiffany* v. *Tiffany*, 9 Chy. 158.

In a suit to administer the estate of a testator, the heir-at-law ought to be a party. *Ib.*

But when the personal representative filed such a bill against the devisee, alleging that no lands had descended, as to which the answer was silent, and the objection was not raised at the hearing, the court, under the circumstances, made a decree in the absence of the heir. *Ib.*

The other creditors need not be made parties to such a bill, but the heirs-at-law must. *Ib.*

Where a trustee commits a breach of trust the person participating is not a necessary party to a suit for the general administration of the trust estate. *Tiffany* v. *Thompson*, 9 Chy. 244.

One devisee of a trustee against whose estate a suit is brought sufficiently, represents those interested in the estate. *Ib.*

Where the usual decree is obtained by one of an intestate's next of kin for administration, the master is not to make the other next of kin parties in his office, but is to see that all have been served with an office copy of the decree under the 6th general order of June, 1853, before the reports, and generally speaking, before he proceeds with the reference. *English* v. *English*, 2 Chy. 441.

In such a case the court may dispense with service of the decree on any of the next of kin who are out of the Province; and the application for this purpose may be made ex parte. *Ib.*

So, when the decree is for the administration of real estate, all the heirs must be served with an office copy of the decree, but are not to be made parties or served with the proceedings in the master's office, though any of them may by notice require to be so served, if they desire it. *Ib.*

The rule is the same when some of the next of kin or heirs are infants. *Ib.*

On application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of the motion; and the order asked for was granted, with a direction that an office copy of the decree should be served on each of the

parties interested in the real estate under the will. *Stewart* v. *Hunter*, 14 Chy. 132.

Legatees are not necessary parties defendant in an administration suit. *Harrison* v. *Shaw*, 2 Chy. Chamb. 44.—Mowat.

The Attorney-General is a necessary defendant to a bill filed to administer an estate, and declare a legacy for religious purposes void. *Long* v. *Wilmotte*, 2 Chy. Chamb. 87.—Esten.

Where a devisee of land subject to a charge mortgaged the devised property, the mortgagees were held to be proper parties to a suit for the realization of the charge. *Goldsmith* v. *Goldsmith*, 17 Chy. 213.

On an application under order 15 of June 2nd, 1853:—Held, that the notice of motion must shew that an affidavit has been filed. *Re Hamilton*, 2 L. J. N. S. 48.—Mowat.

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2. *Other Cases.*

Upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be granted, where the plaintiff does not allege in his bill, and clearly prove the insufficiency of the personal estate to pay debts, and does not pray for the application of the realty or the rents and profits thereof to that object. *Sanders* v. *Christie*, 1 Chy. 137.

Where an order for administration of an estate is granted upon application of a party interested in the estate adverse to the executor, the decree will not direct an enquiry as to wilful neglect and default. *Harrison* v. *McGlashan*, 7 Chy. 531.

But where an executor or administrator applies for such order, the account will be directed to be taken of what he has received, or but for his wilful default he might have received. *Ledgerwood* v. *Ledgerwood*, 7 Chy. 584.

A testator, after appointing executors, and expressing full confidence in them, provided "that in case any of the legatees offer obstructions to the proceedings of my said executors in the fulfilment of the powers hereby conferred," then that such persons should suffer the penalty of "being debarred of all claims to any part or portion of my estate, under any pretence whatsoever, in the same manner as if he, she, or they, had actually predeceased me without issue; and such shall be, and are hereby declared to be debarred therefrom accordingly, any law or practice to the contrary notwithstanding":—Held, in an administration suit by a legatee against the executors, on the application of other legatees, made parties in the master's office, that an enquiry might properly be directed, whether any of the legatees had forfeited his or her share under the above provision. The original decree not containing such a clause of enquiry, was amended in that respect on motion, after the master's report. *Miller* v. *McNaughton*, 9 Chy. 545.

Where in a suit against executors a decree was made referring it to the master to administer the estate, the master was not required to take any account of such portions of the estate as were left to trustees to be administered. *Clouster* v. *McLean*, 10 Chy. 576.

Although proceedings in the master's office may under the general order be taken ex parte against a defendant who has allowed a bill to be taken pro confesso against him, that mode of proceeding is irregular when an administration order has been obtained upon notice filed without bill. *Jackson* v. *Matthews*, *In re Pattison*, 12 Chy. 47.

In a suit for the administration of a debtor's estate under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause. *Mulholland* v. *Hamilton*, 12 Chy. 413.

In 1855 a motion was made, upon notice, for an administration order, under the orders of 1853, and no step since taken. An application now made in 1859, in chambers for a direction that the registrar should draw up the order, was refused. After such a lapse of time all parties must be served with notice. *In re Forrester*, *Messnier* v. *Forrester*, 1 Chy. Chamb. 29.—Spragge.

A bill was filed praying a declaration of the true construction of a will, and for an administration of the estate. The bill was taken pro confesso against some of the defendants. At the hearing, the plaintiff wished to abandon the prayer for an administration, but one defendant, who was a legatee, objected, contending he was entitled to a decree for administration as prayed:—Held, that he was so entitled. *Woodside* v. *Logan*, 15 Chy. 145.

It is not proper, in a report in an administration suit, to append to the report a copy of the will. *McCargar* v. *McKinnon*, 15 Chy. 361.

On application for an administration order an amendment was allowed, where an unimportant mistake had been made in the name of the intestate, which had misled no one, and the right person had been served; and an enlargement to answer the proceedings when amended was refused. *Re Fraser—Fraser* v. *Fraser*, 2 Chy. Chamb. 457.—Taylor, *Secretary*.

Held, that a suit against an administrator by a person entitled to a legacy or distributive share of the estate, cannot be brought before the expiry of a year after the death of the intestate. *Slater* v. *Slater*, 3 Chy. Chamb. 1.—Spragge.

Under an administration decree a creditor claimed by virtue of a partnership with the testator. It was objected that the establishment of his claims involved taking the partnership accounts, and they could not be gone into under the decree. The master held that the claim could be entertained, and directed that a third partner, who was a stranger to the suit, should be served with an office copy decree, and notified of the proceedings to take the partnership accounts. *Kline* v. *Kline*, 3 Chy. Chamb. 137.—Boyd, *Master*.

Where an order for administration had been granted to a devisee who was also a creditor of the estate to a large amount, but did not state that fact when applying for administration, his silence as to it was considered a ground for sustaining an order transferring the conduct of the proceedings under the reference to another party interested under the will. *Perrin* v. *Perrin*, 3 Chy. Chamb. 452.—Spragge.

No one has a special right to the conduct of proceedings in the master's office upon a reference under an administration order, but ceteris paribus it will be committed to those who have the greatest interest in conducting them properly and economically. *Ib.*

In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditor's claim and costs. The right to do so is not confined to the personal representative. *Fitten* v. *Dawson*, 3 Chy. Chamb. 461.—Spragge.

Under the ordinary administration decree in respect of a testator's real and personal estate the master may take an account of timber cut with which the defendants are chargeable. *Stewart* v. *Fletcher*, 18 Chy. 21.

A decree, as drawn up in an administration suit, directed the administrator to be charged with an occupation rent, "and that he should be allowed the various claims and allowances set up and asked for by his answer," the result of which was the allowance to him of several sums which, as against creditors, seemed to be improper, and the assets proved insufficient for payment of creditors in full. The court at the hearing on further directions gave liberty to the creditors who complained of such allowance, to rehear the cause, in order that the decree might be varied so as to give them an opportunity of disputing the claim, so set up by the administrator, in the master's office. *Willis* v. *Willis*, 20 Chy. 396.

III. Evidence.

1. *Proof of Defendant being Administrator.*

Notice of motion for an order to administer the estate of M., a deceased intestate, having been served on his widow as administratrix, the application was refused, there being no evidence that letters of administration had been granted to her. *In re Marshall—Fowler* v. *Marshall*, 1 Chy. Chamb. 29.—Spragge.

On an application by a creditor for an administration order, under order 15, only a certified copy of the will, shewing the defendant to be executor, was produced:—Held, that although strict proof of the claim as required in the master's office is not necessary, prima facie evidence of the applicant having a right to administration of the estate must be furnished; and the motion was refused with costs. *In re Clarke*, 2 Chy. Chamb. 57.—Taylor, *Secretary*.

In moving for an administration order the letters of administration should be produced. *Re Israel*, 2 Chy. Chamb. 392.—Taylor, *Secretary*.

But where the fact of the defendant being administrator is not disputed, and the plaintiff has filed an affidavit that he is administrator, it is not necessary to give further evidence of the fact, or to produce the letters of administration, or a copy thereof. *Re Bell—Bell* v. *Bell*, 3 Chy. Chamb. 397.—Mowat.

Where a bill is filed against the estate of an intestate, alleging that letters of administration have been granted to the defendant, such allegation is sufficiently established by shewing that at the hearing of the case the defendant has obtained letters of administration, although the grant thereof may have been made subsequently to the filing of the bill and the putting in of the answer, and although the defendant has taken the objection by way of defence in answer. *The Edinburgh Life Assurance Co.* v. *Allen*, 19 Chy. 593.

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2. *Other Cases.*

If in an administration suit fraud is charged in the pleadings, it may be proper for defendants to examine the plaintiff thereupon in order to disprove the charge, even though they succeed in the objection, that a proceeding by bill was not necessary. *McMillan* v. *McMillan*, 8 L. J. N. S. 285.—Boyd, *Referee*.

After notice of motion served for an order to administer the estate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate. *Farrell* v. *Cruikshank*, 1 Chy. Chamb. 12.—Spragge.

IV. Costs.

1. *To Executors and Trustees.*

An executor or trustee will sometimes be entitled to his costs in a suit for administration, notwithstanding he may have committed a breach of trust, if no loss is sustained by the estate by reason of such breach. *Wiard* v. *Gable*, 8 Chy. 458.

Where the plaintiff charged improper conduct against the administratrix, which was not sustained in evidence, he was ordered to pay all costs other than of an ordinary administration suit. *Hodgins* v. *McNeil*, 9 Chy. 305.

The report in an administration suit, found £1403 chargeable against an executor. Of this sum £1247 was for the price of land, claimed and received by the executor, the testator's son, as heir, and his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit, when this purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £3 Under the circumstances the executor was allowed his costs, as of an administration suit, out of the estate; and was not charged with interest on the balance in his hands, which he was required to pay into court within a month, after deducting therefrom his share of the estate as legatee. *Blain* v. *Terryberry*, 12 Chy. 221.

A creditor recovered judgment against his debtor, who having afterwards died intestate, the creditor had himself appointed administrator of his estate, and thereupon, without suing out execution against lands, filed a bill against the real representatives of the intestate for relief under 13 Eliz.:—Held, that the peculiarity of his position as both creditor and personal representative did not entitle him to relief in the

court, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree for administration was made, with such costs as would have been incurred on taking out the ordinary administration order, the plaintiff paying to the defendants their costs of answer and of the hearing. *Duffy* v. *Graham*, 15 Chy. 547.

Where an executor and trustee named in a will had acted as such to the advantage of the estate, without having proved the will, he was allowed his costs, as between party and party, of an administration suit to which he was a party defendant, excepting some costs which he had needlessly incurred. *Sunley* v. *McCrae*, 2 Chy. Chamb. 231.—VanKoughnet.

Where an executor obtained the usual order for the administration of his testator's estate, and upon the hearing on further directions no reason was shewn for invoking the aid of the court, and the guardian for the infants did not object in any way to the course taken by the executor the court refused both parties their costs. *Springer* v. *Clarke*, 15 Chy. 664.

An executor who obtains an order for the administration of his testator's estate, is not always entitled to the costs. An executor took out an administration order for the purpose of establishing a claim which he made against the estate, and having it paid by sale of the realty; but he failed to prove his claim, and, on the contrary a small balance was found against him. It appeared, also, that he had not kept proper books of account as executor:—Held, that he should pay the costs of the suit. *Sullivan* v. *Sullivan*, 16 Chy. 94.

Where a bill was filed against an executor and trustee for administration, and praying a receiver, on the ground of the executor becoming embarrassed, and having lately sold a valuable farm belonging to the estate to his own son at an undervalue, without advertising the same, or communicating with the cestui que trust under the will, and of his having taken a mortgage for the payment of the purchase money in his own name individually and not as trustee and the circumstances justified action on the part of the cestui que trust, the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Baile* v. *Thompson*, 17 Chy. 154.

Where the only important difficulties in the administration of an estate were created by a large claim of the executors which they failed to make good, and a claim of their father's which he had made by their persuasion and against his own wish, and the executors had more money in their hands than was required to pay all other claims against the estate, they were charged with the costs of an administration suit brought by a creditor. *McGill* v. *Courtice*, 17 Chy. 271.

Where the executor had power under a will to sell real estate for payment of debts and legacies, and there was more than enough in money to pay the debts, the court considering a suit for administration unnecessary, refused the executor his costs and his commission. *Graham* v. *Robson*, 17 Chy. 318

In an administration suit, the executors were charged with so much of the expenses of the reference as was incurred in the master's office in establishing charges which they disputed. *Stewart* v. *Fletcher*, 18 Chy. 21.

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2. *Other Cases.*

In an administration suit it appeared that the stepfather of one of the children of the deceased, and who had the care of such, had been sued for the child's board while at school, his mother being a creditor of the estate, and neither she nor her husband having any funds to pay for such board while there were funds applicable thereto:—Held, that the stepfather should be allowed the costs of such suit. *Menzies* v. *Ridley*, 2 Chy. 544.

In an administration suit the widow of the testator had made a claim for dower, which had been allowed, and upon an appeal from that decision the Court of Appeal reversed the judgment of the court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of appeal. The appellants having paid their own costs of the appeal, this court upheld the finding of the master in allowing them such costs out of the estate. *Ib.*

Where unnecessary parties were made to an administration suit, the court refused to burden the estate with any of the extra costs thereby occasioned. *Rodgers* v. *Rodgers*, 13 Chy. 457.

A bill had been dismissed, with costs to be paid to the plaintiff. Two of the defendants were administrators, and as such had funds in their hands to which the plaintiff was entitled as one of the heirs and next of kin of the intestate. The defendants had been unable to obtain the costs by fi. fa., and filed a petition asking to be allowed to retain the funds in the hands of the administrators:—Held, that the court had no control over the funds, and the petition was dismissed with costs. *Black* v. *Black*, 1 Chy. Chamb. 360.—Spragge.

Where a plaintiff files a bill for an administration decree in a case in which the decree would have been made on notice, without a bill, he is not entitled to the increased costs thereby occasioned. *Sovereign* v. *Sovereign*, 15 Chy. 559.

Where creditors whose claims in the aggregate were under $200 obtained the usual administration order, and it was shewn that the value of the estate including lands was under $800, and although the real estate which it was necessary to sell to satisfy such claims was encumbered by mortgage to an amount which together with these claims exceeded $200, it was held that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the County Court and the plaintiffs were refused their costs. *In re Scott—Hetherington* v. *Stevens*, 15 Chy. 683.

The next friend of infants filed a bill, against the mother of the infants—their guardian appointed by the Surrogate Court—and her husband, alleging certain acts of misconduct, which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the

plaintiffs to pay the costs of the defendants as between party and party. *Hutchinson* v. *Sargent*, 17 Chy. 8.

In a suit by a residuary legatee for the administration of an estate the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the master's office. To entitle them to such costs some sufficient reason must be shewn for their being represented by a separate solicitor. *Gorham* v. *Gorham*, 17 Chy. 386.

In case a creditor brings an administration suit after being informed that there are no assets applicable to the payment of his claim, if the information appear to have been substantially correct, he may have to pay the costs of the suit. *The City Bank* v. *Scatcherd*, 18 Chy. 185.

The fact that a creditor of an estate has proceeded at law after a decree for administration has been obtained, is not sufficient to deprive him of his costs, either at law or on a motion in this court to restrain his action. *Re Langtry*, 18 Chy. 530.

V. Administration ad Litem.

Where in a creditor's suit, to whose estate administration ad litem had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them pro confesso, and did not appear at the hearing, the court made the usual decree, without requiring a general administration to be first obtained. *Dey* v. *Dey*, 2 Chy. 149.

The court will not appoint an administrator ad litem of a deceased party to the suit where the deceased had a substantial interest in the suit. The suit must be revived. *The Bank of Montreal* v. *Wallace*, 1 Chy. Chamb. 261.—Van-Koughnet.

An order had been made for administration and accounts taken under it, and the master had made his report, but before it was filed or confirmed the administratrix died. No one could be found who was willing to administer to the estate, which was insolvent. The court therefore, under order 56, appointed as administrator ad litem the person who had been guardian of the infant heirs of the intestate, on the application for the administration order, he having also been solicitor for the administratrix in her lifetime. *Re Tobin—Cook* v. *Tobin*, 6 P. R. 40; 9 L. J. N. S. 191.—Blake.

VI. Miscellaneous Cases.

In an administration suit the testator's widow agreed that the real estate should be sold free from her dower, and the master, by his report, approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price; the widow, therefore, petitioned for payment for a small sum towards the allowance that might be made to her in lieu of dower; the creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed. *In re Thompson—Biggar* v. *Dickson*, 1 Chy. Chamb. 323.—Mowat.

Where a suit for the administration of an estate is pending in this Court, it is improper for the Surrogate Judge to interfere by ordering the allowance of a commission to trustees or executors. *Cameron* v. *Bethune*, 15 Chy. 486.

An administration suit by a person interested to an amount less than $200 in an estate which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, it was:—Held, not to be within the equity jurisdiction of the County Court. *Goldsmith* v. *Goldsmith*, 17 Chy. 213.

Where a testator dies in a foreign country leaving assets in this province, the court, at the instance of a legatee, will restrain the withdrawal of the assets from the jurisdiction, notwithstanding that there may be creditors of the testator resident where the testator was domiciled at the time of his death, and that there are no creditors resident in this province. *Sharer* v. *Gray*, 18 Chy. 419.

Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor notwithstanding allowed a creditor to recover a judgment against him by default:—Held, that the executor, on obtaining an administration order, was not entitled to an injunction against proceeding on the judgment. *Doner* v. *Ross*, 19 Chy. 229.

The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor who has proved in insolvency upon a promissory note made by an insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note. *Re Bak.—Bray's Claim*, 3 Chy. Chamb. 499.—Boyd. *Master*.

Infant children of an intestate obtained an administration order against their mother, the administratrix, and the master found as proper to be allowed for their maintenance a sum to meet which the personal estate was inadequate, and on further directions a sale was asked of the realty to satisfy the sum so allowed. The court refused to sanction such a sale, being satisfied that the suit had been instituted for that purpose merely, and was an indirect way of doing what ought to be done under the provisions of 12 Victoria, and the order of this court made to carry that Act into effect: and as the report furnished only a small part of the information which would necessarily be laid before the court under the Act and Order referred to. *Fenwick* v. *Fenwick*, 20 Chy. 381.

Where the court is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Victoria, and the orders of this court made to carry out the same, the question of maintenance, past as well as future, can properly be dealt with, inasmuch as a great deal of the information required by the statute and orders referred to can be evolved in taking the accounts in such suit; but where such a suit was instituted by a party asking for maintenance out of the corpus of the estate, the court as

check upon such suits refused to make any direction as to maintenance. *Goodfellow* v. *Rannie*, 20 Chy. 425. See also *In re Foster et al.* v. *Patterson*, *Ib.* 345.

ADMINISTRATOR.

See ADMINISTRATION SUIT—EXECUTORS AND ADMINISTRATORS.

ADMINISTRATOR AD LITEM.

See ADMINISTRATION SUIT.

ADMIRALTY.

Held, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this province has authority to enquire into offences committed on said lakes although in American waters. *Regina* v. *Sharpe*, 5 P. R. 135.—Chamb.—Wilson.

ADMISSIONS.

I. IN CRIMINAL CASES—*See* CRIMINAL LAW.

II. IN EVIDENCE—*See* EVIDENCE.

III. BY PLEADINGS—*See* EVIDENCE.

ADMIT, NOTICE TO.

Before a party can tax the costs of obtaining an exemplification of judgment, he must serve the other side with a notice to admit under the rule of court, 28 E. T. 1842. The master, however, though he cannot allow such costs without notice, &c., may allow the costs of procuring a copy of the roll. *Conger* v. *McKechnie*, 1 C. L. Chamb. 220.—Burns.

On a notice to admit, no summons can be taken out until the expiration of forty-eight hours from the time specified in the notice for an inspection of the documents. *Cary* v. *Cumberland*, 1 P. R. 140—Chamb.—Burns.

ADULTERY.

I. FORFEITURE OF DOWER—*See* DOWER.

II. CRIM. CON. ACTIONS—*See* HUSBAND AND WIFE.

III. RELIEF FROM ALIMONY—*See* HUSBAND AND WIFE.

ADVANCEMENT.

TO INFANTS—*See* INFANT.

A man by arrangement with his wife and two daughters—by a former marriage,—one of whom was a minor, purchased lands and built thereon, and paid for the property out of moneys produced by the joint labor of himself, his wife, and the daughters; the deed for the property was taken in the name of the wife, upon the understanding that she should hold the same for the benefit of herself and husband during their lives, and after their decease that it should go to the daughters. By his will the husband declared that he had no real estate, but desired the wife to direct her executors to sell the property so purchased, and divide the proceeds between his two daughters and a daughter of his wife by a former husband:—Held, on appeal, affirming the decree below, that the purchase could not be treated as an advancement to the wife; that there was a resulting trust in favour of the testator; and that the trusts in favour of the daughters, if declared, having been so by parol only, were within the Statute of Frauds, and therefore void. Gwynne, J., diss. *Owen* v. *Kennedy (In Appeal)*, 20 Chy. 163.

ADVERSE POSSESSION.

See CHAMPERTY AND MAINTENANCE—EJECTMENT—LIMITATION OF ACTIONS AND SUITS.

ADVERTISEMENT.

I. SERVICE BY OR ON ABSENT DEFENDANTS.

1. *In Foreclosure Suits*—*See* MORTGAGE.

2. *Other Cases*—PLEADING IN EQUITY—PRACTICE IN EQUITY.

II. OF SALE OF LAND—*See* ASSESSMENT AND TAXES—EXECUTION—SALE OF LAND BY ORDER OF THE COURT.

Misrepresentation in advertisement of land to be sold, effect of. See *Osborne* v. *Farmers and Mechanics' Building Society*, 5 Chy. 326; *The Canada Permanent Building and Savings Society* v. *Young*, 18 Chy. 566.

To effect a sale by trustees under the Act respecting the property of religious institutions in Upper Canada, it is essential that all the requirements of the statute should be complied with, and therefore that the public notice should state the terms of the intended sale. *In re the Second Congregational Church property Toronto*, 1 Chy. Chamb. 349.—Mowat; *Re the Baptist Church property of Stratford*, 2 Chy. Chamb. 388.—Taylor. *Secretary.*

Where defendant had been served by advertisement, which by an oversight had been inserted only three times instead of four, on an application for an order pro confesso, it was ordered that defendant be re-advertised the proper number of times. *Patrick* v. *Ross*, 2 Chy. Chamb. 459.

ADVOCATE.

See BARRISTER.

AFFIDAVIT.

I. Authority to Take.

1. *Commissioners.*
   (a) *Effect of separation of Counties*, 55.
   (b) *Attorneys in the cause, or their Partners*, 56.
   (c) *Affidavits sworn Abroad*, 56.
   (d) *Other Cases*, 57.

II. Form of.

1. *Intituling*, 57.
2. *Name of Deponent*, 59.
3. *Addition*, 59.
4. *Contents*, 60.
5. *Interlineations*, 62.
6. *Jurat.*
   (a) *Several Deponents*, 62.
   (b) *Other Cases*, 62.
   (c) *In Affidavits to hold to Bail—See* Arrest.

III. Office Copies, 63.

IV. Miscellaneous Cases, 64.

V. In Particular Cases.

1. *For Attachment — See* Absconding Debtor—Attachment of Debts.
2. *Setting aside and Staying Proceedings on Award—See* Arbitration and Award.
3. *Bail Proceedings—See* Arrest—Bail.
4. *Commission to take Evidence—See* Commission to examine Witnesses.
5. *On Bills of Sale and Chattel Mortgages —See* Bills of Sale and Chattel Mortgages.
6. *Of Loss under Policy—See* Insurance.
7. *Quashing By-laws—See* Municipal Corporations.
8. *In other cases—See* The Several Titles.

I. Authority to take.

1. *Commissioners.*

(a) *Effect of separation of Counties.*

A commission was granted for the Midland district, which then included the present county of Prince Edward and the united counties of Frontenac, Lennox, and Addington. Prince Edward was afterwards set aside as a separate district, the commissioner then being resident in the united counties of F., L., and A. :—Held, that his authority in such united counties would continue. *McWhirter* v. *Corbett*, 4 C. P. 203.

A commission to take recognizances of bail, &c., within the Gore district :—Held not valid since 12 Vict., c. 78, in the county of Brant after its separation from that district. *Carter* v. *Sullivan*, 4 C. P. 298.

K. held a commission for taking affidavits in the district of Wellington, issued in 1848:—Held, that he might act under it in the county of Waterloo, where he was living, being part of the old district, and a junior county disunited from the union of Wellington, Waterloo, and Grey. *Glick* v. *Davidson*, 15 Q. B. 591.

Held, affirming above case, and dissenting from *Carter* v. *Sullivan*, 4 C. P. 298, that a commissioner appointed in 1840, for the district of Gore and Wellington, might after 12 Vict., c. 78, and 14 & 15 Vict., c. 5, continue to take affidavits in Galt, formerly within the Gore district. *Fleming* v. *McNaughton*, 16 Q. B. 194.

(b) *Attorneys in the cause, or their Partners.*

An affidavit sworn before the partner of the attorney of the party on whose behalf the affidavit is made, cannot be read. *Hadley* v. *Hearns*, 1 Q. B. 405; *White* v. *Petch*, 6 Q. B. 13. See also, Rule of Court, 114, T. T. 1856.

Semble, that the attorney of the relator in a contested municipal election may take the recognizance and affidavit. *Regina ex rel. Blaisdell* v. *Rochester*, 12 Q. B. 630.

Affidavits sworn before an attorney who is a partner of counsel engaged in the cause, but not otherwise connected therewith, may be read. *Wilde* v. *Crow*, 10 C. P. 406.

An affidavit for an attachment in insolvency, made before the plaintiff's attorney prosecuting the attachment :—Held, sufficient, under sec. 25 of the Insolvent Act of 1865. *Hillborn* v. *Mills*, 5 L. J. N. S. 41.—C. C.—Hughes.

A., B., and C. were partners in Chancery. A., B., and D. were partners at common law. An affidavit tendered by C. on an application in Chancery, was rejected, it having been sworn before D. *Dunn* v. *McLean*, 9 L. J. N. S. 212.—Chy Chamb.—Taylor, *Referee*.

(c) *Affidavits sworn Abroad.*

[*See now 24 Vict., c. 14, O., which provides for the taking of affidavits abroad for use in Ontario.*]

An affidavit of execution of a chattel mortgage, sworn before the mayor of a foreign town, is useless. *De Forrest* v. *Bunnell*, 15 Q. B. 370.

Quære, whether affidavits sworn before a British consul in the U. S. can be read in answer to a rule. *Bird* v. *Folger*, 17 Q. B. 536.

Affidavits sworn before the mayor of a city or town in the United Kingdom received on motion for a new trial. *Tetley* v. *Knowlson*, 2 P. R. 275.—Q. B.

An affidavit purporting to be sworn before the mayor of a city in England is inadmissible in this court, without proof of his signature and authority to administer oaths; but where the affidavit is sworn out of England it is receivable as evidence here, under the Imperial Statute 14 & 15 Vict., c. 99. *Graham* v. *Macpherson*, 1 Chy. Chamb. 85.—Spragge.

Where no commissioner under statute for taking affidavits to be used in Upper Canada resided nearer than 210 miles from a place in Lower Canada, where an affidavit of service was to be made, the affidavit was ordered to be sworn before one of the ordinary commissioners for taking affidavits in L. C. *Gould* v. *Hutchinson*, 1 Chy. Chamb. 188.—VanKoughnet.

Affidavits sworn before a notary public in the United States, and "certified under his hand and official seal," can be used under 26 Vict., c. 41, on a motion in this Court. *The Merchants' Express Co.* v. *Morton*, 15 Chy. 274; *S. C.* 2 Chy. Chamb. 319.—Spragge.

Sworn before a commissioner for taking affidavits in the English Court of Chancery at Glasgow:—Held insufficient. *McEwan* v. *Boulton*, 3 Chy. Chamb. 63.—Taylor—*Secretary.*

(d) *Other Cases.*

The certificate of a commissioner for administering the oath of allegiance is evidence (after his death and that of the party taking the oath) that such oath was administered. *Doe* d. *McFarlane* v. *Lindsay*, Dra. 123.

Defendants had gone before one A., who was bonâ fide supposed to be a commissioner for the County of L., and acknowledged a recognizance:—Held, that they were not estopped from disputing A.'s authority as commissioner. *Macfarlane* v. *Allan*, 6 C. P. 496; see, also, *Hunt* v. *McArthur*, 24 Q. B. 254.

It is no objection to the affidavit of bona fides of an assignment of goods that the commissioner prepared the assignment. *Noell* v. *Pell*, 7 L. J. 322.—C. L. Chamb.—Draper.

Remarks as to the practice of magistrates or commissioners taking unauthorized affidavits. *Jackson* v. *Kassel.*, 26 Q. B. 341. See also *McIlroy* v. *Hall*, 25 Q. B. 303.

The provision of 23 Vict., c. 2, s. 28, the Crown Lands Act, that all affidavits required thereunder may be taken before "any justice of the peace," only empowers a justice to administer the oath in a place where he can act as such justice. *Regina* v. *Atkinson*, 17 C. P. 295.

The same interpretation of this Act applies to commissioners for taking affidavits mentioned therein. *Ib.*

One of the witnesses swore to the affidavit proving the execution of the memorial of a deed before the other witness:—Held, no objection. *Reid* v. *Whitehead*, 10 Chy. 446.

II. Form of.

1. *Intituling.*

On a motion for leave to file a criminal information against a J. P. the affidavits should not be intituled as of a suit pending. *In re Bastard* v. *Schofield*, 4 O. S. 11.

Where a defendant moved for a rule, on an affidavit incorrectly intituled as to the cause, and the plaintiff, in shewing cause by his attorney, intituled his affidavits as defendant had intituled his, stating the proper style of the cause, and shewing that he was not attorney for the plaintiff in the cause in which the affidavits were intituled, defendant's rule was discharged, there being a fatal variance if there was only one cause, and if there were two no service being proved. It was, however, discharged without costs, as defendant's affidavits were intituled in the same way as the plaintiffs, whereas they should have been intituled in the right cause, denying the existence of the other. *Terry* v. *Matthews*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

Where all the affidavits in a cause, after verdict, were intituled with an initial letter between the Christian and surname of defendant:—Held, no objection to an affidavit made by defendant, that the second name was not set out at length, as the initial might be nothing more than a distinctive letter. *Kendrew* v. *Allen*, T. T. 4 & 5 Vict.

Quære, whether affidavits to be made in England for proof of debts sued for in this province, made before a suit is commenced, can be read at a trial subsequently had, or if such affidavit must be intituled in the cause. *Gordon* v. *Fuller*, 5 O. S. 174.

The additions of "plaintiff" and "defendant" must be inserted. *Brown* v. *Simmonds*, 1 Q. B. 280. *Chafe* v. *Parr*, 2 Q. B. 98.

An affidavit intituled C. D. (the defendants) at suit of,—or, and—A. B. (the plaintiff) is bad. *Winter* v. *Miner et al.*, 10 Q. B. 110; *Wright* v. *Jennings*, 7 C. P. 26; *Lewis* v. *Blackwood*, 3 L. J. 134. C. L. Chamb.—Richards.

It is no objection to an affidavit of execution of a commission to take evidence abroad, that the contractions *Plff.* and *Deft.* were used in the intituling of it. *Frank* v. *Carson*, 15 C. P. 135.

Nor that such affidavit was intituled in the C. P. instead of the Q. B. *Comstock* v. *Burrowes*, 13 Q. B. 439.

Where in the style of the cause the plaintiff was called "Davids Cass," but in the title of affidavits in support of a rule *nisi* in the same case, "Davis H. Cass" and "Davis Hawley Cass":—Held, a fatal variance. *Beauchamp* v. *Cass*, 1 P. R. 291.—P. C.—Richards.

Affidavits under 13 & 14 Vict. c. 53, s. 85, to remove a cause from the Division Court, must be intituled in the court in which the motion is made, not in the Division Court. *Smyth* v. *Nicholls*, 1 P. R. 355. Chamb.—Robinson.

Quære: Whether the affidavits were properly intituled. *The Queen* (plaintiff) v. *Robert Farley* (defendant), on an application to quash an inquisition returned to a writ of *certiorari*. *Regina* v. *Farley*, 24 Q. B. 384.

Affidavits in qui tam actions must shew the character in which plaintiff sues. *Robertson* q. t. v. *Orchard*, 4 P. R. 23.—Chamb.—A. Wilson.

An affidavit in support of a motion to quash a by-law, not intituled in any court, but sworn before a commissioner styling himself "A Commissioner in B. R. and C. P. &c.":—Held, sufficient. *Kinghorn and the Corporation of the City of Kingston*, 26 Q. B. 130. See also *Frazer and The Municipal Council of the United Counties of Stormont, &c.*, 10 Q. B. 286.

But where there was nothing to shew that it was sworn before an officer of any court, the commissioner merely styling himself "A commissioner," &c.:—Held, insufficient. *Hirons and the Municipal Council of Amherstburgh*, 11 Q. B. 458.

Where the commissioner designates himself, "A commissioner in B. R.," &c., it is no objec-

tion that the affidavit is not intituled in any Court. *Ellerby* v. *Walton*, 2 P. R. 147.—Q. B.—See also, *Molloy* v. *Shaw*, 5 P. R. 250.—Chamb. Richards; *Damer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.—Chamb.—Gwynne.

Affidavits for an attachment against an absconding debtor are not vitiated by being intituled before the issue of attachment. *Wakefield* v *Bruce*, 5 P. R. 77.—Chamb.—Gwynne.

The affidavit of the service of a subpœna ad respondendum, directed to defendant in an information of intrusion, is properly intituled in styling the Attorney General "Informant." *Attorney General* v. *McLachlin*, 5 P. R. 63.—P. C.—A. Wilson.

The papers and affidavits used on a motion to set aside a bond for security for costs of appeal from the Court of Chancery, should be intituled in that Court. *Denison* v. *Denison*, 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary*.

Affidavits need not in their intituling distinguish the parties by original and amended bill. It is sufficient to describe them as the now parties to the suit. *Somerville* v. *Kerr*, 2 Chy. Chamb. 154.—VanKoughnet.

Affidavits styled in short form "A., B., and others, plaintiffs," and "C., D., and others, defendants," were held sufficient. *Dickey* v. *Heron*, 2 Chy. Chamb. 490.—VanKoughnet. See *Crooks* v. *Crooks*, 1 Chy. 57.

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2. *Name of Deponent.*

An affidavit made for a ca. sa. by a plaintiff who has two Christian names, need not state the second, where his identity sufficiently appears by the affidavit describing him as the above plaintiff. *Perkins* v. *Connolly*, 4 O. S. 2.

An affidavit of execution of cognovit, made by "William D. Baby," signed "W. D. Baby"; —Held, sufficient. *Folger* v. *McCallum*, 1 P. R. 352.—Chamb.—Robinson.

It is no objection that the second Christian name of a deponent to an affidavit of the execution of a chattel mortgage is not written in full, but the initial only given. *DeForrest* v. *Bunnell*, 15 Q. B. 370.

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3. *Addition.*

Semble, under our rule 2 Will. IV., an affidavit of either plaintiff or defendant need not state the deponent's degree, certainly not where the affidavit is sworn in a foreign country. *Ewing* v. *Lockhart*, 3 Q. B. 248. See also, *Lyman* v. *Brethron*, 2 C. L. Chamb. 108.—Draper. Rule of Court 109, T. T. 1856.

The want of deponent's addition is no objection to an affidavit made for registry of a chattel mortgage. *Brodie* v. *Ruttan*, 16 Q. B. 207.

"Secretary of the Board of Arts and Manufactures:"—Held, a sufficient addition. *Noell* v. *Pell*, 7 L. J. 322.—C. L. Chamb.—Draper.

The addition of a deponent is only descriptive, not an allegation of a fact. *Hood* v. *Cronkrite*, 4 P. R. 279.—Chamb.—Draper.

An affidavit should contain the description or addition of the deponent; or, if made by a plaintiff or defendant, should shew that he is such. *Rogers* v. *Crookshank*, 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary*.

An affidavit on production made by W. R., not stating any description or addition, or otherwise showing that he was a party to the suit, was ordered to be taken off the files; but as the omission was a mere slip, the order was made without costs, and leave granted to re-file the affidavit. *Ib.*

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4. *Contents.*

An affidavit verifying the copy of a paper, "that it is a true copy as the deponent is informed, and verily believes," is sufficient. *Shafe* v. *Parr*, 2 Q. B. 98.

Extracts from a letter embodied in an affidavit cannot be noticed; either the whole letter or a copy should be before the court, or at least it should be sworn that the letter contains nothing more relating to the action. *Vaughan* v. *Ross*, 8 Q. B. 506.

An affidavit is not insufficient for not mentioning the papers annexed separately, nor positively stating to what they are annexed. *McKay* v. *Dearmid*, 2 C. L. Chamb. 1.—Draper.

A copy of the by-law moved against was described as *annexed*, but was not annexed, to applicant's affidavit:—Held, no objection. *Bessey* v. *Municipal Council of Grantham*, 11 Q. B. 156.

The answers of a prisoner to interrogatories, being styled in the cause, and intituled in the proper court, were headed, "The answers upon oath of," &c., and proceeded thus: "To the first interrogatory, he saith," &c. 2. "To the second interrogatory," &c., not adding, *he saith*. To the fifteenth interrogatory only the figures 15 were prefixed. The jurat stated that deponent was sworn, &c., "and made oath that the foregoing answers were true, on the 8th day of March, 1854:"—Held, that the form of the answers and the jurat were defective; and a summons obtained upon them was discharged, but without prejudice to another application. *Addy* v. *Brouse*, 1 P. R. 234.—Chamb.—Richards.

An affidavit for the allowance of service of an attachment should state what efforts have been made to effect personal service. *Stephen* v. *Dennie*, 3 L. J. 69.—C. L. Chamb.—Richards.

Costs for superfluous or irrelevant matter in affidavits will not be allowed, and in extreme cases the judge will disallow costs for the whole affidavit. *Corley* v. *Roblin*, 5 L. J. 225.—C. L. Chamb.—Richards.

The plaintiff having filed many useless affidavits, containing many repetitions as well as idle statements on information and belief, a direction was given to the master that they should not be allowed to the plaintiffs on taxation, although the summons was discharged with costs. *Hooper* v. *Burley*, 1 L. J. N. S. 273.—C. L. Chamb.—Draper.

It is not necessary, under the 112th Rule T. T. 20 Vict., that an affidavit to hold to bail should be divided into paragraphs and numbered. *Ellerby* v. *Walton*, 2 P. R. 147.—Q. B.

Attention called to Rule of Court 112, requiring affidavits to be divided into paragraphs. *In re Park and Park*, 24 Q. B. 459.

Affidavits impeaching the character for veracity of a deponent whose affidavit had been filed on moving a rule, were rejected. *Clark v. Chipman*, 26 Q. B. 170.

A joint affidavit made by the defendant and one D., stated * * * "Each for himself maketh oath and saith that, &c.; and that he, this deponent, is not aware of any adverse claim to, or occupation of said lot." The defendant having been convicted of perjury on this latter allegation:—Held, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. *Regina* v. *Atkinson*, 17 C. P. 295.

An affirmation by a Quaker as follows: "I, W. D. H., of &c., do solemnly, sincerely, and truly, declare and affirm, that I am one of the society called Quakers," and then proceeding with the subject matter of the affidavit, without any further affirmation:—Held, not in compliance with the C. S. U. C. c. 32, s. 1. *Hillborn* v. *Mills* 5 L. J. N. S. 41.—C. C.—Hughes.

Remarks as to improper and irrelevant expressions in affidavits, and the same censured. *Fisher* v. *Green*, 2 L. J. N. S. 14.—C. L. Chamb.—J. Wilson; *Davidson* v. *Grange*, 5 P. R. 258.—Chamb.—Morrison.

The plaintiff's attorney having stated impertinent and irrelevant matter in his affidavit, was ordered to pay the costs of the application. *Anonymous*, 4 P. R. 242.—Chamb.—Morrison. See also *Corley* v. *Roblin*, 5 L. J. 225.—C. L. Chamb.—Richards.

Where the affidavit, on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor, altogether unconnected with the dealings between the solicitor and the client, such allegations were held to be scandalous, and were ordered to be struck out of the affidavits. *In re Fitch*, 2 Chy. Chamb. 288.—Spragge.

Affidavits disingenuously drawn up, with a view of presenting inferences and giving colour to the transactions to which they refer, inconsistent with the whole truth, even though true so far as they go, should be read with suspicion, and carry but little weight. *Regina* v. *Allen*, 5 P. R. 453.—Chamb.—Morrison.

Misconduct of magistrate in drawing up an affidavit in a case of seduction, inserting the words *criminal* connection, instead of *carnal* connection, strongly censured: *McIlroy* v. *Hall*, 25 Q. B. 303.

The court, in a proper case, may relax the rule requiring a deponent to state his means of information; and where deponent swore that such a disclosure would tend to defeat the ends of justice, the court dispensed with it. *The Merchants Union Express Co.* v. *Morton*, 15 Chy. 274; *S. C.* 2 Chy. Chamb. 319.—Spragge.

An affidavit by plaintiff's agent, stating that he had the management of all the plaintiff's business in this country:—Held, sufficient to show his source of information. The expression "owner in fee" held to mean the beneficial owner. *McEwen* v. *Boulton*, 2 Chy. Chamb. 399.—Taylor, *Secretary*.

5. *Interlineations.*

An interlineation not noted by the commissioner does not necessarily avoid an affidavit. *Leeming* v. *Marshall*, 5 P. R. 276.—Chamb.—Dalton, *C. C. & P.*; *Lyster* v. *Boulton*, 5 Q. B. 632.

But in this court all erasures and interlineations in affidavits must be initialed by the commissioner before whom it is sworn, otherwise they cannot be read. *Crippen* v. *Ogilvie*, 2 Chy. Chamb. 304; *McMartin* v. *Dartnell*, 2 Chy. Chamb. 322.—Taylor, *Secretary*.

6. *Jurat.*

(a) *Several Deponents.*

An affidavit by two persons, not stating distinctly in the jurat that both were sworn, cannot be read. *Nicholson* d. *Spafford* v. *Rea*, 3 O. S. 85. See Rule of Court, No. 110.

But an amendment will be allowed by the insertion of their names. *Fisher* v. *Thayer*, 5 O. S. 513.

A jurat stating that two deponents (naming them) were sworn, is sufficient. *Keefer* v. *Hawley*. 1 P. R. 1.—P. C.—McLean.

The words "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word "severally," in the affidavit to a chattel mortgage:—Held, sufficient. *Moyer* v. *Davidson*, 7 C. P. 521.

Semble, that a similar jurat to an affidavit of loss required by a fire policy, would be sufficient. *Mann* v. *The Western Assurance Co.*, 17 Q. B. 190. See also *Regina* v. *Atkinson*, 17 C. P. 295.

It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of court. *Moyer* v. *Davidson*, 7 C. P. 521.

(b) *Other Cases.*

Omission of the place of taking:—Held, not fatal. *McLean* v. *Cumming*, Tay. 184.

"Sworn before me at Belleville," (not saying in *what district*):—Held sufficient. *Ridley* v. *Wilkins*, 1 C. L. Chamb. 26.—Macaulay.

Sworn "at Toronto," without giving the name of a county:—Held, sufficient. *Yeoman* v. *Steiner*, 5 P. R. 466.—Chamb.—Dalton, *C. C. & P.*

The jurat to an affidavit on a chattel mortgage was as follows: "Sworn before me at the Brantford of —— in the —— county of Brantford, this 13th day of October, A. D. 1855: George W. Malloch, a commissioner for taking affidavits in the Queen's Bench, in and for the said county of Brant":—Held, sufficient. *DeForrest* v. *Bunnell*, 15 Q. B. 370.

To sustain a conviction for perjury in an affidavit, it is not necessary that the jurat should contain the place at which the affidavit is sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. *Regina* v. *Atkinson*, 17 C. P. 295.

There was no statement in the affidavit as to where it had been sworn, either in the jurat or

elsewhere, except the marginal venue, "Canada, County of Grey, to wit:" but the contents showed that it related to lands in that county, and it was proved that defendant subscribed the affidavit: that the party before whom it purported to have been sworn was a J. P. for that county, and had resided there for some years: that the affidavit had been received through the post-office, by the agent of the Crown lands there, by whom it was forwarded to the Commissioner of Crown Lands; and that subsequently a patent issued to the party on whose behalf the affidavit had been made:—Held, evidence from which the jury might infer that the affidavit was sworn in the County of Grey. *Ib.*

When sworn by an illiterate person, the omission in the jurat of the statement that the deponent appeared to understand it is fatal. *Moore* v. *James*, Dra. 233. See Rule of Court 113, T. T. 1856.

An affidavit of loss under a fire policy which had no jurat, and was not in the form of an affidavit:—Held, insufficient. *Shaw* v. *St. Lawrence County Mutual Insurance Co.*, 11 Q. B. 73. See also *Mann* v. *The Western Assurance Co.*, 17 Q. B. 190.

The jurat may be referred to, to explain the date of a fact deposed to in the affidavit. *Lyman* v. *Brethron*, 2 C. L. Chamb. 108.—Draper.

The addition of the words, "a commissioner, &c.," or "a commissioner," or "a comr." to the commissioner's signature is sufficient; and semble, no addition is necessary. *Henderson* v. *Harper*, 2 Q. B. 97; *Brown* v. *Parr*, 2 Q. B. 98; *Murphy* v. *Boulton*, 3 Q. B. 177; *Pawson* v. *Hall*, 1 P. R. 294.—Chamb.—Draper; *Brett* v. *Smith*, 1 P. R. 309.—Chamb.—Richards.

But,—Held that the mere signature was insufficient. *Babcock* v. *Municipal Council of Bedford*, 8 C. P. 527.

In the answers, on oath, of a prisoner to interrogatories, the jurat stated that the deponent was sworn, &c., "and made oath that the foregoing answers *were* true on this 8th day of March, 1854":—Held, bad. *Addy* v. *Brouse*, 1 P. R. 234.—Chamb.—Richards.

The jurat of an affidavit stated that it was sworn on a day which had not then arrived:—Held, that the affidavit was a nullity. *In re Robertson*, 5 P. R. 132.—P. C.—Morrison.

"Sworn before at, &c., omitting the word *me*:—Held, sufficient. *Martin* v. *McCharles*, 25 Q. B. 279.

In affidavits of execution of bonds, &c., produced for the approval of the Court of Chancery, it is sufficient to use the form of a jurat generally used. *Re Auschrook*, 4 Chy. 109.

The omission, in the jurat, of the name of the deponent, vitiates the affidavit. *Dickey* v. *Heron*, 1 Chy. Chamb. 293.—Spragge.

III. Office Copies.

If office copies of affidavits are demanded, the parties filing the affidavits must furnish them; and the costs of any delay occasioned by his not doing so falls on the party in default. *Burrows* v. *Hainey*, 2 Chy. Chamb. 186.—VanKoughnet.

In an action for malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by defendant. *Spafford* v. *Buchanan*, 3 O. S. 391; *Fitzgerald* v. *Webster*, T. T. 2 & 3 Vict.; *Wilson* v. *Thorpe*, 18 Q. B. 443.

IV. Miscellaneous Cases.

Amendment of Christian names of plaintiff in affidavits. *Rose* v. *Cook*, 1 Q. B. 5; *Grant* v. *Taylor*, 2 Q. B. 407; *Beauchamp* v. *Case*, 1 P. R. 291.—P. C.—Richards.

The court will not try matters of fact upon affidavits. Where, therefore, defendant moved to set aside a verdict, because the notice of trial had not been served in time, and the plaintiff's attorney swore that defendant's attorney agreed to take short notice of trial, which the plaintiff's attorney denied:—Held, that the verdict must be set aside. *Smith* v. *Ask*, 5 Q. B. 497.

A Judge in Chambers will not *try* the merits of a case on affidavits, but he may properly receive and consider explanatory affidavits filed in reply, so as to be able to exercise a discretion on all the matters properly before him, and grant relief, if he think the facts before him warrant it. *The Bank of Montreal* v. *Harrison*, 4 P. R. 331.—Chamb.—Draper.

In an action for goods sold, the question was the authority of one McA. to bind defendants, as their agent:—Held, that an affidavit made by McA., describing the nature of his agency, and filed by defendants on a motion for a new trial in another suit, brought by this plaintiff against them, was clearly admissible against defendants. *Thayer* v. *Street*, 23 Q. B. 189.

Affidavits of the execution of a chattel mortgage will not be treated with the same particularity as affidavits used in proceedings before the court. *DeForrest* v. *Bunnell*, 15 Q. B. 370; *Moger* v. *Davidson*, 7 C. P. 521.

An affidavit of notice to produce is not admissible under C. L. P. Act, 1856, s. 167, unless made by the plaintiff's attorney, or his clerk. *Patterson* v. *Morrison*, 17 Q. B. 130.

In applications of strict right the law will not assume that an affidavit, made by "the agent of a person, is the professional Toronto agent of such person, and that such person is a practising attorney. *Leslie* v. *Foley*, 4 P. R. 246.—P. C.—Morrison.

Affidavits cannot be read on a motion where the intention to read affidavits thereon is not mentioned in the notice of motion.—*Faris* v. *Martyn*, 1 Chy. 300.—Esten.

A party cannot use affidavits not used before the Secretary, or make a new case, on appeal from Secretary's order. *Bank of Montreal* v. *Wilson*, 2 Chy. Chamb. 117.—VanKoughnet.

Affidavits are admissible, for some purposes, on an investigation of title between vendor and vendee. Where, however, an affidavit was offered to prove the loss of a will which had been proved in a Surrogate Court in New York but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means

proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence. *Brady* v. *Walls*, 17 Chy. 699.

In a prosecution for perjury on an affidavit sworn before a justice of the peace:—Held, that the swearing before the justice of the peace, and the taking the oath by defendant, were made out by proof of their signatures. *Regina* v. *Atkinson*, 17 C. P. 295.

The rule in force in England (Dan. Pr. 810) that a party who has made an affidavit must submit to cross-examination upon it, if required, on notice to his solicitor, before taking any further steps in the cause, being founded on a special English order, has no application in this Province. *Grant* v. *Winchester*, 6 P. R. 44. —Chy. Chamb.—Holmested, *Referee*.

AFFIRMATION.

See AFFIDAVIT.

AGENT.

I. GENERALLY—*See* PRINCIPAL AND AGENT.

II. OF ATTORNEY—*See* ATTORNEY AND SOLICITOR.

AGREEMENT.

I. GENERALLY—*See* CONTRACT.

II. CONSIDERATION FOR—*See* CONTRACT.

III. LEGALITY OF—*See* CONTRACT.

IV. PAROL EXPLANATION OF—*See* EVIDENCE.

V. TO ADMIT EVIDENCE—*See* EVIDENCE.

VI. RELATING TO SALE OF GOODS—*See* SALE OF GOODS.

VII. RELATING TO SALE OF LANDS—*See* SALE OF LANDS.

VIII. TO LEASE—*See* LANDLORD AND TENANT.

IX. SPECIFIC PERFORMANCE OF, ON SALE OF LANDS OR CHATTELS—*See* SPECIFIC PERFORMANCE.

X. WITHIN THE STATUTE OF FRAUDS—*See* CONTRACT—GUARANTIE AND INDEMNITY—LANDLORD AND TENANT—SALE OF GOODS—SALE OF LANDS.

AIR.

It is a plain common law right to have the ee use of the air in its natural unpolluted state, d an acquiescence in its being polluted for any riod short of twenty years will not bar that ght. To bar the right within a stated period, re must be such encouragement or other act the party afterwards complaining as to make fraud in him to object. *Radenhurst* v. *Coate*, hy. 139.

A party had carried on the business of a soap d candle manufacturer for several years with- any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the party complaining. The court, under the circumstances, refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing. *Ib.*

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbor's house any impurity which there are known means of guarding against. *Cartwright* v. *Gray*, 12 Chy. 399.

The defendant erected in the city of Kingston a planing machine and a circular saw driven by steam, and was in the habit of burning the pine shavings and other refuse; he took no means to consume or prevent the smoke, and it being carried to plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke. *Ib.*

ALBION, TOWNSHIP OF.

Tolls can only be collected under 9 Vict., c. 88, s. 33, on the Vaughan branch of the Albion Plank Road when the road is made. *Regina* v. *Haystead*, 7 Q. B. 9.

In this township the lots were originally surveyed in double fronts; but the Adjala road, which forms the northern boundary of the township, cuts lots 30 and 31, in the 7th concession, diagonally, leaving the eastern halves of these lots broken, and not corresponding with the front or western halves; and no posts or monuments were placed to mark the angles of the east halves:—Held, in appeal, that the side or division road between lots 30 and 31 should not run direct from one front to the Adjala road in a direct line, but that the side road should be run from each front to the centre of the lots. Macaulay, C.J.C.P., Esten, V.C., Spragge, V.C., and Richards, J., diss. *McLachlin* v. *Dixon*, 4 C. P. 307; *Ib.* 71.

ALDERMAN.

I. JUSTICE OF THE PEACE—*See* JUSTICES OF THE PEACE.

II. OTHER MATTERS RELATING TO—*See* MUNICIPAL CORPORATIONS.

Held, under the Municipal Act of 1866, as amended by 31 Vict., c. 30, O., that an alderman is not ex officio authorized to act as a justice of the peace until he has taken the oath of qualification as such. *Regina* v. *Boyle*, 4 P. R. 256.—Chamb.—Morrison.

A warrant of commitment under 31 Vict., c. 16, signed by one qualified justice of the peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it

might be a justification to a person acting under it, in an action against him. *Ib.*

Quære, have the aldermen of a city, as ex officio justices of the peace, any jurisdiction beyond the city limits. *Regina ex rel. Blasdell* v. *Rochester*, 7 L. J. 102.

ALIAS WRITS.

See EXECUTION.

ALIEN.

I. RIGHT OF ALIENS AND THEIR DESCENDANTS TO REAL ESTATE, 67.

II. RIGHT TO VOTE, 71.

III. MISCELLANEOUS CASES, 71.

IV. ARREST OF, WHEN DEBT CONTRACTED ABROAD—*See* ARREST.

V. RIGHT OF WIDOWS TO DOWER — *See* DOWER.

VI. ACTION ON FOREIGN JUDGMENT — *See* JUDGMENT.

I. RIGHT OF ALIENS AND THEIR DESCENDANTS TO REAL ESTATE.

By 12 Vict., c. 197, s. 12, aliens are now enabled to hold real estate in this Province as fully and effectually as natural born subjects. *Murray* v. *Heron*, 7 Chy. 177.

An estate legally vested before 12 Vict., c. 197, will not be taken away by it from the possessor, so as to entitle the heir-at-law, though an alien. *Doe* d. *O'Connor* v. *Maloney*, 9 Q. B. 251.

A conveyance to an alien is not void, but he holds for the Crown, and it is not sufficient for a plaintiff in ejectment to prove that defendant claims through an alien, and a title in himself which would have been good but for defendant's title. *Doe* d. *Richardson* v. *Dickson*, 2 O. S. 292.

A person born in the United States before the revolution, and resident there since, is an alien, and cannot maintain ejectment. *Doe* d. *Patterson* v. *Davis*—*Doe* d. *Patterson* v. *Dewitt*, 5 O. S. 494.

The defence of alienage cannot be set up by the grantor against the grantee of the alien, nor against the alien himself. Such a defence must be clearly proved. *Doe* d. *Macdonald* v. *Cleveland*, 6 O. S. 117.—Macaulay, J., diss.

The son of a woman who was a British subject, but who was married to an alien out of the King's allegiance at the time of her son's birth, is not entitled under the Provincial statute 9 Geo. IV. ch. 21, to inherit land which had been granted to his mother in this Province. *Doe* d. *Robinson* v. *Clarke*, 1 Q. B. 37.

Alien friends residing in their proper country cannot, upon a summary application to the court, be deprived, under 5 Geo. II., c. 7, of the right to an execution against the lands of their debtor:—Semble, the alienage should be pleaded in bar of execution. *Wood* v. *Campbell*, 3 Q. B. 269.

Seven years' residence of a parent (a foreigner) in this province—Right of son to inherit—9 Geo. IV., c. 21, 4 & 5 Vict. c. 7, 7 Vict. c. 43. *Doe* d. *Chandler* v. *Tessier*, 6 Q. B. 216.

Held, under the circumstances stated in this case, that John Hay, who was born at Detroit in 1769, being a natural born subject, could not lose his rights by residing in a foreign country, or by holding office there: that he was not affected by the second clause of the treaty of 1794, (commonly called Jay's treaty,) for that relates only to those persons residing within the jurisdiction of the posts referred to in the treaty at the time of their evacuation in 1796: that the plaintiff, his son, as the son of a natural born subject, was within 4 Geo. II., c. 21, which applies as well to Roman Catholics as to Protestants; and that he was therefore entitled to recover. *Doe* d. *Hay* v. *Hunt*, 11 Q. B. 367.

Where a party owning real estate in more counties than one, voluntarily left Upper Canada in 1812, to reside in a foreign country:—Held, that under 54 Geo. III., c. 9, it was not necessary to appoint a commission to enquire into the facts in more than one county; and such commission having been issued, and not traversed within the time allowed by law, and which declared the party, into whose *status* it was issued to enquire, to be an alien under the terms of the statute, all lands in Upper Canada became thereby forfeited:—Held, also, that the ancestor of the plaintiff, through whom he claimed by devise, being, under the circumstances above-mentioned, declared an alien, he was unable to hold land within the Province, and could not therefore devise the same, and that his lands upon office found became vested in the Crown. *Wallace* v. *Adamson*, 10 C. P. 338.

The 54 Geo. III., ch 9, enacts that all persons seised of land in this Province, who had withdrawn into the United States since the 1st of July, 1812, without license, or shall do so during the war, shall be considered aliens born, and incapable of holding land within the Province. The Governor, &c., is to authorize persons in the several districts of the Province to enquire and return by inquisition to the Court of King's Bench the names of such persons seised of land in the respective districts, and after such finding it is enacted that the lands found to have been theirs shall vest in His Majesty: Provided, that nothing therein shall prevent persons interested from traversing the inquisition within one year after the finding, or after peace should be established. By 59 Geo. III., ch. 12, estates thus found are vested in Commissioners; provision is made for publishing the lands returned, and for settlement of all claims thereto; the Commissioners are directed to sell them; and it is enacted that all land on which no claim shall be made pursuant to the act, shall be taken against all persons, and to all intents and purposes, to be vested in the Commissioners. The plaintiff claimed the land in question as devisee of one W., his father, who received a patent for it in 1798, and died in 1823, in the United States having left Niagara, where he had been living in 1813. The defendant claimed through a conveyance from the Commissioners, and put in a commission issued in 1815, under the 54 Geo. III., c. 9, appointing certain persons named Commissioners for the Niagara District, and

giving them power to enquire whether said W. had gone over to the enemy during the war, and if so, then what lands he was seised of. He proved also an inquisition in pursuance of this commission, finding that W. had gone over, and was seised of certain land specified in the town of Niagara, and of the land in question, which was in the Home District. The Commissioners conveyed in 1821 to one C., and the defendant claiming under him went into possession in 1822, the land being then in a state of nature, and had held ever since. The plaintiff had not been in this Province for twenty years before the action:—Held, 1. That by the 59 Geo. III., c. 12, the plaintiff was clearly precluded from contesting the Commissioners' title, and that he therefore could not recover. 2. That the fact of W. being an alien was well found, and extended in its effect to all vacant land of which he was seised, though not within the district to which the commission issued. Whether as an alien the devise made by him was void, was discussed but not decided:—But, Held, that as the statute declared him to be an alien, *and incapable of holding lands within the Province*, he was by it disabled from devising. *Wallace* v. *Hewitt*, 20 Q. B. 87.

[See 24 Vict., c. 44, since passed.]

S., a citizen of the United States, came to this Province and bought the land in question. He died in 1834, leaving four sons, three born aliens, one born in this Province. Two of these three, the other two having died unmarried in 1863, conveyed to the plaintiff, who brought ejectment:—Held, that though an alien may take by conveyance, he cannot pass by descent to an alien heir the land so taken: that as a consequence nothing passed from S. to his two sons; and the plaintiff therefore took nothing by their deed. *Irwin* v. *McBride et al.* 23 Q. B. 570.

A., an alien born in the United States, received a patent for land here in 1826, and in the same year went back to the States, where he died in 1855. Some of his children were born in the States, some here; but they all lived there, and they all brought ejectment:—Quære, whether those who were aliens could recover under C. S. C. c. 8, s. 9:—Semble, that they could, for that clause is not confined to aliens resident here:—Quære, whether, under 9 Geo. IV. c. 21, A., having obtained a patent from the crown, would be entitled to the benefit of that act, without proof that he had taken the oath of allegiance. *Leatherman et al.* v. *Trow*, 15 C. P. 578.

In ejectment both parties claimed through one James Smith. The defendants claimed under Jonathan, his elder brother; the plaintiffs claimed through John, his younger brother, contending that Jonathan, being an alien, could not inherit. James, Jonathan, and John, were all born in the province of New York, before the Treaty of Independence in 1783, James about 1770, Jonathan two years after, their father being a British subject. James and Jonathan came to Canada in 1792, and John in 1794. A copy of a petition to the Administrator of the government of Upper Canada was produced, certified by the Clerk of the Executive Council, purporting to be signed by the three, one being a marksman, stating that they had come into the Province about four years before, and "had taken the usual oaths prescribed," and praying for a location of 200 acres each. The endorsements showed that it was received on the 15th May, 1797, and a grant recommended on the following day. James remained in the province until his death in 1843, having lived on the land in question since 1804. Jonathan, in 1801, received a grant of land in this province, which, among other things, provided that any one coming into possession of the land should within twelve months take the oath of allegiance; but in 1804 he went to live in the State of New York, where he continued till his death in 1846. John remained in the province, and died here in 1842:—Held, 1. That the petition was admissible as evidence, without any proof of the signatures. 2. The court being empowered to draw inferences as a jury, that it might properly be inferred that the three brothers had taken the oath of allegiance before some one properly authorized. 3. That as to James, his remaining in the United States so long after 1783 would show his determination to become an American citizen, in which case, without reference to our statutes, he, as an alien, could not transmit the estate either to John, through whom the plaintiffs claimed, or to Jonathan; but that under 9 Geo. IV., c. 21, having taken the oath of allegiance, his disability was removed. 4. That as to Jonathan, in the absence of anything showing a previous intention to become an American citizen, his coming to this country, taking up land, and taking this oath, showed a clear election on his part to become a British subject, and his return to the United States could not make him the less one. It was held, therefore, that the plaintiff's case failed, Jonathan being entitled to inherit. *Montgomery et al.* v. *Graham et al.*, 21 Q. B. 57.

In ejectment it appeared that the plaintiffs' ancestors were aliens; but:—Held, no bar to the recovery, 12 Viet., c. 197, s. 12, having been passed before the ancestors' death. *Rumrell et al.* v. *Henderson et al.*, 22 C. P. 180.

Ejectment. In 1821, J. S., with his son Samuel, and his daughter H., (who afterwards married M., a British subject) came from the United States, and settled in Canada, all being aliens. On the 20th March, 1821, the Crown granted the land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on the 17th May, 1828, and Samuel about the 6th November, 1842:—Held, that under the Alien Act of 1828, assented to on 10th May, 1828, J. S. was a British subject, for it might be presumed that he took the oath when he got the patent; and if not, having died before 1st January, 1850, the period limited by the Act for taking such oath, he was by sec. 13, empowered to take and hold real estate:—Held, as to Samuel, that not having taken the oath under the Acts of 1828 or 1841, he was an alien:—Held, also, as to Hannah, that having been a resident of the Province on the 1st March, 1828, for seven years, she became a British subject under sec. 2, of the Act of 1828, and also, by intermarriage with a British subject, under 12 Viet. c. 197, s. 10; and as coming within 4 & 5 Viet., c. 7:—Semble, per Wilson, J., that Samuel, if an alien, would have had the same power to devise as he had to convey by deed:—Semble, also, per Wilson, J., that the alienage of J. S. could not have been objected to in his

lifetime, except by the Crown, so as to affect his title, and not by the Crown unless deceived as to his status :—Quære, whether 12 Vict. c. 197, s. 12, has any relation to titles previously acquired. *Iler* v. *Elliott*, 32 Q. B. 434.

A deed of land in trust for an alien, (executed before 12 Vict., c. 197,) and mortgages subsequently created by the alien :—Held, good in Chancery. *Murray* v. *Heron*, 7 Chy. 177.

II. Right to Vote.

A person born in New York in 1830, whose father, a British subject, had emigrated from Ireland a short time previous, and who a year or two after his birth came to this province when he was only about two years old, and had ever since lived here, is himself a British subject within the meaning of section 75 of the Municipal Act, C. S. U. C. c. 54. *Regina ex rel McVean* v. *Graham*, 7 L. J. 125.—Robinson.

Where alienage is taken as an objection in proceedings on a contested municipal election, it must be shewn particularly how the parties complained of are aliens ; a general affidavit of the fact is insufficient. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—Chamb.—Robinson.

An alien cannot be a relator in a quo warranto proceeding under the Municipal Act. *Regina ex rel. Coleman* v. *O'Hara—Regina ex rel. Padwell* v. *Stewart*, 2 P. R. 18, 21.—Chamb.—Burns.

Where the voter was born in the United States, both his parents being British born subjects, his father and grandfather being U. E. Loyalists, and the voter had resided nearly all his life in Canada :—Held, entitled to vote at an election for the Legislative Assembly of Ontario. *Stormont Election, Place's Vote*, 7 L. J. N. S. 213. —Richards.

III. Miscellaneous Cases.

On an application to prevent certificates of naturalization being issued by the Court of General Sessions of the Peace, to C. W., J. F., and B. K., under 31 Vict. c. 66, D., the grounds of opposition were, 1. That the time of residence was not stated in the affidavit of residence ; 2. That the certificate of the justices of the peace, read on the first day of the court, did not shew that the requisite oaths of allegiance had been taken by the applicants. 3. That initial letters only were used in the heading of the affidavits, and not the full names of the applicants. These objections were overruled. *In re Webster et al.*, 7 L. J. N. S. 39.—G. S.—Ardagh, Co. J.

Held, in interpleader, that the claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim. *Buffalo and Lake Huron R. W. Co.*, v. *Hemmingway*, 22 Q. B. 562.

The prisoner was convicted upon an indictment under C. S. U. C. c. 98, containing three counts, each charging him as a citizen of the United States. He was charged with levying war, and being in arms against Her Majesty. The crown rested on the prisoner's statement, that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States, but :—Held, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence. *Regina* v. *McMahon*, 26 Q. B. 195.

In this case, the charge being the same as the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf who proved that he was born within the Queen's allegiance :—Held, that the crown might waive the right of allegiance and try him as an American citizen, which he claimed to be. The fact of the invaders coming from the United States would be prima facie evidence of their being citizens or subjects thereof. *Regina* v. *Lynch*, 26 Q. B. 208.

The prisoner being indicted under C. S. U. C., c. 98, and charged as a citizen of the United States, was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit :—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner being insufficient as against a subject ; and the prisoner, therefore, was not in legal peril on the first indictment. *Regina* v. *Magrath*, 26 Q. B. 385.

Quære, is a foreigner liable to the insolvent laws, being neither resident nor domiciled in Canada. *Mellon* v. *Nicholls*, 27 Q. B. 167.

The right at common law of an alien friend in respect to trade marks stands on the same ground as that of a subject. *Davis* v. *Kennedy*, 13 Chy. 523.

A foreign administrator cannot effectually release a mortgage on land in this province. Payment to him and a release by the heirs are not sufficient to entitle the owner to a certificate of title free from encumbrances under the Act for quieting titles. *In re Thorpe*, 15 Chy. 76.

Where a person resident in a foreign country dies possessed of mortgages on land situate in the province, the Surrogate Court of the county within which the land lies has jurisdiction to grant administration where the Surrogate Court of no other county has jurisdiction. *Ib.*

ALIMONY.

See Husband and Wife.

ALLEGIANCE.

See Alien.

ALLUVION.

See Water and Water Courses.

ALTERATION.

I. Of Affidavits—*See* Affidavit.

II. Of Award—*See* Arbitration and Award.

III. Of Bills and Notes—*See* Bills of Exchange and Promissory Notes.

IV. Of Deeds—*See* Deed.

V. Of Poll Books—*See* Municipal Corporations.

VI. Of Record—*See* Trial.

VII. Of Will—*See* Will.

AMENDMENT AT LAW.

I. Of Writs and Returns.
1. *Capias*, 74.
2. *Capias ad Respondendum*, 74.
3. *Capias ad Satisfaciendum*, 74.
4. *Writs of Summons*, 75.
5. *Executions*, 75.
6. *Returns to Writs of Execution — See* Sheriff.

II. Adding or Striking out Parties.
1. *Plaintiffs*, 76.
2. *Defendants*, 77.

III. Of Pleadings.
1. *Generally*, 78.
2. *Variance between Evidence and Allegations.*
(a) *In Names*, 79.
(b) *In Statement of Bills and Notes*, 80.
(c) *In Statement of Contracts*, 80.
(d) *In Statement of Bonds*, 82.
(e) *In Records and Judgments*, 82.
(f) *Other Cases*, 83.
(g) *In Actions of Defamation — See* Defamation.
3. *Adding Counts and Pleas*, 84.
4. *After Judgment on Demurrer*, 87.
5. *Other Cases*, 89.
6. *Changing Venue — See* Pleading at Law.
7. *Demurrers—See* Pleading at Law.
8. *Leave to amend on granting New Trial —See* New Trial.

IV. Issue Books, 90.

V. Nisi Prius Records, 90.
1. *In Ejectment—See* Ejectment.

VI. Judgments and Judgment Rolls, 91.

VII. Verdict and Postea, 93.

VIII. Incidental Proceedings.
1. *Affidavits*, 94.
2. *Rules, Orders, and Summonses*, 94.
3. *Other Matters*, 94.
4. *Reference and Awards—See* Arbitration and Award.

IX. Practice.
1. *Terms on allowing amendment*, 95.
2. *Other Cases*, 96.

X. Miscellaneous Cases, 97.

XI. Particular Actions.
1. *Ejectment—See* Ejectment.

XII. See also the Several Titles.

[*See the Administration of Justice Act of 1873, s. 50, and C. L. P. Act, s. 222, which now give almost unlimited power of amendment in all cases.*]

I. Writs and Returns.

1. *Capias.*

A variance between a writ and copy in the names of the plaintiffs was corrected by amending the former so as to conform to the latter. *Damer* v. *Busby—Black* v. *Wigle*, 5 P. R. 356.—Chamb.—Gwynne.

Held, 1. That a copy of a capias after action should, like the original writ, shew the nature of the cause of action. 2. That in the note at the foot of the writ, the word "calendar" should precede the word "months," and the words, "including the day of such date," should follow the words, "from the date hereof." 3. That such defects both in the writ and copy served, when produced by defendant, may be amended on payment of costs. *Hubbard* v. *Milne*, 1 L. J. N. S. 14.—C. L. Chamb.—J. Wilson.

2. *Capias ad Respondendum.*

Amendment allowed in the address, cause of action, and teste of ca. re. *Myers* v. *Rathburn*, Tay. 127.

Refused in a bailable ca. re. *Campbell* v. *Hepburn*. Dra. 3.

On application to set aside an arrest, the plaintiff was allowed, on payment of costs, to amend the date of teste in copy served. *Wilson* v. *Storey*, 2 P. R. 304; 3 L. J. 50.—Chamb.—Hagarty.

3. *Capias ad Satisfaciendum.*

Where the endorsement directed the sheriff to take bail for too large a sum, the court allowed it to be amended on payment of costs. *Grantham* v. *Peters*, E. T. 3 Vict.

Refused where one defendant's Christian name was wrong. *Allison* v. *Wagstaff*, M. T. 7 Vict.

A ca. sa. omitting to state any sum for which judgment has been recovered is void, and cannot be amended after execution. *Billings* v. *Rapelje*, 2 P. R. 194.—P. C.—Jones. *Ib.* 200.—P. C.—McLean; *Henderson* v. *Perry*, 3 Q. B. 252.

Where defendant was arrested on a writ issued and tested on 3rd January, 1852, and directed to the sheriff of the united counties of Wentworth and Halton, there being no such officer since 1st January:—Held, that though the writ might be amended the copy could not. *Lyman* v. *Brethorn*, 2 C. L. Chamb. 108.—Draper.

Where a ca. sa. in debt has been issued on a judgment in assumpsit, and not endorsed as required by the rule of court, it may be amended. *Keefer* v. *Hawley*, 1 P. R. 1.

Held, under the facts of this case, that the plaintiffs had violated the spirit of the law in charging defendant in execution on a ca. sa. whilst endeavouring to enforce a remedy against his lands through an execution issued since the ca. sa., and since a fi. fa. goods returned nulla bona. An application to amend the ca. sa. was therefore refused: Semble, the irregularities might on terms have been amended under ordinary circumstances. *Curry* v. *Turner*, 8 L. J. 296.

A ca. sa. tested in the name of a retired Chief Justice is an irregularity only, and may be amended. *Nelson* v. *Roy*, 3 P. R. 226.

4. *Writs of Summons.*

A writ of summons was issued in the common form, for a defendant residing within the jurisdiction, and personally served in a foreign country on the defendant, a British subject. On an application to set aside the writ, it appearing that the time allowed for appearance was a reasonable time, an amendment was allowed without costs, by the substitution of the form of a summons for a defendant without the jurisdiction, in lieu of the form used. *Gray* v. *O'Neil*, 7 L. J. 183.—C. L. Chamb.—Robinson.

Where a plaintiff obtains an order to amend his writ of summons, the defendant is entitled to notice of the amendment having been made, and probably to a copy of the amended proceedings, before he can be required to appear; and the plaintiff is not bound to amend, but may abandon his order. *Campbell* v. *Pettit*, 2 L. J. N. S. 211.—C. L. Chamb.—A. Wilson.

A writ of summons may, after its issue, and before service, be amended on præcipe by substituting a new plaintiff, without an order, and on such amendment there is no necessity for rescaling, nor need it appear on the copy served that any amendment has been made. *Worthington* v. *Boulton*, 6 P. R. 68.—C. L. Chamb.—Dalton, *C. C. & P.*, Morrison.

5. *Executions.*

A fi. fa. may be amended so as to relate to the day of entering the judgment. *Andrews* v. *Page*, Tay. 348.

Original fi. fa. amended by making it a testatum, and new original allowed to be sued out. *Fisher* v. *Brooks*, 3 O. S. 143.

Fi. fa. lands amended after sale under it. *Fleming* v. *Executors of Wilkinson*, T. T. 1 & 2 Vict.

To support a sale of lands under a fi. fa., the writ must correspond with the judgment; but the amendment thereof, even after sale, will cure the defect. *Helm* v. *Crossin*, 17 C. P. 156.

On a judgment in assumpsit a fi. fa. was issued in debt and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given a deed, under which the plaintiff claimed. It was objected that the sale was void, having been made under an erroneous writ, but:—Held, the objection could not be entertained. *Doe d. Elmsley* v. *McKenzie*, 9 Q. B. 559.

A fi. fa. directed to no one is void, and cannot be amended. *Wood* v. *Campbell*, 3 Q. B. 269.

An execution against the goods of a deputy sheriff may be directed to the sheriff of the county in which the deputy resides, and ought not to be directed to a coroner of that county. In such a case plaintiff was allowed to withdraw his writ of execution, and amend by directing it to the sheriff and not to the coroner. *Gordon* v. *Bonter*, 6 L. J. 112.—C. L. Chamb.—McLean.

The statement in a fi. fa. lands of the true amount of debt and costs was amended on plaintiffs' application on payment of costs, and a similar amendment was allowed in a ven. ex. lands and fi. fa. residue. *Watts* v. *Little*—*Watts* v. *Loney* 6 L. J. 233.—C. L. Chamb.—Robinson.

Fi. fa. amended, together with judgment roll, by making it to levy of defendant's goods instead of testator's. *Purdie* v. *Watson*, 3 P. R. 23.—C. P.

One of the defendants, *Edmund* M., correctly styled in the summons, was by mistake named in the judgment roll and execution as *Edward* M.: Held, amendable. *McKenzie* v. *Vaughton*, 3 P. R. 35.—Chamb.—Robinson.

Amendment of an alias fi. fa. lands issued without authority, refused, it appearing that before argument the original writ had been returned and filed, and that nothing had been made thereunder, nor any levy made. *Smith* v. *Smith*, 4 P. R. 354.—Chamb.—Gwynne.

The ven. ex. recited a seizure of goods under a fi. fa. lands, and commanded the sheriff to sell lands:—Held, clearly amendable. *Chambers* v. *Dollar*, 29 Q. B. 599.

See, also, Nicholls v. Nicholls, 3 P. R. 201, p. 93.

II. Adding or striking out Parties.

1. *Plaintiffs.*

Where in assumpsit the wife of the plaintiff was improperly joined:—Held, (before the C. L. P. Act,) that the judge at the trial could not strike out her name. *Rischmuller* v. *Uberhaus*, 10 Q. B. 612.

Held, that the C. L. P. Act, 1856, does not authorize the striking out all the plaintiffs' names in a summons in ejectment, and substituting a new set therefor, after the entry of the record for trial. *Robinson* v. *Bell*—*Vasbinder* v. *Bell*, 9 C. P. 21.

Plaintiff caused defendant to be arrested for the alleged seduction of his step-daughter, alleging at the time of the alleged seduction not being in his service. Afterwards he applied to amend his declaration by joining his wife, striking out the allegation that the girl seduced was the daughter of the plaintiff, and substituting the statement that she was the daughter of the wife. The application was refused. *Lawson* v. *McDermott*, 9 L. J. 45.—C. L. Chamb.—Draper.

Of writ of summon, by substituting new plaintiff. *Worthington* v. *Boulton*, 6 P. R. 68.—C. L. Chamb.—Dalton, *C. C. & P.*, Morrison.

Two of the plaintiffs contracted under seal to do certain work, which was done by the third but not according to the agreement. The third having sued were nonsuited on production of the

contract. The nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused. *Bricker et al.* v. *Ancell*, 23 Q. B. 481.

Held, on the authority of Blake *v.* Done, 7 H. & N. 465, that a judge at nisi prius has power under sec. 222 C. L. P. Act, to amend by adding parties, where such amendment is necessary for the purpose of determining the real question in controversy :—Held, also, that the guardian of an infant, appointed under C. S. U. C. 74, can under s. 5 consent to the name of the infant being so added as plaintiff in an action of ejectment which seems to be for the latter's benefit. *Ogilvie* v. *McRory*, 15 C. P. 557.

Name of person improperly made a plaintiff by a solicitor struck out, and solicitor ordered to pay the costs. *Miller* v. *Hill*, 4 L. J. N. S. 78.

F. was added as a plaintiff at the trial in ejectment, defendant objecting that this could not be done in F.'s absence, and without his consent in writing, but F. was afterwards examined as a witness and no questions asked as to his consent :—Held, that the objection could not be entertained in term. *Henderson et al.* v. *White*, 23 C. P. 78.

Where the plaintiffs sued in their individual names, describing themselves as trustees of the Methodist Wesleyan Church, Brussels, an amendment was allowed at the trial by striking out the names, and allowing them to sue as a corporation, incorporated under C. S. U. C., c. 69 : Held, that the amendment was authorized. *The Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P., not yet reported.

2. *Defendants.*

Where the plaintiff had declared against several defendants, and only one had been served, the others were allowed to be struck out of the declaration. *Zavitz* v. *Hoover*, M. T. 1 Vict.

The plaintiff obtained a verdict against two defendants as partners, which was set aside because partnership was not proved. The plaintiff then applied to strike out the name of one of the defendants :—Held, that the amendment might be made, with costs to the defendant struck out, as upon a nolle prosequi :—Held, also, that the defendant might plead de novo, without swearing to his defence, within two days after the amendment and payment of costs. *Dowding* v. *Eastwood et al.*, 1 C. L. Chamb. 63.—Macaulay.

An action on contract having been referred at nisi prius, and the arbitrator having found that defendants were not co-partners, the court refused to strike out the name of one defendant. *Pulloch* v. *Wells et al.*, 8 C. P. 394.

The statute, C. L. P. Act, 1856, was intended to meet the case of a defendant erroneously joined, not a case where he has been joined intentionally, to try and fix him with liability. *Ib.*

In assumpsit against joint contractors it is still necessary to prove a joint contract by all the defendants. *Bochus* v. *Shaw et al.*, 8 C. P. 391.

The plaintiffs sued defendants H., M., & S., as joint makers of a note. H. and M. did not appear, and judgment was signed by mistake against all, but set aside as against S., who pleaded :—Held, that an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused. *Kerr et al.* v. *Hereford et al.*, 17 Q. B. 158.

Two defendants sued on the common counts joined in a plea of never indebted. After the record had been entered for trial, their attorney told the attorney for the plaintiff that the defendants were not jointly liable, but that one was, and the plaintiff's attorney thereupon entered a nolle prosequi on the record as to one, but omitted to file it. He then took a verdict against the other, upon a written agreement, signed by the attorney after such entry, to admit his liability in a sum named. After the verdict this defendant was arrested, and he then moved to set aside the proceedings :—Held, that the plaintiff, instead of entering a nolle prosequi, should have moved to strike out the defendant's name, but under the circumstances this was allowed to be done after the verdict, and the rule was discharged without costs. *Barnard et al.* v. *McPherson*, 2 P. R. 313.—Q. B.

In an action on an acceptance by a firm, one defendant, who it appeared was not a partner, was struck out at the trial, and the amendment was held to have been proper. *Cowan* v. *McIntyre et al.*, 19 Q. B. 607.

To an action brought on an indenture of apprenticeship, purporting to have been made by two defendants, an amendment by striking out the name of one defendant who had not signed was refused, on the ground that the other would not then have been liable, as it was intended that both should execute :—Held, that he would have been liable, notwithstanding such intention, and that the reason for the refusal was therefore insufficient. *Judge* v. *Thomson et al.*, 29 Q. B. 523.

At the trial, on objection by defendant's counsel, that one defendant had been improperly joined, the judge, on plaintiff's application, struck his name out of the record ; and upon defendant's counsel claiming the right to plead in abatement the non-joinder of another party, the name of such party was with his consent added to the record as a defendant :—Held, that the first amendment had been properly made, but not the second. *McKee* v. *Jali et al.*, 20 C. P. 516.

Under C. L. P. Act., s. 68, the name of a defendant improperly joined in an action on contract may be struck out at the trial without his consent, and even against his objection. *Lake Superior Navigation Co.* v. *Beatty et al.*, 34 Q. B. 201. See *Burritt* v. *Hamilton et al.*, 17 Q. B. 443.

III. Of Pleadings.

1. *Generally.*

The court will not allow an amendment the effect of which would be contrary to the justice of the cause. *Corby* v. *Cotton*, 3 L. J. 50.—C. L. Chamb.—Robinson. See also *McKenzie* v. *Van Sickles*, 17 Q. B. 226.

An amendment should not be allowed, where the effect of it is to make the pleading demur-

rable. *Bank of Upper Canada* v. *Ruttan*, 22 Q. B. 451.

Under the C. L. P. Act, s. 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a judge to determine is, whether they are so necessary. *Bank of Montreal* v. *Reynolds*, 24 Q. B. 381.

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1. *Variance between Evidence and Allegations.*

(a) *Names.*

Plaintiff sued as executrix on a bond made to her in her own right :—Held, that she could not recover, and nonsuit entered. *Haw* v. *Montgomery*, T. T. 3 & 4 Vict.

The plaintiff, having sued as administratrix, was allowed at the trial to amend by claiming in her own name, and the court held the amendment properly granted. *Chamberlain* v. *Smith*, 21 Q. B. 103.

The several members of a firm being sued as indorsers of a note, one by mistake was called *Charles* Jones, his Christian name being *William* :—Held, that the variance could occasion no difficulty on the trial, the only question being as to the identity of the party; and that defendants, if they desired to object, should have moved under 7 Will. IV., c. 3, to compel plaintiff to amend his declaration. *Ketchum* v. *Jones*, 5 Q. B. 460.

Where defendant set up a deed as made between A. B. of the one part, and the Bank of B. N. A. of the other, and when produced at the trial it turned out to be a deed made between A. B. and Thomas Paton, who was afterwards stated in the body of the instrument to be inspector of the bank :—Held, a fatal variance, and not amendable. *Bank of British North America* v. *Sherwood*, 6 Q. B. 552.

To an action on the common counts defendant pleaded a prior suit between the same parties for the same cause, and prayed an inspection of the record, and it appeared that the plaintiff's name in the former suit was *James W.* Whyte, and in the second, *James M.* Whyte :—Held, a fatal variance. *Whyte* v. *Cameron*, 7 Q. B. 378.

Quære, how far the declarations in the two suits varying as to the number and nature of the common counts and the amount claimed, would be fatal. *Ib.*

The plaintiffs, by the name of the "Council of the District of Brock," declared on a bond, which when produced at the trial, was found to be given to "the Municipal Council of the Brock District." The bond was not set out on oyer :—Held, variance not fatal. *Brock District Council* v. *Bowen*, 7 Q. B. 471.

So where a bond was sued upon in the name of the "Trent and Frankford Road Company," and upon being produced was in the name of the "President and Directors of the Trent and Frankford Road Company." *Trent and Frankford Road Company* v. *Marshall*, 10 C. P. 329.

Where defendant appears in a different name from that in which he is sued in the writ, and the plaintiff declares against defendant by the name in the writ, defendant cannot set aside the declaration; he can only compel the plaintiff to amend the misnomer in the declaration, under the new rules. *Gore Bank* v. *Case*, 1 C. L. Chamb. 185.—Macaulay.

The warrant to levy was stated in the notice of action to have been directed to *William* Thompson, when it really was directed to *William H.* Thompson :—Held, not fatal. *Higson* v. *Ward*, 8 Q. B. 502.

(b) *In Statement of Bills and Notes.*

Where on an assessment of damages on a note stated in the declaration to be for £40, a note for £42 was proved, an amendment was refused, but a verdict allowed for the note as set out. *Bank of Upper Canada* v. *Crawford*, 4 O. S. 301.

Where a foreign bill had been so declared upon as not to shew it to have been a foreign bill :—Held, not a variance upon which a nonsuit could be granted. *Boyes* v. *Joseph*, 7 Q. B. 505.

Plaintiff declared against defendant as maker of a note, and produced at the trial a bill of exchange drawn by defendant, and endorsed to plaintiff :—Held, not amendable under 7 Will. IV., c. 3. *Vizard* v. *Gilchrist*, 13 Q. B. 605.

To an action on a note against two defendants, usury was set up, the plea being that plaintiff lent defendants £200, payable in a year, and that the note (for £250) was given therefor. The evidence shewed that the loan was to one defendant only, and that the other signed the note merely as his surety, and was no party to the usurious contract :—Held, a fatal variance. *Farley* v. *Gilbert et al.*, 14 Q. B. 147.

After motion to arrest judgment on a note, which as declared on was not negotiable, there having been no defence at the trial, the plaintiff was allowed to amend on payment of costs. *Martin* v. *Wilber*, 9 C. P. 75.

Declaration on a note payable to G. or order. Plea, non fecit. The note when produced was payable to G. or order, "for the use of M."—Held, no variance, for it was declared on according to its legal effect. *Munro* v. *Cox*, 30 Q. B. 363.

(c) *In Statement of Contracts.*

Where in replevin the landlord avowed for two and a-quarter years' rent, but proved a tenancy for only one year, although the tenant continued in possession for three years, having, however, paid no rent, nor made any acknowledgment during the last two years :—Held, a fatal variance on the plea of non-tenuit. *Thompson* v. *Forsyth*, E. T. 2 Vict.

After refusal at nisi prius, allowed in banc. *Lawrence* v. *Tindall*, M. T. 5 Vict.

Debt on an annuity deed. Pleas of usury amended as to the sum and dates. *Wright* v. *Marralls*, 8 Q. B. 511.

In a qui tam action for usury, any variance between the statement of the time of forbearance laid in the declaration and the true period is fatal. *Fraser* q. t. v. *Thompson*, 1 Q. B. 314.

In a penal action for usury, after verdict for plaintiff and new trial granted for a variance

between the statement of the loan and forbearance as laid and that proved, the court refused to amend the declaration by making it correspond with the evidence. *Frazer* q. t. v. *Thompson*, 1 Q. B. 522.

In an action on notes, the defence set up being usury:—Held, that variances in the amount stated as intended to be loaned, and in the sum stated as the excess beyond legal interest, were material. The learned judge at the trial refused to amend in these respects, desiring the opinion of the court:—Held, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P. Act, s. 222, to allow it. The amendment was therefore ordered, and a new trial granted. *Bank of Montreal* v. *Reynolds*, 24 Q. B. 381.

Variance between a recognizance of bail, entered into in a foreign country, as stated in the declaration, and proved:—Held, fatal. *Short* v. *Kingsmill*, 7 Q. B. 350.

The plaintiff charged defendant on a guarantee for certain rent; to wit, £2 per month. The evidence shewed an agreement to pay only £1:—Held, a fatal variance, notwithstanding the amount was laid under a videlicet. *O'Neill* v. *Carter*, 9 Q. B. 470.

The declaration stated an agreement to pay to three persons, and the agreement was to pay half to one and half to the two others:—Semble, per Draper, J., no variance. *Bens* v. *Stover*, 12 Q. B. 623.

The plaintiffs declared as upon a guarantee to pay for goods furnished to D. between the 26th October, 1848, and 1st April, 1852. The evidence shewed one guarantee to the 1st April, 1850, and attached to it an agreement that the same should continue until the 1st April, 1852:—Held, no variance. *Ross et al.* v. *Cameron*, 4 C. P. 196.

Of declaration in covenant, by allowing plaintiff to claim as assignee of the reversion, instead of proving a covenant with plaintiff, refused. *Brennan* v. *Whitley*, 15 Q. B. 277.

The plaintiff was allowed to amend his declaration on an insurance policy, so as to shew that the policy was to be subject to such conditions only as were contained in the printed applications for insurance, on which it was granted, though the court intimated that such amendment would be of no avail. *Jacobs* v. *The Equitable Insurance Co.*, 18 Q. B. 14.

Plaintiff sued on an agreement, and at the trial his witnesses failed to prove a part of it, which was struck out of the declaration. The plaintiff was then called for the defence, and stated the agreement as at first set out. His counsel did not amend again, and the jury found for the plaintiff, adding that they believed the part struck out to be in the contract. The court in term allowed the declaration to be restored to its original form, and refused a new trial. *Petrie* v. *Tannahill*, 22 Q. B. 608.

In an action by a tenant against his landlord for a wrongful distress and sale of his goods, the gist of the action is the wrong complained of, and therefore a variance between the contract set out in the declaration and that proved is immaterial. *Robinson* v. *Shields*, 15 C. P. 386.

Declaration on special agreement, amended by averring excuse from performance, instead of performance, of contract. *Clarke* v. *McKay*, 32 Q. B. 583.

(d) *In Statement of Bonds.*

Where the plaintiff declared upon a penal bill, and proved a bond with a condition:—Held, not a sufficient variance to set aside the verdict. *De Riviere* v. *Grant*, Tay. 473.

The plaintiffs, who had taken from defendants a bond for the due performance of a collector's duty, with a condition in it prescribed by certain municipal by-laws, declared upon it as upon a common money bond, without setting out the condition; the defendant pleaded non est factum:—Held, not a fatal variance. It would have been better, however, for the plaintiffs to have set out the condition in their declaration, and assigned breaches. *Brock District Council* v. *Bowen*, 7 Q. B. 471.

The plaintiffs sued defendants H. & D. as having jointly executed a bond to secure payment of rent by H., which being set out in the plea it appeared that T. was also named in it as obligor, but had not executed. It appeared that at the execution of the bond T. was not present, and defendant D. told the plaintiff that he could not conveniently attend, but would sign it at any time. T., however, afterwards, on being applied to by the plaintiffs, refused to execute, and no objection had been made by D., although aware of the refusal:—Held, that the non-execution by T. was no defence under a plea of non est factum by H., as shewing a variance between the bond declared on and that set out. *Sidney Road Company* v. *Holmes et al.*, 16 Q. B. 268. But see *Corporation of Huron* v. *Armstrong*, 27 Q. B. 533.

The bond produced acknowledged defendants to be indebted to the holder thereof, and promised to pay the same to such holder at the agency of the Bank of Montreal at Ottawa, on, &c., on the surrender of this bond, with interest, &c., payable, &c., upon presentation of the several warrants or coupons hereunto annexed, at said agency:—Held, that there was no variance between the bonds declared on and those produced, in the former being stated to be payable to holders generally, while the latter were payable only on surrender, and at a particular place. *Fellowes* v. *Ottawa Gas Company*, 19 C. P. 174.

(e) *In Records and Judgments.*

In an action for malicious prosecution, the declaration stated a trial before the Hon. L. P. Sherwood, and A. Macdonell, assigned by His Majesty's letters patent to them and others named therein directed, and the record put in evidence was of a trial before the Hon. L. P. Sherwood and others his fellow justices, assigned by letters patent directed to him and others, and any two of them, of whom he was to be one:—Held, no variance. *Prentice* v. *Hamilton*, 2 O. S. 114.

In trespass for mesne profits brought by husband and wife, alleging a *joint* recovery, the recovery in ejectment was proved to have been the demise of the wife alone:—Held, a fatal variance. *Ashton et ux.* v. *Keesar*, 5 O. S. 325.

On a trial by record, a variance between the pleading on which the issue was raised and the record produced was amended, although a trial had been had on other issues. *Lawrence* v. *Harday*, T. T. 3 & 4 Vict.

Defendant pleaded a set-off of a judgment recovered in debt on bond for £223 15s. 3d., being £200 debt, 1s. damages, and £23 14. 3., costs. The plaintiff replied nul tiel record, and the judgment appeared to be for the recovery of the debt, damages, and costs, and also £55 15s. for damages assessed on account of breaches of the bond:—Held, no variance. *Bowerman* v. *Brown*, 2 Q. B. 409.

In trespass for mesne profits, the variances set out in the case, between the judgment in ejectment pleaded and the one produced, were held fatal. *Garrion* v. *Woodruff*, 8 Q. B. 328.

The declaration set out a writ of ven. ex., reciting that the sheriff had been commanded to make of lands, &c.; his return, that he had taken lands which remained unsold, &c., and commanding that he should sell the said lands, &c. Plea, nul tiel record. The exemplification produced correctly set out the writ, reciting the sheriff's return, that he had taken goods, which said goods remained unsold, and commanding him to sell the lands:—Held, not amendable, the error being in a material part of the writ itself, not in the declaration. *Brown* v. *Carroll*, 9 Q. B. 314.

In debt upon a recognizance of bail against defendants as bail of C., the declaration alleged that the defendants entered into a recognizance, and thereby became bail for said C. to the limits of, &c. Plea, nul tiel record. On the recognizance roll being produced it appeared that the debtor C. had also joined in the recognizance with defendants, which was objected to as a variance:—Held, that the objection, if any, should have been taken by plea in abatement. *McFarlane* v. *Allen*, 6 C. P. 143.

(f) *Other Cases.*

In an action on an award, the submission, as declared on, mentioned three defendants, and the award in reciting the submission only noticed two, but referred to the rule by which the submission was made as annexed to the award, in which rule the three were named:—Held, that the variance between the submission declared on and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale* v. *Mathieson*, Dra. 63.

In trespass for taking goods, defendant justified as sheriff's bailiff, under a warrant to make of defendant's goods a sum recovered for costs in case, and the warrant produced was for damages and costs in assumpsit:—Held, a fatal variance. *Boyle* v. *Garner* T. T. 3 & 4 Vict.

Alias ca. re. averred in the declaration and a ca. re produced at the trial:—Held, an immaterial variance. *Wood* v. *Sherwood*, 4 O. S. 128.

In trespass qu. cl. fr. the description of the locus in quo in the declaration may be amended at nisi prius; but a description of a house as being on the corner of a lot:—Held, not supported by shewing that it was near the corner, but that there were two or three other houses between it and the corner. *Stanton* v. *Windeat*, 1 Q. B. 30.

Where the declaration is in debt, and the process in case, the declaration will be set aside. *Ketchum* v. *Rapelje*, 1 C. L. Chamb. 152.—Robinson.

Where there have been two leases between plaintiff and defendant in replevin, and defendant avows under the wrong one, the court will allow him to amend at the trial, if it cannot be shewn to prejudice the plaintiff. *Edwards* v. *Holmes*, 4 Q. B. 94.

An alias test. ca. sa. is still a ca. sa.; and therefore, when defendant justified under the alias, and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a ca. sa.:—Held, no variance. *Robertson* v. *Meyers*, 7 Q. B. 423.

The warrant directed T. to levy £1 11s. 6d., together with the charges of distress and sale. The notice of action described the warrant as one directing T. to levy a certain large sum of money, to wit, £1:—Held, no variance. *Higson* v. *Ward*, 8 Q. B. 502.

Variance between indictment and proof, in description of land. *Regina* v. *Baby*, 12 Q. B. 346.

The plaintiff at the trial claimed as owner of goods insured, and the judge ruling against him, he applied and was allowed to prove his interest as mortgagee:—Held, that it was in the discretion of the judge to permit this, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd* v. *Equitable Fire Insurance Co.*, 8 C. P. 415.

In an action on a policy defendants pleaded a communication opened between the building where the goods insured were and the building adjoining, without notice to them, contrary to one of the conditions of the policy. At the trial it appeared that they had misdescribed the alteration on which they intended to rely, but it was also shewn that such alteration had not in any way caused or contributed to the fire:—Held, that under these circumstances an amendment of the plea was properly refused. *McKenzie* v. *Vansickles et al.*, 17 Q. B. 226. But see *Bank of Montreal* v. *Reynolds*, 24 Q. B. 381.

The declaration charged the diversion of the water complained of to be the direct act of the defendant, whereas it was caused by a freshet forcing a new channel through a ditch wrongfully cut by him:—Held, that an amendment, if necessary, would have been allowed. *McLean* v. *Crosson*, 33 Q. B. 448.

3. *Adding Counts and Pleas.*

Adding Counts.]—The plaintiff recovered a verdict at nisi prius, which was set aside in term. He then moved to amend his declaration by adding two new counts; and leave was granted on payment of the costs of the former pleading and of the application. *Kingsmill* v. *Brown*, 1 O. S. 591.

In trespass qu. cl. fr., after judgment against the plaintiff on demurrer to his replication, the court refused leave to add a count for assault. *Henderson* v. *Harper*, 1 Q. B. 528.

A new count was added to meet defendant's set-off, defendant having leave to plead de novo. *House* v. *Inty*, 1 C. L. Chamb. 96.—Macaulay.

Under 8 Vict., c. 13, a County Court judge, in a case sent down by writ of trial, allowed plaintiff to add a count excusing the nonpayment of a note to the maker, the declaration having averred its presentment:—Held, unauthorized. *Brown* v. *Boulton*, 8 Q. B. 385.

In an action for money had and received a count for negligence was added at the trial:—Held, amendment improper, not being necessary to determine the real question in controversy in the suit, but the substitution of a new cause of action. *Hammond* v. *Heward*, 20 Q. B. 36.

Held, under the circumstances stated in this case, that in an action for seizing two horses, the judge was justified in allowing a waggon and set of harness to be inserted also in the declaration at the trial, defendant's counsel objecting, but admitting that he was not taken by surprise. *Sage* v. *Callaghan*, 20 Q. B. 266.

P. conveyed land to defendant, "subject to a mortgage," and with a covenant for quiet enjoyment free from incumbrances. Defendant then demised the land to P. and wife for their respective lives, and P. assigned to plaintiff all his interest therein, to hold during the life of P. The mortgagees, or their assignee, brought ejectment against both plaintiff and P., when the plaintiff paid the amount due under the mortgage, and sued defendant for money paid to his use:—Held, that he could not recover in this form of action; and the court refused to allow plaintiff to amend, by adding a count as assignee of the covenant to pay the mortgage contained in the deed from P. to defendant. *Snyder* v. *Snyder*, 22 C. P. 361.

Adding Pleas.]—The court will not allow an amendment by adding a plea, when the effect would be contrary to the justice of the cause. *Corby* v. *Cotton*, 3 L. J. 50.—C. L. Chamb.—Robinson.

The court refused to relieve a sheriff's surety, who had suffered judgment to go by default, after damages had been assessed against him, by allowing him to plead that he had already paid the amount of his covenant under the statute. *Scott* v. *McDonald*, 6 O. S. 238.

Where in an action against an executor on the bond of his testator, non est factum only was pleaded, and the plaintiff had a verdict, the court refused to grant a new trial and allow a plea of plene administravit, on the affidavit of the executor that he had administered all the assets before action there being no satisfactory answer given why the plea had not been pleaded before. *McDonald* v. *DeTuyle*, 6 O. S. 335.

Application to add a plea of usury refused, after several applications to add other pleas had been already refused. *Peel* v. *Kingsmill*, 1 C. L. Chamb.. 225.—Burns.

Defendant agreed to purchase from plaintiff 5000 barrels of flour, to be delivered at a good port on Lake Ontario *in all June next*, by giving the buyer one week's notice at Toronto. Plaintiff sued for non-acceptance, averring an offer to deliver the flour at Oswego, and that defendant refused to accept. Defendant pleaded that the plaintiff gave one week's notice of delivery to him at Oswego on the 1st of June: that he was ready to accept the flour there on said 1st June, *and for a reasonable time thereafter*, but that the plaintiff had not the flour on that day, *nor at any time within a reasonable time thereafter*. It appeared that the plaintiff had given notice of delivery on 1st June, but afterwards, on the 31st May, finding that the 1st June would fall on Sunday, he notified defendant not to attend then, but on the 11th instead, and that he had attended both on the 2nd and 11th, and was ready to deliver, but defendant was not there to accept. At the trial the Chief Justice refused to allow defendant to add a plea, setting up as a defence that by departing from the first notice the plaintiff had put an end to the contract. *Brunskill* v. *Muir*, 15 Q. B. 213.

In an action on a policy of insurance, defendants by their plea denied the loss in the usual form, and under it desired to shew that the building had been designedly set fire to:—Held, that this evidence was rightly rejected, and that an application to add such a plea at the trial was properly refused. *Mann* v. *The Western Assurance Co.*, 17 Q. B. 190.

In an action on a bond given to one T., the plaintiff, describing him as treasurer of the municipality of Fergus, for the performance by defendant P. of his duties as collector:—Held, 1. That the neglect of the clerk to deliver to P. the roll before the 1st October, as directed by 16 Vict., c. 182, s. 39, formed no defence for the sureties. 2. That they were not relieved by an extension of time for the collection of the rates allowed by the council to P. 3. Affirming Judd *v.* Read, 6 C. P. 362, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality. The case was referred at nisi prius with the same power to the arbitrator as the judge had, to amend the pleadings, and under this he allowed pleas to be added, raising the first and second questions above mentioned, which he referred to the court with the last. Per McLean, J.—The last objection should not have been allowed by the arbitrator. *Todd* v. *Perry*, 20 Q. B. 649.

Where a plaintiff applied to amend his declaration, the defendant was also allowed to add new pleas, but not as a matter of course. *Rogers* v. *Deedes*, 2 P. R. 136.—C. L. Chamb.—Robinson.

The judge of the County Court can add pleas in cases sent down from superior courts to be tried by him. *King* v. *Glassford*, 11 C. P. 490.

When an arbitrator, having power to amend the pleadings, allowed a plea to be added, and the parties affected, instead of applying to have the reference revoked, proceeded with it notwithstanding the amendment, which they contended was improper and unjust, relief against the award on this ground was refused, although the court thought, on the material before it, if the same was before the arbitrator, the amendment ought not to have been allowed. *Severn* v. *Cosgrave*, 2 L. J. N. S. 11.—P. C.—Wilson.

The defendants, after an appeal in this country, and to the judicial committee of the Privy Council, and after a new trial ordered, applied to add

to their plea of never indebted a plea of payment and a special plea:—Held, that for the purposes of the application the case must be considered as though awaiting trial for the first time: that the plea of payment ought clearly to be allowed, but that the special plea was calculated to embarrass the plaintiffs unnecessarily, and, if a defence at all, was covered by the plea of never indebted. *The Commercial Bank of Canada* v. *The Great Western Railway Co.*, 2 L. J. N. S. 103.—C. L. Chamb.—A. Wilson.

Where a judge at nisi prius, in a defended case, in which, however, no one appeared for defendant, had amended the record ex parte by inserting an omitted plea and replication:—Held, that the amendment was properly made. *Campbell* v. *Kemp*, 16 C. P. 244.

The plaintiff had sued out an attachment against defendant as an absconding debtor, and went down to the County Court to prove his claim, upon a record shewing interlocutory judgment signed for want of a plea. Defendant applied to have a plea of never indebted put on the record, on the ground that such plea had been filed before signing the judgment. The application was refused, for defendant should have moved against the judgment if irregular, and he had no right to plead until he had put in special bail. *Offay* v. *Offay*, 26 Q. B. 363.

On an application to compel a railway company to arbitrate, the question whether the plaintiff's land was injuriously affected, under the admitted facts, was raised by return to the mandamus, and formally decided in the plaintiff's favor. An arbitration then took place, an award was made, on which the plaintiff sued, and one trial was had, resulting in a verdict for defendants, which was set aside after having gone to the Court of Appeal. Defendants then applied to add a plea that the land was not injuriously affected; but the court refused the application. *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 29 Q. B. 154.

In an action on a mutual insurance policy, defendant pleaded non-payment of an assessment. The judge ruled that an insurer is not liable for assessment made before his insurance was effected or premium note given, and refused to allow defendant to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. *Green* v. *The Beaver and Toronto Mutual Fire Insurance Co.*, 34 Q. B. 78.

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4. *After Judgment on Demurrer.*

After verdict for plaintiff and contingent damages assessed, judgment was given for defendant on demurrer to the replication. The court refused to allow plaintiff to amend. *Phillips* v. *Smith*, Dra. 290.

But such amendment will be allowed where justice requires it, and the plaintiff would be finally concluded. *Breakenridge* v. *King*, 4 O. S. 297. *Maxwell* v. *Ransom*, 1 Q. B. 281.

After judgment on demurrer in favour of plaintiff, the court will sometimes allow defendant to amend on an affidavit of merits, even though the plaintiff has lost a trial. *McCrae* v. *Hamilton*, M. T. 5 Vict.

When there were several counts in a declaration, varying the same cause of action, to which defendant pleaded distinct pleas, and the plaintiff having demurred to some and replied to others, after judgment against him on demurrer, recovered a verdict on the other pleas, no defence having been made at the trial, the court:—Held, that upon the pleadings the plaintiff's recovery was barred, but, under the circumstances, they granted a new trial with leave to amend. *Watson* v. *Hamilton*, 6 O. S. 312.

Where in trespass there were several issues in law and in fact arising on several special pleas going to the whole cause of action, and the plaintiff, before the argument of the demurrers, went to trial and assessed his damages at £17 10s., having proved only one act of trespass, and the demurrers were afterwards admitted to be against him, the court refused to allow him to set aside his verdict, amend his pleadings, and go to a new trial. *Tyrrel* v. *Myers*, 6 O. S. 435.

Amendment will not be allowed unless the circumstances are very special, and the motion prompt. *Counter* v. *Hamilton*, 1 Q. B. 6.

After an unsuccessful demurrer, the court will sometimes refuse to allow a party to amend and plead to the action. *Bacon* v. *McBean et al.*, 4 Q. B. 104.

An amendment of defendant's pleadings was allowed after judgment on demurrer against the rejoinder. *Hamilton* v. *Davis*, 1 Q. B. 526.

Where a defendant after judgment on demurrer was allowed to amend on payment of costs, which were not paid, the rule was made absolute to enter the judgment for plaintiff. *Skinner* v. *Anon.*, E. T. 3 Vict.

In trespass qu. cl. fr., after judgment against the plaintiff on demurrer to his replication, the court refused leave to add a count for assault. *Henderson* v. *Harper*, 1 Q. B. 528.

On the argument of a second demurrer to a declaration it was suggested to the plaintiff's counsel to amend, but he did not, and after judgment against him, he was refused leave to amend. *Metcalfe* v. *McKenzie*, 2 Q. B. 404.

Leave to amend pleadings allowed after judgment on demurrer, and after ten days therefrom, there being a doubt as to whether defendant was to amend in ten or fourteen days. *Perrin* v. *Bowes*, 1 C. L. Chamb. 102.—Macaulay.

After contingent damages assessed on demurrer to plea, and judgment for defendant on the demurrer, the court refused leave to reply de novo, no distinct affidavit of merits being filed. *McLellan* v. *Rogers*, 12 Q. B. 651.

Defendant being sued on a lease for not repairing, pleaded in effect that the injury was caused by the plaintiff, and in E. T., 1863, the plea was held bad on demurrer. In the following term he applied to amend by pleading the same defence in an equitable form, in order to prevent the necessity for a cross action for damages, which he believed the plaintiff would be unable to satisfy. It appeared that the acts complained of by defendant were committed, if at all, about three years ago, but they were positively denied by the plaintiff, and defendant had never sued for them. The application was refused. *Kelly* v. *Moulds*, 3 P. R. 207.—Q. B.

5. Other Cases.

After issue joined on nul tiel record, and a trial, the court permitted the plaintiff to amend his declaration. *Church* v. *Barnhart*, Dra. 443

Of avowry in replevin. *Thompson* v. *Forsyth*, E. T. 3 Vict.

The terms of a demise in an avowry in replevin may be amended at nisi prius. *Leader* v. *Smith*, 1 Q. B. 366.

Of declaration for malicious prosecution, in statement of court where indictment tried. *Carr* v. *Proudfoot*, E. T. 3 Vict.

Of declaration, by inserting a special averment of loss of bond, after the fact of loss found by verdict. *Ketchum* v. *Ready*, T. T. 3 & 4 Vict.

Of plea of set-off by claiming a balance. *Sinclair* v. *Town Council of Galt*, 17 Q. B. 259.

Of equitable plea, to accord with evidence, by alleging certain representations to have been made by plaintiff's agent. *The Corporation of the County of Huron* v. *Armstrong*, 27 Q. B. 533.

By striking out count in County Court suit, to meet objection as to jurisdiction. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.—Chamb.—Gwynne.

Joinder in demurrer allowed to be added at nisi prius. *Boulton* v. *Fitzgerald*, 1 Q. B. 476.

Where defendant by mistake demurred to the replication to his first plea instead of his second, so that upon the second plea no issue was joined, the court set aside the verdict and allowed an amendment. *Perry* v. *Grover*, 5 Q. B. 468.

In dower, the demand before action was directed to the tenant as tenant of lot 3, (the right lot) but in it, and in the declaration on the record, the premises were described as lot 2; a description was, however, given in both by metes and bounds, which shewed plainly what lot was intended. The plea denied the husband's seisin of said lot 2. The tenant at the trial, though he opposed an amendment, admitted that he had not been misled by the mistake:—Held, that the amendment was properly allowed. *Matheson* v. *Malloch*, 13 Q. B. 354.

The judgment was ordered to be arrested, unless the plaintiff was allowed within one month, in chambers, to add the necessary suggestions to the declaration under the 217th section of the C. L. P. Act. Such amendment is not allowed unless the plaintiff, on affidavit, shews reasonable ground for believing that the final decision of the suggestion will be in his favour. *Kirchhoffer* v. *Ross*, 11 C. P. 467.

Where ejectment brought under the old practice in 1848 had been stayed for security for costs, and the demise had expired nine years since, the court refused an amendment by enlarging the term, which would have deprived defendant of a title acquired under the Statute of Limitations. *Doe* d. *Day* v. *Bennett*, 21 Q. B. 405.

The judge at the trial would not amend by converting an action of case for injury to a reversion into one of trespass, and the court refused to interfere. *Emrick* v *Sullivan*, 25 Q. B. 105.

In an action for assault and battery plaintiff was allowed at the trial to amend his declaration, by adding that he thereby "became and was and is permanently injured:"—Held, that the amendment was proper. *Glass* v. *O'Grady*, 17 C. P. 233.

A plea having been held bad on demurrer, for want of an allegation of notice, *an objection not raised on either side*:—Held, that as it was probable the plaintiff had had notice, defendant on filing an affidavit to that effect should be allowed to amend, without paying costs of the argument, but on payment of the costs of the day of the trial which had previously taken place. *Thompson* v. *Leach*, 18 C. P. 141.

In an action for flowing back water, on an objection by defendant as to the right, on the pleadings, to recover except for so backing water as to interfere with the working of plaintiff's mill, the judge allowed an amendment of the declaration, so as to test the right of defendant to overflow any portion of the land. Defendant did not object that this was not the real question in controversy, but merely insisted he could not then proceed with the trial, which was thereupon postponed. It also appeared that there had been several trials many years before between plaintiff and other parties, in which damages were claimed for flowing back on the land as well as on the mills, and it was not denied by defendant that the question on the previous trial of this suit was the right to overflow the land at all, nor that the objection made at the second trial, when the amendment was applied for, had never been before raised, though there had been three entries of the record for trial and two references to arbitration between the first trial and the last entry of the record:—Held, that the amendment had been properly made. *Smith* v. *Wallbridge*, 18 C. P. 180.

In pleading the general issue by statute, any statute relied upon for the defence must be referred to in the margin, as well as that by which such plea is allowed. But where a statute had been omitted in the County Court, this court, on appeal, directed the court below to amend by inserting it. *VanNatter* v. *The Buffalo & Lake Huron R. W. Co.*, 27 Q. B. 581.

IV. Issue Books.

Issue book amended, by inserting a suggestion of a decision on demurrer, &c. *Welsh* v. *O'Brien*, 29 Q. B. 474.

Held, in a case proper to be brought down to the County Court by the Law Reform Act of 1868, where the entry under form A. was omitted from the issue book, but notice of trial had been given for the County Court, that the omission was not a ground for setting aside the issue book and notice of trial, but the plaintiff would be allowed to amend on payment of costs. *McDermott* v. *Elliott*, 9 L. J. N. S. 259.—C. L. Chamb.—Morrison.

V. Nisi Prius Records.

A record was amended in matter of form, after an appeal to the King in council. *Rowland* v. *Tyler*, 5 O. S. 500.

Nisi prius record allowed to be withdrawn and sealed before jury sworn. *McLean* v. *Neeson*, T. T. 5 & 6 Vict.

Amendment in jurata of nisi prius record. *Doe* d. *Corbett* v. *Sproule*, 6 O. S. 431; *Doe* d. *Crooks* v. *Cummings*, 1 Q. B. 256; *Smith* v. *Shaver*, 6 Q. B. 20.

Of record at nisi prius, by filling up the proper day of nisi prius, cannot be made after jury called, though not sworn. *Doe* d. *Benner* v. *Burd*, 8 Q. B. 9.

The court refused to set aside a record because the venire had not been in fact amended, when it appeared that an order for amendment had been granted and placed in the margin of the record, and that the defendant had attended at the trial and gone into his defence. *Arnold* v. *Higgins*, 1 P. R. 246.—P.C.—Sullivan.

Where a judge at nisi prius, in a defended case, in which, however, no one appeared for defendant, had amended the record ex parte, by inserting an omitted plea and replication:—Held, that the amendment was properly made. *Campbell* v. *Kemp*, 16 C. P. 244.

Plaintiff was ordered after verdict to amend the nisi prius record by adding issues in law which had been omitted. *Grant* v. *Palmer*, 5 P. R. 301.—P. C.—J. Wilson.

The Law Reform Act of 1868, s. 18, sub-s. 3, enacts that it shall be competent for the parties at a trial to consent that the notice for a jury shall be waived, and the case tried by the judge, "and to endorse a memorandum of such consent on the record; and thereupon" the judge shall try, &c. The plaintiff had given notice for a jury, but at the trial the counsel on both sides waived it, and requested the judge to try the case, which he did, and found for the plaintiff, but no memorandum was endorsed. On objection by the plaintiff to the judge's authority to try:—Held, that the record might be amended by the judge's notes, which stated the waiver and consent, and the endorsement of the memorandum made nunc pro tunc. *Wycott* v. *Campbell*, 31 Q. B. 584.

VI. Judgments and Judgment Rolls.

A judgment roll was amended by adding the costs. *Wright* v. *Landell*, Tay. 304.

In a judgment on a sci. fa. against an administrator, the name of the intestate was amended so as to correspond with the original judgment against him. *Willard* v. *Woolcott*, Dra. 201.

To debt on bond setting out the condition and assigning breaches, defendant craved oyer and demurred, and the plaintiff, having succeeded on the demurrer, entered judgment for the amount of the penalty in the bond and issued execution. Defendant then moved to set aside the proceedings, but the plaintiff had leave to amend, by substituting an interlocutory for the final judgment, and entering an award of venire to assess damages, and inquire of further breaches, although three years had elapsed from the entry of judgment. *Douglass* v. *Powell*, 2 O. S. 87.

The court will amend a postea by the judge's notes, and amend a judgment by the postea, after an appeal allowed and reasons of appeal assigned, the verdict having been taken generally for the plaintiffs on points reserved, and the postea being framed as if the general issue only had been pleaded, without noticing several other special pleas of the Statute of Frauds. *Rochlean* v. *Bidwell*, 2 O. S. 319.

Where in debt the plaintiff had assessed more damages than the declaration warranted, and had entered judgment for that amount, as if in assumpsit, and issued executions some in debt and some in assumpsit, an amendment was allowed by reducing the damages, on payment of costs. *Averill* v. *Powell*, M. T. 2 Vict.

In debt on bond, the plaintiff entered his verdict as if in debt on simple contract, and entered judgment in assumpsit, and issued a ca. sa. in debt, on which defendant was arrested. The court set aside the ca. sa. with costs, and allowed plaintiff to amend on payment of costs. *Edison* v. *Hogadone*, M. T. 3 Vict.

Award of venire amended. *Whitelaw* v. *Davidson*, 6 Q. B. 534.

Judgment roll amended by inserting the date of its entry, the amount of taxed costs in the cause, and the aggregate amount of debt and costs recovered in the cause. *Watts* v. *Little*, *Watts* v. *Loney*, 6 L. J. 233.—C. L. Chamb.—Robinson.

Held, that a judgment deliberately taken by the plaintiff against the defendants, as administrators, in September, 1858, for assets quando acciderint, with a replication of lands, should not be opened up on the ground that certain assets had since become available for plaintiff's judgment, where defendants had changed their position by making payments, &c. *Ritchie* v. *Worthington et al.*, 7 L. J. 208.—P. C.—Richards.

One of the defendants, *Edmund* M. correctly styled in the summons, was by mistake named in the judgment roll and executions *Edward* M. —Held, amendable. *McKenzie* v. *McNaughton, et al.*, 8 L. J. 329.—C. L. Chamb.—Robinson.

On appeal from a County Court, the Q. B. made absolute a rule to enter a verdict for defendant. Six terms afterwards the plaintiff moved to amend the judgment by granting a new trial, on affidavits that no leave was reserved below to enter such a verdict; but the court refused to interfere. *Robinson* v. *Grange*, 20 Q. B. 270.

Upon an action on a bill of exchange against the drawers and acceptors, the plaintiffs on the 12th of January, 1858, entered a joint judgment against all the defendants. Subsequently one was arrested on a ca. sa. and discharged, and the plaintiffs, upon an action afterwards brought against one of the other defendants, to avoid any difficulty that might arise by reason of the joint judgment, applied to amend the judgment roll by making it a several judgment against the defendants:—Held, that the application, which rested entirely upon the discretion of the court, not on any powers of amendment conferred by the C. L. P. Act, was too late. *Hamilton* v. *Holcomb*, 12 C. P. 229.

Judgment in an action against executors, who pleaded only payment, having been by mistake entered and execution issued against defendants as executors to be levied of the goods of testator in their hands, et si non de bonis, propriis, the judgment and execution was, under the circumstances, amended on payment of costs, and the fi. fa. lands set aside, leaving the plaintiffs to

take out a new writ against defendants' lands. *Purdie* v. *Watson et al.*, 3 P. R. 23.

The plaintiff having declared against defendant as executrix, and obtained judgment by default, by mistake entered it and issued execution as against her in her own right, and on discovering the error obtained an order to amend the judgment roll and fi. fa. so as to correspond with the declaration. On motion to set aside this order at the instance of other judgment creditors of defendant as executrix:—Held, any fraud or collusion between the plaintiff and defendant in the suit being denied, that the applicants had no right to prevent or interfere with such amendment, and that the fact of their judgments being unknown to the judge when he made the order was immaterial. *Nicholls* v. *Nicholls*, 3 P. R. 201.—Q. B. See also *Mein* v. *Short*, 11 C. P. 430.

VII. Verdict and Postea.

A verdict taken for the penalty of a bail bond to the limits, was amended by the judge's notes, by reducing it to the sum endorsed on the ca. sa., with interest and sheriff's fees. *Callagher* v. *Strobridge*, Dra. 158.

Where there is a general verdict for plaintiff on several counts, one of which is bad, but it appears the plaintiff elected to proceed on a good count at the trial, the court will allow the verdict to be amended after motion in arrest of judgment, without costs. *Gouldrich* v. *McDougall*, 2 O. S. 212.

So where the evidence was applicable to a good count only. *Beasly* v. *Darling*, 2 O. S. 214; *Chadwick* v. *McPherson*, 2 Q. B. 379.

So if the evidence at the trial apply equally to the good and bad counts, the amendment may be made. *Baldwin* q. t. v. *Henderson*, 4 Q. B. 361.

But where, in case for waste, the first two counts were for voluntary waste, and the fourth in trover, the third being for permissive waste by a tenant at will, an application to amend the postea by entering the verdict on the first, second, and fourth counts alone, was refused, evidence having been given on the third count. *Drummond* v. *Carthew*, T. T. 3 & 4 Vict.

Where the notes shew that the verdict has been erroneously entered for the plaintiff on both counts, instead of for defendant on one, this may be amended by the judge's notes. *City Bank* v. *Eccles*, 5 Q. B. 633.

Where a verdict has been erroneously entered on one count, the record may, at any time afterwards, by leave of the judge who tried the cause, be altered, and the entry made on another count. *Moore v. Boyd*, 15 C. P. 513.

The court will amend a postea by the judge's notes, and a judgment by the postea, after appeal allowed, and reasons of appeal assigned, the verdict being general for the plaintiff on points reserved, and the postea framed as if the general issue only had been pleaded, without noticing several other special pleas. *Rochlean* v. *Bidwell*, 2 O. S. 319.

Where a verdict has been given in a district court for a sum beyond its jurisdiction, the plaintiff may cure the defect by entering on the record a remittitur for the excess. *Thomas* v. *Hilmer*, 4 Q. B. 527; *Jordan* v. *Carr*, 4 Q. B. 53.

Where a verdict was taken by mistake for £100 too little, and levied under execution, the court refused to interfere, the defendant opposing the application. *The Bank of Upper Canada* v. *Corbett*, 21 Q. B. 65.

Where by mistake a verdict for a certain amount is entered on the record, and the foreman of the jury, before the jury separate or leave the box, points out the error, the judge is right in correcting it. *Moore* v. *Boyd*, 15 C. P. 513.

VIII. Incidental Proceedings.

1. *Affidavits.*

Amendment allowed by insertion of names in jurat of two persons sworn to same affidavit. *Fisher* v. *Thayer*, 5 O. S. 513.

In Christian names of plaintiffs in affidavits. *Rose* v. *Cook*, 1 Q. B. 5; *Grant* v. *Taylor*, 2 Q. B. 407; *Beauchamp* v. *Cass*, 1 P. R. 291.—P. C. —Richards.

2. *Rules, Orders, and Summonses.*

Rule for costs incorrectly intituled, amended. *Ball* v. *McKenzie*, T. T. 7 Vict.—P. C.—Macaulay.

In intituling of rule nisi in the cause. *Ball* v. *Mackenzie*, 1 Q. B. 412; *Hibbert* v. *Johnston*, 1 Q. B. 403; *Grant* v. *Taylor*, 2 Q. B. 407.

Where a party takes out a four-day rule on the Wednesday before the end of the term, and neglects to serve it till Friday, the court will not allow him to amend his rule so as to make it returnable on Saturday. *Hunter* v. *Thurtell*, 4 Q. B. 170.

The court can amend a nisi prius order of reference after it has been made a rule of court. *Laurie* v. *Russell*, 1 P. R. 65.

Where a summons to pay over was argued on one day, and judgment deferred till the next day, when the summons was made absolute (the garnishee having died during the interim) on an application to set aside the order, on the ground that it was made after the proceedings had abated, by reason of the death of the garnishee, leave was given to the judgment creditor to amend his order nunc pro tunc, without costs, the delay being the delay of the judge and not of the party. *Ward* v. *Vance*, 9 L. J. 244; 3 P. R. 210.—C. L. Chamb.—A. Wilson.

Of summons and rule, in the reference made to papers filed. *Re Barton*, 4 P. R. 237.—Chamb. —A. Wilson; *In re Allen*, 31 Q. B. 458.

3. *Other Matters.*

Defendants had gone before one Allan, who was bonâ fide supposed to be a commissioner for the county of Lennox, and acknowledged a recognizance:—Held, there was no estoppel to prevent the defendants from disputing the authority of Allan as commissioner, and that the court would not favor an amendment for the purpose of shutting out evidence, and by estoppel preventing the truth being known. *Macfarlane* v. *Allan et al.*, 6 C. P. 496.

A bail piece in which the plaintiff or defendant is incorrectly named may be amended with the consent of the bail. *Daniell* v. *James*, 2 P. R. 195.—P. C.—Jones.

If through mistake an attorney has delivered an erroneous bill, he may by special application, shewing clearly how the mistake has arisen, be allowed to amend it or deliver another; but not of his own mere motion. *In Re Davy*, 1 L. J. N. S. 213.—C. L. Chamb.—Richards.

A notice of action to a justice of the peace, intituled in the wrong court:—Held, not amendable under the Administration of Justice Act, 1873. *McCrum* v. *Foley*, 10 L. J. N. S. 105.—C. L. Chamb.—Dalton, *C. C. & P.*

The relation, in a contested municipal election case, omitted to state that the relator was a candidate or voter, but the fact was stated in one of the affidavits filed:—Held, amendable under the Administration of Justice Act, 1873. *Regina ex rel. O'Reilly* v. *Charlton*, 10 L. J. N. S. 105. C. L. Chamb.—Dalton, *C. C. & P.*

IX. Practice.

1. *Terms on allowing Amendment.*

If a declaration be drawn up in a slovenly and careless style, the court, although expressing an opinion in favour of the plaintiff on demurrer, will frequently direct him to amend without costs. *Murphy* v. *Burnham*, 2 Q. B. 261.

In trover for a waggon the plaintiff obtained leave to amend his declaration at nisi prius, by limiting his action to two of its wheels, but did not amend, and got a verdict. The court, on granting a new trial without costs, against which no cause was shewn:—Held, that the amendment should have been made only on payment of costs. *Madill* v. *Chilvers*, 2 Q. B. 269.

Where after a case has been made a remanet, defendant has judgment against him on demurrer, and leave is granted to amend, he should pay only the costs of the demurrer, not of the day. *McKenzie* v. *Gibson*, 7 Q. B. 527.

Plaintiff sued upon a bond to pay money by instalments, alleging non-payment of an instalment due on 1st August, 1858. Defendant pleaded. The cause was twice tried. On the first occasion a verdict was taken for plaintiff in the absence of defendants, from which plaintiff was relieved on payment of costs. On the second occasion a verdict was also rendered for plaintiff. That verdict was afterwards set aside, on the ground that the instalment due on the 1st August, 1858, was proved to have been satisfied. Plaintiff afterwards applied to amend his declaration by alleging non-payment of the instalment which fell due on 1st February, 1859. This was granted, but only on payment of the costs of the last trial, the rule setting aside the verdict, and the costs of the application. Payment of the costs of the first trial was not required, inasmuch as the verdict then passed against defendants solely by reason of their own default. *Hooker* v. *Gamble*, 9 L. J. 44.—C. L. Chamb.—Draper.

Where plaintiff obtained a verdict on evidence which did not sustain his declaration as framed, and that verdict was set aside, he was allowed to amend his declaration, but only on the terms of his paying the costs of the trial, the rule to set aside the verdict, and the application for leave to amend *Higgins* v. *The Corporation of the City of Toronto*, 9 L. J. 44.—C. L. Chamb.—Draper.

Where the plaintiff applied to amend his declaration, the defendant was also allowed to add new pleas, but not as a matter of course. *Roger* v. *Deeks*, 2 P. R. 153.—Chamb.—Robinson.

Where an irregularity was trifling, such as an omission to fill in the date of the entry of judgment for default, an amendment was allowed without costs. *Dunn* v. *Dunn*, 1 L. J. N. S. 239.—C. L. Chamb.—Richards.

2. *Other Cases.*

Where a defendant, after judgment on demurrer, was allowed to amend on payment of costs, which were not paid, the rule was made absolute to enter the judgment for plaintiff. *Skinner* v. *Anon.*, E. T. 3 Vict.

Where, after a rule to consolidate, the plaintiff had leave to amend his declaration by increasing his damages:—Held, that it was not necessary to serve the amended declaration nor a new demand of plea. *Ketchum* v. *Hamilton*, E. T. 2 Vict.

Where the plaintiff, after notice of trial in an action of debt, had leave to amend one of the counts, and not having served the amended declaration nor any new demand of plea, signed interlocutory judgment, and afterwards entered final judgment and issued execution, the proceedings were set aside. *Ramdall q. t.* v. *Taggart*, 4 O. S. 2.

Semble, where a declaration is amended in the name of the plaintiff, it is sufficient to amend the declaration filed, without filing an amended copy. *Hart* v. *Bogle*, 6 O. S. 168.

After argument on demurrer to the declaration, the plaintiff had leave to amend on payment of costs; but before any amendment defendant obtained a rule staying proceedings in the cause on payment of the costs of the cause. Defendant afterwards, and without paying or taxing those costs, moved to discharge the plaintiff's rule to amend, because the amendment had not been made, nor costs of demurrer paid. The court discharged his rule with costs. *Hart* v. *Keith*, 2 Q. B. 100.

After an amendment defendant had two clear days to plead to the amended declaration, by the 21st rule of H. T., 1850. After two days if defendant had not amended the plaintiff may take any step which the then state of the cause will warrant, and such step will not affect defendant's right to amend; but notwithstanding the defendant might at any time amend. *Rose* v. *Kline*, 1 P. R. 91.—P. C.—Draper. See now C. L. P. Act, s. 117.

When defendant obtains an order to amend the declaration by inserting his right name, the plaintiff must see the amendment made both in the copy filed and served, and the time to plead will begin from such amendment; but it is not necessary to serve a fresh copy:—Semble, however, that a new demand of plea is required. *Dingman* v. *Keegan*, 1 P. R. 135.—Chamb.—Burns. See now C. L. P. Act, s. 117.

After four terms have elapsed since the last proceeding, an amendment cannot be made in a declaration without a term's notice. *Doe* d. *Lick* v. *Ausman*, 1 Q. B. 399.

Where a cause had been taken down to trial and withdrawn, and in the ensuing term a rule for judgment as in case of a nonsuit was discharged upon the peremptory undertaking and payment of costs, and the plaintiff afterwards obtained a judge's order to amend his declaration on payment of costs, and without paying the costs in both cases served defendant with his amended declaration, the court set aside the filing of the amended declaration with costs. *Maddock* v. *Corbet*, 4 Q. B. 257.

On a variance between proof and deed declared on, counsel must determine at the trial whether they will amend under the statute; leave cannot be reserved to amend the record afterwards. *McFarlane* v. *Brown*, 5 Q. B. 471.

The summons to amend a declaration need not specify the amendment. It is sufficient to mention it in the notice of the intended application. *Brown* v. *Devlin*, 1 C. L. Chamb. 175.—Macaulay.

A party having leave to amend his replication cannot file a special demurrer in lieu thereof. *Bore Bank* v. *Chase*, 7 Q. B. 454.

Service of amended declaration without payment or tender of costs as ordered by rule granting amendment, set aside with costs. *Brown* v. *Goodeve*, 2 C. L. Chamb. 158.—Burns.

Where the true state of facts was not laid before the judge who made an order for leave to amend pleadings, he rescinded his order. *Warlock* v. *Potter*, 8 L. J. 47.—C. L. Chamb—Draper.

The plaintiff having obtained an order in chambers for the amendment, and not having availed himself thereof, because the condition of payment of costs was annexed thereto; upon application to amend at the trial, the judge in his discretion refused it. *Hooker* v. *Gamble*, 13 C. P. 462.

Where an application is made to amend a writ or other proceeding by reason of anything contained therein or omitted therefrom, such writ or other proceeding, or a copy of it, must be brought before the court. *Attorney-General* v. *McLachlan*, 5 P. R. 63.—P. C.—A. Wilson.

When an order is made giving leave to plead and demur to the declaration, with permission to the plaintiff to amend within a certain time, but without any express stay of proceedings, a plea and demurrer filed and served before the expiration of the time are irregular, and will be set aside. *Taylor* v. *Grand Trunk R. W. Co.*, 6 P. R. and 10 L. J. N. S., not yet reported.—C. L. Chamb.—Dalton, *C. C. & P.*

X. Miscellaneous Cases.

Proceedings taken contrary to rule of court, cannot be supported by a subsequent amendment. See d. *Burnham* v. *Simmonds*, 7 Q. B. 598.

Amendment of conviction. *Regina* v. *Ross*, 3 T. 3 Vict. *In re Watts and In re Emery*, 5 P. R. 267.—Chamb.—Gwynne.

Of coroner's warrant on habeas corpus. *In re Carmichael*, 10 L. J. 325.—C. L. Chamb—Draper.

In partition proceedings. *In re Knowles and Post*, 24 Q. B. 311.

Of indictment. *Cornwall* v. *Regina*, 33 Q. B. 106; *Regina* v. *Jackson*, 19 C. P. 280.

Semble, that if material evidence be given before a magistrate, but unintentionally omitted from a return to a certiorari, an amendment may be allowed to supply it, but only with the concurrence of the parties and of the witness by whom the deposition was signed in the correctness of the additions; but it cannot be supplied by affidavit. *Regina* v. *McNaney*, 5 P. R. 438.—Chamb.—A. Wilson.

Of information before a Magistrate. *In re Conklin*, 31 Q. B. 160.

Of election petition. *In re Election for County of Monck*, 32 Q. B. 147.

AMENDMENT IN EQUITY.

I. Of Bills.

1. *After Answer*, 98.
2. *After Replication*, 99.
3. *At and after the hearing*, 99.
4. *After Decree*, 102.
5. *Costs*, 102.
6. *Practice*, 103.
7. *Without prejudice to Injunction*, 104.
8. *Other Cases*, 105.
9. *By adding and striking out parties.*
   (a) *In Foreclosure Suits-See* Mortgage.
   (b) *Other Cases — See* Pleading in Equity.
10. *Supplemental Bills—See* Pleading in Equity.

II. Supplemental Answer—*See* Pleading in Equity.

III. Of Decree, 106.

1. *In Foreclosure—See* Mortgage.

IV. Of Master's Report, 107.

V. Miscellaneous Cases, 107.

VI. In Particular Actions.

1. *Interpleader—See* Interpleader.
2. *Foreclosure—See* Mortgage.

VII. Rectifying and Varying Deeds—*See* Deed.

VIII. See also the Several Titles.

I. Of Bills.

1. *After Answer.*

A motion to amend is no answer to a motion to dismiss for want of prosecution. A plaintiff moving to amend after the time limited by the ninth order of the Court must shew that the order could not be complied with, even with due diligence. *McNab* v. *Gwynne*, 1 Chy. 127.

Where the plaintiff's solicitor absconded before the time to amend the bill as of course had expired, and his departure was not known to the plaintiff till afterwards, and due diligence appeared to have been used by the plaintiff, the

court granted leave to amend on payment of costs. *Carney* v. *Boulton*, 1 Chy. 423.

Where the state of facts made by an original bill does not exist when the defendant answers the plaintiff cannot amend, so as to bring in other facts to keep the bill alive, but must file a new bill. *City Bank* v. *Amsden*, 7 L. J. 293.

A bill was filed against three defendants, A., B., and C., one of whom, C., was then out of the Province. An order was obtained for leave to serve C. by substitutional service on A. and B., for the purpose of a motion for injunction. A. and B. answered the bill, but C. did not; the bill was then amended, and notice of motion for injunction served on A. and B. for themselves and, together with the bill, on them for C. under the order for service. After the motion was disposed of, the plaintiff took out an order dismissing the bill against A. and B., and on the same day an order to amend, under which a re-engrossment of the bill was filed, and served personally on C. This order to amend was styled in the original suit, and worded to amend the "office copies" of the "defendants:"—Held, that it was a second order to amend after answer, within the meaning of order 9, of June, 1853, s. 12, and it was, on the application of C., discharged with costs as irregular. *Kemp* v. *Jones*, 1 Chy. Chamb. 374.—Spragge.

A plaintiff will be allowed to amend even after twenty-eight days from filing the answer, where he has been delayed by defendants not obeying the order to produce within proper time. *Archibald* v. *Hunter*, 2 Chy. Chamb. 277.—Taylor, *Secretary*.

After answer, liberal *addition* to the bill by amendment, retaining the original allegations, is proper, even though rendering a new defence necessary, and the costs of such amendment are proper costs in the suit. *McGillivray* v. *McConkey*, 6 P. R. 56—Chy. Chamb.—Blake.

2. *After Replication.*

An amendment of a bill after replication, and long after bill filed, for the purpose of stating a case of gross fraud, will not be allowed unless it clearly appear that the plaintiff or his solicitor did not know, and could not reasonably have discovered, before filing the bill, the facts upon which the fraud is grounded. *Woodstock* v. *Niagara*, 1 Chy. Chamb. 166.—Esten.

The court may, at any time, under proper circumstances, permit an amendment of the bill in furtherance of justice, and upon such terms as it may think fit to impose; but to obtain such indulgence, the plaintiff must satisfy the court by affidavit of the cause of the delay, and that due diligence has been used in the prosecution of the suit. *Kerr* v. *Finlayson*, 3 Chy. Chamb. 497.—Taylor, *Referee*.

3. *At and after the hearing.*

In what cases allowed under the order of May 1850. *Street* v. *Hogeboom*, 3 Chy. 128.

The court, though it refused to set aside a purchase on the ground of fraud in the vendor, gave leave to amend the bill alleging over value as a ground for relief. *Rees* v. *Wittrock*, 6 Chy. 418.

The provisions of 13 & 14 Vict., c. 63, apply only to judgment creditors whose judgments have been entered up since the 1st of January, 1851. Where, therefore, a creditor whose judgment was entered up in the year 1836, and registered in 1854, filed a bill in 1856 to set aside a deed executed by their debtor to his son in the year 1835, as having been done to defraud creditors, or as being voluntary, and therefore void as against purchasers for value, the court refused this relief, but gave the plaintiffs liberty to amend by making the bill a bill on behalf of all creditors, and praying for an administration of the debtor's estate. *Gillespie* v. *VanEgmondt*, 6 Chy. 533.

An application to amend at a late stage of the cause cannot be granted if it incur any risk of injustice, notwithstanding the practice established by order 9, section 14, of the orders of 1853. *Aitchison* v. *Coombe*, 6 Chy. 643.

The purchaser of land having filed a bill for a specific performance of a parol contract, the court refused relief, the parol contract having been merged in a written contract, but offered the plaintiff, at the risk of costs, permission to amend by alleging the written contract. *McCrumm* v. *Crawford*, 9 Chy. 337.

In a suit instituted by an administrator with the will annexed upon a mortgage, the defendant produced a release for the mortgage money given by the testator in his lifetime, thereupon the plaintiff sought to be allowed to proceed against the defendant as a creditor of the estate, but as this would involve such an amendment as would create an entirely different record, the court refused such permission, and dismissed the bill with costs. *Barrett* v. *Crosthwaite*, 9 Chy 422.

Where in a suit for redemption the defendant sets up an absolute conveyance by way of answer, to which the plaintiff simply files a replication, without amending his bill to impeach the conveyance, he cannot do so in evidence. But the court, under the circumstances, gave the plaintiff, who had purchased from the alleged mortgagor, liberty to amend. *Finlayson* v. *Mullard*, 10 Chy. 130.

Where a bill was filed to set aside a conveyance as having been made to hinder creditors on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief, at the hearing leave was given him to amend setting forth such grounds, and a decree was made in his favour, but, under the circumstances, without costs. *Watson* v. *McCarthy*, 10 Chy. 416.

The court, under the peculiar circumstances of this case, refused a decree in the existing shape of the bill, but gave leave to amend, without costs. *Cunningham* v. *Cunningham*, 10 Chy. 43[illegible]

Amendments may be made at the hearing of causes under the new practice as at nisi prius. *Fraser* v. *Rodney*, 11 Chy. 426.

P. being in insolvent circumstances, and unable to obtain in his own name a lease of certain real estate which he had previously had a lease of, procured one S. to apply for and obtained from the owner of the property a lease to him, S. under an agreement that P. should continue [illegible]

work the same as a nursery, and from the profits reimburse S. certain advances and also pay a debt due by P. to him, and that P. should retain any balance for his own benefit. On a bill filed by a creditor of P. seeking to have S. declared a trustee for P., and to have his interest sold :—Held, that although there was no resulting trust, nor any trust manifested in writing, still that P. had such an interest under the lease as could be reached in this court by an equitable execution on a proper case being made for such relief; and to enable the plaintiff to make such a case leave was granted to him to amend, with liberty to the defendants to speak to the cause after the amendments made. *Toms* v. *Peck*, 12 Chy. 345.

Defendant, by his answer, set up a compromise of the claim, and proved it; whereupon the plaintiff asked leave to amend in order to impeach this settlement. The court granted the leave on payment of costs, but without the right to use again the evidence which had been taken. *McIntyre* v. *Cameron*, 13 Chy. 475.

A bill to restrain certain of the defendants from closing windows looking across a lane of which plaintiff claimed to be the owner, was amended at the hearing by striking out that part claiming title to the lane. *Biggar* v. *Allan*, 15 Chy. 358.

Where the pleadings and evidence were not before the court in a satisfactory shape, and, evidence on both sides having been rejected as immaterial, the result was not satisfactory, leave was given to amend on payment of the costs of the hearing. *Conlin* v. *Elmer*, 16 Chy. 241.

The plaintiff had purchased certain mill premises from C., and afterwards sold the same; the bill alleged that on the sale C. had agreed to accept the sub-purchaser as his debtor for the unpaid purchase money, and to discharge the plaintiff. At the hearing the plaintiff failed to establish this agreement, but there were subsequent transactions by means of which also the plaintiff claimed at the hearing to have been discharged. This ground of relief not having been stated in the bill, the plaintiff had liberty to amend on payment of the costs of the day. *Allan* v. *Newman*, 16 Chy. 607.

After a bill had been filed by a judgment creditor, impeaching certain dealings between his debtor and a vendee of the debtor, the plaintiff allowed the writ against lands to run out for some time, but subsequently renewed it before the hearing:—Held, not necessary to amend stating this fact, and that its existence was no objection to the plaintiff obtaining relief at the hearing. *McDonald* v. *McLean*, 16 Chy. 665.

Leave to amend is, at the hearing, granted in furtherance of justice. *Cook* v. *Jones*, 17 Chy. 58.

In a suit for specific performance, the evidence having clearly established the bargain as alleged by the plaintiff, though his bill omitted to state the terms and mode of payment as agreed upon, the court offered him the alternative of taking a decree for specific performance, with payment of purchase money in hand, or to amend his bill by setting up the exact terms of his bargain. *Gillatley* v. *White*, 18 Chy. 1.

The defence of the Statute of Limitations being allowed at the hearing to be put in by supplemental answer: Held, on rehearing, that the plaintiff should have an opportunity of controverting this defence. *McIntyre* v. *The Canada Company*, 18 Chy. 367.

At the hearing of a cause the plaintiff was held entitled to a decree on the pleadings as they stood; the defendant had omitted to set up a defence of the registry law; and the plaintiff had for that and other reasons not attempted to prove notice; under these circumstances, the defendant was afterwards allowed to set up the new defence, on terms of paying the costs of the former hearing. *Forrester* v. *Campbell*, 19 Chy. 143.

In a suit for alimony the particular act of violence by the husband was stated in the bill to have occurred on the 30th of August, and the evidence shewed that it had been committed on the 31st of that month:—Held, that this was not such a variance as would disentitle the plaintiff to prove the act alleged; and if necessary an amendment would be allowed so as to state the date correctly, as it could not be considered that the defendant had been misled by the mistake in the date. *Rodman* v. *Rodman*, 20 Chy. 428.

A plaintiff will not be permitted to convert a bill by amendment into a new bill for different relief. If in making such amendments as, subject to this restriction, he is justified in making, a plaintiff *strikes out* allegations so as to render the answer to them useless, an application may be made by the defendant answering for his costs thus unnecessarily incurred. Such application should be made at the hearing. *McGillivray* v. *McConkey*, 6 P. R. 56—Chy. Chamb.—Spragge.

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4. *After Decree.*

The court will not amend a bill after decree. *Barrett* v. *Gardner*, 1 Chy. Chamb. 344; *Lawrason* v. *Buckley*, 2 Chy. Chamb. 334.—Van-Koughnet.

Quere: Whether a bill can be amended after decree. It cannot on an application ex parte. *Bank of Montreal* v. *Power*, 2 Chy. Chamb. 47.—Taylor, *Secretary*.

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5. *Costs.*

Where in equity an error occurs in drawing up a paper in a cause, the party applying to rectify it must pay the costs of the motion. *Emmons* v. *Crooks*, 1 Chy. 558.

With respect to the costs of motions to amend under the 13th order of May, 1850, each case must depend upon its particular circumstances. *Applegarth* v. *Baker*, 2 Chy. 428.

If a plaintiff amend his bill by striking out portions so as to render the answer to them useless, an application may be made by the defendant answering for the costs thus unnecessarily incurred, and such an application should be made at the hearing. After answer liberal addition to the bill by amendment, retaining the original allegations, is proper even though rendering a new defence necessary, and the costs of such amendment are proper costs in the suit. *McGillivray* v. *McConkey*, 9 L. J. N. S. 161.—Chy. Chamb.—Blake.

A plaintiff amending his bill after service of a demurrer, and before it has been set down for

argument, although more than eight days have elapsed, is liable for 20s. costs only, and not for taxed costs. *Weiss* v. *Rankin*, 3 Chy. Chamb. 190.—Taylor, *Referee*.

An order to amend taken out pending a demurrer, without providing for the costs of the demurrer, was held irregular. *Lowe* v. *Campbell*, 3 Chy. Chamb. 97.—Taylor, *Secretary*.

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6. *Practice.*

Where by the order allowing a demurrer leave is given to amend the bill, and the plaintiff neglects to amend, the proper course is to move that the plaintiff do amend within a given time, or that the order be discharged and the demurrer allowed. *Nelson* v. *Robertson*, 1 Chy. 530.

A plaintiff submitted to a demurrer and obtained an order to amend, by which he was required to make the amendments within fourteen days. This he failed to do, but took out ex parte and served an order of revivor, the demurring defendant having died after the expiration of the fourteen days:—Held, that by his failure to amend within the time limited, the plaintiff's right to amend was gone, unless by a special application he obtained an order enlarging the time: that the bill was not, by such failure to amend, out of court, without a further order, but it was open to the defendant to move to dismiss: that the plaintiff was not warranted, without notice to the defendant, in taking any further step in the cause before making the amendments, for which, in the first place, the bill was preserved, and he could not, therefore, issue an ex parte order of revivor. *Carr* v. *Moffat*, 9 L. J. N. S. 52.—Chy. Chamb. —Blake.

After the expiry of the term limited by an order to amend, the right of the plaintiff to amend under such order is strictly gone, but the defendant's right to object to amendments made after the period limited may be waived. *Waterous* v. *Farran*, 6 P. R. 31—Chy. Chamb.—Sprague.

Where a motion is made to amend the bill, under the 13th order of May, 1850, a draft of the proposed amendment must be laid before the court upon the application, but it need not be set out in the notice of motion. *Applegarth* v. *Baker*, 2 Chy. 428.

The plaintiff, upon moving, must shew, first, the truth of the proposed amendment; and, secondly, its propriety and expediency, with a view to the ends of justice. *Ib.*

An order to amend having been obtained and served after service of a notice of motion to dismiss, was deemed a sufficient answer to such motion. *Hill* v. *Hill*, 2 Chy. 692.

When it becomes necessary to revive by way of amendment against infant defendants, the proper course is to amend simply in the first instance by making the infants parties. After that is done, if the infants fail to have a guardian appointed, the plaintiff may apply under the 13th order to have a solicitor appointed guardian, and in either case the plaintiff will be in a position to move that the suit do stand revived. *Kirkpatrick* v. *Fouquette*, 4 Chy. 549.

A party by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expires. *Fowler* v. *Boulton*, 12 Chy. 437.

The time appointed by the court for vacation at Christmas, is not excepted in the computation of the time for amending the bill. Order 5 of 1853, refers to the long vacation only. *Connolly* v. *Montgomery*, 1 Chy. Chamb. 20.—Per Sprague, after consulting with the other members of the court.

Apart from any general orders, this court can permit an amendment of its own records; so that, though the order of 6th June, 1862, may not provide, in some exceptional cases, for the introduction into a suit of matter arising subsequent to its institution, such matter may be introduced upon motion for leave to amend the bill. *Baird* v. *White*, 1 Chy. Chamb. 275.—VanKoughnet.

Where an order to amend has been taken out, but, through inadvertence, not without prejudice to an order pro confesso previously obtained, the court will grant such an order nunc pro tunc, so as thereby to revive the order pro confesso. *Ruttan* v. *Smith*, 1 Chy. Chamb. 296.—Mowat.

Order 79 applies only to copies order to amend, not to office copies of bill. *Tyron* v. *Pears*, 2 Chy. Chamb. 470.—Taylor, *Secretary*.

An order to amend obtained before serving the bill, does not require service. *Bolster* v. *Cochrane*, 2 Chy. Chamb. 327.—Mowat.

Where a bill had been amended, and the affidavit was of service of "the bill," the court presumed the bill served was the bill as it stood at the time of service. *Ib.*

Under an order to amend obtained on præcipe a change in the venue laid in the bill cannot be made. A cause set down for hearing at the county town named in the amendment, was ordered to be struck out of the list. *Frietsch* v. *Winkler*, 3 Chy. Chamb. 109.—Taylor, *Secretary*.

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7. *Without prejudice to Injunction.*

After service of an injunction the plaintiff amended his bill and added a new defendant who was a mere trustee for the plaintiff, without however altering the frame of the bill or prayer. Subsequently to the amendment the defendant committed a breach of the injunction, and the plaintiff moved to commit the defendants:—Held, that the amendment was not a waiver of the injunction. *McDonell* v. *McKay*, 12 Chy. 414.

Where after notice of motion for injunction and before the motion, the plaintiff amends his bill, such amendment is an answer to the motion. *McDonell* v. *Street*, 13 Chy. 168.

The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and, as judgment creditors under that judgment, had filed their bill to set aside a prior judgment of other defendants, and had obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction was granted, the plaintiffs obtained another judgment against P., not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill, by alleging the recovery of the

second judgment, was granted. *Montreal Bank* v. *The Auburn Exchange Bank*, 1 Chy. Chamb. 283.—Spragge.

Where the time for amending the bill as of course has not elapsed, an order to amend, without prejudice to an injunction, is as of course, and obtainable on præcipe. *Evans* v. *Root*, 1 Chy. Chamb. 357.—Spragge.

Material amendments will not be allowed without prejudice to a pending motion for injunction. *Davy* v. *Davy*, 2 Chy. Chamb. 81.

A motion to amend without prejudice to an injunction will not be granted ex parte. If the amendments are such as could be made without a special application the order can be obtained on præcipe; if not, notice must be given to the parties affected. *McGregor* v. *Maud*, 2 Chy. Chamb. 387.—Taylor, *Secretary*.

8. *Other Cases.*

The court refused special leave to amend by introducing new matter, where the matter of the proposed amendment could be proved under the pleadings without it. *Wilmott* v. *Boulton*, 1 Chy. 479.

Where the time has elapsed for obtaining the usual order of course to amend, the court will not grant an order to amend *as the plaintiff may be advised*, as an indulgence, on the ground that the plaintiff had intended to take out the usual order within the proper time, but had not done so through a mistake of a clerk of his solicitor. *Bowen* v. *Turner*, 1 Chy. Chamb. 268.—Van-Koughnet.

A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill. Leave was given to amend with a view of shewing that certain land held by the deceased partner, and which had descended to his heir-at-law, had been purchased with partnership assets, and that therefore there was a resulting trust in favour of the plaintiff. *McFadden* v. *Stewart*, 11 Chy. 272.

The court will not grant leave to amend a bill where the proposed amendment would render the bill of a different nature. *Crawford* v. *Cradburn*, 1 Chy. Chamb. 280. *McGillivary* v. *McConkey*, 6 P. R. 56—Chy. Chamb.—Spragge.

The plaintiffs filed their bill to impeach a conveyance of lands in N. to the wife of a defendant. In describing the lands by metes and bounds, by mistake only a portion of the lands in N. were included, which portion was afterwards lost to the parties by being sold under a power in a mortgage. A motion for leave to amend the bill, by inserting the property in N. not included in the former description, was granted. *Wallace* v. *Ford*, 1 Chy. Chamb. 287.—Spragge.

Leave refused when the proposed amendment was an allegation, that a mortgage was made whilst the mortgagor was insolvent. *Curtis* v. *Wade*, 2 Chy. Chamb. 184.—Spragge.

A plaintiff having failed to amend his bill till the time within which he could do so had expired, owing to a pending motion by defendants to dismiss:—Held, not sufficient excuse for the delay, but that the plaintiff might under the circumstances file an additional affidavit, the former being insufficient, and renew the motion. *McDonell* v. *McKay*, 2 Chy. Chamb. 243.—Mowat.

Where an amendment has been allowed without limiting the time, it should be made within fourteen days from the order. Where circumstances prevented this being done, and no order dismissing the bill if it were not done was embodied in the order granting leave to amend, the referee held that the court could grant further time for amending, even on an application after the fourteen days. *McMurray* v. *Grand Trunk Railway Co.*, 3 Chy. Chamb. 306. Taylor, *Secretary*.

III. Of Decree.

The court, on further directions, supplied as far as possible the defects of the decree, without a re-hearing. *Robertson* v. *Meyers*, 1 Chy. 560.

An application to correct a clerical error in a decree or order must, as a rule, be made on notice. *Radenhurst* v. *Reynolds*, 11 Chy. 521.

Where a decree taken out by the plaintiffs in an administration suit, erroneously made provision for certain payments in priority to the provision by the will for the widow, the court upon her petition directed the decree to be amended, but refused costs to either party. *Eadie* v. *McEwen*, 14 Chy. 404.

A decree can only be amended on an application in chambers when it is not drawn in accordance with the judgment, or some necessary consequential direction has been omitted. *Watson* v. *Henderson*, 2 Chy. Chamb. 370.—Taylor, *Secretary*.

The secretary in chambers will only allow an amendment of a clerical error, or to make the decree conform with the judgment. Where the decree omitted to direct that costs should be paid forthwith, an application to amend was refused. *Wilson* v. *Robertson*, 3 Chy. Chamb. 100.—Taylor, *Secretary*.

A motion to amend, when the pleadings and evidence or anything beyond the judgment and decree have to be looked at, must be presented in court, not in chambers. *Lapp* v. *Lapp*, 3 Chy. Chamb. 234.—Taylor, *Referee*.

Where, on a petition to amend a decree, the petitioner asked in the alternative for a rehearing, and that the referee would adjourn that part of the application to be heard before a judge, the referee held it to be beyond his jurisdiction, and dismissed the petition with costs. *Ib.*

The referee's jurisdiction with regard to amending decrees, considered in Lapp *v.* Lapp, 3 Chy. Chamb. 234, affirmed. Leave to rehear refused, after considerable delay by the party seeking to rehear, and where the grounds for rehearing was an alleged error in the decree, which was not an obvious error, and caused no miscarriage of justice. *Lapp* v. *Lapp*, 4 Chy. Chamb. 3.—Spragge.

A consent decree may be amended on petition, if it contain terms not consented to. *Merchants' Bank* v. *Grant*, 3 Chy. Chamb. 64.

In a mortgage suit the plaintiff having obtained a decree which could not properly be issued on præcipe, the plaintiff's solicitor asked, if the referee considered the decree erroneous, to amend by inserting a direction for the master to enquire as to an alleged tender:—Held, that such an amendment could not be made, the decree being one which could not be issued on præcipe, and that a decree so issued could contain no special directions or provisions. *Ross* v. *Vader*, 3 Chy. Chamb. 236.—Taylor, *Referee*.

A petition to amend a decree, under the 336th consolidated order, after the time within which there could be a rehearing without leave, may be presented, without a prior application for leave; but such a case must be shewn on the petition as would entitle the petitioner to leave, if such an application were made. *O'Donoghue* v. *Hembroff*, 19 Chy. 95.

IV. Of Master's Report.

In taking an account of mortgage money and interest, the master computed interest up to the 19th of March, but by some error in his report the money was appointed to be paid on the 19th of January. Upon plaintiff's application ex parte, this was corrected. *White* v. *Courtney*, 1 Chy. Chamb. 11.—Spragge.

After advertisement for sale it was discovered that the report had omitted to include two items of interest:—Held, there was no necessity for appointing a new day for payment, and it was referred to the master to take a fresh account of plaintiff's claim, and to amend his report, and leave was given to fix a new upset price and to postpone the sale if necessary. *Bessey* v. *Graham*, 9 L. J. 82.—Chy. Chamb.—Esten.

A clerical error in a master's report will be amended. *Watson* v. *Moore*, 1 Chy. Chamb. 266.—VanKoughnet.

A motion to correct such error should be on notice, unless on consent. *Simpson* v. *Ottawa*, 2 Chy. Chamb. 12.—Mowat.

V. Miscellaneous Cases.

Where an information had been amended by merely adding a party by the direction of the court, a motion to take the amended information off the files because not signed by the attorney general, was refused. *Attorney General* v. *Toronto Street R. W. Co.*, 2 Chy. Chamb. 321.—Taylor, *Secretary*.

An amendment was allowed where an unimportant mistake had been made in a name, which had misled no one, and the right person had been served; and an enlargement on account of such amendment was refused. *Fraser* v. *Fraser*, 2 Chy. Chamb. 457.—Taylor, *Secretary*.

Where there is a misjoinder of petitioners in a petition for stay of proceedings, the court has jurisdiction at the hearing of the petition to allow the same to be amended by striking out a name. *Gilbert* v. *Jarvis*, 16 Chy. 294.

On a motion to set aside an award, the court allowed the party prejudiced to serve a supplementary notice embodying objections as to the course of the umpire and arbitrator, which had come to light on cross-examination, there being strong reasons for apprehending that the award was not a fair award. *In re Lawson* v. *Hutchinson*, 19 Chy. 84.

ANCIENT DOCUMENT.

See Evidence.

ANIMALS.

I. Fencing against—*See* Fences.

II. Distraining—*See* Distress.

III. Horses—*See* Horse.

IV. Horse Race—*See* Gaming.

V. Impounding—*See* Municipal Corporations—Pound-keeper.

VI. Injury to—*See* Railways and Railway Companies.

VII. Trespass for Seizing—*See* Trespass.

Power of corporation of the city of Toronto to pass by-laws for the destruction of dogs found running at large. *McKenzie* v. *Campbell*, 1 Q. B. 241.

Held, that upon a count in case, for injuries done by defendant's bull, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had once admitted that his bull had done the injury, and offered the plaintiff $10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in Thomas *v.* Morgan, 2 Cr. M. & R. 496. *Mason* v. *Morgan*, 24 Q. B. 328.

Trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act. *Ib.*

ANNUITY.

I. By Will—*See* Will.

Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors:—Held, that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

An annuity payable annually during the annuitant's life is not apportionable, so that his administrator can recover nothing if the annuitant die within the year. *Ausman* v. *Montgomery*, 5 C. P. 364. See now 37 Vict. c. 10, O.

Quære, whether the English annuity acts are in force here; but if so, a bill to enforce an annuity deed need not allege the enrolment of a memorial as required by those acts; and a defendant cannot at the hearing take an objection for want of such enrolment, unless he has set up such defence by his answer. *Emmons* v. *Crooks*, 1 Chy. 159.

A testator having bequeathed £500 per annum, payable out of the rents of his real and personal estate indiscriminately, for the support of his widow and family, (the widow having become sole executrix,) her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like; and—Semble, that where there is no process whereby such a fund can be reached, this court has power under 22 Vict., c. 22, s. 288, to apply a remedy; as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Chy. 486.

The owner of property mortgaged it, and then died, having devised one-half of the property to one son, and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:—Held, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 16 Chy. 239; *S. C.* 17 Chy. 251.

No interest is allowable in respect of arrears of an annuity. *Goldsmith* v. *Goldsmith*, 17 Chy. 13.

ANSWER.

I. Pleading Generally—*See* Pleading in Equity.

II. Separate Answer of Married Woman—*See* Husband and Wife.

ANTE NUPTIAL SETTLEMENT.

I. In lieu of Dower—*See* Dower.

II. In Fraud of Creditors—*See* Fraudulent Conveyances.

APOLOGY.

See Defamation.

APPEAL.

I. Error—*See* Error and Appeal.

II. From Assessment—*See* Assessment and Taxes.

III. In Insolvency—*See* Bankruptcy and Insolvency.

IV. Removal of Causes—*See* Certiorari.

V. From Courts.

1. *From County Court* — *See* County Court.
2. *From Practice Court* — *See* Practice Court.
3. *From Superior Courts*—*See* Error and Appeal.
4. *From Magistrates*—*See* Sessions.

VI. In Criminal Matters—*See* Criminal Law.

VII. From Master—*See* Practice in Equity.

VIII. From Orders—*See* Practice in Equity—Practice at Law.

IX. Second Application—*See* Practice at Law.

The general rule in matters of appeal is, that the judgment appealed against stands, unless the appellate court can say that is clearly wrong, *Keena* v. *O'Hara*, 16 C. P. 435.

While a power resides in any court or judge to commit for contempt, it is the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke and Heermans*, 7 Q. B. 223.

A judge when applied to in vacation, under 4 Will. IV., c. 10, s. 4, for the commitment of a debtor on the limits to close custody, disposes of the case without the power of appeal by declining to interfere. *Shaw* v. *Nickerson—Gillespie* v. *Nickerson*, 7 Q. B. 541.

No new evidence will be received by the court on the examination of a decision of a judge in chambers as to a contested election. *Regina ex. rel. Clark* v. *McMullen*, 9 Q. B. 467.

Semble, that whether the court or a judge before whom the relator brings his case, will go further than declare the election of the defendant void, or will proceed as well to seat the relator, is a matter of discretion not to be interfered with on appeal. *Ib.*—Robinson.

An appeal will lie from an interpleader issue. *Wilson* v. *Kerr*, 18 Q. B. 470.

Where an action in the Division Court by a school teacher against the trustees was referred by order of the judge, with the consent of parties:—Held, that the arbitrator's decision could not be appealed from under 16 Vict., c. 185. s. 24. *Chief Superintendent of Schools, Appellant, In re Milne and Sylvester*, 18 Q. B. 538.

Action for malicious prosecution, alleging a determination of the proceedings. Plea, that an appeal from such decision is still pending:—Held, good. *Griffith* v. *Ward*, 20 Q. B. 31.

Defendant was convicted at the Recorder's Court, on contradictory evidence, for obstructing a highway, the result of the verdict being to show that he and several others whose houses and greenhouses had been standing for sixty years were encroaching upon the street. A new trial having been refused, on appeal only the evidence was returned to the Court of Queen's Bench, with a copy of the rule nisi. The court under these circumstances, considering the importance of the case, *and that the grounds of the judgment below were not given to them*, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon questions of evidence. *Regina* v. *McLean*, 22 Q. B. 443.

Remarks as to the inconvenience, if not danger, of making the writ of habeas corpus a mere method of appealing from other tribunals on points more of practice than affecting the merits. *In re Munn*, 25 Q. B. 24. See, also, *Runciman* v. *Armstrong*, 2 L. J. N. S. 165.—C. L. Chamb.—A. Wilson.

Costs where judgment of court below is reversed, but no directions given as to the costs of appeal. *Menzies* v. *Redley*, 2 Chy. 544.

Interim injunction granted to stay proceedings at law pending the decision of the Court of Appeal. *Cotton* v *Corby*, 7 Chy. 50.

Pending an appeal from the Court of Chancery, an injunction was granted restraining a mortgagee from proceeding to the sale of the mortgage premises under a power of sale contained in a deed. *Commercial Bank* v. *Bank of Upper Canada*, 1 Chy. Chamb. 64.

Paying money out of court pending appeal. *Hill* v. *Rutherford*, 1 Chy. Chamb. 121.

The proper mode of appealing from the master's certificate of taxation is by motion, not by petition. *In re Ponton*, 15 Chy. 355.

An appeal from the decision of the referee, under the Act for quieting titles, may be to a single judge. *Armour* v. *Smith*, 16 Chy. 380.

As to the practice on appeal under this Act. See *Re Howland*, 4 Chy. Chamb. 58; *S. C. Ib.* 90.

There is no appeal from a decision on a question which is by the practice purely within the discretion of the judge. *Chard* v. *Meyers*, 3 Chy. Chamb. 120.—Taylor, *Secretary*.

An appeal bond is properly intituled in the cause in the court below. *Campbell* v. *The Royal Canadian Bank*, 6 P. R. 43.—Chy. Chamb.—Holmested, *Referee*.

Decree directing accounts to be taken varied on appeal. Construction of decree in appeal and duty of Master under it. *Gilbert* v. *Jarvis*, 20 Chy. 478.

APPEARANCE.

I. To Writ of Ejectment—*See* Ejectment.

II. Judgment for want of—*See* Fraudulent Judgment—Judgment.

III. To Writ of Summons—*See* Practice at Law.

IV. By Attorney without Authority—*See* Attorney and Solicitor—Practice at Law.

Putting an appearance under the door of the office of the deputy clerk of the crown during office hours, or handing it to him in the street, is not a due entry of the appearance. Such a practice is not to be encouraged. *Grey* v. *Stacey*, 10 L. J. 245.—C. L. Chamb.—Draper.

Where an appearance properly intituled was filed in the office of the deputy clerk of the crown, but was incorrectly entered in the appearance book by defendant's attorney, and plaintiff's attorney not having searched the files was led to believe that no appearance had been entered, the judgment was set aside, but without costs, as both parties had contributed to the mistake. *Moore* v. *Simons*, 1 L. J. N. S. 183.—C. L. Chamb.—J. Wilson.

The proceedings in replevin as regards appearance are regulated by the Replevin Act, not by the C. L. P. Act; and an interlocutory judgment signed as for want of a plea, without any appearance by or for defendant, is therefore a nullity. *Hart* v. *Pacaud*, 28 Q. B. 390.

APPOINTMENT.

Power of—*See* Will.

Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children:—Held, that these appointments were authorized by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further enquiry was directed. *Fenton* v. *Cross*, 7 Chy. 20.

The donee of a power of appointment made a will, not referring to the power, disposing of "the moneys now or at my death invested in mortgages, or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgages:—Held, that the intention of testatrix to appoint the settled estate sufficiently appeared. *Deedes* v. *Graham*, 16 Chy. 167.

APPORTIONMENT.

I. Of Annuity—*See* Annuity.

II. Of Costs—*See* Costs.

III. Of Rent—*See* Landlord and Tenant.

IV. Of Taxes—*See* Assessment and Taxes.

APPRENTICE.

I. Articled Clerks—*See* Attorney and Solicitor.

II. Servants—*See* Master and Servant.

An indenture of apprenticeship is not void but voidable, when contrary to 5 Eliz. c. 4: and that statute is not in force in this province. *Fish* v. *Doyle*, Dra. 328; *Dillingham* v. *Wilson*, 6 O. S. 85.

The 5 Eliz. c. 4, is not in force in U. C., but the 20 Geo. II. c. 19 is; and under sections 1 & 4 jurisdiction is given to two or more justices and cannot be exercised by one; and the party cannot be arrested on the complaint—he must be summoned. *Shea* v *Choat*, 2 Q. B. 211.

Contracts of apprenticeship for less than seven years, entered into before 14 & 15 Vict. c. 1[illegible] are not void, but voidable. *Webster* v. *McBride*, 5 C. P. 109.

Where a father and his son, a minor, entered into articles, and the son by his father's order refused to complete his apprenticeship:—Held, that covenant against the father on the articles and not case for enticing away, was the proper remedy. *Dillingham* v. *Wilson*, 6 O. S. 85.

The plaintiff, in covenant against the father alleged as a breach that the apprentice unlawfully absented himself on a certain day, and

from thence hitherto continued absent from the service of the plaintiff. Plea, as to the absenting, that the apprentice did depart and absent himself by plaintiff's leave and license:—Held sufficient, without pleading a license to continue absent, as the plea only professed to answer the absenting:—Held, also, that the plea need not shew that the license was by deed or in writing. *Black* v. *Stevenson*, 3 Q. B. 160.

By deed between A. B. and C. D., father and son, of the one part, and E. F. and G. H., partners, coach builders, of the other part, the son, with the consent of his father, bound himself apprentice to the coach builders. The instrument contained this clause: "And lastly, for the true and faithful performance, &c., the said A. B., C. D., and E. F. and G. H., do bind themselves unto *each other* in the sum of, &c.:—Held, in debt by the father alone, against E. F. the surviving partner. 1. That all defendant's covenants were with the son and not the plaintiff. 2. That the words "unto each other" did not mean separately and individually, but that *each party* respectively, *i.e.*, E. F. and G. H. jointly to A. B. and C. D. jointly, became jointly bound to the other; and that there was therefore a non-joinder of plaintiffs. Quære: the sufficiency of the declaration as given in the report. *Connell* v. *Owen*, 3 C. P. 249.

A surviving partner is bound by the covenant of himself and his deceased partner to teach an apprentice, until the end of the term for which he was apprenticed. *Connell* v. *Owen*, 4 C. P. 113.

The defendant, a J. P., convicted an apprentice of having absented himself without leave, and adjudged that he should give sufficient security to make satisfaction to his master, according to 14 & 15 Vict. c. 11, and in default be imprisoned for two months. The conviction was quashed: 1, because the articles of apprenticeship were not within the act, the apprentice being a minor, and the articles not executed by any one on his behalf; and 2, because it could not be sustained under the fifth clause of the act for two months' imprisonment, or under the seventh, because the satisfaction to be given was not ascertained. *In re Regina* v. *Robertson*, 11 Q. B. 621.

The plaintiff declared against the heir of W., on W.'s covenant to teach and board and use the plaintiff a specified period, and that in case of W.'s death her heirs, executors, and administrators should perform the covenant:—Held, bad, for—1. By the form of the covenant the heir was not bound; and—2. Upon such a contract, being one of apprenticeship, he could not be made liable. *Frazer* v. *Wright*, 16 Q. B. 514.

Action for damages by reason of defendant's taking the plaintiffs' apprentice, absenting himself. Plea, that before breach the plaintiffs dissolved partnership:—Held, bad, for not shewing an apprenticeship to plaintiffs as partners, and that a dissolution would render the service impossible. *Rowland et al.* v. *Maguire*, 12 C. P. 407.

Upon an application under 29-30 Vict. c. 45, for the discharge of a prisoner committed under the Apprentices and Minors Act for disobedience to his masters, on the ground, inter alia, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm:—Held, that it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his co-partners had not been present and assented to the execution. *Regina* v. *McNaney*, 5 P. R. 438; 7 L. J. N. S. 325.—C. L. Chamb.—A. Wilson.

In covenant against two defendants the indenture sued upon was produced from the custody of defendants', with whom the apprentice had served until his dismissal. It had four seals, and was signed by the plaintiff, his son the apprentice, and one of the defendants:—Held, that there was evidence of execution by both defendants. *Judge* v. *Thomson et al.*, 29 Q. B. 523.

APPROPRIATION OF PAYMENTS.

See ASSESSMENT AND TAXES—PAYMENT—PRINCIPAL AND SURETY.

ARBITRATION AND AWARD.

I. SUBMISSION OR REFERENCE.
1. *What may be referred*, 115.
2. *By and to whom*, 116.
3. *Compulsory Reference*, 118.
4. *Making submission a Rule of Court*, 119.
5. *Construction and effect of*, 120.
6. *Revocation of Submission*, 122.
7. *Submission becoming abortive*, 123.

II. AGREEMENTS TO REFER.
1. *Staying Proceedings under C. L. P. Act*, 123.
2. *Other Cases*, 124.

III. ATTENDANCE OF WITNESSES AND PRODUCTION OF EVIDENCE, 124.

IV. ARBITRATOR.
1. *Proceedings before*, 125.
2. *Powers and duty of.*
(a) *Generally*, 125.
(b) *Evidence and Witnesses*, 125.
(c) *To amend the Pleadings*, 126.
(d) *Ex parte Proceedings*, 126.
(e) *Delegating Authority*, 126.
(f) *Stating case for opinion of Court*, 126.
(g) *When Verdict taken*, 127.
(h) *Disputes between Partners*, 127.
(i) *Directing manner of Payment*, 128.
(j) *In particular Cases*, 129.
(k) *Costs*, 134.
(l) *Altering Award*, 135.
3. *Fees and Remuneration*, 136.

V. UMPIRE OR THIRD ARBITRATOR, 136.

VI. AWARD.
1. *Time of making*, 137.
2. *Who should draw up*, 139.
3. *Form of*, 139.
4. *Executing*, 140.
5. *Construction of*, 141.

6. *Effect of*, 143.
7. *Certainty and Finality.*
(a) *Omitting to find on the Issues*, 144.
(b) *Omitting to dispose of Suit*, 146.
(c) *Matters relating to Land*, 147.
(d) *Other Cases*, 151.
8. *Partial validity*, 153.
9. *Reference back*, 155.

VII. Setting Aside and Staying Proceedings on Award.
1. *For misconduct of arbitrators or parties.*
(a) *In taking or rejecting Evidence*, 158.
(b) *Other Irregularities*, 160.
2. *For Mistake or Repugnancy*, 161.
3. *On the Merits*, 163.
4. *Practice.*
(a) *Time for Moving*, 164.
(b) *Affidavits and Practice*, 166.
(c) *Form of Rule*, 167.
5. *Other Cases*, 167.

VIII. Enforcing Award.
1. *Making Award a Rule of Court*, 169.
2. *By Attachment and Order.*
(a) *Practice*, 169.
(b) *Other Cases*, 171.
3. *By entering Judgment*, 172.
4. *By Action.*
(a) *Pleading*, 173.
(b) *Evidence*, 178.
(c) *Other Cases*, 181.
5. *By Specific Performance*, 182.

IX. Costs.
1. *Right to full Costs*, 182.
2. *Under Rule of Court*, 183.
3. *Other Cases*, 184.

X. Miscellaneous Cases, 185.

XI. In Particular Cases.
1. *Under Boundary Line Commissioners' Act—See* Boundary Line Commissioners.
2. *By Fence Viewers—See* Fence Viewers.
3. *Under Municipal Institutions Act—See* Municipal Corporations.
4. *Under Public School Acts—See* Public Schools.
5. *By Railways. — See* Railways and Railway Companies.
6. *Under Toronto Esplanade Act — See* Toronto Esplanade.
7. *Roads and Bridges—See* Way.

I. Submission or Reference.

1. *What may be referred.*

A prosecution for selling whiskey without a license cannot be compromised without leave of the court, and therefore cannot be referred. Where, although the offence was not submitted, it was tried by the arbitrator, in order to determine the liability of the parties as to costs, so much of the award was set aside. *In re Fraser and Escott*, 1 L. J. N. S. 324.—P. C.—A. Wilson.

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2. *By and to whom.*

One of two partners cannot execute an arbitration bond in the partnership name so as to bind the other partner. *Baby* v. *Darenport*, 3 Q. B. 54.

In an action on a sealed agreement to abide by an award, it is no objection in arrest of judgment that the submission is not stated to be mutual. A declaration that defendant agreed with the plaintiffs to refer :—Held, not supported by an agreement by one plaintiff only on behalf of himself and the others, being his partners. *French et. al.* v. *Weir*, 17 Q. B. 245.

A bond of submission signed by the wife "*well as* the husband, is valid. *McGill* v. *Prout foot*, 4 Q. B. 40.

A. being interested in a lease, B. became security for his performance of the covenants. D. and A. refer disputes connected with the lease :—Held, no objection on the part of D. to the bond of submission, that B. is not a party thereto. *Ib.*

A submission by the Governor in Council under 9 Vict., c. 37, and 10 & 11 Vict., c. 24, is in effect, a submission by the Commissioners of Public Works. *Commissioners of Public Works* v. *Daly*, 6 Q. B. 33.

An action cannot, under C. L. P. Act, 185[illegible] be referred to the judge of any other county than that in which the venue is laid, unless by consent. *McEdward* v. *McEdward*, 3 L. J. N. S. C. L. Chamb.—Robinson.

Quære, whether the resolution in this case was binding upon the municipal council as a reference to determine the amount to be paid to the plaintiff for damage to crops, &c., on land taken. *Hodgson* v. *Municipality of the township of Whitby*, 17 Q. B. 230.

Plaintiff leased to M. for 21 years, renewable upon certain terms. The lease was assigned by M. to defendant as trustee for one F. At the expiration of the first term arbitration bonds were entered into by F. and the plaintiff. The defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at an advanced rent, or that the lessor should pay a certain sum for improvements. The lessee elected to renew, and notified the lessee, who refused to accept at the new rent, and he then brought ejectment :—Held, that the defendant was not bound by the award, the submission being only by his cestui que trust. *McDonell* v. *Boulton*, 17 Q. B. 14.

The rule for a reference, granted on reading the consent to refer endorsed on the record nisi prius, stated that any question of law at the request of either party should be referred to the court, costs of cause, reference and award to abide the event. The order of reference made a rule of court differed from this; 1. By directing that costs, &c., should be in the discretion of the arbitrator; 2. That he should not be required to reserve any legal question. Messrs. W. & B. acted throughout as agents for defendants' attorney, and all the papers were served upon them; and W. was counsel for

fendants both at nisi prius and the arbitration. It was proved that on an undertaking of W., as counsel for defendants, not to raise any question of law, the terms of the reference were altered as above by consent of W., and of counsel for plaintiffs. On motion to set aside the award :—Held, that W. had authority either as counsel or as agent for defendants' attorney to bind the defendants ; and the award was upheld. *Wilson v. The Corporation of the United Counties of Huron and Bruce*, 11 C. P. 548.

An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable ; but—Held, on demurrer to the declaration set out in the report of this case, that an executor or administrator may, as such, refer to arbitration causes of action which arise in the lifetime of the testator or intestate, so as to bind the estate, and without making himself personally responsible ; and, therefore, the declaration being for a breach of submission to perform the award made in pursuance of such a reference, and also on the common counts admittedly against the defendant in her representative character :—Held, that there was no misjoinder of causes of action. *Reid* v. *Reid*, 16 C. P. 247.

One of several executors being indebted to the estate, the matter was left by himself and his co-executors to arbitration, and the arbitrators awarded a large sum against him :—Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, as he had chosen to submit the matter ; and in a suit by the executors he was decreed to pay the amount. *Koelln* v. *McKenzie*, 15 Chy. 331.

Held, on demurrer to a plea setting up the absence of a corporate seal, that a parol agreement entered into by "the duly authorized agents" of an incorporated insurance company to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them, and subsequently lost, was not binding on the company, as not being a contract relating to the purposes for which the company was incorporated. *Calvin* v. *The Provincial Insurance Co.*, 20 C. P. 267.

A. having devised certain real estate, in separate parcels, to B. and C., afterwards incumbered these lands. B. was a feme covert. All questions having arisen between B. and C. as to the amount of the incumbrance to be borne by each, they by mutual bonds, in which B. and her husband joined, agreed to refer such questions ; and an award was made between the parties :—Held, that B. being a feme covert could not enter into such an agreement to refer ; that the statutes as to conveyances by married women of their real estates, did not apply to such agreements ; and that therefore the agreement and award were not binding on her. *Bagley* v. *Humphries*, 11 Chy. 118. See *Great Western R. W. Co.* v. *Baby*, 12 Q. B. 106.

An application was made on behalf of the plaintiff for an order referring it to the Master of the court to ascertain whether a submission to arbitration would be for the benefit of an infant defendant. The order was granted, on the ground that the established practice in England was in its favour. The effect of the order would be of course to bind the infant by the award, and this is the only way in which an infant can be bound by a submission without the aid of an Act of Parliament. *Allan* v. *O'Neill*, 2 Chy. Chamb. 22.—Spragge. See *Secord* v. *Costello*, 17 Chy. 328.

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3. *Compulsory Reference.*

Where in an action on the common counts for goods sold, interlocutory judgment having been signed, the plaintiff desires a reference to the Master under C. L. P. Act, 1856, s. 143, it must be shewn that no dispute is likely to arise either as to quality or price. *Hutchison* v. *Sideaways*, 14 Q. B. 472.

Assumpsit for work upon a railway. The plaintiff contended that the written contract was determined by certain changes made in the work, and that he could recover upon a quantum meruit, while defendants insisted that the agreement was binding, and all the work in question done under it, it being admitted that if so plaintiff had been fully paid. It appeared to the learned judge at the trial that the case would involve the investigation of long accounts, and he ordered a reference under section 156 of the C. L. P. A., 1856, directing that the court should determine, upon the report of the arbitrators, how far the contract was in force :—Held, that the order must be set aside, for by the statute all the issues joined must be disposed of, either by reference or verdict, and the judge cannot direct a reference making the award subject to the opinion of the court.—Semble, that as the necessity for going into accounts was dependent upon the existence of the contract, the more convenient course would have been, first, to take the necessary evidence for determining whether the plaintiff was bound by it, and the verdict of the jury upon that point, after applying the law to the facts proved, and then, if they found in plaintiff's favor, to refer the amount. *Wells* v. *Gzowski*, 14 Q. B. 553.

It is for the judge to determine whether the case will involve the investigation of "long accounts," within the statute, subject to be reviewed by the court only when it can be said that he plainly did not exercise any discretion on this point, but applied the act where it was altogether inapplicable ; and—Held, that this was not such a case. *Ib.*

No reference will be made under C. L. P. Act, 1856, s. 84, if it appear that defences are intended upon which the opinion of a jury is desirable. *Evans* v. *Jackson*, 3 L. J. 88. C. L. Chamb.—Robinson.

Action upon a policy of insurance on goods : Pleas, denying the policy ; setting up that the goods were not destroyed ; that the plaintiff gave no notice of the loss as required ; misrepresentation as to the value of the goods and mode of heating the premises ; increase of risk by alteration. After the examination of one witness the judge at nisi prius ordered a compulsory reference :—Semble, that the compulsory reference was authorized ; but—Held, that the defendants having attended at the arbitration without protest, were precluded from this objec-

tion. *Newman* v. *The Niagara District Mutual Fire Insurance Co.*, 25 Q. B. 435.

On 7th April an order of reference was made in chambers, and served the same day on defendant's attorney. The arbitrator made an appointment for 16th May following, when the plaintiff attended with four witnesses to prove his account. An enlargement, applied for by defendant's attorney, until the 22nd, was opposed by plaintiff, but was afterwards consented to and allowed on the terms, that, in case of an award made in plaintiff's favour on or before the 24th, defendant was to have up to the 26th inclusive to move against it, but if no award made on the 24th, defendant was not to be bound by the consent. On the 21st defendant moved to set aside the order of reference.. No notice was given to plaintiff of this intended motion, or that the enlargement sought for was to be without prejudice: Held, that defendant had waived his right to move against the order. *Barton* v. *Hubertus*, 16 C. P. 440.

Woodcock *v.* Kilby, 4 Dowl. Pr. 730, referred to, as indicating the course defendant should have taken to enable him to move; and—Semble, that if defendant had applied to the same, or some other judge, for a rescission of the order, and in case of failure had given notice of his intention to move the court as soon as it should sit, and renewed such notice when served with the arbitrator's appointment, protesting, in case he was forced on, against the proceedings, and if both plaintiff and arbitrator had been clearly informed of this,—he would have been in a position to make the motion, if the judge ought not to have made the reference. *Ib.*

At nisi prius a certain question of fact in a cause was left to the jury, a verdict was taken for 1s., and the other questions involving matters of account, it was ordered that "the plaintiff's claim in this cause, and all matters in difference between the parties in this cause, except the question decided by the jury, be referred to P. L., with power to increase the verdict or order a verdict to be entered for defendant," who had pleaded a set-off. On motion against the award, it was objected that this was a reference of all matters in dispute between the parties, and therefore unauthorized:—Semble, that it referred only the matters in dispute in the cause; but it was clear that nothing more was intended or had been considered by the arbitrator, and no objection had been made to the order; and—Held, therefore, that if necessary the order would be amended. *Blanchard* v. *Snider*, 28 Q. B. 210.

Under s. 158 of the C. L. P. Act a country cause may be referred to the arbitration of an officer of the proper court at Toronto, as well as to the county judge. *Bigelow* v. *Cleverdon*, 6 P. R. 3.—C. L. Chamb.—Dalton, *C. C. & P.*

See VII. 2, p. 161.

4. *Making Submission a Rule of Court.*

An agreement to make the submission a rule of court, introduced afterwards:—Held, invalid. *In re Thirkell*, 2 Q. B. 173.—P. C.—Jones.

The absence of a rule making the order of Nisi Prius a rule of court, when objected to, must be shewn by something more than mere inference from the affidavits filed. *Hawke* v. *Duggan*, 5 Q. B. 636.—P. C.—Draper.

An award having been made, and defendant's bond of submission having been given to him by mistake, the court ordered him to bring it in, and that it should be made a rule of court. *Hamilton* v. *Alford*, 1 P. R. 13.—P. C.—Draper.

The court can amend the nisi prius order of reference after it has been made a rule of court. *Laurie* v. *Russell*, 1 P. R. 65.—P. C.—McLean.

5. *Construction and effect of.*

Where the submission as to some of the questions expressly states that the majority may award, this power, though not repeated throughout, extends to all matters referred upon which the arbitrators cannot agree. *Thirkell* v. *Strachan*, 4 Q. B. 136.

Where after proceedings have commenced on a replevin bond, the parties to the replevin go to arbitration, without the consent of the surety, all further proceedings against the surety will be stayed;—aliter where the reference to arbitration takes place with his assent. *Hutt* v. *Gilleland*, *Hutt* v. *Keith*, 1 Q. B. 540. *Burk* v. *Glover*, 21 Q. B. 294.

An offer by defendant to refer a case to arbitration cannot be considered as a waiver of irregularity in service of the notice of trial. *The Grand River Navigation Co.* v. *Wilkes*, 8 Q. B. 249.

Debt on award made by arbitrators appointed to value the plaintiff's property, through which defendants had by their by-law directed a road to be made:—Held, that defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson* v. *The Municipal Council of Port Hope*, 10 Q. B. 405.

Declaration a joint bond by defendants M. & G. to perform an award concerning all differences between plaintiff and defendants, averring an award that M., *one of the defendants*, was indebted to the plaintiff in a sum named, and directing him to pay it by a certain day. Plea by the other defendant, G., that before the execution of the bond the plaintiff had sued defendants on a contract, which G. denied being a party to: that to settle said action the bond was entered into, which recited the suit, and the matters referred were the said action and all differences between the plaintiff and defendants jointly, not either defendant singly: that the only matters brought before the arbitrators, upon which they awarded, were the said action and the matters in question therein, and that the award was as follows: (setting it out in substance as stated in the declaration.):—Held, on demurrer, plea bad—Robinson, C. J., dissenting and holding that the bond, under the circumstances might be taken distributively, and each be held bound to do what should be awarded against himself. *Gerrie* v. *McDonell et al.*, 18 Q. B. 16

The plaintiff sued defendant on a bond, conditioned not to commence business as an hotelkeeper within three years in a certain township. At the Assizes the case and all matters in difference in connection with it were referred. A verdict was taken for the penalty subject to the award, and a memorandum of reference endorse

on the record, signed by the attorneys. By this minute power was given to the arbitrator to examine the parties and their witnesses, certify for costs, and amend the pleadings; but it contained no agreement not to bring error, and no rule of reference had been drawn up. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract:—Held, no rule of reference having been drawn up, that it could not be assumed that defendant had referred on the ordinary condition not to bring error:—Held. also, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade, it was necessary to shew a consideration, and none appeared in the declaration. *Dawes* v. *Wilkinson*, 19 Q. B. 604.

Where a cause and all matters in difference had been referred, and an award made:—Held, that all questions of law as well as fact were submitted: that a demurrer afterwards set down for argument must therefore be struck out of the paper; and that objections to the award as had upon its face could not be raised as giving a right thus to proceed with the action. *McCallum* v. *McKinnon*, 22 Q. B. 175.

Where plaintiff sued an attorney for the amount of an account, and defendant set off several bills of costs, including three in the County Court, several in the Division Court, and some for insolvency and conveyancing, and the cause was referred; and after the reference, plaintiff, an unprofessional man, signed a memorandum as follows: "I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to taxation of all items, properly taxable as aforesaid, charged for costs in suits:"—Held, that not only were the costs in the County Court suits taxable, but the costs in the Division Courts, insolvency fees, &c., were also taxable. *Kelly* v. *Henderson*, 1 L. J. N. S. 132.—C. L. Chamb.—Hagarty.

Under a submission "to determine which of the several items of claim the estate of Mrs. B. is bound as matter of law to pay":—Held, that the arbitrator was authorized to consider the liability for interest, although he could not correctly find the amount due. *Armstrong* v. *Cayley*, 2 Chy. Chamb. 128.—Mowat.

Semble, that a reference of "the plaintiff's claim in this cause, and all matters in difference between the parties in this cause," refers only the matters in dispute in the cause. *Blanchard* v. *Snider*, 28 Q. B. 210.

Attendance before arbitrators and going into case by consent—effect of as a parol submission. See *Hall* v. *Alway*, 4 O. S. 375; *Ruthven* v. *Rossin*, 1 Chy. 370; *McCulloch* v. *White*, 33 Q. B. 331.

See *O'Dougherty* v. *Fretwell*, 11 Q. B. 65, p. 130.

See V. p. 136; VI. 1, 4, pp. 137, 140, and X. 3, p. 184.

6. *Revocation of Submission.*

[See C. L. P. Act, s. 179.]

A reference by order of nisi prius might be revoked by either party before award made. *Burrell* v. *Mills*, 2 O. S. 209.

Where a railway company took possession of lands without consent of the owner, and held them for some time, and an arbitration was agreed on, by which it seemed probable that the price would be fixed at a sum very much larger than the company would be willing to pay:—Held, that the company could not, on this ground, revoke the submission. *Great Western R. W. Co.* v. *Miller*, 12 Q. B. 654.

Declaration on a bond of submission, alleging a revocation of the submission, and non-performance of the award. Plea, that defendant before the award revoked the submission (not saying by an instrument under seal). Replication, that the bond was executed after the C. L. P. Act, 1856, and contained nothing to shew an intention that it should not be made a rule of court: that the revocation in the declaration and plea mentioned is the same; wherefore, and by force of the statute, the arbitrators were empowered to and did proceed notwithstanding, although defendant did not attend. Rejoinder, that neither the bond nor condition was at the commencement of this suit, nor at the time of the revocation, a rule of court, or in any way exempted from the effect of the said revocation:—Held, plea and rejoinder both bad. *Wood* v. *Closter*, 16 Q. B. 490.

Semble, that the restraint upon revocation without leave of the court or a judge, provided by 7 Will. IV. c. 3, s. 29, is extended by the C. L. P. Act, 1856, s. 97, to all submissions without words purporting that they are not to be made a rule of court. *Ib.*

On an application to be allowed to revoke a submission, the discretion of the court ought to be exercised in the most sparing and cautious manner. In this case revocation was allowed. *In re Wright and the Corporation of the County of Grey*, 8 L. J. 104.—P. C.—Burns.

Held, that under the declaration in this case, which was on the common counts, the plaintiff clearly could not recover for damages of any kind; and the plaintiff's counsel having admitted this on the application for leave to revoke, the court would not revoke the submission on the ground, amongst others, that such a claim was being entertained by the arbitrators. *Ross* v. *The Corporation of Bruce*, 21 C. P. 41.

The arbitrator appointed by one of the parties having refused to act, he appointed a new arbitrator, who formerly acted as his attorney, but not in this suit:—Held, that the submission must be revoked. *Tully* v. *Chamberlain*, 9 L. J. N. S. 237.—P. C.—Morrison.

Upon a reference to determine the damage sustained by plaintiff by reason of the taking and detention by defendant of a certain schooner, the arbitrators awarded $2,200 65c.; and, among other items, $40 for travelling and law expenses. Upon a motion to set aside the award, the court, without admitting the legality of the charge, refused to interfere, it being the duty of the party objecting to apply to the judge upon affidavit to revoke the submission, and not

to content himself with merely objecting to the allowance of the item by the arbitrator. *Carreth v. Fortune*, 12 C. P. 504.

Where the time for making an award under a submission made an order of court has expired, and the parties afterwards meet by consent, such meetings operate as a mere parol submission, which is revocable; and if revoked, the time for making an award cannot afterwards be enlarged by the court; and the party making the revocation will not be restrained from merely prosecuting his suit from the point at which it was arrested by the reference. *Ruthven v. Rossin*, 8 Chy. 370.

7. Submission becoming Abortive.

Where a verdict has been taken by consent for plaintiff, subject to a reference, the court will not, on account of the failure to make an award, allow judgment to be entered for the verdict, though such failure be imputed to defendant. *Watson v. Fothergill*, 5 O. S. 135.

Where a verdict had been taken in 1860, subject to a reference, which was never proceeded with, and a second verdict was taken in 1863:—Held that the second verdict was irregular while the first remained, and must be set aside with costs. *Kelly v. Henderson*, 3 P. R. 198.—P. C.—Draper.

Cause referred at nisi prius, and verdict taken for the plaintiff, subject to a reference, award to be made by a certain day, with power to the arbitrators to enlarge the time; they did enlarge it once, but no award was made, and after that day was passed the defendant's attorney was asked by the plaintiff's attorney to consent to a further enlargement, and declined; no application had been made to the arbitrators. The court held they could do nothing more than set aside the conditional verdict. *Monkson v. Eyre*, 5 Q. B. 470.

A cause was referred at nisi prius, the award to be made by the 1st of July, with leave to the arbitrator to enlarge, but no verdict was taken. He enlarged the time until the 2nd of August, and after hearing the evidence adjourned till the 4th to enable defendants to procure their witnesses. Neither party attended again, nor took any steps to procure a further enlargement, and the plaintiff gave notice of trial for the autumn assizes. Defendants notified him that they would move against the proceedings, as the order of reference was yet in force, but the plaintiff went on and took a verdict, defendants not appearing:—Held, that defendants, if they desired the reference to continue, should have applied for an enlargement before the verdict, and that by omitting to do so they had waived their right; but under the circumstances the verdict was set aside without costs, upon an affidavit of merits. *Miller v. Hogg*, 2 P. R. 299.

See, also, *Ruthven v. Rossin*, 8 Chy. 370, supra; *Mott v. Loucks*, T. T. 1 & 2 Vict. p. 172; *Gould v. Freeman*, 3 Q. B. 270, 172

II. Agreements to Refer.

1. Staying Proceedings under C. L. P. Act.

By a condition endorsed on a policy of insurance, the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators. An action having been brought on the policy, and an application made under C. L. P. Act, s. 167, to stay proceedings:—Held 1. That the arbitration intended by the condition was not merely a valuation. 2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute. 3. Per Dalton, *C. C. & P.*, that the plaintiff was a "party" within the meaning of that section. Proceedings were accordingly stayed. *McInnes v. Western Assurance Co.*, 5 P. R. 242.—C. L. Chamb.—Dalton, *C. C. & P.*, and Gwynne. Affirmed in 30 Q. B. 580.

Where parties had agreed to refer any future differences that might arise under a partnership between them to arbitration, and one filed a bill for an account, injunction, and receiver, proceedings were stayed under the C. L. P. Act, though an answer had been filed in the suit, and the bill contained allegations of fraud. *White v. Kirby*, 2 Chy. Chamb. 414.—Taylor, *Secretary*.

2. Other Cases.

Upon a covenant in a lease that in case of fire a fair deduction should be made in the rent, to be ascertained by arbitration as provided, when neither had appointed an arbitrator:—Held, that the tenant was not precluded from making a jury the medium by which a deduction was to be made. Quære, if the landlord had offered to arbitrate, and the tenant had refused, could the reduction then be referred to a jury. *McGill v. Proudfoot*, 4 Q. B. 33.

Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided; and in case of failure of plaintiff to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final. In an action for wrongful dismissal by the plaintiff:—Held, that the agreement to refer being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action. *Griggs v. Billington*, 27 Q. B. 529.

III. Attendance of Witnesses and Production of Evidence.

[See 36 Vict. c. 12, O.]

On an application under 7 Will. IV., c. 3, s. 30, for an order on witnesses to produce documents before an arbitrator, it must be shown that they are such as witnesses would be compelled to produce at a trial. *Carroll v. Ball*, 1 L. J. 12.—C. L. Chamb.—Draper.

An order compelling attendance of witnesses under that section will be granted on an ex parte application, upon affidavit that the cause has been duly referred: that the arbitrator has appointed a day for proceeding; and that certain parties (giving their respective places

residence) are necessary and material witnesses for the party applying. *Gallena* v. *Cotton*, 3 L. J. 47.—C. L. Chamb.—McLean. *Carroll* v. *Ball*, 3 L. J. 12.—C. L. Chamb.—Draper.

Upon a submission to arbitration being made an order of court, a suit is pending within the meaning of C. S. C., c. 79, s. 4, so as to enable the superior courts to issue process to compel the attendance of witnesses resident out of their jurisdiction. *Elliott* v. *Queen City Assurance Co.*, 6 P. R. 30.—Chy. Chamb.—Spragge.

IV. Arbitrator.

1. *Proceedings before.*

Where a cause has been referred, notice of the sitting of the arbitrators must be given to the attorney in the cause, not the party. *Allan* v. *Brown*, Tay. 335.

Where either party to an arbitration objects to an irregularity in conducting the arbitration—as, for instance, to a certain person administering the oath to the witnesses—and takes his chance of the award, he cannot afterwards, on the same ground, impeach the award. *Black* v. *McEathron*, 3 Q. B. 184. P. C.—McLean.

The court set aside an award made under 16 Vict., c. 181, s. 33, as to the damages to be paid to a party through whose land the municipality had opened a road, where it appeared that no notice had been given to the municipality of the meeting of the arbitrators, and that no one had attended on their behalf. *In re Johnson and the Municipality of Gloucester*, 12 Q. B. 135.

2. *Powers and duty of.*

(a) *Generally.*

Semble, that upon a general reference at Nisi Prius, the arbitrators may, as to the amount of the verdict, be governed by matters in favour of defendant which could not have been brought in question at the trial. Also, that where the verdict is intended to be a final settlement between the parties, they may consider matters not embraced within the technical statement of the causes of action on the record, when advanced on the part of the plaintiff. *Watson* v. *Toronto Gas Co.*, 5 Q. B. 523. See also *Williams* v. *Nugair*, 10 Q. B. 24.

An action against a railway company for penning back water, and thus preventing the use of plaintiff's mills, having been referred, the arbitrators awarded £375 damages:—Held, that it could not be assumed from the fact that the annual rental of the plaintiff's mills was only £50, that the damages had been given for more than six months before the suit, and—Semble, that arbitrators, when not restrained by the submission, are not bound as judges are in a court of law. *Glen* v. *Grand Trunk R. W. Co.*, 7 P. R. 377.—P. C.—Burns.

(b) *Evidence and Witnesses.*

The award will be set aside if arbitrators examine one of the parties upon oath when not authorized to do so by the submission. *Stocking* v. *Crooks*, Tay. 492.

In an arbitration under C. S. U. C., c. 54, the arbitrators did not take or file any oral or documentary evidence under s. 358, sub-s. 13, but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the Warden at the last meeting of the arbitrators, and their correctness was not disputed:—Held, sufficient. *In re The Corporation of the United Counties of Northumberland and Durham, and The Corporation of Cobourg*, 20 Q. B. 283.

See VII. 1 (a) p. 158.

(c) *To amend the Pleadings.*

An action on a bond for the performance by defendant P. of his duties as collector, was referred at nisi prius, with the same power to the arbitrator as the judge had to amend the pleadings, and under this he allowed pleas to be added, one of which raised the defence that the sureties were relieved by an extension of time given for the collection, which question he referred to the court, with others. Per McLean, J., the objection should not have been allowed by the arbitrator. *Todd* v. *Perry*, 20 Q. B. 649.

See *Severn* v. *Cosgrave*, 2 L. J. N. S. 11, p 164.

(d) *Ex parte Proceedings.*

Held, that upon the facts in the case, the arbitrator was justified in proceeding ex parte. *Proctor* v. *Jarvis*, 15 Q. B. 187.

Before an arbitrator proceeds ex parte, he should satisfy himself by proper evidence that necessary notice of the appointment has been served, so as to enable the party notified to appear, and it should clearly be shewn that the absence of the party notified is wilful; nor should he proceed ex parte, unless the notice conveys the information that ex parte proceedings will be taken if the party served does not attend, nor if a reasonable excuse is given for such non-attendance. The party prosecuting the arbitration ought to take care that all proper notices are served on the opposite party, and should be able to shew, if he desire to proceed ex parte, that the other party has been properly notified, and that he wilfully absents himself. A party, therefore, who had not fulfilled his duty in this respect, was ordered to pay costs, and the case was referred back. *In re Potter* v. *Knapp*, 5 P. R. 197.—P. R.—Gwynne.

(e) *Delegating Authority.*

Award held bad for delegation to third parties, in awarding a division of property by persons to be selected by plaintiff and defendant. *Harrington* v. *Edison*, 11 Q. B. 114.

(f) *Stating case for opinion of Court.*

Where the reference was, "with power to the arbitrator, if either party requires it," to submit questions of law to the court:—Held, enabling only, not compulsory. *Kesteven* v. *Gooderham*, 20 Q. B. 500. See also this case, pp. 156, 157.

The reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence:"—Held, that this rendered it imperative on the arbitrators to state for the court any legal point raised, and to distinguish, if required, the subject for which they awarded in plaintiff's favour, if any legal question was raised applicable thereto. *Ross* v. *Corporation of Bruce*, 21 C. P. 41.

The arbitrators having neglected their duty in this respect, the court refused to refer the matter back to them, and set aside the award. *Ross* v. *Corporation of Bruce*, 21 C. P. 548. See, also, *Murphy* v. *Cotton*, 14 Q. B. 426.

See *Wells* v. *Gzowski*, 16 Q. B. 42, p. 156: *Gooderham* v. *Denholm*, 18 Q. B. 214, p. 186.

(g) *When Verdict taken.*

Where a verdict was taken, subject to be reduced, the costs to abide the event, an award for defendant was set aside as beyond the submission, the arbitrators having power only to reduce the verdict, and the condition as to costs giving no authority by inference to deprive the plaintiff of them altogether, but applying only to the amount of costs to be taxed. *Shaw* v. *Turton*, 4 O. S. 100.

Where a verdict was taken for 1s. damages, subject to an award, and the award did not in any manner dispose of the verdict or cause:—Held, not final, and bad. *Beatty* v. *McIntosh*, 4 Q. B. 259. See, also, *Roddy* v. *Lester*, 14 Q. B. 259.

A verdict was taken for plaintiff, subject to be reduced, increased, or set aside, and a verdict or non-suit to be entered for defendant, under the provisions of the C. L. P. Act. The award directed that the plaintiff's verdict should be set aside and a verdict entered for defendant; and it further awarded a sum of money as due and owing from plaintiff to defendant on a set-off:—Held, that the award did not in terms direct a verdict for defendant for any sum of money, but even that if it did such an award would be proper under the reference. *Martyn* v. *Dickson*, 2 L. J. N. S. 209.—P. C.—A. Wilson.

Action on the common counts. Pleas, never indebted, payment, and set-off. A verdict was taken subject to be increased, reduced, or a verdict entered for defendant by the award of an arbitrator, who directed a verdict in defendant's favour for $750, under the plea of set-off:—Held, that he had power to do so. *Johnston* v. *Anglin*, 29 Q. B. 372.

See *Williams* v. *Squair*, 10 Q. B. 24, p. 152.

See. VI. 7, p. 144.

(h) *Disputes between Partners.*

Where arbitrators were authorized to dissolve a partnership:—Held, that they might, in order to adjust the terms of the dissolution, award upon disputes arising as to the partnership subsequent to the submission. *Thirkell* v. *Strachan*, 4 Q. B. 136.

As to the power of arbitrators, under a very general submission, to cancel an existing partnership agreement, and award prospective damages to the partner losing by such cancellation. *Crouse* v. *Parke*, 6 Q. B. 362.

On a submission between A. and defendant, described as executor of B., of all matters in difference between the said parties in reference to the business carried on by said A. and B. in partnership, with liberty to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matters referred:—Held, that the arbitrators could order a sum to be paid by defendant absolutely, not merely as executor. *Mulligan* v. *Wright*, 10 Q. B. 408.

See *McLean* v. *Kezar*, 3 C. P. 444, p. 153.

(i) *Directing Manner of Payment.*

Arbitrators may order that notes be given in satisfaction of the sum awarded. *Thirkell* v. *Strachan*, 4 Q. B. 136.

Defendants gave plaintiff and her husband a bond in £500, conditioned that if plaintiff should survive her husband, they would maintain her in her house during her life, &c. An action brought on this contract was referred. The arbitrators awarded that defendants should pay plaintiff £500, on or before the 20th November, 1852, in full of the causes of action in the suit, and of all matters in dispute referred; and further, that the plaintiff should not enforce payment of said £500, provided defendants should respectively give the plaintiff good security on real estate for the payment to her of the following sums, that is to say, setting out certain mortgages to be given by each defendant on or before 1st December, 1852. Plaintiff declared on this in debt, as on award "that the defendants should pay to the plaintiff £500, on or before the 20th of November, 1853." Defendants denied the award as stated; and in another plea set it out and alleged that it was void, as beyond the authority of the arbitrators:—Held, that there was no absolute claim to the money on the 20th of November, as stated in the declaration, but the right of action was suspended until the 1st of December and would then depend on the execution of the mortgages as directed:—Held, also, that the award was void, as the arbitrators had exceeded their power in giving damages not recoverable in the cause, and in imposing conditions beyond their authority. *Hill* v. *Hill*, 11 Q. B. 262.

An award directing that two defendants should give to plaintiff a good endorsed negotiable promissory note for the sum found due:—Held unauthorized. *George* v. *Smith*, 4 C. P. 291.

Such an award means that they shall give their own note, negotiable, with an endorser; a note made by one payable to and endorsed by the other, will not suffice. *Ib.*

Where a reference is general, as of a contract and all matters relating to it, arbitrators can name a day for paying the money; but it is different where only a cause is to be decided upon. *Addison* v. *Corbey*, 11 Q. B. 433.

Held, that a direction to pay money to E., a stranger to the reference, could not be upheld. *In re Campbell and Brown*, 2 P. R. 291.—P. R.—Richards.

Arbitration on erection of town into city. Making award retrospective and giving time for payment :—Held, authorized. Limiting the continuance of the award, and authorizing a ratable division of expenses instead of settling a sum to be paid :—Held, not authorized. *In re The Municipal Council of the County of Middlesex and the Mayor of the City of London*, 14 Q. B. 334.

Held, in an action between school trustees and teacher, that the arbitrators exceeded their powers in awarding payment within thirty days. *VanBuren* v. *Bull*, 19 Q. B. 633.

The sum awarded was directed to be paid forthwith, whereas the statute under which the reference was made allowed a year from the award, or from any rule of court ordering payment :—Held, that this part of the award, which was clearly bad, might be separated from the rest. *In re The Corporation of the City of Toronto* v. *Leak*, 23 Q. B. 223.

G. recovered a judgment against M. and C., upon a note made by them. One J. was also said to have been interested with them, and liable for the debt it represented, though not actually a party to it. It was also said that he was in effect a partner with G. in the transaction. M. made large payments on the judgment, but C. paid nothing. Upon a reference of certain matters in dispute between J. and M., it was left to the arbitrator, amongst other things, to determine whether or not M. or J., or which of them, was liable, or to what extent, in respect of the judgment or the promissory note whereon the judgment was recovered, and to make any orders which the arbitrators should think proper to settle the liabilities of the said parties in respect thereof. The arbitrators awarded, that J., as between him and M., was liable to pay all the balance of moneys still unpaid upon the judgment, and that J. should pay and satisfy the same within one calendar month, and should cause the said judgment and writs of execution to be satisfied and discharged, and satisfaction to be entered on the roll of the said judgment :—Held, that the latter part of the award (which was objected to) was authorized. *In re McLean* v. *Jones*, 1 L. J. N. S. 206.—P. C.—A. Wilson.

See *Stewart* v. *Webster*, 20 Q. B. 469, p. 150; *Ford* v. *Bond*, 15 C. P. 613, p. 155; *Dalton* v. *McVider*, 5 Chy. 501, p. 155.

(j) *in Particular Cases.*

Matters relating to land.]—Award of arbitrators, under a special submission, to determine the title to land in dispute and concerning certain lots :—Held, authorized. *Everett* v. *Whiteford*, 9 Q. B. 261.—P. C.—Jones.

Quære :—Have arbitrators the power, under 9 Vict., c. 37, and 10 & 11 Vict., c. 24, to award consequential damages. *Commissioners of Public Works* v. *Daly*, 6 Q. B. 33.

Held, per cur, McLean, J., dubitante, that under the general words of the submission in this case, authority was given to arbitrate as to the fee simple of land in dispute, if a matter in difference, which must be presumed. *Benedict* v. *Parks*, 1 C. P. 370.

Plaintiff held from defendant a lease of a farm for a term unexpired. Plaintiff and defendant, with D. and M., became bound to each other by bond, with a condition reciting that the parties had agreed to separate, and cancel all arrangements theretofore made, and leave all controversies between them to the arbitration of T. and P., and should they not agree, to choose an umpire whose decision should be final. The umpire awarded that defendant should release and give up to the plaintiff, "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay, and that the lease then held by both parties of said farm be immediately cancelled :"—Held, that the bond was not in itself a surrender of the term; that even if so intended the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vict., c. 7, s. 4; that the award would not amount to a deed of surrender by the defendant; and therefore that the plaintiff could not eject the defendant. *O'Dougherty* v. *Fretwell*, 11 Q. B. 65.

In this case the arbitrators awarded a certain sum for the defendant's interest in the lands as lessee, "and for the lumber taken by the said company now piled upon that part of the wharf taken by the said company" :—Held, that the arbitrators had no power to award compensation for the lumber. *Great Western R. W. Co.* v. *Hunt*, 12 Q. B. 124.

The awards in these cases, making special provision with regard to the repairing and keeping up a mill-dam, &c., were held bad as beyond the submission and power of the arbitrators. *In re Haley* v. *Ennis* 1 P. R. 173.—P. C.—McLean. *Abbott* v. *Skinner*, 7 L. J. 158.—C. C.—Mackenzie.

The submission after recititing that the company had located their line, so as to run across a portion of the land of the other party, and that disputes existed as of the value of the land required and also the damage the said party might sustain thereby, referred "all disputes and differences which exist between the said parties." The arbitrators included damages for slashing done on either side of the line taken by the company :—Held, within their authority. *Great Western R. W. Co.* v. *Chauvin*, 1 P. R. 288. -P. C.—Draper.

The parties to this suit referred the matters in difference between them, stating in the submission in the alternative what the arbitrators were to direct—either that defendants should deliver up the premises, or that a lease should be executed, embodying certain stipulations in the submission set forth. They awarded that a lease should be executed, and that, should it be deemed necessary for the mutual benefit of the parties that during the term certain work should be done, defendants should pay one-fifth of the expense thereof :—Held, that the arbitrators exceeded their power in ordering defendants to pay, &c; they should, according to the submission, have directed a lease to be executed, containing such a stipulation. *Abbott* v. *Skinner*, 11 C. P. 309

Under a special reference of disputes between the Northern R. W. Co. and the town of Barrie as to the construction of a branch line into the town; it was—Held, that the directions as to the conveyance of certain lands by the company,

and a release of their claims as to other land, were authorized, and the latter not objectionable for omitting to state to whom it was to be made; and that, as to the amount awarded, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed no more was given. *In re Corporation of town of Barrie and Northern R. W. Co.*, 22 Q. B. 25.

Held, on a reference of disputes respecting the title to certain land, that the arbitrators were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to direct that a portion of the money which was to be paid to defendant for it, should be appropriated to his wife without his consent. *Bond* v. *Bond*, 15 C. P. 613.

Defendant sold land to one L., and took a mortgage for part of the purchase money, L. conveyed to the plaintiff, subject to this mortgage. Defendant still owned the adjoining land, and disputes as to the boundary having arisen, the plaintiff brought trespass, which, with all matters in difference, was referred. The arbitrator awarded for the plaintiff, and directed that the defendant should discharge this mortgage :—Held, beyond his authority, the mortgage not being mentioned in the reference, and the award was set aside. *Stewart* v. *Brown*, 2 P. R. 158. —P. C.—Burns.

An action against a railway company for penning back water, and thus preventing the use of plaintiff's mills having been referred, the arbitrators awarded £375 damages :—Held, that it could not be assumed from the fact that the annual rental of the plaintiff's mills was only £250, that the damages had been given for more than six months before the suit. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.—P. C.—Burns.

Where the Crown Lands Department, in deciding to allow one of two applicants to purchase land, directed that the amount properly payable by him to the other should be ascertained by arbitration; and the arbitrators found a certain sum due, but directed, in the event of the payee failing to deliver up possession to the other in two months, that $400 should be deducted from this amount :—Held, beyond their authority; their duty being simply to find the amount payable. *Barnes* v. *Boomer*, 10 Chy. 532.

Other Cases.]—Where a submission recited that A. agreed to give up his stock in trade to B., and to assign him all claims and debts due in respect thereof, on payment of such sums as arbitrators should decree; and they awarded that B. should pay a certain sum, and assume the payment and responsibility of debts due by A. on account of said stock :—Held, that the award was warranted by the submission. *Fowke* v. *Lister*, E. T. 3 Vict.

Debt on a submission bond of all matters in difference. Plea, no award. The plaintiff replied, setting out an award on one matter, for the payment by defendant of a certain sum to plaintiff, and averred that the parties had agreed to withdraw all but that matter from the arbitrators, and to settle the other matters themselves; but if they could not, then to refer them back to the arbitrators, who, within the time for awarding under the submission, awarded on the other matters in favour of the plaintiff; and then set out as a breach the non-payment of the money under the awards. On demurrer :—Held, that the first award was clearly good: and—Semble, the second was good also. *Baby* v. *Davenport*, 2 Q. B. 65.

In proceedings under 16 Vict. c. 190, to ascertain the amount to be paid for materials for the construction of a road, the arbitrators cannot confer upon the company a prospective right by awarding an amount as a compensation for materials to be taken at a future time. *Gillam* v. *Cleghorn*, 7 Chy. 83.

The arbitrators awarded damages for materials taken generally, not for the purpose of the road only :—Held, ultra vires. *Ib.*

Held, under the special circumstances of this case, on demurrer on various grounds, that the declaration and award were good: that the other defendant was liable for nonpayment of the $50, though it was a matter in difference between the plaintiff S. and defendant M. only *Stinson* v. *Martin et al.*, 22 Q. B. 154.

When a case has been referred after interlocutory judgment signed, and all matters are submitted to the arbitrator, he is not compelled by such judgment to award for the plaintiff. *Peto* v. *Jarris*, 1 P. R. 81.—P. C.—McLean.

Award on a submission of differences in two suits, set aside for excess of authority in awarding payment by certain lessees to W. of any sum whatever, there being no claim by him against them embraced in either of the actions referred. *In re Wheeler* v. *Murphy*, 2 P. R. 32 —P. C.—McLean.

C. had sued B. on a contract by which he agreed to build for B. a dam, B. to find certain materials. On a reference of all differences relating to this contract :—Held, that the arbitrator might consider claims by B. against C. arising out of the contract; but that a direction to pay money to E., a stranger to the reference, could not be upheld. *In re Campbell* v. *Brown*, 2 P. R. 291.—P. C.—Richards.

The submission referred the cause and all matters in difference to A., C., and G., or any two of them. C. and G. made an award reciting the verdict taken, and directed that the plaintiff on request should execute a bond in a certain penalty conditioned to indemnify defendant against two suits specified :—Held, that the award of indemnity was authorized. *Jones* v. *Anderson* v. *Cotton*, 2 P. R. 109.—P. C.—Hagarty.

A. leased a right of way over a railway, from B., at a rental to be determined by arbitrators, and covenanted to run "at least one train per day, with leave to run more, the maximum number of trains to be fixed by said arbitrators." An award fixing a rental for ensuring four trains a day instead of one :—Held bad, and referred back. *Fowler* v. *Port Hope Lindsay and Beaverton R. W. Co.*, 6 L. J. 13.—C. L. Chamb.—Hagarty.

Held, that under the circumstances of this case the arbitrator was justified in allowing as a set-off the judgment of defendant against the plaintiff and another, as against any claim the plaintiff had against defendant. *Latta* v. *Wallbridge*, 7 L. J. 207.—P. C.—Richards.

Upon a reference of all matters in difference between the parties :—Held, that an award directing the delivery of a certain promissory note was, under the special circumstances, not an excess of authority. *Lund* v. *Smith*, 10 C. P. 443.

Where a reference was specific, of accounts rendered up to 31st December, 1864, and the award went far beyond this, the court, upon the application of the person against whom the award was made, denying any binding authority to thus extend the reference, and his oath being unanswered, set aside the award. *In re Roberts and Lorimer*, 2 L. J. N. S. 11.—P. C.—Hagarty. See, also, *Stewart* v. *Webster*, 20 Q. B. 469.

In an action on an award it appeared that the plaintiff in April gave in a statement of his claim, with interest up to that time, at twelve per cent., the usual rate allowed in the dealings between the parties. Time was allowed defendant to prove his defence; and in making their award on the 6th of October, the arbitrators added interest at the same rate up to the 1st of September, on the sum claimed in April for principal and interest :—Held, that they had power to do this, and to award interest on the amount until paid. *Stewart* v. *Webster*, 20 Q. B. 469.

G. recovered a judgment against M. and C., upon a note made by them. One J. was also said to have been interested with them, and liable for the debt it represented, though not actually a party to it. It was also said that he was in fact a partner with G. in the transaction. M. made large payments on the judgment, but C. said nothing. Upon a reference of certain matters in dispute between J. and M., it was left to the arbitrators, amongst other things, to determine whether or not M. or J., or which of them, was liable, or to what extent, in respect of the judgment or the promissory note whereon the judgment was recovered, and to make any orders which the arbitrators should think proper to settle the liabilities of the said parties in respect thereof. The arbitrators awarded that J. as between him and M., was liable to pay all the balance of moneys still unpaid upon the judgment, and that J. should should pay and satisfy the same within one calendar month, and should cause the said judgment and writs of execution to be satisfied and discharged, and satisfaction to be entered on the roll of the said judgment :—Held, that the latter part of the award (that which was objected to) was not an excess of arbitrator's authority. *In re McLean and Jones*, 2 L. J. N. S. 206.—P. C.—A. Wilson.

By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant, on or before the 20th of March then next, for which the defendants covenanted to pay so much per log. It was provided that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks. By a submission under seal, reciting this agreement and that differences existed in respect thereof, and of the advances made thereon by defendant to plaintiffs, all such differences were referred to arbitration. The arbitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, $866. In an action on this award, defendants pleaded award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that, owing to the snow, the plaintiffs could not proceed with the work and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the costs of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference :—Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiff for work done under the verbal agreement, which was not within the submission; that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action. *Tully* v. *Chamberlain*, 31 Q. B. 299.

Where a submission was made to an arbitrator "to determine which of the said several items of claim the estate of Mrs. B. is bound as matter of law to pay :". Held, that this confined the authority to deciding the question of legal liability, and did not authorize the arbitrator to find sums payable. *Armstrong* v. *Cayley*, 2 Chy. Chamb. 128, 163.—Mowat.—VanKoughnet.

See I., 5, p. 120.

(k) *Costs.*

Where the costs of the cause, reference and award were to abide the event of the cause, and the arbitrators assessed the costs of drawing up the award and their fees at a certain sum :—Held, that merely assessing the amount was no ground for setting aside the award. *Boyle* v. *Humphreys*, 1 P. R. 187.—P. C.—McLean.

Where the costs of the cause and reference were to abide the event, and the award fixed the costs of the reference and award :—Held award bad as to that part. *Jones* v. *Reid*, 1 P. R 247. P. C. Burns.

Held, in an arbitration between school trustees and teacher, that the arbitrators exceeded their powers in awarding costs. *VanBuren* v. *Bull*, 19 Q. B. 633.

By a submission the costs of the "reference and award" were to be in the discretion of the arbitrators, and they directed that defendants should pay the costs of the "submission and award" :—Held, that the award was final, for that the costs of the submission included the costs of reference. The submission and award being set out in full in the declaration, quære, whether this objection could be raised by plea, or whether defendant should not have demurred. *Ellwood* v. *The Corporation of the County of Middlesex*, 19 Q. B. 25.

At nisi prius, in an action for unliquidated damages, a verdict was taken for $500, subject to a reference, with power to the referee to certify for costs as a judge at nisi prius. The referee reduced the damages to $33.50, and made his award without certifying :—Held, that he had no power to certify afterwards :—Quære, whether he had power to certify for the costs of the county or intermediate court. *Smith* v. *Forbes*, 8 L. J. 72.—C. L. Chamb.—Draper.

Held—1. That a certificate for full costs, signed by arbitrators after they had made their award, and had finally separated, and when not all together, could not entitle plaintiff to full costs of suit. 2. That the words "costs of suit," as used in an award, have no reference to any particular scale of taxation, and so cannot per se entitle plaintiff to full costs. 3. That after entry of judgment by plaintiff it is too late to move to refer back to enable an arbitrator to certify for costs. *Keep* v. *Hammond*, 9 L. J. 157. —C. L. Chamb.—Draper.

A cause was referred at nisi prius, and a verdict taken subject to the award. Costs of the cause were to abide the event, and the arbitrators had power to certify for costs as the judge at the trial could have done. The award reduced the verdict to $68, and directed that the defendant should pay the plaintiff's costs according to the scale to be certified by the Court of Q. B. :—Held, that the arbitrators having express powers to certify, and having omitted to do so, a judge in Chambers could not order full costs. *Calder* v. *Gilbert*, 3 P. R. 127.—C. L. Chamb. —Wilson.

See *Jordan* v. *Ambler*, 8 L. J. N. S. 67, p. 185.
See IX. p. 182.

(l) *Altering Award.*

An arbitrator's authority ceases after he has executed an award, and he has no power to alter or amend such award. *Helps* v. *Roblin*, 6 C. P. 52.

Action against a municipal corporation upon an award in favour of the plaintiff for land taken from him for a road. It appeared that the plaintiff named one arbitrator, H., and the reeve another, S. ; and they being unable to agree upon a third, the county judge appointed one B. B. and H. on the 30th June signed the award sued on, giving £40 to the plaintiff. Afterwards the council called another meeting of the arbitrators, when all three attended, and B. and S. afterwards executed another instrument as their award, by which the plaintiff was to have only £3 10s. :—Held, that the first award was good, and the plaintiff entitled to recover upon it : that under the 16 Vict. c. 181, s. 33, it was sufficiently published when it was signed by the arbitrators : that defendants having appointed an arbitrator, it was unnecessary to prove any by-law for opening the road ; that an action was clearly maintainable upon such an award ; and that it was no objection to the declaration that it was upon a submission to three arbitrators while two only executed the award, for the statute authorizes two to act. *Harpel* v. *The Municipality of the Township of Portland*, 17 Q. B. 455.

Held, under the facts of this case, that arbitrators acting under the School Act, had no power to resume consideration of the matter, and issue a warrant to levy, after having once made the award. *VanBuren* v. *Bull*, 19 Q. B. 633.

Arbitrators under the School Act executed an award, the description of the lot not being fully inserted, but a blank being left therefor, which was afterwards filled in, and the word "lot," altered into "gore :"—Held, that the award was bad. *Ryland* v. *King*, 12 C. P. 198.

The arbitrators having discovered a mistake in the amount awarded, destroyed their award and executed another. The court set the second award aside. *Benson* v. *Love*, 1 Q. B. 398.—P. C.—Jones.

3. *Fees and Remuneration.*

[See 29 Vict. c. 32.]

The School Act, C. S. U. C., c. 64, does not provide for the payment of arbitrators, or of the costs of a reference thereunder. *Weaver* v. *Bull*, 10 C. P. 369.

Arbitrators' fees may be referred to the master for taxation. *Scott* v. *Grand Trunk R. W. Co.*, 3 P. R. 276.—C. L. Chamb.—Richards.

Whether named in award or not. *Laurie* v. *Russell*, 1 P. R. 65.—P. C.—McLean.

Where the Master refused to tax an arbitrator's fee upon proof only that a note had been given to the arbitrator for the amount, a judge in chambers refused to interfere. *Tyrrell* v. *Ward*, 8 L. J. 21.—C. L. Chamb.—Draper.

Arbitrators have no power to fix the amount of their own fees. *McCulloch* v. *White*, 33 Q. B. 331. See also *Boyle* v. *Humphrey*, 1 P. R. 167. —P. C.—McLean.

A County Court judge, on a reference to him under sec. 158 of the C. L. P. Act, is not entitled to any fees as arbitrator. On a reference to him at the trial under sec. 160, merely adding to his name the designation of County Court judge, but not referring the matter to him as such judge, he will be entitled to his fees. *Wood* v. *Foster*, 6 P. R., not yet reported.—C. L. Chamb. —Galt.

V. Umpire or Third Arbitrator

After the arbitrators and umpire had heard the plaintiff's witnesses, the defendants refused to give their evidence, and their arbitrator would not concur in the award. The umpire, in consequence, gave notice to defendants to produce their witnesses, but the time which he gave was too short, and he awarded on the evidence already heard. The court set the award aside. *Proudfoot* v. *Trotter*, 6 O. S. 163.

Where arbitrators disagree on some items, and call in an umpire to give his opinion thereon, and adopt it as their own, he need not sign the award. *In re Cayley and McMullen*, 3 Q. B. 121. —P. C.—Hagerman.

Construction of submission bond, as to whether the umpire therein named had the power simply to report upon the state of certain premises, or further than this, to estimate their value and make an award thereupon. *McGill* v. *Proudfoot*, 4 Q. B. 40.

Appointment of umpire need not be in writing if the reference does not in terms require it. *Ray* v. *Durand*, 1 C. L. Chamb. 27.—P. C.—Macaulay.

An award of umpirage is valid, though made before the time limited for the award of the arbitrators, if they disagree and do not make an award afterwards. *Ib.*

Under a submission by four persons to two arbitrators, "and should they not agree, to choose an umpire :"—Held, that the umpire should have been appointed by the parties, not by the arbitrators. *O'Dougherty* v. *Fretwell*, 7 Q. B. 65.

A submission was to K. and M., and such person as they should appoint. The affidavits were contradictory as to the fact of a verbal appointment of C., and there was no appointment in writing proved; but it was sworn that he was chosen by defendant, as one of two proposed by plaintiff, and that he sat with the others and voted in defendant's presence without objection. The court refused to interfere against an award by K. & C. *Osborne* v. *Wright*, 12 Q. B. 65.

Where a case is referred to the award of two persons, and in case of disagreement to the decision of a third, either as an umpire or as a third arbitrator, the parties have the right to insist that such third person shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made. *In re Soules* v. *Morton*, 4 P. R. 249.—P. C.—Morrison.

Where under a submission it was provided that arbitrators should appoint an umpire in case of disagreement, their appointing such an umpire was held, on motion to make the award a rule of court, sufficient evidence of their having disagreed, without any allegation of that fact on affidavit. *White* v. *Kirby*, 2 Chy. Chamb. 452.—Taylor, *Secretary*.

The reference was to two arbitrators, with power for them to appoint an umpire, who was to make an award if the two disagreed; an umpire was accordingly appointed; and, the arbitrators differing, the umpire made an award:—Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference, as a condition precedent to the umpire's authority coming into force, as well as their free judgment in the appointment of the umpire; and that one of the parties holding private conferences with one of the parties was sufficient to avoid the award of the umpire. *In re Lawson* v. *Hutchinson*, 19 Chy. 84. See *Eddy* v. *Lester*, 14 Q. B. 259.

Where arbitrators disagree in some items, and bring the investigation call in an umpire to give his opinion thereon, and adopt it as their own, he need not sign the award. *In re Cayley and McMullen*, 3 Q. B. 124.—P. C.—Hagerman.

VI. Award.

1. *Time of making.*

Submission by bond. On the day limited the arbitrators were prepared to award, but all parties believing the time would not expire until next day, deferred the publication then at defendant's request, and heard further evidence on both sides next day, and then made their award:—Held, that the extension of time was beyond submission, and that assumpsit was maintainable thereon for not performing the award, although no action would lie on the bond. *Bell* v. *Alway*, 4 O. S. 375.

An agreement enlarging the time need not contain a consent that it may be made a rule of court, as well as the submission. *Crooks* v. *Chisholm*, 4 O. S. 121.

Where the submission is, that the award shall be delivered by a certain day, if it be ready for delivery by that day, it is sufficient. *Galbraith* v. *Walker*, E. T. 2 Vict.

Where a verdict was taken subject to a reference, and before the time limited for the award expired it was enlarged by rule, and afterwards by consent again enlarged:—Held, that the award was good under the last submission, although it would have been invalid if made under the rule, and the enlargement by consent might have been made a rule of court, as being part of the original reference. *Charles* v. *Hickson*, T. T. 3 & 4 Vict.

The enlargement must be made a rule of court as well as the original submission. *Masecar* v. *Chambers*, 4 Q. B. 171.

Though no power has been given by the reference, the court, notwithstanding, under 7 Will. IV. c. 3, s. 29, have power to enlarge in their discretion. *Jones* v. *Russell*, 5 Q. B. 303.

A rule issued as of Easter Term generally, to enlarge until the last day of the term:—Held, to relate back to the first day of term, and to operate as an admission that the time had not then expired. *Hawke* v. *Duggan*, 5 Q. B. 636.

Where the rule of reference and an enlargement were made rules of court, the court refused to attach for non-performance of the award, as the enlargement was not shewn to have been assented to by both parties. *Ruthven* v. *Ruthven*, 5 Q. B. 273.

A rule making an enlargement ordered by the arbitrators, a rule of court was set aside, *such* enlargement not having been consented to by both parties; but the award was upheld, the parties having verbally assented to enlargement. *Ruthven* v. *Ruthven*, 5 Q. B. 276.

An award may be made before the time to which the arbitrators have enlarged. *Tracey* v. *Hodgest*, 7 Q. B. 5.—P. C.—Draper.

After expiration of the time limited, arbitrators cannot, without (even if they can with) the concurrence of both parties to the submission, make a binding award. *Ruthven* v. *Ruthven*, 8 Q. B. 12.

Declaration, first count, that defendant, by bond, agreed that one C. should abide by an award respecting differences between C. and the plaintiff, if made before the 6th of June: that the arbitrators, with the consent of C., of the defendant, and of the plaintiff, enlarged the time to the 1st of July, and made their award on the 12th of June, alleging non-performance of such award. Second count.—That defendant requested plaintiff to extend the time, and plaintiff, on such request, and in consideration that the defendant promised him to continue bound, and that C. or the defendant would perform the award, agreed, for the convenience of said defendant and C., that the time should be extended; setting out the award, &c., as in the first count:—Held, on demurrer, both counts bad, as shewing no valid enlargement. *Sexton* v. *Woods*, 15 Q. B. 585.

Held, that a verbal consent to an enlargement of the time for making an award is sufficient under C. L. P. Act, s. 171. *Jones* v. *Prentice*, 2 L. J. N. S. 205.—P. C.—A. Wilson.

The declaration for non-performance of an award set out in full a deed of submission to

arbitration between plaintiff and defendant, which deed provided that the award should be made on or before the 1st of July then next, or such further time as the arbitrators by writing, endorsed on the submission, might from time to time appoint. It was then averred, that after the arbitrators had entered upon the reference, the plaintiff and defendant, by writing under their hands, enlarged the time for making the award to the 1st of December, and the award was made on the 30th of November. Fourth plea: that the enlargement mentioned was not made till after the 1st of July, and when the arbitrators' authority had ceased. Replication, setting out the endorsement enlarging the reference, and averring that the parties, with a full knowledge of the facts, appeared subsequently before the arbitrators, and proceeded without objection to the enlargement, and afterwards the award was made as in the declaration mentioned:—Held, upon demurrer, 1. That the action, if founded upon the deed, must fail, the enlargement not being in accordance with the deed; but, 2. That setting out the deed in the declaration did not necessarily make it the basis of the action, for it might be treated as inducement; and the deed and the circumstances following it, read together, shewed a valid award on a parol submission by the parties, and afforded a good cause of action. The declaration was therefore held good, as regarded the enlargement, and the fourth plea bad: Held, also, that the replication was not a departure; but that as the declaration shewed a new submission by the parties, the facts in the replication as to the attendance of the parties after the enlargement were immaterial, and the replication therefore bad. *McCulloch* v. *White*, 33 Q. B. 331.

An arbitrator having failed, owing to the loss of the papers in the cause, to make his award within the time limited, a judge extended the time under C. L. P. Act, c. 22, s. 172. *Johnston* v. *Anglin*, 5 P. R. 62. Chamb. Morrison.

Where the time for making an award under a submission made an order of court has expired, and the parties afterwards meet, by consent, such meetings operate as a mere parol submission, which is revocable; and if revoked, the the time for making an award cannot afterwards be enlarged by the court; and the party revoking will not be restrained from merely prosecuting the suit from the point at which it was arrested by the reference. *Ruthven* v. *Rossin*, 8 Chy. 370.

On applying for an order to enlarge the time, the original submission should be produced, or if in the custody of the opposite party, it must be shewn that he refuses to give it up; it is not sufficient that the party applying swears merely that he cannot procure it. *Johns* v. *Furze*, 1 Chy. Chamb. 260.—VanKoughnet.

2. *Who should draw up.*

It is not desirable that the attorney of either party should draw up the award. *Manley* v. *Anderson*, 2 P. R. 354.—P. C.—Richards.

3. *Form of.*

All matters in difference between the plaintiffs and defendant having been referred, the award was that the defendant should stand fully acquitted and discharged of and from all such matters:—Held, certain, final, and conclusive. *Ryan et al.* v. *Pomroy*, 1 P. R. 59.—P. C. McLean.

An award that the plaintiffs have no cause of action against defendant:—Held, sufficient, as meaning that at the time of submission they had no cause of action. *Ib.*

Under a submission giving no power to award a verdict, the award was, "I am of opinion that the defendants are entitled to the verdict in the cause, and, by the authority vested in me as arbitrator, confirm this opinion, and decide the case accordingly:"—Held, that the award might be upheld as an informal expression of opinion in favour of defendants, there being no express direction to enter a verdict. *Creighton* v. *Brown et al.*, 1 P. R. 331.—C. L. Chamb.—Richards.

A memorandum in writing, signed by arbitrators, as instructions to a solicitor to draw award:—Held, not to be a binding award. *Shaw* v. *Morton*, 13 C. P. 223.

See *Davis* v. *McGivern*, 11 Q. B. 112, p. 119.

4. *Executing.*

Where the submission as to some of the questions expressly states that the majority may award, this power, though not repeated throughout, extends to all matters referred upon which the arbitrators cannot agree. *Thirlwall* v. *Strachan*, 4 Q. B. 136.

Arbitrators having signed a memorandum of their judgment at the same time and place, may execute the more formal award separately and at different times, but within the time allowed. *Williams* v. *Squair*, 10 Q. B. 24.

Semble that an objection that two of the arbitrators made the award without notice to the third, can be taken advantage of in an action on the award. *Smith* v. *George*, 12 Q. B. 370.

Held, under the circumstances of this case, not a fatal objection that the award had been signed at different times, and when the arbitrators were not all present together. *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns.

Where a submission is to two, and such third person as they shall choose before proceeding, an award by the two only, the third not having acted, is bad. *Sloan* v. *Halden*, 14 Q. B. 49[illegible].

An award executed by two of three arbitrators at different times and places, and after the time expired, cannot be supported. *Helps* v. *Robinson*, 6 C. P. 52.

The reference was to two, with power to appoint a third, the award to be made by any two. The arbitrators met, and two of them determined to award in a particular way. They were afterwards told that it was out of their power so to award; and they then at a subsequent meeting, altered their decision. The third arbitrator was not present at the last meeting, and it appeared that he had been notified of the intention to meet again, but no proper notice had been given to him of the time and place of meeting, nor of the intended alteration in the award:—Held, that the award must be

set aside: that by arbitrator of the two making the not consider his and therefore he to enable him to priety of the pro *McDonald and*

The three arbit met and discuss separated, unable dissent as final. for one party wr amounts found o might appear on t they might be able court, stating that D.'s colleagues as that the claimant ware of it. C. a plication, and deter notice was given t two days afterwa further consulting h , and Morrison, ther two arbitrato and of their intenti ward. Per Drap found to do so, for nd finally understo he letter disclosed he award was there raper, C. J., diss. *e City of Toronto*

Held, under the c se, that the notic he meeting to mak ent. *Anderson* v. Hagarty.

Under a submissio y any two, where ough to be execut ecuted by two only all three for sett ven to the one who rs after:—Held, i P. R. 370.—P. C.—

Where an award itrators, and afte ted, and the other w by letter, pub ed upon, it was uld have met for dence in such a cas dissenting arbitr thod. *Jekyll* v. W

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fferences having on the plaintiff's which defendant h ted to pay plaint

set aside: that by sending notice to the third arbitrator of their intention to meet again, the two making the award had shewn that they did not consider his declaration of dissent as final, and therefore he should have had proper notice to enable him to confer with them on the propriety of the proposed change in the award. *In re McDonald and Present*, 16 Q. B. 84.

The three arbitrators, C., D., and M., having met and discussed all the matters referred, separated, unable to agree, M. expressing his dissent as final. On the next day the attorney for one party wrote to D., requesting that the amounts found on the different heads of claim might appear on the face of the award, so that they might be able to obtain the opinion of the court, stating that the letter was intended for D.'s colleagues as well as himself, and desiring that the claimant's attorney should be made aware of it. C. and D. considered this communication, and determined to disregard it, but no notice was given to M., and an award was made two days afterwards by C. and D., without further consulting him in any way. Per Hagarty, C., and Morrison, J.—It was the duty of the other two arbitrators to notify M. of the letter, and of their intention to settle and execute the award. Per Draper, C. J,—They were not bound to do so, for their disagreement was fully and finally understood when they separated, and the letter disclosed no new facts or evidence. The award was therefore set aside on this ground. Draper, C. J., diss. *In re The Corporation of the City of Toronto and Leak*, 23 Q. B. 223.

Held, under the circumstances stated in this case, that the notice to the third arbitrator of the meeting to make up the award was sufficient. *Anderson* v. *Cottom*, 2 P. R. 109.—P. C.—Hagarty.

Under a submission to three, the award to be by any two, where the award was drawn up as though to be executed by the three, but was executed by two only, and no final meeting had of all three for settling the same, nor notice given to the one who did not sign it, until some days after:—Held, invalid. *Martin* v. *Kervan*, 2 P. R. 370.—P. C.—Burns.

Where an award was agreed upon between arbitrators, and afterwards one of them dissented, and the others, after discussing his new view by letter, published the award as first agreed upon, it was set aside, because they should have met for the discussion: a correspondence in such a case being insufficient, though the dissenting arbitrator did not object to that method. *Jekyll* v. *Wade*, 8 Chy. 363.

5. *Construction of.*

An award for a certain sum, and that a verdict shall be entered for the said sum, naming a large sum, is good for the smaller one. *Charles* v. *Gibson*, T. T. 304, Vict.—P. C.—Macaulay.

Where an award fixes no day for payment, a party suing on it, is not, as of right, entitled to interest. *Bentley* v. *West*, 4 Q. B. 98.

Differences having arisen about defendant's right on the plaintiff's land to embank a stream on which defendant had a mill, defendant was awarded to pay plaintiff £10 a year, so long as he should hold for his own use the premises on which he had such occasion to go, and which the plaintiff was directed to convey to him:—Held that the payment was to be every year, as long as defendant's interest continued, although he might not have occasion to go on the plaintiff's land. *Pickle* v. *Perrin*, 1 Q. B. 387.

An award made under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, awarded a certain sum to A. "for the damage done to his property in the village of Milles Roches, by the construction of the Cornwall Canal.", stating no further particulars of damage. Affidavits however were filed to shew that the sum awarded must have been given, from its amount, for consequential, and not direct damage. But:—Held, that such allowance not being stated in positive terms; and the award being silent on the subject, as it might be, the court could not assume the fact to be so, and upon that ground (if a valid one) set aside the award. *Commissioner of Public Works* v. *Daly*, 6 Q. B. 33. See *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377; *In re Town of Barrie and the Northern R. W. Co.*, 22 Q. B. 25.

The meaning of arbitrators, when an award is made, is not to be gathered from affidavits, or from any other source than the award itself. *Keep* v. *Hammond*, 9 L. J. 157; *Smith* v. *Forbes*, 8 L. J. 72.—C. L. Chamb.—Draper.

Held, under the special terms of the award in this case, that defendants were bound to pay *monthly* for the expense of a new wheel in a mill, in the same manner as for the other repairs: that the plaintiff had the right to judge of the necessity therefor; and that in declaring upon the award it was sufficient to aver that it was deemed necessary, and that the plaintiff proceeded to put it in, as by the award he might do. *Abbott* v. *Skinner*, 20 Q. B. 414. See *S. C.* 7 L. J. 158.—C. C.—Mackenzie.

An award found that on 1st September, 1860, defendant was indebted to plaintiff in £3249, and ordered him to pay it accordingly, with interest half-yearly until paid. Quære, as to the intention and effect of this direction. *Stewart* v. *Webster*, 20 Q. B. 469.

Plaintiffs declared on a bond, conditioned that W., their treasurer, should pay over all moneys received since the 1st of January, 1866, averring that on that day he had in his hands a large sum, and received further sums up to the 6th of April, 1868, when he was dismissed; and that he accounted for all moneys received before that day, but not for a large sum received since. Plea, alleging payment of all moneys since that day; and issue thereon. The case being referred, the arbitrator found that W. admitted $3,031 to be due by him on the 1st of January, 1866: that he had accounted for all moneys received since; and that of all moneys received up to his dismissal, including the $3,031, the balance was $1,806:—Held, that as the breach was only in respect of moneys received since the 1st of January, 1866, the plaintiff upon this finding could recover nothing. *The Corporation of the Township of Rawdon* v. *Ward*, 27 Q. B. 609.

Fence viewers awarded that defendant should open a ditch from the line fence between himself and defendant, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty

rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, &c. ; said ditch to be made before the 1st October, 1865 : Semble, that the award was not bad, as decided in Murray v. Dawson, 17 C. P. 588, for omitting to specify the time within which each party was to perform his share of the work, for that the time mentioned applied to both. *Dawson* v. *Murray*, 29 Q. B. 464.

See VI. 3, p. 139.

6. *Effect of.*

Where arbitrators, to whom disputes arising from the overflowing of three acres of the plaintiff's land by water thrown back by defendant's mill, were referred, awarded damages to the plaintiff for the injury, and that defendants should have a full fall of nine feet, and no more, for their mill-dam, provided that the water on the plaintiff's land was not raised thereby ; and the defendants raised their dam to nine feet, and overflowed five acres more of the plaintiff's land :—Held, that the award did not prevent his recovery of compensation for such further injury. *Casler* v. *Ransom et al.*, 5 O. S. 513.

A plaintiff in ejectment who, before action, has submitted the question of the possession of the premises to arbitration, is estopped by an award in favour of defendant. *Doe d. Galbraith* v. *Walker*, E. T. 2 Vict.

An award upon a question respecting real property, expressly referred, is binding upon the parties, so far as respects the rights of either to bring or defend an ejectment against the other. *Doe* d. *McDonald* v. *Long*, 4 Q. B. 146.

An award made pending a cause does not stay proceedings. If the plaintiff proceed defendant must plead the award puis darrein continuance. *Fido* v. *Wood*, E. T. 2 Vict.

A verdict or award for damages against one of two joint trespassers, is in itself a bar, whether paid or not, and has the same effect as a satisfaction by him in precluding any action against his co-trespasser. But in pleading an award to an action of debt, in which two are jointly bound, there, unless payment be averred, it is no bar. *Adams* v. *Ham*, 5 Q. B. 292.

An award made after the time has elapsed, cannot be taken as evidence of an account stated. *Ruthven* v. *Ruthven*, 8 Q. B. 12.

Action by indorsee against executors on an note for $860, made by testator, averring a promise by defendants as executrix and executor to pay. Pleas, 2. That defendant did not promise ; 3 and 4. Want of consideration ; 5 and 6. Fraud. Replication to all the pleas, by way of estoppel : an arbitration and award as to the liability of defendants as executors, &c., to pay the note, &c., (setting out the terms of the submission and award).—Held, on demurrer, replication bad, as the matter of it did not estop defendants as to the second plea, and because it did not appear on the face of the submission or of the award, that the plaintiff at the time of the reference, and of the making of the award, was the holder of the note. *Cleal* v. *Elliott*, 1 C. P. 252.

Covenant against the executors of a lessor for not rebuilding after loss by fire. The third plea set up an award as to the damages sought to be recovered between the plaintiff and one G. M., who, it was averred, was assignee of the premises under the will of the plaintiff's lessor for a term in the said will mentioned ; but it was not averred that the plaintiff had obtained satisfaction through this award :—Held, on demurrer, third plea bad, as shewing no defence. *Proudfoot* v. *Trotter*, 12 Q. B. 226.

In an action against the makers of a joint and several note payable to R. or bearer, one defendant suffered judgment by default, and the other pleaded, that after the note fell due, and while it was in R.'s hands, disputes arose between R. and this defendant respecting it, among other matters, which were referred : that the arbitrators awarded that defendant should pay R. a sum named, and that he and R. should execute mutual releases ; and that the plaintiff took the note after it fell due, with notice of the facts. At the trial the submission and award were proved, and that the plaintiff was present at the arbitration : that the note was disallowed to R., because this defendant, being a surety only for the other maker, had been discharged by giving time ; and that the plaintiff then stated that he had no claim upon the note :—Held, that the note being several, the plea was good, though the action was against two, and the award related to one only : that it was unnecessary to aver performance of the award : and that defendant was entitled to a verdict. *Folwell* v. *Hyde and Caslor*, 20 Q. B. 565.

The finding of an arbitrator, when unimpeached, is treated as res judicata between the parties to the submission. *Bell* v. *Miller*, 1 Chy. 385.

An administratrix was sued by her brother for a debt alleged to have been due by her husband, the intestate, and judgment was recovered ; subsequently a reference was made in respect of other moneys come to her hands for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties all acted as if these trust moneys, and the debts of the estate, were to be considered and dealt with together, but the infants were not represented before the arbitrators :—Held, that the infants were not bound by the award. *Secord* v. *Costello*, 17 Chy. 328.

See *O'Dougherty* v. *Fretwell*, 11 Q. B. 65 ; 130 ; *Campbell* v. *Howland*, 19 Q. B. 18, p. 19 ; *Sullivan* v. *King*, 24 Q. B. 161, p. 180.

7. *Certainty and Finality.*

(a) *Omitting to find on the Issues.*

Assumpsit. Pleas, general issue, and set-off. A verdict was taken for the plaintiff, subject to a reference ; and the arbitrators awarded "that at the time of the commencement of the action, or at any time afterwards, the plaintiff had not any cause of action whatever against the defendant," and directed a verdict for defendant for £20 10s. 1d. :—Held, that both issues were sufficiently disposed of. *Toovey* v. *Morton*, 2 Q. B. 100.—P. C.—Jones.

Where a cause, with several issues joined, is referred, with costs to abide the event, and the arbitrators award a certain sum to the plaintiff, without saying anything about the issues, which are not necessarily from their nature determined by the award in favour of the plaintiff, the award is bad. *Bernard* v. *Strachan*, 2 Q. B. 128.

Where in trespass to personal property, and several pleas pleaded, a verdict was taken, subject to a reference, and the award determined the cause in favour of the plaintiff, and reduced the verdict to £7 10s., the court refused to set aside the judgment on the award, on the ground that the award was void for not disposing of the issues. *Wood* v. *Moodie*, 3 Q. B. 79.

Where a cause was referred at nisi prius, under a rule of reference providing, "that the costs of the said cause shall be disposed of as follows: the costs on demurrer to be subject to the judgment of the court on the issues in law, upon which the arbitrators are to assess the damages sustained by the plaintiff, and the costs on the issues in fact and the costs on the said reference shall be in the discretion of the said arbitrators," &c.; and the award said nothing respecting the issues in law, and no damages were assessed thereupon:—Held, good. *Masecar* v. *Chambers*, 3 Q. B. 186.—P. C.—McLean.

Declaration on the common counts. Pleas, non-assumpsit, payment, and set-off. A verdict was taken for plaintiff, subject to the award of W. H. "upon all matters in difference between them, as well in this suit as all other matters up to the commencement of this suit:" costs to abide the event. The arbitrator awarded that the plaintiff had good cause of action against the defendant in the said cause, and on the matters so submitted, and was entitled to a verdict therein; and assessed the damages to be paid by defendant to the plaintiff in said cause £43 8s.:—Held, that the award was good; that it disposed by necessary inference of all the issues in the cause, and was not uncertain. *Charles* v. *Carroll*, 9 Q. B. 357.

The declaration and pleas being the same as in the last case, all differences in the suit were referred; costs of the suit, reference and award, to abide the event of the award. The arbitrators, reciting in their award that they had heard the proofs *concerning the premises*, awarded *thereupon concerning the same*, that all proceedings in the cause should cease, and that defendant should pay to the plaintiff £33 12s. 1d., in full of all demands in the cause:—Held, that there was a sufficient determination of the cause, and reasonable inference of a finding on each issue. *Allen* v. *Martin*, 1 P. R. 191.—P. C.—Draper.

The submission directed a specific finding on particular issue, and the arbitrator gave only general award for defendants. A summons to set aside the award on this ground was discharged, on condition that defendants should pay the costs of this issue to be taxed to the plaintiff. *Creighton* v. *Brown*, 1 P. R. 331. C. L. Chamb.—Richards.

Where the reference was of all matters in difference and actions between the parties, costs of the reference and award and of said actions to be in the discretion of the arbitrators, and power was given to the arbitrators to order and determine what they should think fit to be done by either of the parties respecting the matters referred; and the referees ordered, among other things, that a certain sum should be paid and accepted "in full satisfaction and discharge of all the said actions and matters in difference;" also directing that no further proceedings should be taken in the suits:—Held, good, for it put an end to the actions, so that it was unnecessary to award upon the several issues, or find specifically upon the subject of costs. *In re Brown and Overholt*, 2 P. R. 9.

See IV. (g) p. 127.

(b) *Omitting to dispose of Suit.*

Where certain matters between A. and B. were referred, and also all costs of suits by either party, civil or criminal, and the award was that B. should pay a large sum to A., and also all costs of suits:—Held, sufficiently final, without stating that the suits should cease; and the award was upheld, though the court were strongly impressed against the justice of it. *Ducat* v. *Green*, 4 O. S. 110.

Where a verdict was taken for 1s. damages, subject to an award, and the award did not in any manner dispose of the verdict or cause:—Held, not final, and bad. *Beatty* v. *McIntosh*, 4 Q. B. 259.—P. C.—Jones.

Award held bad for failing to give any directions about the action, or the costs of it. *Roddy* v. *Lester*, 14 Q. B. 259.

Under the special circumstances of this case:—Held, that the award was bad: 1. For want of a finality as to Chancery suit referred; for by dismissing the bill as to W. only, the suit was left still undisposed of as to costs and otherwise as between the plaintiffs and the other defendants. 2. Because, as the sureties were directed to pay a large proportion of a gross sum, including accounts not arising under the lease, it was not clear that they were not declared liable for claims for which they could not be held responsible. *In re Wheeler* v. *Murphy*, 2 P. R. 32.—P. C.—McLean.

C. had sued B. on a contract, by which he agreed to build for B. a dam—B. to find certain materials, &c. Afterwards they entered into an agreement, reciting that differences had arisen between them in reference to this contract, and referring the same:—Held, that the submission authorized the arbitrators to consider claims by B. against C. arising out of the agreement; that the omission to dispose of the suit by the award was no objection, as it was not mentioned in the reference nor shewn to have been brought before the arbitrators; and that the award was good, except as to a direction to pay money to E., a stranger to the reference. *In re Campbell* v. *Brown*, 2 P. R. 291.—P.C.—Richards.

Held, upon the award set out in this case, that the replevin suit was clearly and finally disposed of. *Stinson* v. *Martin*, 22 Q. B. 154.

Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others, the costs of an action in the C. P. between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay

him all the costs of the reference and of the said action, and that they should execute mutual releases. Breach, non-payment of the costs. Defendant pleaded, 1. Non est factum; 2. That the arbitrators did not make any such award. The award mentioned no suit, but awarded the costs of reference, "and also all costs that may have been incurred by any legal process through which the matter relating to this arbitration may have passed previous to this award." The plaintiff's attorney in the suit in C. P. produced the bill of costs in that suit:—Held, that the award was sufficiently certain and final, if the existence and substance of the suit and its connection with the matters referred had been properly set out in the declaration and proved; but that, on these pleadings, the suit and the fact of its reference might be taken to be admitted; and a verdict for the plaintiff was therefore upheld. *Hibbert* v. *Scott*, 24 Q. B. 581.

See *Faulkner* v. *Saulter*, 1 P. R. 48.

See IV. (g) p. 127.

(c) *Matters relating to Land.*

Where the arbitrators had power to award upon conveyances to be made between the parties, the amount of rent to be paid, and the security to be taken therefor:—Held, that an award directing "all necessary deeds for granting," &c., "and for securing payment of the rent to be executed," without saying what kind of conveyances, was bad. *Beatty* v. *McIntosh*, 4 Q. B. 259.—P. C. Jones.

Debt on bond. Defendant set out the condition on oyer, which was for the performance of the award of arbitrators, to whom it was referred by the plaintiff and defendant to arbitrate, &c., "upon and concerning the possession" of a certain lot of land, and also of and concerning all, &c., and all manner of actions, controversies, and demands whatsoever, between the said parties, from the beginning of the world to the date of the said bond, and pleaded "no award made." The plaintiff replied, shewing an award made by the arbitrators at the proper time, and with the proper formalities, "that the plaintiffs should pay to the representatives of one S., deceased, within one month, the amount due on certain notes of hand given by plaintiff to said S. in payment of the land, and that the defendant should give to the plaintiff on such payment a sufficient deed in fee simple for said land, and that defendant should not transfer the said notes within the said month; and that the bond for a deed given by the said S. to the plaintiff should be delivered by defendant to plaintiff. The plaintiff then averred notice to defendant of the award, and assigned two breaches, 1. That the plaintiff tendered to defendant, the holder of the said notes, and to the defendant's wife, the executrix of S., the full amount of the notes, and demanded a deed, but that they refused to accept the money, and defendant refused to give the deed, although a reasonable time had elapsed; 2. That after the tender and refusal in the first breach mentioned, and before suit, to wit, &c., the plaintiff requested defendant to deliver to plaintiff the bond for a deed; and although a reasonable time had elapsed, defendant would not deliver the said bond. The defendant rejoined, setting out the award verbatim, and then demurred separately to each breach:—Held, (McLean, J., dubitante on the first point), 1. That under the general words of the submission authority was given to arbitrate as to the fee simple of the land if it were a matter in difference between the parties, which must be presumed; 2. That the award was void for not deciding upon the matter expressly submitted to the arbitrators respecting the possession:—Held, also, that the defendant could not, by thus setting out the award in his rejoinder by suggestion, make it part of the plaintiff's replication, as in the case of a deed pleaded with profert: and that the defendant's demurrer should have been to the replication, and not to the several breaches assigned in the replication. But upon the whole record, judgment was given the defendant on the demurrer, because the award as set out by the plaintiff himself in his replication was void. *Benedict* v. *Parks*, 1 C. P. 370.

An award after directing a certain sum to be paid to defendant for his interest in land, added "We have taken it for granted in making this award, and the said C. H. shall have the right to cross the railway track from one part of his property to another:"—Held, not sufficiently definite or certain. *The Great Western R. W. Co.* v. *Hunt*, 12 Q. B. 124.

When an award between the G. W. R. Co. and a person through whose lands the road passes awards a sum for damages, and on payment for the land taken directs a conveyance, the award will not be set aside for not setting out the land to be conveyed by metes and bounds:—Semble, that a conveyance is not necessary. *Great Western R. W. Co.* v. *Ralph*, 1 P. R. 50.—P. C.—Burns.

Arbitrators appointed to determine the value of land required for the railway, and the damages the owner might sustain thereby, awarded that the company should pay £50 per acre for the land, £31 5s. for damages to the said land, and £13 15s. for other damages. It was admitted that damages to other land were claimed in the arbitration:—Held, that the award was bad, not being final on the matters submitted. *The Great Western R. W. Co.* v. *Laderonte*, 1 P. R. 243.—P. C.—Sullivan.

An award respecting differences between plaintiff and defendants as to the diversion of a watercourse by defendants, directed that the defendants should turn the stream so that the plaintiff should have the same use of the water as he formerly had for the period of five years from the award, and that the plaintiff should pay defendants £5 a year during that period:—Held, uncertain and not final or conclusive. *Bowen* v. *Sou*... 2 P. R. 76.—C. L. Chamb.—Burns.

The submission recited an action by plaintiff against defendant, and referred all matters in differences for damages between the parties directing that "they were to go by the loss which will be produced, and also to take into consideration the wheat on the ground." The award gave plaintiff a sum for damages, "to be paid out of the amount awarded on the way hereinafter mentioned," and directed that the plaintiff should pay defendants "for a certain amount of wheat now in the grounds of lots 13 and 14, 2nd concession east, in the township of Toronto, to be paid as follows: viz., for 2

wheat that now is growing in summer fallow, to be paid for at the rate of £4 10s. per acre, and for wheat that is now growing in barley and pea stubble, to be paid for at the rate of £3 per acre." It appeared that the land had been leased by the plaintiff to defendants for six years from the 1st of April, 1850:—Held, that the award sufficiently disposed of the matters referred, and that it was unnecessary to specify the number of acres of wheat, the quantity not appearing to have been the matter in dispute, but the price. *In re Montgomery and Moore*, 2 P. R. 98.—P. C.—Hagarty.

An action against a railway company for penning back water, and thus preventing the use of the plaintiff's mills, was referred, with power to the arbitrators to determine the damages already sustained, and to direct how the channel should be formed by the defendants, or fix a sum to be paid in lieu thereof at defendants' option, and a time within which to choose. They awarded £375 for such damages, and directed that within three months from the 1st of July, 1858, defendants should construct a channel of specified size, or in lieu thereof should pay the plaintiff £300 on or before the 1st of August, 1858:—Held—1. That it could not be assumed from the fact that the annual rental of the plaintiff's mills was only £250, that the damages had been given for more than six months before the commencement of the suit; and, Semble, that this could form no objection, for that arbitrators, when not restrained by the submission, are not bound as judges are in a court of law. 2. That the award in other respects was sufficiently certain and final. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.—P. C.—Burns.

Under a submission of all differences between plaintiff and defendant, (not specifying any subject of dispute), with power to determine what they should see fit to be done by either, the arbitrators by their award—after reciting that one had by a writing endorsed on the submission, duly agreed to submit to them a charge of £200 per annum, made by defendant for the management of certain property in Berlin, in which G. and the plaintiff were jointly interested—found that on the 1st of September, 1860, defendant was indebted to the plaintiff in £3249 17s. 8d., which they ordered him to pay accordingly, with interest half-yearly until paid. 2. As to the Berlin property, that as regarded the rights and liabilities of the plaintiff and defendant thereto, they did not find that any difference had arisen calling for their arbitrament, (further than as might regard the said amount claimed for management,) and they therefore made no adjudication on such rights or liabilities. 3. As to certain property in Guelph, comprised in a deed made by defendant to plaintiff, they adjudged that the plaintiff should hold the same in fee by virtue of such deed, but that if he, or his heirs or assigns, should sell the same, or any part thereof, and should realize from such sale a larger sum than £1105, he or they should account for such surplus to the defendant, his executors, &c. In an action on this award, defendant, after setting it out at length, pleaded:—1. That the arbitrators awarded upon matters not submitted, and which accrued after the submission, and upon accounts between the parties to a period long after the submission. 2. That the award was not final, in this, that the said matters relating to the Berlin property were matters in difference, and were submitted to the arbitrators, but that they did not award thereon; and in this, that they did not dispose of the difference respecting the value of the Guelph property, but left the same unsettled and dependent upon the sale thereof by the plaintiff, when only the amount to be accounted for to defendant could be determined:—Held, on demurrer, both pleas good; and as to the second plea, that the averment as to the Berlin property was a sufficient defence, and the plea therefore sufficient, although the award as to the Guelph land was not wanting in finality:—Held, also, that upon the evidence, set out in the case, the first plea was not proved:—Quære, as to the intention and effect of the direction in the award to pay the £3,249, and interest half-yearly until payment. *Stewart* v. *Webster*, 20 Q. B. 469.

The plaintiff and defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence viewers, who awarded that defendant should open a ditch from the line fence between himself and defendant, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, and of sufficient length, width and fall, to carry off the water; to be two and a-half feet deep at the line fence; said ditch to be made before the 1st October, 1865: Held, following *Murray* v. *Dawson*, 17 C. P. 588, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch. *Dawson* v. *Murray*, 29 Q. B. 464.

A dispute arose between the Northern Railway Co., and the Corporation of Barrie, as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before the house of parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the company be referred to one H. The arbitrator awarded that there was in 1853, a valid agreement by the company with the town to construct this line, provided that suitable land should be procured by the town; that such land was so procured, but that the line had not been constructed; that the claim of the town to have such agreement performed still subsisted, "and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance, and in full satisfaction of said claim, that the company should pay to the corporation at a day and place named £5,000, and should, when requested by the town, convey to them in fee all the lands mentioned in a certain indenture made by one B. to the company; and should further, when so requested, release all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects apparent on the face of it:—Held, that it was not uncertain as to whether the agreement had been carried out, and whether the company had an option to pay the £5,000 or construct the branch line, but sufficiently shewed that it had not been performed, and that no such option was

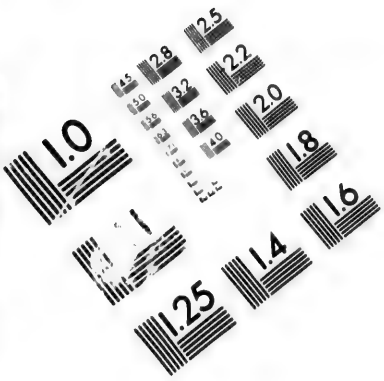
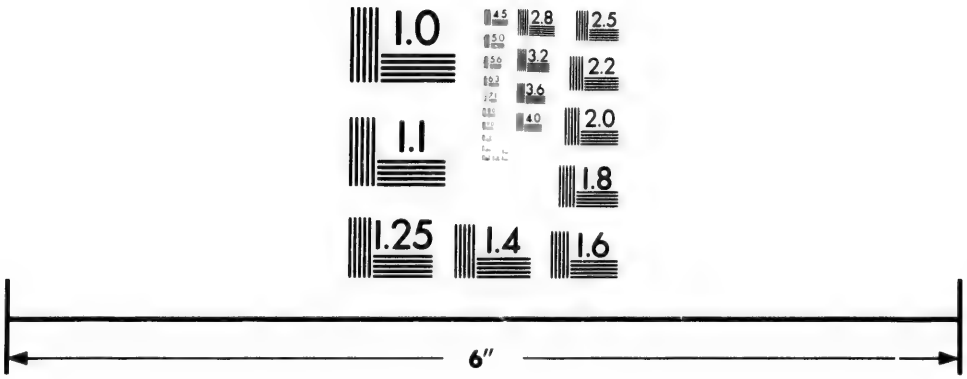
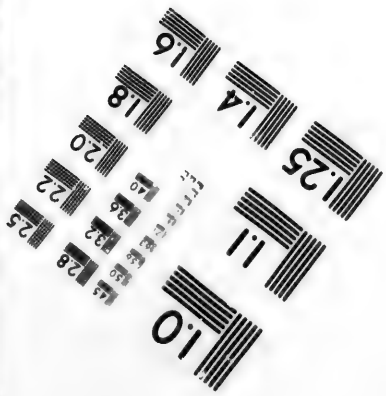
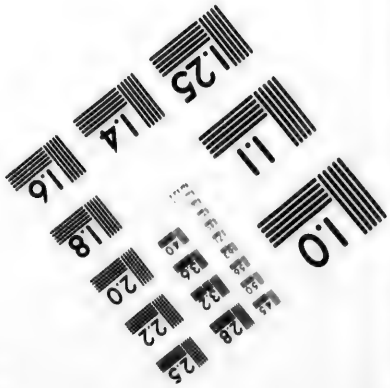




IMAGE EVALUATION TEST TARGET (MT-3)







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intended; that the directions as to the conveyance and release were authorized, and the latter not objectionable for omitting to state to whom it was to be made; and that as to the amount, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed no more was given. *In re Corporation of the Town of Barrie* v. *Northern R. W. Co.*, 22 Q. B. 25.

On a reference of disputes as to the title to a lot of land:—Semble, that an award of $400, "in full consideration and discharge of all plaintiff's claims to and against the land," shewed that the arbitrators had decided that plaintiff had no further title to the land, and that it belonged to defendant. *Bond* v. *Bond*, 15 C. P. 613. See also *Everett* v. *Whiteford*, 4 Q. B. 261.

See VI. 5, 6, pp. 141, 143.

(d) *Other Cases.*

Declaration and award as to payment of money by instalments:—Held, sufficiently certain. *Watson* v. *Sutherland*, 1 Q. B. 229.

Where several parties by jointly submit their claims, the award is final, though it does not distinguish the sum each one is to receive. *McGill* v. *Proudfoot*, 4 Q. B. 40.

The plaintiff sued defendants in case for certain injuries, specifically set forth in the declaration. The cause was referred, and a verdict taken for £1000, subject to the award. By the reference, the arbitrators had power "to take into consideration the various offers made by defendants, and finally to settle and dispose of all the matters in difference, awarding if they should think fit, the payment of an entire sum in full satisfaction of all past and future demands," &c. Upon this the arbitrators declared, that having taken into consideration the matters and things which they were empowered by the submission to consider, they increased the verdict to £1287 10s., with costs to £46 10s., and they concluded the award thus: "And the said sums so to be paid as aforesaid, &c., we do award, &c., be, and the same are for all purposes to be taken in full satisfaction of all past and future demands of the plaintiff against the said defendants, for or in respect of the subject matter or subject matters of the said cause, and all and every part thereof." The defendants moved to set aside the award, objecting—1. That the arbitrators, after hearing evidence (as stated in affidavits filed) of other injuries than those mentioned in the declaration, did not make their award "of all matters in difference," as submitted by the reference, but confined it to the subject matter issuing out of the cause of action in this suit. 2. Because they did not distinguish in their award the sum allowed in the cause, from the sum allowed for the other matters in difference:—Held, award good under the submission. *Watson* v. *Toronto Gas Light, and Water Co.*, 5 Q. B. 523.

Action for injury to a water-course and mill-privilege. At the trial the cause and all matters in difference between the parties were referred, and the arbitrators were especially authorized to determine the value of the property alleged to be injured, as well as to award damages. A verdict was taken for £1000; which it was agreed should stand as security for such value, as well as for any damages awarded, and should be reduced or increased according to the award. The arbitrators awarded that the plaintiff was entitled to a verdict, and assessed the damages in the cause at £500, and ordered the verdict to be reduced to that sum:—Held, that under the terms of the reference the verdict might stand as security for any damages in the power of the arbitrators to award, and therefore for those given, though the arbitrators took into consideration injuries caused before the first day laid in the declaration, and which perhaps, strictly, could not have been recovered for in the cause. (The award itself was clearly not bad on this ground):—Semble, that in the absence of any express agreement in the submission, it would be unnecessary to distinguish how much was awarded in respect of matters in difference in the cause, and how much for other matters. *Williams* v. *Squair*, 10 Q. B. 24.

All differences concerning the renting of a farm by defendant to plaintiff, and all other matters in dispute were referred to arbitrators, who awarded a division of certain crops and stock specified; and in order that an equal division should be made, they ordered that the defendant and plaintiff should select two disinterested persons from the neighbouring farmers, whose decision should be final:—Held, that the award was bad for the delegation to third parties, and for uncertainty. *Harrington* v. *Edison*, 11 Q. B. 114.

All matters in difference in this cause, and on the building agreement between plaintiff and defendant, were referred, costs of the cause and of the reference to abide the event. The award, after disposing of the different issues in the plaintiff's favour, assessed his damages on "account of the non-performance by the defendant of the promises in the said declaration mentioned, and on account of the matters in difference on the building agreement between the parties, over and above the plaintiff's costs and charges, to the sum of £52 16s. 7½d.":—Held, 1. No objection to the award that a gross sum was given, without saying how much for non-performance of the promises declared on, and how much for the difference on the building agreement; 2. That it was unnecessary to determine what damages the defendant was entitled to on the building agreement, or the amount of extra work. *Jones* v. *Reid*, 1 P. R. 247.—P. R.—Burns.

Semble, that the award pleaded in this case was void for not disposing of all the points submitted in relation to the note sued on. *Cleal* v. *Elliott*, 1 C. P. 252.

Upon a general reference to arbitrators of all matters in dispute between two parties:—Held, not necessary that the award should distinguish between the matters in dispute in the cause, upon which the reference is made, and general matters between the parties referring. *Lund* v. *Smith*, 10 C. P. 443.

Where all matters in difference were referred to three arbitrators, the award to be made in writing by them, or any two of them, and it afterwards appeared that one of the three dissented from an award made by the other two, and that they had made no decision regarding a promissory note in difference, which had been

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Jekyll v. *Wade*, 8 Chy. 363

See *Ryan et al.* v. *Pomro*

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8. *Partial V*

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Black, 6 O. S. 105.

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brought under their notice, the award was set aside. *Kemp* v. *Henderson*, 10 Chy. 54.

The plaintiff and defendant agreed to refer all matters touching and concerning all claims and demands whatsoever of the plaintiff against or in respect of the estate of the late T. P. (except as to a specific devise), and all accounts, claims, and demands whatsoever then existing between the plaintiff, and defendant as executor of T. P., or otherwise howsoever. The arbitrator awarded that $4,485 was due from defendant as executor of T. P. and otherwise, to the plaintiff in respect of the matters referred, which sum he directed to be paid, and that when paid it should be in full satisfaction of all demands by plaintiff against defendant as such executor, and otherwise in respect to all the matters referred :—Held, no objection to the award, that it did not find separately the amount awarded against defendant as executor, and in his own right. *Perrin* v. *Perrin*, 32 Q. B. 606.

Two partners (plaintiff and defendant) having dissolved, referred all disputes to three persons named. The award directed a certain sum to be paid by defendant to plaintiff, and then added that the same was "to be secured by such good security as may be requisite to save the said plaintiff harmless" :—Held, sufficiently final : Held, also, that the award directing that defendant should pay all debts due by the partnership was sufficiently certain, without determining the amount. *McLean* v. *Kezar*, 3 C. P. 444.

Held, upon a reference of all matters in dispute between two parties, that an award directing the delivery of a certain promissory note, (which was not in dispute in this action, but was sued upon in the Q. B.,) and upon such delivery ordering releases between the parties, and thereby, as was contended, leaving the note unsettled, was not void. *Lund* v. *Smith*, 10 C. P. 443.

Held, upon the award set out in this case, that the replevin suit and the right to the possession of the goods in question therein, and of the other goods, were clearly and finally disposed of. *Stinson* v. *Martin*, 22 Q. B. 154.

Remarks upon the inconvenience and loss occasioned by the neglect of arbitrators to dispose finally of the matters referred to them. *Jones* v. *Hewson*, 2 L. J. N. S. 107.—C. L. Chamb.—A. Wilson.

Where it is essential to determine whether a partnership was an ordinary one or not, an award not clearly deciding it is void for uncertainty. *Jekyll* v. *Wade*, 8 Chy. 363.

See *Ryan et al.* v. *Pomroy*, 1 P. R. 59, p. 140.

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8. *Partial Validity.*

Where costs were awarded without authority, and could not be separated from the sum awarded, the award was set aside. *Webster* v. *Black*, 6 O. S. 105.

All differences concerning the renting of a farm by defendant to plaintiff, and all other matters in dispute, were referred to arbitrators, who awarded a division of certain crops and stock specified ; and in order that an equal division should be made, they ordered that the defendant and plaintiff should select two disinterested persons from the neighbouring farmers, whose decision should be final. And they further awarded £150, to be paid to the plaintiff by defendant :—Held, that the award was bad for the delegation to third parties, and for uncertainty ; and that the plaintiff could not recover the £150, that part of the award not being separable from the rest. *Harrington* v. *Edison*, 11 Q. B. 114.

When after action matters in dispute have been referred generally, without any thing as to costs, and the arbitrators award a sum to the plaintiff, and direct that the costs of defence and of the award are to be deducted therefrom, the court will not set the award aside because of such deduction. Semble, that when arbitrators award the costs of the arbitration without authority to do so, if they are separable, the award is only bad as to that part. *Faulkner* v. *Saulter*, 1 P. R. 48.—P. C.—Burns.

Costs awarded without power are separable, and the award is only bad as to that part. *Ib.* ; *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns ; *Roddy* v. *Lester*, 14 Q. B. 259.

Where differences between the parties to a building contract as to extra work were referred, and the arbitrators awarded on matters in regard to the original contract not relating to extra work, and the bad part of the award could not be separated, the award was set aside. *In re Knowlsen* v. *Inglis*, 7 L. J. 124.—P. C.—McLean.

Per Draper, C. J.—On a reference under 16 Vict. c. 219, and 20 Vict. c. 80, the Toronto Esplanade Acts, the sum awarded was directed to be paid forthwith, whereas the statute allows a year from the award or from any rule of court ordering payment ; but :—Held, that this part of the award, which was clearly bad, might be separated from the rest. *In re Corporation of the City of Toronto* v. *John Leak*, 23 Q. B. 223.

A submission, after reciting that differences had arisen between plaintiff and defendant respecting, among other matters, the title to a lot of land, referred the matters in dispute to certain parties named. The arbitrators awarded that "as to the right and interest of the parties respectively" in the land, &c., defendant should pay to plaintiff $400 in full compensation for improvements made by plaintiff, and in full consideration and for the discharge of all his claims to and against the said land, the said $400 to be paid to defendant in three equal instalments, fixing the periods for payment and directing how the second and third instalments should be secured ; and that so soon as the $400 had been fully paid, or secured as aforesaid, the plaintiff should give up possession of the land to defendant. The award then proceeded to provide, that if defendant should not pay the first instalment on the 15th January, 1865, or secure the second and third instalments, he (defendant) should, on said 15th of January, convey to plaintiff in fee all his right to said land, and that the plaintiff should, in consideration, pay two several annuities—one of $80 to defendant for life, and another of $20 to defendant's wife, during coverture, for her separate use, with certain directions as to increasing his or her annuity, according as the one survived the other, and as to the occupying a house on the land free of rent, &c. :—Held, that the alternative direction in the award in the event of defendant not paying was in excess

of the arbitrators' powers, as they were not authorized to make a bargain between the parties as to the terms on which the land should be sold by one to the other; and even if they were, they had no right to direct that a portion of the money, which was to be paid to defendant for it, should be appropriated to his wife without his consent: but—Held, that the other alternative, being an express direction to pay by a certain time and in a certain way, and being separable from the rest, might be upheld and enforced. *Bond* v. *Bond*, 15 C. P. 613.

By agreement between the plaintiffs and defendant, the plaintiffs agreed to draw and deliver certain logs on the ice for defendant on or before the 20th March then next, for which the defendants covenanted to pay so much per log. It was provided that, should the sleighing not hold good for four weeks thereafter, the plaintiffs should be bound only to draw such proportion of the logs as the time of sleighing should bear to the four weeks. By a submission under seal, reciting this agreement and that differences existed in respect thereof and of the advances made thereon by defendant to plaintiffs, all such differences were referred to arbitration. The arbitrators awarded that there was due from defendant to plaintiffs, in respect of said agreement, $866. To an action on this award, defendants pleaded no award; and one of the arbitrators, as a witness for the defence, said the evidence satisfied them that, owing to the snow, the plaintiffs could not proceed with the work, and so notified the defendant, who told them to go on and they should lose nothing; and that on this understanding the arbitrators proceeded, and awarded to the plaintiffs the cost of drawing the logs, thinking they had a right to do so under the last clause of the agreement. No objection was made by defendant or his counsel to the reception of the evidence of such undertaking, or that it was a matter not covered by the reference:—Held, that the arbitrators had exceeded their jurisdiction in awarding money to the plaintiff for work done under the verbal agreement, which was not within the submission: that this amount not being separable from the rest, the award could not be supported; and that such excess of authority afforded a good defence to the action. *Tully et al.* v. *Chamberlain*, 31 Q. B. 299.

Although the general principle is, that an award may be good in part and bad in part; still where arbitrators found a sum due to a creditor, and directed the debtor to pay and the creditor to receive it in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due, and reject that portion of it directing the mode of payment. *Dalton* v. *McNider*, 5 Chy. 501.

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9. *Reference back.*

The arbitrators met and two agreed upon an amount, and told the third (who dissented) that they intended to award this amount, and afterwards, in the absence of the third, and without notice to him, they increased the award; the objection being that the same two arbitrators took evidence secretly and without notice to the third, by going to see a mill at the urgent request of defendant, but during his absence:—Held, sufficient ground to refer the case back, but defendant not wishing that:—Held, not sufficient to set aside the award. *Hall* v. *Wilson*, 7 C. P. 272.

Under a submission giving power to the court to refer back upon any application to set aside the award:—Held, that the power might be exercised repeatedly. The arbitrators, on a reference back, having taken the evidence of professional witnesses without notice to the defendants:—Held, that such notice was indispensable; but as the arbitrators seemed to have acted under mistake, and not from a settled intention to do injustice, the matter should be referred back a second time. *In re Manley* v. *Anderson*, 2 P. R. 354.—P. C.—Richards.

Agreement by the parties to withdraw all but one matter from consideration, and try to settle the other matters themselves and if they could not do so then to refer them back to the arbitrators. Reference back accordingly. Validity of second award. *Baby* v. *Davenport*, 2 Q. B. 65.

Where an award is good on its face, the court will not refer the matters back that the arbitrators may state the grounds of their decision, and thus enable a motion to be made against it if illegal. *Wells* v. *Gzowski*, 16 Q. B. 42.

Where a reference contains a power to the court to refer back, it will be exercised only when it appears that the award is egregiously wrong, or not sanctioned by the evidence; and, Held, that no sufficient ground appeared in this case. *In re Brown and Overholt*, 2 P. R. 9.—P. C.—McLean.

Objections not appearing on the face of the award cannot be raised against an application for attachment. But where, on such application, it appeared that defendant had not attended the arbitration through some misapprehension, the matters were referred back *Bleecker* v. *Loyall*, 2 P. R. 14.—P. C.—Burns.

Where cross rules had been obtained, for an attachment for non-performance of an award, and to set the award aside, and the affidavits were conflicting as to whether a particular question had been decided by the arbitrators, and as to alleged mistake in calculation, the court, under sec. 88 of the C. L. P. Act, 1856, referred back the matters in dispute, discharging the rule for attachment without costs. *In re Smith* v. *Ranney*, 2 P. R. 82.—P. C.—McLean.

Matters will not be referred back upon the same grounds, as to the discovery of new evidence, &c., as would support an application for a new trial. *McClain* v. *Maitland*, 2 P. R. 273.—P. C.—Burns.

On a compulsory reference a motion to refer back the award may be made within the first six days of the term following its publication. *Kesteven* v. *Goodrham*, 20 Q. B. 500.

The award, in an action on a building contract, was in favour of the plaintiffs, and one of the arbitrators, in compliance with the defendants' request, certified, without submitting any question, that the building contract was binding and the engineer's certificate conclusive, and that the award had been based on that assumption. The plaintiffs moved to refer back the

award with a direction that the contract did not bind, or to refer back the certificate for amendment, by stating the facts: but—Held, that as the arbitrators had not chosen to submit any point for decision, and were not bound to do so, the court could not interfere. *Ib.*

The effect of the C. L. P. Act, s. 164, enabling the court to refer back, is not in any way to alter the arbitrator's power or authority; and the court therefore refused to refer back upon an objection, not apparent on the face of the award, that in considering the nature of the work claimed for the arbitrator had not conformed to the engineer's certificate, which it was contended bound the plaintiff. *Read* v. *Weir*, 20 Q. B. 544.

An award will only be referred back on the same grounds that would formerly have justified its being set aside. The court refused to refer back on the ground of the discovery of new evidence. *Latta* v. *Wallbridge*, 7 L. J. 207.—P. C.—Richards.

After the entry of judgment by plaintiff, it is too late to ask to be allowed to set aside the judgment and have the cause referred back to the arbitrators to enable them to certify for full costs in proper form, assuming that the omission to so certify is a ground, but as to which, quære. *Keep* v. *Hammond*, 9 L. J. 157.—C. L. Chamb.—Draper.

An application to refer back on account of a mistake in charging the plaintiff with the same sum twice was refused, the mistake being denied on affidavit, though the arbitrator certified that in his opinion the case should be reopened, as he was not sure this was not the case. *Latta* v. *Wallbridge*, 3 P. R. 157.—P. C.—Richards.

Held, that under the circumstances appearing in this cause it could not be said that the arbitrator had fully considered or really pronounced judgment on the questions submitted, and the matters were referred back. *In re Ingersoll and Ellwood*, 3 P. R. 162.—P. C.—Richards.

An arbitrator, as appeared from his minutes taken on the arbitration and other evidence, having misconceived certain facts and misunderstood some alleged admissions by counsel, the award was referred back for re-consideration as to the particular item affected by this mistake, with special directions as to costs. *Clancy* v. *Clancy*, 5 P. R. 108.—P. C.—Gwynne.

Where a rule is asked for to refer a case back to an arbitrator to allow him to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs, the costs of taking the award again before the arbitrator to be borne by the applicant. *Jordan* v. *Ambler*, 8 L. J. N. S. 67.—P. C.—Galt.

An award, by mistake, instead of directing that the plaintiff should pay his own and the defendant's costs of the reference, except $12 which the defendant should pay, directed that the defendant should pay such costs except the $12, which the plaintiff was directed to pay. The award was made on 17th May, 1873, the Saturday before Easter Term, but nothing was done, which delay was not accounted for, until 2nd September, when defendant obtained a certificate from the arbitrator as to the mistake made, and on the 11th September obtained a summons in chambers to enlarge the time for making the award till the 1st October, and to remit the award back to the arbitrator for reconsideration. The summons having been enlarged till Michaelmas Term, and heard before the full court:—Held, that the application was not too late, and the rule was made absolute. *Connor* v. *McCormack*, 23 C. P. 271.

See *Ross* v. *Corporation of Bruce*, 21 C. P. 548, p. 161.

VII. Setting Aside and Staying Proceedings on Award.

1. *For Misconduct of Arbitrators or Parties.*

(a) *In taking or rejecting Evidence.*

Where the plaintiff's attorney had attended a meeting of arbitrators, the court refused to set aside the award, because the plaintiff had not attended to give his evidence according to the provision in the rule of reference, from the miscarriage of a notice sent to him by his attorney, and although the award proceeded principally upon the evidence of defendant. *McDougall* v. *Camp*, Tay. 87.

An award set aside for unfair conduct of the arbitrators in the manner of hearing the evidence. *Hamilton* v. *Wilson*, 4 O. S. 16.

An award set aside for irregularity of the arbitrators, such as the examination of witnesses in the absence of the parties, will be set aside without costs. *Campbell* v. *Boulton*, 1 Q. B. 407.—P. C.—Jones.

Where after the arbitrators had commenced their investigation, both plaintiff and his attorney requested delay, and understood that it had been granted, but the arbitrators awarded in favour of defendant without giving further time, and without hearing all the testimony that the plaintiff might have offered—the award was set aside without costs. *Grisdale* v. *Boulton*, 1 Q. B. 407.—P. C.—Jones.

Where the arbitrators refused to examine witnesses, the award was set aside, although before the submission was signed the arbitrators informed the parties that they would not allow either of them, or their attorneys or agents, to be present at their investigations. *In re McMullen and Tayley*, 2 Q. B. 175.—P. C.—Jones.

When arbitrators without consent examined an interested witness, and afterwards awarded in favour of the party calling him, the award was set aside. *Davis* v. *Birdsall*, 2 Q. B. 199.

Arbitrators refusing to give time to produce testimony cannot support their award by shewing that such testimony could have been of no service. *In re Bull* v. *Bull*, 6 Q. B. 357.—P. C.—McLean.

Held, no objection to an award by three arbitrators, but which might have been made by any two, that one arbitrator alone examined a witness without notice to the opposite party, it being sworn that the other two arbitrators were totally ignorant of such evidence when they made the award. *Boyle* v. *Humphrey*, 1 P. R. 187. P. C.—McLean.

Where counsel had agreed to submit their views on a legal point in the case to the arbitrators in writing, and the arbitrators decided without waiting to hear from them, the award was set aside. *Perlet* v. *Perlet*, 15 Q. B. 165.

Where, after an arbitration was closed, the agent of one party sent letters to two of the arbitrators, containing statements and arguments in favour of his principal, which the other party did not see, the award was set aside. *Williams* v. *Roblin*, 2 P. R. 234.—P. C.—Richards.

Where a witness was examined in the absence of defendant the award was set aside. *McNulty* v. *Jobson*, *Jobson* v. *McNulty*, 2 P. R. 119.—P. C.—Burns.

Though the arbitrator stated that the evidence thus given had in no way influenced his decision. *Waters* v. *Daly*, 2 P. R. 202.—P. C.—Burns.

Where the umpire chosen upon a reference to arbitration had allowed an affidavit to be used in evidence; but remarked, when it was read, that he would not attach any weight to it, and swore that in adjudicating upon the matters in difference he did not take such affidavit as evidence, or attach any weight whatever thereto, the award, notwithstanding, was set aside, but, under the circumstances, without costs. *McEdward* v. *Gordon*, 12 Chy. 333.

Where an order of reference by consent provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation" it was held that he had no discretion to reject the evidence of one of the parties on his own behalf. *Lister* v. *Ham*, 1 L. J. N. S. 298.—P. C.—A. Wilson.

The decision of an arbitrator being binding on the parties in matters of law as well as in fact, an award will not be set aside because letters are put in as evidence by one of the parties which are not legal evidence, if the circumstances and the conduct of the arbitrators are consistent with the supposition that they only read the letters for the purpose of judging of their admissibility as evidence, and it does not appear that they actually received them as evidence. *Hotchkiss* v. *Hall*, 5 P. R. 423.—P. C.—Gwynne.

Where a witness for one party is examined in the absence of and without notice to the other party, the award will be set aside. *Hickman* v. *Lawson*, 8 Chy. 386.

Where two arbitrators took the evidence of B. in the absence of the plaintiff and of the other arbitrator, by which evidence it appeared the two were influenced in their award:—Held, that the award was invalid. *Ib.*

Where at the commencement of a reference, L., the arbitrator for one side conferred privately with the parties who nominated him on the matters in question, and on the evidence to be offered, and continued this course to the end:—Held, that the impropriety was not cured by shewing that after the reference had made some progress, the other arbitrator acted with similar irregularity on the other side. The reference was to two, with power to them to appoint an umpire, who was to award if they disagreed. An umpire was appointed, and made an award:—Held, that the irregularity of L's course in holding private conferences with one of the parties was sufficient to avoid the award of the umpire. After the two arbitrators had finally differed, the umpire had a private conversation on the subject of the reference with the arbitrator L., in the absence of the other arbitrator and of the parties:—Held, that as L. had acted as the agent for one side, private conversation with him was as injurious and objectionable as private conversation with the principals would have been. *Re Lawson and Hutchinson*, 19 Chy. 84.

The court allowed the party prejudiced, to serve a suplementary notice embodying the objections as to the course of the umpire and arbitrator L., the same having come to light on cross-examination, and there being strong reason for apprehending that the award was not a fair award. *Ib.*

See *Stocking* v. *Crooks*, Tay. 492, p. 125; *Slack* v. *McEathron*, 3 Q. B. 184, p. 125; *Hall* v. *Wilson*, 7 C. P. 272, p. 156; *Re Manley and Anderson*, 2 P. R. 354, p. 156.

(b) *Other Irregularities.*

Where, on a reference by A. and B., A.'s agent attended, and after B. had given evidence to the amount of £200, retired, understanding from the arbitrators that the case was closed; and B., in his absence, induced two of the arbitrators to award him £1000, the third refusing to consent—the award was set aside on payment of costs. *VanEgmond* v. *Jones*, 4 O. S. 119.

Action on an award of compensation to plaintiff under the Railway Act, for injuriously affecting his land. Plea, that the award was procured by fraud and misrepresentation.. The land in question was situate upon a navigable river, running down to high water mark, and defendants' railway was built upon cribs in the river, cutting him off from access to the water, which was the injury complained of. The jury were directed, that if the plaintiff contended before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to damages, when he had not, this was evidence of fraud under the plea:—Held, a misdirection, for no argument used by the plaintiff to enhance his claim or place his case in the best light, could be a fraud. *Widder* v. *The Buffalo and Huron R. W. Co.*, 24 Q. B. 529; in appeal, 27 Q. B. 425.

On applications to set aside awards for misconduct of an arbitrator, the facts relied upon to establish charges of partiality and unfairness on his part must be clearly averred. Quere as to the right on such application to shew cause on the last day of term. *In re Hotchkiss and Hall*, 7 L. J. N. S, 320.—P. C.—Gwynne.

A charge of corruption and partiality against an arbitrator must be sustained by specific, not by general affidavits. *Burr* v. *Gamble*, 4 Chy. 62[illegible]

Where the defendant made a representation to the arbitrators which was to influence the conduct, but suppressed a material fact, the court set aside the award. *Hickman* v. *Lawson*, 8 Chy. 386.

On a submission to arbitration of a cause and all matters in difference therein, subject

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2. *For Mistake or*

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24.—P. C.—Hagerman.

Held, that a mistake in the i
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Hickson, T. T. 3 & 4 Vict.—

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such points of law as should properly arise on the pleadings and evidence, a question arose as to the sufficiency to bind one of the parties of certain evidence tendered respecting some extra work done outside of the sealed contract entered into between the parties, and the arbitrators, instead of reserving this for the opinion of the court, themselves decided that the evidence was quite sufficient, merely reporting what the legal objections were. The court, with very strong observations on the flagrant disregard of their plain duty under the submission, refused to refer the matter back to the arbitrators, but simply set aside their award and the verdict found by them in favour of the plaintiff. *Ross* v. *The Corporation of Bruce*, 21 C. P. 548. See *Murphy* v. *Cotton*, 14 Q. B. 426.

Where the legal rights are not harsh, but the award disregards them entirely, it is void for inequality and partiality. *Jekyll* v. *Wade*, 8 Chy. 363.

The reference was to two arbitrators with power to them to appoint an umpire, who was to make an award if the two disagreed; an umpire was accordingly appointed; and the arbitrators differing the umpire made an award:—Held, that each party was entitled to the free judgment of the two arbitrators on the matters in difference as a condition precedent to the umpires authority coming into force, as well as their free judgment in the appointment of the umpire; and that one of the arbitrators holding private conferences with one of the parties was sufficient to avoid the award of the umpire. *In re Lawson* v. *Hutchinson*, 19 Chy. 84.

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2. *For Mistake or Repugnancy.*

A mistake in the calculation of interest was held no objection. *Priestman* v. *McDougal*. Tay. 451.

Where a plaintiff, having two actions pending, one in a representative character and the other in his own right, referred both to arbitrators, who were to award by a certain day, or appoint an umpire in writing, and the arbitrators not being able to agree appointed, but not by writing, an umpire, who made an award, which the arbitrators adopted and published as their own before the time limited for making the award had expired, and awarded thereby a sum of money to the plaintiff in his representative character—the court, on affidavits of the umpire and of the arbitrators, that the money was intended for the plaintiff in his own right, refused an attachment for non-payment of the sum awarded; and afterwards on motion, set the award aside on account of the mistake, and because it was not the arbitrators' own award. *Dennison* v. *Sandford*, 3 O. S. 379; See *In re Cayley & McMullen*, 3 Q. B. 24.—P. C.—Hagerman.

Held, that a mistake in the initial letters of the name of one of the parties is not fatal; and that an award for a certain sum, and that a verdict should be entered for the said sum, naming a larger sum, is good for the smaller one. *Charles* v. *Hickson*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

Where all matters in difference in law and equity have been referred, and the award is legal on the face of it, it will not be set aside, though it may seem that the arbitrators have mistaken the law, and the amount awarded is large. *Hall* v. *Ferguson*, 4 O. S. 392.

An award will not be set aside for a mistake in law on the part of the arbitrators, not apparent upon the face of the award. *The Municipal Corporation of Kingston* v. *Day*, 1 P. R. 142.—P. C.—Burns.

The rules as to setting aside awards are the same with respect to compulsory references as to others. The court, therefore, refused to interfere on affidavits tending to shew that the arbitrator was mistaken as to the law and fact. *Sadler* v. *Carruthers*, 20 Q. B. 560.

The alleged mistake in law and fact must appear on the face of the award, or be disclosed by some contemporaneous writing. *McDonald* v. *McDonald*, 7 L. J. 297.—P. C.—Hagarty.

In this respect there is no difference between awards made on compulsory reference under the C. L. P. Act and other awards. *Ib.*

An award that defendant should pay the plaintiff a certain sum, including the costs of the reference, and afterwards directing that each party should pay half the same costs, is bad for repugnancy. *Shaver* v. *Scott*, 5 O. S. 575.

Where a verdict was taken for the plaintiff, subject to a reference, and the arbitrator awarded for defendant, but everywhere styled the plaintiff "John," instead of "Patrick,"—the court set the award aside and granted a new trial. *McManmon McElderry*, H. T. 6 Vict.

Declaration on a joint bond by defendants, M. & G., to perform an award concerning all differences between the plaintiff and defendants, averring an award that M., one of the defendants, was indebted to the plaintiff in a sum named, and directing him to pay it by a certain day. Plea, on equitable grounds, in substance, that the only matter in dispute in the action, besides the amount due by M., was whether G. was liable with him, and it was distinctly agreed that in case the arbitrators should award for G., such award should release him from all liability on the bond: that instructions were given to prepare an instrument to carry out said agreement, but by mutual mistake it was not so worded, and was executed without the error being discovered; and that upon the reference the plaintiff abandoned all claim upon G., and the arbitrators thereupon awarded as they did:—Held, on demurrer, plea good. *Gerrie* v. *McDonell*, 18 Q. B. 146.

The rules as to setting aside awards are unchanged by the C. L. P. Act, and are the same with respect to compulsory references as to others. The court therefore refused to interfere on affidavits tending to shew that the arbitrator was mistaken as to the law and fact. *Saulter* v. *Carruthers*, 20 Q. B. 560.

Held, that an award (in an action of replevin for a promissory note) that declared the defendant to have detained the note illegally, and at the same time awarded that it should be delivered up, upon payment of a certain sum, (which amount was due thereon,) was not void for inconsistency, as it effected substantial justice between the parties. *Lund* v. *Smith*, 10 C. P. 443.

On a motion to set aside or refer back, it was alleged that $122 had been twice charged against

the plaintiff, being identical with a judgment also allowed against him, and the arbitrator certified that in his opinion the matter should be reopened, as he was not sure this was not the case. It was objected also that the judgment was improperly allowed, having been recovered against the plaintiff and another, and therefore not admissible as a set-off. In answer the mistake was denied, and it was shewn that the identity of the two sums had been expressly in dispute before the arbitrator, and that the judgment had been recovered on a note made by the plaintiff, and endorsed by another defendant in a suit upon it for his accommodation. It was sworn also that the plaintiff was insolvent. The application was refused. Quære, whether under the circumstances the judgment was not properly allowed as a set-off. *Latta* v. *Wallbridge*, 3 P. R. 157.—P. C.—Richards.

An award, by mistake, instead of directing that the plaintiff should pay his own and the defendant's costs of the reference, except $12, which the defendant should pay, directed that the defendant should pay such costs, except the $12, which the plaintiff was directed to pay. The award was made on the 17th May, 1873, the Saturday before Easter Term, but nothing was done—which delay was not accounted for—until 2nd September, when defendant obtained a certificate from the arbitrator as to the mistake made, and on the 11th September obtained a summons in Chambers to enlarge the time for making the award till the 1st October, and to remit the award back to the arbitrators for reconsideration. The summons having been enlarged till Michaelmas Term, and heard before the full court:—Held, that the application was not too late, and the rule was made absolute. *Connor* v. *McCormack*, 23 C. P. 271.

The court will relieve against an award made between partners in ignorance, on the part of the arbitrators, and of the remaining partners, that important transactions had not been entered by the other, the managing partner, in the books of the firm, in consequence of which omission the award had been to a corresponding amount too favourable to such managing partner. An injunction to restrain proceedings on a judgment recovered at law upon an award alleged to have been made under these circumstances was continued to the hearing, in a case in which the ultimate success of the plaintiffs at the hearing was not considered as wholly free from question, the amount of the judgment being ordered into court. *Wilson* v. *Richardson*, 2 Chy. 448.

See VI. 9, p. 155.

3. *On the Merits.*

Although the court are bound not to set aside an award on the merits, yet they will interfere when they see that either party has not had an opportunity of explaining or examining into the whole matter submitted. *Small* v. *Rogers*, H. T. 4 Vict.

The court will not enquire into the grounds on which an award is made even although it be suggested that the arbitrators have opened a final judgment of a competent court under a submission in the common form, if it does not clearly appear that they have reversed the judgment or gone into its merits. *McLevy* v. *Vandecar*, 6 O. S. 481.

The court will not set aside an award upon affidavits setting forth a party's just claim to the allowance of large sums of money, upon grounds which the arbitrators had rejected. *McMillan* v. *McLean*, 4 O. S. 5.

The court will not set aside an award upon an affidavit of merits, except upon manifestly clear and strong grounds. *Scobell* v. *Gilmour*, 5 Q. B. 48.

Nor will they intend matter; such matter must be shewn affirmatively. *Tracey* v. *Hodgest*, 7 Q. B. 5.—P. C.—Draper.

An award cannot be impugned for excessive damages, on the affidavit of one of the arbitrators, giving no data or basis for calculation to support his opinion against the majority. *In re Great Western R. W. Co. and Chaurin*, 1 P. R. 288.—P. C.—Draper.

Where parties to a protracted reference thought their case so strong that it would be impossible for the arbitrator to find against them, and did not do all that it was in their power to do to repel the case of their opponent, relief against an adverse award was refused on the ground of surprise and discovery of new evidence. *Severn* v. *Cosgrave*, 2 L. J. N. S. 11.—P. C.—A. Wilson.

Where the arbitrator, having power to amend the pleadings allowed a plea to be added, and the parties affected, instead of applying to have the reference revoked, proceeded with it notwithstanding the amendment, which they contended was improper and unjust, and applied for relief against the award on this ground, it was refused, although the court thought on the materials before it, if the same were before the arbitrator, that the amendment ought not to have been allowed. So where the arbitrator, having power to allow or disallow a claim set up by one of the parties to the reference, in the exercise of his judgment decided to allow it, and his motives were unassailed, the court, though differing from him as to the propriety of allowing the claim referred to, would not set aside the award on the merits. *Ib.*

An action upon a policy of insurance on goods was ordered to be referred, and the award was in favour of the plaintiff. The evidence and proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised. The main objection was that the arbitrator had found due notice and account of the loss given, whereas it was disproved by the plaintiff's own evidence:—Held, that the objection being to the arbitrator's finding on the evidence, was untenable unless misconduct could be inferred. *Newman* v. *The Niagara Mutual Fire Insurance Co.*, 25 Q. B. 435.

4. *Practice.*

(a) *Time for Moving.*

Too late after four terms from the publication and an attachment granted for non-performance. *Crooks* v. *Chisholm*, 4. O. S. 121.

Where a verdict has been taken, subject to a reference, the award, unless under very peculiar circumstances, must be moved against within the first four days of the term after it was made. *Campbell* v. *Cameron*, 1 Q. B. 29.

Held, that an application to set aside a judgment on an award, after a lapse of two years, was too late. *Wood* v. *Moodie*, 3 Q. B. 79.

The time given to move under 9 Vict. c. 37 and 10 & 11 Vict. c, 24—viz., one year—extends to Upper Canada as well as Lower Canada. *Commissioner of Public Works* v. *Daly*, 6 Q. B. 33.

An application was made during Easter Term to set aside an award of the 9th December preceding, a term having elapsed after the making of the award:—Held, too late. *In re Matthews and Webster*, 1 P. R. 75.—P. C.—McLean.

An award, under submission by bond, was made on the 31st of January, and a notice mailed to the plaintiff on that day, which was received on the 2nd of February, the first day of Hilary Term:—Held, that an application in Easter Term was too late. *In re Cumming and Graham*, 1 P. R. 122.—P. C.—McLean.

An action of covenant was referred at nisi prius, and on certain breaches assigned a verdict taken for specified sums, the damages on other breaches being reserved; and as to two of the breaches particularly, a verdict was entered for £125, subject to the award. The rule of reference required that the arbitrators should report in or with their award the evidence and facts on which they should find the damages awarded (if any) on either or both of these breaches, so as to enable the court to determine whether such evidence and facts would in law warrant the damages. The arbitrators awarded damages on each of these breaches, but omitted to return the evidence or facts. A copy of the evidence only was found in court, not signed, or annexed to the award, or referred to in it; and the facts did not otherwise appear:—Held, that under the circumstances of the case and terms of the submission, the award might be moved against although the first term after it was made had expired. *Murphy* v. *Cotton*, 14 Q. B. 426.

The time for moving runs from the time the defendant is notified of the award having been made, not from the making. And when it is made under a rule of reference, the court, on good ground shewn, will not always hold the party to the strict rule of moving within the next term. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.—C. L. Chamb.—Robinson.

A judge in chambers will not interfere to stay proceedings on an award, in order that a motion may be made in term to set it aside, when the facts is sworn to are conflicting, and for all that appears the award may be in accordance with the facts proved. Quære, should not such motion in chambers be made within four days after the award, as in a motion in banc in term? *McLeary* v. *Smith*, 5 L. J. 212.—C. L. Chamb.—Richards.

Where a cause and all matters in difference were referred:—Held that judgment could not be entered until after the first four days of the term following the award, and, Semble, the defendant would have the whole term to move in. *Williams* v. *McPherson*, 2 P. R. 49.—P. C.—Richards.

Where a verdict was taken, and an award made on the first day of term, which defendant became aware of on the following Monday:—Held, that a motion on the last day of term was too late. *Perley* v. *Loder*, 2 P. R. 105.—P. C.—Richards.

Held, that the undertaking set out in this case, given on the last day of term, was a waiver of any objection as to time, so that the motion might be made in the following term. *McNulty* v. *Jobson—Jobson* v. *McNulty*, 2 P. R. 119.—P. C.—Burns.

It would seem that a motion to set aside an award in this court, must be made within the common law term following the publication of the award. *Re Taylor and Bostwick*, 1 Chy. Chamb. 53.—Esten

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(b) *Affidavits and Practice.*

Where there is no provision in an order of reference at nisi prius to make it a rule of court, the court will not set aside the award. *Cumming* v. *Allen*, Tay. 205.

The court will refer to papers delivered by the arbitrators simultaneously with the award, and intended to be explanatory of it, as a part of the award itself. *Hall* v. *Ferguson*, 4 O. S. 392.

Where it was sworn that the original was in the possession of plaintiff's attorney, who refused to give it up, a rule nisi was granted, which was afterwards made absolute, on the production and verification of copy of the award served. *Steen* v. *Glass*, M. T. 1 Vict.

Facts relied on to set aside an award must be distinctly sworn to, and if denied the denial is conclusive. *Slack* v. *McEathron*, 3 Q. B. 184.—P. C.—McLean.

Semble, that an objection that two of the arbitrators made the award without notice to the third can be taken advantage of in an action on the award. The application to set aside an award under such circumstances should be made to the court in which the action is pending. *Smith* v. *George*, 12 Q. B. 370.

Where the time for making an award expired on the 1st of September, and the affidavit of execution of the award was sworn on the 7th of August, it was held sufficient, without stating on what day the award was executed. *McPherson* v. *Walker*, 1 P. R. 30.

Held, that a copy of the affidavit need not be served together with the award. *Ib.*

The party on whose motion an order of reference has been made a rule of court cannot, in opposing an application to set aside the award, object that the cause is improperly styled in such rule. *Creighton* v. *Brown*, 1 P. R. 331.—C. L. Chamb.—Richards.

When a rule nisi is obtained before the last day of the term in which an award must be moved against, the court may allow additional affidavits to be filed after that day. *In re Wheeler and Murphy.*, 2 P. R. 32.—P. C.—McLean.

As a general rule, each deponent should state in his own affidavit the facts to which he swears, not by reference to the statements in other affidavits filed. *In re Campbell and Brown*, 2 P. R. 291.—P. C.—Richards.

An action upon a policy of insurance on goods, was referred by a compulsory reference. On motion to set aside the award, the evidence and

proceedings, with the exhibits, were annexed, with a certificate signed by the arbitrator, dated 11th May, stating that he certified the same to enable the defendants to move against his award if so advised:—Semble, that the certificate could not be looked at, as it was written after the award. *Newman* v. *The Niagara District Mutual Fire Insurance Co.*, 25 Q. B. 435.

On application to set aside awards for misconduct of arbitrators, the facts which are relied upon to establish charges of partiality and unfairness on the part of an arbitrator must be clearly averred. *In re Hotchkiss* v. *Hall*, 5 P. R. 423.—P. C.—Gwynne.

Quære, as to the right on such application to shew cause on the last day of term. *Ib.*

(c) *Form of Rule.*

The rule must be drawn up on "reading the award;" and the alleged defects in the award must be sufficiently pointed out. *Grand River Navigation Co.* v. *McDougall*, 1 Q. B. 255; *Wilkins* v. *Peck*, 4 Q. B. 263.

A rule nisi, not drawn up "on reading the award," is sufficient if among "the affidavits and papers filed," on reading which the rule was drawn up, there is a copy of the award verified by affidavit. *Tracey* v. *Hodgest*, 7 Q. B. 5.

A rule nisi was discharged with costs, because not drawn up on reading the award or copy, nor the submission, nor the rule making it a rule of court. *Jacobs* v. *Ruttan*, 2 C. L. Chamb. 138.—Sullivan.

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5. *Other Cases.*

The court refused to set aside an award on the ground that the arbitrators had desired it not to be delivered until the costs for making it were paid. *Gee* v. *Attwood*, Tay. 119.

Where either party to an arbitration objects to an irregularity in conducting it—as, for instance, against a certain person administering the oath to the witnesses—and takes his chance of the award, he cannot afterwards, on the same ground, impeach the award. *Slack* v. *McEathron*, 3 Q. B. 184.—P. C.—McLean.

Where an action on the award is pending, an application to set aside the award will be refused if the grounds could be urged as a defence under the pleas. *Smith* v. *George*, 12 Q. B. 370.

All matters in difference in a cause and on a building agreement between plaintiff and defendant were referred, costs of the cause and of the reference to abide the event. The award, after disposing of the different issues in the plaintiff's favour, assessed his damages, over and above his costs and charges, at £52, and fixed the costs of the reference and award at £20. The costs of the suit were afterwards taxed without notice to defendant, and a demand made of the amount awarded, the costs of the award as fixed by the arbitrators, and the taxed costs:—Held, that the want of notice of taxation was not a ground for setting aside the award, but for withholding the attachment until the costs could be revised. *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns.

An award will not be set aside because the style of the cause in which it is intituled is not set out correctly and at length, provided it can be sufficiently identified by reference to the body of the award as being in the cause referred. *Creighton* v. *Brown*, 1 P. R. 331.—Chamb.—Richards.

Awards under 9 Vict., c. 81, ss. 26 and 27, are final, and not subject to be set aside by the court. *In re Great Western R. W. Co.* v. *Light*, 1 P. R. 378.—P. C.—McLean.

The Court of Q. B. has no authority to set aside an award of fence viewers made under C. S. U. C., c. 57. *In re Cameron and Kerr*, 25 Q. B. 533.

No appeal lies from the decision of the judge in Practice Court on an application to set aside an award. *Brown* v. *Overholt*, 14 Q. B. 64.

Award held invalid for want of a proper return of the evidence and facts as required by the rule of reference. *Murphy* v. *Cotton*, 14 Q. B. 426. *Ross* v. *Corporation of Bruce*, 21 C. P. 548.

What objections are available against an award declared by statute to be final. *Kennedy* v. *Burness*, 15 Q. B. 473.

The fact of one of the arbitrators being a creditor of one of the parties to the suit is not sufficient to make an award invalid. *Hall* v. *Wilson*, 7 C. P. 272.

Under the special circumstances of this case:—Held, that although the suit at law referred was against the sureties only, it was competent for the principals to move against the award in respect of it. *In re Wheeler* v. *Murphy et al.*, 2 P. R. 32.—P. C.—McLean.

Discovery of fresh evidence is no ground, unless it be shewn satisfactorily why it was not before obtained. *Dean* v. *Peterborough and Cobourg R. W. Co.*, 2 P. R. 79.—P. C.—Burns.

The court refused either to set aside or refer back for the discovery of new evidence. *Latte* v. *Wallbridge*, 7 L. J. 207.—P. C.—Richards. See *Severn* v. *Cosgrave*, 2 L. S. N. S. 11; *McClain* v. *Maitland*, 2 P. R. 279.

Held, that on the facts set out in this case, nothing appeared to support the award as to a matter alleged to have been verbally submitted, but not included in the written reference. *Martin* v. *Kergan*, 2 P. R. 370.—P. C.—Burns.

Upon a reference to determine the damages sustained by plaintiff by reason of the taking and detention by defendant of a certain schooner, the arbitrators awarded $2200.65, and among other items $40 for travelling and law expenses. Upon a motion to set aside the award the court, without admitting the legality of the charge, refused to interfere, as the defendant should have applied to revoke the submission. *Carveth* v. *Fortune*, 12 C. P. 504.

The inability of a company awarded against under their charter to expend their funds in paying the award, would be no ground for setting it aside. *In re Corporation of the Town of Barrie* v. *Northern R. W. Co.*, 22 Q. B. 25.

Where a reference was specific of accounts rendered up to 31st December, 1864, and the award went far beyond this, the court, upon the application of the person against whom the award was

made, denying any binding authority to thus extend the reference, and his oath being unanswered, set aside the award. *In re Roberts* v. *Lorimer*, 2 L. J. N. S. 11.—P. C.—Hagarty.

It is no objection to a motion to set aside an award, that the award has been made an order of court. *In re Lawson and Hutchinson*, 19 Chy. 84.

VIII. Enforcing Award.

1. *Making Award a Rule of Court.*

Where a case has been referred and an award made, such award must in all cases be made an order of the court before any other order in the cause can be made. *Wadsworth* v. *McDougall*, 5 Chy. 290.

An award made in pursuance of a reference by the court will be treated as a judicial act, and made an order of this court as a matter of course. It is not necessary to wait until after a term before moving to make it an order of court. *Allan* v. *O'Neal*, 2 Chy. Chamb. 452.—Taylor, *Secretary*.

An application to make an award a rule of court can properly be made in chambers on notice. *White* v. *Kerby*, 2 Chy. Chamb. 452.—Taylor, *Secretary*.

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2. *By Attachment and Order.*

(a) *Practice.*

The rule will not be absolute in the first instance, although the party consents by his counsel. *Stewart* v. *Crawford*, Tay. 409.

To obtain an attachment for nonpayment of an award, the affidavit should shew that the person making the demand has a power of attorney for that purpose, and that the party on whom the demand was made was apprised of it. *Powell* v. *McMartin*, Dra. 169.

To bring a party into contempt for not paying money awarded, the original rule and other papers should be shewn when the copies are served. *Kent* v. *Sumner*, T. T. 11 Geo. IV.

It must appear distinctly by the affidavit that the demand was not made too soon. *Baines* v. *McMartin*, E. T. 6 Will. IV.; *Barnes* v. *McMartin*, 5 O. S. 143.

Where the award is made by an umpire, it must be shewn how he was appointed, and his appointment must be in writing. *Carpenter* v. *Vanderlip*, E. T. 3 Vict.

Where there was nothing to shew such appointment except the umpire acting as such, a rule nisi for an attachment was discharged, with costs; and the court refused to reserve leave to the plaintiffs to renew the application next term. Quære, however, whether he would be prevented from such application. *Reynolds* v. *Burkhart*, 1 P. R. 213.—P. C.—Draper.

The affidavit must deny payment of any part of the sum demanded. *Masecar* v. *Chambers*, 6 Q. B. 171.—P. C.—Macaulay.

An affidavit denying service of an award must be intituled in the cause, and not "The Queen v. Defendant," as it is an affidavit made before the attachment has been ordered. If the affidavit, however, contain a good answer upon the merits, the party will have leave to swear to an amended affidavit. *Heathers* v. *Wardman*, 4 Q. B. 173.—P. C.—Macaulay.

The affidavit of execution of the award must shew that it was executed within the time limited by the submission. *Ib.*

The allocatur in this case was held not objectionable as improperly embracing a moiety of the costs of reference. *Ib.*

In an application for an attachment for the nonpayment of money awarded, the submission being by bond, the rule nisi was intituled "in the matter of A. *v.* B." The affidavit of service was intituled in the same way. The rule making the submission by bond a rule of this court, was intituled in this court, "A. *v.* B." The affidavit of the execution of the award was intituled in this court only:—Held, that the intituling of the rule nisi and the affidavit of service thereof was correct:—Held, also, that there was no material variance between the intituling of the rule nisi and the other previous papers. *In re Beckett* v. *Cotton*, 5 Q. B. 271.—P. C.—Macaulay.

The original award must be brought into court, and the rule for attachment drawn up upon reading it:—Semble, that such rule may be granted on shewing service of a copy of the award, with the demand of performance; the original having before been shewn to defendant. *McLean* v. *Kezar*, 1 P. R. 125.—P. C.—Burns.

The rule for an attachment for non-payment of an award, is properly a four not a six day rule. *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns.

All matters in difference in a cause and on a building agreement between plaintiff and defendant, were referred, costs of the cause and of the reference to abide the event. The award, after disposing of the different issues in plaintiff's favour, assessed his damages over and above his costs and charges at £52, and fixed the costs of the reference and award at £20. The costs of the suit were afterwards taxed without notice to defendant, and a demand made of the amount awarded, the costs of the award as fixed by the arbitrators, and the taxed costs:—Held, that the want of notice of taxation was not a ground for setting aside the award, but for withholding the attachment until the costs could be revised: that the demand upon which the attachment was moved for, though too large, in including the costs of the award, was good as to the rest, each sum having been separately demanded. The rule for attachment was therefore made absolute, but the writ was ordered to lie in the office a month, to enable the defendant to get the costs of the suit and award taxed, and make payment. *Ib.*

A rule nisi for attachment, drawn up "upon reading the rule of court, award, allocatur, and papers filed in this cause" is insufficient; the affidavits filed, and necessary to bring the party into contempt, should be specifically referred to. *Dickey* v. *Mulholland*, 2 P. R. 169.—P. C.—Hagarty.

When a rule nisi on the face of it refers to papers and affidavits filed, this is sufficient in ordinary cases; but in applications touching awards, and in proceedings to bring a person

into contempt, the particular materials moved upon should be specified. *Hesketh* v. *Ward*, 17 C. P. 667.

A power of attorney from one of three defendants to demand the costs is sufficient, payment to one being payment to all. *Shipman* v. *Shipman*, 2 P. R. 393.—P. C.—McLean.

Semble, that the court, when applied to under C. S. U. C. c. 24, s. 19, for a rule to pay over money awarded, will exercise the same discretion as formerly on motion for attachment, for which this remedy is now substituted. *Watson* v. *Garrett*, 3 P. R. 70.—C. L. Chamb.—Richards.

To obtain execution under that section it is not sufficient to make the submission a rule of court. The defaulter must be called upon to shew cause why he should not pay, specifying the sum, and a rule absolute obtained. *Re Thomas and Brooke*, 3 P. R. 78; *Niagara and Detroit Rivers R. W. Co.* v. *Buckwell*, 3 P. R. 82.—P. C.—Richards.

The award directed payment of a sum by monthly instalments, with a proviso that on default in any of them the whole should fall due. Quære, whether the court would order payment of the whole sum, unless it were shewn that defendant had notice of the award before default. *Niagara and Detroit Rivers R. W. Co.* v. *Buckwell*, 3 P. R. 82.—P. C.—Richards.

To enforce performance of an award, the proper mode is to serve an order that the party do within a time therein to be limited perform the award; which order must be endorsed with the notice required by the 46th of the orders of 1853. An attachment issued for non-performance of an award, when no such order had been served, was set aside with costs; although an order making the award an order of court with such notice endorsed, had been duly served. *Wilson* v. *Switzer*, 1 Chy. Chamb. 44.—Esten.

(b) *Other Cases.*

Where executors submitted to arbitration, with a proviso that it should not be taken as an admission of assets, and the arbitrators awarded that they should pay a certain sum, without stating that they had assets, a rule for an attachment against them for non-payment was refused. *Gilbert* v. *Simpson*, M. T. 7 Vict.—Jones.

An attachment will be ordered against a party who files a bill in equity, contrary to his undertaking in a rule of reference, and in disregard of a rule of court made thereon. *Manners* v. *Clarke*, 1 Q. B. 191.

The court will enforce performance of an award by attachment, though it extends to the delivery of possession of land. *McPherson* v. *Walker*, 1 P. R. 30.—P. C.—Draper.

An attachment will not be granted where a new arrangement has been made between the parties, subsequent to the award; but the successful party will be left to his action on the award. *Thompson* v. *Macklem*, 1 P. R. 293.—P. C.—Draper.

A party intending to attach, should proceed with reasonable dilligence. *Dexter v. Fitzgibbon*, 4 L. J. 43.—C. L. Chamb.—Robinson.

Where an award is vague, and defendant swear that it is impossible to comply with it, owing to the uncertainty, an attachment will be refused. *In re Manley* v. *Anderson*, 2 P. R. 106.—P. C.—McLean.

The execution by defendant of an assignment in trust for his creditors, by which the plaintiff is to be first paid, and the acceptance of such assignment by plaintiff, is no answer to an application for attachment on an award previously made for the same debt. *McKenzie* v. *McKenzie*, 2 P. R. 157.—P. C.—Burns.

Where the costs of the cause were to abide the event, but no authority was given to direct a verdict, and the award was silent as to costs:—Held, that attachment was the proper remedy for their recovery. *Shipman* v. *Shipman*, 2 P. R. 393.—P. C.—McLean.

The award in this case ordered certain securities to be assigned to a trustee, who was to dispose of them, and out of the proceeds pay a certain sum to the applicant:—Semble, not an award on which an order to pay would be granted. *Re Thomas and Brooke*, 2 P. R. 78.—P. C.—Richards.

This court has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contained no submission to pay, where the reference has been made an order of the court, and will in such a case order a reference to the master, and not oblige the party to sue at law. *Armstrong* v. *Cayley*, 2 Chy. Chamb. 163.—VanKoughnet.

3. *Entering Judgment.*

Where a cause was referred on a verdict taken by consent, and the award made in vacation, final judgment entered before the next term was held to be irregular. *Vincent* v. *McLean*, Dra. 168.

A plaintiff who takes a verdict subject to a reference, but does not proceed to an arbitration, owing partly to the fault of the arbitrators, partly to the delay of the defendant, cannot enter judgment on the verdict without first applying to the court. *Mott* v. *Loucks*, T. T. 1 & 2 Vict.

And the court will not allow such judgment to be entered. *Gould* v. *Freeman*, 3 Q. B. 270.

Where on a reference at nisi prius, a verdict is taken subject to the award, and the cause only is referred, and an award made, judgment may be entered after the first four days of the succeeding term. But when matters not included in the cause are referred, judgment cannot be entered until after the next succeeding term. *Hawke* v. *Duggan*, 5 Q. B. 636.—P. C.—Draper.

Where a cause "and all matters in difference" were referred:—Held, that judgment could not be entered until after the first four days of the term following the award: and Semble, that defendant would have the whole term to move in. *Williams* v. *McPherson*, 2 P. R. 49.—P. C.—Richards.

A verdict was taken at the autumn assizes, subject to an award, which was made in May following, and the plaintiff, without waiting until after the fourth day of the next term,

immediately entered up judgment thereon :—Held, regular. *Laurie* v. *Russell*, 1 P. R. 36.—P. C.—Burns.

Where a verdict is taken and the award not made until after the next term, the plaintiff need not wait to enter his judgment until after the first four days of the term following the award. *Blanchard* v. *Snider*, 28 Q. B. 210.

Semble, that under the submission in this case no judgment could be entered up for the sum awarded, without application to the court. *Murphy* v. *Cotton*, 14 Q. B. 426.

Where a plaintiff, in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under the 17 Car. II. c. 8. No execution, however, can issue in the name of plaintiff's executor without reviving the judgment. *Proctor* v. *Jarvis*, 15 Q. B. 187.

Where a verdict was taken, and an award made on the first day of the term following, on which judgment was entered soon after that term :—Held, not too soon. *Ib.*

An application to set aside a judgment, founded on a verdict which was taken for the plaintiff subject to a reference to arbitration, the judgment having been entered up before the expiration of four days succeeding the day of making the award, was refused. *VanNorman* v. *Bridgeford*, 2 L. J. N. S. 132.—P. C.—Hagarty.

Judgment may be entered upon an award made on a reference at nisi prius under the compulsory clauses of the C. L. P. Act, although no verdict has been taken, without the formalities formerly required in the case of an attachment for nonpayment of the amount awarded. An order for leave to enter such judgment is not necessary. *McNeil* v. *Lawless*, 2 L. J. N. S. 190.—C. L. Chamb.—A. Wilson.

A County Court and a Division Court suit, and all disputes were referred, and a sum of money awarded, to be paid by A. to B. after ten days' notice of the award. The notice was served upon the attorney who had acted for A. in the arbitration, but who disclaimed any right otherwise to represent him on application for leave to enter judgment for nonpayment :—Held, that the service was insufficient. *In re* [illegible] v. *Potter*, 4 P. R. 61.—P. C.—Hagarty.

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4. *By Action.*

(a) *Pleading.*

Separation of husband and wife. Reference to settle the allowance in lieu of alimony. Declaration on submission bond. Special demurrer. *Tewsley* v. *Stegman*, Tay. 498.

In debt on award that defendant should pay plaintiff £149 on a day mentioned, and that the plaintiff should deliver up a house to the defendant on the same day :—Held, that these were concurrent acts, and that the plaintiff must aver readiness to perform his part. *Baker* v. *Booth*, 2 O. S. 65.

But it is sufficient to aver readiness to deliver the premises without actual delivery, and to a verdict; and where to a plea that the defendant demanded the award from the arbitrator on the 5th of February, the plaintiff replied a publication and notice of the award on the 6th, (the day when the award was to be made), the replication was held good. *Baker* v. *Booth*, 2 O. S. 373.

Declaration in debt on a submission bond, averring that the award was made on the day appointed. Plea—"no award." Replication—an award within the time—to wit, on a day and year different from the year stated in the declaration. Replication held sufficient on general demurrer. *Judge* v. *Judge*, 5 O. S. 692.

Nonpayment of the money awarded is a sufficient breach, without averring notice of an award. *Turner* v. *Alway*, 5 O. S. 45.

When the submission does not limit any time for the award, plaintiff need not aver that it was made within a reasonable time, nor allege notice of the award. *Adams* v. *Ham*, 5 Q. B. 292.

Money awarded was held under the circumstances, not recoverable on the common counts. *Holden* v. *McCarthy*, 5 O. S. 99.

In debt on bond to perform an award, a plea setting forth mere legal grounds of objection and concluding to the country, is bad; and if there be two separate parts in the award, an answer to one part cannot be pleaded in bar of both; and if two breaches be assigned in the replication, it will be sufficient on general demurrer if one only be supported. *Boyd* v. *Durand*, 5 O. S. 122.

In debt on an award in favour of the Kingston Bank Commissioners, under 10 Geo. IV. c. 7, the declaration set out an award that defendant should pay £900 in bills or notes of the bank, or bank certificates, or orders for stock, by a certain day; and assigned as a breach nonpayment in the terms of the award, but did not negative payment in money :—Held bad, on general demurrer. *Kingston Bank Commissioners* v. *Dalton*, E. T. 3 Vict.

Plea of no award by arbitrators, or by umpire, *duly* appointed :—Held, bad on special demurrer. *Croker* v. *Hoggan*, 6 O. S. 508.

Declaration in debt for £1000, alleging a reference between plaintiff and defendant, by bonds with a penalty of £1000, and setting out the award thereon, assigning breaches for nonperformance, and concluding "whereby an action had accrued to recover the sum of £1000 above demanded :"—Held bad on special demurrer, as an informal declaration on the bond of submission. *Simpson* v. *Mode*, 6 O. S. 511.

A set-off of a sum certain is a good plea in debt on a submission bond, assigning as a breach the non-payment of a sum certain awarded. *Lindford* v. *Musgrove*, 6 O. S. 642.

Award to be made in writing. Plea, that the arbitrators did not award in writing under their hands :—Held, bad. *Baby* v. *Davenport*, 6 O. S. 643.

The effect of a repugnancy in a replication, setting out an award, to the submission set out on oyer, as regards the name of the arbitrator. *Tewsley* v. *Dunlop*, 1 Q. B. 138.

Where plaintiff and defendant refer all causes of action, and after an award given plaintiff sues

defendant for a cause of action not brought before the arbitrators, on the ground that he then had no knowledge of it, an issue tendered as to such knowledge is material. *Lusty* v. *Van-Volkenburgh*, 1 Q. B. 214.

Plaintiff declares in debt on bond for the performance of an award. Defendant pleads no award upon the premises. Plaintiff replies setting out the award. Defendant rejoins matter extrinsic of the award, and relies upon it for shewing the award void. The rejoinder is bad, as being a departure from the plea. *Maxwell* v. *Ransom*, 1 Q. B. 219.

Plea of performance, replication denying it only by inference—Held, bad on special demurrer. *Lymburner* v. *Norton*, 1 Q. B. 485.

A variance in the names of arbitrators—Held no ground of nonsuit. *Bentley* v. *West*, 4 Q. B. 98.

Defendant set out the condition on oyer, which was for the performance of the award of arbitrators, and pleaded "no award made." The plaintiff replied, showing an award made at the proper time and with the proper formalities, and setting it out; and then averred notice by defendant of the award, and assigned two breaches. The defendant rejoined, setting out the award verbatim, and then demurred separately to each breach:—Held, that the defendant could not by thus setting out the award in his rejoinder by suggestion, make it a part of the plaintiff's replication, as in the case of a deed pleaded with profert; and that the defendants demurrer should have been to the replication, and not to the several breaches assigned in the replication. But upon the whole record judgment was given for the defendant on the demurrer, because the award as set out by the plaintiff himself in his replication was void. *Benedict* v. *Parks*, 1 C. P. 370.

Plea in assumpsit on an award, held bad on special demurrer for not identifying the matters referred with the cause of action. *Calvin* v. *McPherson*, 4 C. P. 150.

Debt on submission bond. Seven pleas objecting to validity of award, all held bad on demurrer. *Finkle* v. *Arnold*, 6 Q. B. 168.

Declaration on a bond of submission to J. and L., of an action brought by plaintiff against defendant, with other matters, with liberty, either before said arbitration or pending said reference, to appoint an umpire. The condition was, to abide by the award of the arbitrators, if made on or before the 16th of June, 1855, or if they should not make their award by that time, then by the award of the umpire, *if made on or before the same day*. Plea, no award by arbitrators or umpire, on or before the 16th of June. Replication, that the arbitrators before entering on the arbitration appointed an umpire, who with the said arbitrators, within the time limited for making the award by the umpire, to wit, on the 16th June, 1855, awarded that there was due from defendant to plaintiff £55 16s. 1d., upon balance of accounts, and also £5, costs of the arbitration, which sums they awarded defendant to pay to the plaintiff, &c.:—Held, on demurrer, replication bad, for, 1. If the award could be supported at all, it could only be as the award of the two arbitrators, and should have been so set out, to make it in accordance with the submission. *Roddy* v. *Lester*, 14 Q. B. 259.

Proceeding by attachment on an award is no bar to subsequent action on the same award, though the court may stay the action so that the defendant be released from the attachment. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.—C. L. Chamb.—Robinson.

In a declaration on an award that defendant should make, execute, and deliver to the plaintiff a good and sufficient conveyance in fee simple, with the usual covenants, of certain land specified. Breach that defendant never had any title, and so could not perform the award. Plea—that defendant did, in pursuance of the award, execute and tender to the plaintiff such deed as in the declaration mentioned:—Held, on demurrer, plea good. *Anderson* v. *Van Buseck*, 18 Q. B. 172.

An action on an award, to which the defendant pleaded performance only. At the trial a verdict was entered for defendant, with leave reserved, if he was not so entitled, to enter a verdict for the plaintiff for £26 9s. and interest:—Held, under the special circumstances set out in the case—1. That defendant was not entitled to a verdict in his favour, for though the award was unauthorized, yet he had not objected to it, but pleaded performance, which he had clearly failed to prove. 2. That a verdict must go for the plaintiff for the £26 9s., as it had been so agreed at the trial, although under the circumstances the plaintiff was not necessarily entitled to that sum, the defendant having offered to do all that he had a just claim to call upon him for. *Ib.*

The submission and award being set out in full in the declaration; quære, whether an objection that the award was not final, could be raised by plea, or whether defendant should not have demurred. *Ellwood* v. *The Corporation of the County of Middlesex*, 19 Q. B. 25.

To an action on an award defendant, after setting it out at length, pleaded, 1. That the arbitrators awarded upon matters not submitted and which accrued after the submission, and upon accounts between the parties to a period long after the submission; 2. That the award was not final, in this, that the said matters relating to the Berlin property were matters in difference, and were submitted to the arbitrators, but that they did not award thereon; and in this, that they did not dispose of the difference respecting the value of the Guelph property, but left the same unsettled and dependent upon the sale thereof by the plaintiff, when only the amount to be accounted for to defendant could be determined:—Held, on demurrer, both pleas good, and as to the second plea, that the averment as to the Berlin property was a sufficient defence, and the plea therefore sufficient, although the award as to the Guelph land was not wanting in finality:—Held, also, that upon the evidence set out in the case, the first plea was not proved. *Stewart* v. *Webster*, 20 Q. B. 469.

In assumpsit on an award the plea of nunquam indebitatus puts in issue the submission, the enlargement of the time, and the making of the award according to the submission. *Abbott* v. *Skinner*, 7 L. J. 158.—C. C.—Mackenzie.

In debt on a submission bond a plea of nunquam indebitatus puts the submission in issue. *Abbott* v. *Skinner*, 11 C. P. 309.

Defendants *besides* ... tion pleaded, setting o... declaration and allegi... face of it, for not ... referred, for want of ... authority:—Held, plea... matter of law already ... murrer. *Stinson* v. *M...*

Action on bond. ... conditioned to perform ... made. Plaintiff must ... the condition, or setting ... ing a breach; he cannot ... *White*, 9 L. J. 131.—C. ...

The declaration, after ... erences had arisen betwe... testator of defendant, an... entered into an arbitrati... tiff to refer said differe... were set out; and tha... published their award in ... of testator, and had awa... should pay plaintiff by ... then averred nonpayment ... ant:—Held, on demurrer, ... the action appearing to be ... on the bond, it was not n... whole award, but only so ... the plaintiff's case. Prop... on bond conditioned to per... *McCallum* v. *McKinnon*, 1...

The second count averre... Railway Company, by th... ion, alleged that the pla... no compensation; and ... warded him $10.000; wh... of the statute, defendants ... him the costs of the arbit... ay:—Held, on the author... ay Co. *v.* Blake, 6 H. & ... indebted was a good plea to... *The Buffalo and Lake Hu...* 222.

The eleventh plea to the ... on count for money awa... ward mentioned and the r... id in the first count (a s... ward), were the same:—He...

Arbitrators having award... e plaintiff for injuriously ... an action on the award def... uitable grounds, that the ... cessively and fraudulently ... ward was made by the frau... presentation of the plaintiff ... aking it:—Held, on demurr...

Plaintiff declared on a bo... leging that the arbitrators ... difference, amongst other... tion in the C. P., between... warded that defendant shoul... ts of the reference and of t... fendant pleaded non est fac... itrators did not make any ... ard mentioned no suit, but ... reference, "and also all cos... en incurred by any legal ... ich the matter relating to th... re passed previous to this a... attorney in the suit in C.

Defendants besides demurring to the declaration pleaded, setting out the whole award in the declaration and alleging that it was void on the face of it, for not deciding all the matters referred, for want of finality and for excess of authority :—Held, plea bad, as putting in issue matter of law already brought up by the demurrer. *Stinson* v. *Martin*, 22 Q. B. 154.

Action on bond. Plea, that the bond was conditioned to perform an award, and no award made. Plaintiff must reply specially, denying the condition, or setting out an award and alleging a breach ; he cannot take issue. *Cowan* v. *White*, 9 L. J. 131.—C. L. Chamb.—Draper.

The declaration, after reciting that certain differences had arisen between the plaintiff and the testator of defendant, and that said testator had entered into an arbitration bond with the plaintiff to refer said differences, several of which were set out ; and that the arbitrators had published their award in writing in the lifetime of testator, and had awarded that said testator should pay plaintiff by a certain day £100 ;—then averred nonpayment by testator or defendant :—Held, on demurrer, declaration good ; for the action appearing to be on the award, and not on the bond, it was not necessary to set out the whole award, but only so much as would support the plaintiff's case. Proper form of declaration on bond conditioned to perform an award stated. *McCallum* v. *McKinnon*, 15 C. P. 561.

The second count averred that the defendants, a Railway Company, by their notice of arbitration, alleged that the plaintiff was entitled to no compensation ; and that the arbitrators awarded him $10.000 ; whereby, and by force of the statute, defendants became liable to pay him the costs of the arbitration, but did not pay :—Held, on the authority of Welland Railway Co. *v.* Blake, 6 H. & N. 410, that never indebted was a good plea to this count. *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 24 Q. B. 222.

The eleventh plea to the third count (a common count for money awarded), was that the award mentioned and the money claimed there had in the first count (a special count on the award), were the same :—Held, no defence. *Ib.*

Arbitrators having awarded compensation to the plaintiff for injuriously affecting his land, in an action on the award defendants pleaded, on equitable grounds, that the sum awarded was excessively and fraudulently exorbitant, and the award was made by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators taking it :—Held, on demurrer, a good defence.

Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others the costs of an action in the C. P., between the parties, and awarded that defendant should pay him all the costs of the reference and of the said action, &c. Defendant pleaded non est factum, and that the arbitrators did not make any such award. The award mentioned no suit, but awarded the costs of reference, "and also all costs that may have been incurred by any legal process through which the matter relating to this arbitration may have passed previous to this award." The plaintiff's attorney in the suit in C. P. produced the bill of costs in that suit :—Held, that on these pleadings, the suit and the fact of its reference might be taken to be admitted. *Hibbert* v. *Scott*, 24 Q. B. 581.

Held, that sec. 171 of the C. L. P. Act, did not in any way alter the pleadings in the case of awards ; but that, the declaration shewing the submission on a certain day and the award within a few days thereafter, the court would intend it to have been within the stipulated time, and that it was certainly within a reasonable period, and within three months from the appointment of the arbitrator :—Held, also, not necessary to aver a demand to comply with the award, or that a reasonable time had elapsed before action. *Reid* v. *Reid (Administratrix)*, 16 C. P. 247.

The court had decided that one portion of an award was bad, but the other portion good. Plaintiff sued for non-compliance with the latter, but omitted to set out the former part :—Held, that the omission was immaterial ; but that even the omission of a material part could not be objected to under a denial of the award in the declaration mentioned. *Bond* v. *Bond*, 16 C. P. 327.

See *Gerrie* v. *McDonnell*, 18 Q. B. 146. p. 120.

(b) *Evidence.*

In an action upon a submission bond, plea, non est factum, and subsequent suggestion of breaches by the plaintiff, it is sufficient to prove the bond and submission set out upon the record, and an award tallying with it. *Lossing* v. *Horned*, Tay. 219.

In an action on an award, with the common counts, the submission to arbitration as set out in the declaration mentioned three defendants, and the award in reciting the submission only noticed two, but referred to the rule by which the submission was made as annexed to the award, in which rule the three defendants were named :—Held, that the variance between the submission set out in the declaration and that recited in the award was immaterial, as the submission itself agreed with the declaration. *Hale* v. *Mattheson*, Dra. 63.

In debt on an award under bonds of submission, it is necessary to shew a mutual submission, and to prove the bonds executed by all the parties ; but where the defendant at the trial accepted a credit without objection for money paid on the award, he was held precluded from objecting that the plaintiff had not proved his own execution of the bond. *Skinner* v. *Holcomb*, 6 O. S. 336.

In debt on award the declaration recited a submission by bond, averring that under it the arbitrators had made an award upon one of the matters in difference, the other matters having been by consent withdrawn, and that afterwards the other matters having been again submitted, the arbitrators made an award in favour of the plaintiffs. Defendant pleaded no such submission, and never indebted. At the trial the plaintiff proved the parol submission, but not the bond, and a point was reserved for the defendant to move upon that objection. The court on motion for a new trial (the verdict being in accordance with the justice of the case) refused to interfere. *Baby* v. *Davenport*, 3 Q. B. 13.

Held, that an award made after the time had elapsed could not be taken as evidence of an account stated. *Ruthven* v. *Ruthven*, 8 Q. B. 12.

Semble, that the award was not admitted by the pleadings in this case; but—Held, that it was sufficiently proved by shewing that the defendants paid a portion of the sum awarded, and that their officers had stated in writing the particulars of the award, and the sum remaining due on it. *Hughes* v. *Mutual Fire Ins. Co. of District of Newcastle*, 9 Q. B. 387.

The plaintiff and defendant having a dispute referred it to M. to determine; and M. having heard their statements, awarded that defendant should pay to the plaintiff £25. Subsequently, at the request of the plaintiff's attorney, he made a written award to the same effect, and delivered it to the parties. The plaintiff having sued as upon a verbal submission:—Held, not necessary to produce the written award, as it appeared from the testimony of the arbitrator that the verbal decision was in fact his award and so intended. *Davis* v. *McGivern*, 11 Q. B. 112.

Where a plaintiff proves such an award as stated in his declaration, its legal effect or validity is not involved under a plea of nul tiel award. *Hartley* v. *Huntley*, 4 C. P. 276.

Plaintiff need not shew that the award was executed by the arbitrators at the same time. That is assumed in the first instance, but defendant may shew the contrary under a plea denying the award. *Sullivan* v. *King*, 24 Q. B. 161. See *Smith* v. *George*, 12 Q. B. 370.

In an action founded upon a bond conditioned for the performance of an award:—Held, that under a plea of nul tiel agard evidence is admissible to shew that the arbitrators took into their consideration and decided upon matters not referred to them. *Carveth* v. *Fortune*, 12 C. P. 360.

In an action on an award it is sufficient to produce the submission bond executed by defendant, without that executed by the plaintiff. *Towsley* v. *Wythes*, 16 Q. B. 139.

A municipality by by-law opened a road across plaintiff's property, and arbitrators were appointed under 16 Vict., c. 181, to determine what compensation should be paid to him. Afterwards a resolution was passed by the council that the arbitrators so chosen should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled; and they awarded separate sums for opening the road and for damages, respectively. The plaintiff having brought debt on this award, defendants pleaded no award:—Held, that under this plea they could not dispute the arbitrators' authority to award the latter sum; but should have moved to set aside the award, or might have pleaded nunquam indebitati to that sum, which would have brought the submission in issue. *Hodgson* v. *Municipality of Whitby*, 17 Q. B. 230.

To an action on an award defendant pleaded a set-off for costs of defence in certain suits due to him by the same award. The award recited a submission of an action in the C. P. by plaintiff against defendant, and also of "all other matters of difference, action and actions, suits, and controversies whatsoever," and awarded that defendant should pay all costs of said suit, "and all other law costs occasioned by any suit or suits, action or actions, either at law or equity, had about and regarding the premises, and brought before the execution of said bonds of submission to arbitration; and we also order and direct that no further proceedings shall be had in any or either of said actions:"—Held, that the defendant could not under his plea recover for costs of suits in which judgment had been given before the reference, for they were not included in the submission or award:—Held, also, that the evidence of the arbitrators was rightly received, to shew that such costs were not intended to be allowed. *Campbell* v. *Howland*, 19 Q. B. 18.

The declaration on a submission bond alleged an award that defendant should pay the plaintiff $540, and each pay their own costs of the submission, and that $60, other costs, should be paid by them equally. Pleas, denying the submission and award. The plaintiff proved the execution of defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of third arbitrator endorsed on it, having served a notice to produce on defendant's attorney, at 11 a.m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail:—Held, 1. That the execution of plaintiff's bond being put in issue, it might be presumed to be in possession of defendant's attorney; and if it were not, that the notice under the circumstances was sufficient; 3. That the plaintiff having paid the $60, was not entitled to recover half of it from the defendant. *Sullivan* v. *King*, 24 Q. B. 161.

To an action brought upon an award of compensation to the plaintiff under the Railway Act for injuriously affecting his land, defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was obtained by the fraud, covin, and misrepresentation of the plaintiff and the arbitrators. At the trial, to support this plea, defendants called several witnesses to prove that the sum was grossly excessive. None of these witnesses, however, had been brought forward at the arbitration, although defendants could have called them then as well as at the trial; the award was clearly sustained by the only evidence before the arbitrators; no attempt was made to impeach the credit of any of the witnesses who gave it; no misconduct was proved on the part either of the plaintiff or of the arbitrators; and the arbitrators, being sworn, denied any improper motive:—Held, that under these circumstances the evidence as to value of witnesses not before the arbitrators was inadmissible in support of the plea. Quære, whether anything short of actual fraud could support such a plea. *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 24 Q. B. 520.

Upon appeal from the above decision:—Held, Per Richards, C. J., Adam Wilson, J., Morrison, J., and John Wilson, J., such evidence could not be wholly rejected. Per Draper, C. J., Mowat, V. C., and Spragge, V. C., it was not admissible. *Widder* v. *The Buffalo and Lake Huron R. W. Co.*, 27 Q. B. 425. See also *Daly* v. *The Buffalo and Lake Huron R. W. Co.*, 16 Q. B. 238.

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The attesting witness to an award may be compelled to attend and prove the award. *Taylor* v. *Bostwick*, 1 Chy. Chamb. 23.—Spragge.

(c) *Other Cases.*

For non-payment of money awarded in accordance with a deed, the plaintiff should sue in covenant. *Tait* v. *Atkinson*, 3 Q. B. 152.

Upon a motion against a verdict on an award, the court will not go into the merits of the award. *Thirkell* v. *Strachan*, 4 Q. B. 136.

When an award directs two to pay each a certain sum, and one is obliged to pay the whole because the other refuses to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award. *Allen* v. *Coy*, 7 Q. B. 419.

Where the plaintiff had been awarded a certain sum in accordance with the terms of an instrument under seal; for the non-payment of such an award the plaintiff should sue in covenant: he cannot sue in assumpsit unless some new consideration, apart from the written instrument, can be proved. *Tait* v. *Atkinson*, 3 Q. B. 152.

Semble, that an objection that two arbitrators made the award without notice to the third, could be taken advantage of in an action on the award. *Smith* v. *George*, 12 Q. B. 370.

In an action on a bond of submission, an excess of authority in giving costs of the reference was —Held no objection to the award, as those costs were not sued for. *Roddy* v. *Lester*, 14 Q. B. 259.

Defendant became bound to plaintiff in a penalty to abide by an award. The arbitrators awarded $400 to be paid by defendant to plaintiff in three instalments, the two last to be secured by defendant upon real estate, and payable at a future day. Defendant neither paid the first instalment, nor secured the second and third in the manner directed:—Held, that plaintiff was entitled to assess his damages for the whole three instalments. *Bond* v. *Bond*, 16 C. P. 327.

First count of declaration on a promissory note of $400. 2nd. For $85.18, under an award founded on a submission, leaving all matters in difference, whether partnership or otherwise, to arbitration. Pleas, 1. Payment; 2. Set-off on common counts. On motion to set aside a verdict for plaintiff, on the grounds, 1. That the arbitrators exceeded their authority in making their award. 2. That since the making of said award money had been received by plaintiff to defendant's use:—Held, that as no defence had been set up to the award at the trial, and no action taken to set aside the award, the defendant could not now set up such a defence; and if moneys had been received by plaintiff to defendant's use, as alleged by defendant, since the award, defendant could on the pleadings have shewn the same at the trial. *McKenzie* v. *Somers*, 14 C. P. 97.

Suing on an award will estop a party from denying the authority of the arbitrators. *Black* v. *Allan*, 17 C. P. 240.

School trustees cannot be held liable under 23 Vict., c. 49, s. 9, for wilfully neglecting or refusing to comply with an award, without being first afforded an opportunity of explaining or justifying such non-compliance. *Graham* v. *Hungerford*, 29 Q. B. 239. See also, *VanBuren* v. *Bull* 19 Q. B. 633.

5. *By Specific Performance.*

This court, when the relief given by the award is of a nature proper to be specifically performed, will decree that relief; and that, too, although the court cannot specifically perform some part of the award, which is for the benefit of the plaintiff, but which portion the plaintiff consents to forego. *Bell* v. *Miller*, 9 Chy. 385.

The plaintiff and defendant owned adjoining lots, through which a stream flowed freely in its course until defendant threw logs and refuse wood into it, which had the effect of damming back the water on the plaintiff's land, whereupon the plaintiff instituted proceedings at law, which action, with all matters in difference between the parties, was referred to arbitration, when the arbitrators decided that defendant should remove all the timber across the creek, and pay one-half the costs of the action at law. The defendant having refused to obey the award, the plaintiff filed a bill for the purpose of compelling obedience thereto. The court, under the circumstances, made the decree as asked, and ordered the defendant to pay the costs of the suit. *Hodder* v. *Turvey*, 20 Chy. 63.

IX. Costs.

1. *Right to Full Costs.*

Where an action is commenced in the King's Bench, and arbitrators upon a reference award damages under the jurisdiction of the District Court, the plaintiff if not deprived of costs. *Lang* v. *Hall*, Tay. 215.

Where a verdict was taken subject to a reference, and the arbitrators awarded £10, reducing only the price and not the items of the account sued for, a suggestion to deprive the plaintiff of costs, under the Court of Requests Act, was refused. *Stratford* v. *Sherwood*, 5 O. S. 169.

Where a cause has been referred by nisi prius order, an application for costs of special jury struck and called, must be to the judge by whom the reference was made. *Commercial Bank* v. *Pringle*, 3 L. J. 28.—C. L. Chamb.—Draper.

All matters in difference in this cause, and in a building agreement between plaintiff and defendant were referred, costs of the cause and reference to abide the event. The award after disposing of the issues in plaintiff's favour, assessed his damages on account of the non-performance by defendant of the promises alleged in the declaration, and of the matters in difference on the building agreement, and also the plaintiff's costs and charges, at £52 16s. 7d. The costs of the reference and award were then fixed by the award at £20. The costs of the suit were afterwards taxed without notice to defendant:—Held, that as no verdict had been taken the plaintiff was entitled to full costs. *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns.

Held, that the words, "costs of the suit," as used in an award, have no reference to any par-

ticular scale of taxation, and so cannot, per se, be relied upon as entitling plaintiff to full costs of suit in a case where the amount awarded is within the jurisdiction of an inferior court. *Keep* v. *Hammond*, 9 L. J. 157.—C. L. Chamb. Draper.

Where the transactions amounted to about $1,100 on one side, and about $800 on the other, and defendant paid into court $176, and plaintiff recovered $102.30 by the award:—Held, that full costs should be allowed to the plaintiff. *Jones* v. *Hewson*, 2 L. J. N. S. 107.—C. L. Chamb.—A. Wilson.

Where a cause is referred, costs to abide the event, the plaintiff is not entitled to full costs if he is awarded anything, but to such costs only as he could have claimed if he had recovered the same amount. *Watson* v. *Garrett*, 3 P. R. 70. —Chamb.—Richards.

Where a cause was referred, costs of the cause to abide the event, and costs of the reference in the discretion of the arbitrator, and £4 was awarded to plaintiff, the taxing officer refused to tax only Division Court costs subsequent to the award, and his decision was upheld. *Fleurynck* v. *Clifton*, 3 P. R. 216.—Chamb.—Burns.

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2. *Under Rule of Court*

Where a cause is referred by order of nisi prius, and a sum awarded within the District Courts—the court or a judge may grant an order for full costs under the ninth rule of E. T. 11 Geo. IV. *Elmore* v. *Colman*, 4 O. S. 321.

A cause having been referred by order at nisi prius, and a sum awarded within the County Court jurisdiction, the court, on affidavit, granted an order for full costs, under the 9th rule of E. T. 11 Geo. IV. *Morse* v. *Teetzel*, 1 P. R. 375. —P. C.—Richards.

Where final judgment is obtained without a trial a judge in chambers has power to make an order for full costs. Quære—Should the order be ex parte? Where a cause is decided by an award, the cause is one proper for an application of the kind. The order may be made unless it appear that the cause was one in which the plaintiff was bound to sue in an inferior court. A plaintiff, in order to bring his cause within the jurisdiction of an inferior tribunal, is not bound to give credits. It is his privilege to do so, but there is no legal obligation upon him to do so. *Geroux* v. *Yager*, 8 L. J. 19.—C. P.

Two actions for false imprisonment were referred at the assizes, no verdict being taken, costs to abide the event. In one the arbitrator found £20, in the other £10. The plaintiff having proceeded by attachment on the award:—Held, that he was entitled to full costs without a certificate. Such a case is not within the 155th rule of court, for the plaintiff cannot be considered as proceeding upon the final judgment. *Cochrane* v. *Scott*, *Cochrane* v. *Cross*, 3 P. R. 32. —C. L. Chamb.—Burns. Moved against in full Court of C. P., but rule discharged.

A cause was referred, before trial, by judge's order, costs to abide the event, and the arbitrator awarded £9 3s. 9d., the claim being originally of the jurisdiction of the County Court, dan reduced by set-off. The plaintiff applied for full costs, on affidavit shewing that he intended to enforce his award by rule of court, and execution under C. S. U. C., c. 24, s. 19. The application was refused for—Held, that he must be considered as obtaining final judgment without trial, and the case came within the rule of court No. 155. *Watson* v. *Garrett*, 3 P. R. 70 —Chamb.—Richards.

Semble, that the rule of T. T. 24 Vict. applies in the case of a compulsory reference to the whole costs in the action, including the costs of the reference and award and proceedings subsequent thereto, and is not restricted to what may strictly be called the costs of the action:—Held, that under any circumstances such was the proper construction of this order of reference, by which "the cause and all matters in dispute therein were referred to arbitration, with power to the arbitrator to certify for costs in the same manner as a judge at nisi prius, and that the costs of the cause, award, order and reference, subject to such certificate, should abide the event." *Johnson* v. *Morley*, 3 P. R. 217.— Chamb.—A. Wilson.

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3. *Other Cases.*

Where a cause was referred, costs to abide the event, and the arbitrators having made no award the parties agreed to refer the cause to any judge of the District Court who should first come to Perth, and such judge awarded that the plaintiff had no cause of action, and that judgment should be entered for the defendant:— Held, that the award was good, and that defendant might maintain assumpsit for the taxed costs of the cause, and was not obliged to enter judgment. *Hale* v. *Matthison*, 3 O. S. 73

Where, owing to the misconduct of a party, arbitrators do not award, but an umpire does, costs will not be granted to the other party under a clause in the reference, "that if either party shall by affected delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the court shall think reasonable and just." *Proudfoot* v. *Trotter*, 1 Q. B. 398.—P. C.—Jones.

When the costs of the reference are in the discretion of the arbitrators, it is the usual and most proper practice to fix a specified sum. *Laurie* v. *Russell*, 1 P. R. 65.—P. C.—McLean.

An agreement that all costs shall be in the power of the arbitrators, &c., inserted after the condition of the bond, must be read as part of it. Extravagance in the amount of costs allowed under such a submission must be objected to by motion. *Towsley* v. *Wythes*, 16 Q. B. 139.

Where the costs of the reference are in the discretion of arbitrators, and the award says nothing about them, each party pays his own costs of reference, and the costs of the award are to be borne equally. *Glen* v. *Grand Trunk R. W. Co.*, 2 P. R. 377.—P. C.—Burns.

Where the costs of the cause were to abide the event, but no authority was given to direct a verdict, and the award was silent as to costs —Held, that attachment was the proper remedy for their recovery. A power of attorney from

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one of three defendants to demand the costs is sufficient. *Shipman* v. *Shipman et al.*, 2 P. R. 393.—P. C.—McLean.

It having been agreed on the trial that if certain facts left to the jury should be found for plaintiff, the matters of account were to be referred, no mention having been made as to costs, the jury found for plaintiff:—Held, that the costs of reference were costs of the cause. *Ruttan* v. *Boulton*, 10 C. P. 417.

The costs of shewing cause against a rule for setting aside an award, are costs in the cause, although no mention of them is made in the rule. *Corporation of Essex* v. *Parke*, 12 C. P. 159.

The phrase "costs in the cause" generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award, as follows: "We also order and award that plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201.50," it was—Held that "costs in the cause" meant the whole costs of both plaintiff and defendants. *Scott* v. *Grand Trunk R. W. Co.*, 10 L. J. 72.—C. L. Chamb.—Richards.

Costs of the award ordered to abide the event cannot be divided between the parties. *Martyn* v. *Dickson*, 2 L. J. N. S. 209.—P. C.—A. Wilson.

When a rule is asked for to refer a case back to an arbitrator to certify to prevent defendant deducting costs, the arbitrator evidently intending that each party should pay his own costs, the rule will be made absolute without costs, the costs of taking the award again before the arbitrator to be borne by the applicant. *Jordan* v. *Ambler*, 8 L. J. N. S. 67.—P. C.—Galt.

By the reference the costs of the cause and award were to abide the event:—Held, that specific directions given as to the costs in the award were unobjectionable, as in effect they directed only what would have been the result without them. *Johnston* v *Anglin*, 29 Q. B. 372.

A taxation by a deputy clerk of the Crown of costs under an award, on a reference to arbitration of two causes in different courts, together with all matters in difference, is not a nullity, in being beyond his jurisdiction, and probably not even an irregularity. *In re Hotchkiss and Hall*, 5 P. R. 423.—P. C.—Gwynne.

See *Campbell* v. *Howland*, 19 Q. B. 18, p. 180; *Sullivan* v. *King*, 24 Q. B. 161, p. 180; *Connor* v. *McCormack*, 23 C. P. 271, p. 158.

See IV. 2, (k) p. 134; VI. 8, p. 153.

X. Miscellaneous Cases.

A plea, stating that defendants, executors as aforesaid, submitted to arbitration, does not imply that they submitted in their character as executors. *Bleeker* v. *Meyers*, Tay. 285.

Right of defendant arrested to be discharged on reference to arbitration. *Barry* v. *Eccles*, 9 Q. B. 383.—P. C.—Hagerman. *Ruthven* v. *Ruthven*, 5 Q. B. 279.—P. C.—Macaulay.

A sheriff is liable to an action for the escape of a party attached for contempt in not performing an award, and it is not necessary that the party should be brought up on the return of the writ of attachment, and formally committed by the court. In such an action the sheriff will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award. He cannot go behind the order authorizing the attachment. *Huntley* v. *Smith*, 4 Q. B. 181.

To an action of trespass defendant pleaded, 1. Not guilty; 2. Close not plaintiff's; 3. Plaintiff not possessed:—Held, that an award as to the boundary between the parties could not be given in evidence by the defendant under any of these pleas. *Lake* v. *Briley*, 5 Q. B. 136.

In dealing with awards made under 9 Vict. c. 37, and 10 & 11 Vict. c. 24, the court will be governed by the ordinary rules of law as applicable to awards between party and party. *Commissioner of Public Works* v. *Daly*, 6 Q. B. 33.

Debt on submission bond, The plaintiff insured his property with defendants; upon a fire a dispute arose, which was referred. Before the award, the plaintiff assigned the bond, the policy, and the money due thereon, to H.:—Held, that defendant's assent to this was not necessary:—Held, also, that the assignment of the bond did not, by vesting the interest in the assignee, affect the legality of the award made under it. *Hughes* v. *Mutual Insurance Company of Newcastle*, 9 Q. B, 387.

Upon a special case stated by an arbitrator, in an action for converting the machinery, &c., of plaintiff's foundry, the court refused to stay proceedings on condition of defendant restoring the machinery, &c., taken by him, and held to be fixtures; 1. Because they considered it not to be a case in which they could properly take that course; and, 2. Being submitted merely to obtain their opinion on certain legal questions, they had no power to make such an order. *Gooderham* v. *Denholm*, 18 Q. B. 203, 214.

The changing of a contract by an award, even though for the surety's benefit, without his consent, would release him from liability thereon. *Titus* v *Durkee*, 12 C. P. 367.

Held, by the arbitrators appointed under B. N. A. Act, 1867, sec. 142, that as the British North America Act, 1867, confers powers on the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and a joint award is therefore unnecessary. *In re The Provinces of Ontario and Quebec in the Dominion of Canada*, 6 L. J. N. S. 212.

A copy of a fence viewers award, sworn to by the township clerk, was admitted in evidence under C. S. U. C. c. 32, s, 6. *Warren* v. *Deslippes*, 33 Q. B. 59.

Where a married woman applied as devisee and legatee for an administration order by motion without bill, and it appeared that an award had been made professing to determine all matters between the executors and the legatees interested in the estate, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied:—Held, that the validity of the award could not be tried on the motion, and that a bill must be filed, more especially as other legatees not

parties to the motion were interested in maintaining the award. *Nudell* v. *Elliott*, 1 Chy. Chamb. 326.—Mowat.

A defendant to an action at law pleaded, by way of equitable defence, an agreement to give time by the plaintiff, and a verdict was taken for the plaintiff, subject to a reference. Before the arbitrator had done more than make an appointment to attend before him, the defendant filed a bill to restrain the proceedings at law, on the same grounds as had been pleaded by him in the action. The court dismissed the bill with costs. *Pomeroy* v. *Boswell*, 7 Chy. 163.

Semble, that it is a contempt of a court of common law to proceed in chancery after a reference under an order of that court, which orders the parties to perform the award. *Ib.*

Witness to award bound to prove it. *Taylor* v. *Bostwick*, 1 Chy. Chamb. 23.—Spragge.

ARBITRATOR.

See ARBITRATION AND AWARD.

ARGUMENTATIVENESS.

See PLEADING AT LAW.

ARMY, NAVY, AND MILITIA.

I. LIABILITY OF OFFICERS, 187.

II. DESERTION.

1. *Assisting Sailors to Desert*, 188.
2. *Enticing Soldiers to Desert*, 188.

III. ORDNANCE—*See* ORDNANCE.

I. LIABILITY OF OFFICERS.

No action will lie by an officer against the paymaster of his regiment for his pay, when the paymaster is directed not to pay it over by the commanding officer. *Elliott* v. *Hall*, H. T. 2 Vict.

A lieutenant-colonel of militia was held not to be liable for the price of clothing ordered by him for his men, he being merely a servant of the government. *McIlderry* v. *Baldwin*, 6 O. S. 31.

The officers of a regimental mess are not liable for debts contracted by their messman without their authority. *Sutherland* v. *Sparke*, 6 O. S. 103.

A military officer on duty out of Canada, and suing as plaintiff, must, upon the usual affidavit, give security for costs. *Tripp* v. *Fraser*, 1 Q. B. 253.

Liability of officers to pay toll when travelling in a private carriage, though in uniform. *Regina* v. *Dawes*, 22 Q. B. 333.

Plaintiff, under commission from the Governor General, dated 28th May, 1859, was appointed quarter-master in a troop of volunteer militia cavalry:—Held, that under the general powers conferred by 22 Vict. c. 18, s. 16, the commander-in-chief might make such appointment, and that so long as he was serving with or attached to such troop, he was an officer thereof, and his horse protected from distress under 18 Vict. c. 77, s. 31. *Davey* v. *Cartwright*, 20 C. P. 1.

In replevin for certain instruments forming part of the band of a militia battalion, brought by the commanding officer, it appeared that the instruments had been purchased partly by money voted by the city corporation, partly by general subscription, and partly by donations of the officers and men of the battalion. Some difficulty having arisen amongst the officers, one defendant refused to give up the instruments, alleging his right to hold possession as being president of the band committee, and the other defendant acted with him:—Held, 1. That under s. 48 of 27 Vict. c. 3, the instruments became the property of the commanding officer who might maintain replevin for them; and that this section, as to such property, was in no way controlled by section 47. *Lewis* v. *Teale* and *McDonald*, 32 Q. B. 108.

Held, also, that defendants were not entitled to notice of action under 31 Vict. c. 40, s. 9, for that statute had no application, and if it had there could be no right to such notice in replevin; and the finding of the jury that defendants did not honestly believe that they had the power under the statute to do what they did would also disentitle them to the notice. *Ib.*

II. DESERTION.

1. *Assisting Sailors to Desert.*

The Naval Discipline Act, 29 & 30 Vict. c. 109, s. 25, authorizes a summary conviction before magistrates for assisting sailors to desert, but the 101st section expressly preserves the power of any court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the act, punishable by common or statute law, and:—Held, therefore, that the defendant could be indicted under C. S. U. C. c. 100, s. 2. *Regina* v. *Patterson*, 27 Q. B. 10.

The indictment charged that defendant "did receive, conceal, or assist" one W., a deserter from the navy:—Semble, not sufficiently certain and precise. *Ib.*

2. *Enticing Soldiers to Desert.*

Held, that a warrant of commitment, in which it was charged that the prisoner on the 2[illegible] June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade on James Hewitt, a soldier in Her Majesty's service, to desert, was bad, for it was impossible to say upon reading the warrant how many offences he had committed or how the punishment was awarded. *In re McGinnes*, 1 L. J. N. S. 15.—C. L. Chamb. J. Wilson.

ARREST.

I. MANNER OF ARREST AND BY WHOM.

1. *What amounts to an Arrest*, 190.
2. *Power of Private Individual to Arrest*, 190.
3. *By Constable*—*See* CONSTABLE.
4. *By Sheriff*—*See* SHERIFF.

II. IN WHAT CASES ARREST CAN BE MADE.

1. *Of Foreigners*, 191.

2. *Other Cases*, 191.
3. *For Contempt or Non-payment of Costs* —*See* ATTACHMENT OF THE PERSON.
4. *In Bankruptcy and Insolvency*—*See* BANKRUPTCY AND INSOLVENCY.
5. *Writ of Arrest for Alimony*—*See* HUSBAND AND WIFE.
6. *On Ca. Re.*—*See* CAPIAS AD RESPONDENDUM.
7. *On Ca. Sa.*—*See* CAPIAS AD SATISFACIENDUM.
8. *On Ne Exeat*—*See* NE EXEAT.
9. *Extradition*—*See* EXTRADITION.
10. *Commitment*—*See* JUSTICE OF THE PEACE.

II. BAIL ON—*See* BAIL—CRIMINAL LAW.

V. AFFIDAVIT TO HOLD TO BAIL.

1. *How Intituled*, 192.
2. *Form and Contents of in Particular Cases.*
   (a) *On Bills of Exchange and Promissory Notes*, 193.
   (b) *On Bonds and Sealed Instruments*, 194.
   (c) *On Common Counts*, 194.
   (d) *On Several Claims*, 195.
   (e) *In Other Actions*, 196.
3. *Miscellaneous requisites of.*
   (a) *Statement that Defendant about to leave*, 196.
   (b) *Other Cases*, 197.
4. *Jurat and Commissioner*, 198.

WRIT OF CAPIAS, 198.

APPLICATION FOR DISCHARGE OR TO SET ASIDE ARREST.

1. *General Principles*, 200.
2. *For Defects in Affidavits*, 201.
3. *For other Irregularities*, 202.
4. *Waiver of Irregularities*, 203.
5. *On Affidavit denying intention to Leave*, 204.
6. *Where one of Several Defendants is Discharged*, 205.
7. *Practice in Moving*, 205.
8. *Other Cases*, 206.
9. *Under Attachment*—*See* ATTACHMENT OF THE PERSON.
10. *On Habeas Corpus*—*See* HABEAS CORPUS.

SECOND ARREST AND ARREST ON ALIAS WRITS.

1. *After Discharge or First Arrest set aside*, 208.
2. *Other Cases*, 209.

COSTS UNDER C. L. P. ACT, S. 322.

1. *Affidavits on Applications for*, 210.
2. *Other Cases*, 210.

PRIVILEGE FROM ARREST, 212.

1. *Members of Parliament*—*See* PARLIAMENT.

X. MISCELLANEOUS CASES, 212.

XI. ACTIONS FOR WRONGFUL COMMITMENT—*See* JUSTICE OF THE PEACE.

XII. ACTION FOR MALICIOUS ARREST—*See* MALICIOUS ARREST.

XIII. ACTIONS FOR ASSAULT AND FALSE IMPRISONMENT—*See* CONSTABLE—JUSTICE OF THE PEACE—TRESPASS.

XIV. ACTION FOR ESCAPE—*See* CONSTABLE—SHERIFF.

I. MANNER OF ARREST, AND BY WHOM.

1. *What amounts to an Arrest.*

In an action for malicious arrest, the arrest is not proved by shewing that the bailiff to whom the warrant was directed went to the plaintiff's house and told him at the door that he had a writ against him, but did not enter the house, nor touch him, and afterwards left him on his promise to put in bail the next day, which he did. *Perrin* v. *Joyce*, 6 O. S. 300.

The deputy sheriff, having a ca. sa. to arrest a party, went to his house with the writ in his possession for that purpose; he told him of the process, and being assured that a friend of his (the debtor's) who was then from home, would go his bail, he returned home and did not insist on the debtor coming with him. Afterwards the sheriff went again to the debtor's house and told him, without laying his hands on him, that he must come to his (the sheriff's) house, which he did, and remained there till discharged, but not under actual constraint:—Held, that under these facts there had been no legal arrest of the debtor on the first visit of the sheriff: that the merely insisting on the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest; but that the debtor, in having gone to the sheriff's house as desired, and having remained there till discharged, though without constraint, had been duly arrested. *McIntosh* v. *Demeray*, 5 Q. B. 343.

A bailable capias having issued, the deputy sheriff went to defendant and asked him to find bail. They both then went in search of bail, and a bail bond was executed:—Held, an arrest. *Morse* v. *Teetzel*, 1 P. R. 369.—P. C.—Richards.

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2. *Power of Private Individual to Arrest.*

A man assaulted by a person disturbing the peace in a public street, may arrest the offender and take him to a peace officer, who need not be the nearest justice. *Forrester* v. *Clark*, 3 Q. B. 151.

A private individual cannot arrest on suspicion of felony; he must shew a felony committed. *Ashley* v. *Dundas*, 5 O. S. 749.

When a private person takes upon himself to arrest without a warrant for a supposed offence, he must be prepared to prove, and affirm it unequivocally in his plea, that a felony has been committed; strong suspicions of it will not do. *McKenzie* v. *Gibson*, 8 Q. B. 100.

II. In what cases Arrest can be made.

1. *Foreigners.*

Where both plaintiff and defendant were inhabitants of a foreign country, and had come together into this province to remain only a few hours, and during their stay here the plaintiff made the usual affidavit and arrested the defendant, the arrest was held to be regular. *Raynor* v. *Hamilton*, M. T. 2 Vic.

Semble, that it is contrary to the policy of our laws of arrest to permit one foreigner to follow another to this country, and arrest him for a debt contracted abroad. *Frear* v. *Ferguson*, 2 C. L. Chamb. 144.—Burns.

Held, that the affidavits in this case did not sufficiently shew the plaintiff and defendant to be foreigners, and therefore that the arrest could not be objected to on that ground. *Romberg* v. *Steenbock*, 1 P. R. 200.—C. L. Chamb.—Burns.

The plaintiff, a merchant living in Toronto, arrested defendant, lately from England, on a bill accepted by him there. The arrest was moved against, on the ground that defendant was here for a temporary purpose only, and on business; but the plaintiff gave reason for believing that he had absconded from England to avoid proceedings there on this same bill, and the judge under these circumstances refused to interfere. *Brett* v. *Smith*, 1 P. R. 309.—C. L. Chamb.—Richards.

Defendant applied to be discharged from arrest for a debt contracted abroad, on affidavit that both plaintiff and he were foreigners, that he had come to this province very lately, and had never any residence or home here; but it was not shewn under what circumstances or for what purpose he came, whether as a transient visitor or intending to become a resident, and on this ground the application was refused. *Blumenthal* v. *Solomon*, 2 P. R. 51.—Chamb.—Hagarty; 3 L. J. 12.

The mere fact that both plaintiff and defendant are foreigners does not of itself warrant setting aside an arrest. *Palmer* v. *Rodgers*, 6 L. J. 188.—C. L. Chamb.—Richards.

See *Terry* v. *Comstock*, 6 L. J. 235.

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2. *Other Cases.*

A plaintiff cannot arrest for purchase money paid for an estate conveyed to him by deed, upon the ground that the defendant, the vendor, was not lawfully seized; he must resort to his covenant. *M'Lean* v *Hall*, Tay. 491.

An order to arrest was refused in actions for malicious arrest and libel. *O'Connor* v. *Anon.* and *Darcus* v. *Hall*, T. T. 2 & 3 Vict.

Where a judge's order was necessary to hold to bail, an arrest could not be made in a district court. *Ferris* v. *Dyer*, 5 O. S. 5; *Smith* v. *Jarvis*, H. T. 3 Vict.

7 Vict. c. 31, abolishing imprisonment in execution for debt, applied to cases where judgment was obtained before it passed. *Bank of British North America* v. *Clarke*, 1 Q. B. 1. Upheld in *Bell* v. *Ley*, 1 Q. B. 9.

A defendant, committed to prison on mesne process, and charged in execution in the cause without a new affidavit, before 7 Vict. c. 31:—Held, not entitled to his discharge. *Hamilton* v. *Mingay*, 1 Q. B. 22. See C. S. U. C. c. 24, s. 12.

A summons to set aside a ca. sa. on the ground that defendant had been arrested for a sum under £10, exclusive of costs, was discharged on the facts stated in this case. *Baker* v. *McKay*, 1 C. L. Chamb. 73.—Macaulay.

Under 12 Vict. c. 63, a bailable capias could not issue in a suit commenced by summons. *Kelly* v. *Kelly*, 1 C. L. Chamb. 281.—Burns.

After that Act commissioners could not issue bailable process under 2 Geo. IV. c. 1, s. 9. *McIntyre* v. *Hutson*, 8 Q. B. 560.

10 & 11 Vict. c, 31, s. 3, applying only to persons in execution for debt:—Held, not to include a defendant in custody on a ca. sa. in an action for seduction. *Merrall* v. *Franson*, 1 P. R. 230.—C. L. Chamb.—Draper.

The 8 Vict. c. 48, except s. 44, was continued in force by 18 Vict. c. 85, till the 1st of July, 1856, and no longer. The C. L. P. Act, which came into force on the 21st of August, 1856, enacted that from the time when it should take effect, the 44th section of 8 Vict. c. 48, should be repealed:—Held, that this 44th section could not be considered as continued by the C. L. P. Act, though, no doubt, it was so intended, and therefore no arrest could take place under it after the 1st July. *Barrow* v. *Capreol*, 2 P. R. 91. C. L. Chamb.—Burns.

Semble, a person in custody on a criminal charge, may be detained in a civil suit. *Palmer* v. *Rogers*, 6 L. J. 188.—C. L. Chamb.—Richards.

Arrest on notes secured by mortgage as collateral—action for malicious arrest. *Blakely* v. *Patterson*, 15 Q. B. 180.

IV. Affidavit to hold to Bail.

1. *How Intituled.*

[See now C. S. U. C. c. 24, s. 6.]

An affidavit intituled in the District Court instead of in the Q. B., is irregular, not void. *Sanderson* v. *Cummings*, M. T. 3 Will. IV.

Arrest under the statute allowing an arrest under an alias writ, on a testatum writ issued to a different district. Affidavit held right intituled in the cause. *Glass* v. *Colclough*, E. 3 Vict.

Where there is a cause pending, the affidavit must be intituled in it. *Brown* v. *Palmer*, Q. B. 110.

Where the commissioner designates himself "A commissioner in B. R., &c.," it is no objection that the affidavit is not intituled in a court. *Ellerby* v. *Walton*, 2 P. R. 147.—P. —Robinson. Followed in *Molloy* v. *Shaw*, 3 R, 250.—Chamb.—Richards; and in *Dawe* v. *Busby*, 5 P. R. 356.—Chamb.—Gwynne.

Where the order for bailable process was made upon two affidavits, one intituled in the Q. B. and the other not in any court, and the pro-

afterwards issued from the C. P., the arrest was set aside with costs. *Swift* v. *Jones*, 6 L. J. 63. —C. L. Chamb.—Richards.

A technical objection to the form of the affidavit must be made before the time for putting in bail expires. An objection that the affidavit is not intituled in any court, is such an objection. *Palmer* v. *Rodgers*, 6 L. J. 188.—C. L. Chamb. —Richards.

The name of the court must be inserted in the affidavit at the time of suing out the process. *Allman* v. *Kensel*, 3 P. R. 110.—Chamb.—Hagarty.

The affidavit to hold to bail may be intituled in a court or cause, or one of them, or it may be altogether without a title. *Dumer* v. *Busby*, *Black* v. *Wigle*, 5 P. R. 356.—Chamb.—Gwynne.

Form and Contents of in Particular Cases.

(a) *On Bills of Exchange or Promissory Notes.*

Must state it to be "payable." *Smith* v. *Sullivan*, Tay. 493; *Andruss* v. *Ritchie*, Dra. 6.

Must state the default of the maker or acceptor. *Ross* v. *Balfour*, 5 O. S. 683.

Must shew the amount for which the note was drawn. *Norton* v. *Latham*, M. T. 3 Vict.

That the defendant was indebted in a named sum due on a promissory note, *due before the commencement of this suit*, the affidavit having been made several days before the writ issued, held insufficient, as being equivocal and uncertain. *Clarke* v. *Clarke*, 1 Q. B. 395.

An affidavit for several different notes need not state the aggregate sum, but the amount of each note must be mentioned. The dates of the notes should be set out in words, but figures will not make the affidavit defective. *Ross* v. *Hurd*, 1 P. R. 158. P. C.—Burns.

An affidavit by the endorsee of a note must state that it was endorsed to the plaintiff, and by whom. *Glass* v *Baby*, 1 P. R. 274.—P. C.—Draper.

That defendant is indebted in £560 of sterling money on a bill of exchange drawn, &c., for the payment of £560, not saying of what money :—held, sufficient. *Pawson* v. *Hall*, 1 P. R. 294. —C. L. Chamb.—Draper.

The affidavit stated the bill to be "payable the day now past," and presentment on the day of non-payment; and then, after stating the several sums for which it was intended to hold bail, concluded,—"and that the said several sums of money are now justly due and payable aforesaid :"—Held, that it sufficiently appeared that the bill was still unpaid. *Ib.*

Defendant was stated to be indebted in the amount of the bill, and in £5 19s. 8d. of sterling money aforesaid, "for interest thereupon, being the principal money and interest the sum of £5 19s. 8d. of sterling money aforesaid :"—Held, that the claim for interest was insufficiently stated. *Ib.*

It is sufficient to describe a note as being "to the payment to," instead of "payable to," the plaintiffs. *Ib.*

An affidavit stated that defendant was indebted to deponent in £1217 16s. 5d. of lawful money of Canada, upon and on account of a bill of exchange for £1000 sterling (describing the bill); and that the sum of 19s. sterling was paid by defendant for notarial charges in protesting the same :—Held, that the amount due for the bill was sufficiently distinguishable from the notarial charges, which ought not to have been included; and therefore that the arrest should not be set aside, but the amount to take bail for should be reduced by deducting such charges. *Brett* v. *Smith*, 1 P. R. 309.—Chamb. —Richards.

The plaintiff need not state expressly that he is the holder of the bill at the time of making the affidavit to hold to bail. *Ib.*

The affidavit must shew that the note is overdue, either by directly stating the fact or by giving the date of the note and the time it has to run. *Racey* v. *Carman*, 3 L. J. 204; *Ross* v. *Hurd*, 1 P. R. 158.—Chamb.—Robinson.

An affidavit stated that defendant was indebted to the plaintiff in $2,615, being the amount of four several promissory notes made by defendant, bearing date the 6th of February, 1866, for $653 75 each, payable respectively at forty days, sixty days, three months, and four months after date; and that said notes were given by defendant for goods purchased by defendant from plaintiff. On motion to set aside the arrest, because this affidavit did not shew to whom the notes were payable, nor in what character the plaintiff held them :—Held, that it was sufficient. *Jones* v. *Gress*, 25 Q. B. 594.

(b) *On Bonds and Sealed Instruments.*

That the defendant is indebted to the plaintiff upon a certain bond or obligation, is insufficient. *Prior* v. *Nelson*, Tay. 176.

An affidavit on a money bond must shew to whom the bond was made. *Case* v. *McVeigh*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

When the debt arises on a written or sealed instrument, the affidavit need not set out the date or other particulars, if it show distinctly the nature of the debt and the instrument on which it accrued *Clarke* v. *Clarke*, 3 L. J. 149. —C. L. Chamb.—Robinson.

(c) *On the Common Counts.*

"That the defendant was indebted to the plaintiff in the sum of £50 for the use and occupation of a certain tenement"—Held, sufficient. *Ferguson* v. *Murphy*, Tay. 206.

On account stated, need not say that the account was had. *Black* v. *Adams*, E. T. 3 Vict.

For work and labour done, without stating a request, is defective. *Hall* v. *Brush*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

For goods sold and delivered, must shew defendant's request, and the request being laid to other sums will not supply the defect. *Watkins* v. *Liebshitz*, H. T. 7 Will. IV. But this case is overruled by *Ogilvie* v. *Kelly*, 4 Q. B. 393.—P. C.—McLean.

An affidavit of debt whereon a judge's order to hold to bail was founded, stated simply "that the defendant is justly and truly indebted to me (the plaintiff) in the sum of $259.90, for medicine, medical attendance, and services, and money lent, a detailed account of which I have some months ago delivered or caused to be delivered to him;" without averring either that the medicine was delivered, the medical attendance and services performed, or the money lent by the plaintiff to the defendant, or at his request:—Held, following Handley *v.* Franchi, L. R. 2 Ex. 34, affidavit insufficient. Semble, that the affidavit would be sufficient, without the words "at his request." *Diamond* v. *Cartwright*, 22 C. P. 494.

It must be shewn that the goods were sold and delivered by plaintiff to defendant. *McDonnell* v. *Kelly*, 4 Q. B. 394.—P. C.—McLean.

That A. and B. are indebted for money lent to A.:—Held sufficient to authorize the arrest of A. Quære, whether it would have supported an arrest of both. *Ellerby* v. *Walton*, 2 P. R. 147.—P. C.—Robinson.

(d) *For several Claims.*

An affidavit for money lent, paid, and on an account stated, need not state the sum due on each account. *Tunnahill* v. *Mosier*, 2 O. S. 449; *Black* v. *Adams*, E. T. 3 Vict.

An affidavit for £80, on a promissory note for that amount, and also for goods sold, not specifying the sum due on each account, nor whether the goods sold formed the consideration of the note:—Held, insufficient. *McKenzie* v. *Reid*, 1 Q. B. 396.—P. C.—Macaulay.

An affidavit for £613, stated to be due as a distinct sum for each of three different causes of action, but concluding "that the said sum of £613 is still due and owing to this deponent by the said T. E.," &c.:—Held, insufficient. *Barry* v. *Eccles*, 2 Q. B. 383.—P. C.—Hagerman.

Where more than one debt is mentioned, and they are not combined and the aggregate stated, the affidavit must clearly express the plaintiff's apprehension that defendant will leave with intent to defraud the plaintiff of the several debts mentioned; any uncertainty as to which he apprehends he will be defrauded of will be fatal. *Brown* v. *Palmer*, 3 Q. B. 110.

An affidavit that defendant was indebted in £100 on a note, and in £28 for goods; that the two sums amounted to £128; and that the deponent believed the defendant was about to leave Upper Canada to defraud him of the said debt, (instead of debts):—Held, sufficient. *Romberg* v. *Steenbock*, 1 P. R. 200.—Chamb.—Burns.

Where the affidavit set out a cause of action for goods sold and delivered, and also upon an executed contract for the delivery of certain lumber, but stated only an aggregate amount due:—Held sufficient. *McIntyre* v. *Brown*, 4 L. J. 85.—C. L. Chamb.—McLean.

When some of the demands are well and others badly stated, the affidavit is not bad as to all; but the defendant will be released on putting in bail for the sum properly sworn to. *Ross* v. *Hurd*, 1 P. R. 158.—P. C.—Burns. See *Brett* v. *Smith*, 1 P. R. 309, p. 194.

(e) *In other Actions.*

An affidavit that the defendant "took possession of the plaintiff's goods, and still keeps possession of them" is sufficient to warrant an order to hold to bail. *Ingraham* v. *Cunningham*, Dra. 116.

In an action by husband and wife for a verbal slander of the latter, not actionable without special damage, the affidavit stated only that persons not named had in consequence withdrawn their custom from her husband, who was a tailor. The learned judge expressed surprise and regret that an arrest should have been ordered on such statements, but set it aside on the ground of irregularity only. *Allman* v. *Kensel*, 3 P. R. 110.—Chamb.—Hagarty.

3. *Miscellaneous requisites of.*

(a) *Statement that defendant about to leave.*

"That the plaintiff had reason to believe," instead of "is apprehensive that the defendant was about to depart this province without paying," &c.:—Held, insufficient. *Choate* v. *Stevens*, Tay. 449.

Where an application is made for an order to arrest, the affidavit must contain the ordinary conclusion, that the deponent is apprehensive of defendant's departure from this province. *Wilson see* v. *Bloor*, E. T. 2 Vict.

"That defendant will leave the province of Canada":—Held, sufficient. *Brown* v. *Parr*, 1 Q. B. 98.—P. C.—Jones.

Held, that the affidavit under C. S. U. C., c. 24, s. 5, must shew facts and circumstances to satisfy the judge that there is good and probable cause for believing that the debtor, unless forthwith apprehended, is about to quit, &c. *Denison* v. *Easterbrook*, 10 L. J. 246.—C. L. Chamb.—A. Wilson.

Held, that an affidavit stating deponent's belief that the debtor, unless held to bail, would quit Canada, not saying when, or assigning any special reason for forthwith apprehending him, was insufficient. *Ib.*

Held, that the facts and circumstances laid before the county judge in this case, to satisfy him that the debtor had at any time an intention to quit Canada, were insufficient. *Ib.*

On an application to review the decision of a county judge, it was held that defendant must be discharged; that the denial of the debt alone would not be sufficient, though the facts and circumstances relating to the claim might be important to consider as affecting the probability of his absconding; but that an apprehension that his leaving at some future period could not warrant the arrest, for the judge must be satisfied that he is about to leave unless forthwith apprehended, that is, to leave forthwith. *Bowers* v. *Flower*, 3 P. R. 62.—Chamb.—Burns.

Semble, the judge to whom an application is made for an order to arrest has only to be satisfied of the existence of a cause of action, &c., and an intention on the part of defendant to abscond with intent, &c. *Damer* v. *Burke*, 3 P. R. 356.—Chamb.—Gwynne.

See Part VI. 5, p. 204.

(b) *Other Cases.*

An arrest was set aside, where defendant, whose name was "Patrick," was called "Peter" in the affidavit and writ. *Botsford* v. *Stewart*, E. T. 11 Geo. IV.

Deponent's name must be set forth in words at length. *Richardson* v. *Northrope*, Tay. 331.

And his Christian names must be given in full. *Westover* v. *Burnham*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

The conclusion negativing any vexatious or malicious motive required by 2 Geo. IV. c. 1, s. 8, is not necessary where a judge's order to hold to bail is obtained. *McLachlan* v. *Wiseman*, 5 O. S. 333.

And such conclusion is dispensed with by 1 Vict. c. 48, s. 44. *Lee* v. *McClure*, 3 Q. B. 330.

It is irregular to make an affidavit of debt, or issue a writ, on Sunday; and in an affidavit of debt the proper place of residence of the deponent must be stated. *Hall* v. *Brush*, T. T. 3 & 4 Vict.

It is no ground for setting aside an arrest that the word "malicious" is spelt with a "t" instead of a "c" in the affidavit of debt. *Gardener* v. *Morrison*, H. T. 4 Vict.—Jones.

Construction and effect of 7 Vict. c. 31. *Bruce* v. *Schofield*, 1 Q. B. 1.

The affidavit to arrest in a special case requiring the sanction of a judge to the issuing of the writ, need not follow so strictly the form prescribed by the act, as where the creditor may sue out the capias as of right. *Bardon* v. *Cawdell*, Tay. 486; *Neven* v. *Butchart*, 6 Q. B. 196.

An affidavit that the plaintiff "had reason to believe," not "good reason:"—Held bad, and writ set aside. *Meyers* v. *Campbell*, 1 C. L. Chamb. 31.—Macaulay.

Quære, whether it must shew that the deponent is the attorney or agent of the plaintiff. *Chamberlain* v. *Wood*. 1 P. R. 195.—Chamb. Burns.

The affidavit stated the amount in sterling, viz., to wit, the sum of £704 6s. 7d., or thereabouts, of lawful money of Canada:—Held, not sufficiently precise and positive; but it is sufficient to state a debt due to a plaintiff in England in sterling money only, and the insufficient statement of the sum in currency would not vitiate; but the amount for which bail should be taken was ordered to be reduced to the true sum in currency, as it appeared that the amount given in the affidavit was excessive. *Wilson* v. *Hall*, 1 P. R. 294.—Chamb.—Draper.

That defendant is about to leave Upper Canada to defraud the plaintiffs of "*their* said debt," is sufficient, though the form given by the statute is "*the* said debt." *Ib.*

It should state the name of the parties informed, but if it shew facts sufficient to satisfy the mind of the judge, this is sufficient; it need not copy the words of the statute. *McInnes* v. *Hamilton*, 6 L. J. 14.—C. L. Chamb.—Hagarty.

An affidavit shewing sufficient to satisfy the judge that the defendant, unless apprehended, will forthwith about to leave, will be sufficient, though it is only sworn that defendant is about to leave *Upper* Canada. *Swift* v. *Jones*, 6 L. J. 63—C. L. Chamb.—Richards.

An affidavit made by the assignee of the plaintiff's estate, that the defendant is indebted to the estate and deponent as assignee thereof, &c., and that he is about to leave, &c., "to defraud the deponent, as such assignee as aforesaid, of the said debt:"—Held sufficient. *Bamberg* v. *Solomon*, 2 P. R. 54.—Chamb.—Hagarty.

It is not necessary, under the 112th rule of T. T. 20 Vict., that an affidavit to hold to bail should be divided into paragraphs and numbered. *Ellerby* v. *Walton*, 2 P. R. 147.—P. C.—Robinson.

4. *Jurat and Commissioner.*

Order to hold to bail granted on affirmation made by a Quaker in New York, properly verified, &c., taken before the city recorder. *Smith* v. *Lawrence*, 3 O. S. 18.

Where a defendant was arrested under a commissioner's writ, and the commissioner's name was not attached to the jurat at the time of the arrest, but was placed there before the motion to set the writ and arrest aside, the court held the proceedings irregular, and set them aside with costs. *Black* v. *Halliday*, T. T. 5 & 6 Vict.—Macaulay.

Under 7 Vict., c. 31, the jurat must state that the affidavit was duly read over and explained to deponent, and the omission of the word "duly" was held fatal. *Thayer* v. *Hensley*, 1 Q. B. 335—P. R.—McLean.

During a cause an affidavit to arrest defendant cannot be taken before the plaintiff's attorney. *Burger* v. *Beamer*, 3 Q. B. 179—P. C.—McLean.

But an affidavit before action commenced may be. *Brett* v. *Smith*, 1 P. R. 309.—Chamb. Richards.

In moving on this ground it should clearly appear that he was attorney at the time the affidavit was sworn. *Demill* v. *Easterbrook*, 10 L. J. 246—C. L. Chamb.—A. Wilson.

V. Writ of Capias.

A capias cannot issue upon a verdict in trespass without a judge's order. *McLeod* v. *Bellars*, Tay. 273.

A *true* copy of a non-bailable process must be served on a defendant. *Scott* v. *Heffernan*, 5 O. S. 321.

Quære, whether it is sufficient, under the first rule of H. T., 13 Vict., to state in the margin of a writ the *county* where it was issued. The matters directed to be *endorsed* on a capias by 12 Vict., c. 63, sched. 3, may be *at the foot* of the copy served; and quære, whether they may not be written at the foot of the original, instead of being endorsed. *Chamberlain* v. *Wood*, 1 P. R. 195.—Chamb.—Burns.

Where in the original the warning to defendant was at the foot of the writ, and in the copy was endorsed, though in the body of the copy it was referred to as "hereunder:"—Held, no objection. The signature of the clerk of the

process was placed at the foot of the warning, not of the writ, and also to a memorandum in the margin that the writ had been issued by him:—Held, a sufficient signature of the writ. *Gilmour* v. *McMillan*, 2 P. R. 168; 3 L. J. 71. C. L. Chamb.—Robinson.

The name of the officer who issues a writ in the margin is not "a memorandum or notice subscribed to, or an endorsement on the writ," within 12 Vict., c. 63, s. 24, and therefore the omission of it in the copy served is not fatal. *Jannet* v. *Bush*, 2 P. R. 42.—Chamb.—Richards.

It is no objection to an arrest that the copy of the writ served does not contain the name of the clerk of the crown, or a mark [L.S.] to shew that the original was issued by the proper authority, and sealed. *Carrol* v. *Light*, 1 P. R. 137. Chamb.—Burns.

The date of the endorsement on a capias, given in 12 Vict., c. 63, sched. 3, means the date of the judge's order, not of the affidavit. Where the arrest is on affidavit no date need be endorsed. *Romberg* v. *Steenbock*, 1 P. R. 200.—Chamb.—Burns.

The omission to endorse upon the writ the day of execution thereof, as directed by the rule of court, is no ground for setting aside an arrest. Quære, whether such endorsement should be by the bailiff who makes the service, as he is not the person who has the execution and return of the writ. *McNider* v. *Martin*, 1 P. R. 205.—Chamb.—Sullivan.

It is sufficient to serve a copy of the writ immediately after an arrest; and if defendant refuse to take such copy, he cannot afterwards object that it was not served upon him. *Ib.* See also *Hetherington* v. *Whelan*, 1 C. L. Chamb. 153.—Robinson.

The direction to take bail by affidavit need not be dated. *Pawson* v. *Hall*, 1 P. R. 294.—Chamb.—Draper.

A capias addressed to the sheriff of the united *counties* of York and Peel, and directing him to take defendant, "if he shall be found in your *county*," is sufficient, the latter sentence being surplusage. *Brett* v. *Smith*, 1 P. R. 309.—Chamb.—Richards.

One of several defendants, Stephen Nathaniel Campbell, was arrested on a capias in which he was called Samuel N. Campbell; and on the copy served there was no direction to take bail. He was taken to the sheriff's office, and about an hour afterwards was served there with another copy, on which was endorsed, "take bail for £319 11s. 3d.," not saying that this was the sum sworn to, nor was this stated on the original either. The next day he was served in gaol with a third copy, on which was endorsed the same direction, with "by affidavit" added. As to the misnomer, the plaintiff showed that the defendant had represented his first name to be Samuel, but did not show that he had said this was his only name, or that any enquiries had been made to learn what his second name was:—Held, arrest bad on both grounds. *Pegg* v. *Campbell*, 1 P. R. 328.—Chamb.—Robinson.

The copy of a capias need not show the debt on which the order authorizing the writ issued; nor need the writ show the name of the county judge who made the order. *Swift* v. *Jones*, 6 L. J. 63.—C. L. Chamb.—Richards.

On an application to set aside an arrest for a variance between the original writ and the copy served, the writ was amended so as to conform to the copy. *Damer* v. *Busby*—*Black* v. *Wigle*, 5 P. R. 356.—Chamb.—Gwynne.

VI. Application for Discharge or to set aside Arrest.

1. *General Principles.*

Under the old law neither the existence of the debt, nor the circumstances under which it was contracted, nor the conduct of the defendant, could be tried upon affidavits for the purpose of permitting an arrest, if the affidavit of debt and intention to leave the country was a positive one. *Frear* v. *Ferguson*, 2 C. L. Chamb. 144.—Burns.

Where defendant, being a married woman, and known to be so by the plaintiff, was arrested on a ca. re., both writ and arrest were set aside with costs. *Foley* v. *White*, 2 C. L. Chamb. 31—Macaulay.

When the writ of ca. re. is only against the wife, and is irregular against her, the husband cannot be compelled to appear. *Ib.*

Quære, when one judge on a statement of facts has ordered a ca. sa. to issue, can another judge, taking a different view of the same facts, interfere without any new matter being shewn? The question whether any debt is due or not will be entertained on an application to discharge an order for a ca. sa., but unless a very clear case is made out, the court or judge will not interfere. *McInnes* v. *Macklin*, 6 L. J. 14.—C. L. Chamb.—Hagarty.

There must always be great reluctance to set aside the order of a county judge directing issuable process, when there are reasonable grounds from which he might draw the conclusion that defendant was about to leave. *Swift* v. *Jones*, 6 L. J. 63.—C. L. Chamb.—Richards.

On an application by a debtor arrested under a capias for his discharge, the judge may receive affidavits denying the indebtedness, or his intentions to leave, or any other facts relied upon in plaintiff's affidavit. *Demill* v. *Easterbrook*, 10 L. J. 246.—C. L. Chamb.—A. Wilson.

On an application to set aside an arrest under 22 Vict. c. 96:—Semble, that the existence of a cause of action may be enquired into, but that the absence of it must be very clearly shewn to warrant interference. *Delisle* v. *Degrand*, 3 P. R. 105.—C. L. Chamb.—Draper.

There is a broad distinction, on an application to set aside an order for an arrest, between an order based on affidavits deficient in statutory requirements, and those containing statements from which different conclusions might fairly be drawn by different judges. In a case coming under the latter head, a judge in chambers declined to set aside an order for arrest by a County Court judge of competent authority, preferring to leave it to the full court. Nor would he interfere, the evidence being conflicting, on the ground that it was not the intention of de-

ant to leave the country. *McGuffin* v. *Cline*, P. R. 134.—Chamb.—Hagarty.

But as the order was granted for a sum greater han that warranted by the allegation in the ffidavit, the amount for which defendant was eld to bail was directed to be reduced to the orrect sum, without setting aside the order. *Ib.*

A judge of a Superior Court will not interfere here the County Court judge has exercised is discretion. *Molloy* v. *Shaw*, 5 P. R. 250.—Chamb.—Richards.

A judge in chambers has no power to set aside an order to arrest, though he may, on hearing both parties, discharge the prisoner, or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order, for irregularity. *Damer* v. *Busby —Black* v. *Wigle*, 5 P. R. 356.—Chamb.—Gwynne.

The order itself can be rescinded only by the court, but after arrest defendant may apply for his discharge on the ground of non-existence of the debt, or otherwise upon the merits, to any judge in chambers, or to the County Court judge who granted the order. Such an application is not an appeal from the order to arrest, and new facts must be shewn to warrant the discharge of the prisoner, unless it be granted on account of manifest and vital defects in the original material. *Ib.*

Either of these orders may be discharged or varied by the court, which possesses over the original order to hold to bail: 1. A general appellate jurisdiction on the identical material which was before the judge; 2. An express statutory jurisdiction to rescind the order, upon motion to discharge the prisoner. In addition to this, the court has also co-ordinate jurisdiction with a judge in chambers, or the County Court judge who granted the first order, to discharge the prisoner upon merits appearing in the affidavits of both parties. *Ib.*

Quære, whether, on shewing cause to an application to set aside an arrest, affidavits can be received to support the original affidavits as to the cause of action. *Diamond* v. *Cartwright*, 1 C. P. 494.

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2. *For Defects in Affidavits.*

The court will not set aside an arrest for irregularity in the affidavit, after the prisoner has escaped. *Keefer* v. *Merrill*, Tay. 490.

On a motion to set aside an order to discharge a prisoner from arrest, it appeared that the affidavit to hold to bail described the deponent's residence as at Canandaigua, State of New (York being omitted):—Held, description insufficient. *Ward* v. *Read*, Tay 413.

Where an affidavit to hold to bail was made that defendant was in the United States, and was left here ready in case he should come over, the court set the arrest aside. *Cozens* v. *Ritchie*, 1 167.

When a defendant puts in special bail to an arrestable writ, he is not thereby prevented from objecting to any irregularity in the arrest. *Ward* v. *Balfour*, 5 O. S. 683.

Where the objection taken to an affidavit to hold to bail was new in this court, and the plaintiff followed a form given in Tidd's appendix, the arrest was set aside without costs, and on condition that no action should be brought. *Ib.*

After removal of the proceedings from an inferior court, the writ and arrest were set aside for a defect in the affidavit of debt, though a similar motion was pending in the court below. *English* v. *Everett*, 1 Q. B. 336.—P. C. —McLean.

An arrest was made on the 2nd November, special bail put in on the 9th November, a verdict rendered sometime before the 12th December, a render by the bail on the 5th January, an application to the county judge on the 2nd January, and the discharge of that application on the 5th January, and the final judgment given sometime in the same month. An application, upon a habeas corpus issued on the 8th March, to discharge defendant because the affidavits upon which the judge made his order to arrest were not sufficient in law, was not entertained, as it might have been if the affidavits had been a nullity. *Runciman* v. *Armstrong*, 2 L. J. N. S. 165.—C. L. Chamb.—A Wilson.

Held, following Ellerby *v.* Walton, 2 P. R. 147, not a valid objection to an order to hold to bail, that it was granted upon affidavits not intituled in any court. *Molloy* v. *Shaw*, 5 P. R. 250. —Chamb.—Richards.

Applications having been made to set aside two orders for arrest, with the writs and subsequent proceedings, on the ground that the affidavit to hold to bail in one case was untrue and insufficient, and in the other case was not intituled in any court, and was insufficient in substance: Held, that a judge in chambers has no power to set aside an order to arrest, though he may on hearing both parties discharge the prisoner; or, by virtue of his general jurisdiction over procedure, may set aside proceedings subsequent to the order for irregularity in this respect. *Damer* v. *Busby—Black* v. *Wigle*, 5 P. R. 356. —Chamb.—Gwynne.

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3. *For other Irregularities.*

Where the affidavit stated that two persons, trading under the name of "T. & Co." were indebted, and process issued against one only, the other being within the jurisdiction, the arrest was set aside. *Chisholm* v. *Ward*, Dra. 490.

It was held no objection to an arrest on a ca. sa. that several terms had elapsed after the return of the execution against goods before the ca. sa. issued. *Glynn* v. *Dunlop*, 4 O. S. 111.

An informality in the warrant of the bailiff is not ground to set the arrest under it aside, especially where the writ itself is not produced. *Hussey* v. *Link*, E. T. 2 Vict.

Where an arrest is made upon a judge's order, and no sum is specified in the affidavit, the 2 Geo. IV. c. 1, s. 8, as to indorsements on the writ, does not apply. *Sligh* v. *Campbell*, 4 Q. B. 255.

Where the warrant to arrest is addressed to two bailiffs, as if jointly, one may nevertheless arrest. *Hetherington* v. *Whelan*, 1 C. L. Chamb. 153.—Robinson.

Where defendant was arrested on a writ issued and tested on the 3rd of January, 1852, and directed to the sheriff of the United Counties of Wentworth and Halton:—Held, that since the 1st of January, 1852, there was no such officer; and the arrest was set aside with costs:—Held, that the writ might be amended, but the copy not. The judge declined permission to arrest on the amended writ. *Lyman* v. *Brethron*, 2 C. L. Chamb. 108.—Draper.

A warrant to sheriff to commit a party is not irregular, though no return day is mentioned in it. *Prentiss* v. *Brennan*, 1 Chy. 497.

An arrest will not be set aside because the direction to take bail is for less than the sum sworn to. *Campbell* v. *Wood*, 1 P. R. 199.—Chamb.—Burns.

4. *Waiver of Irregularities.*

Where a defendant moved on the ground that the debt was paid, and the rule was refused:—Held, that he could not afterwards move for a defect in the affidavit of debt. *Smith* v. *Ross*, T. T. 3 & 4 Vict.—Macaulay.

An action for malicious arrest is not a waiver of objections to the affidavit upon which the arrest was made. *Pawson* v. *Hall*, 1 P. R. 294.—Chamb.—Draper.

The affidavit complied with 2 Geo. IV., c. 1, s. 8, except in omitting the averment that the writ was not sued out from any vexatious or malicious motive; and defendant having put in special bail:—Held, that this defect was waived, *Barrow* v. *Capreol*, 2 P. R. 95.—Chamb.—Burns.

Where a defendant puts in special bail to an alias bailable writ, he may still object to an irregularity in the arrest. *Ross* v. *Balfour*, M. T. 2 Vict.

Putting in special bail after an application to set aside the arrest is a waiver. *Racey* v. *Carman*, 3 L. J. 204.—C. L. Chamb.—Draper.

Quære, whether defendant arrested on a ca. sa. having given bail to the limits is not precluded from a formal objection to the affidavit, such as the want of deponent's addition. *Ewing* v. *Lockhart*, 3 Q. B. 248.

An undertaking to "cause special bail in this action to be put in for the defendant in due course of law," is not a waiver of any objection to the affidavit. *Glass* v. *Baby*, 1 P. R. 274.—P. C.—Draper.

Putting in special bail after having given a bond to the sheriff:—Held, not to preclude defendant from moving to rescind the order for his arrest. *Bowers* v. *Flower*, 3 P. R. 62.—Chamb.—Burns.

Does not waive objections not technical. *McGaffin* v. *Cline*, 4 P. R. 134.—Chamb.—Hagarty.

The rule requiring prompt application for irregularity, is not strictly applied in the case of prisoners. *Barry* v. *Eccles*, 2 Q. B. 383.—P.C.—Hagerman.

Defendant was arrested on a ca. sa. It appeared that the officer who made the arrest had no warrant from the sheriff, though he assured the plaintiff that he had authority to act. Defendant brought trespass against the plaintiff, and assessed damages. After such assessment, after giving bail to the limits, and nearly two months after the arrest, he applied to be discharged, and to have the bail bond cancelled. The court refused the application. *Kirby* v. *Finkle*, 10 Q. B. 365.

Held, that defendant had not, by proposal for settlement, &c., waived his right to a discharge because plaintiff had not declared in time. *Tyson* v. *McLean*, 1 P. R. 339.—Chamb.—Richards.

Where a party by his own conduct and admissions has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer, and—Held, that in this case defendant was precluded from raising the objection. *Brown* v. *Smith*, 1 P. R. 347.—Chamb.—Richards. See *Pegg* v. *Campbell*, 1 P. R. 328, p. 199.

5. *On Affidavit denying intention to leave.*

Quære, should a capias, or the arrest thereunder, be set aside on the ground that there was not at the time of making the affidavit to hold to bail good and probable cause for believing that the defendant, unless forthwith apprehended, was about to quit Canada with intent, &c.; and if so, can a judge in chambers entertain the application? *Palmer* v. *Rodgers*, 6 L. J. 188.—C. L. Chamb.—Richards.

Where defendant applied under sec. 31 of C. S. U. C., c. 22, to be discharged upon the ground that he had no intention to quit Canada with intent, &c.; and it appeared that the debt had been created through fraud; and that he had no more ties in Canada than elsewhere, where he would not be criminally responsible for his fraud, the application was refused. *Terry* v. *Comstock*, 6 L. J. 235.—C. L. Chamb.—Draper.

That section applies only to writs of capias of the nature of mesne process. *Bank of Montreal* v. *Campbell*, 2 L. J. N. S. 18.—C. L. Chamb.—J. Wilson.

A judge in chambers has no jurisdiction at common law to discharge a defendant on the ground that he had no intention to quit Canada when the ca. sa. was issued. *Ib.*

A party was arrested upon the affidavit of the plaintiff, stating that "from information I have received from various sources, and from my own personal knowledge, I have good reason to believe that the said J. R. is privately making away with his property, with the intention of realizing the same and leaving Upper Canada and that unless the said J. R. is forthwith apprehended he will leave Canada, and depart out of the jurisdiction of this honourable court * * * and for the express purpose of defrauding me of the damages I may recover against him." This was confirmed by similar affidavits from two others. Upon motion to set aside the capias or to discharge defendant:—Held, that the court could not infer that plaintiff did not show such facts and circumstances as satisfied the judge there was reasonable and probable cause for believing that defendant was about to leave the province. But, inasmuch as defendant's own affidavit denied the charge

f seduction, upon which he was arrested, ost unequivocally, and shewed circumstances y which it might be inferred he had no inten- on (then) of leaving the province, the court ntered him to be discharged, but refused to set ide the capias and arrest. This decision is not be referred to as upholding arrests upon affi- avits such as were made in this case. *Brown* v. *Riddell*, 13 C. P. 457.

Defendant swore that he had not at the time f his arrest, or of making his affidavit, any in- ention of quitting Canada with intent, &c., but e did not deny or explain any of the facts orn to on obtaining the order; and the court, olding that these facts justified the arrest, efused his discharge. *Jones* v. *Gross*, 25 Q. B. 94.

Held, that on the affidavits set out in this se, the cause of action and the circumstances warrant the arrest were sufficiently made out. imble, that defendant's own affidavit that he not about to leave the province would not me, under any circumstances, be sufficient to aside the arrest. *Delisle* v. *Degrand*, 3 P. 105.—Chamb.—Draper.

Where one of several Defendants is Discharged.

In a case where two defendants were in cus- dy on a joint execution, and the plaintiff ing come to an arrangement with one defen- t, discharged him:—Held, that this operated a discharge of the other. *Leahy* v. *McFar- e*, 5 O. S. 688.

he discharge of one of two defendants in ecution on a joint judgment, discharges both. *er* v. *Daniels*, E. T. 2 Vict.

n informality in arresting one defendant can- be made a ground of objection by the other. *herington* v. *Whelan*, 1 C. L. Chamb. 153.— imson.

laintiff having arrested A. and B. on a ca. took a mortgage from B. and discharged ; but it was taken only as collateral security B. did not desire A. discharged:—Held, A. was nevertheless entitled to it. *Benja- v. Foot*, 2 P. R. 47.—P. C.—Burns.

See IV. 3 (a) p. 196.

7. *Practice in Moving.*

here a motion was made to set aside a and the arrest for irregularity, and to dis- e the prisoner, or to deliver up the bail to be cancelled, as the case might be, the made the rule absolute with costs, although was asked than could be granted. *Arm- y v. Scobell*, 3 O. S. 303.

rule nisi to set aside an arrest on grounds ed in affidavits filed, was discharged e the defect was not apparent from the vit, but could only be ascertained by a ce to the writ which was annexed to *McIlarn* v. *Howison*, H. T. 7 Vict.

irregularity complained of must be pointed the rule, or referred to in the rule as ing in the affidavits. *Cook* v. *Norton*, T. ct.—Macaulay.

ion on the 2nd of September to set aside a on which a party was arrested on the 6th of August:—Held, not too late. *Keefer* v. *Hawley*, 1 P. R. 1.—P. C. McLean.

Where the original affidavit to hold to bail was transmitted by the deputy clerk of the crown to the clerk in chambers, at the request of defendant's attorney, without a judge's order:—Held, that such original might be acted upon in moving to set aside an arrest, instead of filing a verified copy. *Chamberlain* v. *Wood*, 1 P. R. 195. Chamb. Burns.

A statement in an affidavit of a defendant applying to set aside an order for his arrest, that B. and C. are copies of the affidavits filed on which the order to arrest was granted, &c., means all the affidavits filed. *Demill* v. *Easterbrook*, 10 L. J. 246.—C. L. Chamb.—A. Wilson.

Held, that in this case it was unnecessary to set aside the order for arrest, as substantially the same object would be accomplished by merely discharging the debtor from custody, which was done. *Ib.*

8. *Other Cases.*

Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries. *Brown* v. *Hudson*, Tay. 390.

The court refused to discharge a defendant upon filing common bail, on the ground of his person having been discharged from arrest by an insolvent law of New York. *Dascomb* v. *Heacocks*, Tay. 438.

After an arrest for £613, and while defendant was in custody, all matters in difference were referred, and an award made for the plaintiff for £140. The defendant was discharged. *Barry* v. *Eccles*, 2 Q. B. 383.—P. C.—Hagerman.

So where, under similar circumstances, the award was for a sum payable by instalments, one of which was due:—Held, that the prisoner, without shewing payment of the instalment due, was entitled to his discharge. *Ruthven* v. *Ruthven*, 5 Q. B. 279.

When a defendant in custody on mesne process put off the trial at one assizes, and at the approach of the following assizes—after being apprized that the plaintiff had neglected to give notice of trial—pressed that the record might be entered low on the docket to give him time to procure a witness, and it was so entered, but could not be tried for want of time:—Held, that defendant was not supersedeable because the cause had not been tried within three terms. *Gordon* v. *Fuller*, 5 O. S. 34.

The court will in general impose terms on a defendant when an arrest is set aside for mere irregularity, or a trifling error; but where an arrest is made for more money than is due, and there is a substantial defect, or if a manifest injury has been sustained, the court will not interfere. *Billings* v. *Rapelje*, M. T. 4 Vict.

A mere release from custody under a ca. sa. for a given time, in order to make arrangements, if possible, to satisfy the debt, is not a discharge in law. *Davis* v. *Cunningham*, 5 L. J. 254.—C. L. Chamb.—McLean.

Where a debtor leaves the province, and returns upon an agreement that he is not to be arrested, provided that he immediately proceed to the settlement of his estate, and the creditors arrest him, alleging that he has broken the condition, the court will not discharge him, but will leave him to his action on the agreement. *Sutherland* v. *Murphy*, 4 Q. B. 176.—P. C.—Macaulay.

A defendant arrested on a ca. sa. was discharged from custody with costs, he undertaking to bring no action; and in the order leave was reserved to him to move the court to set aside the writ and arrest. The court discharged a rule for this purpose; for defendant being released, and precluded from an action, there could be no object served by setting aside the process. *Brown* v. *Brown*, 10 Q. B. 393.

Right of married woman to her discharge on application. *Rennette* v. *Woods*, 11 Q. B. 29.

Infancy is no ground for discharging a person from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.—C. L. Chamb.—Robinson.

The plaintiff having a judgment against defendant and C., and a fi. fa. upon it in the sheriff's hands, sued defendant alone on the judgment, and arrested him under a capias. Richards, J., refused to set aside the arrest or stay proceedings, but left defendant to plead the non-joinder and proceedings under the fi. fa. *Ferrie* v. *McDiarmid*, 2 P. R. 521.—Chamb.—Richards.

Where defendant was illegally detained in close custody, without warrant, at the instance of the plaintiff, on a charge involving the subject matter afterwards stated in the affidavit to arrest, as creating the demand for which the defendant was ordered to be held to bail in the cause, he was discharged from custody on entering a common appearance. *Palmer* v. *Rodgers*, 6 L. J. 188.—C. L. Chamb.—Richards.

Where application was made for a discharge from custody under a capias, upon the ground that his arrest was procured through a trick, by means of the use of criminal process, afterwards abandoned, and the affidavits in answer positively denied the trick and all collusion, the judge, without enquiring into the legality of the arrest under the criminal process, discharged the summons. *Glennie* v. *Ross*, 3 P. R. 281.—C. L. Chamb.—Hagarty.

Defendant was arrested on a capias, and gave bail. After judgment a ca. sa. was issued, and proceedings being had against the bail, the prisoner was rendered to the sheriff, but gave bail to him under C. S. U. C. c. 24, s. 29:—Held, on an application by the prisoner for his discharge from bail as not being worth $20, &c., under C. S. U. C., c. 26, ss. 7, 8, 13, that he was not confined "in close custody in execution," and had not been "arrested under a writ of ca. sa., though not confined to close custody, but has given bail"; and, therefore, that he was not entitled to be discharged. *Hesketh* v. *Ward*, 4 P. R. 158.—Chamb.—A. Wilson.

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost, the court held the executor guilty of a breach of trust with respect to the money, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest. *Lamson* v. *Crookshank*, 2 Chy. Chamb. 426.—Mowat.

Right of insolvent to his discharge from arrest, though not entitled to a certificate of discharge *Hood* v. *Dodds*, 19 Chy. 639.

VII. Second Arrest and Arrest on Alias Writs.

1. *After discharge or first arrest set aside.*

A second arrest was set aside, where the plaintiff had been non-prossed in the first suit and had not paid the costs. *McCague* v. *Meighan*, 2 O. S. 516.

A second arrest allowed where first set aside for a clerical mistake in the affidavit of debt, plaintiff having discontinued that action and paid the costs. *Sheldon* v. *Hamilton*, 3 O. S. 6[illegible]

A defendant discharged by supersedeas, the plaintiff not having charged him in execution in due time, cannot be arrested again on the same judgment. *Burn* v. *Straight*, 5 O. S. 523.

Second arrest upheld, where defendant had been discharged from the first on giving a joint note, and agreeing to pay the costs, the note having been dishonored and costs not paid, although an action had been brought upon the note. *McDonald* v. *Amm*, E. T. 2 Vict.

Where a defendant was discharged for defect in the affidavit of debt, on entering a common appearance, and afterwards arrested on an alias writ, the arrest was set aside, the plaintiff having no right to make a second arrest in the cause, where the entry of an appearance is made a compulsory condition of discharge from the first. *Benson* v. *Adams*, E. T. 3 Vict.

Where an arrest on mesne process was set aside for irregularity, and the plaintiff afterwards proceeded to judgment:—Held, that he might again arrest defendant on a ca. sa. issued on a new affidavit. *Gordon* v. *Sommerville*, E. T. 7 Vict.—C. P.—Jones.

Where defendant had been discharged from custody on a ca. sa. by the partner of the plaintiff's attorney, under a mistaken supposition that the debt had been compromised by the acceptance of new securities by the plaintiff, the court refused to order a new ca. sa. *Bunbury* v. *Loney*, 6 O. S. 291.

Where after an arrest set aside for irregularity in a District Court, the plaintiff arrested the defendant in the same cause on an alias writ under the statute, and defendant then removed the cause into the Q. B. by habeas corpus, the order to set the second arrest, aside, but subsequently took steps in the cause in the District Court, and did not put in special bail in the Q. B., the court refused to set the arrest aside and ordered a procedendo. *Garfield* v. *Sim*, 2 Q. B. 411.

A defendant discharged cannot be detained for the same plaintiff, upon a second writ issued upon an affidavit sworn while he was in custody upon the first. *Barry* v. *Eccles*, 3 Q. B. 1[illegible]

The defendant having been arrested in the County Court, was discharged for insufficiency of the affidavit, but expressly without [illegible]

The plaintiff then took out a rule to discontinue his suit on payment of costs, if any, and arrested defendant in the Queen's Bench for the same cause. Defendant was discharged—1. Because, the first arrest had been set aside for a substantial defect, there could be no second arrest; Because the first suit had not been effectually discontinued, the plaintiff having taken no step to tax or pay costs. *Ellis* v. *James*, 1 P. R. 153. Chamb.—Burns.

A second arrest for the same cause may be made without leave where it appears not to be vexatious, and the first has been set aside for a very trivial irregularity. *Gillespie* v. *Deming*, P. R. 387.—Chamb.—Robinson.

On a ca. re. to arrest T., a warrant was made one G., a sheriff's officer, to execute. G. being unwell, gave it to another bailiff, not named in the warrant to arrest. T. promised bailiff to go to the sheriff's office and give which he did. Subsequently, because the name of the second bailiff was not in the warrant, the judge of the County Court set aside arrest. While the process was still current second warrant was made out and T. arrested. Thereupon, in the County Court, this arrest was set aside, as being a second arrest in the same cause without leave. T. was discharged left the Province, and plaintiff brought covenant against the sheriff and his sureties. The breach charged that the sheriff neglected to arrest T., &c., to which defendants pleaded that sheriff did arrest T. At the trial the issue submitted to the opinion of the court:—held, that defendants were entitled to succeed, when the first arrest was set aside as a nullity the sheriff might still arrest while the process was current. Semble, that the first writ was unnecessarily set aside. *McIntosh* v. *Wright et al.*, 8 Q. B. 535.

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2. *Other Cases.*

Where a defendant was arrested on an alias writ under 2 Geo. IV. c. 1, and gave a bail bond to the sheriff after having entered an appearance to serviceable process, the bail bond was set aside with costs. *Douglass* v. *Powell*, T. 2 Will. IV.

After the service of non-bailable process a judge's order obtained by defendant for the delivery of particulars, with a stay of proceedings, does not operate so as to prevent the plaintiff from arresting the defendant on an alias writ. *Wilson* v. *Wilson*, 3 O. S. 297.

Where a justice takes bail for appearance at a certain time, a second arrest for the same charge by the same complainant before the time appointed, is illegal. *King* v. *Orr*, 5 O. S. 724.

A defendant cannot be arrested on an alias writ issued after appearance entered to serviceable process, where it is necessary to obtain a judge's order for his arrest, as the statute allowing arrest on an alias writ after serviceable process applies only to cases where the cause of action is a debt. *Ross* v. *Urquhart*, 6 O. S. 556.

Where a judge's order is necessary, a defendant cannot be held to bail on an alias writ. *Bowman* v. *Yielding*, M. T. 2 Will. IV.; *Ross* v. *Urquhart*, 6 O. S. 556.

A person arrested under a ca. sa., and suffered to go at large by the sheriff for a limited time, with the consent of the attorney, may be re-arrested under the same writ. *Davis* v. *Cunningham*, 5 L. J. 254.—C. L. Chamb.—McLean.

If defendant is arrested on a ca. sa. and gives bail, plaintiff cannot issue an alias ca. sa. and arrest him a second time. But where defendant had endeavoured after the arrest on the ca. sa. by a contrivance to escape, so as to relieve his bail and charge the sheriff, the court refused to set aside his arrest under an alias ca. sa. Semble, before the issue of an alias under such circumstances, the original should be returned and filed. *Brown* v. *Stevens*, 6 L. J. 89.—C. L. Chamb.—Robinson.

Where, upon application to commit a defendant to gaol, under 22 Vict., c. 96, s. 13, the judge ordered a ca. sa. to issue instead, and defendant thereupon gave bail to the limits:—Held, that he could not again be committed to close custody under the first alternative of the same clause. *Perrin* v. *Bowes*, 2 P. R. 348.—P. C.—Burns.

After a voluntary escape from the sheriff of a prisoner held under mesne process, plaintiff may proceed with his action, and, semble, may issue a ca. sa. without affidavit, if he has had a capias pending action, or an alias ca. sa., if the ca. sa. to fix bail has been returned non est inventus, and take the defendant thereunder; and at all events the plaintiff may have a ca. sa. issued on a new affidavit and re-arrest defendant. *Hesketh* v. *Ward*, 17 C. P. 667.

Per A. Wilson, J.—Quære, whether, after the voluntary return of an escaped prisoner, a plaintiff cannot accept such a return and lawfully charge his debtor in execution, by merely delivering a ca. sa. to the sheriff. *Ib.*

See, also, *Arnold* v. *Andrews*, 8 C. P. 467.

VIII. Costs under Common Law Procedure Act, s. 322. (Formerly 49 Geo. III. c. 4.)

1. *Affidavits on application for.*

An application for costs under 49 Geo. III. c. 4, must be supported by affidavit stating that defendant was arrested without reasonable or probable cause. *McIntosh* v. *White*, Tay. 57.

Where the difference between the amount recovered and that sworn was only £7, and in defendant's affidavits in support of an application a wrong Christian name was given to one of the plaintiffs in the style of the cause—the court refused to allow them to be amended, and discharged the rule. *Rose* v. *Cook*, 1 Q. B. 5.

The rule was refused, because it nowhere appeared in the affidavits for what sum the plaintiff had a verdict. *Powell* v. *Gott*, 1 Q. B. 415.—P. C.—Jones.

If the facts sworn to in the affidavits filed show want of reasonable and probable cause, that is enough, without swearing to it in express terms. *Laderonte* v. *Cullen*, 1 P. R. 22.—P. C.—Draper.

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2. *Other Cases.*

Where the cause has been referred.]—Where evidence had been given in court of a larger sum being due to the plaintiff than he had arrested

defendant for, and the case was then referred with other matters, and the arbitrators awarded the possession of a mill to the plaintiff, and £6 or £7 only in money, the court refused costs to defendant. *McGregor* v. *Scott*, Tay. 56.

Quære, under what circumstances the court will allow costs to a defendant under the statute where there has been a reference. *Beard* v. *Orr*, Dra. 40.

Where plaintiff arrested defendant for upwards of £30 without allowing a set-off, of which he must have been aware, and a verdict being taken subject to a reference, the arbitrators allowed the set-off and awarded plaintiff only £20, defendant was held entitled to costs. *Kendrew* v. *Allen*, T. T. 4 & 5 Vict.—P. C.—Macaulay.

Where the plaintiff arrested for £20, and a verdict was taken by consent for £50, subject to a reference, and the arbitrators awarded 11s. 3d. to the plaintiff, and it appeared by their affidavit that the plaintiff shewed a cause of action to no greater an amount, the court allowed defendant his costs. *McMicking* v. *Spencer*, H. T. 6 Vict. —P. C.—McLean.

Where a verdict has been taken subject to a reference, defendant may be allowed his costs; but—Semble, not if the reference direct the costs to abide the event. *Nicholson* v. *Allan*, 6 O. S. 252.

Where a cause has been referred by order of nisi prius, but no verdict taken, defendant cannot deprive the plaintiff of costs. *Powell* v. *Gott*, 1 Q. B. 418.—P. C.—McLean.

Other Matters.]—Semble, the words of the statute, "arrested and held to special bail," are satisfied by defendant being arrested and imprisoned. *McGregor* v. *Scott*, Tay. 56.

The plaintiff is allowed no costs where in a bailable action he recovers less than the sum sworn to, and the court will order defendant his costs; and the defendant is entitled to set off his costs against plaintiff's verdict. *Burrows* v. *Lee*, E. T. 3 Vict. But see *Higson* v. *Phelan*, 1 P. R. 24.—P. C.—Draper.

Where a defendant arrested under a bailable writ has obtained a rule granting him his costs under 49 Geo. III. c. 4, the plaintiff is not entitled to tax costs on entering the judgment. The effect of the first clause of this statute is to deprive the plaintiff of all his costs of suit. And the word "recovered" in the latter part of this clause, as well as the word "recover" in the former part, refers to the amount for which the verdict was given. *Higson* v. *Phelan*, 2 C. L. Chamb. 7.—Draper.

This point was considered at least doubtful in the same case, 1 P. R. 24.—P. C.—Draper.

Where the rule nisi was not correctly intituled, the court allowed an amendment by the affidavits on payment of costs. *Ball* v. *McKenzie*, T. T. 7 Vict.—Macaulay.

Plaintiffs arrested for £106, and got a verdict for £54 7s. 6d:—Held, under the special circumstances set out in this case, that the plaintiffs had shewn "reasonable and probable cause," and had sufficiently explained their failure in recovering the full amount for which they had arrested. *Goldie* v. *Cameron*, 1 P. R. 20.—P. C.—Draper.

The plaintiff cannot object to the notes of the judge who tried the cause being referred to, for the purposes of this application. *Higson* v. *Phelan*, 1 P. R. 24.—P. C.—Draper.

Semble, that one of two defendants, arrested for more than the sum recovered, cannot obtain costs of defence. *Glass* v. *Carry*, 1 P. R. 12[illegible] —P. C.—Draper.

A bailable capias having issued, the deputy sheriff went to defendant, and asked him to find bail. They both then went in search of bail, and a bail bond was executed:—Held, a sufficient arrest to entitle defendant to apply; but Held also, that under the circumstances of the case, want of reasonable and probable cause was not shewn. *Morse* v. *Teetzel*, 1 P. R. 369.—P. C.—Richards.

IX. Privilege from Arrest.

An officer when employed in executing process is privileged. *Welby* v. *Beard*, Tay. 304.

So is a suitor attending a court of request. *Baldwin* v. *Slicer*, 4 O. S. 131.

A person who, having attended as a grand juror at a court which adjourned for a few days, went into another district on private business, was held not to be privileged from arrest there during such adjournment. *Mittleberger* v. *Clark*, 5 O. S. 718.

An attorney coming to court in term on professional business, which has been disposed of, is not privileged from arrest in execution. *Strobridge* v. *Davis*, M. T. 2 Vict.

An attorney has no privilege on attachment for contempt. *Re McIntyre*, 2 P. R. 74.—Chamb. —Burns.

A barrister cannot be arrested upon mesne process. *Adams* v. *Ackland*, 7 Q. B. 211.

A judge of the County Court cannot be arrested on mesne or final process. *Ib.*

A judge of Surrogate Court is privileged. *Michie* v. *Allen*, 7 Q. B. 482.

Infancy is no ground for discharge from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.—C. L. Chamb.—Robinson.

Right of married woman arrested to be discharged. *Rennett* v. *Woods*, 11 Q. B. 29.

A clerk of the County Court, being also ex officio deputy clerk of the crown and clerk of assize, is privileged only while engaged in his official duties, or while going to or returning from his office; and this court therefore discharged a rule to prohibit the County Court judge from issuing an order of committal against such officer. *In re Mackay* v. *Good*, 27 Q. B. 263.

X. Miscellaneous Cases.

Under 2 Geo. IV., c. 2, a judge of a District Court had no authority to order an arrest for a cause of action on a contract where the damages were not liquidated. *Ferris* v. *Dye*, 1 O. S. 5.

The sheriff's warrant to a bailiff to arrest must be endorsed with the amount of the debt claimed and costs, in like manner as the writ is required to be. *Steele* v. *Lameux*, 5 O. S. 154.

In debt on a judgment of a District Court it is good plea in bar that the plaintiff arrested the defendant on a ca. sa. and afterwards consented to his discharge. *Fraser* v. *Bacon*, 2 Q. B. 132.

Under 1 Vict., c. 21, s. 27, a magistrate cannot cause the arrest of a party in the first instance; he must first be summoned before him. *Cronkhite* v. *Sommerville*, 3 Q. B. 129.

Semble, that a constable may legally allow a debtor, whom he has arrested, to go at large so long as before the return of the writ he deliver him to the sheriff. *Ross* v. *Webster*, 5 Q. B. 570.

An arrest by a constable on mesne process directed to the sheriff is not legal by the 2 Geo. IV., c. 139, unless the affidavit of the debt be annexed to the process. *Ross* v. *Winter*, 5 Q. B. 570.

Certiorari granted to remove cause from County Court, defendant having been arrested. *Winter* v. *Pringle*, 1 P R. 357.—P. C.—Richards.

Where a party arrested under a capias pending action, and before judgment, gives bail, and after judgment and ca. sa. to fix bail returned nihil est inventus [illegible] ordered to the sheriff's custody by his bail i[illegible] their own discharge, such prisoner is still under mesne process, and is not confined in execution. *Hesketh* v. *Ward*, 17 C. P. 367.

The English statutes 1 Anne st. 2, c. 6, and 7 Anne c. 9, relating to escape warrants, are not in force in this province. *Ib.*—A. Wilson, dissenting.

Semble, a person in custody on a criminal charge may be detained in custody in a civil suit. *Palmer* v. *Rogers*, 6 L. J. 188.—C. L. Chamb.—Richards.

Quære, whether after the voluntary return of an escaped prisoner a plaintiff cannot accept such return, and lawfully charge his debtor in execution by merely delivering a ca. sa. to the sheriff.—A. Wilson.

Discharging in execution is the process whereby a prisoner in actual confinement is detained in custody, whether at suit of the same or a different plaintiff. *Ib.*—A. Wilson.

The plaintiff is not compelled to charge the defendant in execution in the county where the latter have surrendered him; he may be charged where the venue is laid. *Beattie* v. *Robinson*, 1 L. Chamb. 217.—Burns.

Held, that a constable executing a warrant issued under the Fishery Act, 31 Vict. c. 60, D. commanding him to convey plaintiff to gaol, and thereafter to hold him for 30 days (absolutely, and not until the fine, &c., be sooner paid for non-payment of which the warrant was issued), had no authority to receive the money, and discharge the prisoner. *Arnott* v. *Bradly*, 1 P. I.

ARREST OF JUDGMENT.

See JUDGMENT.

ARREST, WRIT OF.

FOR ALIMONY—*See* HUSBAND AND WIFE.

ARSON.

See CRIMINAL LAW.

As to the defence of arson in actions against insurance companies, and the evidence necessary to support it. *Mann* v. *The Western Assurance Co.*, 17 Q. B. 190; *Richardson* v. *Canada West Farmer's Insurance Co.*, 17 C. P. 341; *Gould* v. *British American Assurance Co.*, 27 Q. B. 473.

ARTICLED CLERK.

See ATTORNEY AND SOLICITOR.

ASHBURTON TREATY.

See EXTRADITION.

ASSAULT.

I. CRIMINAL ASSAULT—*See* CRIMINAL LAW.

II. ACTION FOR ASSAULT AND FALSE IMPRISONMENT.

1. *By Constable*—*See* CONSTABLE.
2. *Other Cases*—*See* TRESPASS.

III. ACTION FOR ASSAULT AND BATTERY—*See* TRESPASS.

IV. PUTTING PERSONS OFF THE TRAIN—*See* RAILWAYS AND RAILWAY COMPANIES.

Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. *Forrester* v. *Clarke*, 3 Q. B. 151.

On motion to quash a conviction by two justices of the County of Norfolk for an assault:—Held, 1. That stating the offence to have been committed at defendant's place in the Township of Townsend was sufficient, for C. S. U. C. c. 3, s. 1, sub-s. 37, shews that township to be within the county. 2. That it was unnecessary to shew on the face of the conviction that complainant prayed the magistrates to proceed summarily, for the form allowed by C. S. C. c. 103, s. 50, was followed, and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit. 3. That it was clearly no objection that the assault was not alleged to be unlawful. *Regina* v. *Shaw*, 23 Q. B. 616.

It had been previously decided that the prayer for summary jurisdiction should appear on the face of the conviction, even if not necessary on the face of the information. *In re Switzer and McKee*, 9 L. J. 266.—Q. S.—Harrison.

The Court of Quarter Sessions has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in case of default. *Ovens* v. *Taylor*, 19 C. P. 49.

ASSESSMENT AND TAXES.

I. ASSESSMENT.
1. *Generally*, 216.
2. *Of Personalty*, 216.
3. *Of Income*, 218.
4. *Of Lands.*
(a) *Generally*, 218.
(b) *Non Resident Lands*, 221.

II. EXEMPTIONS.
1. *Property held by the Crown*, 222.
2. *Other Cases*, 223.

III. ASSESSORS.
1. *Appointment of*, 224.
2. *Duties of*, 224.

IV. EQUALISATION OF RATES, 224.

V. APPEAL TO COURT OF REVISION AND COUNTY JUDGE, 226.

VI. STATUTE LABOUR, 228.

VII. COLLECTION OF RATES.
1. *Distress and Sale*, 230.
2. *Other Cases*, 236.

VIII. RESPONSIBILITY OF COLLECTORS AND THEIR SURETIES, 237.

IX. SALE OF LAND FOR TAXES.
1. *Proof of Taxes in Arrear*, 239.
2. *Sale after Taxes paid*, 241.
3. *Sales under 3 Vict. c. 46*, 241.
4. *Apportionment of Payment*, 242.
5. *Distress on Premises*, 242.
6. *Non-Resident Lands*, 243.
7. *Several Lots*, 244.
8. *Treasurer's Warrant*, 245.
9. *Advertisement*, 246.
10. *Improper Conduct at Sale*, 247.
11. *Duty of Sheriff*, 249.
12. *Sheriff's Certificate*, 250.
13. *Sheriff's Deed.*
(a) *Description of Land*, 250.
(b) *Other Cases*, 252.
14. *Effect of Mortgagee Purchasing*, 253.
15. *Recovering back Purchase Money*, 253.
16. *Redemption of Lands Sold*, 253.
17. *Objections cured by Statutes*, 255.
18. *Other Cases*, 257.

X. RECOVERING BACK TAXES WRONGFULLY IMPOSED, 260.

XI. NON-RESIDENT LAND FUND, 262.

XII. MISCELLANEOUS CASES, 262.

XIII. CUSTOMS AND EXCISE—*See* REVENUE.

XIV. COVENANT FOR TAXES—*See* COVENANT FOR TITLE.

XV. JURORS' EXPENSES BETWEEN COUNTY AND CITY—*See* JURY.

XVI. TAXES AS BETWEEN LANDLORD AND TENANT—*See* LANDLORD AND TENANT.

XVII. MUNICIPAL BY-LAWS REGARDING—*See* MUNICIPAL CORPORATIONS.

XVIII. SCHOOL RATES—*See* PUBLIC SCHOOLS.

I. ASSESSMENT.

1. *Generally.*

[*The present Assessment Act is 32 Vict. c. 36, O. as amended by 33 Vict. c. 27, O., 34 Vict. c. 3[illegible] O., and 37 Vict. c. 19, O.*]

An assessment for school purposes cannot be levied by an unequal rate in different wards in a city. *In re Scott* v. *Municipal Council of the City of Ottawa*, 13 Q. B. 346.

Held, that a municipal council has no authority to place names on the assessment roll after it is finally passed by the revising tribunal. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.—C. C.—Mackenzie.

Where several devisees and executors were rated to a school rate in respect of the property of their testator, as "John A., and brothers," which entry appeared to have been made at the instance of some of the plaintiffs, but two of them only had slept on the premises occasionally although such was not their usual place of residence, and they had received the usual notice of assessment in that form without appealing, and the same two had paid taxes on an assessment on the township roll in their individual names :—Held, 1. That the facts afforded sufficient evidence to shew that the plaintiffs were "inhabitants of the school section," for the purposes of the rate. 2. That the parties were sufficiently named on the roll to render the rate lawful. *Appelgarth et al.* v. *Graham*, 7 C. P. 171.

The east half had been assessed separately and it was admitted that the whole of the lot had been granted together :—Held, under 13 14 Vict. c. 67, that it should be presumed the tax on the west half had been paid, and that it had therefore been properly assessed separately. *McDonell* v. *McDonald*, 24 Q. B. 74.

Held, that the effect of the 29 & 30 Vict. c. 53, was to abolish the distinction between the mode of assessment in cities and counties both for the purposes of the Jurors' Act and otherwise. *The Corporation of the County of Frontenac* v. *The Corporation of the City of Kingston*, 30 Q. B. 584 ; affirmed in 32 Q. B. 348.

Where a bill to restrain proceedings for collecting the township assessments of the year, on the ground of objections of form, and because an overcharged assessment of small amount was filed after it was too late to apply at law to quash the by-law complained of, the court affirmed on re-hearing a decree dismissing the bill with costs. *Grier* v. *St. Vincent*, 13 C. P. 512.

Quære, whether a township council is at liberty to provide for abatements and losses which may occur in the collection of the county rate in respect of personal property. *Ib.*

See *Coleman* v. *Kerr*, 27 Q. B. 5, p. 236.

2. *Of Personalty.*

Bank Stock.]—Under 32 Vict, c. 36, O., bank stock is personal property liable to assessment

Nickle v. *Douglas*, Q. B., E. T., 1874, not yet reported. *In re appeal from the Court of Revision of the City of Kingston*, 9 L. J. N. S. 259.—C. C.—Burrowes.

But in another case it was held not to be liable to assessment. *In re appeals from the Court of Revision of the Town of Cobourg*, 9 L. J. N. S. 304.—C. C.—Boswell.

Bank stock held by a person as trustee is not assessable as against the trustee. *In re appeal from Court of Revision of Kingston*, 9 L. J. N. S. 259.—C. C.—Burrowes.

Stock held by a resident of Kingston in the Merchants Bank, which has its chief place of business in Montreal:—Held to be personal property owned out of the Province, and therefore exempt; for it was owned by such resident, so far as the Assessment Act was concerned, at the head or chief place of business of the bank. *Nickle* v. *Douglas*, E. T., 1874, not yet reported.

[Now, by 37 Vict. c. 19, s. 3, O., bank stock is exempt.]

Other Matters.]—The gravel road in the county of Elgin, forming part of the London and Port Stanley Road, was granted by the crown to the corporation of the county, and by them leased for a term of years to the appellants, who were not residents of the village of St. Thomas: Held, under C. S. U. C., c. 55, that the interest of the appellants in the road being a chattel interest, could only be assessed as personal property; 2. That as the appellants did not reside in the village, they could not be assessed by the municipal council of that village in respect to their interest in the road. *In re Appeal from Court of Revision of St. Thomas*, 7 L. J. 46, C. C.—Hughes.

Held, under C. S. U. C., c. 55, that the personal property of a partnership must be assessed against it at its usual place of business. *In re* , 7 L. J. 103.—C. C.—Armstrong.

A steamboat was held personal property, and properly assessable at one of the two places between which in summer it plied, and at which winter it was laid up. *Ib.*

Held, that the pipes of a gas company laid throughout and under the streets of a city could be deemed "land," but rather personal property, within the Assessment Act, C. S. U. C. c. *In re Gas Company and the City of Ottawa*, J. 104.—C. C.—Armstrong.

The plaintiff being in possession of a stock of , was assessed therefor in his own name, st which he appealed to the court of revision, to the County Court judge, when an indenof assignment of the goods to one R. M. trusts for creditors was produced, and the iff's name was erased and that of R. M. ituted therefor. The plaintiff alleged, how- that his name was not struck out on his ation, for that his ground of appeal was he goods were not equal to the debts due them, and so were exempt. The defendants distrained upon the goods, the plaintiff ied, and defendants avowed as for taxes o them by the plaintiff, whose name did ppear on the collector's roll. It was con- that the plaintiff having denied his title, is name being erased from the roll, he was ed from replevying the goods distrained; but—Held, that under the assignment he had a right of possession in the goods, which, being coupled with actual possession, entitled him to maintain replevin under our statute: that he was not estopped; and that the plaintiff not being shewn to be indebted to defendants for taxes, the avowry failed. *Sargant* v. *The City of Toronto*, 12 C. P. 185.

Held, that the 16th sec. of C. S. U. C. c. 55, making the yearly taxes to be computed from 1st January to 31st December, does not authorize the assessor to enter persons for personal property on the roll as "taxable persons," who are not permanently resident in the municipality, or have taxable property therein at the time of the assessment, under the 19th sec. Re Yarwood, 7 L. J. 47, referred to and partially overruled. *Marr* v. *The Corporation of the Village of Vienna*, 10 L. J. 275.—C. C.—Hughes.

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3. *Of Income.*

Where the appellant, who was manager of a bank in the incorporated village of St. Thomas, ceased to be such in February, 1860, was then paid $170 83, the balance of his salary, had not during 1860, derived income from any other source, and had not after the commencement of May, 1860, been a resident of the village:—Held, under C. S. U. C. c. 55, that he could not be assessed by the village for an amount greater than $170 83, and as that sum was under $200, the proper amount to enter on the assessment roll under section 33, would be $100 only. *In re Yarwood*, 7 L. J. 47.—C. C.—Hughes. See *Marr* v. *The Corporation of Vienna*, 10 L. J. 275, supra.

Where the appellant, though in the village of St. Thomas at the time of assessment, was there only temporarily to wind up the business of agency of the Bank of Montreal at that place, but his real place of residence was London:—Held, that he could not be taxed on his income in St. Thomas. *In re Ashworth*, 7 L. J. 47.—C. C.—Hughes.

Where a former resident of Vienna had taken a house at Ingersoll, in another municipality, whither the major part of his household effects had been removed, and his servant and most of his family resided when the assessment was taken, and he remained and slept in his former domicile during the night previous to the taking of the assessment, and was found on the following morning in the act of removing the last of his household effects, and taking his final departure, when the assessor came to assess:—Held, that his "residence," for the purpose of assessing his income under the 40th section of the C. S. U. C. c. 55, was at Ingersoll, his permanent residence, and not at Vienna. *Marr* v. *The Corporation of the Village of Vienna*, 10 L. J. 275.—C. C.—Hughes.

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4. *Of Lands.*

(a) *Generally.*

Land not described by the surveyor-general is not liable to be taxed. *Doe* d. *Bell* v. *Orr*, 5 O. S. 433.

But lands "described as granted" by the surveyor-general are taxable, under 59 Geo. III.

ch. 7, although no letters patent for them have ever issued. *Doe* d. *McGillis* v. *McDonald*, 1 Q. B. 432.

The court refused a mandamus to compel a municipal council to alter the assessment of the applicant's property as settled on appeal by a court of revision. They also declined to express any opinion as to the principle to be adopted in the taxation of property, whether the intrinsic value only should be regarded, or whether the amount which it could be or has been leased for, or what it does in fact produce to the proprietor, should be considered. *In re Dickson and the Municipal Council of the Village of Galt*, 10 Q. B. 395.

Under 16 Vict. c. 182, s. 21, only the land occupied by a railway is subject to assessment, not the superstructure. *Great Western R. W. Co.* v. *Rouse*, 15 Q. B. 168.

Upon replevin to recover goods seized for taxes, the plaintiffs contended, that their land was not assessed at the average value of land in the vicinity: that no proper notice was given of the assessment; and that the roll was not completed within the proper time. The defendant produced a letter written by the plaintiffs' solicitor, as follows: "In reply to yours of the 15th instant, addressed to the managing director of this company, I am directed to inform you that the only real property owned by the company, in the township of Maidstone, consists of the roadway of 106 acres, and 17 acres of extra or waste land. I have not the rate at which this land has been hitherto assessed, but I presume that the average value of land in the locality cannot exceed ten pounds per acre." They also proved a notice of assessment delivered 9th July, 1856: Held, that this letter did not fix £10 as the average value of the land, and that the notice of assessment, being served after the time for the revision of taxes had expired, was too late, under which they had assessed the plaintiffs' land at £10 per acre, while the average value of the land through which the railway went was £1 10s. The plaintiffs, therefore, were held entitled to succeed. *Great Western R. W. Co.* v. *Ferman*, 8 C. P. 221.

Where executors and devisees in trust of land were assessed as owners:—Held, that they were properly so assessed, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 Q. B. 276.

Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term continues. *McCarrall* v. *Watkins*, 19 Q. B. 248.

Under C. S. U. C. c. 55, the 10 per cent. charged upon arrears of taxes due upon land is to be charged upon the whole amount due at each annual settlement, thereby making it a compound computation of 10 per cent each year, and not upon the amount of each year's taxes separately. *Gillespie* v. *City of Hamilton*, 12 C. P. 426.

Held, under the facts stated in this case, that the land was improperly assessed for the year 1858 as non-resident, being occupied, and that the sale being therefore for more than was due was entirely void. *Allan* v. *Fisher*, 13 C. P. 63.

Held, that the district council had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of so much in the pound on the assessed value. The land having been sold for arrears of such taxes, in addition to arrears accrued under the statute:—Held, that the sale was void. Quere, whether the district council could direct land to be sold for payment of taxes imposed not by the provincial statute, but by their by-law. *Doe* d. *McGill* v. *Langton*, 9 Q. B. 91, followed in *Williams* v. *Taylor*, 13 C. P. 219.

One S., from 1858 to 1861, inclusive, occupied, as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots, and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot 24 had during these four years been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was applied to to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, $228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere. *In re Secker and Paxton, Treasurer of the County of Ontario*, 22 Q. B. 118.

The omission of the assessor to distinguish, in his notice to a railway company, between the value of the land occupied by the road and their other real property, as required by the act, does not avoid the assessment. Such an omission may be corrected on appeal by the Court of Revision and County Court judge. Scragg & Corporation of London, 26 Q. B. 263, dissenting from Great Western R. W. Co. *v.* Rogers, 16 Q. B. 500, approved of and followed on this point *The Great Western R. W. Co.* v. *Rogers*, 29 Q. B. 245.

The suspension bridge across the Niagara Falls at Clifton, with the stone towers, &c., supporting it:—Held, land and real property within the Assessment Act of 1866, s. 3. *Niagara Falls Suspension Bridge Company* v. *Gardner*, 29 Q. B. 194.

Under 59 Geo. III. c. 7, it was the duty of the Quarter Sessions to assess the amount of taxes to be paid upon lands, not exceeding the sum of one penny in the £ of the statutable value; and where the treasurer of his own motion charged every wild lot one penny in the £ of such value, the sale of land for such tax was held invalid. *Cotter* v. *Sutherland*, 18 C. P. 357.

A lot, previously assessed as to the whole, was, on claim made to half of it, assessed as to this half, and the taxes of previous years apportioned between both halves:—Held, that there was no objection to this. *Stewart* v. *Tapp*, 22 C. P. 284.

The patent granted the lot by north and south halves. The patentee in 1853 conveyed the lot as a whole, and it continued in one owner to the sale of 35 acres in 1858. In 1858 and

each half was assessed separately:—Held, not objectionable. For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years the north half, 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of $330 on the whole:—Held, right. *The Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

Held, that the 13 & 14 Vict. c. 67, ss. 46 and 47, did not make the list of taxes directed to be prepared by the treasurer binding. *McAdie* v. *Corby*, 30 Q. B. 349.

Where three distinct lots were assessed in bulk, and sold for taxes, the sale was set aside. *Christie* v. *Johnston*, 12 Chy. 534.

The omission of assessors in a city to make and complete the roll until after the 1st May, does not avoid the assessment; and the person assessed having appealed to the Court of Revision and county judge, paid part of his taxes, and refused to pay the rest on a ground inconsistent with this objection, would be precluded from taking it. *Nickle* v. *Douglas*, Q. B. E. T. 1874, not yet reported.

Where there were two lots on a particular street with the same number, one on the south side and one on the north side, and neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other, the sale was held void for the uncertainty. *Grant* v. *Walkington*, 15 Chy. 332.

See III. 2 p. 224; IX. 7, p. 244.

(b) *Non-Resident Lands.*

Held under 16 Vict. c. 182, that a non-resident owner of lands can only be rated on the assessment roll by name at his own request. *Municipality of Berlin* v. *Grange*, 5 C. P. 211. Affirmed on Appeal, 1 E. & A. 279.

And that the entry of a party on the assessment roll as resident, when in fact he was a non-resident, did not render his assessment nugatory. *De Blaquiere* v. *Becker*, 8 C. P. 167.

The term "lands of non-residents" means occupied land not assessed against the owner or occupant. *Mace* v. *Ruttan*, 7 L. J. 299.—C. J. Mackenzie.

Quære, as to the manner in which wild lands of non-residents, not included in the assessment roll, were to be rated under 59 Geo. III. c. 7; and Semble, such lands were not assessable at all. *Cotter* v. *Sutherland*, 18 C. P. 357.

Held, that under the facts stated in this case, the land was improperly assessed for the year 1861, as non-resident, being occupied, and that the sale being therefore for more than was due was entirely void. *Allan* v. *Fisher*, 13 C. P. 63.

Under 13 & 14 Vict. c. 67, land was sold in 1854 for taxes of several years, including 1851, in which year the collector's roll had been returned to the treasurer, with his affidavit that the reason for not collecting the amount was that the land was non-resident. It was proved by, however, that from the 6th February, 1851, until long after the sale, the land had been occupied by defendant's father, who lived on it with his family:—Held, that the sale was illegal. *Street* v. *Fogul*, 32 Q. B. 119.

It is the duty of the assessors to assess village lots, the property of non-residents, separately, placing opposite to each the value and amount of assessment. *Black* v. *Harrington*, 12 Chy. 175.

For several years a parcel of land, containing 100 acres, was returned to the treasurer of the county as non-resident land. In 1860, fifty acres only of the 100 were returned to the treasurer as non-resident:—Held, sufficient to authorize the treasurer in subdividing the 100 acres for assessment purposes. *Brooke* v. *Campbell*, 12 Chy. 526.

In a suit to impeach a sale of land for taxes, it appeared that about twenty or thirty acres of the lot were cleared and fenced, and a barn was erected thereon, into which hay made on these twenty acres was stored in winter, by a person occupying the adjoining lot under the authority of the proprietor; no one resided on the twenty acres; the owner was resident out of the country, and had not given notice to the assessor of the township to have his name inserted on the roll of the township:—Semble, that the lot should have been assessed as occupied. Draper, C. J., Hagarty, C. J., and Gwynne, J., diss., who were of opinion that the lot was properly assessed as non-resident. *Bank of Toronto* v. *Fanning*, 17 Chy. 514; in appeal, 18 Chy. 391.

See *In re Secker and Paxton*, 22 Q. B. 118, p. 220.

II. Exemptions.

1. *Property held by the Crown.*

Plaintiff in 1853 purchased crown lands through the agent at Chatham, taking a receipt for the first instalment. In January, 1854, the commissioner of crown lands, in supposed compliance with 16 Vict. c. 182, s. 48, transmitted a list to the registrar of the county, (in the statement of the case set out.) Plaintiff paid all the instalments on the land as they became due, but obtained no evidence of his right, except by the receipt. The land had never been in the possession of any person, and the plaintiff had always resided out of the county in which they were situate. Plaintiff having paid the taxes from 1854 to 1859 under protest:—Held, that these lands were not subject to assessment, as they were vested in the crown, no license of occupation, lease, or patent thereof, having been granted by the crown:—Held, that 16 Vict. c. 159, s. 24, (C. S. U. C. c. 22, s. 27, since repealed,) was not intended for Upper Canada: that sec. 13, C. S. U. C. c. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease, or settle on any crown land. *Street* v. *The Corporation of the County of Kent*, 11 C. P. 255.

Held, affirming the judgment of the court below, 12 C. P. 284, that unpatented lands, though held by purchasers from the crown who had paid a part of the price therefor, were not liable to assessment, although purchased from the crown after June, 1853. *The Corporation of the County of Simcoe* v. *Street*, 2 E. & A. 211.

[See now 32 Vict. c. 36, O., ss. 108, 109, 127.]

Property, whether leasehold or freehold, in the use or occupation of the crown, or of any person

or persons in his or their official capacity as servants of the crown, is not assessable, either at present or as a charge upon the reversion. *Shaw* v. *Shaw*, 12 C. P. 456. See, also, *Shaw* v. *Shaw*, 21 Q. B. 432.

Held, affirming Shaw *v.* Shaw, 12 C. P. 456, that land leased to a commissariat officer on behalf of the secretary of state for war, and occupied by Her Majesty's troops, was exempt from taxation; and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference. But where such land before the execution of the lease had been assessed to the lessor for that year:—Held, that it was not discharged, but that as payment could not be enforced from the crown, and the officer had paid to the collector under protest, the money might be recovered back. *The Principal Secretary of State for War* v. *The Corporation of Toronto*, 22 Q. B. 551.

Where the premises were so leased in April, having been previously assessed to the lessors, but the roll had not been returned:—Held, that the property was exempt as against the crown for the taxes of that year. *The Principal Secretary of State for War* v. *The Corporation of London*, 23 Q. B. 476.

See *Cotter* v. *Sutherland*, 18 C. P. 357, p. 258.

2. *Other Cases.*

Land which has not been described by the surveyor general is not liable to be taxed. *Doe* d. *Bell* v. *Orr*, 5 O. S. 433. See *Doe McGillis* v. *McDonald*, 1 Q. B. 432.

Under 16 Vict. c. 182, s. 21, only the land occupied by a railway is subject to assessment, not the superstructure. *Great Western R. W. Co.* v. *Rouse*, 15 Q. B. 168.

The institution of the Sisters of Charity in the city of Ottawa was held exempt as "a public hospital" within the Assessment Act of 1853. Quære, if it is a "poor house" or "alms house" within the Act. Semble, even if so the parcels of land assessed in this case could not be deemed "real or personal property" "belonging to or connected with the same," so as to be exempt from taxation. *In re the Sisters of Charity of the City of Ottawa*, 7 L. J. 157.—C. C.—Armstrong.

Held, under C. S. U. C. c. 55, s. 3, that land covered with the waters of a harbour is not taxable, and therefore, that the Buffalo and Lake Huron R. W. Co. could not be taxed for the Goderich harbour. *Buffalo and Lake Huron R. W. Co.* v. *The Corporation of the Town of Goderich*, 21 Q. B. 97.

Section 8 of the Assessment Act of 1866 clearly exempts church and school property from local as well as other taxes. *Haynes* v. *Copeland*, 18 C. P. 150.

Held, affirming the judgment of the Q. B., that land owned by a city, but leased by them to a tenant for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes. Morrison, J., dissented, on the ground that the land was not liable; VanKoughnet, C., and Spragge, V. C., on the ground that, though the corporation might sue on the covenant to pay, they could not distrain. *Scragg* v. *The Corporation of the City of London*, 28 Q. B. 457; 26 Q. B. 263.

[See now 32 Vict. c. 36, s. 9, sub-s. 7.]

III. Assessors.

1. *Appointment of.*

The council by resolution appointed one R. assessor, who was sworn into office and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances the court granted a quo warranto to determine the validity of the last appointment. *In re McPherson and Beeman*, 17 Q. B. 99.

2. *Duties of.*

Held, that the assessors are not bound to enquire into trusts upon which lands are held, but to view each man's premises and find out whether or not he is assessable or comes under any of the exemptions allowed; and that the assessor upon seeing a dwelling-house occupied as such by a minister of religion for his private residence, is bound to assess the occupant for it, no matter upon what trust the freehold in the land upon which the house stands is held. *Franchon* v. *The Corporation of St. Thomas*, 7 L. J. 245.—C. C.—Hughes.

Sec. 24 of C. S. U. C., c. 55, requiring the names of owner and occupant to be entered, applies to the assessor's roll only, not to the collector's. *Coleman* v. *Kerr*, 27 Q. B. 5.

The omission of assessors in a city to make and complete the roll until after the 1st of May does not avoid the assessment, and the person assessed having appealed to the Court of Revision and county judge, paid part of his taxes, and refused to pay the rest on a ground inconsistent with this objection, would be precluded from taking it. *Nickle* v. *Douglas*, Q. B. E. T. 18[illegible], not yet reported.

Held, that the omission of assessors to return their roll by the 1st of May is not an indictable offence under sec. 175 of the Assessment Act, 32 Vict. c. 36, O., and that if it were the two assessors would not be jointly liable. *Regina* v. *Snider et al.*, 23 C. P. 330.

IV. Equalization of Rates.

Upon an application to quash a by-law imposing a county rate, for disregard of the direction of sec. 70, C. S. U. C. c. 55, as to equalizing the rates:—Held, that except perhaps where dishonest intention on the part of the council clearly shewn, (which was not the case here) the court have no authority to over-rule the valuation on the ground of its alleged unfair or unequal effect. Remarks as to the proper mode of proceeding under the above section. The court refused a mandamus commanding the council to proceed as directed by the act, as it was not clear that they had not complied with it by their by-law. *Gibson and The Corporation of Huron and Bruce*, 20 Q. B. 111.

Where the county council, in equalizing the assessments under that section, had intentionally capitalized the personal property in towns and villages at ten per cent., instead of six, contrary to the express direction in section 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection. It was also objected that by this course the amount of ratable property in towns and villages was made much greater than it should have been, and so (in effect) that the amount shewn by the last revised assessment rolls, followed in the by-law, was wrong: but,—Held, that on this application the court clearly could not go behind the rolls. *Record and The Corporation of Lincoln*, 24 Q. B. 92.

Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by defendants of the proportion to be raised by them. Plea, that in capitalizing the real property not actually rented but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby $1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up:—Held, on demurrer, a good defence, for such capitalization was contrary to the statute, and though it benefited the defendants' assessment they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the law. Held, also, that it was unnecessary to quash the by-law, for the court in their discretion might decline to do that, though they could not deny the defendants' right to contest their liability on any legal ground. *The Corporation of the County of Lincoln* v. *The Corporation of the Town of Niagara*, 25 Q. B. 578.

Held, that the aggregate value of municipalities, to form the basis for the calculations for equalization for county purposes, under sub-s. 1 s. 71 of the Assessment Act, 32 Vict. c. 36, is the value of the municipality as returned in the last revised assessment roll, and that it is not in the power of county councils to vary such valuation. *The Municipality of the Town of Dunnville* v. *The County of Norfolk*, 5 L. J. N. S. 181.—C. C.—Wilson.

Held, in equalizing the rolls, although a difference is recognised by 32 Vict. c. 26, s. 71, between town and village property and county property, that as the valuation of the former is arbitrarily reduced by two-fifths, the duty of the county council is to increase or decrease the aggregate valuations of townships, towns, and villages, as the rolls stand, as well as to make any statutory reduction with respect to the former—town and village rolls being subject to equalization in the same way as townships. Comment of the mode of procedure adopted in bringing the question for consideration in this case before the judge of the County Court under sub-s. 3 of s. 71. Remarks upon the difficulty, under the present system of assessment, of arriving at a fair equalization of the assessment rolls in different townships. *In re Appeal from the County Council of the County of Simcoe*, 5 L. J. N. S. 294.—C. C.—Gowan.

V. Appeal to Court of Revision and County Judge.

Under 16 Vict., c. 182, ss. 26 and 28, the decision of a C. C. judge is final only as to such matters as are to be submitted to him, that is, as to any alleged overcharge, or the wrongful insertion or omission of any person's name, not as to whether only the land occupied by a railway is assessable, or the superstructure as well. *Great Western R. W. Co.* v. *Rouse*, 15 Q. B. 168.

Where the assessors illegally assessed the superstructure of a railway as well as the land occupied by it:—Held, that the company might defend an action as to the superstructure, although no appeal had been made to the Court of Revision, and although the whole was called land in the assessment. *Municipality of London* v. *Great Western R. W. Co.*, 17 Q. B. 262.

It is no defence to an action for taxes, that defendant's property was rated higher than the average value of land in the locality, as assessed for the same year; the only remedy in such a case is by appeal to the Court of Revision. *S. C. Ib.* 267.

Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term continues; but—Held, that the plaintiff having omitted to appeal was liable to pay the sum assessed against him, and therefore could not replevy his goods seized. *McCarrall* v. *Watkins*, 19 Q. B. 248.

Where property was assessed in the occupation of a crown official and not appealed against, and taxes collected thereunder—upon replevin:—Held, that under such circumstances the party assessed need not appeal to the Court of Revision, the assessment being a nullity. *Shaw* v. *Shaw*, 12 C. P. 456; *S. C.* 21 Q. B. 432.

Held, following Corporation of Toronto *v.* Great Western R. W. Co., 25 Q. B. 570, p. 227, that a person assessed for property exempt from taxation, who has appealed to the Court of Revision (but not to the county judge), is bound by their decision. *Scragg* v. *The Corporation of the City of London*, 26 Q. B. 263.

The judge of the C. C., on appeal from the Court of Revision, by which the assessment of a suspension bridge as land at $150,000 was affirmed, reduced the assessment to $1000, on the ground that all except the land on which the towers stood was personal property:—Held, that his decision was final, though clearly erroneous, and could not be questioned in an action; for he had jurisdiction to reduce the assessment, and the wrong reason given could not make his judgment less binding. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 Q. B. 194.

The omission of the assessor to distinguish in his notice to a railway company between the value of the land occupied by the road and their other real property, as required by the act, does not avoid the assessment. Such an omission may be corrected on appeal by the Court of Revision and County Court judge. *Great Western R. W. Co.* v. *Rogers*, 29 Q. B. 245.

Where bank stock not assessable, because owned out of the province, was assessed, and such assessment confirmed by the Court of Revision and county judge, it was—Held, on demurrer, in replevin for goods distrained, that the defect of want of jurisdiction was not cured. *Nickle* v. *Douglas*, Q. B. E. T. 1874, not yet reported.

Held, that a municipal council has no authority to place names on the assessment roll after it is finally passed by the revising tribunal. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.—C. C.—Mackenzie.

A county council, on a petition for a revision of assessment under 24 Vict., c. 38, without hearing the petitioner further than reading his petition, dismissed it:—Held, that the dismissal of the petition was a sufficient decision to warrant an appeal to the C. C. judge. *In re the Judge of the C. C. of Perth and J. L. Robinson*, 12 C. P. 252.

The plaintiffs had for several years appealed from the assessment of their property to the Court of Revision, who had decided against them, and from thence to the County Court judge, who had reduced it one third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, who said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of revision that no judgment had been given, and found none in the book where their decisions were entered. The collector in October, called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed. The mistake having been discovered in the following year:—Held, that they might recover it back, for the Court of Revision not having determined the appeal, the roll, as regarded the plaintiffs, was not "finally passed," within sec. 61 of C. S. U. C. c. 55, so as to bind them. Hagarty, J., dissenting, on the ground that the return of the roll unaltered as regarded the plaintiffs' assessment, was in effect a decision against them. *The Law Society of Upper Canada* v. *The Corporation of Toronto*, 25 Q. B. 199.

The Court of Revision confirmed the assessment of a lot of land occupied by a railway company at $1200 annual value, and assessed the station built upon it at $1500, and the county judge being appealed to confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether, after the valuation of the land had been fixed in accordance with section 30 of the Assessment Act, the building could be added:—Held, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision. *The Corporation of the City of Toronto* v. *The Great Western R. W. Co.*, 25 Q. B. 570.

An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May the court met, when it was objected for the parties named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters:—Held, that they were right, the six days' notice being imperatively required by the act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it. Semble, that, if this were otherwise, the proper course would have been a mandamus to the mayor to summon the Court of Revision, under section 55 of the C. S. U. C. c. 55. *Regina* v. *The Court of Revision of the Town of Cornwall*, 2 Q. B. 286.

An island forming part of a municipality, but situated in no road division, and deriving no benefit from the roads of the municipality, having been assessed for statute labour, the owners appealed to the Court of Revision and thence to the county judge, on the grounds of over assessment, and that the property was not liable to statute labour. On an application to stay proceedings before the judge:—Held, that though a county judge has authority to increase or reduce an assessment, or to rectify errors or omissions from the roll, the question of liability for statute labour is beyond his jurisdiction. A writ of prohibition was accordingly granted. *The Township of Walsingham* v. *The Long Point Co.*, 5 P. R. 279.—Chamb.—Gal

Power of the Court of Revision to grant time for entering appeals beyond that prescribed by the Assessment Act. Practice in appeal cases. Notice of appeal, and necessity for stating grounds as cautions and matters of appeal. Right of counsel to be heard before Courts of Revision and all other courts. *In the First Division Court in the County of Elgin*, 6 L. J. N. S. 295.—C. —Hughes.

The three days allowed for service of notice of appeal from assessment, counts from the time for the decision of each case by the Court of Revision, and not from the day the court closes. *In re Downey*, 8 L. J. N. S. 198.—C. C. Macarow.

Held, that the clerk of the Division Court is not bound under sec. 63, sub-s. 3 of the Assessment Act, 32 Vict. c. 36, O., to receive an appeal unless the sum of $2 be deposited with him as security for costs: that if so disposed he may give credit for the amount; and if he does so, the appeal is properly entered, and ought to be heard by the county judge: that a complainant to the Court of Revision is bound to appear and support his appeal; but if he fail to do so, the court may hear the complaint ex parte, and if they strike the assessment the complainant may appeal to the judge. *In re Pain* v. *Town of Brantford*, 1 L. J. N. S. 261.—C. C.—Jones.

See *In re Appeal from the County Council of Simcoe*, 5 L. J. N. S. 294, p. 226; *Sargent* v. *City of Toronto*, 12 C. P. 185, p. 218.

VI. Statute Labour.

A party must perform his statute labour where called upon within the division of the town

which he resides. *Gates* v. *Darenish*, 6 Q. 261.

A proprietor of land cannot be compelled to statute labour in the township in which the land lies, unless he is himself resident there. *Moore* v. *Jarron*, 9 Q. B. 233.

The municipal council of a village can impose performance of statute labour, or a tax in thereof, only on those inhabitants not otherwise assessed. *In re Dickson* v. *The Municipal Council of the Village of Galt*, 9 Q. B. 257.

Held, under 13 & 14 Vict. c. 67, where a non-resident owns several lots in the same township county, that he is chargeable with the rate of commutation estimated with reference to the value of such lots separately, and cannot claim to have them rated according to their aggregate value. *The Canada Company* v. *Howard*, 9 Q. B. 654.

Municipal corporations, under 12 Vict. c. 81, and 16 Vict. c. 182, could not fix the commutation for statute labour at a higher rate than 6d. per. day. *In re Tilt and the Municipality of Toronto*, 13 Q. B. 447.

The municipality of a township by by-law enacted, that any person liable to perform statute labour, who, after being duly notified, should neglect or refuse to attend, should forfeit and pay 5s. for every day he should so neglect or refuse, and the payment of such fine should release such person from the performance of the labour required of him by the by-law :—Held, not an attempt to compel commutation at a rate exceeding 2s. 6d. per day ; and that the by-law was good. *In re Bannerman and the Municipality of Yarmouth*, 15 Q. B. 14.

A by-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour before the reeve or nearest justice of the peace, who upon conviction should impose a fine of 5s. for each day's neglect, with costs, and adjudge that the payment of the said fine and costs should not relieve the party from performance of the labour ; and in default of payment should issue a distress warrant :—Held, good. *In re Stoddard and the Municipality of the United Townships of Wilberforce, Grattan, and Fraser*, 15 Q. B. 163.

The plaintiffs were incorporated by 10 & 11 Vict. c. 95, to make a road *from* the town of Streetsville to different points specified, and had power to claim the statute labour, by commutation or otherwise, to the extent of one half the concession on each side of their road, and to collect it from the persons liable. The village of Streetsville, incorporated in 1857, was within one half concession of plaintiffs' road, which ran through it. In 1858 the village council imposed and collected a rate, of which a certain sum was for commutation of statute labour :—Held, that the plaintiffs were entitled to recover from the defendants, as money had and received, so much of the sum as was received in respect of persons and property forming no part of the village of Streetsville mentioned in the plaintiffs' act of incorporation, but within half a concession on each side of their road. *Streetsville Plank Road Company* v. *Corporation of the Village of Streetsville*, 19 Q. B. 62.

Under C. S. U. C. c. 55, s. 86, a warrant may issue to imprison a person for non-payment of statute labour tax, without first summoning him to answer, or making a conviction. *Regina* v. *Morris*, 21 Q. B. 392.

It is not necessary, under C. S. U. C. c. 126, to set aside such warrant before an action can be brought against the justice. *Ib.*

The point decided being new, the court discharged without costs a rule *nisi* obtained to quash the conviction. *Ib.*

Held, that under 16 Vict. c. 182, and 22 Vict. c. 99, s. 409, statute labour was imposed on all persons assessed on the assessment-roll of a town, whether residents or non-residents, and that in the case of the latter the commutation was fixed by the statute at 2s. 6d., no by-law being necessary unless the municipality intended to fix it at a higher or lower rate. *Robinson* v. *The Corporation of the Town of Stratford*, 23 Q. B. 99.

See *The Township of Walsingham* v. *The Long Point Company*, 5 P. R. 279, p. 228.

VII. Collection of Rates.

1. *Distress and Sale.*

Appointment and Authority of Collector.]—Held, that city and county councils cannot legally pass a resolution under the 104th sec. of the Act, C. S. U. C. c. 55, to continue the levy and collection of unpaid taxes by distress after the return of the collector's roll, and that such roll must be returned at furthest by 1st March in each year. *Smith* v. *Shaw*, 8 L. J. 207.—C. C.—Mackenzie.

Held, under C. S. U. C. c. 55, that after the collector's roll for the year has been formally returned the municipality cannot appoint any one to collect the unpaid taxes by distress ; their collection belongs to the treasurer. *Holcomb* v. *Shaw*, 22 Q. B. 92.

In replevin defendant avowed, setting out the assessment of certain taxes in the City of Kingston for the years 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid : that the defendant was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls : that certain persons named were set down and assessed on the said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector for those years ; and that at the said time when, &c., (being in 1861) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiff's possession on the premises so assessed :—Held, on demurrer, that the avowry shewed no defence, the council having under the circumstances no authority to make such appointment. The plaintiffs in answer to the avowry pleaded several pleas, denying the assessment of the several parties as alleged, to which the defendants replied, so far as it might be intended to rely on any error in said assessments, that the collector's rolls for said years were made out by the clerk from the assessment roll as finally passed, and the assessments in question correctly transcribed :—Held, on de-

murer, replication bad. *Holcomb* v. *Shaw*, 22 Q. B. 92.

Held, on appeal by the chief superintendent of education, that a collector of school taxes might in 1861 collect by distress the taxes for 1859 and 1860, not having made his final return of such taxes as in arrear, and being still collector; and—Semble, that in this case, the plaintiff who complained of the seizure having led to it by his own conduct, the proceeding should in the Division Court have been upheld at all events. *Chief Superintendent of Education, In re McLean* v. *Farrell*, 21 Q. B. 441.

The time for levying a school tax in the city of Kingston, imposed by by-law in December, 1855, was extended by resolutions of the city council, under 18 Vict., c., 21, s. 3, until the 1st August, 1856, and again on the 22nd December, 1856, to the 1st March, 1857:—Held, that the collector, who was the same person for both years, might distrain between the 1st of August and the 22nd December, 1856, although no resolution extending the time was then in force—McLean, J. diss.; *Newberry* v. *Stephens*, 16 Q. B. 65, followed in *McBride* v. *Gardham*, 8 C. P. 296.

Held, no objection to a sale of land that the collector was bound by the act to make his return on the 14th of December, but delayed till the 8th of April following, for that it was a matter between him and the municipal council, which could not prejudice the title; and as they received the return without objection, it might be assumed that they had appointed the 8th of April to make it on. *McDonell et al.* v. *McDonald*, 24 Q. B. 74.

Defendant was duly appointed collector of the municipality for the years 1865 and 1866:—Held, following Newberry *v.* Stephens, 16 Q. B. 471, Chief Superintendent of Schools *v.* Farrell, 21 Q. B. 441, and McBride *v.* Gardham, 8 C. P. 296, that he had authority in 1866 to distrain for the taxes of 1865 upon the owner of premises duly assessed. *Coleman* v. *Kerr*, 27 Q. B. 5.

Section 126 of the assessment act, 32 Vict. c. 36, O., directs, that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *The Corporation of the County of Frontenac*, 30 Q. B. 275.

Demand.]—Where several devisees and executors were rated to a school rate in respect of the property of their testator as "John A. and brothers," which entry appeared to have been made at the instance of some of them, and they had received the usual notice of assessment in that form without appealing:—Held, that a demand made by the collector on "John A." was sufficient to bind the others. *Applegarth et al.* v. *Graham*, 7 C. P. 171.

Held, that a statement and demand of taxes are not a condition precedent to a distress in the case of non-residents. *DeBlaquiere* v. *Becker*, 8 C. P. 167.

One N. S., the plaintiff's son, was assessed in 1868 as a freeholder for $450 on real estate, and $200 on personal property; and was on the collector's roll for county rate, $9.75; schools, $7.02; township rate, $2.60; and dog tax, $2.00, in all $21.37. The collector was not aware how much was for real and how much for personal property, and he demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August, 1868. The plaintiff offered to pay him the tax on the real estate only, but he tendered no money and required a receipt in full for the real property. The defendant, thereupon, seized on the premises goods which belonged to N. S.; and the plaintiff brought trespass: Held, under 29 & 30 Vict. c. 53, that the demand upon the plaintiff was sufficient, he being the person who ought to pay. *Squire* v. *Mooney*, 30 Q. B. 531.

Held, that the goods of an occupant who took possession of premises after assessment were liable to distress for taxes assessed on the premises against the previous occupier, and that a demand on such occupant was unnecessary, a demand having been made on the previous occupier. *Anglin* v. *Minis*, 18 C. P. 170.

What may be seized.]—Held, that executors and devisees in trust of land were properly assessed as owners, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 7 Q. B. 276.

A lot of land being in arrear for taxes for years up to 1859, inclusive, during which it had been assessed as "non-resident" land, was duly returned in 1865, under 27 Vict., c. 19, as occupied by the plaintiff, who had become tenant of it on the 1st of April of that year. These taxes were placed upon the collector's roll, and in order to satisfy them he seized the plaintiff's goods *upon another lot* in the same township:—Held, that such seizure was unauthorized. *Warne* v. *Coulter*, 25 Q. B. 177.

By agreement between the plaintiffs and the Erie and Niagara Railway Company, the plaintiffs were working the latter railway with their own engines and cars, and defendant as collector seized the plaintiffs' car on such railway for taxes due by the Erie and Niagara Railway Company in respect of other land belonging to that company:—Held, that such seizure was unauthorized, for the car when taken was in the plaintiffs' possession and their own property. *Great Western R. W. Co.* v. *Rogers*, 29 Q. B. 245.

Held, that the goods of a future occupant who took possession of premises after assessment and was in possession before the return of the collector's roll, were liable to distress for taxes assessed in respect of the premises against the previous occupier, and this although the goods were not at the time on the property actually assessed. *Anglin* v. *Minis*, 18 C. P. 170.

C. owned a boiler and smoke pipe, which had been erected in a building of which he was the lessee. On the 19th of February they were seized for city taxes due by him, and bought by the plaintiff; but the whole purchase money, being paid, they were left in charge of the chamberlain. On the 23rd he settled the b

and was removing the goods on the 26th, when they were seized for rent due to the original landlord:—Held, that they were liable to such seizure:—Held, also, that the goods could not be considered as in the custody of the law after the sale on the 19th of February. *Langton* v. *Bacon*, 17 Q. B. 559.

Held, that a planing machine standing on the floor without fastening, with belts, and an engine to work it, was a chattel liable to seizure for taxes. *Hope* v. *Cumming*, 10 C. P. 118.

A bailiff having a warrant from the collector to distrain for taxes due by A. on his lands, went to the premises, where A. pointed out to him property of his own amply sufficient to cover the amount due. The bailiff, however, insisted on seizing a pair of horses then in the stable, and which A. was at the time putting to a waggon in order to use them, but A. refused to let him take these, saying that they belonged to his son-in-law, who lived in the house, but was then away from home. The bailiff declared that he seized them for the taxes, though he did not touch them, but A. drove them away, and three days after the bailiff returned and took them from the stable, no one being present. The owner having replevied, it appeared on the trial that the horses belonged to the son-in-law, who kept them in a part of the stable reserved for his exclusive use:—Held, (McLean, J., diss.,) that the horses were in the possession of A., and liable to seizure under 16 Vict., c. 182, s. 42; and that the facts proved amounted to a distress. *Fraser* v. *Page*, 18 Q. B. 327.

Distress for more than due.]—A collector having legal authority for the collection of three sums, being the rates for three specific years due for taxes, distrained by his bailiff for the amount of them with other sums not properly collectable. Upon replevin:—Held, that the three legal distresses were separable from the illegal ones, and that the sums due on them were paid replevin would not lie. *Corbett* v. *Johnston et al.*, 11 C. P. 317.

One N. S., the plaintiff's son, was assessed in 1868 as a freeholder for $450, on real estate, and $50 on personal property, and was on the collector's roll for county rate $9.75; schools $7.02; township rate, $2.60, and dog tax $2.00; in all, $21.37. The rate did not appear on the collector's roll, and the collector was not aware how much was for real and how much for personal property. He demanded the taxes from the plaintiff, to whom N. S. had made an assignment in August 1868, and the plaintiff offered to pay all the tax on the real estate only, but he tendered no money and required a receipt in full for real property. The defendant thereupon seized on the premises goods which had belonged to N. S., and the plaintiff brought trespass:—Held, that he could not recover, for it was not certain, and the court would not assume, that any part of the amount seized for was for personal property, except the $2 dog tax; and this sum being severable, and the other sums not tendered, seizing for it with the rest would not vitiate the whole distress. *Squire* v. *Mooney*, 30 Q. B.

Allan v. *Fisher*, 13 C. P. 33, p. 257.

Pleading.]—An avowry by collector of taxes for distress in levying a municipal rate, must shew that a by-law was passed authorizing the levying and collecting of such rate. *McCarthy* v. *Shaw*, 8 L. J. 49.—C. C.—Mackenzie.

A justification for taking goods under a distress for taxes assessed under 22 Vict., c. 7:—Held, bad, for averring only a demand of part of the sum due, not saying what part. *Campbell* v. *Corporation of Elma*, 13 C. P. 296.

In avowing for a distress for taxes due upon land belonging to a railway company, it is unnecessary to allege that in the assessment the value of the land occupied by the railway was distinguished from that of their other real property, or that they had no other real property, or that the assessment was communicated to the company. Such objections should form the subject of a plea. *Great Western R. W. Co.* v. *Rogers*, 27 Q. B. 214. See, also, *Great Western R. W. Co.* v. *Rogers*, 29 Q. B. 245.

Other Matters.] A bailiff having a warrant from the collector to distrain for taxes due by A. on his lands went to the premises, where A. pointed out to him property of his own amply sufficient to cover the amount due. The bailiff, however, insisted on seizing a pair of horses then in the stable, and which A. was at the time putting to a waggon in order to use them, but A. refused to let him take these, saying that they belonged to his son-in-law, who lived in the house, but was then away from home. The bailiff declared that he seized them for the taxes, though he did not touch them, but A drove them away, and three days after the bailiff returned and took them from the stable, no one being present. The owner replevied, and it appeared on the trial that the horses belonged to the son-in-law, who kept them in a part of the stable reserved for his exclusive use. There was no evidence that the collector interfered in any way in the execution of the warrant. The jury having found for the plaintiff against both defendants:—Held, McLean, J., diss., that the horses were in the possession of A., and liable to seizure under 16 Vict. c. 182, s. 42; that the facts proved amounted to a distress; and that defendants therefore were entitled to succeed, though the bailiff might perhaps be liable in another form of action for his unreasonable conduct. Quære, per Robinson, C. J., whether the collector in this case could be held liable for the acts of his bailiff. Per McLean, J., he was liable. *Fraser* v. *Page*, 18 Q. B. 327.

Held, that a collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and that an action will lie against them jointly. *Corbett* v. *Johnston*, 11 C. P. 317.

When land is assessed against an occupant, the collector of taxes cannot collect the taxes as in the case of lands of non-residents, by distress and sale of goods, under sec. 97 of the C. S. U. C. c. 55, Assessment Act. *Mace* v. *Ruttan*, 7 L. J., 299.—C. C.—Mackenzie.

Held, that the "future owners and occupants," mentioned in the 24th sec. of the Assessment Act, C. S. U. C. c. 55, are persons who become owners or occupants by purchase or otherwise between the making of the assessment and the return of the collector's roll. *Smith* v. *Shaw*, 8 L. J. 297.—C. C.—Mackenzie.

Held, that "the persons who ought to pay the taxes," mentioned in C. S. U. C. c. 55, s. 96,

are persons whose names appear on the collector's roll as owners or occupants, or persons who have become owners and occupants by purchase or otherwise between the time of the making of the assessment and the return of the collector's roll. *Smith* v. *Shaw*, 8 L. J. 297.—C. C.—Mackenzie.

Held, that the neglect of the collector to enquire with sufficient care for the address of the party assessed on his roll, in order to transmit a statement by post under the 41st section of 16 Vict. c. 182, did not invalidate a sale of land made for non-payment of those taxes. *Allan* v. *Fisher*, 13 C. P. 63.

A collector of taxes or his bailiff distraining for arrears of taxes, is entitled only to two dollars for distress and sale. He is not entitled to collect from the debtor, poundage on the amount of taxes levied. *Murray* v. *McNair*, 2 L. C. G. 14.—C. C.—Logie.

The provision requiring certain rates to be kept separate on the collector's roll is directory only; and where it had not been observed, a sale was held valid. *Cook* v. *Jones* 17 Chy. 488.

A sheriff returned to a ven. ex. and fi. fa. residue against goods that he had made $50, out of which he had paid a collector of taxes $48.39 claimed by the collector as taxes due by the defendant at the time of the seizure under the writ on land upon which the goods were, and of which the sheriff had notice prior to the sale, and that he had retained the balance towards his fees, &c. No distress had been made by the collector:—Held, that the sheriff must account to the execution creditor for the $50, because a distress by the collector is a necessary antecedent to obtaining the benefit of the statute. *Adshead* v. *Grant*, 4 P. R. 121.—P. C.—A. Wilson.

Replevin for horses. Plea, justifying the taking under a warrant for school taxes, and alleging that they were delivered by the collector to defendant, an innkeeper, to take care of until the sale. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named, (not saying that it was the amount due by him,) payable to bearer, which was accepted in satisfaction of the taxes: that the collector released the property seized, and said note is still outstanding, and the plaintiff liable upon it, and that the seizure in the plea mentioned was made afterwards:—Held, on demurrer, replication bad, for, 1. The collector acting under a warrant legal on the face of it, would not be liable in trespass or trover, and therefore not in this action, nor the defendant for taking the horses from him to keep; and, 2. Even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 Q. B. 161. See the comments on this case in *Coleman* v. *Kerr*, 27 Q. B. 5, and in *Harling* v. *Mayville*, 21 C. P. 499.

Where lands, which had been assessed as non-resident, became occupied and assessed as such:—Held, not competent for the treasurer, under section 126 of 32 Vict. c. 36, O., to issue his warrant to levy arrears accrued when the lands were non-resident, the secs. 111 to 117 of the Act providing for that event. *Snyder* v. *Shibley*, 21 C. P. 518.

Defendant held two rolls, each headed "Collector's Roll for the Town of Belleville," one being also headed "Town Purposes," the other, "School Purposes." In the first, the column headed "Town or Village Rate" contained nothing, but in that headed "Total Taxes Amount," $40 was inserted. In the other the column had nothing, but $16 was in the column headed "General School Rate:"—Held, in replevin for goods seized, insufficient, for there was nothing to shew for what purpose the sum not specified to be for school rate was charged. *Spry* v. McKenzie, 18 Q. B. 165, distinguished. *Coleman* v. *Kerr*, 27 Q. B. 5.

The omission to set down the name in full of the person assessed was treated as immaterial. *Ib.*

Where a corporation leased property to a tenant, taking a covenant to pay taxes, VanKoughnet, C., and Spragge, V. C., held, in the Court of Appeal, dissenting from the judgment of the court, that though they might sue on the covenant to pay, they could not distrain. *Scragg* v. *Corporation of Toronto*, 28 Q. B. 457.

In case of a sale of chattels for taxes, it is not necessary for the purchaser, to maintain his title, to be able to shew a strict and literal compliance by the bailiff with the directions of the Assessment Act, 29-30 Vict. c. 53, s. 99. *Gibson* v. *Lovell*, 19 Chy. 197.

A sale for city taxes was objected to on the allegation that the public places where the advertisement of the sale was posted were not within the ward where the sale took place. It appeared, however, that the chattels were seized and sold on the premises of the owners with the knowledge of the parties in charge, and without fraud, and without objection by any one:—Held, that the sale was valid. *Ib.*

Chattels in the possession of a receiver were seized and sold by a bailiff for municipal taxes. Neither the bailiff nor the purchaser was aware until after the completion of the sale that the property was in the receiver's possession, or was intended to be affected by the order appointing the receiver; and both had been informed to the contrary in good faith by the party in charge. The court refused to hold the sale void. *Ib.*

The establishment in which these chattels were being afterwards sold by order of the court in one lot as a going concern, it was—Held, that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realized at the Chancery sale. *Ib.*

See *Sargant* v. *City of Toronto*, 12 C. P. 18[illegible] p. 218.

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2. *Other Cases.*

A township collector may sue for the amount of an assessment for common schools under 4 & 5 Vict. c. 18, in a Division Court. *McGregor* v. *Whit*, 1 Q. B. 15.

Held, on appeal, affirming the decision of C. P. that a non-resident owner of lands cannot sued for the recovery of rates imposed in respect

uch lands, unless it be averred and proved that the owner had personally or in writing informed the assessor that he owned the property, and desired to be assessed therefor; and the omission to aver such request is not cured by defendant suffering judgment to go by default. *Municipality of Berlin* v. *Grange*, 1 E. & A. 279; 5 C. P. 211.

The taxes due on lands of non-residents cannot be sued for as a debt until they have been five years in arrear, and until they cannot be realized by a sale of the lands in manner provided for by the act. Macaulay, J. diss. *The Municipality of Berlin* v. *Grange*, 5 C. P. 211.

The declaration stated that a tax amounting to £128 was duly assessed against defendants for the year 1856, of which they had due notice, yet defendants, although said sum had been duly demanded, refused to pay the same. Defendants, as to £6 15s. 5d., pleaded payment into court, and except as to that sum, that the assessors for the year did not deliver or transmit by post to any station or office of defendants a notice of the total amount at which they had assessed defendants' real property in the municipality, distinguishing the value of the land occupied by the road, and the value of all defendants' other real property:—Held, a good defence. *Municipality of London* v. *Great Western R. W. Co.*, 16 Q. B. 267.

It is no defence to an action for taxes that defendant's property was rated higher than the average value of land in the locality as assessed for the same year; the only remedy in such a case, is by appeal to the Court of Revision. *The Municipality of London* v. *The Great Western R. W. Co.*, 17 Q. B. 267.

Held, that no action on the case will lie against a collector of taxes for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made. *McElheron* v. *Mackenzie*, 7 L. J. 244.—C. C.—Robinson.

After the return of the collector's roll municipalities must sue under the 102nd sec. of C. S. U. C. c. 55, or proceed against the land. *Smith* v. *Fraser*, 8 L. J. 297.—C. C.—Macdonald.

II. Responsibility of Collectors and their Sureties.

Bond by collector of township rates after 6 Wm. IV., c. 2, and before the repeal of 5 Will. IV. c. 8.—Right of action on. *McLean* v. *Shaver*, 2 U. C. R. 189.

In debt on bond against the collector of a township and his sureties for not paying over moneys collected in 1846, on or before the first day of December in that year, defendant pleaded a by-law of the council passed in May, 1846, that the collector should pay his moneys thereby, which he did:—Held, bad, as no answer to the condition. *Baby* v. *Drew*, 5 Q. B. 536.

Sec. 60 of 13 & 14 Vict., c. 67, requiring the collector to give a bond, as required by by-law, is directory, and not so imperative as to make the collection of the taxes illegal where a bond to the collector's surety had been given to the treasurer instead of the town by its corporate name, and no by-law had been passed by the corporation under that section. *Judd* v. *Read*, 6 C. P. 362.

Held, that the roll not being "certified under the hand of the clerk," the collector was not liable to the corporation for negligence in not distraining on the goods of a party assessed. *Corporation of Vienna* v. *Marr*, 9 L. J. 301.—C. C.—Hughes.

To an action against a surety for a collector of taxes for moneys received and not paid over, defendant pleaded that no roll properly certified was received by the collector, but that he collected the moneys wrongfully and without authority. It appeared that a roll was delivered to him signed by the clerk, but not otherwise certified:—Held, sufficient authority. Defendant also pleaded that the collector had not taken the oath of office:—Held, that the proof of such issue lay upon him. *The Corporation of the Township of Whitby* v. *Harrison*, 18 Q. B. 603. See, also, *Municipality of Whitby* v. *Flint*, 9 C. P. 449.

The bond was taken to "The municipality of the township of Whitby," and afterwards the township was divided by 20 Vict. c. 113, into Whitby and East Whitby:—Held, that the bond was properly sued upon in the name of the corporation of Whitby. *The Corporation of the Township of Whitby* v. *Harrison*, 18 Q. B. 603.

The fact that a collector of taxes received the money without any roll having been delivered to him, and without having taken the oath of office, forms no defence for his surety to an action for not paying over such money. *S. C. Ib.* 606.

An extension of time for making the collection without the surety's consent does not discharge him, that being expressly allowed, and his liability retained, by 18 Vict. c. 21. *Ib.*

The treasurer of a town by authority of the corporation applied for a mandamus to the collector, commanding him to give an account in writing for each of the seven years during which he had held office of the taxes remaining due on his rolls, and the reason why he could not collect the same, by inserting in each case the words "non-resident," or "no property to distrain," and to make oath that the sums were unpaid. The court refused the writ, holding that as there were other remedies provided, under ss. 167, 170, 173, and 177 of the Assessment Act, C. S. U. C. c. 55, it must at least be shewn that they could not be used or would be of no avail. *In re Quin*, 23 Q. B. 308.

One M. was a collector of a township for 1864 and 1865. In January, 1865, he was authorized to continue the collection of the taxes for 1864, until the 1st of May then next; and in January, 1866, to continue the collection of taxes for the township "so long as he should be recognized by the municipality of said township." He did not return the rolls until April, 1867, when a large sum of the taxes for each year appeared not to be accounted for. On the 2nd of that month the treasurer, under sec. 182 of the Assessment Act of 1866, under a resolution of the council, demanded payment, and on the 6th he issued his warrant to levy of the goods and lands of the collector, under which the sheriff in May sold the land in question:—Held, under C. S. U. C. c. 55, as amended by 27 Vict. c. 19, s. 12, and under the Assessment Act of 1866, that the

sale was unauthorized, and that the sheriff's deed conveyed no title. Per Richards, C. J.—The extraordinary remedy given by the issue of a warrant applies only when the collector neglects to pay over by some time fixed within the period allowed by law; but if the municipality authorize him to continue the collection beyond that period, his liability, and that of his sureties, must be enforced by the ordinary means. Per Wilson, J.—The demand on the 2nd of April made that the day on which the payment ought to have been made, but under the statute the warrant could not be issued until the expiration of twenty days from that time, and was therefore premature. *Charlesworth* v. *Ward*, 31 Q. B. 94.

On the 1st January, 1867, the Acts above mentioned were repealed. "saving any rights, proceedings, or things legally had, acquired, or done under them." Quære, whether the right to issue the warrant still existed. *Ib.*

IX. Sale of Land for Taxes.

1. *Proof of Taxes in Arrear.*

In ejectment by the purchaser of land sold for taxes, under 6 Geo. IV. c. 7, he must prove that the writ to sell was gr[illegible] the treasurer's return shewing arrears [illegible] eight years on the particular tract of land, and that there was no sufficient distress on the land, and Semble, also, that the land had "been described or granted." *Doe* d. *Bell* v. *Beaumore et al.*, 3 O. S. 243; *Doe* d. *Bell* v. *Orr*, 5 O. S. 433; *Errington Dumble*, 8 C. P. 65.

But not that the writ was in the sheriff's hands for the period required by law. *Doe* d. *McGillis* v. *McDonald*, 1 Q. B. 432.

The surveyor general made a return to the treasurer of the London District, headed thus: "Township of Dorchester, southern division, broken front concessions A and B, south part to John Reilly, Jr., 100 acres, north part to Dudley McPhee, 200." The treasurer did not open his account in accordance with this return, but opened a separate account against "N. ½ of lot 22 in broken front B. 100 acres," and returned it as in arrear, upon which return it was sold. It was proved that the parties who had paid taxes on the lot, having title to the whole 200 acres, had paid taxes on the whole, and not separately on any part of it:—Held, that the sale of the north half of lot 22, made in 1830, was void, because, notwithstanding the return by the treasurer, there was no arrear in fact subjecting the land to sale. *Doe* d. *Upper* v. *Edwards*, 5 Q. B. 594.

When the surveyor-general returns a lot of land as described for grant, proof that the land was not in fact so described must be of a very positive and affirmative kind; the mere evidence of a clerk in the surveyor-general's office that he finds no trace of it, will not do. *Perry* v. *Powell*, 8 Q. B. 251.

Quære, the effect of a lot having been erroneously returned as described for grant, and in consequence of this error having been assessed and sold. *Ib.*

Under 59 Geo. III., c. 7, lands returned in the surveyor general's schedule in June, 1820, were liable to have taxes charged against them on the 1st of July following, which taxes for the first year were to be then assessed for 1820, so that, if not paid, there would be eight years' taxes in arrear on the 1st of January, 1828. Such lands having been sold under a warrant which described the taxes on them as being in arrear from the 1st of July, 1820, to the 1st of July, 1828, the sale was upheld; for eight years' taxes being really due, the mistake in the time of commencement was unimportant, and could not vitiate the warrant. *Doe* d. *Stata* v. *Smith*. 9 Q. B. 658.

Defendant claimed under a sale for taxes made in 1839, but the only proof that any taxes were imposed or in arrear was an extract from the treasurer's book, shewing that the taxes on the lot had been paid up to 1828:—Held, insufficient. *Munro* v. *Grey*, 12 Q. B. 647.

Held, that the jury, on the evidence set out in this case, were warranted in finding that there were no taxes in arrear for five years. *Harbourn* v. *Boushey*, 7 C. P. 464.

Ejectment for village lot 4, south side of Catharine street, village of Ingersoll, part of No. 10 in broken front concession of N. Oxford. Defendant claimed through a sheriff's sale for taxes. It appeared that the village comprised parts of two townships, called N. and W. Oxford: in W. Oxford it contained a park lot 4, which was sub-divided into village lots after the year 1853. The treasurer's warrant dated in June, 1860, contained two village lots 4 south of Catharine street, one being stated as in arrear for 1858 only, the other for 1854-5 and 1858. The sheriff sold both to different purchasers, and conveyed the one in dispute to the purchaser as being the one charged with three years' taxes. Under the facts set out in the case, it was held that the warrant and evidence did not sufficiently describe this lot as the one on which the three years' taxes were in arrear, or prove such arrears, and that the sale was bad. *Townsend* v. *Elliott et al.*, 12 C. P. 217.

In ejectment upon a sale for taxes, made under 16 Vict. c. 182:—Held, That the treasurer producing his official books, and shewing that the lands were charged with the taxes when the warrant issued, was sufficient proof of their being in arrear. Quære, whether the warrant also would not suffice. *Hall* v. *Hill*, 22 Q. B. 57[illegible]

The collector's roll was delivered to him on 26th August, 1852, and the treasurer's warrant to sell was issued on 11th August, 1857:—Held, that, under sec. 42 of the Assessment Act of 1853, no portion of the tax being due for five years on 11th August, 1857, the sale was void. Semble, per A. Wilson, J., that the tax of the preceding year, for the purposes of sale for arrears, are not in arrear till after the year in which they are imposed. *Bell* v. *Mclean*, 9 C. P. 416.

The taxes were unpaid for 1853, 4, 5, 6, and On the 25th February, 1858, the treasurer issued his warrant to sell:—Held, that no portion of the taxes was due for five years, within the S. U. C. c. 55. *Ford* v. *Proudfoot*, 9 Chy.

Where land was sold for taxes including a year's assessment which had been paid, the sale was set aside, though the number of years in arrear was greater than was required to warrant a sale. *Irwin* v. *Harrington*, 12 Chy. 179.

The five years for which lands are to be in arrear for taxes, before they are liable to be

nder 16 Vict. c. 182, must be before the delivery f the treasurer's warrant to the sheriff. *Kelly* , *Macklem*, 14 Chy. 29.

When the first year's taxes had been imposed y a by-law passed in July, 1852, and the collector's roll was not delivered until after August, 852; and the treasurer's warrant was dated 0th July, 1857:—Held, that the sale was invalid, r no taxes had been in arrear for five years. *onnor* v. *McPherson*, 18 Chy. 607.

On the evidence set out in this case, to sustain title under a tax sale made in 1839, it was eld sufficiently shewn that the land had been urned by the surveyor-general as described e patent. *Jones* v. *Cowden*, Q. B., H. T. 1874, t yet reported.

See *Hamilton* v. *McDonald*, 22 Q. B. 136, p. 2; *Jones* v. *Bank of Upper Canada*, 13 Chy. 256.

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2. *Sale after Taxes Paid.*

If a writ has been issued for the sale of land taxes, but before sale under it, the taxes are id, the sale is illegal and void. *Howe et ux.* v. *ompson*, M. T. 6 Vict.

Where the taxes had been paid to the treasurer the district, and a receipt obtained, a subsent sale by the sheriff, as for taxes, in consence of the treasurer having omitted to credit payment on the lot, was held void, although treasurer had returned the lands as in ar- *Myers* v. *Brown*, 17 C. P. 307.

eld, also, that such sale was equally void, re the taxes had, in accordance with 9 Geo. c. 3, been paid to the treasurer of the district hich the owner resided. *Ib.*

o prove payment of taxes it is not necessary ew that the collector was duly appointed; sufficient to shew that he acted and was nowledged as such. *Smith* v. *Redford*, 12 . 316.

Hamilton v. *Eggleton*, 22 C. P. 536, p. 255.

See next sub-head, 3.

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3. *Sales under 3 Vict. c. 46.*

e lot was duly advertised by the sheriff on th June, 1840, pursuant to 3 Vict. c. 46, he taxes had been paid to him before sale: that, as the payment was made to the f and not to the treasurer, the 3 Vict. c. as not applicable, and the sale was void *Sherwood* v. *Mattheson*, 9 Q. B. 321.

e land having been duly advertised in acnce with the 3 Vict. c. 46, the sale was valid notwithstanding a receipt produced xes for a portion of the time, the owner g failed to comply with the provisions of *Macdonald* v. *Rowe*, 9 C. P. 76.

3 Vict. c. 46, certain sales for taxes made he, 1839, were confirmed, and under the ions of that act the sheriff in 1842 con- to the plaintiff:—Held, that under the nstances set out in the case there were eight years taxes in arrear at the time of June, 1839, for the warrant issued in r a previous sale was for taxes only up to t of July, 1828, though it might properly have been for another year in addition. *Hamilton* v. *McDonald*, 22 Q. B. 136.

Held, that the 3 Vict. c. 46, does not limit the period within which a sheriff's deed for a sale for taxes may be given to two years from the date of sale. Hamilton *v.* McDonald, 22 Q. B. 136, followed on other points. *Weegan* v. *McDiarmid*, 12 C. P. 499.

Quære as to the effect of 3 Vict. c. 46, relating to tax sales in the Ottawa District, and of the payment of taxes made by defendant to the wrong officer, as stated in this case. *Cushing* v. *McDonald*, 26 Q. B. 605.

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4. *Apportionment of Payment.*

A patent having issued for lot 8 and three-quarters of lot 7, including the east quarter, although the east quarter was not returned by the surveyor-general as described for grant, and the taxes on the whole of the grant having been paid, the treasurer credited such payment to the west three-quarters, and returned the east quarter as in arrear for taxes:—Held, that the east quarter could not be sold, the payments having been made on the part which included it. *Peck* v. *Munro*, 4 C. P. 363.

Defendant G. was collector of rates in the town of B. for 1856–1858. One M. was charged on the collector's roll for 1857 with £27 taxes for 1855 remaining unpaid, together with £24 15s. taxes for 1857. The roll for 1855 was not shewn to have been returned. On the 7th December, 1857, the council, by resolution, authorized G. to continue the collection of taxes on the roll for 1857, after the usual time:—Held, that G. had the right to appropriate the moneys collected by the sale of M.'s goods in January, 1858, to the taxes charged against him for 1855. *McBride* v. *Gardham*, 8 C. P. 296.

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5. *Distress on Premises.*

[*By 6 Geo. IV. c. 7, the warrant directed the sheriff to sell the lands, provided there was no distress thereon from which the taxes might be made. This act was repealed by the 13 & 14 Vict. c. 67, sec. 48, which directs the treasurer to issue a warrant to sell, saying nothing as to distress; and since that act the fact of their having been distress upon the land can make no difference. See McDonell v. McDonald, 24 Q. B. 77; 29 & 30 Vict. c. 53, s. 131, and the present Assessment Act, 32 Vict. c. 36, s. 130, O.*]

A sheriff's vendee bringing ejectment for land sold under 6 Geo. IV. c. 7 must prove that there was no sufficient distress on the premises to satisfy the arrears. *Doe Bell* v. *Reaumore*, 3 O. S. 243; *Doe* d. *McGillis* v. *McDonald*, 1 Q. B. 432.

Proof that there were some few pieces of wood and timber that had been cut down by trespassers and left by them on the lot to be prepared for the market:—Held, not sufficient evidence of distress. *Doe* d. *Powell* v. *Rorison*, 2 Q. B. 201.

Where the jury found that there was a sufficient distress to satisfy the taxes, the court refused a new trial, although it might be doubtful whether much too high a value had not been

put upon the distress. *Doe* d. *Powell* v. *Craig*, 2 Q. B. 208.

Where taxes have accrued upon the whole of a lot while it is undivided, and a distress could be made upon part, no portion could be sold for such taxes. *Stafford* v. *Williams*, 4 Q. B. 488.

Under 16 Vict. c. 182, the sheriff might sell, unless he had good reason to believe that there was sufficient distress. A declaration, therefore, which charged him with neglect of duty in selling when there were goods on the land to distrain, but did not aver that he had notice of the goods being there, was held insufficient. *Foley* v. *Moodie*, 16 Q. B. 254.

In ejectment upon a sheriff's deed for taxes, the plaintiff showed that the lot was all wild, with no one living on it, and that an inspection had been made but no distress found. Defendant proved that certain persons were then in the habit of making sugar upon the rear of the lot, and used to leave there two kettles and their sap-troughs, which might have been worth the sum due :—Held, that such evidence could not be allowed to invalidate the sale. *Fraser* v. *Mattice*, 19 Q. B. 150.

Where there was proved to have been ample distress on the premises between the receipt of the warrant and the day of sale :—Held, under 6 Geo. IV. c. 7, that the sale was invalid. *Dobbie* v. *Tully*, 10 C. P. 192.

Per McLean, C. J., the evidence of distress (set out in the case) having been left to the jury, their verdict for the plaintiffs must be taken as shewing that there was none at any time before the sale. Per Burns and Hagarty, JJ., the existence of distress between the 17th of April, 1839, when the land was first offered, and the sale on the 19th of June, would form no objection, as the sheriff was not bound to search then. Quære, whether in any case a search could be required between the inception and completion of the sale. *Hamilton et al.* v. *McDonald*, 22 Q. B. 136.

The defendant in ejectment claimed under a sale for taxes made on the 4th November, 1859 :—Held, under C. S. U. C. c. 55, and 16 Vict. c. 182, that it was not the duty of any officer, after the return by the collector to the township treasurer, to search for distress upon the premises. *Allan* v. *Fisher*, 13 C. P. 63.

Held, also, that the neglect of the collector to search for goods which with diligence he might have found, and which would have satisfied the taxes, did not invalidate the sale. *Ib.*

Where land is assessed and taxes imposed, an omission by the collector to demand and levy the amount from property on the premises, cannot, since 32 Vict. c. 36, O., avoid the sale. *Stewart* v. *Taggart*, 22 C. P. 284.

See *Street* v. *Fogal*, 32 Q. B. 119, p. 259 ; *Doe* d. *Upper* v. *Edwards*, 5 Q. B. 594.

6. *Non-Resident Lands.*

Held, that under 13 & 14 Vict. c. 67, non-resident lands could be sold for taxes due prior to 1st January, 1853. *Jarvis* v. *Brooke*, 11 Q. B. 299.

Under C. S. U. C. c. 55, the chamberlain and high bailiff in cities had power only to sell the lands of non-residents for arrears of taxes. A sale in 1865 of land belonging and assessed to a resident, was therefore held invalid. *McKay* v. *Bamberger*, 30 Q. B. 95.

See I, 4 (b), p. 221.

7. *Several Lots.*

Semble, that where several lots are included in one grant, but described by separate numbers, a portion of each lot must be sold for the taxes due on it, and not a portion of the whole block beginning at the boundary from which the lots are numbered, for the taxes due on the whole. *Monro et al.* v. *Grey*, 12 Q. B. 647.

Held, that, under the facts set out in this case, the sale was void, for that as a portion of the east half of the lot had been sold for taxes, part whereof had accrued upon the west half, and was not chargeable on the east half, and as there were no means of apportionment, it was void as to all. *Ridout* v. *Ketchum*, 5 C. P. 50.

Lot 18 and the west part of 19, containing together 200 acres, were granted to B. in one patent, and in the same year the east part of 19, 156 acres, was granted to one S. B.'s land being in arrear for eight years, was returned by the treasurer as 18 and the west part of 19, 200 acres, and the sheriff in 1848 sold and conveyed to the plaintiff 135 acres of lot 19, which would include part of the land granted to S.:—Held, that the sale could not be upheld even as to that portion of 19 granted to B., for lot 18 and the west part of 19 should each have been separately charged, and sold for its own arrears. *McDonald* v. *Robillard*, 23 Q. B. 105.

The north and south half of a lot having been assessed separately, and different amounts charged against each half, which were afterwards added together and charged against the whole lot, and a portion of the whole lot having been sold for the combined amounts :—Held, that such sale was illegal. *Laughtenborough* v. *McLean*, 14 C. P. 175.

The patent granted the lot by north and south halves. The patentee in 1853, conveyed the lot as a whole, and it continued in one owner until the sale of 35 acres in 1858. In 1858 and 1859 each half was assessed separately :—Held, not objectionable. For the next three years it was assessed in two parcels of 165 acres and 35 acres, and for the succeeding two years, the north half 100 acres, and the west part south half, 65 acres, were assessed, with a valuation of $330 on the whole :—Held, right. *The Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

In 1865 the 165 acres was sold for the taxes due for six years, including 1858, which was not covered by the warrant under which the 35 acres were sold in that year :—Held, that the sale as to 1858, could not be supported, for all or any of each half should have been sold for the taxes due on it for that year, notwithstanding the sale of the 35 acres ; and that as there were not five years due of any portion of the residue on which the warrant issued, the whole sale must fail. *Ib.*

The land in question in this case was not sold for its own arrears only, but was assessed with another lot, and the arrears charged against the

—Semble, that this would be fatal. *Thompson v. Colcock*, 23 C. P. 505.

The assessor should assess village lots the property of non-residents separately, placing opposite to each the value and amount of assessment. Where, therefore, the assessor had included three village lots in one assessment, two of which only belonged to one person, the sale was set aside; but without costs, as the purchasers—defendants in the suit—had nothing to do with the irregular proceedings for which the sale was set aside. *Black* v. *Harrington*, 12 Chy. 175.

Where three distinct lots were assessed in bulk, and sold for taxes, the sale was set aside, and the purchaser having stated at the sale that his object in buying was to secure the property for the person entitled, and afterwards claimed to hold the land for his own benefit, he was ordered to pay the costs of the suit. *Christie* v. *Johnston*, 12 Chy. 534.

Where two half lots were assessed separately, sale of the whole lot for the total amount was held invalid, notwithstanding 27 Vict. c. 19 s. 4. *Oldham* v. *Hall*, 15 Chy. 335.

See I, 4 (a), p. 218.

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8. *Treasurer's Warrant.*

Lands having been sold under a warrant which described the taxes on them as in arrear from the 1st of July, 1820, to the 1st of July, instead of the 1st January, 1828, the sale was held; for eight years' taxes being really due, the mistake in the time was unimportant. *Doe Gata* v. *Smith et al.*, 9 Q. B. 658.

A sale in 1839, under a warrant issued in 1837:—Held valid, the sale having been delayed by the 1 Vict. c. 20, passed in consequence of the rebellion. *Todd* v. *Werry*, 15 Q. B. 614.

By the treasurer's warrant, dated in June, 1855, there appeared to be two village lots 4, south of Catharine street, in arrear for taxes, lot being in arrear for the year 1854 only, the taxes for 1854, 5, and 8. The sheriff sold both, and only conveyed the one in dispute in this action to the purchaser:—Held, that the warrant did not sufficiently define the lot to be sold (though the sheriff had assumed it to be the lot in question in this action), and that the sale was invalid. *Townsend* v. *Elliot*, 12 C. P. 217.

By 3 Vict. c. 46, certain sales for taxes made in 1839, were confirmed, and under the provisions of that act the sheriff in 1842 conveyed to the plaintiff;—Held, that, under the circumstances set out in the case, the warrant issued in 1839 had clearly not lapsed or become void before the sale. *Hamilton* v. *McDonald*, 22 Q. B. 568.

Semble, that it is sufficient to state the lands sold in a schedule annexed to the warrant, which schedule is expressly incorporated with it, Quære, if the warrant mention no lands the schedule is not so incorporated. *Hall* v. *Hill*, 22 Q. B. 578.

Held, affirming the judgment of the court below, that the 16 Vict. c. 182, ss. 55 and 56, C. S. U. C. c. 55, requiring the county treasurer to warrant for the sale of lands in arrear to distinguish those that have been patented, from those under lease or license of occupation, is compulsory; and that sales effected under a warrant omitting such particulars are void. *Hall* v. *Hill*, 2 E. & A. 569; 22 Q. B. 578.

The land was called in the collector's return the east half 25, 2nd concession Charlottenburg, the word "front" before "2nd," being struck through with a pen, while in the warrant that word was written, and in the sheriff's deed it was omitted:—Held, immaterial, for that the identity of the land sold with that on which the tax was to be collected was sufficiently proved. *McDonell et al.* v. *McDonald*, 24 Q. B. 74.

A sale for taxes under a warrant issued without a seal:—Held, invalid. *Morgan* v. *Quesnel*, 26 Q. B. 539.

The warrant contained two different entries of the same lot for taxes due for two successive years. The sheriff sold the lot for the first year's taxes, then adjourned the sale in consequence of other lots remaining unsold, and at a subsequent date sold the same lot for the second year's taxes, to another party:—Held, that the warrant was wrong in entering the same lot twice, as if two separate properties, and that the sale was void; the first, because the sheriff did not sell for all the taxes appearing to be due; the second, because, having previously, at the same sale and under the same warrant, sold the land to one, he could not sell it again to another. *Schaefer et ux.* v. *Lundy*, 20 C. P. 487.

Held, that the 13 & 14 Vict. c. 67, ss. 46 and 47, did not make the list of taxes directed to be prepared by the treasurer binding; and that if the tax was not legally imposed, but merely debited against the lot by the treasurer, it was not made valid by being entered in such list. *McAdie et al.* v. *Corby*, 30 Q. B. 349.

Held, that a sale of land in 1865, the only description of which in the Canada Gazette and in the treasurer's warrant was, "part of south part 111, 1st concession Tay, 40 acres, $12.95," could not be supported. *Grant* v. *Gilmour*, 21 C. P. 18.

A warrant describing the lands as "all patented":—Held, sufficient. *Brooke* v. *Campbell*, 12 Chy. 526.

So also "all deeded." *Cook* v. *Jones*, 17 Chy. 488.

See *Thompson* v. *Colcock*, 23 C. P. 505, p. 259.

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9. *Advertisement.*

A defendant claiming under a sale for taxes under 6 Geo. IV. c. 7, need not shew that all the necessary formalities were attended to, such as advertising, &c. *Doe* d. *Bell* v. *Orr*, 5 O. S. 433.

Held, under 13 and 14 Vict. c. 67, that a sale would not be invalid for want of due advertisement thereof in a newspaper published in the county where the lands are situated, as required by sec. 50. *Jarvis* v. *Brooke*, 11 Q. B. 299. But see *Hall* v. *Hill*, 22 Q. B. 578; 2 E. & A. 569.

The advertisement of sale not having been inserted in a local newspaper in accordance with 16 Vict. c. 183:—Held, that the sale was not confirmed by said statute. Semble, that the statute being passed to give effect to a forfeiture,

a strict compliance with its terms was necessary to bar the rights of owners of land sold. *Williams* v. *Taylor*, 13 C. P. 219.

The omission of the treasurer to advertise the list returned by him to the Court of Q. S., within one month thereafter, and to advertise such lot in the Official Gazette, and imperfections in the advertising :—Held, to be irregularities cured by 6 Geo. IV. c. 7, s. 22, and by analogy to the holding of the Courts in the cases of sales under execution. *Cotter* v. *Sutherland*, *Stevens et al.* v. *Jacques et al.*, 18 C. P. 357.

The sheriff's advertisements of the sale and its postponement in the Gazette in these cases were held sufficient. *Ib.*

Semble, that the advertisement of a sale made in 1855 was bad, for not specifying whether the lands were patented or held under a lease or license of occupation. *McAdie* v. *Corby*, 30 Q. B. 349.

Held, in ejectment, that a sale of land for taxes to defendant in 1865, the only description of which, in the Canada Gazette and in the treasurer's warrant, was "Pt. of S. pt. 111, 1st con. Tay, 40 acres, $12.95," could not be supported. *Grant* v. *Gilmour*, 21 C. P. 18.

Where a tax sale was advertised in the Canada Gazette for thirteen successive weeks before sale, but such thirteen weeks did not amount to three calendar months from the date of the first publication, it was held that the irregularity did not invalidate the sale. *Connor* v. *Douglas*, 15 Chy. 456, in appeal. Followed in *McLauchlin* v. *Pyper*, 29 Q. B. 526.

See *Street* v. *Fogal*, 32 Q. B. 119, p. 259.

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10. *Improper conduct at sale.*

Defendants claimed title through one W. McC. who claimed under a sale for taxes. On the trial it was proved that W. McC. claimed the lot in question at the sale for taxes ; and alleging that his title was imperfect, he asked the audience not to bid against him, which request they complied with, and he became the purchaser thereof for £4 or £5. The jury found that McC.'s statement was false, and in consequence he purchased without competition :—Held, that the sheriff having duly conveyed the land to McC., the legal estate thereby passed, and if it was sought to impeach the sheriff's deed for fraud, the case must be taken into equity, where complete justice could be done to all parties concerned. *Raynes et ux.* v. *Crowder et al.* 14 C. P. 111.

The lot was first put up on the 10th of April, 1839, when one M. offered to take 29 acres for the sum to be levied, but afterwards he refused to carry out the purchase ; and the sheriff in July following put up the whole lot, 200 acres, which M. then purchased for the same sum, stating at the sale that he had already acquired a title to the land, which he wished to have confirmed, and requesting the bystanders not to bid against him. This title came by deed from the treasurer, who had purchased from a person assuming to be heir of the patentee, but who was not in fact his heir ; and M. had given back a mortgage to the treasurer to secure part of the purchase money :—Held, that the second sale of the whole lot was illegal, being unauthorised by the statutes, and improperly conducted. Semble, that the treasurer's connexion with the land could not avoid the sale, he not having been in fact the purchaser. *Todd* v. *Werry et al.*, 15 Q. B. 614. See also *In re Cameron*, 14 Chy. 612.

The sheriff at a tax sale, on the 26th of December, 1855, notified the purchasers that if they did not pay in two or three weeks he would sell the land again. Defendant having purchased portions of certain lots did not pay, and the lots were put up again as whole lots, not by the acre. Defendant then asked those present not to bid as he had a title to the lots bid off by him at the first sale, which he wished to perfect. Accordingly no one bid against him, and he obtained the lots. What his title was did not appear. Semble, that the sale under such circumstances could not be supported ; but no opinion was given on this point, as the plaintiff might, under *Raynes v. Crowder*, 14 C. P. 111, be compelled to go into chancery for relief on such a ground. *McAdie* v. *Corby*, 30 Q. B. 349.

It was objected also that the land was sold for taxes which had accrued for more than twenty years, and that the sale was adjourned illegally though a large number of bidders were present. Semble, that these objections could not be supported. *Ib.*

Where a person, in order to purchase land at the sheriff's sale, consented to representations which he knew to be untrue, and which prevented competition, and so was enabled to purchase at less than the value, the sale was declared void. *Foy* v. *Merrick*, 8 Chy. 323.

By an arrangement between several of the parties bidding at the sale, it was agreed that each should be allowed to bid off a whole lot for the taxes due upon it ; and others, not parties to this agreement, were prevented from bidding by reducing the quantity to such a trifle as to be quite useless to the purchaser. The land in question, said to be worth £500, was thus bid off for £2 12s. The court set aside the sale, but without costs, it being shewn that the purchaser was not a party to the combination complained of. *Henry* v. *Burness*, 8 Chy. 345.

Where at the sale a lot of land was sold at a trifling amount, as compared with its value, by reason of a combination among some of the persons attending the sale to prevent competition, and although it was not shewn that the purchaser was any party to such combination, still he so acted as to prevent competition, the court in setting aside such sale ordered the purchaser to pay the costs of the suit ; and the sheriff having been joined as a defendant, was, under the circumstances, refused his costs. *Davis* v. *Clark*, 8 Chy. 358.

A., one of the sheriff's officers, conducted a sale, at which he knocked down without competition to another officer of the sheriff a lot worth about £350, for less than £7 10s., which lot was subsequently, with the assent of the sheriff, entered in the sales book in the name of A. to enable the person to whom it had been knocked down to cheat his creditors. Upon a bill filed to set aside the sheriff's deed, it was shewn that by arrangement amongst the persons attending the sale it was understood a lot should be knocked down to each in turn, in pursuance of which the sale in question was effected.

...rt set aside the sale with costs as against the ...rson to whom the conveyance was made. ...assingberd v. Montague, 9 Chy. 92.

The sheriff's duty is to sell such portions of ... lands offered as he may consider most for ... advantage of the owners. Where, therefore, ...heriff so neglected his duty that very valuable ... of land were knocked down for trifling ...ounts of taxes, in pursuance of an agreement ...that effect amongst the bidders, some of which ...ds were purchased by bailiffs in his employ, ...with his knowledge, the court in dismissing ... bill filed to set aside one of the sales to the ...liff, as against the sheriff, refused him his ...ts. It is not sufficient that the sheriff does ... participate in such arrangements for his own ...efit. *Ib.*

Twenty-four acres, worth £7 10s. an acre, were ...d in 1859 for £2 1s. 9d., and purchased by ... of the bailiffs in the employ of a former ...eriff. Although there was no direct evidence ... combination amongst the audience to prevent ...petition, still their conduct was such as to ... to that opinion. The court, following Mas-...gberd *v.* Montague, 9 Chy. 92, and Henry *v.* ...rnes, 8 Chy. 345, set the sale aside upon ...yment of the amount which would have been ...uired to redeem the land within the year, ... interest since that time; or the amount ...ght be applied in part payment of the amount ... upon a mortgage created on the land by the ...rchaser at the sale for taxes. *Templeton* v. ...ell, 10 Chy. 214.

Where at the sale practices were indulged in ... the audience which checked fair and free ...petition, and the lands were sacrificed, the ..., in the absence of any direct proof of com-...tion, granted relief to the owner by setting ...e the sale. *Logie* v. *Young*, 10 Chy. 217.

...e several cases where sales have been set aside ... intimidation, or other undue practices pre-...ting fair competition, approved of and con-...ed in. *Scholfield* v. *Dickinson*, 10 Chy. 226.

Where the owner of land sold had paid no ... thereon for ten years, and did not redeem ... in the year, and suffered four years after the ... to elapse before taking any steps to impeach ...ale:—Held, that he was precluded by his ... from obtaining relief, supposing him to ... been otherwise entitled to it. *Ib.*

... appearing on the evidence, though not ...ioned in the pleadings, that the purchaser ...axes was a mortgagee of the property:— ..., in dismissing a bill to set aside the pur- ... for undue practices at the sale, that it ... unnecessary to reserve liberty to file a bill ...aching the sale on the ground that he was ...alified as mortgagee to purchase for his own ...it. *Ib.*

See the next sub-head, 11.

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11. *Duty of Sheriff.*

...heriff can and should ascertain, to a cer- ...xtent, the value of land sold for taxes. He ... be heard to say that he cannot tell whe- ... it is worth £2 12s., or £500. *Henry* v. ..., 8 Chy. 345.

... sheriff not having made himself acquainted ... the land, was unable to correct an erroneous impression among the audience as to the value of a lot, in consequence of which property worth £400 was sold as if doubtfully worth £20; Held, that such omission of duty by the sheriff was not a sufficient ground to disturb the sale to an innocent purchaser. *Logie* v. *Stayner*, 10 Chy. 222.

Semble, it is the duty of the sheriff, when he sees the intention of the legislature thwarted by improper practices indulged in by the audience, to declare to those guilty of them that he will not continue the sale, but will postpone it until a fair sale can be effected. *Henry* v. *Burnees*, 8 Chy. 345; *Logie* v. *Young*, 10 Chy. 217.

Held, that it would not be inferred that a sale which took place in November, was necessarily affected by practices of the audience to prevent competition, which had been carried on at the sale in October preceding, and from which this sale in November was adjourned. *Logie* v. *Stayner*, 10 Chy. 222.

Quære, whether a sheriff ought to permit a whole lot or piece of land to be sold in the first instance, where the value is greatly disproportioned to the taxes due, without adjourning the sale, or taking some steps to protect the interests of the owner. *Scholfield* v. *Dickenson*, 10 Chy. 226.

Quære, also, whether a sheriff is justified in proceeding with a sale, when the audience evinces a determination to purchase nothing but entire lots, or act in any other way inconsistent with a proper sale. *Ib.*

Where less than the whole lot is sold, the sheriff should designate in some way the portion sold or offered for sale, so that bidders may know what portion they are bidding for. *Knaggs* v. *Ledyard*, 12 Chy. 320; affirmed in appeal, see 32 Q. B. 30, note.

See *Street* v. *Fogul*, 32 Q. B. 119, p. 259; *Massingberd* v. *Montague*, 9 Chy. 92, p. 249.

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12. *Sheriff's Certificate.*

Under the sheriff's certificate the purchaser is entitled to possession of the land sold for taxes; and being in part possession he can avail himself of such certificate as a defence to ejectment by the owner, even though he has not received a deed, or a valid deed, from the sheriff; and, Semble, he could maintain ejectment on such certificate against any one in possession under the former owner. *Cotter* v. *Sutherland, Stevens et al.* v. *Jacques et al.*, 18 C. P. 357.

It is competent for the purchaser to set up a defence under the sheriff's certificate given at the time of sale, notwithstanding he has given it up on receiving the invalid conveyance. *Ib.*

See *Williams* v. *McColl*, 23 C. P. 189, p. 251, *Knaggs* v. *Ledyard*, 12 Chy. 320, p. 251.

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13. *Sheriff's Deed.*

(a) *Description of Land.*

The lot in question, fronting to the north, was bounded on the south by the river Thames. The sheriff, while the 6 Geo. IV. c. 7 was in force, sold 120 acres of the lot for taxes, and in his deed first gave a description by metes and

bounds, which was not in accordance with the statute, and then added a general description of the land, as being 120 acres measured in the manner prescribed by the act:—Held, that the latter description must govern:—Held, also, that according to the statute the rear line of the tract should correspond with the rear of the whole lot, following the windings of the river. *McIntyre* v. *Great Western R. W. Co.*, 17 Q. B. 118.

Defendants claimed under two deeds from the sheriff, made upon different sales, one in 1841, the other in 1851, under a sale in 1846. One described the land as thirty acres of the lot, "to be measured according to the statute in that case made and provided," the other as "twenty-five acres" of the lot, giving no further description:—Held, that the first deed was sufficient, the second not. *Fraser* v. *Mattice et al.*, 19 Q. B. 150.

"Eighty-nine acres of the south part of the east half of lot number twenty-five, in the second concession of the township of Charlottenburg":—Held, insufficient, under 13 & 14 Vict. c. 67, as containing no statement of boundaries. *McDonell* v. *McDonald*, 24 Q. B. 74.

A description in the sheriff's deed of land sold under 6 Geo. IV. c. 7, as "twenty-five acres of lot 31, in the 12th concession of the township of King":—Held, insufficient. *Cayley* v. *Foster*, 25 Q. B. 405.

"75 acres of the front part of the west ½ of lot No. 5, in the 1st concession of the township of Winchester":—Held, sufficient, under 7 Will. IV. c. 19. *Fraser* v. *West*, 21 C. P. 161.

Where a sheriff sold 183 acres out of 200 for taxes, and gave a certificate merely describing the land sold as the west part of the lot, comprising 185 acres, and no further intimation was given by the sheriff of the portion of the lot he was to convey until the deed was executed, the sale was held invalid. *Knaggs* v. *Ledyard*, 12 Chy. 320. This case was affirmed in appeal. See 32 Q. B. 30, note.

Land sold for taxes under C. S. U. C. c. 55, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17, in the 9th concession of Rawdon, 75 acres; and in the sheriff's deed by metes and bounds:—Held, that according to Knaggs *v.* Ledyard, 12 Chy. 320, and McDonell *v.* McDonald, 24 Q. B. 74, such description was insufficient. Wilson, J., but for these decisions, would have held the description sufficient, as meaning the south 75 acres of the west half. Semble, such a defect would not be cured by 27 Vict. c. 19, s. 4, or by the 29 & 30 Vict. c. 53 s. 156, or 32 Vict. c. 36 s. 155, O. *Booth* v. *Girdwood*, 32 Q. B. 23.

A certificate given for the portion of a lot sold for taxes on the 12th November, 1867, under 29-30 Vict. c. 53, stated it to be the "one-twenty-seventh part," without further describing it. The deed given on the 19th April, 1871, described the land by metes and bounds:—Held, that the deed was void. *Williams* v. *McColl*, 23 C. P. 189.

Where there were two lots on a street with the same number, one on the south side and one on the north side, and neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other, the sale was held void for uncertainty. *Lount* v. *Walkington*, 15 Chy. 332.

A sheriff's deed for "about fifteen acres, more or less, being the whole of a block or piece of land adjacent to the Grand Trunk Railway being a part of lot number twenty-seven in the first concession of South Easthope, now in the town of Stratford:"—Held, insufficient, under C. S. U. C. c. 55, and the deed void. *Davidson* v. *Kiely*, 18 Chy. 496.

See *Stewart* v. *Taggart*, 22 C. P. 284, p. 29[illegible]

(b) *Other Cases.*

The deed of land sold for taxes may be made by the sheriff to the assignee of the highest bidder. Land which has not been described by the surveyor-general is not liable to be sold for taxes. *Doe d. Bell* v. *Orr*, 5 O. S. 433.

Where land was returned under 59 Geo. III. c. 7, s. 12, as described for patent, it was liable for taxes, and having been regularly sold therefor, it was held that the sheriff's deed must prevail against a patent subsequently issued to the original nominee or his representative. *Charlton* v. *Dulmage*, 14 Q. B. 585; *Ryckman* v. *Vanstenburg*, 6 C. P. 385.

Quære as to the effect of a conveyance under 16 Vict. c. 182. *Harbourn* v. *Boushey*, 7 C. P. 464.

Certain land was sold for taxes in 1830, under 6 Geo. IV., c. 7. but owing to the loss of the certificate no deed was made by the sheriff until 1862. The 13 & 14 Vict. c. 66, which was passed on the 10th of August, 1850, and came into force on the 1st of January, 1851, repealed the 6 Geo. IV., except so far as it might affect any taxes which had accrued and were due, or any remedy for the enforcement or recovery of the same. Held, that this exception did not continue the power of the sheriff to convey, and therefore that nothing passed by his deed. *Bryant et al.* v. *Hill*, 23 Q. B. 96; followed in *Cotter* v. *Sutherland*; *Stevens et al.* v. *Jaques et al.*, 18 C. P. [illegible]

But the purchaser may defend under the sheriff's certificate given at the time of sale notwithstanding he has given it up on receiving the invalid conveyance. *Cotter* v. *Sutherland*; *Stevens et al.* v. *Jaques et al.*, 18 C. P. 357.

The 13 & 14 Vict. c. 67, allows three years for redemption before the sheriff can convey. It was repealed by 16 Vict. c. 182, which came into force on the 1st of January, 1854, except in so far as it might affect "any rates or taxes of the present year," 1853, "or any rates or taxes which have accrued and are actually due, or any remedy for the enforcement or recovery of such rates or taxes not otherwise provided for by this act." The plaintiff purchased under 13 & 14 Vict., in 1852; so that he was not entitled to a conveyance until the act had been repealed. Held, that as the exemption in the repealing clause gave no power to complete inchoate proceedings, the sheriff could not convey, although such a result was clearly not intended. *McDonald* v. *McDonnell et al.*, 24 Q. B. 424.

In ejectment defendant claimed through a sale under 6 Geo. IV. c. 7. The warrant refer[illegible]

ued in 1837 to the then sheriff, M., who ceased hold office in 1838; the return stated the e to have been made in 1840; and M. executed deed in 1841:—Held, clearly insufficient, the sale and deed being made by a person of office were prim facie unauthorized, and fendant proved no proceedings taken by M. hich could be regarded as an inception of ecution. If there had been such proof, Quære, ether the law as to inception of execution ocess applies equally to tax sales and to e of land on judgments. *McMillan* v. *Mc-ald*, 26 Q. B, 454.

Semble, that a deed by the successor of the eriff who made the sale, is good under 27 Vict. c. 28, s. 43. *Bell* v. *McLean*, 18 C. P. 6.

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14 *Effect of Mortgagee Purchasing.*

Property subject to a mortgage, having been owed to run into arrear for taxes, was offered sale under the wild land assessment law, n the mortgagee purchased and obtained the from the sheriff. The mortgagee after-ds sued the mortgagor for the mortgage ey and interest, whereupon the mortgagor a bill to restrain the action, asserting that sale discharged him from the mortgage . The court refused the application, the t of such purchase by the mortgagee being greater than a decree of foreclosure; where, fter a final decree the mortgagee proceeds to ce payment of the mortgage money, it will up the foreclosure: and, Semble, that after a sale the mortgagor might have treated mortgagee as liable to be redeemed, and filed his bill for that purpose. *Smart* v. *e*, 10 Chy. 59.

lthough a mortgagee may as well as a ger purchase lands of which he is mort-, still, if he purchase as mortgagee, and his interest in the land a ground for being ed to purchase, he cannot set up his title obtained against the mortgagor's right to m. *Kelly* v. *Macklem*, 14 Chy. 29.

nd having been sold for taxes, a party in-ed therein as mortgagee applied to the e of the sheriff to be allowed to purchase, e ground of his having an interest in the and was permitted to do so, his only st in the land being as mortgagee:—Held, the purchaser could not afterwards set up le in opposition to the mortgagor's claim deem. *Ib.*

Scholfield v. *Dickinson*, 10 Chy. 226, p. 249.

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15. *Recovering back Purchase Money.*

ere lands not assessable were improperly r taxes:—Held, that the purchaser could cover back the money in an action against unty. It did not appear in this case er a conveyance had been executed to the ff or not. *Austin* v. *The Corporation of nty of Simcoe*, 22 Q. B. 73.

See X. p. 260.

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16. *Redemption of Lands sold.*

ment and redemption by a stranger before r is out after the sale will prevent the forfeiture, though done without the knowledge of the owner. *Boulton* v. *Ruttan*, 2 O. S. 362.

The time of redemption excludes the day on which the sale takes place; and the expression "from the time" may be held as either inclusive or exclusive of the day, according to the context in the statute and the bearing and object of its provisions. *Ib.*

If the treasurer certify a redemption improperly he is liable, and not the sheriff refusing to make the conveyance. *Ib.*

The defendant, as treasurer, returned the plaintiff's land as part of a tract on which taxes were unpaid. The plaintiff tendered the amount of taxes on his own portion, which defendant refused to accept, and the land was sold:—Held, that an action would not lie against the treasurer for not accepting the redemption money, the tender to and refusal by the latter being equivalent to payment, and that therefore the plaintiff had not lost his land. *Cunningham* v. *Markland*, 5 O. S. 645.

Held, that the assignee of the original owner of property (sold for taxes) was entitled to redeem under secs. 9 and 12 of 16 Vict., c. 183, *Gilchrist* v. *Tobin*, 7 C. P. 141.

When a sale took place upon the 7th of October, 1840, and the money was not paid to redeem until the 8th of October, 1841;—Held, too late. *Proudfoot* v. *Bush*, 12 C. P. 52.

The land was sold in October, 1860, for the taxes of 1855, 1856, 1857, and 1859, under a warrant dated 11th June, 1860, the amount paid by the purchaser being $31.51. In January, 1861, the plaintiff applied to the treasurer to know the amount of taxes then due on the lot, and was told $37.48 for the years 1855 to 1860, inclusive, which he paid, and took a receipt as for the taxes of those years. The treasurer, in March, 1861, went to the sheriff's office and caused an entry to be made in the book of sales opposite to this lot, that the taxes had been paid within two months after the sale, that he would pay the purchaser the redemption money, and that no deed was to be given. The sheriff and the treasurer afterwards saw the purchaser and told him what had been done; but, for some reason not explained, the sheriff subsequently executed to him a deed:—Held, that the land had been redeemed, the plaintiff having substantially complied with C. S. U. C. c. 55, s. 148. *Allan* v. *Hamilton*, 23 Q. B. 109.

An entire lot having been sold, one C. paid the redemption money on the east half, and one P. on the west half, but it being represented that P.'s payment had been made by mistake, the treasurer applied the money, by P.'s authority, to another lot:—Held, that under C. S. U. C. c. 55, s. 113, the owner of part of a whole lot sold for taxes might redeem such part on paying the proportionate amount chargeable against it; and that the clause did not merely allow such payment before sale. The east half was therefore held to have been properly redeemed; but, quære, if redemption of the whole had been necessary, as to the effect of P.'s payment by mistake. *Payne* v. *Goodyear*, 26 Q. B. 448.

If the owner, instead of paying the redemption money to the county treasurer for the sheriff's

vendee, pays it to the latter personally, and he accepts it, the payment is, in equity, effectual. *Cameron* v. *Barnhart*, 14 Chy. 661.

So if the sheriff's vendee verbally agree to accept payment personally at a distance from the county town, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. *Ib.*

Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Ib.*

See *Boulton* v. *Corporation of the United Counties of York and Peel*, 25 Q. B. 21, p. 261.

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17. *Objections Cured by Statutes.*

Quære, as to the effect of a conveyance under sec. 65 of 16 Vict. c. 182. *Harbourn* v. *Boushey*, 7 C. P. 464.

A sale under a warrant not sealed:—Held, invalid, and the defect not cured by 29 Vict. c. 26. *Mogan* v. *Quesnel*, 26 Q. B. 539.

An action of ejectment to try the validity of a tax title having been begun before 33 Vict. c. 23, O., was passed, the court, under sec. 4, determined the objections taken to the sale, in order to settle the right to costs, as if the act had not been passed. *McAdie et al.* v. *Corby*, 30 Q. B. 349.

Semble, that several objections taken to the tax title, and set out in the report of this case, were cured by the 33 Vict. c. 23, O. *Davies* v. *VanNorman*, 30 Q. B. 437.

It is not incumbent, under 33 Vict. c. 23, O., for the tax purchaser, in order to bring himself within the protection of sec. 1, in cases where he has paid eight years taxes charged on the lands, to prove that the taxes so paid had been legally charged, but the production of the treasurer's books, shewing that such taxes had been charged and paid, is sufficient. Under that act any person claiming under the tax purchaser may avail himself of the provisions of the Act. *Fraser* v. *West*, 21 C. P. 161.

Held, that sec. 155 of 32 Vict. c. 36, O., does not make valid a deed given in pursuance of a sale for taxes where there were in fact no taxes in arrear at the time of sale, but they had been regularly paid. *Hamilton* v. *Eggleton*, 22 C. P. 536.

A tax sale of land for more than was due, is not rendered valid by 27 Vict. c. 19, s. 4. *Yokham* v. *Hall*, 15 Chy. 335.

Where two half lots were assessed separately, a sale of the whole lot for the total amount was held invalid, notwithstanding that act. *Ib.*

In 1865 the land was sold for six years taxes, including 1858; for that year the sale could not be supported, and as there were not five years due of any portion of the residue for which the warrant issued, the whole sale was held bad—and Held, following Yokham *v.* Hall, 15 Chy. 33[illegible] that this defect was not cured by the 27 Vict. 19, s. 4; 29 & 30 Vict. c. 53, s. 131, or 32 Vict. 36, s. 130, O. But for that decision, Wilson, would have held otherwise. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

Land sold under C. S. U. C. c. 55, was described in the assessment roll, advertisement and treasurer's warrant, as the south part of west half of lot 17 in the 9th concession of Raydon, 75 acres, and in the sheriff's deed by metes and bounds:—Held, insufficient; and, Semble such a defect would not be cured 27 Vict. c. 19, s. 4, or by the 29-30 Vict. c. 53, s. 156, or 32 Vict. c. 36, s. 155, O. *Booth* v. *Girdwood*, Q. B. 23.

It was objected that the description of land on the roll and in the warrant as the and W. pt. S. ½, 165 acres, and the N. ½, and W. pt., S. ½, 65, was insufficient; and the treasurer had improperly altered the roll as to reduce the taxes by one half, and made the description still more defective—but Held that these objections would be cured by the 27 Vict. c. 19, s. 4, and 29 & 30 Vict. c. 53, 131. *Ib.*

The sheriff's deed was given on the 19th May, 1866, and the action was not brought until the 13th of January, 1871:—Held, the plaintiff was not barred by the 29 30 Vict. c. 53, s. 156, passed on the 15th August, 1866, which made valid all tax deeds due before unless questioned within four years from the date; for that the effect of the 32 Vict. c. 36, s. 155, O., passed on the 23rd of January, 1869, was to give two years from the passing of that act to all whose rights were not then barred. *Ib.*

By the Assessment Act of 1866, owners had four years to impeach a tax deed. By an act passed in 1869, all actions for that purpose were stayed until after the following session; and another act of the same session all previous Assessment Acts were repealed, amended, and consolidated, with a reservation of rights had or acquired under the repealed acts. By one of the clauses of the amended act the limit appointed for bringing actions was two years. Held, that an owner who had less than two years of his four remaining when the acts of 1869 were passed, had like others two years thereafter to bring his suit. *Connor* v. *McPherson*, 18 C. 607.

Where taxes had accrued due on certain lands in the county of Bruce, before the separation of that county from Huron, which took place on the 1st January, 1867:—Held, that the treasurer of the county of Huron, after the separation, could not advertise and sell such lands for these taxes. Held, also, that the sale was not made valid by 32 Vict. c. 36, s. 155, O., as it only applies to deeds given by the sheriff or treasurer authorised to sell. *The Canada Permanent Building and Savings Society* v. *Ayl* 23 C. P. 200.

Where a party relies on a tax sale, it is not sufficient in equity, any more than at law, to produce the sheriff's deed. There must, among other things, be the proper legal evidence of taxes having been in arrear for the necessary period; and such evidence is not dispensed with by the act 27 Vict. c. 19. *Jones* v. *The Bank of Upper Canada*, 13 Chy. 74.

The Act 32 Vict. c. 35, O., staying actions impeaching sales for taxes applies only to cases in which the validity of a tax sale is called in question. If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to the other branch of his case. *Cameron* v. *Cameron*, 2 Chy. Chamb. 346.—Mowat.

Held, per Richards, C. J., Wilson, J., Mowat, V. C., Galt, J., and Strong, V. C., (Draper, C. J., doubting), that 27 Vict. c. 19, s. 4, cures all errors as regards the purchaser at a tax sale, if any taxes in respect of the land sold had been in arrear for five years; and this rule applies where an occupied lot has been assessed as unoccupied. *Bank of Toronto* v. *Fanning*, 18 C. P. 391, in Appeal.

Objections to a sale made in 1839, that the notices were not shewn to have been properly imposed by the Q. S. under 59 Geo. III. c. 7, and other statutes, and that there was no sufficient evidence of the sheriff's advertisements of sale: Held, under the evidence, to be cured by 29-30 Vict. c. 53, s. 156, O., and 32 Vict. c. 36, s. 155, O. The 33 Vict. c. 23, s. 2, O., was also applicable in favour of the sale, under the facts proved. *Doe* v. *Cowden*, Q. B. H. T., 1874, not yet reported.

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18. *Other Cases.*

A sale of lands made before the 8 Vict. c. 22, in the district of Colborne for arrears of taxes, of which had accrued due before the division of the district of Newcastle, (of which Colborne was formerly a part), is legal. McLean, J., dissentiente. *Doe* d. *The Earl of Mountcashel* v. *Grover*, 4 Q. B. 23; followed in *Cotter* v. *Sutherland*, 18 C. P. 357. See also *Canada Permanent Building Society* v. *Agnew*, 23 C. P. 200, p. 256.

The 8 Vict. c. 22 is a declaratory act, retrospective as well as prospective. McLean, J., *Doe* d. *The Earl of Mountcashel* v. *Grover*, 4 Q. B. 23.

The omission of a township treasurer to comply with section 49 of 16 Vict. c. 182, by furnishing the county treasurer with a correct copy of the collector's roll, was not sufficient to invalidate a sale for taxes, which was properly conducted by him. *Allan* v. *Fisher*, 13 C. P. 63.

Where land has been sold for a larger amount of taxes than has been or can be lawfully claimed, such sale is void. *Allan* v. *Fisher*, 13 C. P. 63; *Cotter* v. *Sutherland—Stevens et al.* v. *Jacques et al.*, 18 C. P. 357; *Doe McGill* v. *Langton*, 4 Q. B. 91.

Held, that the neglect of the collector to enter with sufficient care for the address of the person assessed on his roll, in order to transmit a notice of assessment by post under the 41st section of 16 Vict. c. 182, did not invalidate a sale of land for non-payment of the taxes. *Allan* v. *Fisher*, 13 C. P. 63.

Held, no objection to a sale that the collector was bound by the act to make his return on the 14th of December, but delayed till the 8th of January following, for that it was a matter between the municipal council, which could not advance the title; and as they received the return without objection, it might be assumed that they had appointed the 8th of April to make it on. *McDonell* v. *McDonald*, 24 Q. B. 74.

It is not necessary that the treasurer should keep his accounts of taxes due according to the statute in order to validate the sale. *Cotter* v. *Sutherland—Stevens et al.* v. *Jacques et al.*, 18 C. P. 357.

Per A. Wilson, J.—Tax statutes should not be construed as statutes creating a forfeiture, but rather in the same manner as statutes by which lands are sold under execution for debt, and the same rules which apply to sales under execution should govern tax sales. *Ib.*

Per A. Wilson, J.—Strict proof should be given as to the legality of the tax and its actual imposition, but in matters concerning its collection unnecessary or unreasonable rigor in carrying out the clauses of the statute should not be exacted from the officials entrusted therewith *Ib.*

Considerations as to what requirements of the tax Acts are imperative, and what are merely directory. *Ib.*

It is competent to sell the whole of a lot for taxes, and the court will not presume against a sale on the supposition that too much land was sold for a small amount. *Ib.*

Sales for taxes made after the return day of the writ to sell, are valid. *Ib.*

When taxes are in fact imposed on patented lands, and no return of the surveyor-general of the land having been granted can be found or proved, such return may be presumed. *Ib.*

When, owing to land being patented in July, taxes are charged thereon only for half a year, yet that is in effect a taxation for the whole of the fiscal year, and so long as the patent issues before the assessment is completed, taxes for the whole of the year wherein such patent issues may be properly imposed, and the lands sold therefor if unpaid. *Ib.*

A designation in the treasurer's list furnished under 32 Vict. c. 36, as "the N. or W ½ 14:"—Held, sufficient. *Stewart* v. *Taggart*, 22 C. P. 284.

It is not necessary at a sale of land for taxes to describe particularly the portion of the land to be sold, and therefore a sale of "89 acres" of a particular lot was held sufficient. *Ib.*

The party assessed may become the purchaser of the land sold for taxes. *Ib.*

The treasurer's list, under secs. 110 and 131 of 32 Vict. c. 36, O., is sufficiently furnished at any time during the month of February. *Ib.*

This list need not contain the amount in arrear. *Ib.*

The county treasurer is not at liberty to become a purchaser. *In re Cameron*, 14 Chy. 612. See, also, *Todd* v. *Werry*, 15 Q. B. 614.

Held, that the plaintiffs in this case, claiming against the sale, were not bound to pay the value of improvements under 33 Vict. c. 23, O., for the sale was not void by reason of uncertain or insufficient description of the lands sold, and therefore not within the statute. *Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

It was objected to a sale under 13 & 14 Vict. c. 67 that there was no proof of want of distress on the land, nor of the advertisement of sale: that the affidavit of the collector was insufficient: that the assessment was not proved: that secs. 45 and 46 of the Act had not been complied with; and that the sheriff did not sell that part of the lot most beneficial to the owner; but these objections, upon the evidence set out in this case, were overruled, except the last, which was not decided. *Street* v. *Fogal*, 32 Q. B. 119.

The county council, by by-law passed in June, 1866, directed the treasurer to collect all taxes on lands where the same was in arrear and unpaid on the 1st May, 1861:—Held, that under this he should have sold for the arrears due up to 1865. *Thompson* v. *Colcock*, 23 C. P. 505.

On the 5th of February, 1867, the lot in question was sold for taxes due for 1859 and 1860, and on the 28th December, 1867, it was again sold for the taxes due for 1862, 3, 4, 5, and 6, these latter taxes being due at the time of the first sale:—Held, that the second sale was valid, for the fact of the subsequent taxes being due at the time of the first sale and not included in the warrant under which it took place, did not free the land from the payment thereof. *Ib.*

To a suit by an owner to set aside a sale for taxes, the plaintiff offering to repay the purchase money, with interest, the corporation of the county municipality is not a necessary party. *Smith* v. *Redford*, 12 Chy. 316.

Where the court is called upon to set aside a tax sale which is equally void at law and in equity, the court does so, if at all, only on such terms as are equitable. *Paul* v. *Ferguson*, 14 Chy. 230.

After a sale of land for taxes for 1859 and following years, a subsequent sale for the taxes of 1858 was held invalid, and the purchaser under the first sale was held entitled to retain the land free from past taxes. *Mills* v. *McKay*, 15 Chy. 192.

Where ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed, to apply to this court for relief. *Bamberger* v. *McKay*, 15 Chy. 328.

The Act 32 Vict. c. 35, O., staying actions impeaching sales for taxes, applies only to cases in which the validity of a tax sale is called in question. If a plaintiff claims land by two titles, one only of which involves any question as to the validity of a tax sale, he may proceed as to the other branch of his case. *Cameron* v. *Barnhart*, 2 Chy. Chamb. 346.—Mowat.

One Tripp, being owner of certain land, executed a marriage settlement, under which his wife was entitled to the land for her life; the taxes afterwards fell into arrear, and the land was sold by the sheriff to pay them. By arrangement with the purchasers Tripp's widow became entitled to their interests in the property; and she having sold it to the defendant G., the purchaser at sheriff's sale conveyed to G. In a suit by the assignee of Tripp's heirs to set aside this sale, G. claimed to be a purchaser for value without notice. The same solicitor acted for the vendors and vendee, G., in the transaction of the sale to G., and this solicitor knew then and before that Tripp had been the owner, and that he had executed a marriage settlement under which his wife was tenant for life: but he did not know or suspect she was bound to pay the taxes for which the land was sold, and he did not communicate to G. that she was under any such obligation:—Held, that G. was not affected by constructive notice of the liability; and the bill against him was dismissed with costs. *Monro* v. *Rudd*, 20 Chy. 55.

X. Recovering back Taxes Wrongfully Imposed.

Where taxes were paid to the treasurer of the Home district on lands situate in the Ottawa district, for the purpose of their being transmitted to the treasurer of the latter district, and the treasurer of the Home district not having so transmitted the amount, the lands were duly advertised for sale, and the plaintiff in order to save the lands, paid the taxes to the treasurer of the Ottawa district under protest:—Held, that he could not maintain an action for money had and received against him to recover them back. *Baldwin* v. *Johnson*, 2 Q. B. 47[illegible]

If a person overrated pay the overrate without remonstrance or compulsion, he cannot afterwards recover it back. *Grantham* v. *The City of Toronto*, 3 Q. B. 212.

The plaintiff paid certain taxes imposed by by-law of a district council. This by-law was afterwards decided to be illegal in ejectment brought by this plaintiff to contest the validity of the sale of his land for these taxes, but it was not quashed by the court, because before the application was made for that purpose it had been repealed by the council who passed it. The plaintiff then brought this action for money had and received, &c., to recover back what he had paid. During this suit the 16 Vict. c. [illegible] was passed, enacting that taxes imposed under certain by-laws, of which this was one, should be valid, &c. The action was held to be defeated by this statute, and it was unnecessary, therefore, to determine the point argued—whether money had and received would lie under the circumstances in which the payment was made. *McGill* v. *Municipal Council of Peterborough & Victoria*, 12 Q. B. 44.

When goods are seized, and money paid under protest to release them from seizure, an action will lie. *Smith* v. *Shaw*, 8 L. J. 297.—C. [illegible] Mackenzie.

Defendants having assessed certain lands, a non-resident the treasurer returned the same in arrear and issued his warrant for their sale. The plaintiff, to avoid further expense, paid the taxes under protest. The lands were not patented, and not liable to be assessed:—Held, that the money having been paid under protest and protest, the plaintiff was entitled to recover it back as money had and received. *Street* v. *Corporation of Simcoe*, 12 C. P. 284; affirmed on appeal, 2 E. & A. 211.

The plaintiff having remitted money through the county treasurer to pay taxes supposed to be due by him on unpatented lands in that county, on the terms stated in his letter (as shewn in the statement of case) :—Held, that the circumstances created the treasurer the plaintiff's agent, and that the payment as made was a voluntary one with a full knowledge of the facts, and conld not be recovered back. *Street* v. *County of Lambton*, 12 C. P. 294.

Held, that the Crown could not be prejudiced in its right to recover back taxes paid on land held on behalf of Her Majesty, by the mistake of the officer in charge in paying them. *The Principal Secretary of State for War* v. *The Corporation of the City of London*, 23 Q. B. 476.

Where lands were sold for taxes, and within a year the owner paid under protest to the county treasurer the sum required to redeem them, he having objected to the sale :—Held, that he could not recover this sum from the county as money had and received, for under sec. 148 of C. S. U. C. c. 55 it was received, not for his use, but for that of the purchaser; and the payment of redemption money, to deprive the purchaser of his rights, must be unqualified. *Boulton* v. *The Corporation of the United Counties of York and Peel*, 25 Q. B. 21.

The plaintiffs had for several years appealed to the Court of Revision, who had decided against them, and from thence to the county judge, who had reduced it one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, who said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the Court of Revision that judgment had been given, and found none in the book where their decisions were entered. The collector in October called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed. The mistake having been discovered in the following year :—Held, that they might recover it back, for the Court of Revision not having determined the appeal, the roll as regarded the plaintiffs, was not "finally passed," within section 61 of C. S. U. C. c. 55 so as to bind them. Hagarty, J., dissenting on the ground that the return of the roll altered as regarded the plaintiffs' assessment, was in effect a decision against them. *The Law Society of Upper Canada* v. *The Corporation of Toronto*, 25 Q. B. 199.

Certain lands were sold by the crown to B. in 1853, which sale was cancelled in 1866, and the same lands sold to the plaintiff, to whom the patent issued. The land, it was admitted, had been legally assessed for certain taxes for 1864, and 1865. The plaintiff, on application to the county treasurer, ascertained the amount due and paid it, stating that he did so under protest and without prejudice to his rights; but no demand had been made, nor any pressure exercised or threatened to compel such payment :—Held, that the money so paid could not be recovered back. *Benjamin* v. *The Corporation of the County of Elgin*, 26 Q. B. 660.

The plaintiff, to prevent his lands from being sold for taxes as non-resident lands, paid under protest to the sheriff the sum claimed, including costs, and then sued the county to recover back part of the amount, consisting of commutation of statute labour, which he disputed :—Held, that he could not recover, for the sheriff was not the agent of defendants, and there was nothing to shew that he had paid it over to their treasurer. The non-resident land fund is so far the property of the county, that they may be liable for it in such an action, *Robertson* v. *The Corporation of the County of Wellington*, 27 Q. B. 336.

See *Principal Secretary of State for War* v. *Corporation of Toronto*, 22 Q. B. 551, p. 223.

See IX. 15, p. 253.

XI. Non-Resident Land Fund.

Moneys in the hands of the sheriff arising from a sale of non-resident lands for taxes pursuant to sec. 137 of C. S. U. C. c. 55, under a warrant directed to him pursuant to sec. 124, cannot be attached at the instance of creditors of the corporation of the county in which the lands are situate, as being a debt due from the sheriff to the corporation of the county. *Wilson et al.* v. *The Corporation of the United Counties of Huron and Bruce*, 8 L. J. 136.—C. L. Chamb. —Draper.

Held, that all moneys received by the county treasurer from non-resident land tax, either from the owners or from the proceeds of tax sales, do not become in his hands the moneys of any particular municipalities, so as to entitle them to sue him at once as for their moneys, but that such funds must be considered as belonging to the county council, whose duty it is to appropriate them as by law directed; and therefore :—Held, that an action for money had and received would not lie against the treasurer, at the suit of a township municipality, for moneys paid over by him, before such appropriation, to the township reeve, who had misapplied them. Quære, whether an action would lie against the treasurer in any case for non-payment, or whether he could discharge himself by payment to the reeve. *Corporation of the Township of Nottawasaga* v. *Boys*, 21 C. P. 106.

Sums were credited by the treasurer of a county in the corporation books to certain townships, in respect of the non-resident land fund. Portions thereof were paid over to the townships, and other sums were in the same books charged against one of the townships which the township considered itself not chargeable with. The treasurer's books, containing these entries, were audited and approved by the county council, but no by-law had been passed by the county council appropriating the fund :—Held, that the townships had no relief in equity. *The Corporation of the United Townships of Mara and Rama* v. *The Corporation of the County of Ontario*, 13 Chy. 347.

See *Robertson* v. *Corporation of the County of Wellington*, 27 Q. B. 336, supra.

XII. Miscellaneous Cases.

Under s. 18 of 1 Vict., c. 21, a collector of rates who had not paid over the amount collected by him and settled his accounts with the treasurer on or before the third Monday in December of the

year for which he had been serving, was ineligible to any township office. *Regina* v. *Ryan*, 6 Q. B. 296.

Moneys paid by the owners of land sold for taxes within one year from the day of sale, as redemption money to the county treasurer for the use and benefit of the purchaser, and banked in the name of the county treasurer, cannot be attached at the instance of a creditor of the corporation of the county as a debt due by the bank to the corporation of the county. *Wilson* v. *The Corporation of the United Counties of Huron and Bruce*, 8 L. J. 135.—C. L. Chamb.—Draper.

An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk. *Regina* v. *Preston*, 21 Q. B. 86.

Sec. 126 of 32 Vict. c. 36, O., directs that when the county treasurer is satisfied that there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested, "Given under my hand and seal, being the corporate seal," and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *The Corporation of the County of Frontenac*, 30 Q. B. 275.

Remarks by A. Wilson, J., as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due. *The Corporation of the County of Frontenac* v. *The Corporation of the City of Kingston*, 30 Q. B. 584.

A sale of land for taxes destroys the right of the widow of the owner to dower. *Tomlinson* v. *Hill*, 5 Chy. 231.

Semble, a tenant for life of the whole estate of the testator, consisting of an improved farm and of wild lands, is bound to keep down the taxes upon the whole. *Biscoe* v. *VanBearle*, 6 Chy. 438.

A devisee of a life estate in all a testator's property is bound to keep down the annual taxes on the land, and they form a first charge on the testator's interest. *Gray* v. *Hatch*, 18 Chy. 72.

The non-production of a certificate of no taxes in arrear is no objection to the title of a vendor. *Thompson* v. *Millikin*. 9 Chy. 359.

Compensation was granted to the purchaser of land out of the purchase money, for taxes due on the land and unpaid. *Stewart* v. *Hunter*, 2 Chy. Chamb. 335.—Taylor, *Secretary*.

Under the act for quieting titles the court has no jurisdiction to grant a certificate unless all taxes except those for the current year have been paid. *Ex parte Chamberlain*, 2 Chy. Chamb. 352.—Mowat.

An engine and boiler in the hands of a receiver having been sold for taxes, and the establishment in which they were allowed to remain after the sale having been afterwards sold by order of the court in one lot as a going concern, it was—Held, under the facts stated in the case, that the purchaser of such chattels at the tax sale was entitled to a corresponding part of the purchase money realized at the Chancery sale. *Gibson* v. *Lovell*, 19 Chy. 197.

ASSESSMENT OF DAMAGES.

I. GENERALLY—*See* DAMAGES.

II. NOTICE OF—*See* TRIAL.

ASSESSMENT ROLL.

See ASSESSMENT AND TAXES—MUNICIPAL CORPORATIONS.

ASSESSORS.

See ASSESSMENT AND TAXES.

ASSETS.

See EXECUTORS AND ADMINISTRATORS.

ASSIGNEE.

See ASSIGNMENT.

ASSIGNMENT.

I. FOR THE BENEFIT OF CREDITORS—*See* BANKRUPTCY AND INSOLVENCY.

II. OF GOODS AND CHATTELS—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

III. OF CHOSES IN ACTION—*See* CHOSES IN ACTION—ATTACHMENT OF DEBTS.

IV. FRAUDULENT ASSIGNMENT—*See* BANKRUPTCY AND INSOLVENCY—CRIMINAL LAW—FRAUDULENT CONVEYANCES.

V. OF DOWER—*See* DOWER.

VI. OF JUDGMENTS—*See* JUDGMENT.

VII. OF LEASES—*See* LANDLORD AND TENANT.

VIII. OF MORTGAGES—*See* MORTGAGE.

IX. OF POLICIES—*See* INSURANCE.

X. OF SECURITIES—*See* PRINCIPAL AND SURETY.

XI. OF STOCK—*See* CORPORATION.

ASSURANCE.

See INSURANCE.

ASSUMPSIT.

See ACTION.

ATTACHMENT OF DEBTS.

I. WHO MAY ATTACH, 265.

II. WHAT MAY BE ATTACHED.

1. *Money in Court*, 265.
2. *Unliquidated Amounts*, 266.
3. *Where Debt has been Assigned*, 266.
4. *Other Cases*, 269.

III. EXAMINATION OF JUDGMENT DEBTOR.

1. *Affidavit for Order*, 273.
2. *Other Cases*, 273.

IV. PRACTICE.

1. *Affidavit for Order to Attach*, 273.
2. *Costs*, 274.
3. *Other Cases*, 274.

V. DIRECTING ISSUE TO BE TRIED, 276.

VI. PRIORITY OF JUDGMENT CREDITORS, 276.

VII. OPERATION AND EFFECT OF, 276.

VIII. PAYMENT BY GARNISHEE, 277.

IX. RIGHTS OF GARNISHEE, 278.

X. MISCELLANEOUS CASES, 278.

XI. ABSCONDING DEBTOR — *See* ABSCONDING DEBTOR.

XII. IN DIVISION COURT—*See* DIVISION COURT.

I. WHO MAY ATTACH.

The garnishee clauses of the C. L. P. Act do not extend to the Queen. The crown, therefore, cannot under them attach a debt. *Regina* v. *Johnson*, 2 P. R. 350.—Q. B.

The assignee of a judgment creditor can proceed in his name to attach a debt. *In re Smart* v. *Miller*, 3 P. R. 385.—Chamb.—A. Wilson.

II. WHAT MAY BE ATTACHED.

1. *Money in Court.*

The judgment debtors had leased from C. a piece of land on the river Humber, on which there was a stone quarry. Upon an arbitration under 16 Vict. c. 146, the Great Western Railway Company were directed to pay them £255 as a compensation for injury occasioned to them as lessees by the erection of a permanent railway bridge over the river. Before the arbitration one of them, being then sole lessee, had engaged to a building society his interest in the land, and all privileges as to quarrying stone mentioned in the lease, and the railway company were notified by the society not to pay to the judgment debtors the amount awarded, paid it into the Common Pleas. The judgment creditor, having obtained judgment in this court, claimed the claim, and asked to be allowed to take the money out of court, or for an order on the company to pay it:—Held, that the money was in the Common Pleas, this court could not interfere, but that if they had power to dispose of it the mortgagees would be entitled before the judgment creditors. Quære, whether the commissioners were authorized, under 16 Vict. c. 99, s. 9, to pay such money into court, and whether such money could be attached. *French* v. *Lewis et al.*, 1 U. C. R. 547.

On a subsequent application to the Common Pleas on behalf of the mortgagees, that court refused to interfere, on the ground that the company had no right to pay the money into court. *Ib.* 551, note.

The court has no jurisdiction to grant "a stop order" at the instance of a judgment creditor of a party entitled to funds in court. *Lee* v. *Bell*, 2 Chy. Chamb. 114.—Taylor, *Secretary*.

The fact that the judgment creditor has obtained a garnishee order, will not enable the court to grant a stop order. *Purkiss* v. *Morrison*, 2 Chy. Chamb. 117.—Taylor, *Secretary*.

See *Mellish* v. *Buffalo, &c., R. W. Co.*, 2 P. R. 171, p. 279.

2. *Unliquidated Amounts.*

An unsettled balance due by one partner to another cannot be attached; but otherwise if it has been fully ascertained. *Campbell* v. *Peden et al.*, 3 L. J. 68.—C. L. Chamb.—Robinson.

The garnishees had given the judgment debtors a bond conditioned that one A., in their employment, should pay over all moneys received:—Held, that the liabilities incurred under this bond could not be attached. *Griswold* v. *Buffalo Brantford & Goderich R. W. Co.*, 2 P. R. 178.—C. L. Chamb.—Robinson.

Quære, can a debt be attached in the hands of an assignee for the payment of debts, before a dividend has been declared by him. *Commercial Bank* v. *Williams*, 5 L. J. 66.—C. L. Chamb.—Draper.

The sum to be garnished was money awarded, of which part was for work done under a contract, and the remainder for damages sustained by having the work taken out of the execution debtor's hands:—Held, that as this latter was not a debt until the award was made, only the attaching orders after the award would bind it, not those before. *Tate* v. *The Corporation of Toronto*, 3 P. R. 181.—C. P.

A verdict against an insurance company for unliquidated damages, even although not moved against, and which the company had promised to pay without entry of judgment, cannot be attached until it becomes a debt by judgment. *Boyd* v. *Haynes*, 5 P. R. 15.—Chamb.—Hagarty.

Claims for unliquidated damages cannot be attached before judgment, by which alone they become debts. *Bank of Toronto* v. *Burton*, 4 P. R. 56.—Chamb.—Hagarty; *Gwynne* v. *Rees*, 2 P. R. 282.—P. C.—Richards.

The claim of a debtor to compensation for misrepresentations of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered, before the amount is determined by decree or otherwise. *Roberts* v. *The Corporation of the City of Toronto*, 16 Chy. 236.

3. *Where Debt has been Assigned.*

Although an order is not intended to operate upon debts already assigned, yet, where the assignee had neglected to give the garnishee precise and distinct notice of the assignment, and his attorney stood by whilst such order was made, and the garnishee had paid the debt to the judgment creditor, the court relieved the

garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor. *In re Jones, ex parte Kelly*, 7 C. P. 149.

Under a submission between one R. and the City of Toronto, it was awarded that the corporation should pay R. £1,925, as compensation for land taken for the esplanade, and £825 for damages sustained by the construction of it, to be paid on or before the 28th of January, 1858, on the title to the land taken being perfected in the corporation. On the 2nd of January a notice was served on the city chamberlain that R. had assigned to H. all the damages awarded, and requiring the city to pay H. On the 9th an order was made attaching all debts due by the city to R. to answer a judgment recovered against him by one G., and a summons for them to pay; and on the 14th the garnishees were ordered to pay G. within ten days, or execution to issue. The attaching order and summons, and the order to pay, were duly served on the chamberlain, but no notice of them was given by him to the solicitor, or any member of the corporation; and on the 8th of May an execution issued against the city, under which a levy was made. They then applied for relief on the above facts, and it was shewn that the land in question had been mortgaged for a large sum to one B., who claimed to receive the sum awarded:—Held, that this, being upon a claim for unliquidated damages, could not be attached before judgment obtained upon it: that the part assigned to H. could clearly not be garnished; and that all proceedings subsequent to the attaching order must be set aside, on payment of costs by the garnishees, the judgment creditor to be at liberty to apply for a summons on them to pay him the amount of his claim, under which all the parties claiming might be heard. *Gwynne* v. *Rees*, 2 P. R. 282.—P. C.—Richards.

N. had a contract with the corporation of Guelph for work, defendants being his sureties. After completing a portion he gave it up, and assigned to defendants all his interest in the contract, giving them power to finish the work and receive payment, the moneys to be applied to indemnify themselves and complete the work, and the residue to be paid to him. N. afterwards left the country, and they finished the job. The plaintiff, who had been N.'s foreman, and continued with defendants, recovered judgment against them for his services, and the defendants having sued the corporation in N.'s name on the contract, obtained an award against them:—Held, (Burns, J., diss.) that the plaintiff might attach the moneys which defendants, as assignees of N., were entitle to receive from the corporation. *Alden* v. *Boomer et al.*, 2 P. R. 339.—Q. B.

The attorney of the defendant moved to rescind an order to pay over, so far as it regarded a judgment recovered by his client against the garnishee, on the ground that the judgment had been assigned to him as security for endorsements. The summons was served only on the judgment creditor:—Held, that all parties must have notice before the matter could be re-opened on the ground of the assignment. *Bank of Upper Canada* v. *Wallace*, 2 P. R. 352.—Chamb. —Burns.

To an action on the common counts defendants pleaded, that before suit the plaintiff assigned the claim to one G.: that one H. recovered judgment against G., and obtained an order to attach all debts owing by defendants to G., to answer said judgment, and this debt then became bound in defendants' hands to answer the judgment. Plea held bad, the debt not being attachable as by law due to G. *Arthur* v. *Cloyes et al.*, 17 Q. B. 302.

Judgment was recovered by B. & Co. against defendant, against whom the plaintiff afterwards likewise recovered judgment. B. & Co. then and the plaintiff afterwards put a fi. fa. against defendant's goods into the hands of the sheriff who returned the plaintiff's writ nulla bona. Plaintiff then obtained an order for defendant's examination, and very shortly after being served with it, defendant assigned his book debts, accounts, and claims to B. & Co. A few days after the plaintiff obtained the usual order to attach debts due to defendant, but no summons was shewn calling on the garnishees to pay. B. & Co. applied to set aside the order:—Held, that they had no right to intervene in the cause, and that they could not raise the question of the validity of the assignment to them on such application. *Rittinger* v. *McDougall*, 10 C. P. 395.

Where the debt is claimed by a third party as assignee, there is no power to direct an issue to try the validity of the alleged assignment. *Ker* v. *Fullarton*, 3 P. R. 19.—C. P.

On 30th July, 1859, the garnishee executed a mortgage for £200 to the judgment debtor, for six annual instalments of £33 6s. 8d. each. About a month after this, he paid £50 on account of the mortgage. An attaching order was obtained before the first instalment fell due, and this on 29th June, 1860, was followed by an order that the garnishee should pay to plaintiff £34 11s. 8d. in the following manner:—£13s. 4d. on 30th July, 1861, and £17 13s. 4d. on 30th July, 1862. An application was made to set aside these orders upon a suggestion that the mortgage had been assigned; but it appearing that the assignment, if any, was made after the attaching order had been served, the application failed. *Worthington* v. *Peden et al.*, L. J. 48.—C. L. Chamb.—Draper.

Where it was made to appear that the debt sought to be attached was bonâ fide assigned before the issue of the garnishee order, the order was, on the joint application of the judgment debtor and his assignee, set aside. *Clark* v. *Clark*, 8 L. J. 107.—C. L. Chamb.—Draper.

Where the judgment debtor, after making a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at a value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage by him on real estate, and held by the garnishees, and the garnishees accepted the render, but on terms different to those proposed it was held, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor. *Le Gay* v. *Gorrie*, 1 L. J. N. S. 76.—C. L. Chamb.—Richards.

An order to pay over was made upon a summons of which the judgment debtor had no

...ce. It appeared, on motion to rescind such ...der, that the debt had been assigned before ...e order, of which the garnishees had notice ...ore the summons was served on them, to ...hich they did not appear, and before they paid ...er the money under the order. The order ...s rescinded, with costs to be paid by the judg...nt creditor, who was also aware of the assign...nt. *Ferguson* v. *Carman*, 26 Q. B. 26.

It was alleged, but held not sufficiently proved, ...t the judgment debtor was insolvent when ... made the assignment; and Quære, whether ... judgment creditor could set that up. *Ib.*

A debt duly assigned to another is not gar...hable, and the attaching order will be set ...le; and where the judgment creditor was ...re that this answer would be made to his ...lication by the judgment debtor, the latter ... allowed the costs incident to such answer. ...aulay v. *Rumball et al.*, 19 C. P. 284.

The judgment debtor, through his sub-con...tors, delivered to the garnishees certain ...way ties, and gave the sub-contractors an ...r on the garnishees for all moneys coming to ... therefor. Subsequently, but before the ...nishees had notice of this order, they were ...ed with the attaching order in this case:—..., that the order in favour of the sub-con...tors operated as an assignment of the fund ...em, although there was no notice of it to ...garnishees, they not having been led by the ... of notice to alter their position. *Brown* v. ...ffin, 5 P. R. 231.—Chamb.—Dalton, *C. C.* ...

...*French* v. *Lewis*, 16 Q. B. 547, p. 265.

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4. *Other Cases.*

...ts due by or to Trustees.]—The Trust ... Loan Company held a mortgage from one ...ith power of sale for cash or upon credit, ...nder it on the 22nd of November sold the ...to C., who paid them part in cash, and gave ...rtgage for the balance. There was a mort...upon the land to one D., executed before, ...gistered after theirs, and they paid to D.'s ...ee, out of the cash received, the surplus ... whole purchase money above their claim. ... mortgage declared that they should stand ...of the proceeds of any sale in trust to apply ...here mentioned. A judgment creditor of ...ing served his attaching order on the 25th ...vember, sued the company as garnishees for ...rplus:—Held, that he could not recover; ... Defendants were trustees, and could not ...d at law for the money, even if they had ...fully paid it over to D.; and, 2. They ...stified in so paying, notwithstanding the ...und that D.'s mortgage was fraudulently ...ive for O.'s benefit, for defendants had no ...dge of such fraud. *Smith* v. *Trust and ...o. of Upper Canada*, 22 Q. B. 525. See ... v. *Mitchell*, 6 L. J. 61, p. 271.

...bt due by a garnishee to a person who ...stee of it for the judgment debtor, cannot ...ched to satisfy the judgment debt; there ... a legal debt due by a legal debtor to a ...editor. *Boyd* v. *Haynes*, 5 P. R. 15.—...—Hagarty. See, also, *Caisse* v. *Tharp*, ...265.—Chamb.—Dalton, *C. C.* & *P.*

Debts due by or to Executors.]—A debt due to a deceased defendant cannot be attached without reviving the judgment against his personal representatives. *Commercial Bank* v. *Williams*, 5 L. J. 66.—C. L. Chamb.—Draper.

An order upon executors to pay a simple contract debt, pursuant to an attaching order, was refused, on the ground that they might be liable on specialty debts, after satisfaction of which they might have no assets, and before satisfaction of which they ought not to be ordered to pay a simple contract debt. The attaching order was also at the same time discharged. *Ward* v. *Vance*, 10 L. J. 269.—C. L. Chamb.—Draper.

There is no power in the court or judge to order or permit a suggestion to be entered of the death of a garnishee, so as to legalize execution against his executors or administrators. *Ward* v. *Vance*, 3 P. R. 323.—Chamb.—Draper.

The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as such executor to the judgment creditor. *Tiffany* v. *Bullen*, 18 C. P. 91.

A debt due by the garnishee to the judgment debtor as executor is not garnishable. *Macaulay* v. *Rumball*, 19 C. P. 284.

A debt due to an administrator as such cannot be attached to answer a debt due by him in his private capacity. *Bowman* v. *Bowman*, 1 Chy. Chamb. 172.—Spragge.

Money in the hands of an Agent.]—May be attached where the garnishee resides out of the jurisdiction. *Brown* v. *Merrills*, 3 L. J. 31.—C. L.—Chamb.—Burns.

But not where the garnishee is a foreign corporation, out of the jurisdiction, as the statute only allows an agent to be served with a writ of summons for the purpose of commencing an action. *Lundy* v. *Dickson*, 6 L. J. 92.—C. L. Chamb. — Robinson; *Bank of British North America* v. *Laughrey*, 2 L. J. N. S. 44.—C. L. Chamb.—Morrison.

Partnership Debts.]—Thomas F. Park was a member of two firms, Park & McLeod, and Park & Park (Theodore, J.) Park & Park recovered judgment against M. a judgment creditor of Park & McLeod:—Held, that Park & Park could not on their judgment attach the debt due by M. to Park & Park. *McCormick* v. *Park et al.*, 9 C. P. 330.

One A. P. McD. entered into a written contract with defendants to execute certain work for them, and verbally agreed to give one A. McD. an interest in the contract. A McD. did not sign the contract, and afterwards drew money on it under the authority of A. P. McD., and apparently as his agent. Upon a writ to attach a sum of money due upon the contract, in a suit by plaintiffs *v.* A. P. McD.:—Held, that it was not a partnership debt, and therefore was attachable against A. P. McD. *Bescoby et al.* v. *Hamilton Water Commissioners*, 9 C. P. 81.

Rent.]—Where the debt was in respect of rent of land mortgaged with a power of sale, and power to receive rent, &c., and no rent was in fact due, and ejectment had been commenced by the mortgagee:—Held, not to be a case for an

attaching order. *McLaren* v. *Sudworth*, 4 L. J. 233.—C. L. Chamb.—Draper.

Rent to become due at a future time cannot be attached. *Commercial Bank* v. *Jarvis*, 5 L. J. 66.—C. L. Chamb.—Draper.

The mere registry of a judgment against a husband's lands, before the passing of the 22 Vict. c. 34 (Married Women's Protection Act) does not of itself give a right to the judgment creditor to garnish a debt due for rent of the wife's land since that act. *Burton et al.* v. *Kelly*, 7 L. J. 20.—C. L. Chamb.—Richards.

Where an execution creditor has under the statute of Anne paid rent demanded by a landlord upon an execution against the tenant upon the premises of the former, and the sheriff levies as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums, and liable to him in an action for money had and received, and so does a bailiff under the Division Courts Act; and therefore the execution money in his hands might be attached, to satisfy the demand of another execution claimant against the execution creditor. *Lockart* v. *Gray*, 2 L. J. N. S. 163.—C. L. Chamb.—A. Wilson.

Other Matters.]—The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Slover*, T. T. 3 & 4 Vict.

Any debt that a defendant could set off at law against his creditor may be attached. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb. —Draper.

The recovery of a verdict for a debt which might have been attached before any action brought for its recovery, will not make it less a subject of attachment. *McKay* v. *Tait*, 11 C. P. 72.

Moneys paid by the owners of land sold for taxes, as redemption moneys to the county treasurer, for the use of the purchasers, and banked in the name of the county treasurer, cannot be attached by a creditor of the county as a debt due by the bank to the county. *Wilson et al.* v. *Corporation of Huron and Bruce*, 8 L. J. 135; *S. C. Ib.* 136.—C. L. Chamb.—Draper.

The surplus money arising from sale of mortgaged premises in the hands of the mortgagee, may be attached on a judgment against the mortgagor. *McKay* v. *Mitchell*, 6 L. J. 61.—C. L. Chamb.—Draper.

Quære, has not a judge a discretion, in the case of an attachable debt, to decline under special circumstances to make an order to pay over the amount, where such an order would be inequitable, or tend to give one creditor a preference, after the making by the judgment debtor of a general assignment in favour of his creditors without preference or priority. *Lee et al.* v. *Gorrie*, 1 L. J. N. S. 76.—C. L. Chamb. —Richards.

Where on a debt contracted in 1855, plaintiff on 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of a legacy deposited by the wife of M. in her own name in the bank of the garnishees, she having been married on the 28th of May, 1859. *Hoge* v. *Muir et al.*, 1 L. J. N. S. 275.—C. L. Chamb. —J. Wilson.

Semble, that money in the hands of a Division Court bailiff may be attached. *Lockart* v. *Grey*, 2 L. J. N. S. 163.—C. L. Chamb.—A. Wilson.

The salary of the physician of a municipal corporation, holding his appointment at their will, at an annual salary, payable quarterly, cannot be attached. *Shanly* v. *Moore*, 3 P. R. 223.

Money made by a sheriff under an execution is attachable in his hands for the debt of the execution creditor. *In re Smart* v. *Miller*, 3 P. R. 385.—Chamb.—A. Wilson.

A debt owing to two cannot be attached to satisfy a claim against one of them only. *Ib.*

Semble, that an equity of redemption in mortgaged premises cannot be sold upon a garnishment execution sued out against a mortgagor, in respect of the mortgage debt, at the suit of a creditor of the mortgagee. *Vanneman* v. *McCarty*, 20 C. P. 42.

Money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons on the bank to pay over. The order was issued on the 17th of August, thirteen days before the bank agency at the place where the debtor resided was advised of the deposit:—Held, that the amount could not be attached. Semble, that the father might revoke the gift, and therefore it was not a debt. *Caisse* v. *Tharp*, 5 P. R. 265.—Chamb. —Dalton, *C. C. & P.*

A testator having bequeathed the sum of £500 per annum, payable out of the rents, income, and profits of his real and personal estates indiscriminately for the support of his widow and family, (the widow having been sole executrix) her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like; and—Semble that where there is no form of legal process or process whereby such a fund can be reached this court has power, under 22 Vict. c. 22, s. 2, to apply a remedy, as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Chy. 486. But see next case, and see *Blake* v. *Jarvis*, 17 Chy. 203.

A bill was filed by judgment creditors alleging that their debtor was devisee and executor of her husband; that she was entitled to an annuity under his will, and was a creditor of his estate for advances she had made to pay his debts, and claiming that these debts and claims should be ascertained, the estate administered, and sufficient land of the testator sold to pay what the estate owed, or so much of it as would cover the judgment debt. Held, that the plaintiff was not entitled to relief. Bank of British North America v. Matthews, 8 Chy. 486, overruled. *Gilbert* v. *Jarvis*, 16 Chy. 265, in appeal.

A judgment creditor cannot attach or garnish by a suit in equity a debt for which he has

btained an attaching order at law. But, semble, after obtaining and serving such an order, a remedy in equity is needed for the realization of the debt so attached, the creditor is entitled to file a bill for the purpose. *Blake* v. *Jarvis*, 16 Chy. 295; 17 Chy. 201.

Where money, the proceeds of land belonging to some of the defendants, had been ordered to be paid into court, to meet a judgment held by plaintiff against one of these defendants, and the decree directed that the plaintiff should pay the other defendants their costs of suit:—Held, that these defendants were entitled to a garnishee order against the money to be paid into court. *Grant* v. *Kennedy*, 2 Chy. Chamb. Rep.—Taylor, *Secretary*.

A sum of money directed by a decree or order to be paid, is a debt which is attachable under C. S. U. C. c. 24, s. 19. *Cotton* v. *Vansittart*, 6 U. R. 96.—Chy. Chamb.—Holmested, *Referee*.

III. EXAMINATION OF JUDGMENT DEBTOR.

1. *Affidavit for Order.*

The affidavit should show that an execution has been issued and acted upon. *Irvine* v. *Merry*, 3 L. J. 49.—C. L. Chamb.—Richards.

And it should specify what efforts have been made to collect the judgment, and show that it cannot be recovered in the ordinary way. *Smith* v. *Gill*, 3 L. J. 134.—C. L. Chamb.—Richards.

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2. *Other Cases.*

The proceedings for the oral examination of a judgment debtor, under sec. 192 of C. L. P. Act, 1856, (C. S. U. C. c. 22, s. 287) should be by summons and order; not by order in the first instance. *Carter* v. *Carey et al.*, 3 L. J. 49. C. L. Chamb.—Richards.

A summons having been granted under that section, calling upon a corporation to shew cause why the president or secretary should not be examined as to the debts due to the company, the order was refused: 1. Because it is doubtful whether that clause applies to corporations. 2. Because the summons should have been directed to the officers mentioned, and not to the company. *Cameron* v. *The Brantford Gas Co.* 2 L. J. 58.—Chamb.—Burns.

The court will order the examination of the defendant to ascertain what debts are due to him, under 22 Vict. c. 33, s. 12, with a view of garnishing such debts. *Bostwick* v. *Shortis*, 1 Chy. Chamb. 69.—Blake.

IV. PRACTICE.

1. *Affidavit for Order to Attach.*

The affidavit required by 194th sec. C. L. P. Act, 1856, will not be dispensed with; and must be positive and explicit. Under certain circumstances, however, an affidavit founded on belief may be sufficient. *Cataraqui Road Co.* v. *Dunn*, 3 L. J. 27.—C. L. Chamb.—Hagarty. But see *Lockwood* v. *DeBergue*, 3 L. J. 28.—C. L. Chamb.—McLean.

But if sufficient grounds be shewn for such belief, it will be sufficient. *Jones* v. *DeBergue*, 3 L. J. 31.—C. L. Chamb.—Burns.

Quære, whether an affidavit of information and belief is sufficient. Semble, an ex parte order will not at all events be granted on it, when no application for an oral examination of the defendant has been made. *McLaren et al.* v. *Sudworth et al.*, 4 L. J. 233.—C. L. Chamb.—Draper.

An order will be granted ex parte, upon affidavit that on an oral examination of the debtor, he swore that the garnishee was indebted to him. *Macpherson* v. *Kerr*, 3 L. J. 49.—C. L. Chamb.—Richards.

An order to attach will be granted, though the amount be not stated; but it must be stated in a summons to pay over. *Meldrum* v. *Tulloch*, 3 L. J. 184.—C. L. Chamb.—Richards; but see *Bank of British North America* v. *Laughrey*, 2 L. J. N. S. 44.—C. L. Chamb.—Morrison.

The judge should require the nature of the indebtedness to be fully stated; but where he granted an order without this the court refused to set the proceedings aside. *Tiffany* v. *Bullen*, 18 C. P. 91.

An order founded on the affidavit of "the agent for the above defendant," without any affidavit by the judgment creditor or his attorney, is irregular; and such order was set aside, but, the point being new, without costs. Semble, that had it been affirmatively shewn that the deponent was in fact the attorney of the judgment creditor, though not so described in the affidavit, the statute would have been complied with. *Ib.*

An order to attach should not be made without an affidavit either of the plaintiff or his attorney, stating the indebtedness of the garnishee. *Boyd* v. *Haynes*, 5 P. R. 15.—Chamb.—Hagarty.

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2. *Costs.*

A judgment creditor was not allowed the costs of a garnishee application, either against the judgment debtor or the garnishee. *Bank of Montreal* v. *Yarrington*, 3 L. J. 185.—C. L. Chamb.—Robinson.

But it is now the practice at law to grant such costs where there is a sufficient fund out of which to pay them, and this practice was concurred in in Chancery, reversing Evans *v.* Evans, 1 Chy. Chamb. 248. *Evans* v. *Evans*, 1 Chy. Chamb. 303.—Full Court.

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3. *Other Cases.*

Where the garnishee (a deputy sheriff) after ten months applied to set aside an order to pay, upon the ground that when the garnishing order was made there was no such debt, and that he, the garnishee, was ignorant of the nature and effect of the proceedings taken against him, the application was refused. *Gordon* v. *Bonter*, 6 L. J. 112.—C. L. Chamb.—McLean.

Held, that the judgment debtor is admissible as a witness on behalf of the plaintiff in an action under a garnishee order. *Hutcheson* v. *Allen*, 9 L. J. 24.—Nisi Prius—Draper.

An attaching order had been served by leaving a copy at the store and residence of the garnishee. Service of a summons to pay over

was accepted for him by a practising attorney, and this summons, with such acceptance endorsed, was afterwards served in the same way as the order. On the return of it, another attorney appeared for the garnishee, and objected that the acceptance was without authority, and the service insufficient:—Held, that personal service of the summons and order was not indispensable. The service if moved against would have been insufficient, as it was not shewn that personal service could not have been effected, or that the papers had come to the knowledge of the garnishee; but held, also, that no such application having been made, the acceptance should be held sufficient, and that any defect in the service of the attaching order was thus cured:—Held, also, that the appearance of the garnishee by another attorney duly authorized was a waiver of any objection to the service. *Ward* v. *Vance*, 3 P. R. 130.—Chamb.—A. Wilson.

Adam Wilson, J., adhered to the above decision as to the service of the attaching order, and held that the new affidavits set out rather tended to sustain such service than otherwise. *S. C.* 3 P. R. 210.

A summons to pay over having been opposed the judge took time to consider, and before the order was granted the garnishee died. On motion to rescind the order:—Held, that the delay being that of the judge the order was not void, but might be amended and dated as of the day of argument. Quære, whether in strictness all orders should not be thus dated. *S. C.* 3 P. R. 210.—Chamb.—A. Wilson.

Quære, has not a judge a discretion, in the case of an attachable debt, to decline under special circumstances to make an order to pay over the amount where such an order would be inequitable, or tend to give one creditor a preference after the making by the judgment debtor of a general assignment in favour of his creditors without preference or priority. *Lee et al.* v. *Gorrie*, 1 L. J. N. S. 76.—C. L. Chamb.—Richards.

23 Vict. c. 33, does not extend to the service of attaching orders, but only applies to the service of process, &c. *Bank of British North America* v. *Laughrey*, 2 L. J. N. S. 44.—C. L. Chamb.—Morrison.

Notice of an application to garnish should always be given to the judgment debtor; but,—Quære, whether it can be imposed as a condition on the judgment creditor, the statute not requiring it. *Ferguson* v. *Carman*, 26 Q. B. 26.

Where an application is made to compel a garnishee to pay over debts due by him to the debtor, which have been garnished, notice must be served on such garnishee. *In re English*, 1 Chy. Chamb. 197.—VanKoughnet.

A garnishee order granted by the court on an application in chambers is regular. *Robertson* v. *Grant*, 3 Chy. Chamb. 331.—Strong.

Where an application for the discharge of an attaching order was made nominally by a plaintiff, against whom the attaching order had been granted, but really by and for the benefit of his solicitor who had a lien on the debt attached, leave was given to amend the proceedings by making the solicitor the applicant, and the order was discharged, but without costs. *Cotton* v. *Vansittart*, 6 P. R. 96.—Chy. Chamb.—Holmested, *Referee*.

V. Directing Issue to be Tried.

An interpleader will not be granted to try the validity of an attaching order, or to determine amount due. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb.—Draper.

Where the debt is claimed by a third party as assignee, there is no power to direct an issue to try the validity of the alleged assignment. *Kerr* v. *Fullarton*, 3 P. R. 19.—C. P.

The executor of the garnishee having on affidavit denied the debt, and imputed collusion between the judgment creditor and debtor, which was not denied, the attaching order was rescinded, and an issue directed, on payment of costs. *Ward* v. *Vance*, 3 P. R. 210—Chamb.—A. Wilson.

A suit was pending between the judgment debtor and the garnishees as to the claim sought to be attached:—Quære, as to the propriety of directing an issue, and as to the proper mode of procedure. *Bank of Toronto* v. *Burton*, 4 P. R. 56.—Chamb.—Hagarty.

A judge of the court will, when it appears proper, instead of directing an issue, himself try a question of fact arising on application before him in chambers. *Robertson* v. *Grant*, 3 Chy. Chamb. 331.—Strong.

VI. Priority of Judgment Creditors.

Although the plaintiff's judgment be subsequent to others registered as against the land sold under a mortgage, still if he first attach the surplus of proceeds of sale, he is entitled to the exclusion of the prior judgment creditors. *McKay* v. *Mitchell*, 6 L. J. 61.—C. L. Chamb.—Draper.

There is no priority in respect to debts due to a judgment debtor, in favour of any judgment creditor. *Ib.*

Several judgment creditors proceeding against the same garnishee, are entitled in the order in which their attaching orders are served, and ratably. *Tate* v. *Corporation of Toronto*, 1 P. R. 181.—C. P.

VII. Operation and Effect of.

Quære, what effect has an attaching order on the party's right to set off. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb.—Draper.

An attorney's lien for costs as between him and his client, the judgment debtor, will not be allowed to stand in the way of an attachment. *Regina* v. *Benson*, 2 P. R. 350.—Q. B. *Bank of Upper Canada* v. *Wallace*, *Ib.* 35[illegible] Chamb.—Burns.

Upon the application of a solicitor, having a lien in respect to a debt attached, the attaching order will be discharged as against him; but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien, in favour of his solicitor. *Cotton* v. *Vansittart*, 6 P. R. 96.—Chy. Ch[illegible] —Holmested, *Referee*.

Declaration for work and materials. A plea set up several attachment orders obtained by judgment creditors of the plaintiff, and

to one that it was directed that the creditor should be at liberty to proceed against defendants; and that the others were duly served upon defendant and plaintiff:—Held, bad. *McGinnis v. The Corporation of Yorkville*, 21 Q. B. 163.

VIII. Payment by Garnishee.

A garnishee is not discharged by payment to the judgment creditor merely upon the attaching order, without an order to pay. But he is, if, upon being served with a summons to pay, he forthwith pay the money into court. *Clark* v. *Clark*, 8 L. J. 107.—C. L. Chamb.—Draper.

It is no defence to an action for a debt that attaching orders have been served upon defendant for the claim, or that he has been ordered to pay it over. There must be payment on such orders, or execution levied on defendant. *Sykes* v. *Brockville and Ottawa R. W. Co.*, 22 Q. B. 209. See, contra, *Carr* v. *Baycroft*, 4 L. J. 209.—C. L. Chamb.—Burns; *McNaughton* v. *Webber*, 6 L. J. 17.—C. L. Chamb.—Draper.

Defendant having a judgment against M. and others, obtained an order on C. and others, garnishees, to pay over, after deducting any contra claim they might have. The defendant received on this order $171, by check of the plaintiff's firm, the plaintiff alone being the assignee of M.'s estate. It was afterwards discovered that the order had been for too much, and it was therefore rescinded, except as to the proper sum, which the garnishees' admitted set-off more than covered, so that nothing in fact should have been paid:—Held, that the plaintiff might recover the $171 from defendant as money had and received:—Held, also, that the fact of the payment having been made by the check of plaintiff's firm, could not prevent the plaintiff one from recovering, as the money was proved to have been the money of C.'s estate, in which the plaintiff's partners had no interest. *Sessions* v. *Strachan*, 23 Q. B. 492.

An award for an amount, together with costs, having been made in favour of a party, the costs were taxed by consent, and the amount provided to be paid to the solicitor of the party entitled to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances a motion made to stay proceedings to enforce payment of the costs under the award, at the instance of the solicitor to whom they were payable, was refused with costs. *McLean* v. *Beatty*, 1 Chy. Chamb. 138. *VanKoughnet*.

Land which had been mortgaged by the owner was taken by the township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a solicitor of the mortgagor, by whom it had been received:—Held, that the mortgagee had the first right; that his mortgage being a registered mortgage, the corporation must be taken to have purchased the land with notice of it; and that the mortgagee was entitled to recover the amount from the corporation with costs. *Dunlop* v. *City of York*, 16 Chy. 216. See *French* v. *Lewis*, 16 Q. B. 547, p. 265; *Smith* v. *Trust and Loan Company*, 22 Q. B. 525, p. 269.

See *Blevins* v. *Madden*, 11 C. P. 195, infra.

IX. Rights of Garnishee.

Where there has been a previous understanding that the garnishee should have a certain period of credit, he will not be ordered to pay until such period expires. *Harding* v. *Barratt*, 3 L. J. 31.—C. L. Chamb.—Richards.

Action on a mortgage for £309. Plea, non est factum. Second count, on a judgment in Q. B. for £78. Third count, on a judgment in this court for £128. To the last two counts the defendant pleaded, on equitable grounds, that the judgments were obtained on confessions taken by plaintiff from defendant, while the plaintiff was defendant's attorney, by fraud, and given without consideration, and by undue influence; and—after setting out two judgments in the county court, amounting to £99, recovered against the plaintiff, by C. and M. respectively, that C. and M. had each obtained an order to attach all debts due to this plaintiff from defendant to satisfy said judgment, and had issued a fi. fa. lands on which the sheriff had taken in execution lands of defendant, more than enough to satisfy the said judgments recovered by them respectively; and that said judgments were in full force and unsatisfied,—the plea alleged that the indebtedness on the judgments in the two counts alleged (if any) due to the plaintiff had been attached to satisfy the other judgments. On demurrer held bad, 1. Because pleaded in bar of the plaintiff's whole cause of action on the second and third counts, whereas it only shewed a partial answer, if good as to that. 2. That it did not shew any order requiring the garnishee to pay the judgment creditors. 3. For all that appeared on the pleas, the plaintiffs in the two attachments might issue execution and obtain satisfaction of their judgments against the present plaintiff, before defendant's lands could be sold under the executions. *Blevins* v. *Madden*, 11 C. P. 195.

X. Miscellaneous Cases.

The garnishee was indebted to the Buffalo, Brantford, and Goderich R. W. Co., (the judgment debtors), on two negotiable bills accepted by him and not yet due, and they, in order to induce R., a creditor, to release a chattel mortgage which he held against them, had promised to pay him out of the proceeds of these bills; there were also other claims by some of the directors of the company, which were to be paid in the same way. The judgment creditors obtained a summons on the garnishee to pay their claims, which was less than the amount due on the bills, and M., another creditor, subsequently obtained an order to attach the balance, but no summons had issued upon it. With the assent of the judgment creditors, the judgment debtors, and the garnishee, M. being no party to the arrangement, the acceptances were handed into court, and afterwards delivered to Z. on his paying in the money. These facts were stated on the return of the summons obtained by the judgment creditors, and the judge in chambers was asked to determine what should be done with the surplus after

paying the judgment creditors. The learned Chief Justice refused to decide this, as he had no power to determine summarily between the claimants; and held, that the money having been paid in without any authority, he could only order the surplus to be returned to the garnishee. Semble, however, that M., who had obtained an attachment order, should be preferred to R. and the directors. Semble, also, that the best course would have been for Z. to pay the claim of the judgment creditors, getting it endorsed upon the bills, and then the sum due to M., when he had obtained an order for payment. *Mellish et al.* v. *The Buffalo, Brantford, and Goderich R. W. Co.*, 2 P. R. 171.—Chamb.—Robinson.

Garnishee proceedings—Neglect of attorneys in conduct of—Action for—Priority of orders—Service of—C. L. P. Act, s. 289, et seq. *Sweetnam* v. *Lemon et al.*, 13 C. P. 534.

Held, that a creditor has a right under writ of sequestration, to compel payment by a third party of a debt which he owes to defendant against whose estate the writ issues. *McDowell* v. *McDowell*, 1 Chy. Chamb. 140.—VanKoughnet.

Until the sequestrator, or the party claiming under the writ, take steps to obtain payment of the money, the chose in action is not bound by reason of the writ being in the sheriff's hand. *Ib.*

A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money in pursuance of the report therein:—Held, that the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in this court, and payment of the proceeds towards satisfaction of the judgment. *Bank of Elgin* v. *Hutchinson*, 13 Chy. 59.

ATTACHMENT OF THE GOODS OF DEBTORS.

I. Against Absconding Debtor—*See* Absconding Debtor.

II. In Bankruptcy—*See* Bankruptcy and Insolvency.

III. From Division Court — *See* Division Court.

IV. Maliciously Issuing — *See* Malicious Arrest, Prosecution, and Other Proceedings.

ATTACHMENT OF THE PERSON.

I. When Granted.

1. *For Non-payment of Costs.*
   (a) *Generally*, 280.
   (b) *In Ejectment*—*See* Ejectment.
2. *For Contempt of Process or Orders*, 281.
3. *For non-payment of Money*, 282.
4. *For non-production of Documents or Accounts*, 282.
5. *Other Cases*, 284.
6. *Breach of Injunction*—*See* Injunction.
7. *Disobedience of Mandamus*—*See* Mandamus.
8. *Against Attorneys*—*See* Attorney and Solicitor.
9. *Against Judgment Debtors.*
   (a) *For not Appearing to be Examined under C. S. U. C. c. 24, s. 41*—*See* Bankruptcy and Insolvency.
   (b) *For not Appearing to be Examined under Division Courts Act C. S. U. C. c. 19, s. 160*—*See* Bankruptcy and Insolvency.
10. *Against Witnesses*—*See* Evidence.
11. *Against Members of Parliament*—*See* Parliament.
12. *Against Sheriff*—*See* Sheriff.
13. *For Non-performance of Awards*—*See* Arbitration and Award.

II. Practice on Moving for.

1. *Service of Rule or Notice*, 284.
2. *Other Cases*, 285.

III. Proceedings on.

1. *Setting Aside, or Motion for Discharge.*
   (a) *For Non-payment of Costs*, 287.
   (b) *Purging Contempt*, 287.
   (c) *Other Cases*, 287.

IV. Miscellaneous Cases, 289.

V. Against Defendant in Ejectment on Resuming Possession—*See* Ejectment.

VI. Maliciously Issuing Attachment—*See* Malicious Arrest, &c.

I. When Granted.

1. *For Non-payment of Costs.*

(a) *Generally.*

Where the judgment of a Court of Requests had been removed into this court by certiorari and set aside upon the application of the defendant, without any interference on the part of the plaintiff, the court refused to grant an attachment against him for non-payment of costs in removing the proceedings. *Cramer* v. *Nile*, Tay. 36.

On affidavit of a rule for payment of costs served and demanded, a rule absolute for an attachment was granted. *Rowsell* v. *Harris*, Dra. 90.

An order of nisi prius must be made a rule of court before attaching. *Plumb* v. *Miller*, 1 S. 484.

Where a judge's order for non-payment of costs has been made a rule of court, a demand must be made after it has become a rule of court. *Culver* v. *McDonell*, T. T. 7 Will. IV.

Where the demand has been made under a power of attorney, it need not be shewn that

he time of the demand a copy of the affidavit of he execution of the power was served. *Sanders v. McSherry*, 6 O. S. 191.

But it was held otherwise in earlier cases. *Marcy* v. *Butler*, E. T. 2 Vict.; *Morrison* v. *Lowden*, T. T. 2 & 3. Vict.; *Qua* v. *Holmes*, E. T. 3 Vict.; *Brewster* v. *McEwen*, E. T. 3 Vict.

Where a demand was made on the allocatur, and part paid:—Held, that no attachment could go for the residue without a new demand. *Hyatt v. Anger*, E. T. 3 Vict.

Where a rule directs costs to be paid to a party in a cause, a demand may be made by his attorney. *Kimball* v. *Ripson*, T. T. 3 & 4 Vict. C. P. C.—Macaulay.

Before attaching an over-holding tenant, under 4 Will. IV. c. 1, s. 55, for non-payment of costs, an order to pay must be served, and a demand made. *In re McLachlan*, 3 Q. B. 331.

To enforce payment of solicitor's costs, taxed upon the petition of the client, entitled in a cause depending, the proper course, under the 42nd order of V. C. Jameson's orders, is by subpœna and attachment, though such costs include costs at law. *McGill* v. *Sexton*, 1 Chy. 311.

An attachment to commit for contempt will not be granted merely for non-payment of the costs of the contempt. *Dickson* v. *Cook*, 1 Chy. Chamb. 210.—Spragge.

The court will not hold a party, who has been in contempt for not obeying an order, in gaol for non-payment of the costs occasioned by his contempt. *Pherill* v. *Pherill*, 2 Chy. Chamb. 444. —Taylor, *Secretary*.

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2. *For Contempt of Process or Orders.*

A party becoming bankrupt will not prevent his being arrested for contempt in not obeying an order of this court. *Brewer* v. *Rose*, 2 O. S. 6.

An attachment for not obeying a certiorari, will not be granted against a district county judge unless he is acting contumaciously. *In re Judge of the Niagara District Court*, 3 O. S. 437.

An order to commit to close custody for not attending to be examined pursuant to a judge's order, is to be looked upon as a commitment for contempt, not as a commitment in execution. *Henderson* v. *Dickson*. 19 Q. B. 592.

On moving to commit for a contempt in not delivering possession of mortgage premises, in obedience to an order made in pursuance of 12 Vict. c. 32 of 1853, it must be shewn that the possession was demanded. *Nevieux* v. *Labadie*, 2 Grant. Chamb. 13.—Esten.

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order, it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son, aged fifteen. They denied the motion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so, if time were given him. To the demand made for the children, the father replied that they were not in his custody:—Held, that he was not excused from obeying the order, and was in contempt. *Regina* v. *Allen*, 5 P. R. 453.—Chamb.—Morrison.

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3. *For non-payment of Money.*

A defendant in attachment for contempt for not paying over money pursuant to a rule of court, may be admitted to the limits, after being ordered to be committed upon his answers to interrogatories. *Rex* v. *Kidd*, 4 O. S. 415.

The court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one guilty of a contempt of court, it may imprison him for a stated period, allowing him to be discharged if he pay the costs of his contempt before the expiration of such period. *Harris* v. *Myers*, 1 Chy. Chamb. 229. —VanKoughnet.

The court will not commit for disobeying a decree, where the disobedience is in effect the non-payment of money. *Male* v. *Bouchier*, 1 Chy. Chamb. 359; *S. C.* 2 Chy. Chamb. 254.—Spragge.

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4. *For non-production of Documents or Accounts.*

Where a party neglects to comply with the terms of an order for the production of books and papers, the proper mode of proceeding is to serve personally a notice of motion to commit. *Paterson* v. *Bowes*, 4 Chy. 44.

A party in contempt to an attachment for not bringing accounts into the master's office on a reference, afterwards filed the same, but neglected to pay the costs of his contempt, and an ex parte order to remove the accounts so brought in from the files, in order to proceed against him for the contempt, was granted. *Corbett* v. *Meyers*, 1 Chy. Chamb. 26.—Spragge.

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption. *Maughan* v. *Wilkes*, 1 Chy. Chamb. 91.—Spragge.

A married woman, a defendant, living with her husband, was ordered, as administratrix of a former husband, to bring certain accounts into the Master's office, in a suit in which her husband was joined as a co-defendant. On an application to commit her for disobedience of the order, it was contended that the rule laid down in Maughan *v.* Wilkes, 1 Chy. Chamb. 91, that the husband must answer for his wife's default unless he shewed some ground of exemption, was in effect abrogated by 35 Vict. c. 16, O., which renders married women liable for their separate engagements in certain cases:—Held, that sec. 8 of that act was not applicable in the present case, where the marriage took place before the passing of the act, and that the other sections did not affect the rule. It was also contended that the reason for the rule in this instance was wanting, as it was shown that the married woman was a woman of great force of character,

and not in fact under the control of her husband: —Held, that the husband must satisfy the court that he has used his best endeavours to get his wife to obey the order before he will be discharged from his liability to attachment. *Murcheson* v. *Donohoe*, 10 L. J. N. S. 106.—Chy. Chamb. —Holmested, *Referee*.

A party neglecting to produce accounts before the master when so required, will be ordered to pay the costs occasioned by his contempt, although no commitment has taken place. The notice required by section 6 of general order 46, is not necessary in cases of orders nisi for non-production. *Berrie* v. *Moore*, 1 Chy. Chamb. 107.—Spragge.

Where an order nisi has been duly served to enforce the filing of accounts in the master's office, and accounts are filed, but the master certifies that they are insufficient, it is the practice to grant an order absolute ex parte; but if asked, an opportunity will be given to shew the sufficiency of the accounts. *Spencer* v. *Leeming*, 1 Chy. Chamb. 186.—VanKoughnet.

Where, on an application for not bringing in accounts in a Master's office, for an order nisi, on the ground that the accounts brought in were insufficient, it appeared that the insufficiency consisted in the items being undated, the order nisi was refused. In such case, before applying a warrant should be obtained from the master, calling upon the parties to bring in better accounts. *Merkley* v. *Casselman*, 1 Chy. Chamb. 292.—Spragge.

A notice of motion for an order absolute for non-production in the registrar's office, under order 31 of the 6th of February, 1865, requires personal service, by analogy to the former practice by order nisi. *Dickson* v. *Dickson*, 1 Chy. Chamb. 366.—VanKoughnet.

A party parting with papers after service on him of an order to produce was ordered to produce them, to file a better affidavit, and pay costs. *Ross* v. *Robertson*, 2 Chy. Chamb. 66.—Taylor, *Secretary*.

Where a party is in contempt for not bringing in accounts, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into. *Clancy* v. *Patterson*, 2 Chy. Chamb. 217.—Spragge.

On a motion to commit for non-production of certain documents after an insufficient affidavit on production has been filed, it is not absolutely necessary that the notice of motion should specify what is demanded in addition to what has been produced, though the court considered such the better course. On such a notice the court will grant the more limited relief, and order further production, but without costs. *Fisken* v. *Smith*, 2 Chy. Chamb. 491.—Mowat.

When a party has been committed for not bringing in accounts, and it is shewn by certificate that the accounts have since been brought in, it cannot be urged on a motion for his discharge that the accounts are insufficient. Nor will the payment of costs be made a condition precedent to his discharge. *Clark* v. *Clark*, 3 Chy. Chamb. 67.—Taylor, *Secretary*.

See II. p. 284.

5. *Other Cases.*

An attachment for refusing to swear to the execution of a cognovit will not be granted until a rule has been served on the witness ordering him to do so, and has been disobeyed. *Hans* v. *Ham*, 3 O. S. 176.

The judge at nisi prius declined to commit a witness for not answering questions, when it was sought to elicit the admission of facts importing a scandal upon himself. Besides, the judge thought the witness intoxicated, and by no means able to give evidence at all. *Doe Mar* v. *Marr*, 3 C. P. 36.

No attachment will lie for not making a return to a peremptory mandamus. It should be for not obeying the writ. *Regina* v. *The Trustees of School Section* 27, *in the Township of Tyendinaga*, 3 P. R. 43.—C. L. Chamb.—Burns.

The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi directed to H., to deliver up to him the books and papers: that he went to the office with two constables in H.'s absence, and demanded the keys of his wife, reading what purported to be a peremptory mandamus as his authority (it being only a mandamus nisi), but refusing to allow her or her solicitor to examine it; and they then took away the books, &c. Upon these affidavits the court granted a rule nisi for an attachment against M., but refused it against the constables there being nothing to shew that they were aware of the fraud. *In re McLay et al.*, 24 U. B. 54.

A solicitor whose costs have been taxed on the application of the client, and not paid, a fi. fa having been returned nulla bona, is entitled to an order for an examination of the client, touching his estate and effects. *Re Blain, a Solicitor*, 1 Chy. Chamb. 345.—Mowat.

II. Practice on Moving for.

1. *Service of Rule or Notice.*

A rule nisi for an attachment must be personally served, and the original shewn. *Cry* v. *Campbell*, 1 Q. B. 416.—P. C.—Jones.

A notice of motion for an order absolute under order 31 of 6th February, 1865, must be served at least four clear days before its return, by analogy to the former practice by order nisi. *Kelly* v. *Smith*, 1 Chy. Chamb. 364.—VanKoughnet.

The notice of motion to take an affidavit of production off the files, and to commit for contempt, should be served on the defendant's solicitor, not on defendant personally. *Ross* v. *Robertson*, 2 Chy. Chamb. 66.—Taylor, *Secretary*.

Service of notice of motion on the solicitor of the party charged with contempt, is good service. *Gourlay* v. *Bell*, 2 Chy. Cham. 158.—Taylor, *Secretary*.

On a motion to commit for disobedience of order of a master it will be insufficient for the members to prove by any other means than the certificate of the master, the service of the order and that it has not been complied with, as the master is the proper person to decide both these facts. *Paxton* v. *Dryden*, 6 P. R. 83.—Chy. Cham.—Holmested, *Referee*.

2. *Other Cases.*

The rule for attachment for non-payment of money awarded is properly a four, not a six day rule. *Jones* v. *Reid*, 1 P. R. 247.—P. C.—Burns.

An attachment for not obeying an order to appear and be examined as to debts, cannot be issued in vacation. *Greene* v. *Wood*, 2 P. R. 165.—Chamb.—Robinson.

An attachment for not obeying a writ of mandamus must be tested in term, on the same day as the rule on which it issues. *Regina* v. *The Trustees of School Section No. 27, in the Township of Tyendenaga*, 3 P. R. 43.—Chamb.—Burns.

The rule nisi called upon the trustees of school section number 27 in the township of Tyendinaga, in the county of Hastings, to shew cause why an attachment should not issue against them. On an affidavit of service of this rule on A. B. and C., stating them to be trustees of said section, a rule absolute was granted following in form, and thereupon an attachment issued against A., B. and C. :—Held, bad, as not warranted by the rules. *Ib.*

A mandamus nisi having been directed to "M. treasurer of Belleville," and an attachment being moved for after he had ceased to be treasurer for not making a return to the same :—Held, that the proper direction would have been "to the treasurer," &c. generally, though the personal direction was not absolutely wrong, but as S. had ceased to hold the office, the attachment must be refused. *Burdett* v. *Sawyer*, 3 P. R. 398.—P. C.—Burns.

A writ of attachment for contempt in not obeying the original order to deliver up the custody of children, under C. S. U. C. c. 74, was moved against for irregularity :—Held, that it was unnecessary to make the order for delivery of the children a rule of court before bringing the father to contempt, but that the proceedings should have been moved into and adopted by the court before an attachment could issue from it ; and that this attachment therefore was irregular. *In re Allen*, 31 Q. B. 459.

Per Wilson, J.—The judge could by his own order have attached the party. *Ib.*

Held, also, that such attachment was properly signed and sealed by the clerk of the process, and issued by the clerk of the crown. *Ib.* See, also, *Wakefield* v. *Bruce*, 5 P. R. 77.—Chamb.—Hagarty.

A warrant to the sheriff to commit a person is irregular, though no return day is mentioned in it. *Prentiss* v. *Brennan*, 1 Chy. 55.

Where a plaintiff endorses on the copy of the bill served on the defendant the notice required by the 75th (old) order of this court, he cannot afterwards proceed by attachment to compel an answer. *Meyers* v. *Robertson*, 1 Chy. 55.

An application to commit a witness for refusing to sign depositions made by him, will not be granted ex parte. *Blain* v. *Terryberry*, 1 Chy. Chamb. 255.—Spragge.

A party moving to make an order nisi for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either party named in the order. *Dick* v. *McNab*, 1 Chy. Chamb. 31.—Blake.

Where an order to commit is sought for the non-execution of a conveyance directed to be kept at a solicitor's office for execution, it must be shewn that it was accessible for execution in such office. *Bell* v. *Miller*, 1 Chy. Chamb. 370. Spragge.

It is not necessary to state in a notice of motion that a certificate of an officer of the court will be read in support of the application. Such certificate can be read though no such notice be given. *Malloch* v. *Plunkett*, 1 Chy. Chamb. 381.—Spragge.

Where an order is complied with after service of notice of motion to commit for disobedience of it, and before the motion comes on, an order to commit will not be granted, but the party will be required to pay to the applicant the costs of the motion within twenty-four hours after the amount has been settled. *Ib.*

Four day's notice must be given of a motion to commit. *Gray* v. *Hatch*, 2 Chy. Chamb. 12.—Mowat. *Broughall* v. *Hector*, 2 Chy. Chamb. 434.—Taylor, *Secretary.*

Motion for attachment must be on notice. *Morphy* v. *Feehan*, 2 Chy. Chamb. 53.—Taylor, *Secretary.*

Motions for orders to commit for non-production are properly made in chambers. *Ross* v. *Robertson*, 2 Chy. Chamb. 66.—Taylor, *Secretary.*

The court will entertain applications affecting the liberty of the subject during long vacation. *Harris* v. *Myers*, 2 Chy. Chamb. 229.—Van-Koughnet.

Poverty is no excuse for delay in making an application to the court, as in such case the party can apply in forma pauperis. *Ib.*

Where notice of motion had been given of an application to commit for not bringing in accounts, and four days intervened between the service and the motion, one of which was Good Friday, during which the master's office had been closed, the secretary refused the application without costs. *Wilson* v. *Gould*, 2 Chy. Chamb. 236.—Taylor, *Secretary.*

A motion for production, with the alternative that the party be committed in default, being substantially a motion to commit, requires four clear days' notice. *Abel* v. *Hilts*, 9 L. J. N. S. 363.—Holmested, *Referee.*

A party is not in contempt for non-compliance with an order of court until the opposite party by some step brings him into contempt ; if such party omits this, he cannot urge the contempt in bar to a proceeding by the party so in default, or urge it in extenuation of his own laches. *Gillespie* v. *Gillespie*, 2 Chy. Chamb. 267.—Van-Koughnet.

A party moving to commit for disobedience of any order or direction of a master, must shew by means of a certificate of the master, that the person moved against has disobeyed the order, and is in default. *Paxton* v. *Dryden*, 6 P. R. 83.—Chy. Chamb.—Holmested, *Referee.*

It will be insufficient in chambers to prove by any other means the service of the order, and that it has not been complied with, as the master is the proper person to decide both these facts. *Ib.*

III. Proceedings on.

1. *Setting aside or Motion for Discharge.*

(a) *For non-payment of Costs.*

Where on granting an attachment against a plaintiff for non-payment of costs pursuant to a rule, several objections were taken and overruled:—Held, that after the plaintiff's arrest under the attachment he could not take objections to the arrest which might have been urged on shewing cause. *Regina* v. *Hyatt*, T. T. 4 & 5 Vict.—P. C.—Macaulay.

A defendant in custody on an attachment for non-payment of costs, is not entitled to his discharge under 5 Will. IV. c. 3, in the same manner as if he were in custody in execution for costs. *Wilson* v. *Dillingham*, 6 O. S. 537.

An attachment for non-payment of costs pursuant to the consent rule in ejectment is not a writ of execution, and a party taken under it is not entitled to be discharged from custody as having been illegally arrested under 5 Will. IV. c. 3, s. 2, which abolishes writs of execution issued on a judgment entered for costs only. *Regina* v. *Kelly*, 6 O. S. 152.

Where expenses have been vexatiously incurred in a suit by the attorneys on both sides, the court to protect the client will order an attachment for non-payment of costs, though regular, to be stayed without costs, upon payment of the money due. *Regina* v. *Cameron in Playter* v. *Cameron*, 4 Q. B. 165.—P. C.—Macaulay.

When on the taxation of a solicitor's costs the master, without any order as to the costs of taxation, taxed them, and included them in his certificate, and a subpœna and attachment issued in due course for the whole amount in such certificate, and the client remained in close custody for a considerable time under the attachment, before applying in regard to the supposed error, the court refused to set aside the subpœna and attachment. *McGill* v. *Sexton*, 1 Chy. 311.

(b) *Purging Contempt.*

Where a party is in contempt for not bringing in accounts, it is a sufficient clearing of his contempt to bring in such accounts, and the sufficiency of them will not be looked into. *Clancy* v. *Patterson*, 2 Chy. Chamb. 217.—Spragge.

It is a sufficient clearing of contempt if a party has done the act ordered and paid the costs. An order of court clearing his contempt need not be made unless he has been in custody. *Duncan* v. *Trott*, 2 Chy. Chamb. 487.—Taylor, *Secretary.*

(c) *Other Cases.*

Where defendants had been brought into court upon an attachment, although they cleared themselves upon interrogatories of the imputed contempt, the court refused to allow costs against the prosecutor, even although he had omitted a fact in his affidavit which might have affected their granting the attachment, and although one of the affidavits upon which the attachment was moved for was not filed early enough for them to answer by a counter affidavit. *Rex* v. *McKenzie et al.*, Tay. 70.

An affidavit to set aside an attachment must be intituled on the crown side, and not in the names of the parties to the suit. *Mallock* v. *Morris*, T. T. 1 & 2 Vict.

Even although the attachment ordered has not issued. *Garland* v. *Burrowes*, T. T. 3 & 4 Vict. —P. C.—Macaulay.

A party moving under 7 Vict. c. 3, s. 8, for his discharge from custody, must shew that he is in contempt for non-payment of money; and the notice of intention to move must be served on the opposite party, not on his attorney. *Garneson* v. *Balkwell*, 1 Q. B. 2.

Where a verdict was taken at nisi prius subject to a reference, and the reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity, a defendant, against whom the award was, did not move in the court in the proper time, but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which attachments writs of habeas corpus were subsequently issued: the court refused to set aside those writs, or suspend proceedings upon them. *Regina* v. *Maddock et al.* 1 Q. B. 322.

Quære as to the right of a defendant in contempt for non-appearance to a subpœna issued on an information of intrusion, but not actually arrested, to move quia timet to set aside the process issued against him. *Attorney General* v. *McLachlin*, 5 P. R. 63.—P. C.—A. Wilson.

A writ of attachment for contempt in not obeying the original order of a judge to deliver up the custody of children, under C. S. U. C. c. 74, was by order of a judge issued from the Court of Queen's Bench; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it, he could not be heard; but Held, that he might nevertheless defend himself by objections to the process if irregular. *Re Allen*, 31 Q. B. 458.

An amendment of a bill by adding parties requiring no answer from defendant, is a waiver of process of contempt for want of answer; and on an ex parte motion the defendant will be discharged. *Thrasher* v. *Connolly*, 1 Chy.

A defendant in equity appealed from an order directing his committal for a breach of an injunction, and moved the court to stay proceedings under the order pending the appeal, which was refused. *Gamble* v. *Howland*, 3 Chy.

The court will entertain applications affecting the liberty of the subject during long vacation. *Harris* v. *Myers*, 1 Chy. Chamb. 228.—Koughnet.

It is improper to have recourse to an attachment when the object can be obtained without it. Where, therefore, a party who was directed to execute a conveyance had come into court to execute it, although after the proper period, the plaintiff's solicitor knowing these facts

attachment, it was set aside with costs. *Mason* v. *Seeney*, 2 Chy. Chamb. 220.—Spragge.

The fact that a defendant had put in an insufficient affidavit on production, is no bar to his moving to dismiss the bill. *Gillespie* v. *Gillespie*, 2 Chy. Chamb. 267.—VanKoughnet.

A direction to do an act "forthwith" is a sufficient compliance with orders 288 and 293. Where under an order so endorsed a party was attached for disobedience, the attachment was held to be irregular. Where the attorney of the parties directed to confess judgment at law, had been arrested for disobedience as well as the parties; he was discharged. *Wallace* v. *Acre*, *Livingston* v. *Acre*, 2 Chy. Chamb. 392.—Spragge.

IV. Miscellaneous Cases.

Attachment lies against commissioners of Courts of Requests who try causes in which they have an interest though remote. *Rex* v. *McIntyre et al.*, Tay. 22.

An attachment was granted against a deputy clerk of the crown for having issued serviceable process without authority; and afterwards, on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings. *Ex parte* v. *Fraser*, 3 O. S. 247.

A prisoner in custody for contempt, may have the benefit of the limits. *Rex* v. *Kidd*, H. T. 4 Will. IV.

Owing to a mistake in the crown office a rule to return the writ of certiorari to remove a conviction, and afterwards a rule for an attachment issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months should be held to run only from the time of quashing the conviction. *In re Joice*, 19 Q. B. 197.

A party arrested upon an attachment issued out of this court, is entitled to the benefit of the bail limits, on production to the sheriff of the certificate from the clerk of the crown of bail having been filed according to the provisions of 4 & 11 Vict. c. 15, which places prisoners in custody upon such attachment on the same footing as debtors. *Davis* v. *Casper*, 1 Chy. 354.

A bond to the limits may be taken on an attachment for non-payment of money, and may be assigned. *Montgomery* v. *Howland*, E. T. 2 Vict.

Quære, is an attachment of privilege at the suit of an attorney within the 9th clause of 2 Geo. IV. c. 1. And quære, would this doubt, the want of an affidavit being annexed to a writable process, prevent the defendant, a consable, from having the benefit of the 21 Jac. I, as to the point of venue. *Brown* v. *Sheet*, 5 Q. B. 141.

A sheriff is liable to an action for the escape of a party attached for contempt of court in not performing an award, and it is not necessary in order to this action that the party should be brought up on the return of the writ of attachment and formally committed by the court. *Bailey* v. *Smith*, 4 Q. B. 181.

Semble, that the omission by the plaintiff to aver that the sheriff had not the party before the court at the return of the writ of attachment, though not bad on general would be bad on special demurrer. *Ib.*

Semble, that before the return of a writ of attachment for contempt the sheriff cannot properly take bail for the appearance of a party, without the order of a judge; but after the return, if the party be upon attachment merely to compel the payment of money, the sheriff as of course may take bail to the limits. *Lane* v. *Kingsmill*, 6 Q. B. 579.

Semble, that if an attachment for contempt in not paying moneys is to be regarded as mesne process, it should be averred in a declaration for an escape that the sheriff had not the party in court to answer the exigency of the writ; and if the attachment is to be regarded as an execution, Semble, it then requires something in the nature of a judgment to support it. *Ib.*

The merely averring that the plaintiff sued out an attachment for contempt, without stating what the contempt consisted in, or by what authority it had been determined the party was guilty of contempt, is insufficient; a good legal foundation for the attachment must be shewn on the record. *Ib.*

Where upon application to commit a defendant to gaol under the 22 Vict. c. 96, s. 13, the judge ordered a ca. sa. to issue instead, as allowed by that section, and the defendant thereupon gave bail to the limits:—Held, that he could not again be committed to close custody under the first alternative of the same clause. *Perrin* v. *Bowes*, 2 P. R. 348.—P. C.—Burns.

ATTAINDER.

The property of a person attainted for high treason, is not forfeited until the attainder is complete. Quære, as to the effect of a defendant becoming attainted between the seizure and sale of his goods under a fi. fa. *Eastwood* v. *McKenzie*, 5 O. S. 708.

Semble, that the wife of an attainted traitor cannot defeat the recovery in ejectment of the purchaser at sheriff's sale, in an action against the traitor on a bond entered into before his attainder, by setting up the title by forfeiture in the crown, which the crown had foreborne to assert. *Doe* d. *Gillespie* v. *Wixon*, 5 Q. B. 132.

The estate of a traitor concerned in the rebellion of 1837, and who accepted the benefit of the provincial statute 1 Vict. c. 10, is at once by such acceptance as much vested in the crown, under the operation of 33 Hen. VIII. c. 20, s. 2, without office found, as afterwards. *Ib.*

Though by 33 Hen. VIII. c. 20, the crown, in case of attainder for high treason, would be deemed in actual possession without any inquisition of office, yet such lands would only vest in the commissioners under 59 Geo. III. c. 12, as should be found by inquisition to be vested in the crown, and therefore no more land could possibly pass by a deed from the commissioners than the inquisition had found the traitor seized of. And held, that the inquisition could not support the conveyance which the commissioners

made; for it referred to nothing which could supply proof of identity, and the commissioners were not warranted in going beyond the inquisition. And semble, that the inquisition was void for want of certainty. *Doe* d. *Sheldon* v. *Ramsay*, 9 Q. B. 105.

A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect such portions of his estate as had not been already declared forfeited, and been sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted: provided, always, that nothing in the act contained should affect any property sold or conveyed by the commissioners of forfeited estates, or any public officer acting for the crown in that behalf, but that such property should remain as if the act had not been passed. In the preamble it was recited that a part of the estate had been taken upon inquisition and seized by the crown:—Held, that the plaintiffs, claiming as devisees of A. S., must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe* d. *Stevens* v. *Clement*, 9 Q. B. 650.

ATTESTATION.

I. Of Cognovit—*See* Cognovit.

II. Of Wills—*See* Will.

ATTESTING WITNESS.

See Evidence.

ATTORNEY AND SOLICITOR.

I. Articled Clerks.
1. *Service under Articles*, 293.
2. *Discharge from Articles*, 293.
3. *Application for Admission*, 294.

II. Certificate and Persons Disqualified, 294.

III. Privileges of Attorneys, 295.

IV. Change of Attorneys, 295.

V. Agent of Attorney, 296.

VI. Proceedings against and Liabilities of.
1. *On Undertakings*, 297.
2. *For Acting without Authority.*
(a) *Production of Authority*, 298.
(b) *Liability*, 298.
(c) *Effect of*—*See* Practice at Law.
3. *For Negligence.*
(a) *In Conduct of Causes or discharge of Duties*, 300.
(b) *In Investigating Titles and Registering Instruments*, 304.
(c) *When a Defence to Claim for Costs*, 305.
(d) *Other Cases*, 306.
4. *To Summary Jurisdiction.*
(a) *For not Paying over Moneys*, 30
(b) *Answering Affidavits*, 308.
(c) *Striking off the Rolls*, 308.
(d) *Other Matters*, 309.
5. *For Sheriff's Fees*, 310.
6. *Other Cases*, 311.
7. *To Actions of Trespass*—*See* Trespa

VII. Authority, 313.

VIII. Duties.
1. *Retainer*, 315.
2. *Conduct and Management of Busi*
(a) *Vexatious Conduct*, 315.
(b) *Other Cases*, 316.
3. *Dealing with Client*, 318.
4. *Other Cases*, 322.

IX. Bill of Costs.
1. *Signing and Delivery*, 322.
2. *Agreements as to Costs*, 325.
3. *Reference to Taxation or Revision.*
(a) *Who may Apply*, 325.
(b) *What may be Referred*, 326.
(c) *Time of Reference*, 327.
(d) *After Twelve Months or Settle* 327.
(e) *Proceedings to Tax*, 328.
(f) *What Recoverable*, 329.
(g) *Disputing Retainer*, 330.
(h) *Costs of Taxation*, 331.
(i) *Other Cases*, 331.
(j) *Costs between Party and Pa* *See* Costs.
4. *Recovery by Action.*
(a) *Statute of Limitations*, 332.
(b) *Other Cases*, 332.
5. *Taking Security for Costs*, 334.
6. *Other Cases*, 334.

X. Lien for Costs.
1. *To What Extent*, 334.
2. *When Lost*, 335.
3. *Set-off of Costs*, 336.
4. *Settlement of Suits by Clients*, 336.
5. *Other Cases*, 337.

XI. Miscellaneous Cases, 338.

XII. Other Matters.
1. *Name of in Notice of Action*— Action.
2. *Swearing Affidavits*—*See* Affida
3. *Execution of Cognovit*—*See* Cog
4. *Confidential Communication*—*Se* dence.
5. *Attorney and Solicitor General*—*S* torney and Solicitor Ge
6. *Barristers*—*See* Barrister.
7. *County Attorney*—*See* County A ney.
8. *Power of Attorney*—*See* Princip Agent.

I. Articled Clerks.

1. *Service under Articles.*

An articled clerk can serve only one year with agent of the attorney in this Province. *re Gilkison*, H. T. 7 Will. IV.

Where an articled clerk carries on business in place where the master does not reside, the so spent will not be computed in his ser- *McIntosh* v. *McKenzie*, M. T. 1 Vict.

An attorney was struck off the rolls, where it shewn on affidavit that during the entire riod he was under articles he was a salaried k attending a public office. *In re Ridout*, T. 2 & 3 Vict.

A clerk having served four years, obtained his ster's consent to go to Ireland for the benefit his health, intending to return in six months, his health still continuing bad, he with his ster's permission remained six months longer. court on his return admitted him as an rney. *In re Hagarty*, 6 O. S. 188.

On an application for an attachment against ttorney for having improperly granted a cer- ate of actual service to A. B., an articled k, when he had been absent from his service account of ill health for nearly two years, at he was under articles, and to strike A. B. the rolls, on which he had been admitted e than two years before, the court refused rules, on the ground of the long time that elapsed since the clerk's admission as an at- ey; but they made his master pay the costs he application. *In re Holland*, 6 O. S. 441.

he applicant, in 1847, articled himself to J. an attorney, then in partnership with E. J. ovember, 1850, J. M. went to England and not return: in February, 1852, his partner- with E. J. was dissolved. In March, 1852, clerk articled himself, of his own accord, to for the residue of his five years—J. M. not enting to this arrangement. The court would allow the time served with the last master. *parte McIntyre*, 10 Q. B. 294.

having been articled on the 21st November, for five years, was permitted to be absent g 1855 for six months, under the belief that period would be allowed. This he at a grammar school preparing for the versity. He was afterwards absent for and five weeks respectively in 1856, to re for his examination at the University:— that the six months could not be allowed, that the other periods might be. *In re* , 19 Q. B. 373.

attorney agreed with a clerk to take him partnership at the expiration of his articles, that his share in the profits should com- e from the date of his articles. The evi- did not shew that the clerk had been ed. A separation took place, and an was brought for compensation for services: d, within 22 Geo. II. c. 46, which is in here, although repealed in England, and he action was not maintainable. *Dunne* v. *y*, 11 C. P. 404.

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2. *Discharge from Articles.*

court ordered a clerk's discharge, the y refusing to release him or assign the . *In re Patterson*, 18 Q. B. 250.

A clerk articled to an attorney who absconds, will be discharged. *In re McGregor*, 15 C. P. 54.

Delivery of a copy of the rule nisi to the attorney's town agent, and leaving copies at the attorney's last place of residence, and at his office:—Held, sufficient service. *Ib.*

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3. *Application for Admission.*

A person was admitted upon his own affidavit of service, the attorney being absent from the province. *Radenhurst, ex parte*, Tay. 138.

A certificate from the master, and an affidavit of the clerk "that he had during his clerkship done everything required of him," was held not sufficient. *Lyons, ex parte*, Tay. 171.

Where an attorney's clerk had lost his articles, he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *In re Loring*, M. T. 2 Vict.

The time of a clerk articled after the 1st of July, 1858, must expire fourteen days before the term of his admission, for the affidavit of service cannot be accepted at a later period. Where, therefore, M. was articled for a year on the 25th of January, 1860, and H. T. began on the 4th of February, 1861:—Held, that he could not be admitted in that term. *In re MacGachen*, 20 Q. B. 321.

II. Certificate and Persons Disqualified.

A solicitor in the sheriff's court in Scotland is not entitled to be admitted on proof of service here for three years, under 7 Will. IV. c. 15. *In re Macara*, 2 Q. B. 114.

The penalty of £4 for omitting to take out a certificate in proper time, is payable in each court. Quære, as to the amount to be paid for his certificates, where the attorney has allowed the time specified for the courts of C. P. and Chancery to pass, but not for Q. B. *Re Latham* v. *The Law Society*, 9 Q. B. 269.

To a declaration against a County Court judge under C. S. U. C. c. 15, s. 5, as amended by 29 Vict. c. 30, to recover the penalty imposed for acting as an attorney and conveyancer, and preparing documents for one G. to be used in a court. Defendant pleaded that he did not practice in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said Surrogate Court. The evidence showed that defendant prepared gratuitously for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband:—Held, that the second plea was proved, and a verdict was therefore entered for defendant on the leave reserved. Per Draper, C. J. of Appeal, and Morrison, J., the evidence did not bring defendant within the spirit of the act, or the mischief against which it was directed, which was the doing the acts prohibited for profit. *Allen* v. *Jarvis*, 32 Q. B. 56.

Local masters and deputy registrars of the Court of Chancery are not at liberty to practise in partnership with solicitors practising in this court, although they may not actually share in

the emoluments of suits. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

A county attorney practising only as such need not take out a certificate. *Re Coleman*, 33 Q. B. 51.

See *Rex* v. *Bidwell*, Tay. 487, p. 311.

III. Privileges of Attorneys.

Where to a plea in abatement of privilege as an attorney, the plaintiff replied process issued against him and others, under 5 Will. IV. c. 1, (restraining several actions on bills, notes, &c.,) and that the others could not be served, &c., a demurrer to the replication was overruled. *Richmond* v. *Campbell*, M. T. 2 Vict.

An attorney coming to court in term on professional business which has been disposed of, is not privileged from arrest in execution. *Stronbridge* v. *Davis*, M. T., 2 Vict.

An attorney has no privilege from arrest on attachment for contempt of court. *Re McIntyre one &c.*, 2 P. R. 74.—Chamb.—Burns.

An attorney cannot act at a trial both as an advocate and a witness. *Benedict* v. *Boulton*, 4 Q. B. 96. See *Cameron* v. *Forsyth*, 4 Q. B. 189.

Per Macaulay, J., and Jones, J.—Attorneys, not being barristers, cannot, as of right, be heard as advocates in the District Courts. (Robinson, C. J., diss.) *In re Lapenotiere*, 4 Q. B. 492.

Held, that County Court judges cannot allow attorneys who are not barristers to practice before them as advocates in County Courts. *In re Brooke*, 10 L. J. 49.—C. C.—Jones.

As to the right of an attorney to insist on taking part in proceedings at an inquest. *Agnew* v. *Stewart*, 21 Q. B. 396.

No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in the Division Courts. *In re Judge of the County of York*, 31 Q. B. 267. But see 35 Vict. c. 8, O., since passed.

IV. Change of Attorneys.

It is no ground of objection to a notice of action against a magistrate, that the plaintiff declared by a different attorney from the one by whom notice was given and process issued. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Semble, that a notice of trial cannot be said to be irregular, because A., one of two partners as attorneys, signs the notice of trial as the plaintiff's attorney, although B., the other partner, appeared as the attorney on the record, there having been no order to change the attorney. *Gamble* v. *Rees*, 7 Q. B. 406.

Where the attorney for plaintiff died after service of replication, and before service of notice of trial, and a new attorney, signing himself plaintiff's attorney, gave notice of trial without a notice of the appointment of a new attorney having been previously given, the notice of trial was set aside with costs. *Steel* v. *Manning*, 8 L. J. 167.—C. L. Chamb.—Richards.

J., an attorney, sued out a writ for the plaintiff, an infant. Next day it was agreed that B. should be substituted as attorney, and the plaintiff's agent, with J. and B., went to the crown office, where, with the permission of the clerk, J.'s name was struck out and B.'s name inserted in the præcipe. The same change was made in the writ and copy before service:—Held, that the alteration was unauthorized, and that the copy and service must be set aside. *O'Reilly* v. *Vanevery*, 2 P. R. 184.—Chamb.—Richards.

On the death of an attorney in a suit it is only necessary to notify the other side of his death, and the appointment of another in his place. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.—Chamb.—Draper.

This court will order a party's solicitor to be changed without any condition as to paying the solicitor his costs. *Meyers* v. *Robertson*, 1 Chy. 439.

The common order to change the solicitor is obtainable as of course on præcipe. *In re Myles*, 1 Chy. Chamb. 199.—Esten.

On an appeal from a Master's report, it was objected that the solicitors appealing were not the solicitors who proved the claims before the master:—Held, that the solicitor might be changed without order, that being the English practice in 1837, when it came into force, and having no order to the contrary. *Bailey* v. *Bailey*, 2 Chy. Chamb. 57.—VanKoughnet.

V. Agent of Attorney.

Service on the agent in the cause, though not the general agent, is good. *Crooks* v. *Davis*, O. S. 141.

Where money by the award is to be paid to the plaintiff, or to the plaintiff's attorney, the attorney cannot substitute another attorney under him to receive the money. *Macer* v. *Chambers*, 4 Q. B. 171.—P. C—Macaulay.

A defendant, sued in the county of W. worth, but who lived in York, employed an attorney in Toronto to defend him, who instructed another attorney in Hamilton to enter an appearance; a declaration was then delivered to the attorney in Hamilton, and declined. An interlocutory judgment was signed and damages assessed. An application to set these proceedings aside did not shew that a copy of the declaration had not been served by affixing a copy at the county office:—Held, that upon this omission, and for other reasons, the summons must be discharged. *Hamilton* v. *Brock*, 1 Chy. Chamb. 257.—Macaulay.

Held, that an application on the part of an attorney resident in the country, made to set aside a notice of trial served on his [illegible] agent as irregular, and made within eight days after such service, is not too late. *Mills* v. *Culver*, 10 L. J. 159.—C. L. Chamb.—Wilson.

The fact that a man employed another to do a specified act for him at a particular time raises no presumption whatever that the person so employed has authority to do a similar act at a different time. *Smith* v. *Roe*, 1 L. J. 154.—C. L. Chamb.—Hagarty. See *Wood* v. *McKinstry*, 21 Q. B. 622, p. 338.

Where defendant's attorney, living at St. Thomas, sent an appearance to B. of London, whence the writ of summons issued, to enter there for him, which was done, and on the 24th January plaintiff's attorney served the declaration and demand of plea on B., which did not reach defendant's attorney till the 25th January :—Held, that although B. had twice entered appearances in like manner for defendant's attorney, B. was not to be deemed his general agent to accept service of papers ; and therefore that the time for pleading did not count till the 25th January, when the declaration and demand of plea were received by defendant's attorney, at St. Thomas :—Held, also, that the receipt of the declaration and demand of plea by defendant's attorney from B. and sending a plea to him to be filed and served, was not a ratification of the service on B. as his agent. *Ib.*

A summons cannot be taken out by an agent for one attorney and served on himself as agent for another attorney. *Ontario Bank* v. *Fisher*, 1 P. R. 22.—C. L. Chamb.—A. Wilson.

In applications of strict technical right it will not be assumed that an affidavit made by "the agent" of a person is by his professional Toronto agent, and that such person is a practising attorney. *Leslie* v. *Foley*, 4 P. R. 246.—P. C.—Harrison.

The agent of a solicitor has a lien on the papers or on a fund recovered against his principal, and to the same extent against the principal's client, and such client is justified in paying the agent so as to discharge such lien and obtain his papers. *Re Cross*, 4 Chy. Chamb. 11.—Taylor, *Referee*.

Where the client had paid the Toronto agent, who retained the bulk of the funds recovered on account of his agency bill, and offered the principal the balance, who refused it and issued execution against the client for the whole amount ; the execution was stayed with costs. *Ib.*

The agency charges in this case were wholly for work in the suit in which the client was a party; Sed quære, would the solicitor's lien attach for the amount of his agency bill generally. *Ib.*

Held, that the "two clear additional days to the time now allowed by law" for service on the agent of a country attorney under 34 Vict. c. 5, s. 12 O., means the insertion of two days between the day of service and the day of the happening of the event to which the notice relates. *Nordheimer* v. *Shaw*, 6 P. R. 14.—C. L. Chamb.—Dalton, *C. C. & P.*, Galt.

See *In re McGregor*, 15 C. P. 54, p. 294 ; *Taylor, A. & B.*, 1 L. J. N. S. 300, p. 307 ; *Re Robertson*, 5 P. R. 132, p. 307 ; *Herr* v. *Toms*, 3 P. R. 423, p. 303 ; *Re Geddes and Wilson*, 2 Chy. Chamb. 447, p. 325.

PROCEEDINGS AGAINST AND LIABILITY OF.

1. *On Undertakings.*

Where a declaration in ejectment had been served on a wrong party, and the plaintiff's attorney wrote to the attorney of the person who ought to have been served, that if he would consent to trial no action for mesne profits should be brought against his client, if the plaintiff should be successful—the court stayed such an action afterwards brought by the attorney, and ordered the attorney to pay the costs. *Stephenson* v. *McCombs*, 1 Q. B. 456.

Sheriffs recommended to take precise written engagements from attorneys when they mean to hold them liable in cases they have nothing to do with except professionally, though the court, where the attorney has verbally agreed to indemnify, if the agreement is admitted, will enforce it. *In re Corbett* v. *O'Reilly*, 8 Q. B. 130.

H. having been arrested, his attorney gave the sheriff an undertaking to put in bail, which was not done. On the application for an order to compel the attorney to pay the debt and costs :—Held, that the facts set out in the case formed no excuse. *In re Baby* v. *O'Connor*, 2 P. R. 203. P. C.—Burns.

A party alleged that he was induced by the plaintiff's solicitor to allow his name to be used as "next friend," on the assurance that he would not be rendered liable to costs. This the solicitor denied. It was considered that such a fact could not be established by ex parte affidavits. *Burgess* v. *Muma*, 2 Chy. Chamb. 43.—Mowat.

See *Fleming* v. *Duncan*, 17 Chy. 76, p. 321 ; *In re Harrison*, v. *A. & B.*, 6 L. J. 91, p. 307.

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2. *Acting without Authority.*

(a) *Production of Authority.*

A plaintiff and defendant having settled between themselves without paying the costs, the court refused to make the attorney produce his warrant in an action instituted against the bail to recover those costs. *Shankland* v. *Scantlebury*, Tay. 231.

Upon defendant's application in the suit, proceedings will be stayed till the plaintiff's attorney files his warrant to prosecute. *Robe* v. *Reid*, 1 C. L. Chamb. 98.—Macaulay.

And where in such a case proceedings had been stayed on defendant's application, and the warrant was not filed, the attorney was ordered to pay the defendant's costs of defence and of staying proceedings. *Smith* v. *Turnbull*, 1 P. R. 88 ; *Shaw* v. *Ormiston*, 2 P. R. 152.—P. C.—Draper.

A defendant in equity has no right to call upon the plaintiff's solicitor to produce his authority for using a plaintiff's name ; and particularly where no improper conduct in using such name is positively alleged and verified. *Chisholm* v. *Sheldon*, 1 Chy. 294.

(b) *Liability.*

The court refused an order to an attorney to pay the costs of a suit on a bond to the limits, where he had signed the name of one of the obligors and executed the bond on his behalf on a mere parol authority. *Leonard* v. *Glendenman*, Dra. 232.

Where a defendant swore that no process had been served on him, and that an attorney had appeared for him without authority, the court ordered that the attorney should file an affidavit accounting for his entry of appearance. *Weir Hervey*, H. T. 4 Vict.

And the court in the following term set the proceedings aside, and ordered the attorney to pay all costs. *Ib.* 1 Q. B. 430.

In an action against an attorney for discharging a debtor in custody on a ca. sa. without any authority from the plaintiffs, the damages are discretionary, and it is not incumbent on the jury to give the whole amount of the debt. *Bradbury et al.* v. *Jarvis*, 1 Q. B. 301.

Where an attorney had used the plaintiff's name without his consent, he was ordered to repay the plaintiff the costs which he had paid to defendant on failure of the suit. *Henderson* v. *McMahon*, 12 Q. B. 288.

Where proceedings had been stayed until the attorney filed his warrant to prosecute, and the warrant was not filed, the attorney was ordered to pay defendant's costs of defence, and of staying proceedings. *Smith* v. *Turnbull*, 1 P. R. 88. *Shaw* v. *Ormiston*, 2 P. R. 152.—P. C.—Draper.

Defendant being tenant was served with a writ of ejectment, which he handed to H., his landlord, and H. took it to his attorney, who, instead of getting leave for H. to defend, entered an appearance in defendant's name without his authority. A verdict having been obtained against defendant, the judge refused to interfere, but left him to his remedy against his landlord and the attorney. *Moran et al.* v. *Schermerhorn*, 2 P. R. 261.—Chamb.—Burns.

Where an attorney without authority appears for defendant, the court will not set aside the proceedings if the attorney is solvent, but will leave the defendant to his remedy by summary application against the attorney. If the attorney be insolvent, the court may relieve defendant on equitable terms, if he has a defence on the merits. Where, however, it appears that the suit instituted against the defendant is brought by collusion between plaintiff and defendant to enable defendant to cheat his creditors, a judge will not interfere summarily to remove the appearance, and thus assist the parties in the perpetration of a fraud. *Warely* v. *Poapst*, 7 L. J. 294.—C. L. Chamb.—McLean.

Where an attorney without the knowledge or consent of plaintiff brought an action in his name, relying upon an assignment of choses in action from the plaintiff to the client of the attorney, and the right of the attorney under the assignment so to use plaintiff's name was very doubtful, an order was made to stay the proceedings until the attorney or his client should indemnify the plaintiff against costs. *Ellison* v. *Ellison*, 9 L. J. 245.—C. C.—Hughes.

Plaintiff sued defendant for having caused an appearance to be entered for the defendants in an ejectment, brought by plaintiff against them, for land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge or authority of the defendants, but not charging malice or want of reasonable or probable cause: —Held, on demurrer, that the declaration was bad on this ground. Semble, that defendant and his attorney would, on such a declaration, be liable to the defendants in the ejectment suit; and that (the defendants therein being worthless) he would also be liable to the plaintiff for the costs of that suit, on a summary application to the court made therein. *Fisher* v. *Holden*, 17 C. P. 395.

Where a solicitor in Chancery purchased a widow's right to dower in all the lands of which her husband was seised during her coverture, taking from her an assignment thereof, and a power of attorney to use her name in suing therefor, six years after the death of her husband, and several years after the purchase filed a bill in her name to have dower assigned to her in a particular portion of her late husband's lands, not noticing the sale to himself, the court, on the application of the widow, ordered the bill to be taken off the files, with the costs to be paid by the solicitor. *Meyers* v. *Lake*, 1 Chr. 305.

Where the plaintiff's solicitors made a person plaintiff without being instructed by him, and name was, at his instance, struck out of the proceedings in the cause as a plaintiff, with costs to be paid by the solicitors. *Miller* v. *Hill*, 4 L. N. S. 78.—Taylor, *Secretary*.

L. & A., partners, dissolved partnership, being understood that L. should pay the debts &c. There had been ill-feeling and litigation between them, in which the attorney had acted for L. The attorney being authorized to act for W. & Co., creditors of L. & A. for a sum of $500, applied to L. for information as to other creditors of the firm, whose names he might use in order to put L. & A. in insolvency. L. refused him to use the names of K. & D. of Rochester U. S., stating that they would agree to what he, L., said. On the 3rd of May, 1873, the attorney served a demand on A. in the names of the W. & Co. and K. & D., requiring them to make an assignment in insolvency, and on the same day he wrote to K. & D. asking for their authority. They made no answer; and A. having gone to Rochester and settled their claim, applied to set aside the demand. The attorney thereupon abandoned the proceedings and paid A.'s costs. On a motion to strike the attorney off the rolls for this, on affidavits attributing such conduct to malice:—Held, under the circumstances, which are more fully set out in the report, and malice being expressly denied, that the rule should be discharged; but as the attorney had been indiscreet, he was directed to pay the costs of the application. *In re An Attorney*, 34 Q. B. 246.

Entry of appearance without authority. See of—*See* PRACTICE AT LAW.

See *McLean* v. *Grant*, 20 Chy. 76, p. 30

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3. *For Negligence.*

(a) *In Conduct of Causes or Discharge of*

A note having been given to an attorney to collect, he commenced a suit upon it, which was afterwards referred, and the note sent to the arbitrators where the arbitrators met; no award was made and the note was not afterwards to be found. The attorney then proceeded in the action on the trial, the note not being produced or evidence given to prove its loss, and a verdict was taken for the plaintiff, subject to the

of the court, who directed a new trial on payment of costs; but as the costs were not paid, the rule for a nonsuit was made absolute:—Held, that the attorney was liable as well for negligence in not producing the note, or not having evidence prepared to account for its absence, as for the damages and costs incurred by the plaintiff by reason of the nonsuit. *Grover* v. *Gamble*, 1 O. S. 561.

In this case the court discharged the rule for a new trial, upon the plaintiff's attorney undertaking that the plaintiff should give the attorney authority to proceed on the note in his (the plaintiff's) name, on the former undertaking to indemnify the latter against the costs of such action. *Ib.*

Where an attorney was retained to apply to release a sheriff from an attachment, and the jury found him in fault in conducting the application: Held, that he was liable to nominal damages, though the special damage laid was not proved. *McLeod* v. *Boulton*, 3 Q. B. 84. See *Doan* v. *Carven*, 11 C. P. 423, p. 305.

Where a promissory note was given to an attorney to get the amount of it secured, and the attorney subsequently said he would pay the amount in a few days, and an action was afterwards brought against him for negligence in not suing on the note, with a count for money had and received:—Held, that neither count was supported by the evidence. *Drennan* v. *Boulton*, 2 Q. B. 72.

A. retained B., an attorney, in Kingston, to defend him in a suit to be tried at Perth, and before the trial A. went to Kingston, where B. told him that he could not go to Perth in this suit, but that C., a barrister at Perth, would attend to it, and that A. had better see him. A. made no objection, but went to Perth and instructed C., who conducted the suit at the trial. A nominal verdict was given against A. No complaint was made that C. mismanaged the case in any way:—Held, that B. was not liable for negligence at the suit of A., in not himself drawing up a brief and delivering it to C. Gwynne, J., diss. *Kenney* v. *Armstrong*, 4 Q. B. 186.

Quære, that an attorney would not be liable for culpable negligence, in not urging for his client the defence that the agreement sued upon was made on a Sunday, as it is no part of his professional duty to take all dishonest advantages. *Vail* v. *Duggan*, 7 Q. B. 568. See, also, *Vail* v. *Nickerson*, 7 Q. B. 541.

A declaration is sufficient in stating generally that by defendant's negligence the plaintiff lost his cause. *Vail* v. *Duggan*, 7 Q. B. 568.

Case against attorneys employed by the plaintiff for not taking a confession of judgment from L., their debtor. Plea, that after the retainer and before the alleged default of defendants the plaintiffs, without the consent of defendants, with other creditors, made an assignment with L., by which he assigned all his effects to B., one of the plaintiffs, and another person, to be disposed of in paying the creditors as should concur in this:—Held, on demurrer, plea good. Held, also, that in the declaration (set out in the report) the retainer of defendants and the damage sustained by the plaintiffs were sufficiently stated. *Benner et al.* v. *Burton et al.*, 13 Q. B. 387.

The plaintiff employed defendant to ascertain whether an old judgment obtained by him against one W. had been released, and if not, to issue execution. Defendant issued the execution without having made a sufficient search, though the plaintiff had in fact released the judgment, whereby the plaintiff was subjected to an action for damages at the suit of W. Before the sheriff had seized he informed the plaintiff that W. asserted the judgment was released, and plaintiff told him to go on with the levy:—Held, that these instructions by plaintiff were not necessarily a discharge of defendant, but were only a matter in mitigation of damages. *O'Beirne* v. *Wilson*, 6 C. P. 366.

Declaration, that the plaintiff employed R. & J., the defendants, as attorneys, for reward, to prosecute a certain action against one W.: that judgment was recovered, and the plaintiff then retained defendants to issue execution: that the lands of W. were sold under such execution by the sheriff to J., one of the defendants, yet that defendants did not require J. to pay the purchase money to the sheriff, although at their request the sheriff conveyed the land to him, but as such attorneys discharged the sheriff from said money, which had not been paid to the plaintiff:—Held, that a good cause of action was shewn. *Phillips* v. *Dempsey et al.*, 18 Q. B. 177.

The plaintiff sued an attorney for negligence in conducting a suit for him, alleging that defendant pleaded an improper defence, neglected to subpœna witnesses, or to instruct counsel, but acted as counsel himself, and did not apply for an amendment required, or offer to prove payment. Defendant pleaded as to the allegation that he did not instruct counsel, but acted as such himself, that he was a barrister, and that the plaintiff never objected to his so acting; and he demurred to the allegation that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer:—Held, that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions. *Leslie* v. *Ball*, 22 Q. B. 512.

Quære, per A. Wilson, J., whether, considering the union of the professions in this province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities. *Ib.*

B., an attorney, was employed to prosecute a suit against M., who was arrested and discharged without bail, and the writ of capias and all proceedings set aside for irregularity. Upon an action against B. for negligence:—Held, that the production of the order of the judge setting aside the capias was not sufficient evidence to sustain the action; but that the negligence must be gross, and evidence of it must be given. *Chapman* v. *Boultbee*, 13 C. P. 372.

The plaintiff, in his second count, stated, that having retained the defendants to prosecute an action against one G. for a debt, they took a

confession of judgment, and delayed to issue execution thereon for some months, whereby the plaintiff was damnified. Third count, for money had and received. The evidence went to shew that between the time when the plaintiff was entitled to execution, and when it was issued, a writ of one B. was placed in the sheriff's hands, against G. and settled. It was also shewn that G. had, during the same period, made chattel mortgages of his property, of which defendants were aware. One of the defendants, on being called, stated that G., having recovered a judgment against one K., garnishee proceedings were instituted in the suit of plaintiff against G., and of defendants against G., and J. & L. against G., in respect of K.'s debt; and that orders under garnishment proceedings were made in all these suits against K., but *by mistake of one of the defendants' clerks* the plaintiff's execution was placed first in the sheriff's hands. The lands of K. were duly advertised by the sheriff in suit of G. against K., and in the garnishment proceedings, and subsequently, he was instructed by defendants to withdraw the advertisement, and take no further steps, as K. had settled the amount due. The plaintiff's writ on the garnishee order against K.'s lands was returned expired; during the currency thereof no instructions having been given to the sheriff. A receipt for $20, signed by defendants, was put in, intituled in the suits of plaintiff against G., and defendants against G.—K. garnishee. A verdict having been found for plaintiff on both counts:—Held, that there was evidence to go to the jury to shew that if defendants had issued execution as soon as the plaintiff was entitled thereto, he might have recovered his debt; and the defendants knowing that G. was disposing of his property by chattel mortgage, &c., it was a breach of their duty not to issue plaintiff's execution. 2. That as defendants obtained and had the benefit of the settlement of K.'s debt, and as it was admitted the plaintiff's writ had priority, it was the duty of defendants to see that he did not lose his priority; and if their duty conflicted with their interest, they should not be allowed to sacrifice the former to the latter. *Sweetman* v. *Lemon and Peterson*, 13 C. P. 534.

Plaintiff obtained a verdict against attorneys for negligence, in not having procured the attendance of witnesses stated to be material at a trial between plaintiff and another, in which plaintiff failed. It did not appear, however, that the evidence of such witnesses would have produced a different result, and defendants' leading counsel at the trial in question had decided upon proceeding without such evidence. On these grounds a new trial was granted. *Wade* v. *Ball et al.*, 20 C. P. 302.

Where an attorney, being employed to get a judgment of non pros. signed against the plaintiff set aside, applied through his town agent for an order for that purpose, which was granted on the 16th June, but the agent neglected to take out the order until the 22nd October following, in consequence of which delay the order was set aside and the judgment allowed to stand:—Held, that this was negligence for which the attorney was responsible, and that it was no defence that he acted under the advice of counsel. *Herr* v. *Toms*, 32 Q. B. 423.

Where a solicitor incurs useless and unnecessary costs by instituting a suit in Chancery within the jurisdiction of the County Court, the surplus of the costs in Chancery over the Inferior Court tariff, will not be allowed to him against his client. *Re Hardy, Poole* v. *Poole*, 3 Chy. Chamb. 179.—Boyd, *Master*.

Where in such a suit the costs in Chancery had been disallowed in toto between the parties the Master allowed the plaintiff's solicitor County Court costs, the client having derived some benefit from the suit. *Ib.*

(b) *In Investigating Titles and Registering Instruments.*

Plaintiff in 1854 employed defendant to examine the title to certain lands, and took a deed. Afterwards it was discovered that in 1851 a portion had been sold for taxes, but when the plaintiff purchased he had still a year to redeem. In 1857 the sheriff made a deed to the purchaser. —Held, that defendant was not liable. *Ross* v. *Strathy*, 16 Q. B. 430.

Declaration for neglecting to register a mortgage for ten months, and until the mortgagor had executed a subsequent mortgage to other persons, which was recorded before that to the plaintiff. Defendants pleaded, 1. That the register was by law entitled to certain fees before recording any deed, as the plaintiff well knew; that he never furnished them with any money to pay the same; "and so the defendants say, that said mortgage was not registered by the registrar or by the defendants for the default of the plaintiff in not providing the defendants or said registrar with any sum of money to pay the registrar the fees allowed to him by law for registering the said mortgage." 2. That after the plaintiff accepted from D. another mortgage on other land of D., as security to the plaintiff for £750, in full satisfaction and discharge of defendants' promise and all damages accrued to the plaintiff from the breach thereof:—Held, demurrer, second plea good, it being no objection that the accord was by a third person, a stranger to the action. Per McLean, J. The first plea was bad, for the retainer being admitted, the plaintiff's omission to furnish money formed no excuse, without notice to him that it was required, which defendants should have averred. Hagarty, J. The plea stated that the neglect of registration was caused by the plaintiff's neglect to furnish fees which he knew were necessary, and it therefore could not be held bad. Boyd, C., being absent, and the court thus equally divided, no judgment was given on the demurrer to the second plea. *Lynch* v. *Wilson et al.*, 22 Q. B.

An attorney having been employed to register a mortgage of £250, withheld the mortgage, and he recovered and registered a judgment against the mortgagor, under which the mortgaged was subsequently sold:—Held, that an action for such neglect being substantially a breach of contract, was maintainable without shewing actual damage, and a nonsuit for that could not be entered. While the case was pending, the plaintiff, upon payment of the charged the mortgage on registry, and thus prevented the court from doing substantial justice; a new trial was therefore ordered without as to the mala or bona fides in obtaining the charge. Quære, would not the amount

ment with interest, costs, &c., be the mea- of damages. *Doan* v. *Warren*, 11 C. P. 423.

Where an attorney received money to invest eal estate security:—Held, that he was lia- for the want of reasonable care as regarded value of the security, not merely in the ex- nation of the title. *Peters* v. *Weller*, 30 B. 4.

ee *Darling* v. *Weller*, 22 Q. B. 363, p. 315.

(c) *When a Defence to Claim for Costs.*

an action by an attorney for his costs, jury having found for defendant:—Held, the facts set out in the case, that the nce did not support the verdict, for the dant had obtained a judgment against M., might yet produce the debt, and it could e said that the plaintiff's services had by negligence become wholly worthless to de- nt. A new trial was therefore granted. ble, that if defendant had lost all benefit his action by its not having been tried in the court would not have interfered, for torney, in refusing to issue new subpœnas the circumstances stated, might be con- dered to have taken upon himself the risk sequences. *Vidal* v. *Donald*, 20 Q. B. 507.

an action by an attorney for his costs, neg- may be set up as a defence under the l issue. *Ib.*

re services charged for by an attorney required only in consequence of his own e or neglect, which a careful person would ve been likely to fall into, and not arising error in judgment in a matter affording r doubt or difficulty, he cannot recover; h a defence is available under the gene- e. *Burnham* v. *Burns*, 21 Q. B. 349.

the common order by a client to tax his 's bill, the master may consider alleged ce of the solictor as having occasioned or rendered it useless, and therefore a for disallowing the whole bill, or as and a ground for disallowing parts. v. *Milliken*, 13 Chy. 104.

rtgagee instructed his solicitor to proceed mortgage. The solicitor omitted to the owner of the equity of redemption ion of the property, a party to the suit. aining portion having been sold under in that suit, the client was benefited to ent by the proceedings therein, although y against J. was gone. In taxing the 's bill under a common order obtained lient, the master allowed the costs of ceedings; and on appeal to the court, upheld. *Thompson* v. *Milliken*, 15

ster, under such order, has no author- itute an inquiry as to loss sustained nt through the alleged negligence of r; and the costs of such inquiry can- rged to the solicitor. *Ib.*

itor before commencing a suit should he instrument on which it proceeds; of its loss, should use due diligence g to the means of information open d to which he is referred by the client. Where this duty had been omitted, and the instrument had in consequence been set forth so incorrectly in the bill that the proceedings were useless, and had to be abandoned after decree, the solicitor (though he had acted in good faith) was held not entitled against his client to the costs of the suit. *Roe* v. *Stanton*, 17 Chy. 389.

On a motion to have the costs of an interpleder issue paid out of moneys in court, costs of the motion were refused, and the solicitor was not allowed to charge his client any costs, as the motion was rendered necessary by his fault or oversight. *Macdonald* v. *Carrodi*, 1 Chy. Chamb. 145.—VanKoughnet.

See *In re Toms and Moore*, 2 Chy. Chamb. 381, p. 308; *In re A. B.*, 8 L. J. N. S. 21, p. 330; *Lynch* v. *Wilson*, 3 P. R. 169, p. 333; *Scanlan* v. *McDonough*, 10 C. P. 104, p. 330.

(d) *Other Cases.*

Under 8 Vict. c. 48, the right to sue an attorney for negligence vests in the assignee of an insolvent plaintiff. *Alexander* v. *A. B. & C. D.*, 5 Q. B. 329.

In an action against defendants' solicitors, for investing money on insufficient security, one of the defendants having made an entry or memorandum of his instructions in the presence of the plaintiff and H., offered it as evidence of the transaction:—Held, that it was properly rejected. A new trial was granted in this case, on the ground of excessive damages. *Phelps* v. *Wilson et al.*, 13 C. P. 38.

4. *To Summary Jurisdiction.*

(a) *For not Paying over Moneys.*

Where a rule nisi for an attachment for nonpayment of money had lapsed, the court refused to renew the rule without a fresh affidavit. *Roy* v. *DeLay*, Tay. 9.

An attorney of Q. B. practising in a District Court, may be attached for not paying over money received for his client. *Carruthers* v. ———, Tay. 243.

An attachment was refused, to compel an attorney to pay over money which had in fact been forwarded, but lost by accident. *Radcliffe* v. *Small*, Tay. 308.

Where a rule required that the money should be paid within a month after service, an attachment was refused, no copy of the affidavit of the execution of the power of attorney under which the money had been demanded having been served, and the affidavit of non-payment stating only non-payment within the month, but not after. *Brewster* v. *McEwen*, T. T. 3 Vict.

The court will not order an attorney to pay over money which has been attached in his hands as the property of an absconding debtor. *Clark* v. *Stover*, T. T. 3 & 4 Vict.

A. being indebted for costs to an attorney who owed him for rent, it was agreed to set off the rent against the costs. A. afterwards sued in the Division Court for the rent, but was defeated, and he then obtained a rule nisi on the attorney to pay over the net amount. The rule

was discharged, with costs. *Elliott* v. *Baines*, 1 P. R. 64.—Chamb.—McLean.

A rule nisi having been obtained on an attorney to pay over to Charles Edward Hatherley a sum of money, it was objected that the name was not Charles Edward, but Charles Edmund: Held, that the objection must prevail. *In re Latham*, 1 P. R. 91.—Chamb.—Draper.

An attorney received from his client a note for £50, costs in three suits. The client being sued for this note in the name of one W., apparently a nominal plaintiff, paid £29 and gave a confession for the balance. The bills were afterwards taxed at £24, and the court then ordered the attorney to refund the amount overpaid. *In re —— one, &c., on the complaint of Colborn*, 1 P. R. 208.—P. C.—Draper.

The court will not attach an attorney for not paying over money received by him as an agent, and not in his professional character; but if from the circumstances, it appear that he is not trustworthy, he may be struck off the roll. *In re Hamilton* v. *O'Reilly*, 1 Q. B. 392; *S. C.* 2 P. R. 198.—P. C.—Jones.

A rule nisi for such attachment should not be granted on the last day of the term, but if so granted it may be acted upon afterwards. *Ib.*

Quære, as to the effect of loaning to an attorney money in his hands for his clients. Where the fact of such loan is disputed, an undertaking signed by the attorney to hold the money as money collected for his client, and if not paid by a certain day, consenting to an order to pay it over, will be enforced against him, and the usual order will be made. *In re Harrison* v. *A. & B., Attorneys*, 6 L. J. 91.—C. L. Chamb.—Richards.

Where T. having a claim in the Division Court against a resident of Belleville, sent it to McM., an attorney in Toronto, for collection, who sent it to A. & B., attorneys in Belleville, and the clerk of the latter collected $20 on account and sued for the remainder in the Division Court, and afterwards B. arranged with a third party for the payment of the balance, it was held that T. could not make a summary application against A. & B. for the payment of the money, but that McM. must apply. *Taylor* v. *A. & B.*, 1 L. J. N. S. 300.—P. C.—A. Wilson.

Thompson *v.* Billing, 11 M. & W. 361, remarked upon; the practice therein allowed as to proceeding on a demand of money from the town agent for a country attorney without giving time for correspondence between them, thought to be unreasonable. *In re Robertson et al.*, 5 P. R. 132.—P. C.—Morrison.

The proper proceeding against an attorney for mere non-payment of money pursuant to a rule of court, where there are no special circumstances shewing fraud or dishonesty, is by judgment and execution under C. S. U. C. c. 24, s. 15, and not by motion to strike him off the rolls, nor by attachment. *Re Campbell, an Attorney, &c.*, 32 Q. B. 444.

Under the Imperial Act, 32 & 33 Vict. c, 62, s. 4, sub-s. 4, attorneys ordered to pay money in that character are excepted from the general rule, and may be attached as before. There is no such exception in our act. *Ib.*

A solicitor is liable to account for moneys or securities on summary application, although they may have come to his hands as an agent for the owner, and not strictly as solicitor or attorney or involve any duty as such in the holding of possession of them. *Re Carroll*, 2 Chy. Chamb. 323. See also *Re Walker*, 2 Chy. Chamb. 29—Taylor, *Secretary*.

The Court of Chancery will order solicitors to pay over moneys of clients in their hands. Where, therefore, it was shewn that a client had paid his solicitors, $1,800, to carry out an agreement to purchase entered into by him, and when they untruly informed him they had paid into court, they were ordered to pay the amount in ten days. *In re Toms and Moore*, 2 Chy. Chamb. 381.—Taylor, *Secretary*.

It being shewn, also, that a bill for specific performance instituted by them as his solicitors to enforce said agreement, had been dismissed with costs for want of prosecution, owing to the default of said solicitors, the costs so paid were not included in the above-mentioned order, but the client was left to his action. So also with respect to money paid to the vendor and lost by the negligence of said solicitors, and money paid to them on account of their own costs. *Ib.*

Mortgages were delivered to a solicitor by his brother for collection, and the money collected. A dispute arose as to whether such solicitor was alone responsible to his brother, or whether the solicitor's partner was responsible also. On motion of the client for payment, the Court refused to make an order against the partner, holding that the petitioner should be left to sue. *In re Toms and Moore*, 3 Chy. Chamb. 41.—Mowat.

See *Crooks* v. *Crooks*, 1 Chy. 57, p. 313.

(b) *Answering Affidavits.*

Upon an application to compel attorney to deliver a bill of payments and charges, in relation to a certain lot of land, and to answer affidavits filed in support of the rule, it appeared that there was no retainer of the attorney by either of them, as such:—Held, that the court therefore, could not grant the first part of the rule; and that courts will not call upon attorneys to answer affidavits upon an application such as this, the course to be pursued being to dispose of that which relates to the suit, and then, if the circumstances warrant it, to move to strike the attorney off the roll. The rule was therefore discharged. *In re Keys and Smith, Henderson*, 13 C. P. 262.

The attorney in this case was called upon to answer affidavits charging him with untrue statements as to disbursements for payments to and procuring money for witnesses. The court, under the special circumstances stated in the case, discharged the rule, but ordered the attorney to pay the plaintiff's costs of the application. *In re S., an Attorney, in the suit of McLean* v. *Campbell*, 14 C. P. 323.

(c) *Striking off the Rolls.*

Application to strike an attorney off the roll who had been admitted two years, for being [illegible] years absent whilst under articles, and for

attachment against his master for having improperly granted a certificate of actual service. ...th rules refused on the ground of delay, but ...e master made to pay the costs of the application. *In re Holland*, 6 O. S. 441.

An attorney who had been ordered to pay the costs of setting aside proceedings in an action in which he had acted without authority, afterwards wrote a highly improper and unjustifiable letter to the chief justice, impugning his motives in the judgment which he had given and stating that he was actuated from personal and private feelings of dislike towards him. The court directed that a rule nisi should issue to strike him off the rolls; and no proper nor sufficient apology having been made, the rule was afterwards made absolute. *In re Hervey*, M. T. 5 Vict.

The court will not attach an attorney for not paying over money received by him as an agent, but not in his professional character; but if upon the circumstances, it appear that he is not trustworthy, he may be struck off the roll. *In re Hamilton O'Reilly, one, &c.*, 1 Q. B. 392; *S. C.* 2 P. R. 198.—P. C.—Jones.

A certificate of the clerk of the court, on which an application under the rule of court is made to have the attorney struck off the rolls in another court, should shew the ground on which he was struck off. The application should also be for a rule to shew cause, and should not be made on the last day of term. *In re Tremayne*, 3 C. P. 257.

See *Re Campbell*, 32 Q. B. 444, p. 307; *Re Keys & Smith & Henderson*, 13 C. P. 262, p. 308: *In re Attorney*, 34 Q. B. 246, p. 300.

(d) *Other Matters.*

Where an attorney of the Queen's Bench practising in an inferior court has charged and the judge has allowed costs clearly not sanctioned by law, the Queen's Bench will punish by fine or attachment. *Rex* v. *Whitehead*, 1 476.

The court refused to order an attorney to pay the costs of a suit on a bond to the limits, where he had signed the name of one of the obligors, executed the bond on his behalf, on a mere authority. *Leonard* v. *Glendennan*, Dra.

The court will not attach on a charge of malpractice, where the alleged conduct has been merely inadvertent, and the party complaining has a remedy by action. *In re Stuart*, 5 O.

The court will not proceed summarily on a claim of matters for which (if the charge were true) the attorney might be indicted; especially where the affidavits are contradictory. *Patterson* v. *Miller*, 1 Q. B. 256.

Semble, that the court may prevent an attorney pleading the statute of limitations to defeat his client's just claim; but not his executors. *Hall* v. *Cline*, 6 Q. B. 546.

A solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest in the premises. The decree so pronounced was subsequently opened, and a decree nisi directed to be drawn up directing, inter alia, a sale of the mortgage premises, and that all judgment creditors should be served with the decree and made parties to the suit; notwithstanding this, however, the solicitor, who was also a judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgage premises under execution. The court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application. *Goodwin* v. *Williams*, 5 Chy. 178.

The court will suâ sponte, where the circumstances appear to warrant it, take notice of the conduct of its solicitors, and investigate matters in which their acts seem open to suspicion. *In re Toms, in the matter of M. C. Cameron*, 3 Chy. Chamb. 204.—Spragge.

The referee has no power to exercise summary jurisdiction over solicitors. Such jurisdiction can only be exercised on an application to the court. Semble, when one member of a firm of solicitors has died, the summary jurisdiction of the court can no longer be exercised over the survivors, because such an application may necessitate the taking of the partnership accounts, and the representatives of the deceased partner are necessary parties. *Re L. & M., Solicitors*, 6 P. R. 21.—Chy. Chamb.—Strong.

The plaintiff, being owner of land, after having created a mortgage thereon, emigrated to Australia, and he subsequently remitted money to his agents in this country with which to pay off the incumbrance; but, instead of doing so, they applied the money to their own use. Subsequently the holder of the mortgage, to whom it had been assigned, instituted proceedings in this Court to foreclose, to which suit an answer was put in on behalf of the plaintiff, but without his knowledge or consent, admitting the allegations of the bill, and that the full amount of principal and interest was due; whereupon a final order of foreclosure was, in due course, obtained, and the plaintiff in that suit conveyed to the defendant A, for the consideration of $1002, the value of the property; and on the same day the defendants M. & S., as attorneys of the plaintiff, conveyed the premises to A., who was ignorant of any fraudulent practices in the matter. The plaintiff having returned to this country, and ascertained the frauds which had been practiced upon him, filed a bill against his agents and the purchaser, A.:—Held, that the plaintiff, so far as the purchaser was concerned, was bound by the statement in his answer, and was not entitled to relief as against him: that the fact of the purchaser having heard before his purchase that the plaintiff had remitted money to pay the mortgage was not sufficient to charge him with notice that the foreclosure was wrongful; but, in view of the fraudulent conduct of the attorneys, the court made a decree against them for the amount realized on the sale of the land, and directed them to pay the costs of the suit, including the costs of the purchaser. *McLean* v. *Grant*, 20 Chy. 76.

See VIII. 2, (a), p. 315.

5. *For Sheriff's Fees.*

An attorney is liable to the sheriff for fees on executing writs, and for services rendered for

him in causes of his clients, without any special undertaking. *Jarvis* v. *Washburn*, Dra. 163; *Fraser* v. *Fellowes*, 7 L. J. 131.—C. C.—Armstrong.

But not for poundage upon an execution which the attorney has placed in his hands to be executed. *Corbett* v. *McKenzie*, 6 Q. B. 605.

6. *Other Cases.*

Where a bill had been filed against an attorney in the office of an outer district, and proceedings had thereupon to verdict and judgment, the court refused to set them aside for irregularity. *Mitchell* v. *Tenbrock*, Tay. 126.

Where a bill was filed against an attorney in vacation, he had four days in the next term to plead. *Macanady* v. *Foster*, Dra. 479.

When all the proceedings against an attorney subsequent to filing the bill had been set aside, and the plaintiff afterwards proceeded without serving a copy of the bill anew, the court set aside the subsequent proceedings for irregularity, but without costs, thinking the objection had little merit in it. *Fraser* v. *Boulton*, 3 O. S. 19.

Under 8 Vict. c. 13 s. 51, a writ may go to the district court to try an issue in which an attorney is a defendant. *Martin* v. *Gwynne*, 5 Q. B. 245.

A demand of plea in an action against an attorney must still be served in term, or within four days afterwards, notwithstanding the 10th rule of the new rules, and he cannot be compelled to plead in vacation to a bill and a demand of plea served in the same vacation. But where a bill and demand of plea were served in vacation, and interlocutory judgment was signed and notice of assessment given on 21st September for the assizes to be held on the 10th October, and the attorney did not move in chambers against the proceedings, but gave notice of his intention to move in court in the following term on the 11th October, and moved accordingly, it was held that his application was too late, and his rule was discharged. *Haigh et al.* v. *Boulton, one, &c.*, 1 Q. B. 340. See, also, *Fraser* v. *Boulton*, 2 O. S. 210; *Cormack* v. *Radenhurst*, 1 Q. B. 391; *Gibb* v. *Miller*, 4 Q. B. 113.

To subject a person to the penalty of 22 Geo. II. c. 46, for suing out process, &c., the attorney allowing his name to be used must first be convicted. *Rex* v. *Bidwell*, Tay. 487.

An attorney will not be ordered to pay costs due by his client to the opposite party, unless he has positively engaged to do so. *Ross* v. *Calder*, 3 Q. B. 180.—P. C.—McLean.

It is no defence in an action against an attorney for money received by him on account of his client, that the judgment on which the money was paid was obtained through fraud of such client. *Williams* v. *King*, E. T. 1 Will. IV.

An attorney is not responsible as for a fraudulent breach of duty, for an erroneous opinion on a will. *Alexander* v. *Small*, 2 Q. B. 298.

One W., suing in his individual capacity, obtained a judgment against M., and the defendant (his attorney) after W.'s death received the money. W. was the administrator of A., and this judgment was for rent of A.'s land. W.'s executors having sued defendant for the money so received, persons interested in A.'s estate notified him not to pay; but,—Held, that having received the money as W.'s attorney, he could not resist payment to his executors. *Charters et al.* v. *Miller*, 14 Q. B. 62.

Held, that the second count of the declaration, set out in this case, charging defendants as attorneys, with having entered judgment and levied on plaintiff for the full amount of a claim without deducting a payment made; and the third count, charging a levy on other goods after enough had been seized, were both good in substance. *Reid* v. *Ball et al.*, 15 Q. B. 568.

A plaintiff's attorney, acting as plaintiff's agent, and arresting a defendant on his own affidavit, on a verdict being rendered against him for a malicious arrest, cannot deduct the amount of the verdict against himself from the amount received by him for the plaintiff. *Ingram* v. *Boulton, one, &c., Renaud* v. *Brown*, 1 P. R. 60.—P. C.—McLean.

The attorney for an execution creditor, and who indemnified the bailiff who executed the fi. fa., is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized. *Eadus* v. *Dougall*, 14 C. P. 202.

W. C. having filed a bill to administer the estate of his father, obtained an injunction restraining several judgment creditors who had placed executions against lands of the deceased in the hands of the sheriff, from proceeding thereon until a decree for administering the estate could be obtained. After this, W. C., by the advice of his solicitor, sold part of the estate and the greater portion of the purchase money was retained by the solicitor, upon which he claimed to have a lien for his costs. A decree was afterwards obtained in the cause, making the injunction perpetual, after which the solicitor advised the conveyance of a large portion of the estate to his (the solicitor's) partner, upon certain trusts, whereby the eldest judgment creditor was entirely excluded from all benefit. The agent of the solicitor advised a conveyance of another portion of the estate to one of the creditors, and obtained from this creditor a power of attorney to sell, under which he contracted to sell several portions of the lands so conveyed and received moneys on account thereof, which he had also applied to his own use, with the exception of certain parts paid to his client. One of the defendants, upon these facts, filed a petition under the 163rd order, praying that it might be referred to the master to enquire and report if the sales had been beneficial to the estate; and if the master should be of that opinion, that the proper parties might be ordered to pay the amounts received into court:—Held, per Cur., that the proper order to make would be for a reference to enquire and report; and if the sales adopted, then that the money remaining in the hands of the solicitors should be forthwith paid in, without prejudice to the creditors' right to get rid of the contracts. Blake, C., who considered that the proper order to make was for the immediate payment of the money whatever might be the ultimate disposition thereof. But—Held, also, per Cur., that had the petition given notice to the parties that relief would be asked, sufficient appeared on the

davits to warrant the court in making an order for immediate payment, pending the enquiry before the master, and that the solicitors could not claim to have any lien for costs:—Held, also, that sufficient was not shewn, to enable the court to pronounce any judgment as to the liability of the principal for the acts of his agent. The affidavits and petition were entitled in the causes of Crooks v. Crooks, omitting any mention of the solicitors:—Held, that the intituling was sufficient. Semble, that where from the nature of the facts upon which a petition to the court is founded, they cannot be sworn to, it is not sufficient to make use of the short form given in the 163rd order, but that such facts should be stated in the petition, so that the respondents may be made aware to what extent and on what grounds relief is sought against them. *Crooks v. Crooks et al.*, 1 Chy. 57.

VII. Authority.

An attorney (merely as such) is not authorized to discharge a defendant in execution, certainly not without receiving the debt, and a sheriff so discharging a debtor upon his authority will be liable as for an escape. *Brock* v. *McLean*, Tay. 3. See, also, *Stocking* v. *Cameron*, 6 O. S. 475.

The court will not hold defendant to terms accepted by his attorney, at the suggestion of a judge at chambers, when he immediately abandons the judge's order. *Young* v. *Shore*, 2 O. 314.

Application for new trial where attorney had acted contrary to instructions. *Williams* v. *Rapp*, H. T. 4 Vict.

Semble, that bail are not bound by what the attorney for their principal may choose to do as such. *Mitchell* v. *Noble et al.*, 1 C. L. Chamb. —Burns.

Held, that under the circumstances of this case (as given in the statement and judgment), the solicitor could not be considered the agent of the plaintiff, so as to make a payment to the solicitor from the defendant a payment to the plaintiff. *Proudfoot* v. *Murray*, 7 Q. B. 456.

A client is not to be regarded as having a right to govern the conduct of his attorney, as to the degree of liberality he shall observe in his practice. *Shaw et al.* v *Nickerson, and Gillespie* v. *Nickerson*, 7 Q. B. 541. See also *Vail* v. *Duggan*, 7 Q. B. 568.

As to the power of the attorney on the record to compromise suits against a corporation, and how far he may bind them by parol, when authorized under seal. *Doran* v. *Great Western R. Co.*, 14 Q. B. 403.

Where a mortgage provided that no means should be taken by the mortgagee to obtain possession of the land until he should have given to the mortgagor one calendar month's notice in writing after default made demanding payment: Held, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the mortgage, more than a month before this action, was sufficient, without any proof of authority. *Forsyth* v. *Thompson*, 16 Q. B. 178.

A rule for a reference in this cause was granted on reading the consent to refer endorsed on the record at nisi prius; it stated that the cause and all matters in difference between the parties should be referred to S. C., and among other things stated that the evidence as taken before the judge at nisi prius should be read before the arbitrator, and that any question of law which should arise at the request of either party should be referred to the court, and costs of cause, reference, and of the award to abide the event. The order of reference, as made a rule of court, differed from the above memorandum in these, among other things, 1. By directing that costs, &c., should be in the discretion of the arbitrator; 2. That the arbitrator should not be required to reserve any legal questions for the decision of the court. Messrs. W. P. & B. acted throughout in this case as agents for the defendant's attorney, all the papers in the suit being served upon them, and W., one of the members of the said firm, was counsel for defendant in the cause, both at nisi prius and before the arbitrator. It was proved that on an undertaking of W., as counsel for defendants, not to raise any question of law, the terms of the reference were altered by consent of W., and of counsel for the plaintiffs. On motion to set aside the award and final judgment:—Held, that W. had power, either as counsel or as agent for defendants' attorney, in his discretion in the matters of this suit to bind the defendants, and the award was upheld. *Wilson* v. *The Corporation of the United Counties of Huron and Bruce*, 11 C. P. 548.

A. & B. were in partnership as attorneys, A. being the attorney on the record in this suit. Notice of trial was given in the name of B.:—Held, that the notice was irregular only, and not a nullity. Semble, a notice of trial given in the partnership name would not be irregular. Nor would a notice subscribed "the plaintiff's attorney," without giving his name. *Macaulay* v. *Phillips*, 9 L. J. N. S. 237.—P. C.—A. Wilson.

The solicitor of a party has not, as such, any authority to contract for the sale of his client's lands. *Cameron* v. *Brooke*, 15 Chy. 693.

Where a solicitor in good faith gives his consent and enters into an arrangement, even without instructions, the client cannot be relieved. Where the solicitor has acted fraudulently the case is different. *Bailey* v. *Bailey*, 2 Chy. Chamb. 58.—VanKoughnet.

Where a solicitor had been appointed by the master to represent certain creditors as a class: Held, that one of such creditors, who repudiated the act of such solicitor, was bound by the solicitor's proceedings. Held, further, that the solicitor was not only authorized to act for such creditors in the proceedings in the master's office, but also in proceedings arising out of or connected with these,—such, for instance, as a motion in chambers on their behalf.—*Re McConnell*, 3 Chy. Chamb. 423.—Taylor, *Referee*.

An agreement by a solicitor that his client's suit should abide the event of another suit by the same plaintiff against another party, made without instructions from the client, who afterwards repudiated it:—Held, not binding on the client. *Dewar* v. *Orr—Dewar* v. *Sparling*, 3 Chy. Chamb. 224.—Strong.

VIII. Duties.

1. *Retainer.*

It is no part of an attorney's duty, under the ordinary retainer, to issue an execution and collect the money; his authority ceases with the judgment. Where, therefore, the plaintiff laid as a breach of the defendant's undertaking to prosecute an action, &c., that he delayed to issue execution, without averring any special retainer to do so:—Held, declaration bad on general demurrer. *Searson* v. *Small*, 5 Q. B. 259.

Under the ordinary retainer to collect a debt, an attorney is not bound to re-register the judgment which has been obtained by him and put on record; and—Held, that the evidence in this case shewed no special retainer for that purpose. Semble, that the common retainer imposes no duty to pursue any collateral remedies, such as to register the judgment in the first instance, or to examine the defendant, or to attach debts due to him. *Darling* v. *Weller*, 22 Q. B. 363.

Held, that the evidence of defendant's retainer, set out in the report of this case, was clearly sufficient. *Herr* v. *Toms*, 32 Q. B. 423.

If a firm, consisting of two or more partners, are retained, and one die, it will be assumed that the retainer continues to the surviving partner or partners. *Alchin* v. *Buffalo and Lake Huron R. W. Co.* 2 Chy. Chamb. 45.—Taylor, *Secretary.*

2. *Conduct and Management of Business.*

(a) *Vexatious Conduct.*

Where expenses have been vexatiously incurred in conducting a suit by the attorneys on both sides, the court, to protect the client, will order an attachment, though regularly issued, to be stayed without costs, upon payment of the money due. *Regina* v. *Cameron, in the suit of Playter* v. *Cameron*, 4 Q. B. 165.

On an application to set aside a fi. fa. vexatiously issued, the plaintiff's attorney was ordered to pay the costs of the application, he having stated impertinent and irrelevant matter in his affidavit. *Anon.*, 4 P. R. 242.—Chamb.—Morrison.

Held, that the second count of the declaration, set out in this case, charging defendants, as attorneys, with having entered judgment and levied on plaintiff for the full amount of a claim, without deducting a payment made; and the third count, charging a levy on other goods after enough had been seized, were both good in substance. *Reid* v. *Ball et al.*, 15 Q. B. 568.

Held, under the facts of this case set out in the report, there being no ground for apprehension of losing the debt, that the conduct of the attorney in issuing and enforcing three executions to different counties was improper, and that his client's instructions could form no justification. The court therefore ordered him at once to refund to defendants the poundage retained by two of the sheriffs, and to pay the costs of the executions directed to them, and of this application. *Henry* v. *Commercial Bank*, 17 Q. B. 104.

Quære, as to plaintiff's right under the circumstances of this case to costs as between attorney and client, to be paid by defendant's attorney, as a punishment for his vexatious conduct. *Gore District Mutual Fire Insurance Co.* v. *Webster*, 10 L. J. 190.—C. L. Chamb.—Draper.

Remarks upon the vexatious and oppressive conduct of an attorney in enforcing a levy for costs without any necessity, after an offer of payment in a reasonable time and manner; and upon the introduction of irrelevant and improper matter into an affidavit. *Davidson* v. *Grange*, 5 P. R. 258.—Chamb.—Morrison.

It is irregular to take out a fi. fa. the instant costs have been taxed, without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Chy. Chamb. 94.—Mowat. But see *Coolidge* v. *Bank of Montreal*, 6 P. R. 73; *Smith* v. *Cronk*, *Ib.* 80.—P. C.—A. Wilson.

Where a solicitor adopts a course obviously unreasonable and perverse, he will be ordered to pay the costs occasioned thereby. Where, therefore, a solicitor refused to leave with the master a mortgage under which he claimed on behalf of a creditor, and the master disallowed the claim, the court refused to interfere with the master's finding, and made an order for costs against both the solicitor and client. But they gave the client, the creditor, a further opportunity of proving his claim, unless the solicitor should shew that he acted under express instructions. *Brigham* v. *Smith*, 2 Chy. Chamb. 462.—Spragge.

(b) *Other Cases.*

An attorney having received declaration without denying he was defendant's attorney, and a plea having been requested from him several times, he not denying his character as attorney for defendant, the court set aside interlocutory judgment, signed for want of a plea, without costs, but stated they would on application against the attorney order him to pay the costs. *Dobie* v. *McFarlane*, 2 O. S. 285.

When after process served the parties settled and the plaintiff agreed to pay his own costs, but notwithstanding the attorney went on, thinking that the defendant should pay the costs, the proceedings were set aside for irregularity. *Parent* v. *McMahon*, 4 O. S. 120.

Semble, that an attorney would not be liable for culpable negligence, in not urging for his client the defence that the agreement sued upon was made on a Sunday, as it is not part of his professional duty to take all dishonest advantages. *Vait* v. *Duggan*, 7 Q. B. 568.

The practice of an attorney using the name of his clerk as nominal plaintiff, instead of the name of his client, is reprehensible. *Dickson* v. *McMahon*, 14 C. P. 521.

Semble, that the inability of the plaintiff's attorney in replevin to communicate with his client, not knowing where he was, affords no excuse for allowing two assizes to elapse, for it is the plaintiff's delay, not that of his attorney, which is a breach of the bond. *Bletcher* v. *Burn*, 24 Q. B. 124.

Where the plaintiff's attorney had conducted his proceedings with little care, the defendant's rule to set them aside was discharged without costs. *Harrington* v. *Fall*, 15 C. P. 541.

Defendant moved against the verdict because no issue book had been served in time, shewing by his affidavits that notice of trial was given on the 11th October, and that on the commission day an issue book with notice of plaintiff's, but not of defendant's title, was served. In answer it was sworn that with the notice of trial an issue book had been served, with which, for a reason explained, no copy of plaintiff's notice of title was given, and that, according to promise, such notice was given afterwards, to which a copy of the issue book was attached, to make it intelligible. The court severely censured the conduct of defendant's attorney in suppressing the fact of an issue book having been delivered with the notice of trial. *Parsons* v. *Ferriby*, 26 Q. B. 389.

In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which it was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before. *Cushman* v. *Reid*, 20 C. P. 147.

Until after appearance a defendant has no attorney in the cause, and an affidavit by a person calling himself such was therefore held insufficient to support an application to change the venue. *Hood* v. *Cronkrite*, 4 P. R. 279.—Chamb. —Draper. Commented upon in *Attorney-General* v. *McLachlin*, 5 P. R. 63.—P. C.—A. Wilson.

An infant cannot appear by attorney but by guardian. If the appearance is by attorney, all subsequent proceedings are irregular. *Macaulay* v. *Neville*, 5 P. R. 235.—Chamb.—Dalton, *C. J. & P.*

An attorney who appears for an infant, knowing his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside. *Ib.*

The solicitor of the husband is not as such disqualified from taking the examination of a married woman for the conveyance of her land. *Romanes* v. *Fraser*, 16 Chy. 97; 17 Chy. 267.—Spragge, dubitante.

It is irregular for a solicitor to become security for costs for his client. *Beckitt* v. *Wragg*, 1 Chy. Chamb. 5.—Spragge.

The fact that an answer had been sworn before a commissioner who had been formerly concerned as a solicitor in the cause, was not held to be ground for taking the answer off the files; but where an answer had been irregularly translated, it was ordered to be re-sworn within a given time, with costs against the defendants. *Gordon* v. *Johnson*, 2 Chy. Chamb. 205—Taylor, *Secretary.*

A solicitor should not treat with a party to a cause in the absence of his solicitor. *Bank of Montreal* v. *Wilson*, 2 Chy. Chamb. 117.—Vankoughnet.

Where a solicitor appeared to represent parties who had been served with notice, being claimants in the master's office, but were not in the suit interested in the question then at issue, and asked for costs, the court held that such conduct ought to be discouraged, and refused him costs. *Simpson* v. *Ottawa R. W. Co.*, 2 Chy. Chamb. 226.—Spragge.

On a motion to dismiss, it appeared that the case had not been brought to a hearing, through an error in judgment of the plaintiff's solicitor:—Held, that it was proper to take into account such error in considering the application, in connection with the other circumstances of the case. *McFeeters* v. *Dixon*, 3 Chy. Chamb. 84—Mowat.

A solicitor before commencing a suit should examine the instrument on which it proceeds, or in case of its loss should use due dilligence in resorting to the means of information open to him, and to which he is referred by the client. *Roe* v. *Stanton*, 17 Chy. 389.

The court has jurisdiction to relax its general as well as its special orders, and will in its discretion do so to further the ends of justice, or to relieve a suitor against difficulties occasioned by a solicitor. Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin* v. *Devlin*, 3 Chy. Chamb. 491.—Boyd, *Master.*

An application was made to vacate a præcipe decree taken into the master's office, and to allow, instead of a disputing note, an answer to be filed setting up the statute of limitations. The application was held to be properly made in chambers and was granted, it being shewn that the note was filed through a mistake of the solicitor in supposing that the defence of the statute was available under it. *Cattanach* v. *Urquhart*, 6 P. R. 287.—Chy. Chamb.—Blake.

3. *Dealing with Client.*

An attorney purchasing securities from his client, taking no undue advantage, cannot be punished as for any violation of his duty. *In re Bartlett* v. *Meyers*, 1 Q. B. 252.

An attorney had for a long time advised his client as to raising money, and also got bills discounted for him. Upon an alleged settlement between them the client signed a formal acknowledgement of indebtedness in a large sum. The court, upon a bill filed impugning the bona fides of such settlement, refused to admit this acknowledgement as prima facie evidence in favor of the attorney. *Davis* v. *Hawke*, 4 Chy. 394.

An attorney sold lands to his client at a most exorbitant price, and took back a mortgage on the estate sold and on other lands securing the purchase money. The court on a bill filed declared that the sale was fraudulent, and that an assignee of the mortgage, without notice of the fraud, was not at liberty to sue on the covenant for the mortgage money; although as a bonâ fide purchaser for value without notice, he was entitled to hold the land in security. They, however, ordered the attorney to discharge the lands from the incumbrance thus created. *Ib.*

An attorney assigned to his client a mortgage securing £175, with a payment of £50 endorsed, leaving £125 due. In reality nothing had been paid, but the £125 was the amount for which

the attorney (the mortgagee) had sold the land to the mortgagor. Afterwards the attorney claimed certain costs from the client for proceedings taken upon this mortgage against the mortgagor, and obtained his note for the amount. When the note became due, the attorney charged the client five per cent. commission, in addition to legal interest, on renewing it, on three several occasions. The court set aside the assignment of the mortgage, and directed an account of all dealings between the attorney and client, with costs to the hearing. *Grantham* v. *Hawke*, 4 Chy. 582.

A person in indigent circumstances being entitled to a grant of land from the crown, had consulted a solicitor with a view of obtaining it. In the course of their transactions the solicitor wrote, "I think I can manage for you so effectually that I can get your deed from government, probably through some assistance on my part." The client having executed an assignment, as he alleged, by way of security to the solicitor, and the patent for the land having been issued, the solicitor set up the transaction as an absolute purchase, in consequence of which the wife of the plaintiff, acting as his agent, took steps to assert her husband's claim, and procured the assistance of her brother. After repeated applications the solicitor agreed to re-convey upon being paid £170, asserted by him to be due. This the brother advanced and took a conveyance of the property, said to be worth £800, in his own name, and then alleged he had purchased for his own benefit. The court (Esten, V. C., diss.) declared the deed to the solicitor a mortgage only; that his assignee had in fact acted as agent of the plaintiff, and could not purchase for his own benefit; and directed an enquiry as to certain points left in doubt by the evidence before the court, and an examination of the solicitor's books; unless the purchaser would consent to re-convey upon receiving back the amount paid by him to the solicitor. *McIlroy* v. *Hawke*, 5 Chy. 516.

An execution being in the hands of the sheriff against lands, the defendant therein applied to a solicitor to procure his services in obtaining a settlement of the demands against him. To enable the solicitor to raise funds for that purpose, the client, at his suggestion, conveyed his lands to him in fee, taking back a defeasance stating the object for which the deed was made, which was subsequently lost. To raise money the solicitor executed a mortgage for £245, and the mortgagee sold the same to another party for £150, which was handed to the solicitor, and thereout he paid the claims against the client, amounting in all to about £90. Afterwards the solicitor demanded from the client £245, and subsequently £300 as the price at which the client would be allowed to redeem; and this not having been complied with, the solicitor sold to a third party for £125 over and above the mortgage, but the purchaser had notice of the claim of the client. The court declared the acts of the solicitor a plain breach of trust: that the client was entitled to redeem upon payment of what was actually expended on his behalf: that the purchaser of the mortgage was, under all the circumstances, entitled to hold the land only for what he had actually paid, and interest; the excess of which over and above the amount expended for the client the solicitor was ordered to pay, together with the costs of the suit to the hearing. *McCann* v. *Dempsey*, 6 Chy. 192.

The attorney having made a loan to his client, the court, under the circumstances of this case, refused to interfere on the alleged ground of fraud by the attorney, defendant having denied all the allegations of fraud set up by the plaintiff, and his statements being corroborated by the signature of the plaintiff to a memorandum prepared by defendant when the loan was effected, although the attorney, they thought, should have refused to proceed with the loan without the appointment of a solicitor to act on behalf of the borrower. *Rees* v. *Wittrock*, 6 Chy. 418.

An attorney retained to recover an estate for the heir-at-law of a former owner, bought up a title paramount to his client's, and obtained possession of the property, which he conveyed to a brother of his client, as the heir-at-law, who subsequently sold portions of it to several purchasers, all of whom but one had not paid their purchase money, and as to that one, he had employed the same attorney in effecting his purchase. In fact the person in whose behalf the proceedings had been taken was not dead, and the attorney had been made aware of it. On a bill filed for that purpose the purchasers were declared trustees for the heir-at-law. *Graves* v. *Henderson*, 8 Chy. 1.

An attorney in the prosecution of suits to recover an estate for the supposed heir-at-law, A., buys in a paramount title for the heir-at-law, and subsequently conveys the estate to A., the supposed heir, who sells and conveys to divers purchasers. On a bill filed by B., the real heir, against the attorney and A., and the purchasers from them, the court—in this respect affirming the decree below, as reported in 6 Chy. 32—adjudged them to be trustees for B., although it appeared that the ancestor had long before his death conveyed away all his interest in the lands for value. Robinson, C. J., diss. But some of such purchasers having had a prior or better equity than the plaintiff, the court—varying the decree of the court below in this respect—directed that they should not be disturbed, although they got in the legal estate with constructive notice of the opposing claim; Esten, V. C., diss. And also varied the decree as to the other purchasers by directing that under the circumstances the account of rents and profits against them should be limited to commence from the filing of the bill, and that they should be allowed the fair value of all substantial repairs and permanent improvements made by them prior to that date. Esten, V. C., dubitante. *Henderson* v. *Graves*, 2 E. & A. 9; *Graves* v. *Smith*, 6 Chy. 306.

Although a solicitor may for sufficient cause, by notice to his client, terminate the connection between them, the court will not make an order for that purpose upon the ex parte application of the solicitor. *Bricker* v. *Ansell*, 1 Chy. Chamb. 367.—Spragge.

On a bill filed by one of two infant plaintiffs in an administration suit, (after attaining majority) seeking to impeach the proceedings therein on the ground of fraud:—Held, that the fact that the plaintiffs in that suit, as also the trustees and executors, had been represented by one solicitor, the omission from the decree of any direction

to wilful neglect or default on the part of the defendants therein; a material difference between the decree and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor, so acting for the several parties, of a valuable portion of the estate did not of themselves evidence fraud and collusion. *McDougall* v. *Bell*, 10 Chy. 283.

The widow of an intestate obtained letters of administration, and her brother, a lawyer, acted for her as a friend, not professionally, in the management and settlement of the affairs of the estate. While so employed, the brother with his own money purchased a mortgage which had been created by the intestate:—Held, that he was entitled to hold the mortgage for his own benefit. *Paul* v. *Johnson*, 12 Chy. 474.

In August, 1860, the plaintiff, being pressed for money, applied to defendant to purchase from him a mortgage, which the defendant agreed to purchase on such terms as would give the defendant fifteen per cent. per annum. In October of the same year, the transaction was completed. In 1865, the plaintiff filed his bill, alleging that the defendant was his solicitor, and had taken advantage of his necessities, and praying that he might be relieved. The defendant did act as attorney for the plaintiff in 1854, but not from that time until February, 1860, when the plaintiff put two claims into the defendant's office for collection, one of which proceeded no further than issuing a writ. The money in the other had been collected and paid over to the plaintiff in June, 1860; the defendant knew nothing of either suit, and was never afterwards employed professionally by the plaintiff. The court, having reference to all the circumstances and the delay in instituting proceedings, dismissed the bill with costs. *McLennan* v. *McDonald*, 14 Chy. 61.

An attorney selling property of which he was the apparent but not the real owner, acted for the purchaser, who had confidence in him and employed no other solicitor in the matter. The attorney did not disclose to the purchaser the true state of the title, but alleged it to be good, though without any fraudulent intention. The true owner having, after the conveyance was executed, recovered the property from the purchaser:—Held, that the purchaser was entitled to have his payment and expenditure on the property made good to him by his vendor, and the latter was not protected by having given only limited covenants for title. *McRory* v. *Anderson*, 14 Chy. 271.

An attorney took a conveyance of property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes which he held against the client:—Held, that this agreement was binding on the attorney, though not in writing. After making the agreement, the attorney put the two notes in suit, in the name of a third person, and obtained judgment by default:—Held, that the judgment was similar to a suit by the client for specific performance of the agreement. *Fleming* v. *Duncan*, 14 Chy. 76.

Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. Where these obligations are neglected, the suit of the client must be brought within twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief. *Oakes* v. *Smith*, 17 Chy. 660.

A solicitor of a mortgagee cannot become a purchaser under a power of sale contained in the mortgage, though the proceedings for the sale were not taken in his name, and it was not shewn that any loss had occurred by reason of his being the purchaser. *Howard* v. *Harding*, 18 Chy. 181.

An old man whose mental faculties had been somewhat impaired by age, being in difficulties with his son, applied for advice to the attorney of persons against whom he had recovered a judgment for one debt and a verdict for another debt; the attorney obtained from him a release of the two debtors without any consideration, and without his having any other advice in regard to the transaction; and the only evidence of what had passed between the two was the evidence of the attorney himself, the client being dead:—Held, that the release could not be maintained in equity. *Dewar* v. *Sparling*, 18 Chy. 633.

See also *McLean* v. *Grant*, 20 Chy. 76, p. 310.

4. *Other Cases.*

Where there were several plaintiffs in a suit, and a final order of foreclosure had been obtained by their solicitor:—Held, that their solicitor could not afterwards move on behalf of the defendants foreclosed to set aside the order for foreclosure, though two of the plaintiffs concurred in the application, and only the third objected. *Boulton* v. *Don and Danforth Road Co.*, 1 Chy. Chamb. 329. Mowat.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice. *Cameron* v. *Hutchison*, 16 Chy. 526.

Where the mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was held that the circumstance of his having employed one of the mortgagees as solicitor in drawing the assignment, did not make the knowledge of the solicitor notice to the vendee. *Ib.*

IX. Bill of Costs.

1. *Signing and Delivery.*

The month required by 2 Geo. II. c. 23 for the delivery of an attorney's bill is a lunar, and not a calendar month, and the day of the service of the bill is included. A defendant having endorsed an admission of service on the bill produced:—Held, to have admitted that

the copy received was signed by the attorney. *Berry* v. *Andruss*, 3 O. S. 645.

In an action by an attorney for his fees, he must prove the delivery of his bill, although the defendant has suffered judgment by default. *Ridout* v. *Brown*, 4 O. S. 74.

Where an attorney served his bill on the 20th May, and the placita on the record were intituled as of T. T., which commenced on the 16th of June—not a lunar month after such service—but a memorandum was added, "to wit, 11th July," and the plaintiff proved that his declaration was filed on that day, but did not produce the writ:—Held, sufficient, and that if the writ were issued too soon, defendant should shew it. *McMartin* v. *Spafford*, 4 O. S. 332.

A defendant is entitled to a copy of the bill according to the statute, even though he may have admitted the amount to be due. Where, therefore, to a declaration for fees, containing a count upon the account stated, defendant pleaded no bill delivered, &c.:—Held, plea good. *Dempsey* v. *Winstanley*, 5 Q. B. 317.

Non-delivery of the bill is not a plea to the merits. Judgment for defendant, therefore, is no bar to a second action. *Dempsey et al.* v. *Winstanley*, 6 Q. B. 409.

Pleading non-delivery of a bill is not an issuable plea. A plea denying the retainer is. *Eccles* v. *Johnson*, 1 C. L. Chamb. 93. —Macaulay.

The attorneys who commence the action must sign the bill delivered. Where, therefore, three attorneys composing a firm commenced the action, and only one of them signed the bill:—Held, insufficient. *Sullivan et al.* v. *Bridges*, 5 Q. B. 322.

Action for services as attorneys. Plea, that though the plaintiffs did, before suit, to wit, on the 10th September, 1851, deliver to defendant a bill, yet that a month from such delivery had not expired before suit. Replication, that a month from the delivery of the bill in the plea mentioned had expired before this suit:—Held, replication good. *Draper et al.* v. *Steen*, 8 Q. B. 441.

Where one attorney sues another, it is not necessary to deliver a bill one month before action. But by 3 Jac. I., a bill must be delivered at some time before action in a case where the business done is not agency business, but as for any other client. *Draper et al.* v. *Beasley*, 8 Q. B. 260.

An attorney may be ordered to deliver his bill though it has been fully settled, and to give credit therewith for all moneys received. When after such an order he makes default in delivery, he will have to pay the costs of such order. *In re Francis* v. *Boulton*, 6 L. J. 20.—C. L. Chamb. Draper.

A bill must be delivered before it will be referred for taxation. The first application should therefore be for delivery. Affidavits filed in support of such application must be intituled in the court, and, under the statute, "in the matter of A. B." *In re Eccles et al.*, 6 L. J. 59.—C. L. Chamb.—Richards.

In an action on a bill, where the costs were charged at one lump sum, although the costs as between party and party had been taxed at that sum in the original suit, and no bill of items had been delivered by the plaintiffs to their client:—Held, not a compliance with C. S. U. C. c. 3 s. 27. *Stanton and Warren* v. *McLean*, 9 L. J. 301.—C. C.—Hughes.

An attorney, upon the request of his client on the 27th March, 1863, delivered to them a bill of costs. They afterwards, disregarding this, obtained an order upon him to deliver a bill of costs of all causes and matters wherein he had been concerned for them, which he did, including the services for which his former bill had been delivered. No objection was made to the taxation of the new bills till after it was pretty well ascertained that the balance would be against the clients, when they endeavored to hold the attorney to his first bill, which, with a receipt endorsed upon it, would have made a balance against him:—Held, that the client could not revert to the old bill, to the prejudice of the attorney:—Held, also, that the attorney was entitled to charge in his bills for services, garnishee papers, the same having been performed at the request of the clients, and the charges therefor appearing in his ordinary bill. *In re Malloch*, 10 L. J. 327.—C. L. Chamb.—A. Wilson.

An attorney having once rendered his bill cannot, after steps taken to have it taxed, add to it, or deduct from it, without leave of the court. *In re Davy*, 1 L. J. N. S. 213.—C. L. Chamb.—Richards.

If he has rendered his bill making charges in a lump sum, though he may perhaps make up items to shew it correct as to the amount, yet he cannot recover or tax more than the amount. *Ib.*

If through mistake an attorney has delivered an erroneous bill, he may by special application, shewing clearly how the mistake has arisen, be allowed to amend it, or deliver another, but not of his own mere motion. *Ib.*

On an application to refer an attorney's bill to taxation, an amended bill of costs was allowed to be substituted for the bill delivered to the client: the attorneys undertaking to receive in full of their fees, charges, &c., the amount of the original bill or the amended bill as taxed, whichever might be the least. *In re B. & L.*, 1 P. R. 18.—Dalton, *C. C. & P.*

Solicitors delivered bills of costs indorsing each, "In the event of taxation, we reserve ourselves the right of delivering another and more complete bill:". Held, an absolute order. Re Pender, 8 Beavan; Re Chambers, 3 Hare considered. *In re Spencer* v. *McDonald*, 1 [illegible] 467.—Sprague.

Quære, can attorneys properly be made to pay the costs of an order for delivery of bills of costs. *In re Lemon et al., Attorneys, &c.*, 1 L. J. N. S. —Chy. Chamb.—A. Wilson.

A judge cannot by the same order direct delivery and reference to taxation at the Nor can he, in an action for such bill, stay proceedings until delivery and taxation: [illegible] ble, that the right to restrain the action, the statute, only attaches on a reference of bill to taxation. Quære, whether there may be an order for delivery after action commenced, but unless a very strong case is made

defendant should be left to plead the non-delivery. *Boomer* v. *Anderson—In re Boomer, &c.*, 16 C. P. 163.

An attorney or solicitor may be ordered to deliver a bill of his charges for business done by him as such, though the services performed were not in whole or in part for business done in court, as in this case, where the retainer was to investigate the title of and purchase property. *In re O'Donohoe* v. *Warmoll*, 4 P. R. 266.—Chamb. —Draper.

A summons calling upon an attorney to deliver his bill of costs did not refer to any affidavit or papers filed. Amendment allowed. *Re Barton*, 4 P. R. 237.—Chamb.—A. Wilson.

Service of the bill on one of several clients acting in conjunction by the same solicitor, but not co-partners, is sufficient service on all. *Re Murphy & Kerr*, 2 Chy. Chamb. 82. —Taylor, Secretary.

Service on a solicitor appointed by the one of several clients who had been active in the suit, and through whom instructions had been given, deemed sufficient. *Ib.*

2. *Agreements as to Costs.*

When conveyances are prepared under a special agreement, it will bind the master. *In re McPeasley and Eccles et al.*, 5 L. J. 279.—C. L. Chamb.—Burns.

The master in taxing such bill must decide as best he can, according to the contract expressed or implied between the parties. *In re Eccles et al.*, 6 L. J. 59.—C. L. Chamb.—Richards.

Costs of suits being in all cases the money of the client:—Held, that an attorney taking an annual salary in lieu of such costs, cannot tax more than disbursements (which by his agreement he was entitled to recover from his client) from a defendant, though all such costs were the property of the attorney by the arrangement. *Hales* v. *The Great Western R. W. Co.*, 8 C. P. 280.

Where an attorney, having had for three years judgment on confession for a large amount, leads defendants to understand that his charges against plaintiff were $200, which defendants understood to mean all his charges, which sum defendants paid, the attorney was not allowed afterwards to treat the $200 as paid for costs between attorney and client only, and to proceed for costs between party and party incurred prior to the giving of the note. *Gillespie et al.* v. *Shaw et al.*, 10 L. J. 100.—C. L. Chamb.—A. Wilson.

A bargain between a solicitor and client, whereby the latter undertakes to pay more than recognized fees for the work to be done, can be enforced. *Re Geddes and Wilson*, 2 Chy. Chamb. 447.—Mowat.

Where a solicitor's Toronto agent made a bargain with the client for $2 an hour for attendance at master's office, such bargain was held not binding, although reasonable, the sufficiency or insufficiency of the amount being immaterial where the item is fixed by tariff. *Ib.*

3. *Reference to Taxation or Revision.*

(a) *Who may apply.*

Where, on a settlement of several suits between the parties, it was agreed that defendant should pay, among other things, all the costs of every kind, including retainers, for which the plaintiff was liable to his attorney, it was held that defendant, though he had not paid the bills, was entitled to have the bills referred to taxation on the usual terms. Quere, is such a defendant a party "liable to pay," within s. 38 of C. S. U. C. c. 35. *In re Greenwood, one, &c.* 10 L. J. 131.—C. L. Chamb.—A. Wilson, J. Wilson.

The mortgagees of land having brought ejectment, and sold under the power of sale, their solicitor sent the surplus purchase money to the mortgagor, accompanied by a statement of the amount due, in which one item was for "solicitor's costs, $143." The particulars being asked for, he rendered two separate bills, one of the ejectment, the other of the sale:—Held, that the mortgagor was clearly a person entitled to apply for taxation within C. S. U. C. c. 35, s. 8. *Ex parte Glass, In re Macdonald*, 3 P. R. 138; 9 L. J. 111.—C. L. Chamb.—Hagarty.

An assignee in insolvency employed a firm of attorneys to perform certain services in connection with the estate. Subsequently he resigned the position and gave these attorneys the moneys of the estate remaining in his hands, with instructions to pay their own costs first, and then to hand the balance to the new assignee. This they did and rendered their bill of costs:—Held, that the estate of the insolvent was within the meaning of C. S. U. C. c. 36, s. 38, the "party liable to pay," though "not chargeable as a principal," and the second assignee was entitled to have the bill taxed. *In re A. & B., two, &c.*, 6 P. R. 68.—C. L. Chamb.—Dalton, *C. C. & P.*

(b) *What may be Referred.*

Items not appertaining to the business of an attorney cannot be taxed. A revision will be granted when the master, upon a reference of a bill "for fees and disbursements in his professional business," has allowed charges for other business. *In re Jones* v. *Ketchum*, 3 L. J. 167. —C. L. Chamb.—McLean.

A bill for conveyancing only cannot be referred. Contra, where it consists either wholly or in part of business done in court. *Re Lemon and Peterson*, 8 L. J. 185.—C. L. Chamb. Burns. *Ex parte Glass*, 3 P. R. 138.—Chamb. —Hagarty. See *Re Eccles*, 6 L. J. 59.—C. L. Chamb.—Richards.

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The bill is one entire matter, and in taxation the client cannot separate certain charges for

taxation and ask that they alone be referred. *In re Davy*, 1 L. J. N. S. 213.—C. L. Chamb.—Richards.

On an application by a client for taxation of costs in a suit in this court, and in another suit in a County Court, his affidavit admitted a retainer in the C. C. suit, but denied one in the suit in this court. The solicitor making no claim for costs in the suit in this court:—Held, that this court could not order taxation between the client and solicitor. *In re Malcolm C. Cameron, a Solicitor*, 1 Chy. Chamb. 356.—Spragge.

Where a solicitor has funds of a client in his possession, or has papers over which he claims a lien, this court will order delivery and taxation of his bills and payment of any balance, though the services for which he claims have been wholly in County Court proceedings. *Re Prince*, 3 Chy. Chamb. 282.—Taylor, *Referee*.

See *In re Wilson & Hector*, 9 L. J. 132, p. 329.

(c) *Time of Reference.*

A bill with exorbitant charges was ordered for taxation, although paid, and several months had elapsed since its delivery. *Doe* d. *Fraser* v. *Eagleson*, 5 O. S. 77.

On an application by solicitor to tax costs against their clients, when the bill was rendered on the 22nd of August, and the petition presented on the 22nd of September:—Held, too soon. The month must be reckoned exclusive of the day of rendering the bill and presenting the petition. *In re Morphy & Kerr*, 2 Chy. Chamb. 56.—Taylor, *Secretary*.

(d) *After Twelve Months, or Settlement.*

An order was refused where the bill had been paid and acquiesced in. *Morden* v. *Morgan*, E. T. 2 Vict.

A bill settled for more than twelve months will not be ordered to be taxed, and if taxed by mistake taxation will be set aside. *In re Jones v. Ketchum*, 3 L. J. 167.—C. L. Chamb.—McLean *S. C. Ib.* 203.—C. L. Chamb.—Robinson.

The court cannot refer a bill after it has been delivered twelve months, unless under special circumstances. The fact that an action is brought on a number of bills delivered during several years, while defendant was plaintiff's client, is not a "special circumstance," within the Act:—Quære, is an overcharge in the absence of fraud a "special circumstance?" *Read* v. *Cotton*, 6 L. J. 114.—C. L. Chamb.—Hagarty.

Where several bills were delivered by plaintiff to defendant, the first in January, 1854, and the last in January, 1859, and there were several applications for payment, and a payment made in January, 1860, and an action was commenced in respect of the bills in August, 1861, and no application made to refer them till 4th November, 1861, a summons to refer them was discharged. Read *v.* Cotton, 6 L. J. 114, upheld. *Ruttan* v. *Austin*, 8 L. J. 47.—C. L. Chamb.—Draper.

Where defendants, in 1860, in consideration of forbearance, promised to pay a demand of $200, which the attorney said he had charged to his clients, but which was not strictly in whole recoverable from defendants, it was held that it was too late in 1863 to call upon the attorney to deliver a bill of items for the $200, although such a bill was demanded at the time the note was given; and it was also held that the pressure of an execution against lands in 1860 was not a sufficient "special circumstance" to entitle the application to succeed, notwithstanding the lapse of time. *Gillespie* v. *Shaw et al.*, 10 L. J. 100.—C. L. Chamb.—A. Wilson.

Plaintiffs acted as attorneys for defendants from 1854 to 1858. In 1855 they had a large claim for costs, which defendants settled on a reduction being made. They continued to act and rendered full bills each half year, no objection being made to them until a short time before this action, brought by the plaintiffs in January, 1860. Defendants on being sued applied to have the bills taxed, not pointing out any particular error, but alleging generally that the charges were excessive:—Held, that no "special circumstances" were shewn, and the order was refused as to all bills delivered more than twelve months. *Read et al.* v. *Cotton and Manning*, 3 P. R. 118.—Chamb.—Hagarty.

A solicitor had been employed to conduct a suit, and otherwise rendered professional services. Without furnishing a bill he demanded £45, but compromised for the client's note for £40, which was renewed and ultimately paid. A motion by the client, after eleven months, for an order to furnish a bill and to refer it for taxation was refused with costs. *In re Faulkner, a Solicitor*, 1 Chy. Chamb. 222.—VanKoughnet.

In the absence of gross over-charge or pressure, the court will not tax a bill rendered several years and treated as paid, the solicitor having abandoned any excess over certain sums received by him. *Re Thompson*, 2 Chy. Chamb. 100.—Mowat.

A petitioner seeking to tax a bill rendered over a year, must allege and establish items of overcharge, and shew special circumstances. *In re Cameron*, 2 Chy. Chamb. 311.—Taylor, *Secretary*.

Where a solicitor had irregularly proceeded to tax as between solicitor and client, in the client's absence, the court, upon a petition presented seven years afterwards, ordered a taxation, treating the previous taxation as void, and ordered the solicitor to pay costs of the application. *Clarke* v. *Manners*, *Re Manners*, 4 Chy. 62.

(e) *Proceedings to Tax.*

An application to have a bill referred under Vict. c. 175, s. 20, must be made in the name of such solicitor. *Duggan* v. *Cotton*, 3 L. J. —C. L. Chamb.—Hagarty.

An order to tax between attorney and client must be made in the court in which part of the business is done, and must be for professional services. A revision will not be ordered unless the grounds of the original taxation have for some reason failed, or become or been found useless. *In re Jones* v. *Ketchum*, 3 L. J. 206. C. L. Chamb.—Robinson.

A common law judge in Chambers may refer taxation to the proper officer of the Court.

Chancery a bill for services in that court. If such an order be waived or abandoned by the party who obtained it, it is necessary to move to set it aside. Whether it has or no can be properly decided in the Court of Chancery, especially in a case where one party treating the order as in force obtained from the master of that court a warrant for taxation under the order, and the other party, treating the order as waived or abandoned, obtained an independent order of that court for taxation. A common law judge will, under such circumstances, decline to interfer. *In re Wilson and Hector, two, &c.*, 9 L. J. 132.—C. L. Chamb.—Draper.

On an ex parte application of a client by petition for taxation, the common order only can be obtained; if a special order is required notice must be given. *In re Atkinson and Pegley*, 1 Chy. Chamb. 187.—VanKoughnet.

The common order to tax may be obtained by client on præcipe; it is not necessary to apply to a Judge in Chambers for it. *In re Daniel, Solicitor*, 1 Chy. Chamb. 224.—Spragge.

Where the bill had been delivered more than month, the client must apply for taxation in Chambers, otherwise the order can be obtained on præcipe. *Re Boulthee*, 2 Chy. Chamb. 58.

Where an order for taxation had been obtained ex parte at the instance of one of two clients who had jointly retained the solicitors, such order was set aside as irregular. *Re Becher et al*, 2 Chy. Chamb. 215.—Taylor, *Secretary*.

An order to tax is not to be granted ex parte to the solicitor where there appear to be any facts in dispute between him and the client. He must make known such facts to the court, or the order will be set aside. *In re Fitch*, 2 Chy. Chamb. 288.—Spragge.

Such motions for taxation should be on notice, and the reference should, as a rule, be to the master at Toronto. *Ib.*

Where the affidavit, on which a motion to review taxation was grounded, contained allegations of misconduct on the part of the solicitor altogether unconnected with the dealings between the solicitor and the client, such allegations were held to be scandalous, and were ordered to be struck out of the affidavits. *Ib.*

An order of course for the taxation of costs is not to be discharged for the omission therefrom of any reference to defences of which the petitioners had no previous intimation. *Re Bacon*, 1 Chy. Chamb. 79.—Mowat.

An order will not be granted for taxation before a master in an outer county even on a consent. *Re Solicitors*, 3 Chy. Chamb. 90.—Taylor, *Secretary*.

(f) *What Recoverable.*

Quære, whether an attorney suing as an unprivileged person, is entitled to charge fees. *Pegley* v. *Clench*. Tay. 309.

Attorneys suing in person are allowed fees for the same services as in England; but if also a master he cannot tax a counsel fee to himself for conducting his own cause at Nisi Prius. *Brock et al.* v. *Graham*, 2 Q. B. 268.

Fees paid to counsel at the trial are recoverable. *Brock et al.* v. *Bond*, 3 Q. B. 349.

No retaining fee will be allowed to a solicitor who is also counsel. *In re McBride*—*Farley* v. *Davis*, 2 Chy. Chamb. 153.—Taylor, *Secretary*.

Held, that a party who gave instructions to commence an action without specifying the court (the attorney not stating that he would expect him to pay the difference should the verdict be within the County Court jurisdiction, and commencing the action in the superior court) was only liable for County Court costs between attorney and client, the sum recovered being within the jurisdiction of the County Court, and no higher costs being taxable between party and party. *Scanlan* v. *McDonough*, 10 C. P. 104.

Practice defined as to the manner in which the master will tax solicitor's costs for professional services rendered in the sale of lands and collection and transmission of the purchase money. *In re Richardson*, 3 Chy. Chamb. 144.—Boyd, *Master*.

If charges in a bill are unusual or exceptional, he has to make out a very clear case to have them allowed. *In re A. B., Solicitor*, 8 L. J. N. S. 21.—Boyd, *Master*.

If the usual charges are made, but the client complains of negligence or unskilfulness, not apparent on the face of the bill, then the onus rests on him to establish his case. *Ib.*

A retaining fee of £5, was held not taxable in this case. *Cullen* v. *Cullen*, 2 Chy. Chamb. 94.—Mowat.

A solicitor upon the plaintiff's application having been appointed guardian ad litem to infant defendants, and being unable to recover his costs from the plaintiff, or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund. *McKay* v. *Harper*, 6 P. R. 54.—Chy. Chamb.—Spragge.

(g) *Disputing Retainer.*

In referring to taxation, there is no authority here, without consent, to reserve the right to dispute the retainer. It exists in England under 6 & 7 Vict. c. 73, which differs in this from our C. S. U. C. c. 35, s. 44. *In re Totten, an Attorney*, 27 Q. B. 449. See, contra, *In re Lewis*, 9 L. J. 81.—C. L. Chamb.—Morrison.

Where on an application by a solicitor for a taxation, the client disputed the retainer as to the whole bill, and also set up the Statute of Frauds, it was held that the court could refer these defences to the master. *Re Bacon*, 3 Chy. Chamb. 79. Mowat.

Where an order for the delivery and taxation of bills had been taken out on præcipe on the application of the administrator of the client, and the fact that the solicitor disputed the retainer by such client was not brought to the notice of the court on the issuing of the order, but it was established that the administrator did not then know that the retainer was disputed:—Held, that there was no suppression of a material fact, and that the order was regular. *In re Toms, a Solicitor, In re M. C. Cameron*, 3 Chy. Chamb. 204.—Spragge.

Where a solicitor has no written retainer, and it is disputed, and the evidence is conflicting, this court will give weight to the denial of the client as against the solicitor. *In re Eccles and Carroll*, 1 Chy. Chamb. 263.—VanKoughnet.

See IX. 1 p. 322.

(h) *Costs of Taxation.*

When after settlement the client applies for taxation and nothing is found due to him, he must pay the costs of application. *In re Francis* v. *Boulton*, 6 L. J. 20.—C. L. Chamb.—Draper.

In a bill rendered by an attorney and referred to the master, he is not to take into consideration—in determining whether one-sixth has been taxed off the bill, so as to make the attorney pay the costs of the reference—items which are not properly taxable items, such as sheriff's fees and witness fees, &c., not actually to be repaid to the attorney nor a part of his claim. *In re Davy, one, &c.*, 2 L. J. N. S. 70.

Where one item had been abandoned by an attorney after a summons taken out for the taxation, but before actual taxation, and one sixth was afterwards struck off the whole bill, including such item:—Held, that the attorney was properly ordered to pay the costs of taxation. *In re Davy*, 5 P. R. 55.—Chamb.—Richards.

Where a solicitor offered to make a deduction from his bill, the court held that the master should not charge the solicitor with the costs of taxation unless the bill had been reduced one-sixth independently of the voluntary deduction. *Re Freeman et al.*, 1 Chy. Chamb. 102.—Esten.

Held, where an order, silent as to costs, was made upon attorneys for the delivery of bills to a client, and the bills were afterwards delivered, and a subsequent order made for the taxation, costs of the reference to abide the event, that costs of the first order could not be taxed as part of the costs of the reference:—Held, also, that no order could be made upon the attorneys by a judge different to the one who signed the first order for payment by them of the costs of the first order. *Re Lemon et al., Attorneys*, 1 L. J. N. S. 19.—C. L. Chamb.—A. Wilson.

Held, that the court has no discretion as to allowing costs of taxation, when the party chargeable neither obtains the order nor attends under an order obtained by the solicitor. *In re Kerr*, 2 Chy. Chamb. 47; 2 L. J. N. S. 302.

See *McGill* v. *Sexton*, 1 Chy. 311, p. 332.

(i) *Other Cases.*

Defendant's costs not having been taxed with sufficient liberality as between attorney and client, a revision was ordered. *Cameron* v. *Campbell*, 1 P. R. 170.—C. L. Chamb.—Burns.

An attorney received from his client a note for £50, the costs in three suits. The client being sued for this note in the name of one W., apparently a nominal plaintiff paid £29, and gave a confession for the balance, the bills were afterwards taxed at £24, and the court then ordered the attorney to refund the amount over paid. *In re——, one, &c., on the complaint of Colborn*, 1 P. R. 208.—P. C.—Draper.

When on the taxation of a solicitor's costs, the master, without any order as to the costs of taxation, taxed them and included them in his certificate, and a subpœna and attachment issued in due course for the whole amount included in such certificate, and the client remained in close custody for a considerable time under the attachment, before making any application in regard to the supposed error as to the costs of taxation, the court refused to set aside the subpœna and attachment. *McGill* v. *Sexton*, 1 Chy. 311.

In a suit of foreclosure on a mortgage taken by a solicitor from his client to secure advances and costs, the court refused to direct taxation, there being no over-charges pointed out, or any undue pressure shewn. *Shaw* v. *Drummond*, 13 Chy 662.

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties. Where, therefore, an appeal was made to this court from an order directing the taxation of a solicitor's bill against his client in a particular mode, the court dismissed the appeal with costs. *Re Freeman et al.*, 2 E. & A. 109.

The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings. *Ib.*

A re-taxation will not be ordered unless improper charges are specified and established. *Eastman* v. *Eastman*, 2 Chy. Chamb. 325. Taylor, *Secretary*.

4. *Recovery by Action.*

(a) *Statute of Limitations.*

In an action by an attorney against his client for costs of prosecution, it appeared that the claim was barred by the Statute of Limitations, but that the lands of the defendant in the suit had been sold under a fi. fa. sued out within six years, and bought in by this defendant under his own execution:—Held, that this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his use, but that only the costs of the fi. fa. could be recovered. *Jones* v. *Hutton*, 11 Q. B. 554.

The plaintiff's attorney sued in 1870 for his costs in suits brought for the defendant in which suits judgment was entered, respectively in 1860 and in 1861, and executions which were issued in 1863, had been renewed yearly, at the defendant's request, until 1870: Held, that the plaintiff could not recover for any costs incurred before and in the entry of the judgments; that they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute, which then began to run. *Hurst* v. *Quine*, L. R. 4 Q. B. 657, distinguished. *Lee & McFarlane* v. *Dawson*, 32 Q. B. 237.

(b) *Other Cases.*

An attorney may sue for his fees in a suit which he does not conclude, if he can assign satisfactorily for not proceeding. *Ford* v. *Spafford*, 5 O. S. 440. See *Smith et al.* v. *Graham*, 2 Q. B. 138.

An attorney cannot proceed for his costs after a plea of release puis darrein continuance, unless he establish a clear case of fraud. *White* v. *Boulton*, E. T. 2 Vict.

In an action by an attorney for his fees, proof by a copy made up from his books after delivery to defendant, is sufficient. *Hall* v. *Shannon*, E. T. 2 Vict.

Where the plaintiffs, suing as attorneys for the amount of a bill of costs, proceeded by an attorney and not in person by attachment of privilege, and assessed damages at a sum under £10, the court refused to allow them full costs. *Strachan et al* v. *Bullock*, 2 Q. B. 382.

A client not having obtained a regular order for the taxation before the trial, will not be allowed, by producing the Master's allocatur at the trial, shewing a less sum taxed than claimed, to dispute the items of the bill. *Brock* v. *Bond*, 3 Q. B. 349.

Defendant signed a written retainer of D. & , as his attorneys, to prosecute one M. While the suit was pending, their partnership was dissolved, and E. retired, assigning to D. all his rights. D. alone appeared as plaintiff's attorney on the record:—Held, that D. might sue alone for costs. *Dougall* v. *Ockerman*, 9 Q. B. 354.

The plaintiff, an attorney, sued defendant for costs as between attorney and client. Before appearance defendant procured an order for taxation, on undertaking to pay what should be found due. An attachment was irregularly issued upon this order, under the pressure of which defendant paid the amount taxed. The plaintiff also proceeded in the suit by signing interlocutory judgment. The court, under these circumstances, ordered that the plaintiff (as an attorney) should pay the money received by him into court—that the defendant should be relieved from his undertaking—that the interlocutory judgment should be set aside without costs, and that the plaintiff should pay the costs of this application. *Regina* v. *McLeod, in re Miller* v. *McLeod*, 10 Q. B. 588.

Defendants, as attorneys, delayed to register a mortgage to B. their client, by which the security was defeated. They then obtained another mortgage from the same mortgagor to on different land, subject to two prior incumbrances, and B. authorized their proceeding to foreclose this mortgage, expressly without prejudice to his rights as against them. B. having left pending a suit against the defendants for negligence, his administrators obtained a verdict for it and issued execution. Defendants then applied to stay proceedings until they could obtain judgment for the costs taxed in the foreclosure suit, in order to set it off, B.'s estate, being insolvent. In answer, it was urged that the second mortgage and foreclosure (which proved out of no benefit) as well as the insolvency, resulted from defendants' negligence, and that the judgment against them was the only fund to which the plaintiffs had to look for the purposes of administration, &c., for which they were personally liable. Under these circumstances the application was refused. *Lynch et al.* v. *Wilson et al.*, 3 P. R. 169. Chamb.—Mowat.

5. *Taking Security for Costs.*

Held, that a security taken from a client by an attorney or counsel for costs to accrue in respect of services to be rendered to the client, is invalid and cannot be enforced. *Hope* v. *Caldwell*, 21 C. P. 241, followed in *Robertson* v. *Caldwell*, 31 Q. B. 402.

6. *Other Cases.*

An attorney may be ordered to return moneys which he has retained beyond the amount of his bill as taxed to the person at whose instance the taxation has taken place under C. S. U. C. c. 35, though such person be a third party who is liable to pay and has paid the bill to the attorney or party entitled thereto. *In re Glass et al.* v. *Macdonald*, 13 C. P. 419.

A solicitor whose costs have been taxed on the application of the client and not paid, a fi. fa. having been returned nulla bona, is entitled to an order for the examination of his client touching his estate and effects. *Re Blain*, 1 Chy. Chamb. 345.—Mowat.

A solicitor who is a member of a municipal council cannot recover from the corporation for services rendered them, he being a trustee under C. S. U. C. c. 54, s. 217. *The Corporation of the Town of Peterboro'* v. *Burnham*, 12 C. P. 103.

To enforce payment of solicitor's costs taxed upon the petition of the client, entitled in a cause depending, the proper course, under the 92nd order of Vice-Chancellor Jameson's orders, is by subpœna and attachment, though such costs include costs at law. *McGill* v. *Sexton*, 1 Chy. 311.

G. recovered a judgment against D., and afterwards, though in insolvent circumstances, assigned the same by two assignments to his attorney, one for costs due him by G., and the other for a debt due to R. by G. Afterwards C. obtained a judgment against G. and attached the debt so due to him by D., and gave notice of the attachment to D. before the assignee of G. had given notice of his assignments. D. paid the moneys due to G. by himself to the sheriff, under an execution issued at the instance of the assignee of G.:—Held, that the solicitor of G. must be restricted to the costs incurred by him in the action brought by G. against D., and that R. must stand as an ordinary creditor. *Davidson* v. *Douglas*, 15 Chy. 347.

X. Lien for Costs.

1. *To what extent.*

The plaintiff having recovered judgment against B. and his sureties on a replevin bond, B. moved to have satisfaction entered. The plaintiff's attorney claimed a lien on the judgments for his costs as between attorney and client, not only in these suits, but in other actions between the parties upon the same subject:—Held, that he was entitled only to the taxed costs as between attorney and client in the suits. *Bletcher* v. *Burn, and Bletcher* v. *Marsh and Everitt*, 25 Q. B. 92.

A deed ordered to be executed under a decree was sent by the vendor's solicitor, after being

executed by him, to the defendants to be executed by them, which they did before their attorney employed by them for that purpose:—Held, that such attorney was not entitled to a lien upon the deed beyond his disbursements and for preparing the affidavit of execution. *Crooks* v. *Street*, 1 Chy. Chamb. 220.—VanKoughnet.

See *Re Cross*, 4 Chy. Chamb. 11, p. 297.

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2. *When lost.*

The plaintiff being the holder of a note made by Francis and endorsed by Thomas Somerville, employed B., his attorney, to collect the same, who sent it to C., a clerk of a Division Court, to issue process thereon. B. obtained judgment against the maker, and failed against the endorser. Another suit was afterwards brought in the name of the same plaintiff, by instructions of B. against Thomas S. (the endorser on the former note) upon an alleged promise to join in a new note with Francis S., the consideration being the discharge of the former judgment against F. S. in the Division Court. The evidence, although it did not prove English (the plaintiff) to have been a party directly to the new arrangement, still shewed that he was present and cognizant of it. Upon demand made by the plaintiff upon the clerk of the Division Court for the note, he refused to give it up unless paid $10, and afterwards sent it to B., the attorney. An action of trover being brought for the same:—Held, that the plaintiff being present and cognizant of the arrangement between Clark and Thomas S., he was to be considered as in possession of the note, and as there can be no lien without possession, B.'s (the attorney's) claim failed, and the plaintiff was entitled to recover. *English* v. *Clark*, 12 C. P. 451.

Property was sold under order in the suit, and the conveyance and a mortgage, which was to be given back to the vendor, were prepared at the purchaser's expense. After engrossment of the deeds by the solicitor for the purchaser they were given to the parties for execution, and the conveyance (executed) was returned to the solicitor of the purchaser, the mortgage being retained by the vendor:—Held, that the solicitor by delivering the engrossment to the vendor for execution had lost his lien thereon for the costs of preparation, as against the vendor (the mortgagee), and was bound to deliver it up to him: Held, also, that the application to deliver was properly made in the matter in which the sale had taken place. *In the Sproule*, 1 Chy. Chamb. 396.—Mowat.

A solicitor having a lien on title deeds as against his client for costs generally, was employed by A. to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favour of another person. On default in such second mortgage, the mortgagee sold under a power of sale in the mortgage:—Held, that the lien on the deeds in his possession, as against the mortgagor, continued as against the purchaser. *Gill* v. *Gamble*, 13 Chy. 169.

The plaintiff's solicitor carried on a suit to wind up a partnership till a decree was obtained and some progress made with the reference thereby directed. The plaintiff became embarrassed, and assigned to a creditor, in whose name acting by another solicitor, the suit was revived, and a sum was ultimately found due to him:—Held, that the solicitor of the original plaintiff had not lost his lien for costs, but was entitled to be paid next after satisfaction of the costs of the solicitor of the plaintiff who had concluded the suit, out of the fund realized. *Clark* v. *Eccles*, 3 Chy. Chamb. 324.—Boyd, *Master*.

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3. *Set-off of Costs.*

A. having obtained a decree against B. for payment of a large sum of money, issued an attachment to enforce payment, upon which B. was arrested. The attachment was afterwards set aside for irregularity, and an action for false imprisonment brought by B. against A. and his solicitor. An injunction to restrain the proceedings at law was granted, but A. and his solicitor were ordered to pay B. his costs of the action at law and of the motion for injunction. On an application by A. and his solicitor to set off these costs against the debt due by B. to A.: Held, that the lien of the attorney at law for costs not having accrued, and, as by reason of the injunction, it never could accrue, and B.'s right to his costs being derived from an order of this court, A. was entitled to set-off. *Wilson* v. *Scriter*, 1 Chy. Chamb. 75.—Spragge.

One of several defendants in a cause, against all of whom a verdict had been recovered, was allowed, on a summary application after judgment, to set-off the amount of a judgment which he had recovered against the plaintiff, against the plaintiff's judgment against him and his co-defendants, saving to the attorney his lien for costs. *Fortune* v. *Hickson et al.*, 1 Q. B. 81. *Tippete* v. *Haacke*, 1 P. R. 365. Chamb. Robinson. See, also, *Reed* v. *Smith*, 1 P. R. 2 Chamb.—Robinson.

See *Lynch* v. *Wilson*, 3 P. R. 169, p. 333.

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4. *Settlement of Suit by Client.*

If, after notice by plaintiff's attorney to defendant, a bonâ fide settlement, or without notice a collusive settlement, be made by defendant with plaintiff, this court will interfere to prevent the attorney being unjustly deprived of his costs. *Langle* v. *Fetherley*, 5 Q. B. 623.

Where defendant, an attorney, settled with the plaintiff after a fi. fa. had been put in the sheriff's hands, which the defendant must have known the plaintiff's attorney had issued almost wholly for costs, the court ordered the plaintiff's attorney's costs included in the execution to be referred for taxation, and the defendant to pay the sum to the plaintiff's attorney, with the costs of the application. *Griggs* v. *Meyers*, 5 Q. B. 532.

Collusion to deprive the attorney of his costs must be clearly made out to entitle him to succeed for them. Here the plaintiff informed the attorney that he intended to settle with the defendant, and said that he would see the costs paid. No objection was made, nor any notice given to defendant not to pay the plaintiff; but some months after the settlement, the plaintiff being insolvent, the attorney issued a fi. fa. for costs:—Held, that the writ must be set aside. *Brown* v. *Conant*, 2 P. R. 208. Chamb. Richards. See, also, *Plant* v. *Stone*, 9 Q. B.

Defendant having settled collusively with the plaintiff, was ordered to pay the plaintiff's attorney his costs, and an application afterwards made to revise the taxation of such costs was refused. *Connors* v. *Squires*, 2 P. R. 149.—Chamb.—Robinson.

In shewing cause against a rule to set aside a verdict, which was not moved on affidavit, the plaintiff's attorney irregularly filed an affidavit that the plaintiff owed him £80 when he instituted the suit, which it was agreed should be paid out of the money collected; that the plaintiff was insolvent; and that he had no doubt the defendant and he had colluded to deprive deponent of his claim and costs. Semble, that if these facts had been shewn on a proper application, the court might have protected the attorney in his costs, but that they could not have interfered with respect to his interest in the claim. *Lipmas* v. *Henderson*, 21 Q. B. 447.

Where a suit is commenced and carried on under instructions from a person who tells the attorney that he is agent for the plaintiff, but the attorney takes no trouble to ascertain the truth of this, and proceeds without any communication with the plaintiff, the attorney will not be protected as to his costs where a settlement is made between the parties which has the effect of depriving him of his lien, but will be liable to an action against the plaintiff. *Smith* v. *Thompson*, 5 P. R. 166.—Chamb.—Gwynne.

The plaintiff and defendants, without the knowledge of defendants' solicitor, compromised a suit for foreclosure, in which the usual decree of reference had been made, defendants releasing their equity of redemption for $200, which was paid by plaintiff to them:—Held, that there was a fund recovered by defendants' solicitor, and that no lien for his costs had ever existed. *Peacock* v. *Tully*, *Re Fairbairn*, 3 Chy. Chamb. 71.—Strong.

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5. *Other Cases.*

Where, as to the right of an attorney to detain papers of account belonging to his client, on an unsettled claim. *McLean* v. *Maitland*, 5 L. J. N. S.—C. L. Chamb.—Robinson.

An attorney's lien for costs as between him and his client, the judgment debtor will not be allowed to stand in the way of an attachment. *Jones* v. *Benson*, 2 P. R. 350.—Q. B.; *Bank of Upper Canada* v. *Wallace*, *Ib.* 352.—Chamb.—

Upon the application of a solicitor having a lien in respect of a debt attached, the attaching order will be discharged as against him, but the party against whom such an order has been made is not entitled to its discharge on the ground of the existence of the lien in favour of his solicitor. *Jones* v. *Vansittart*, 6 P. R. 96.—Chy. Chamb. Suggested, *Referee*.

Where an application for the discharge of an attaching order was made nominally by a plaintiff against whom the attaching order had been issued, but really by and for the benefit of his solicitor, who had a lien on the debt attached, which was given to amend the proceedings by substituting the solicitor the applicant, and the order was discharged, but without costs. *Ib.*

Where a solicitor refused to carry on a suit unless money was advanced, or to deliver up the papers to a new solicitor until his costs in the suit were paid, the court ordered a taxation, and directed the papers to be delivered up to the new solicitor upon his undertaking to hold them subject to the lien, if any, of the former solicitor, and to re-deliver them within ten days after he ceased to have occasion for them for the purposes of the suit. *Ley* v. *Brown*, 1 Chy. Chamb. 179.—Spragge.

The rule that a solicitor is bound to produce documents subject to his lien, does not apply when the person asking for their production is the party to pay the amount claimed. *Moodie* v. *Thomas*, 1 Chy. Chamb. 19.—Esten.

An award for an amount, together with costs, having been made in favour of a party, the costs were taxed by consent, and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances, a motion made to stay proceedings to enforce payment of the costs under the award, at the instance of the solicitor to whom they were payable, was refused with costs. *McLean* v. *Beatty*, 1 Chy. Chamb. 138.—Van-Koughnet.

A mortgagor after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee. On a motion for that purpose, an order was made for their delivery. *Stennett* v. *Aruyn*, 2 Chy. Chamb. 218.—Spragge.

See *Crooks* v. *Crooks et al.*, 1 Chy. 57, p. 313.

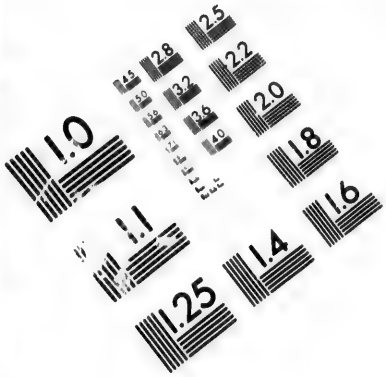
X. Miscellaneous Cases.

The rules of this court of Michaelmas Term, 4 Geo. IV., respecting the service of pleadings and papers in a cause on an attorney residing out of the district in which the action is brought, apply equally to all districts, and to the attorneys for both parties in the cause. *Clemow* v. *Her Majesty's Ordnance*, 5 Q. B. 458.

In an action against B. and S., a firm of solicitors, on promissory notes endorsed by B. in the name of the firm, it was proved that on other occasions S. had endorsed in the same manner, and as the witness believed with B.'s knowledge, but it did not appear what the consideration was for the endorsements sued on, or that S. knew of them:—Held, sufficient evidence to go to the jury of a mutual authority; and a verdict having been found for the plaintiff, the court refused to interfere. *Workman* v. *McKinstry et al.*, 21 Q. B. 622.

A practising attorney may be a surety in an election petition. *Re Hamilton Election*, 10 L. J. N. S. 170.—C. L. Chamb.—Dalton.

A solicitor, whose costs have been taxed on the application of the client and not paid, a fi. fa. having been returned nulla bona, is entitled to an order for the examination of his client touching his estate and effects. *Re Bain*, 1 Chy. Chamb. 345.—Mowat.



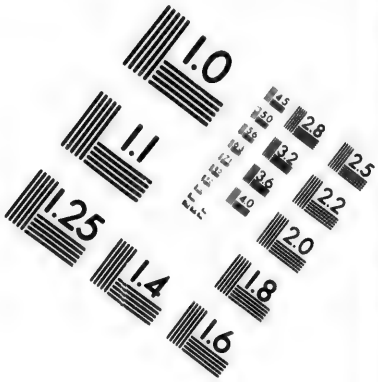
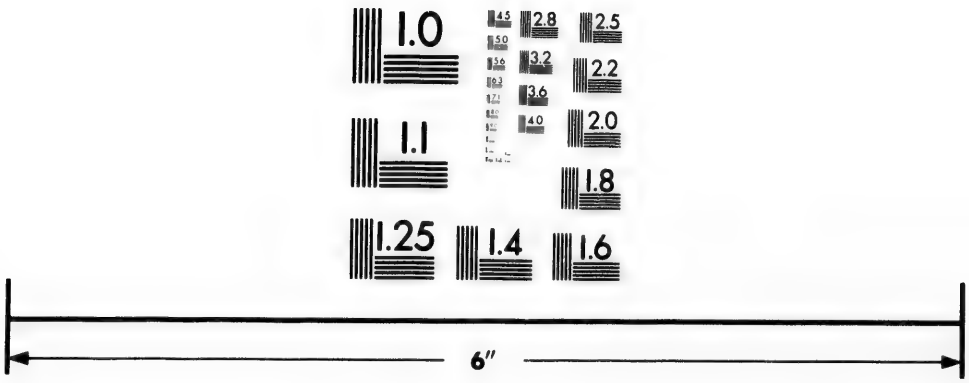
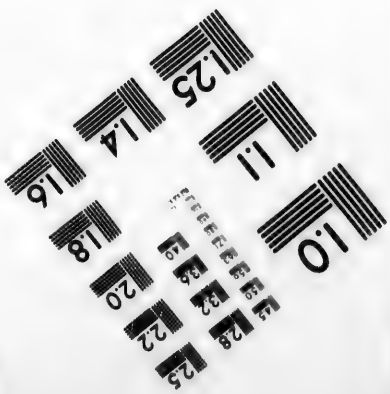


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ATTORNEY AND SOLICITOR GENERAL.

I. Informations, 339.
II. Miscellaneous Cases, 340.
III. Party to Bill in Chancery—*See* Pleading in Equity.

I. Informations.

In an action in the nature of an information filed by the attorney general, costs will not be allowed to the defendant against the crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

The proceedings in an ex-officio information may be either at the suit of the Queen or the attorney general, but the defendant cannot be called upon to plead in vacation upon a rule to plead given in vacation, but is entitled to a regular rule to plead, and an imparlance. *Regina* v. *Burnham*, 1 Q. B. 413.—P. C.—Macaulay.

To an information of intrusion filed by Her Majesty's attorney general for the Dominion, prosecuting for Her Majesty, the defendant pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada; but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate. Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the crown, with leave to defendant to move to enter it for him:—Held, that the crown was clearly entitled to recover, for, among other reasons, the plea set up no title in defendant, and admitted the crown title by stating the lands to belong to this province; and the fact of the attorney general for Canada prosecuting for the crown could not shew that a Dominion title was necessarily claimed. *Attorney General* v. *Harris*, 33 Q. B. 94.

Remarks upon the form of and defects in the nisi prius record. *Ib.*

An information in the name of the attorney general not signed by him, but on which was endorsed a fiat, "Let the within information be filed,"—Signed by the solictor general:—Held, irregular. *Attorney General* v. *Toronto Street Railway Co.*, 13 Chy. 441.

There is no precedent for dispensing with the signature of the attorney general to an information. *S. C.* 2 Chy. Chamb. 165.—Mowat.

Where in his absence from the province an information was filed without his signature, but having endorsed thereon a fiat signed by the solicitor general, it was ordered to be taken off the files. *Ib.*

Where an information had been amended by merely adding a party by the direction of the court, a motion to take the amended information off the files because not signed by the attorney general, was refused. *S. C. Ib.* 321.—Taylor, *Secretary.*

The provincial attorney general, and not the attorney general of the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the crown as representing the government of the Dominion, but of a violation of the rights of the public of Ontario. *Attorney General* v. *Niagara Falls International Bridge Co.*, 20 Chy. 34.

The provincial attorney general is the proper person to file an information in respect of a nuisance, caused by interference with a railway. *Ib.*

II. Miscellaneous Cases.

A writ of certiorari lies to remove orders of sessions relating to the expenditure of the district rates and assessments, at the instance of the attorney general, without notice. *Rex* v. *Justices of the Newcastle District*, Dra. 114.

A patent from the crown appointing a barrister a Queen's counsel, directed that he should take precedence next after another Queen's counsel who was subsequently appointed attorney general:—Held, that such patent did not thereby entitle him to precedence before the solicitor general. *In re Boulton*, 1 Q. B. 317.

Where the attorney general is a defendant and does not answer, the proper course is to obtain an order that he answer in a week, or that the bill be taken pro confesso. *Shea* v. *Fellowes*, Chy. Chamb. 30.—Spragge.

The attorney general is never made to pay costs even upon interlocutory applications. *Gibson* v. *Clench*, 1 Chy. Chamb. 69.—VanKoughnet.

The attorney general of the province is the officer of the crown who is considered as present in the courts of the province, to assert the rights of the crown, and of those who are under its protection. *Attorney General* v. *Niagara Falls International Bridge Co.*, 20 Chy. 34.

ATTORNEY, POWER OF.

See Principal and Agent.

AUCTION AND AUCTIONEER.

I. Auctioneer.
1. *Duty and Liability of*, 341.
2. *Right to recover Price*, 341.
3. *Authority of*, 342.
4. *Lien of*, 342.
II. Contract of Sale.
1. *Conditions of Sale*, 342.
2. *Statute of Frauds.*
(a) *Sufficiency of Writings*, 342.
(b) *Acceptance and Part Payment*, 3
3. *Representations and Warranty*, 344.
III. Biddings.
1. *Conduct of Sale*, 345.
2 *Sales of Land by order of the Court*—
Sale of Land by order of
Court.
IV. Sale of Land for Taxes—*See* Assessment and Taxes.
V. Sale of Land by Order of the Court—
See Sale of Land by Order of
Court.
VI. Sale of Land under Execution—
Execution.

I. Auctioneer.

1. *Duty and Liability of.*

An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury find that he has acted negligently and disregarded his duty; and it is no misdirection to tell the jury that the low price obtained is evidence to go to them of negligence. *Cull* v. *Wakefield*, 6 Q. B. 178.

The plaintiff before the sale gave the sheriff a memorandum authorizing him to bid on his account to the amount of the debt and costs in the suit. Under this the sheriff, instead of bidding gradually, bid at once the full amount, and bought in the land:—Held, that the plaintiff had clearly no ground of action against him for so doing; and—Quære, whether the writing could be construed as more than an authority, and whether, if the defendant had disregarded it altogether, any action could have been maintained. *Markle* v. *Thomas*, 13 Q. B. 321.

An auctioneer is not bound to accept all bids, as a matter of course, from persons present at the auction. An action, therefore, will not lie for refusing to accept such bids unless by reason of some special condition or terms of the sale. *Calder* v. *Jackson*, 11 C. P. 543.

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2. *Right to recover Price.*

Where goods were sold by auction, but being bought by the purchaser were re-sold at a loss, and were purchased by a partner of the auctioneer, though in another business totally distinct from that of auctioneer; and an action was afterwards brought by the auctioneer to recover from the first purchaser the loss on the re-sale:—Held, that it was no good ground of objection to such action that the goods on the re-sale had been purchased by such partner. *Clarkson et al.* v. *Noble*, 2 Q. B. 361.

In an action by an auctioneer against a purchaser for goods sold, the purchaser pleaded that he delivered the goods to the auctioneer to sell; that A. was the agent of B., to whom the goods belonged, and that he (the purchaser) had a set-off against B., which he pleaded:—Quære, could the purchaser plead the set-off against B., without further alleging that the auctioneer sold the goods to him as the auctioneer of B.? Robinson, C. J., was of opinion that he could not. Macaulay, J., diss. Macaulay, J., and McLean, J., had no opinion on this point. *Wakefield* v. *Noble*, 5 Q. B. 160.

By an auctioneer's conditions of sale, purchasers to an amount exceeding £30, were to have "six months credit, giving approved indorsed notes:"—Held, per Cur., (Robinson, C. J., diss.) that a purchaser over £30, upon these terms, was a purchaser unconditionally on credit, and could not be treated as a purchaser for cash upon his refusal to furnish the indorsed note; that he could not consequently be sued on the common count for goods sold and delivered under the expiration of the credit, that to a special action brought by the auctioneer against the purchaser before the credit had expired, for not giving the indorsed note when requested, a special set-off would be inadmissible. *Wakefield* v. *Harris*, 5 Q. B. 159.

3. *Authority of.*

If goods are sent to an auctioneer to sell, and the principal afterwards directs him not to sell, but the goods remain in his possession, and are purchased bonâ fide by a third party, who has no notice whatever of the revocation of the authority, such sale is good. *Gunn* v. *Gillespie*, 2 Q. B. 151.

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4. *Lien of.*

An auctioneer has no lien on maps left with him to sell land by—such plans not being regarded as title deeds, which are quasi part of the land. *Blackburn* v. *Macdonald*, 6 C. P. 380.

II. Contract of Sale.

1. *Conditions of Sale.*

Where the conditions of a sale by auction are stated in the declaration as being imposed at the time of sale, the defendant cannot be discharged from them by any agreement before the sale; and a plea containing such defence is bad on general demurrer. *Mead* v. *Hendry*, 1 Q. B. 238.

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2. *Statute of Frauds.*

(a) *Sufficiency of Writings.*

The auctioneer himself need not sign the purchaser's name, it may be done by his clerk at the time; and the clerk of the owner of the goods sold; acting openly at the sale for the auctioneer, is his clerk to bind the purchaser. *Sandford* v. *O'Donohoe*, M. T. 4 Vict.

The signature of the clerk of an auctioneer on behalf of a purchaser, is sufficient to charge the party purchasing, within the statute. *Clarkson* v. *Noble*, 2 Q. B. 361.

A sale of goods by the sheriff or his bailiff under execution is within the 17th sec. of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing, in the same manner as an auctioneer or his clerk. *Flintoft* v. *Elmore*, 18 C. P. 274.

The entry of defendant's agent as the purchaser is sufficient, if the defendant afterwards acknowledge the agent's authority, as was done here. *Ib.*

In this case a person requested by the bailiff to act as his clerk noted in pencil on the back of a letter the name of each purchaser, the article sold, and the amount bid; and after the sale was over, but on the same day, the bailiff made out a more extended memorandum, headed "List of goods sold and by whom bought, 17th October, 1866," and containing the article, the purchaser's name and the price. This he signed "D. Howard, bailiff:"—Held, insufficient, for it did not appear who the seller was, or the terms of sale, and the second memorandum could not bind, for the bailiff's authority continued only during the sale. *Ib.*

The purchaser after the sale wrote to the deputy sheriff, speaking of the engine, one of the articles alleged to have been sold to him, as

being on his lot, which belonged to him, and having been bid in for him by Mr. T. (the agent who had purchased at the sale), and saying that he had heard the sheriff's fees had not been paid, and that he intended to sell again:—Held, insufficient, for it did not shew the terms of the sale, and it was not evidence of a delivery to satisfy the statute, which the other evidence tended strongly to disprove. *Ib.*

A paper used at the sale by auction of certain lands contained the conditions of sale, and the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, and afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers:—Held, a sufficient signing of the contract within the Statute of Frauds. *Crooks* v. *Davis*, 6 Chy. 317.

The conditions of sale must be annexed to the list of purchasers, so as to make a complete contract to bind the vendee under the Statute of Frauds. *Sandford* v. *O'Donohoe*, M. T. 4 Vict.

The signed list should shew the weight and value of the articles purchased, and the price given for them. *Ib.*

A signed agreement expressed that the subscribers had purchased at auction the lots of land set opposite to their names respectively, *according to the terms of sale, made known at the time of sale*, and they agreed to take the deed, bond, or agreement, or lease, as the case might be, to each of them individually, on condition of their having made the payments *according to the conditions of sale*. The conditions of sale, thus referred to, had been printed and distributed in handbills, and were read to the purchasers at the auction:—Held, that the conditions of sale were sufficiently referred to by, and incorporated with, the signed agreement, so as to constitute a binding contract in writing, within the Statute of Frauds. *Dalton* v. *McBride*, 7 Chy. 288.

The conditions of sale appeared in the printed bill of the sale, and were announced by the auctioneer. The purchaser's name was entered by the auctioneer's clerk on one of several sheets of paper used by him at the sale for entering the purchasers' names, but these sheets were not attached to the printed bill:—Held, that there was no contract within the Statute of Frauds. *Kaitling* v. *Parkin*, 23 C. P. 569.

In an action on the common count for land sold, it appeared that the land in question was put up at auction under hand bills signed by the plaintiffs, and having been knocked down to the defendant, his name was entered as purchaser in a book by the auctioneer's clerk, and he paid the deposit required down, but he afterwards refused to pay the subsequent instalments. A bond to convey had been executed by the plaintiffs, and left ready for defendant, with a bond for payment of the money, which defendant did not execute:—Held, that the plaintiffs could not recover, for the land was not conveyed, and therefore an action on the common count would not lie:—Held, also, that there was no contract for sale sufficient to satisfy the Statute of Frauds. *Thomas et al.* v. *Ross*, 19 Q. B. 370.

(b) *Acceptance and Part Payment.*

An offer by a purchaser at auction to sell to another person the goods purchased by him, does not constitute an acceptance of them to take the case out of the Statute of Frauds. *Clarkson* v. *Noble*, 2 Q. B. 361.

Where at a sale by auction defendant purchased goods on the condition of furnishing indorsed notes for the amount, with the option of obtaining a discount of ten per cent. for cash, and that if the conditions were not complied with the goods were to be re-sold at the risk of the purchaser, and after the sale the defendant paid £15 on account, but performed no other part of the conditions, and the plaintiff re-sold the goods at a loss:—Held, that the part payment took the case out of the Statute of Frauds, so as to dispense with the necessity of proof of a written contract; and that such payment could not be considered as depriving the plaintiff of the right to re-sell and make the defendant responsible for the loss on the re-sale. *Furniss* v. *Sawers*, 3 Q. B. 77.

The conditions of sale required approved notes for the purchase money. The morning after the sale the purchaser called on the seller and drew a note, signed by himself only, for the goods he said he had purchased. A dispute arose as to the goods to which he was entitled, and he went away leaving the note. Some days after he returned and offered another note with sureties, which was refused, and the seller on the same day sent back the first note:—Held, clearly insufficient to take the case out of the Statute of Frauds. *Kaitling* v. *Parkin*, 23 C. P. 569.

See *Flintoft* v. *Elmore*, 18 C. P. 274, p. 342.

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2. *Representations and Warranty.*

An auctioneer at an attempted sale of goods warranted them, saying they were his own, and he would stand between the purchaser and loss. Having sold the property by auction a few days subsequently to a bidder on the former occasion, and the goods having been claimed and taken by a third party under a chattel mortgage which covered them, the auctioneer, upon an action for money had and received, was held responsible to the purchaser. *Somers* v. *O'Donohue*, 9 C. P. 26

In a printed catalogue of articles for sale a bull was stated to be "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller (defendant) warranted nothing:—Held, that the plaintiff (the purchaser) in an action as for a breach of warranty, was obliged to shew that the warranty, if any, contained in the catalogue was imported into the sale at auction at which he bought. *Craig* v. *Miller*, 22 C. P. 348.

By the advertisement of an intended sale of land in lots, it was stated, "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen and various other kinds of trees." The purchaser at the sale, which took place upon the property, set up as a defence to a suit for specific performance that the soil was not such as was represented, and was unfit for gardening pur-

poses, and that the trees upon the property were not of the description set forth in the advertisement:—Held, that these representations having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract. *Crooks* v. *Davis*, 6 Chy. 317.

III. Biddings.

1. *Conduct of Sale.*

An agreement to pay money on a party's not bidding at a sheriff's sale is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land. *Waddel* v. *McCabe*, 4 O. S. 191.

When out of an audience or attendance at a sale of twenty-five or thirty persons, three or four were induced to refrain from bidding because they were informed that a person who was attending at the sale intended to buy the property for the family of the debtor, the court refused to set aside the sale which was made to such person upon a small advance upon the upset price, although the person purchasing did so for the benefit of persons other than the family of the debtor. *Brown* v. *Fisher*, 9 Chy. 423.

A person attended on a sale of land, and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser, but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands. The court declared the plaintiffs entitled to redeem, and ordered the defendant to pay all the costs of the suit. *Watson* v. *James*, 19 Chy. 355.

A sale of lands by auction being about to take place, an intending purchaser, in conversation with a person who had previously purchased a portion of the same property, was told by him that he intended buying additional portions thereof, and that he expected the property would fetch about £70 or £80 an acre, and that he was prepared to go as high as £100 per acre for that portion which he intended to buy. It was shewn that by an arrangement between the owner of the estate and this person it was agreed that he should have the lots desired by him at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him; and they were accordingly bid off by him at a rate much higher than that formerly paid by him:—Held, that this was not puffing, although it might have the effect of misleading the intending purchaser, who swore that he had reliance on the opinion of this party; but as he did not swear that he had been influenced by the example of this person or the information thus given by him, the court decreed specific performance of the contract for the purchase of certain portions of the estate bid off by him at the auction. *Crooks* v. *Davis*, 6 Chy. 317.

AUCTIONEER.

See Auction and Auctioneer.

AUDITA QUERELA.

The court refused to grant this writ where the applicant had no other privity with the judgment than as alienee of the land taken in execution, and having acquired his interest after execution issued. *Beard* v. *Ketchum*, 8 Q. B. 523.

A judge in chambers will not in general entertain or enter into a question as to the validity of an order of discharge for insolvency in the nature of a bankrupt's certificate, under 19 & 20 Vict. c. 93, but will rather let the point be determined by way of auditâ querelâ. *Schofield* v. *Bull*, 3 L. J. 204.—C. L. Chamb.—Burns.

AUTRE FOIS ACQUIT.

See Criminal Law.

AVERAGE.

See Insurance—Ship.

AWARD.

See Arbitration and Award.

BAGGAGE.

I. Liability of Railway Companies—*See* Railway Companies.

BAIL.

I. Application for Allowance of, 347.
II. Indorsement on Bailable Writs, 347.
1. *Capias*—*See* Arrest.
III. Bail Piece, 348.
IV. Bail Bond, 348.
V. Justification, 348.
VI. Proceedings against Bail.
1. *Staying and Setting Aside*, 349.
2. *Practice*, 350.
3. *Pleadings in Actions on Bail Bond*, 350.
VII. Discharge of Bail.
1. *By Surrender of Principal*, 352.
2. *Under Bankruptcy or Insolvency Acts*, 354.
3. *By Arrangement with Principal*, 354.
4. *Other Cases*, 355.
VIII. Bail to the Limits.
1. *Who may give*, 355.
2. *Bond.*
(a) *Form of*, 356.
(b) *Allowance of*, 357.
(c) *Assignment of*, 358.
(d) *Breach of*, 358.
3. *Separation of Counties*, 360.

4. *Commitment to Close Custody*, 360.
5. *Relief of Bail*, 361.
6. *Rights, Duties and Liabilities of Sheriff*, 361.
7. *Action on Bond to the Limits.*
   (a) *Pleadings*, 362.
   (b) *Practice*, 363.
   (c) *Damages*, 363.
   (d) *Other Cases*, 364.
8. *Other Cases*, 364.

IX. Miscellaneous Cases, 364.

X. Bail in Particular Cases.
1. *In Criminal Matters — See* Criminal Law.

XI. Other Matters.
1. *Affidavit to hold to Bail—See* Arrest.
2. *Charging in Execution—See* Prisoner.
3. *Recognizance of Bail — See* Recognizance.

I. Application for Allowance of.

A rule for allowance was refused, where since their justification one of the bail had absconded. *Billings et al.* v. *Loucks*, 5 O. S. 78.

Where the notice to plaintiff was that special bail had been put in, and the recognizance produced was only for the limits, the application for allowance was refused with costs. *Clegg* v. *McNab*, 1 P. R. 150.—P. C.—Draper.

II. Indorsement on Bailable Writs.

A bailable writ must be indorsed with the sum sworn to. *Armstrong* v. *Scobell*, 3 O. S. 303.

Although it be sued out by an attorney in person. *Washburn* v. *Walsh*, 4 O. S. 322.

The claim must also be indorsed on the bailiff's warrant, as well as on the writ. *Steele* v. *Lameux*, E. T. 6 Will. IV.

Semble, that an alias bailable writ must be endorsed. *Ross et al.* v. *Balfour et al.*, 5 O. S. 683.

A rule to set aside process for want of an indorsement of the plaintiff's claim was refused, where the omission had been supplied two hours after the arrest, and before bail was put in. *Smith* v. *Smith*, 4 O. S. 10.

The arrest was set aside, although the omission was supplied immediately after it. *Gibbs* v. *Kimble*, 1 Q. B. 408.—P. C.—Jones.

On such an application, the defendant must shew by affidavit that the cause of action is a debt. *Leggatt* v. *Marmott*, E. T. 3 Vict.

Where the indorsement directed the sheriff to take bail for too large a sum, the court allowed it to be amended on payment of costs. *Grantham* v. *Peters*, E. T. 3. Vict.

Semble, if the sum be mentioned in the affidavit and written in the margin of the writ, that would be sufficient, without indorsing it on the writ. *Sligh* v. *Campbell*, 4 Q. B. 255.

Where a ca. sa. in debt has been issued on a judgment in assumpsit, and not endorsed as required by the rule of court, it may be amended. *Keefer* v. *Hawley*, 1 P. R. 1.—P. C.—McLean.

III. Bail Piece.

According to the old practice, a bail piece must have been transmitted from the country to a judge of King's Bench. *Whitney* v. *Stone*, Dra. 235.

Where there are two plaintiffs with the same surname, the non-repetition of the surname after the Christian name of each in a bail piece is only an irregularity, and will not warrant the plaintiffs in taking an assignment of the bail bond. *Meighan et al.* v. *Brown*, Dra. 167.

A bail piece in which the plaintiff or defendant is incorrectly named may be amended with the consent of the bail. *Daniell* v. *James*, 1 P. R. 195.—P. C.—Jones.

A bail piece may be intituled of a term preceding that in which the ca. re. is returnable; but the bail piece must state in the margin the district from which the process issued with that in which the bail is taken as thus: "Testatum from the Home District to the Niagara District." *Ward* v. *Skinner*, 3 O. S. 163.

The bail-piece need not set out the writ on which the defendant has been arrested; it is not therefore necessary that the certificate of the clerk of the crown and pleas, of the defendant having filed a recognizance of bail, and affidavit of the justification of bail, under 10 & 11 Vict. c. 15, s. 5, should state the writ on which the defendant has been arrested. *White* v. *Petch*, 7 Q. B. 1.—P. C.—Draper.

In the warning to defendant in a writ of capias it is proper to direct the bail piece to be filed in the office of the clerk or deputy clerk of the crown and pleas for the county from which process issued, although a county different to that in which the arrest is made or bail given. *Hubbard* v. *Milne*, 1 L. J. N. S. 14.—C. L. Chamb. —J. Wilson.

IV. Bail Bond.

A bail bond is irregular in a case where the action was commenced by process not bailable, and the arrest made on bailable process after appearance entered. *Douglass* v. *Powell*, 2 O. S. 219.

A bail bond conditioned that the defendant shall enter special bail at the return of the writ, or surrender himself to the sheriff, is bad, though the first part of the condition alone would be good. *Wilson* v. *McCullough*, 5 O. S. 680.

V. Justification.

The affidavit of justification cannot be sworn before defendant's attorney. *Koyle* v. *Wilson*, 2 O. S. 113.

Bail may justify by the affidavit made at the time of the acknowledgment, though an exception to them be entered, where nothing is shewn to repel such affidavit. *Duggan* v. *Derrick*, 1 O. S. 75.

Since 4 Will. IV. c. 5, bail excepted to in vacation must justify in vacation, and have notice till the term. *McKenzie et al.* v. *Macnab*, E. T. 2 Vict.

It is not a sufficient ground to reject one of two bail, that one of his creditors agreed to compound for his debt for 2s. in the pound. *Daniell* v. *James*, 2 P. R. 195.—P. C.—Jones.

See *Langlois* v. *Baby*, 10 Chy. 358; 11 Chy. 21, p. 366.

VI. Proceedings against Bail.

1. *Staying and Setting Aside.*

Staying Proceedings.]—Where one of the bail to the sheriff had, in consequence of defendant leaving the province, and under an apprehension that he would not return to defend the cause, given a cognovit in his own name to the plaintiff, the court, upon an affidavit of merits, stayed the proceedings upon the cognovit. *Roberts* v. *Hasleton*, Tay. 32.

Where a defendant had neglected to put in special bail upon the plaintiff's representation that it was unnecessary (they being about to compromise), proceedings on the bail bond were stayed for one month to let him put in such bail. *Myers* v. *Rathburn*, Tay. 202.

The court will stay proceedings on a bail bond after judgment and execution, on payment of costs, where the plaintiff has delayed for three years to proceed against the bail; and they will not keep the bail to terms accepted by them when obtaining a judge's order, which was abandoned and never acted upon. *Young* v. *Shore*, 2 O. S. 314.

Bail must not only be put in, but perfected, before moving to stay proceedings upon the bail bond on the usual terms. *Gould* v. *Birmingham*, 2 O. S. 298.

When bail rely upon performance of their undertaking they must plead it; they cannot apply for summary interference. *Mitchell* v. *Cable et al*, 1 C. L. Chamb. 284.—Burns.

Plaintiff had R. arrested on mesne process on 4th November, 1869, P. and H. becoming his bail to the sheriff. On 25th November plaintiff took an assignment of sheriff's bail bond, and brought an action on it. Special bail was put in and perfected upon 28th November, and notice given:—Held, that the bail were entitled to have the proceedings stayed on payment of costs. *Hall* v. *Remily*, 4 P. R. 177.—Chamb.—J. Wilson.

Setting aside Proceedings.]—This court will set aside a recognizance roll not warranted by the proceedings, after comperuit ad diem pleaded to action on the bail bond. *McDonnell* v. *Rutter*, 2 O. S. 340.

It is no ground for setting aside or staying proceedings on a fi. fa. against bail, that the ca. sa. against their principal has not been returned filed. *Hugill* v. *McCarthy et al.*, 2 O. S. 495.

Defendant was arrested and gave bail, who to have themselves put in special bail. The attorney for the bail gave notice, and signed himself "defendant's attorney," and all the subsequent papers in the cause were served on him. Judgment was obtained, and defendant arrested on ca. sa., when it was shewn that defendant had never employed the attorney. The court set aside the whole proceedings. *McMartin* v. *Shannon*, 5 O. S. 72.

Where judgment and execution have been obtained against bail by returns of nihil to sci. fas. without their knowledge, the court, although they cannot set aside the proceedings, will let them in to defend upon payment of costs. *Read* v. *Hilts et al.*, 4 Q. B. 175.—P. C.—Macaulay.

Where an action was brought on a recognizance of bail taken in a District Court, and on application to set aside proceedings facts were shewn upon which the court might have ordered an exoneretur to be entered on the bail piece, if the original action had been brought in this court:—Held, that the application should have been made to the court below. *Morgan* v. *Mosier et al.*, T. T. 4 & 5 Vict.—P. C.—Macaulay.

Where there was an irregularity both in the special bail piece and in the notice of bail, and the plaintiffs took an assignment of the bail bond and obtained judgment and execution, the court refused to set aside the proceedings on the bail bond on payment of costs, the defendant in the original action being insolvent, and the plaintiffs having lost two assizes. *Lyman et al.* v. *Binge*, H. T. 5 Vict.—P. C.—McLean.

See VII. p. 352.

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2. *Practice.*

Where a recognizance is not enrolled until after nul tiel record pleaded, the plaintiff must pay the costs of plea, and the defendant be at liberty to plead de novo. *Smith* v. *Moreton*, 5 O. S. 551.

There must be fifteen days between the teste and return of a ca. sa. to charge bail. *Ferrie* v. *Mingay*, M. T. 5 Vict.—P. C.—Jones. But see *Beattty* v. *Taylor*, 2 P. R. 44.—C. L. Chamb.—Burns.

Bail need not move to set aside a ca. sa. against their principal until proceedings are instituted against them. *Beattie* v. *McKay et al.*, 2 C. L. Chamb. 56.—Draper.

On an application to set aside a ca. sa. in the original action, or proceedings against bail, the affidavits are rightly entitled in the action against the bail. *Ib.*

In an action upon a bail bond given in a District Court, the plaintiff (if the plaintiff in the original action) should sue in the District Court; and if he sue in the Queen's Bench, the defendant may take advantage of the error in one of three ways—either by applying to the court to set aside the proceedings, or by pleading in abatement to the jurisdiction, or by demurring generally to the declaration; he cannot have a repleader. *Hamilton* v. *Shears*, 5 Q. B. 306.

Semble, that if the sheriff sue, he is not restricted to the District Court of the district in which the bond was taken, but may sue in the Court of Queen's Bench. *Ib.*

In order to proceed against the bail, the ca. sa. must be in the hands of the sheriff four days (exclusive) before the return day. *Ib.*

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3. *Pleadings in Actions on Bail Bond.*

A plea by bail to an action on their recognizance that they did not become bail, concluding to the country, is bad on special demurrer; and

on pleas of nul tiel record to the judgment and no ca. sa., a judgment varying in the term from that stated in the declaration, and a ca. sa. in a form of action different from that stated in the replication, constitute a fatal variance. *Burns* v. *Grier et al.*, 5 O. S. 500.

Debt on bail bond. Plea, that the principal put in bail to the action according to the condition. Replication, that he did not cause special bail to be put in for him in said action:—Held, an issue of nul tiel record, which could not be tried by a jury. *Dusolme* v. *Hamilton*, 15 Q. B. 183.

A plea that after a ca. sa. against their principal the plaintiff gave notice to the sheriff not to arrest him, is bad on general demurrer. *Burns* v. *Donelly et al.*, 5 O. S. 495.

Where in debt on a bail bond, taken in a suit brought by an executrix, the declaration shewed the cause of action to have accrued and the bond to have been given to the plaintiff as executrix, and on a plea of non est factum it appeared that the bond was given to the plaintiff in her individual right:—Held, that she could not recover. *Haw* v. *Montgomery et al.*, T. T. 3 & 4 Vict.

Held, declaration bad on special demurrer, in not averring that the recognizance was filed in the office of the deputy clerk of the crown in which it was taken, as directed by the 40th section of 2 Geo. IV. c. 1. *Gillespie et al.* v. *Grant*, 3 Q. B. 400.

Mistake in averment of endorsement of ca. sa. as to amount:—Held, no ground of special demurrer. *Easton* v. *Longchamp*, 3 Q. B. 475.

Held, not necessary to aver, in an action by the assignees of a bail bond, that the sheriff did not receive the money after the assignment; nor that the defendant had notice of the assignment. *Ib.*

Debt on a recognizance of bail. Plea, no ca. sa. Replication, setting out a ca. sa. directed to the sheriff of the Newcastle district, averring that the venue was laid there, and concluding with a prayer to the court to inspect the record, and giving a day for that purpose. Rejoinder, traversing the venue being laid in Newcastle, and averring it to have been laid in the Victoria district:—Held, on demurrer, rejoinder good. *Robertson* v. *Goin et al.*, 5 Q. B. 72.

Debt on a recognizance entered into in a District Court.—Plea, no ca. sa. sued out of that court.—Replication, that the plaintiff did sue out and prosecute a ca. sa., setting it out, and praying that a day might be given to bring in the record. The record certified to this court, by the judge of the District Court, agreed with the replication:—Held, therefore, 1. That under the issue no objection could be taken to the ca. sa., as varying from the judgment. 2. No objection that it did not appear upon the record that the ca. sa. had lain four days in the sheriff's hands before the return day, this being matter of practice of another court. *Cochrane* v. *Eyre et al.*, 6 Q. B. 594.

Variance between a recognizance of bail entered into in a foreign country as stated in the declaration and proved. *Short* v. *Kingsmill et al.*, 7 Q. B. 350.

In debt on a recognizance, the declaration will be bad if it appear that the plaintiff is suing in an outer district, upon a record of this court remaining in Toronto. *Manning* v. *Proctor et al.*, 7 Q. B. 22.

The declaration must shew the recognizance to have been filed where it was taken. *Ib.*

When bail rely upon performance of their undertaking, they must plead it; they cannot apply for summary interference. *Mitchell* v. *Noble et al.*, 1 C. L. Chamb. 284.—Burns.

Debt on a recognizance of bail:—Held, on special demurrer to the pleas, that it was sufficiently averred in the declaration that the recognizance was entered into in a suit *then pending* between the plaintiff and the principal; and that the defendants were therefore estopped from pleading that at the time of making the recognizance there was no such action. Plea of render and discharge as an insolvent debtor:—Held, bad on special demurrer. *Mitchell* v. *Noble et al.*, 9 Q. B. 555.

Where in an action on a recognizance the declaration shewed that others besides defendant were jointly bound, the objection was held fatal without a plea in abatement. *Mills* v. *McBride*, 10 Q. B. 145.

The declaration alleged that the defendant by a recognizance became bail for C. to the limits of, &c. Plea, nul tiel record. On the recognizance roll, it appeared that C. had also joined with defendants, which was objected to as a variance:—Held, that the objection, if any, should have been taken by plea in abatement. *McFarlane* v. *Allen*, 6 C. P. 143.

The principal debtor need not be joined in a recognizance under 10 & 11 Vict. c. 15, nor need the sum for which the debtor was arrested be mentioned. The averment of enrolment in the declaration was held sufficient. *McFarlane* v. *Allen et al.*, 4 C. P. 438.

On a joint and several recognizance, one may be sued alone. A plea that defendant was jointly bound, means that his undertaking was joint only, not several. *Ross et al.* v. *Jones*, 15 Q. B. 60.

Delay in issuing a ca. sa., to fix the bail, cannot be pleaded in bar to an action against them on the recognizance. *Carroll* v. *Berryman et al.*, 16 Q. B. 520.

VII. Discharge of.

1. *By Surrender of Principal.*

Where a defendant presented himself to the sheriff in discharge of his bail before the return of the ca. sa., which had been lodged in the office merely to fix the bail, and the plaintiff nevertheless proceeded against them, the court set the proceedings aside. *Ward* v. *Stocking*, Tay. 216.

The court will not allow an exoneretur, where bail have surrendered their principal, without a certificate from the sheriff to whom he was rendered. *Linley* v. *Cheeseman*, Dra. 53.

Bail are fixed after eight days in full term after the return of process against them, and the court will not relieve by allowing a render. *McFarlane* v. *Mosier*, 2 O. S. 491.

Bail have eight days in full term after the return of process against themselves to surrender

their principal, and the plaintiff is bound to stay proceedings on receiving notice of the render, although the costs be not paid. *Ives* v. *Robinson*, M. T. 2 Vict.

Bail surrendered their principal and gave due notice within eight days after the return of process on recognizance; the plaintiffs nevertheless proceeded to judgment. The court stayed proceedings without exacting costs up to the notice. *Wright et al.* v. *Tucker et al.*, 6 Q. B. 24.

When bail surrender within the time allowed after return of process against themselves, they are not liable to costs. *Lewis* v. *McDonald*, T. T. 2 & 3 Vict.

A debtor on the limits comes to the sheriff's office and tells the clerk there that he wishes to surrender himself; the clerk tells him to remain till he finds the sheriff or his deputy, and leaves the debtor in the office, but before he finds the sheriff and returns, the debtor absconds:—Held, that this being a mere pretended and fraudulent render, it could not fix the sheriff and support a plea of render by the bail. *Kennedy et al.* v. *Brodie*, 4 Q. B. 189.

The bail before action took the debtor to an office some distance from the court house, where the deputy sheriff transacted business with practitioners, and there tendered him in their discharge. The deputy referred them to the sheriff's office, where they went, but found only a clerk, who had no authority in such matters. They then tendered him to the gaoler's wife at the gaol, the gaoler being absent, but she refused to receive him. Afterwards the plaintiff sued on the recognizance. Defendants applied without success in chambers to stay proceedings, and at the end of three months rendered the principal. A verdict having been found for the plaintiffs:—Held, that the court could not interfere. *Read et al.* v. *Scovill et al.*, 16 Q. B. 453.

An interim order of protection under the Insolvent Debtors' Act does not prevent bail from surrendering their principal. *Ross et al.* v. *Brookes et al.*, 3 L. J. 110.—C. L. Chamb.—Robinson.

Where there is any doubt as to the validity of a surrender, a judge in chambers will not order an exoneretur, but will leave the bail to plead it. *Blackman* v. *O'Gorman*, 5 L. J. 161. C. L. Chamb.—Robinson.

In case of a surrender after judgment, plaintiff must proceed to execution within two terms after the surrender and notice, and a render in addition is to be deemed as of the preceding term, so as to make that term count as one. *Torrance* v. *Walden*, 10 L. J. 332.—C. L. Chamb.—J. Robinson.

Where judgment was obtained on 14th January, defendant being on bail, and he was on 21st January following, in the vacation preceding Trinity Term, surrendered by his bail, of which notice was given to plaintiff, and the whole of Trinity Term was allowed to elapse without any thing being done towards execution, defendant was superseded. *Ib.*

The sureties in a bond taken under C. S. U. C. c. 29, s. 29, may surrender their principal under the power given by sec. 24. *Kingan* v. *Hall*, 23 U. C. R. 503.

Under C. L. P. Act, s. 37, a judge in chambers cannot order an exoneretur unless he be "a judge of the court in which the action is pending." *Roszel* v. *Strong*, 2 L. J. N. S. 48.—C. L. Chamb.—Draper.

A surrender to the sheriff elsewhere than at the gaol, if within his county, is sufficient for the purposes of that section. *S. C.*—Richards.

See *LeMesurier* v. *Smith*, 2 O. S. 479, p. 358.

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2. *Under Bankruptcy or Insolvency Acts.*

An exoneretur may be entered on the bail piece (for the limits), where the defendant has been discharged by order of the insolvent court, and the debt in the action included in the schedule. *McCarthy* v. *Leonard*, 1 C. L. Chamb. 135.—Robinson.

Leave to enter an exoneretur upon a final order of discharge in bankruptcy of a debtor on the limits was refused, and the bail were left to plead it. *Wilson* v. *Downing*, 3 L. J. 49.—C. L. Chamb.—Richards.

The fact of a defendant on the limits having obtained his discharge from the insolvent court, is no ground for entering an exoneretur. *Nordheimer et al.* v. *Grover*, 2 P. R. 167.—Chamb.—Robinson.

An interim order of protection under the Insolvent Debtors' Act does not prevent bail from surrendering their principal; nor does the final certificate discharge them from liability if the bail be previously fixed. *Ross et al.* v. *Brooks et al.*, 3 L. J. 110.—C. L. Chamb.—Robinson.

The defendant B. having been arrested gave bail. A verdict was rendered against him in the suit, and a ca. sa. issued was returned non est inventus. A writ of summons was then issued on the recognizance against J., his surety, but prior to the service upon J., the defendant B. applied under 19 Vict. c. 93, as an insolvent debtor, and on the 16th February, obtained the interim order to protect him from arrest; on the 17th J. was served. It was contended that the ca. sa. having been received and the return made after the interim order, the bail were not fixed by the return of non est inventus:—Held, that the bail were liable. *Ross et al.* v. *Brooks et al.*, 7 C. P. 366.

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3. *By Arrangement with Principal.*

Where a verdict was taken for plaintiff subject to a reference, and the time for making the award was afterwards enlarged beyond the time when the plaintiff would regularly have been entitled to judgment:—Held, that the bail were not therefore entitled to an exoneretur. *Whiting* v. *Nicoll*, E. T. 3 Vict.

The court refused to allow an exoneretur on the ground of laches, where an agreement, out of which the laches grew, had been entered into with the assent of the bail, and was such that a length of time must necessarily have elapsed before the principal could complete it. *Spencer* v. *Gifford*, E. T. 3 Vict.

The acceptance of a cognovit with stay of execution until a period not later than the plaintiff could in the ordinary course have obtained exe-

cution, will not discharge bail. *Carter* v. *Sullivan*, 4 C. P. 298.

Where the trial of an action of replevin had been postponed at the instance of the defendant, but without the direct assent or concurrence of the bail :—Held, that the bail were discharged. *Canniff* v. *Bogert*, 6 C. P. 474.

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4. *Other Cases.*

Where a defendant had been arrested by one of two plaintiffs for £18, and was afterwards arrested in the name of both for £18 10s., the former amount being included in the second, the court ordered the bail bond to be cancelled. *Ransom et al.* v. *Donaghue*, Tay. 493.

Under 7 Vict. c. 31, the recognizance was not forfeited by the non-payment of the condemnation money on the recovery of judgment, unless the alternative condition was not complied with. The legislature having made no provision in the act repealing 7 Vict. c. 31, for continuing the proceedings commenced under it, no proceeding can now be taken against bail under such recognizance. *Hardy* v. *Hall et al.*, 2 Q. B. 276.

Since the repeal of that act :—Held, that the recognizances taken under it are not binding, except where the debtor has been notified, and has made default while the act was still in force. Macaulay, J., diss. *Macdonald* v. *Weeks et al.*, 3 Q. B. 441.

Where a sheriff is requested to return non est inventus, he need not seek the debtor, but if he do, and arrest him, the bail are discharged ; and if the debtor escape, no matter from what cause, their liability does not revive. *Reid* v. *Hilts et al.*, 4 Q. B. 175.—P. C.—Macaulay.

Where the plaintiff, after service of notice of application, allowed an exoneretur to be entered on the bail-piece without opposition, and then, six years afterwards, applied to rescind the order for the exoneretur for irregularity, the application was refused, on the ground that the plaintiff's acquiescence in the order for six years must be considered as waiving the irregularity and discharging the bail. *Roberts et al.* v. *Fox et al.*, 1 C. L. Chamb. 146.—McLean.

The defendant in the original action having given bail to the sheriff, the plaintiff went on and obtained judgment :—Held, that he had waived bail above, and could not afterwards take an assignment of the bail bond and proceed against the bail. *Dusolme* v. *Hamilton*, 15 Q. B. 574.

Where plaintiff agreed to discharge the bail on certain terms, and after three years, the conditions not having been performed, proceeded against the bail :—Held, that they were not entitled to an exoneretur for laches. *McQueen* v. *Pratt*, 2 P. R. 196.—P. C.—Jones.

The fact that a plaintiff has not charged in execution within two terms after judgment a debtor who has given bail to the action, is no ground for an exoneretur. *Torrance* v. *Holden*, 10 L. J. 298.—C. L. Chamb.—Draper.

VIII. Bail to the Limits.

1. *Who may give.*

A prisoner in custody for contempt may have the benefit of the limits. *Rex* v. *Kidd*, H. T. 6 Will. IV.

A bond conditioned that a debtor shall confine himself to the limits of the gaol is void under 23 Hen. VI. c. 9, if at the time of its execution the debtor was not in custody nor on the limits. *Campbell* v. *Lemon*, 2 O. S. 401.

Debtors in custody on mesne, as well as on final process, may have the benefit of the limits. *Montgomery* v. *Howland*, E. T. 2 Vict. ; *Clegg* v. *McNab*, 1 P. R. 150.—P. C.—Draper.

A bond to the limits may be taken on an attachment for non-payment of money, and may be assigned. *Montgomery* v. *Howland*, E. T. 2 Vict.

As to when the court would direct the clerk of the crown to give a certificate under 10 & 11 Vict. c. 15, to the sheriff to admit to the limits. *Mills* v. *James*, 5 Q. B. 216.

Semble, that before the return of an attachment for contempt the sheriff cannot properly take bail for appearance without the order of a judge ; but after the return, if the party is in upon an attachment merely to compel the payment of money, the sheriff, as of course, may take bail to the limits. *Lane* v. *Kingsmill*, Q. B. 579.

Where a sheriff returns cepi corpus to a writ of ca. sa., and the plaintiff rules the sheriff to bring in the body, and the sheriff not complying with the terms of the rule, the plaintiff then obtains a rule for an attachment against the sheriff for not bringing in the body of the defendant at the return of the rule to that effect. —Held, that it is a good answer to such rule for an attachment, to shew by affidavit that the defendant was arrested under a ca. sa. and placed in close custody, and was afterwards discharged from close custody and admitted to the limits by virtue of a certificate from the clerk of the crown and pleas annexed to the affidavit, and that he had not since been committed to close custody by any process whatever. *White* v. *Petch et al.*, 7 Q. B. 1.—P. C.—Draper.

It is not necessary under C. S. U. C. c. 24, that a debtor be actually conveyed to gaol before bail can legally be taken by the sheriff. *Small et al.* v. *Foster*, 11 C. P. 161.

A party arrested upon an attachment out of this court is entitled to the gaol limits under 10 & 11 Vict. c. 15. *Davis* v. *Caspar*, 1 Chy. 354.

Quære, whether this act would repeal the 1 Geo. IV. c. 3. *Ib.*

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2. *Bond.*

(a) *Form of.*

Sec. 29 of C. S. U. C. c. 24, (taken from 2 Vict. c. 33) does not repeal sec. 25, (taken from 19 Vict. c. 43, and 20 Vict. c. 57), and the two are not so inconsistent as to be incapable of standing together, in some respects at least. The 25th governs where the bond was taken before the 4th of May, 1859, the 29th after, and where the two are at variance the latter must prevail. Sec. 29 therefore does not contain all that is required in the condition of bonds since that date, but the requirements of sec. 25, where not inconsistent, must be incorporated with it. *Kingan et al.* v. *Hall*, 23 Q. B. 503.

The sheriff cannot admit a debtor to the limits except by statute, and where he does so on

bond not in accordance with the act, he is liable as for a voluntary escape. *Ib.*

Where, therefore, in the condition the words, "to be examined vivâ voce or otherwise," were omitted:—Held, that the bond afforded no justification:—Held, also, that the creditor by having required and taken an assignment of such bond was not estopped from looking to the sheriff. *Ib.*

The introduction in the condition of a bond given since the 4th May, 1859, of a provision that the debtor shall remain within the limits, which that clause says the condition "*shall not contain*:"—Held, fatal. *Ib.*

The omission of the word "close" before "custody" in such condition:—Held, immaterial. *Ib.*

(b) *Allowance of.*

Where the notice given to the plaintiff was that special bail had been put in, and the recognizance produced was only for defendant remaining on the limits, the application for allowance was refused with costs. *Clegg* v. *McNab*, 1 P. R. 150.—P. C.—Draper.

Under 10 & 11 Vict. c. 15, and 16 Vict. c. 175, it was not necessary to an action on recognizances to the limits, that the bail should be allowed. *Kerr* v. *Reid*, 18 Q. B. 254.

Held, that sec. 25 of the C. L. P. Act, 1857, requiring the condition of allowance of bond within thirty days, applies to the county as well as superior courts. *Arnold* v. *Murgatroyd*, 1 C. P. 87.

Defendant being arrested gave bail to the sheriff, under 16 Vict. c. 175, s. 7; within thirty days a recognizance was entered into as bail to the limits, and a certificate of its allowance given by the deputy clerk. An action was commenced on the recognizance but failed, it having been entered into before a person not authorized to take it. The plaintiff then got a judge's order to set aside the certificate of allowance. This order was rescinded by this court.—Draper, C. J., concurring upon the ground that if it stood it would prevent an appeal to decide whether the bail were liable. *Macfarlane* v. *Macwhirter*, 1 C. P. 76.

A. being arrested on a ca. sa. gave bail to the limits by bond to the sheriff, with B. & C. as sureties, and afterwards entered into a recognizance under 16 Vict. c. 175, with B. & D. as sureties, which was improperly allowed, being defective in form, and executed before a person not authorized. The plaintiff having failed in his suit against the sureties in the recognizance, and the sureties in the bail bond to the sheriff, having first obtained an assignment from him:—Held, that they were released from liability by the allowing of the certificate of allowance under 16 Vict. c. 175, although the recognizance itself was void and ought not to have been allowed. *Macfarlane* v. *McWhirter*, 9 C. P. 334. See, *Macfarlane* v. *Allan, et al.*, 6 C. P. 496.

The fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits. *Dougall* v. *Moodie*, 19 Q. B. 568.

See VIII. 5, 6, p. 361.

(c) *Assignment of.*

To action by the assignee of the sheriff under 16 Vict. c. 175, averring a departure, it is a good defence that the debtor left the limits by the leave and license of the plaintiff. Such a plea need not allege that the departure allowed is the departure complained of:—Semble, per Burns, J., that there can be no assignment of such bond until after forfeiture. *Whittier* v. *Hands*, 18 Q. B. 295. See *S. C.* 19 Q. B. 170, 172; *Hicks* v. *Godfrey*, 15 C. P. 262, p. 359.

The deputy sheriff is, under 4 Anne, c. 16, s. 20, a credible witness to the execution by the sheriff of an assignment of a bond to the limits. *Whittier* v. *Hands*, 19 Q. B. 172.

In an action by the assignees of the sheriff against the sureties of one S. on a bond to the limits under 16 Vict. c. 175:—Held, that the bond continued in force after the expiration of the thirty days, and might be assigned and sued upon for a breach committed by departure after that period. *Brown et al.* v. *Paxton et al.*, 19 Q. B. 426.

The plaintiff declared, as assignee of G., the sheriff of Middlesex, on a bond to the limits given to H., the late sheriff, alleging that after the making of the bond H. died, and that the defendant on several occasions departed from the limits; but it was not stated whether the departure was before or after the death of H., or the appointment of G., or whether the bond had been allowed:—Held, that the declaration was bad, as for all that appeared the departure might have been at such a time as to render the late sheriff liable, and if so his successor could not assign the bond. *Osborne* v. *Cornish et al.*, 20 Q. B. 47.

See *Dougall* v. *Moodie*, 19 Q. B. 568, p. 363.

(d) *Breach of.*

In an action by the assignee of the sheriff of a bond to the limits, a voluntary return, and a surrender before action and before assignment, are not good pleas in bar. *Evans* v. *Shaw*, Dra. 14.

It is no defence by the sureties, that the debtor before the assignment left the limits for an hour without their knowledge or consent, and afterwards and before action returned to the limits, and still continued thereon. *McMahon* v. *Masters*. 6 O. S. 579.

To debt on a bond by the sheriff's assignee, it is a good plea, that after breach and before assignment to the plaintiff, the sheriff delivered up the bond to the debtor to be cancelled; but a surrender after breach is not if the bond were not cancelled. *Le Mesurier* v. *Smith*, 2 O. S. 479.

Semble, that a bond to the limits is not broken where the debtor has not willingly withdrawn, but has been misled as to their extent. *Lewis* v. *Grant*, 1 Q. B. 290.

Where a defendant has left the limits, it is no defence that he was informed and believed that the place he went to was within his limits, unless such was the general impression, or the boundary was disputed. *Hedden* v. *Gregory et al.*, 10 Q. B. 334.

Debt on bond to the limits. Plea, that defendant was taken from the limits by the sheriff, in whose custody he was, under a writ of habeas corpus ad test. issued on the equity side of the county court and directed to said sheriff:—Held, a good defence, for the writ was valid; and if not, the departure was involuntary, and therefore not a breach. *Ross* v. *Reid*, 18 Q. B. 631.

To an action on the bond, alleging a departure, defendants pleaded that the debtor, by virtue of a warrant of the speaker of the house of assembly, then in session, was required to attend as a witness before said house, and that to obey the warrant he left the limits and remained away ten days:—Held, no defence, as it was not shewn that the speaker knew the debtor to be on the limits, or what occasion there was for requiring his attendance, or that any process had issued by which he was placed in custody of any officer while absent. *Brown et al.* v. *Paxton et al.*, 19 Q. B. 238.

The plaintiff's attorney cannot authorize a departure from the limits when committed on a ca. sa.:—Semble, that if defendant departs by plaintiff's permission, and returns, the bond is not thereby gone. *Whittier* v. *Hands*, 19 Q. B. 170.

The debtor applied to the plaintiff's attorney for permission to go to Toronto and obtain the money, and the attorney told him he would take no advantage if he wished to go for that purpose. He thereupon went, returned without effecting his object, and after remaining some time left the province. The plaintiff then sued upon the bond:—Held, that there was no evidence to sustain a plea that the debtor departed with the plaintiff's leave, and that it was unnecessary to new assign the second departure. *Whittier* v. *Hands*, 19 Q. B. 172.

The declaration upon a bond to the sheriff conditioned that G., the debtor, should observe and obey all notices, orders, and rules of court touching and concerning him or his answering interrogatories, &c., assigned as a breach that the said G. being released from close custody, the plaintiff duly filed certain written interrogatories for the purpose, &c., and caused a copy to be served on said G., requiring him to file his answers under oath thereto, *within ten days* after service thereof * * * and thereupon it became the duty of said G. to file his said answers on oath within the said time; yet said G. did not file his said answers within the said time, whereby the bond became forfeited, and the sheriff assigned said bond to the plaintiff:—Held, on demurrer, declaration bad; 1. Because the only breach shewn was the omission to comply with the notice requiring the defendant to answer the interrogatories *within ten days*, which was not authorized by the statute; and, 2. That inasmuch as no sufficient breach was shewn, the sheriff could not assign the bond, so as to enable the assignee to sue in his own name. *Hicks* v. *Godfrey*, 15 C. P. 262.

Semble, that the failure of the debtor to answer interrogatories or to attend to be examined, upon notice given by the plaintiff of his own mere motion, would not forfeit the bond; but that there must be a judge's order or rule of court requiring the debtor so to answer or attend. *Ib.*

3. *Separation of Counties.*

The limits of the gaol of the united counties of York, Ontario, and Peel, mean the limits for the time being, and when Ontario was separated, a debtor on the limits continuing in that county his bail were held liable. *Ross* v. *Farewell*, 5 C. P. 29.

Under 18 Vict. c. 69, s. 5, defendants in actions on bail bonds, where the breach has arisen by the separation of counties by the legislature, are entitled to have all proceedings stayed upon payment of costs. *Ross* v. *Farewell et al.*, 5 C. P. 101.

A rule to tax costs was taken out on the 26th June, 1855, and served on the 26th February, 1856, under the provisions of 18 Vict. c. 69, which provides for relief of bail who have been sued by reason of the debtor having travelled from one county to another of a union of counties, or continued to reside in one county after the dissolution, by enacting that the proceedings shall be discontinued on payment of costs. The plaintiff not having produced his bill, the defendant, on the 28th February, 1856, taxed a nominal bill. On the 17th of March, 1857, the plaintiff made up and delivered his bill, and demanded payment, which was refused. In Easter term, 1857, relief was sought by plaintiff by application to set aside the taxation and all subsequent proceedings, which was enlarged by consent of the parties till Easter term, 1858:—Held, that the plaintiff was entitled to succeed, notwithstanding the delay. *Macdonell* v. *Farewell*, 9 C. P. 54.

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4. *Commitment to Close Custody.*

The demand on a debtor on the limits for a statement of his effects, if in writing, must be signed by the plaintiff or his attorney, and the rule nisi for his commitment personally served. *Meighan* v. *Reynolds*, 4 O. S. 19.

Where a defendant on the limits offered to assign his whole property for all his creditors but refused to give up any part to the plaintiff alone, he was committed to close custody under 4 Will. IV. c. 10. *Bruneau* v. *Joyce*, 6 O. S. 61.

An order for such committal should be directed to the sheriff, and follow the form in the statute. *Hamilton* v. *Anderson*, 2 Q. B. 452.

A judge, when applied to in vacation under 4 Will. IV. c. 10, s. 4, for the commitment of a debtor on the limits, disposes of the case without the power of appeal, by declining to interfere. *Shaw* v. *Nickerson*—*Gillespie* v. *Nickerson*, 7 Q. B. 541.

A defendant on the limits re-committed for unsatisfactory answers under 4 Will. IV. c. 3. *Kirby* v. *Mitchell*, 1 C. L. Chamb. 137.—*Robinson*; *Leavens* v. *Ostrom*, *Ib.* 261.—*Macaulay*.

A prisoner on bail to the limits, having been rendered to the sheriff, made his escape while the officer in whose custody he was placed was otherwise engaged:—Held, that the sheriff was justified in re-taking and committing him to close custody; and that when the defendant endeavours to shew he was improperly held, he must prove positively there was no process, and not leave it to be inferentially inferred. *Arnold* v. *Andrews*, 9 C. P. 467; *Scatcherd* v. *Andrews*, *Ib.* 473.

5. *Relief of Bail.*

Where judgment is recovered against two parties jointly liable, and at the instance and for the benefit of one of them, who pays the debt without the costs, the plaintiff proceeds to enforce payment of the whole amount from the other party—the court will order the damages assessed by a jury on the breach assigned, in an action on a limit bond given by that other party, to be reduced to the costs and charges in the original action. *Gooderham* v. *Chalmers et al.*, Q. B. 172.

Bail to the limits had been given under sec. 22, C. L. P. Act, 1856. The bail omitted to have the bond allowed as required by sec. 25 of C. L. P. Act, 1857, and plaintiffs took an assignment of the bond and sued upon it. The bail applied to stay proceedings upon their getting the bond allowed and on payment of costs, which was refused, but leave was given to apply to the full court after verdict. *Barber et al.* v. *Amone et al.*, 4 L. J. 138.—C. L. Chamb.—Robinson.

See *McKay* v. *Hudson*, 2 P. R. 222, p. 363.

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6. *Rights, Duties, and Liabilities of Sheriff.*

A sheriff may sue bail to the limits for the escape of a debtor before he has been sued or paid the money for which the debtor was in execution. *Ruttan* v. *Wilson*, M. T. 3 Vict.

Where one of the bail to the limits, hearing of the debtor's escape, paid to the sheriff the debt and costs for which he was imprisoned, exclusive of the sheriff's own fees, and the sheriff never-theless sued the other obligor in the limit bond to recover the costs in an action which the plaintiff in the original action had brought against the sheriff:—Held, that after the receipt by the sheriff of the money paid by the other of the bail he could not recover for those costs, since he ought to have paid over the money, and not have sued the action nor allowed it to proceed. *Hewlett* v. *Lake*, 5 Q. B. 454.

The sheriff cannot of his own mere motion allow a prisoner charged in execution, and in actual custody, the benefit of the limits. A debtor who is admitted to the limits on giving bond to the sheriff under 16 Vict. c. 175, is required to enter into and file the recognizance required by 10 & 11 Vict. c. 15, within a month after such bond. If he does not, the sheriff may re-commit him to close custody or he will be liable as for an escape. If the certificate of such recognizance, &c., be not delivered to the sheriff within a month, the bond to him is vitiated:—Semble, the sheriff must take a bond under 16 Vict. if the sureties are sufficient. *Calvert* v. *Ruttan*, 13 Q. B. 220.

The sheriff cannot admit a debtor to the limits except by statute, and where he does so on a bond not in accordance with the act he is liable for a voluntary escape. *Kingan et al.* v. *Hall*, 5 B. 503.

The bond here, therefore, in the condition the words "to be examined viva voce or otherwise," were void:—Held, that the bond afforded no justification:—Held, also, that the creditor, by having required and taken an assignment of such a bond, was not estopped from looking to the sheriff. *Ib.*

Until the bond has been allowed the creditor may either take an assignment of it or hold the sheriff responsible. The mere taking the bond, therefore, without allowance, is no defence for the sheriff; he must shew that the debtor has fulfilled its condition. *Ib.*

See VIII. 2 (b), p. 357; VIII. 7 (c), p. 363.

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7. *Action on Bond to the Limits.*

(a) *Pleadings.*

A blank having been left in the bond, which was afterwards filled up with the consent of the debtor, although not in his presence, was held no variance on non est factum. *Leonard* v. *Merritt*, Dra. 281.

Where in declaring on a bond the condition set out was, that the debtor should not depart from the limits, and the defendant on oyer shewed the condition to be that the debtor would remain on the limits until the debt was paid or he should be legally discharged from the limits, and demurred:—Held, a fatal variance. *McGuire* v. *Pringle*, M. T. 3 Vict.

The declaration on a bond to the limits given by a debtor in execution must shew the judgment, writ, and arrest of the debtor, and the execution of the bond while he was in custody; and the recital of those facts in the bond set out will not suffice. *Leonard* v. *McBride*, 3 O. S. 1.

An averment that the justices in quarter sessions assigned limits to the gaol is sufficient on general demurrer; and the bond is not avoided altogether because part of the condition is contrary to the statute. *Stebbins* v. *O'Grady*, 5 O. S. 742.

It should be shewn expressly, and not by implication, that the defendant became bound, and where it did not so appear and no profert of any bond was made, a plea of nil debet was held good. *Douglass* v. *Murchison*, 6 O. S. 48.

In an action by a sheriff on a bond to the limits, if defendants plead that the debtor left the limits, but afterwards returned to them, and always remained on them after his return, the sheriff may take issue on the subsequent remaining, and need not new assign; but he cannot do so if defendants by their plea do not admit the bond to have been broken before the debtor's return, as the plea would then amount to the general issue. And where the plaintiff declared that the debtor left the limits in February, and defendants pleaded that the plaintiff, as sheriff, removed him in November, and that the debtor returned and always afterwards remained thereon; and the plaintiff replied that he did not always afterwards remain, on which issue was joined, and the plaintiff obtained a verdict, the court refused to arrest the judgment, the verdict, according to the time stated, being consistent with the plaintiff's right, and the issue having been in fact on the subsequent remaining only. *Cameron* v. *McLeod et al.*, T. T. 4 Vict.

One L. was arrested under an attachment for certain interlocutory costs, and gave the usual bond to the limits. He had never left the limits, but neglected to get the bond allowed within thirty days, and the plaintiffs thereupon called upon the sheriff to assign the bond. Having

lost it, the sheriff was unable to assign by endorsement in the usual form, but he offered to prove the loss, and execute a separate assignment, or to give the plaintiffs authority to sue in his name. The plaintiffs declined this, and brought an action against him, alleging in one count refusal to assign, and in another charging an escape. Defendant pleaded to the first count that he was always ready to assign, but that the plaintiffs never required or tendered to him any assignment for execution, and that he gave them notice that they might sue on the bond in his name; and to the other count not guilty. On leave reserved to move to enter a verdict for the plaintiffs, if the court, drawing the same inferences as a jury, should think them entitled to recover:—Held, that the defendant was entitled to a verdict on the first count, for though the plea might be immaterial, because the sheriff is bound to prepare the assignment himself, yet the plaintiffs had not demurred, but taken issue; and the action being without merits, if the jury had found for defendant judgment non obstante would not have been granted. But, semble, per Robinson, C. J., that the issue was not immaterial, for the plea might be taken to deny that the plaintiffs required the sheriff to assign, and the evidence shewed that on such an issue defendant should succeed. Burns, J., dissenting, on the ground that the plea being no answer to the first count, the plaintiffs, as the case was left, were entitled to have a verdict entered for them upon it. Held, also, that on the second count the plaintiffs could not recover, for the fact of the bond not having been allowed within the thirty days would not make the sheriff liable for an escape where the debtor remained on the limits. *Dougall et al.* v. *Moodie*, 19 Q. B. 568.

(b) *Practice.*

The plaintiff must assess his damages after interlocutory judgment, in debt on a bond to the limits. *Callagher* v. *Strobridge et al.*, Dra. 158.

In debt on bond to the limits, an order for particulars of breach will be granted. *Church* v. *Barnhart*, Dra. 213.

Where the condition of a bond is set out on oyer, and it appears on the record by that means that the bond is within the 8 & 9 Will. III. c. 11, the plaintiff ought to suggest his breaches before trial, and cannot take a verdict for the penalty, and suggest breaches afterwards. *Campbell* v. *Lemon*, 2 O. S. 401.

A recognizance of bail to the limits is not within 8 & 9 Will. III. c. 11; and when there is no plea, but a breach is assigned in the declaration, the plaintiff may enter final judgment without assessing damages. *McNamee* v. *Reilly et al.*, 13 Q. B. 197.

The court cannot relieve against forfeiture of a bail bond by neglecting to procure its allowance within thirty days, according to the C. L. P. Act. 1857, s. 25. *McKay* v. *Hudson*, 2 P. R. 222.—Q. B.

(c) *Damages.*

In an action by a sheriff on a limit bond it is not necessary to shew actual pecuniary damage. *Kingsmill* v. *Gardiner et al.*, 1 Q. B. 223.

In an action by the assignees of a sheriff against the sureties of one F., on a bond that F. should remain within the limits:—Held, that the measures of damages was the amount for which the debtor was in custody, with interest thereon, notwithstanding the debtor was insolvent from the time of the arrest until the breach of the condition. *Kerr* v. *Fullarton*, 10 C. P. 250.

In an action by the assignees of the sheriff against the sureties of one S. on a bond to the limits under 16 Vict. c. 175:—Held, Burns, J., diss., that the plaintiffs were not entitled as of course to the full amount of their debt and costs, but only to the loss actually sustained by the breach; and that in this case, as it was proved that the debtor was insolvent from the time of his arrest till his death, the verdict should be reduced to nominal damages. Calcutt *v.* Ruttan, 13 Q. B. 220, commented upon. *Brown et al.* v. *Paxton et al.*, 19 Q. B. 426. But see *Kerr* v. *Fullarton*, 10 C. P. 250.

[See, now, 34 Vict. c. 12, s. 7, O.]

(d) *Other Cases.*

Where in an action on a bond to the limits, it was proved that the principal had been seen fifty yards beyond the limits, and the jury notwithstanding found for the defendant, a new trial was granted on payment of costs. *Chesley* v. *McMillan*, E. T. 3 Vict.

An admission by a debtor on the limits that he had gone beyond them, is not admissible to charge his sureties. *Freeland* v. *Jones*, 6 O. S. 44.

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8. *Other Cases.*

An attorney will not be ordered to pay costs of suit on a bond to the limits signed by him on behalf of an obligor. *Leonard* v. *Glendenman*, M. T. 1 Will. IV.

The gaol limits of the city of Toronto do not include the liberties of the city. *King* v. *Latham*, 5 O. S. 488.

Quære, should the clerk of the crown and pleas grant a certificate until he is satisfied that due notice of bail has been given to the plaintiff in the cause. *White* v. *Petch*, 7 Q. B. 1.—P. C.—Draper. See *Mills* v. *James*, 5 Q. B. 216.

The provisions of 10 & 11 Vict. c. 15, s. 5, as to gaol limits, apply to cases in which County Court ca. sas. are issued under 13 & 14 Vict. c. 52, to the sheriffs of other counties than that in which judgment has been obtained. *Gibson* v. *Thomas*, 7 C. P. 163.

IX. Miscellaneous Cases.

Bailable process issued against two, the plaintiff allowed to proceed against one. *Laing* v. *Harvey*, Tay. 414.

A commissioner who takes a recognizance cannot himself make the affidavit of such taking. *Walbridge* v. *Lunt*, Tay. 462.

Several actions having been brought on a bond to a sheriff for the gaol limits, the court granted a rule to consolidate them. *Leonard* v. *Merrit*, Dra. 190.

A constable who arrests under a commissioner's writ may refuse to take bail, and if he does take bail the sheriff may reject them, as the constable's duty under such a writ is only to deliver the defendant to the sheriff; but if the sheriff accept them, the bail bond is good. *Price* v. *Sullivan et al.*, 6 O. S. 640.

A defendant rendered by his bail after the return of non est inventus to the capias ad satisfaciendum, is not in custody on mesne process, nor is he charged in execution so as to obtain the weekly allowance. *Lyman* v. *Vandecar*, M. T. 2 Vict.

Bail who have paid the costs of an action against themselves, cannot recover them from their principal as money paid; they must declare specially. *Shore* v. *Burrill*, M. T. 3 Vict.

Where a defendant was committed to prison on a bailable writ, and afterwards, and before the return day of the writ, was released on bail, and on the return day of writ entered special bail, he was held not entitled to be served with a declaration before the end of the term then next after such arrest. *Glenn* v. *Box*, 3 Q. B. 182.—P. C.—McLean.

Semble, that the plaintiff, though the defendant will not put in bail, may go on with his action against him, and pursue his remedy against the sheriff at the same time. *Regina* v. *Sheriff of Hastings*, 1 C. L. Chamb. 230.—Burns.

Semble, that bail are not bound by what the attorney for their principal may choose to do, in being the attorney for the principal. *Mitchell* v. *Noble et al.*, 1 C. L. Chamb. 284.—Burns.

The bail of any of the parties who are sued upon a bill or note, or any persons who pay the bill or note on account of any of the parties, become on payment holders; and they hold as upon a transfer from the person for whom they made the payment, not as a transfer from the person they have paid; and they stand, with respect to other parties to the bill or note, in the situation of the party for whom they have made the payment; and consequently, unless he could have sued upon the bill or note, they cannot. *Hutchinson* v. *Munroe*, 8 Q. B. 103.

Semble, that the sheriff, if suing on a bail bond, is not restricted to the District Court of the district in which the bond was taken, but may sue in the court of Queen's Bench. *Hamilton* v. *Kearns*, 5 Q. B. 306.

Held, (before the passing of 16 Vict. c. 179), that magistrates were not liable for refusing to admit to bail on a charge of misdemeanour, in the absence of any proof of malice. *Conroy* v. *McKenney*, 11 Q. B. 439. See *McKinley* v. *Munro*, 15 C. P. 230.

The plaintiff having arrested the defendant, proceeded in the suit and obtained a verdict. After verdict, the plaintiff obtained an order to set aside the recognizance of bail and to take the same off the files, on account of an alteration made after filing. The plaintiff, notwithstanding the proceeding in the action, had taken an assignment of the bail bond from the sheriff, and sued upon it as well; and the defendant in this action pleaded that special bail had been entered in the original action, and demanded a replication, and the defendant not replying, signed judgment of non pros:—Held, that such judgment was regular. *Caspar* v. *Herschberg*, 1 P. R. 175.—Chamb.—McLean.

The owner of real estate being under arrest upon civil process, conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action, and after the same had been settled the lands were reconveyed, but in the mean time a writ against the lands of the grantee had been placed in the hands of the sheriff, and a sale was effected thereunder after such reassignment, and a conveyance made to the purchaser (the plaintiff in the writ), who had notice of the claim set up by the original owner:—Held, that the transaction was one against public policy and morality, and that the court would not lend its aid to the grantor in getting back his estate; but the purchaser at sheriff's sale having in his answer disclaimed any interest in the lands other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of such judgment and expenses, together with interest and the costs of suit; and the defendant having also by his answer alleged that the conveyance was made for the purpose of enabling the grantee therein to justify as bail and that he did justify as such bail upon the lands so conveyed, and submitted that "the plaintiff under the circumstances ought to be estopped and precluded from saying that the said lands are not the lands" of the grantee:—Held, also, that although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated. *Langlois* v. *Baby*, 10 Chy. 358; affirmed on rehearing, 11 Chy. 21.

BAILEE.

See BAILMENT.

BAILIFF.

I. NOTICE OF ACTION TO—*See* ACTION.

II. DISTRESS BY—*See* DISTRESS.

III. OF DIVISION COURT.—*See* DIVISION COURT.

IV. MISCELLANEOUS CASES.

An action on the case was held to be maintainable against a bailiff of a Court of Requests for falsely swearing to the service of a summons, which had not been served, whereby judgment was given against the plaintiff; and the common law remedy is not taken away by the action given against the bailiff on his covenant under the Court of Requests Act. *Cline* v. *McDonald*, E. T. 2 Vict.

An action for escape should be brought against the sheriff, not against the bailiff who arrested, unless the act complained of amounts in effect to a rescue. *Wilson* v. *McCullough*, M. T. 2 Vict.

If a stranger having no legal process goes to a defendant in execution, and takes down in his presence a list of his goods, and tells him he

must not remove them, and does nothing more, he cannot be sued in trespass. So if, instead of a stranger, a bailiff has so acted under a legal process, he may have bound the property as against other writs, but he cannot be sued in trespass, as he neither removed, detained nor handled the goods. *Cameron* v. *Lount*, 4 Q. B. 275.

The writ of fi. fa. and warrant to the bailiff must be proved, or its production accounted for, in order to charge the plaintiff in the execution with an act of trespass committed by the bailiff. *Ib.*

An action on the case lies in favour of a sheriff against a bailiff for negligence in allowing a prisoner to escape, in consequence of which the sheriff is sued by the creditor, and a verdict recovered against him for nominal damages; and —Semble, that in such an action the sheriff is allowed to recover both the costs of the action against himself and his own costs, although no notice of that action had been given to the bailiff by the sheriff, the bailiff not being concluded by the former verdict, if he had no opportunity of defending in the sheriff's name. *Ruttan* v. *Shea*, 5 Q. B. 210.

Under the plea of not guilty the bailiff can only prove that he was not guilty of the negligence. He cannot give in evidence any special contract of service. *Ib.*

When the warrant to arrest is addressed to two bailiffs as if jointly, one may, nevertheless, arrest. *Hetherington* v. *Whelan et al.*, 1 C. L. Chamb. 153.—Robinson.

A person acting in aid of a bailiff may plead the general issue by statute, but not if he be a mere volunteer interfering from the interest which he has in the process. *Dale* v. *Coon*. 2 P. R. 160.—Chamb.—Robinson.

Held, that a collector of taxes is responsible for the acts of his bailiff, holding legal authority (by warrant), from him so to act, and that an action will lie against them jointly. *Corbett* v. *Johnston et. al.*, 11 C. P. 317. But see, also, *Fraser* v. *Page*, 18 Q. B. 227.

Action to recover the value of a mare which had been taken and the plaintiff arrested by defendant as a bailiff, acting under a search warrant against the plaintiff issued by a justice of the peace, which commanded the bailiff to take and safely keep the mare until he was ordered to deliver up the same by due course of law. The indictment against the plaintiff having been ignored by the grand jury he was discharged, and the defendant then being instructed by the crown counsel to deliver the mare to the plaintiff, refused to do so, saying he had given her to his brother, taking a bond to indemnify himself from loss. The plaintiff then obtained a copy of the bond and sued thereon in the name of defendant, which the defendant as the obligee stayed. The judge in the court below being of opinion that the defendant was entitled to the benefit of the statute as a bailiff acting in the discharge of his duty nonsuited the plaintiff. Upon appeal: —Held, that the facts as proved raised a question of bona or mala fides of the defendant acting in the discharge of his duty as a bailiff, which was properly left to the jury, and that the jury having found against him, he had no right to invoke the aid of the statute. *McCance* v. *Bateman*, 12 C. P. 469.

The attorney for an execution creditor, and who indemnified the bailiff who executed the fi. fa., is not responsible over to an assistant whom the bailiff employed, for damages recovered against such assistant by a person who claimed the goods seized as his property. *Eadus* v. *Dougall*, 14 C. P. 352.

A sale of goods by a sheriff or his bailiff under execution is within the 17th sec. of the Statute of Frauds, and either of them may sign for the purchaser the memorandum in writing, in the same manner as an auctioneer or his clerk. *Flintoft* v. *Elmore*, 18 C. P. 274.

BAILMENT.

I. Particular Bailees.

1. *Carriers — See* Carriers — Railways and Railway Companies—Ship.
2. *Hirers of Horses—See* Horses.
3. *Warehousemen—See* Warehousemen.

II. Miscellaneous Cases.

A bailee of goods is not estopped from disputing the bailor's title. *White* v. *Brown*, 12 Q. B. 477.

A factor has no lien on goods assigned to him until they actually come into his possession. *Clark* v. *Great Western R. W. Co.*, 8 C. P. 191.

Held, 1. That it is not illegal to deliver a money letter to a private friend on his way journey, or travel, provided such letter be delivered by such friend to the party to whom it is addressed; 2. That such friend as a gratuitous bailee would be bound to take as much care of the letter as he would have of his own; 3. That if lost where he does take such care he is not responsible. *Tindall* v. *Hayward*, 7 L. J. 243.—C. C.—Hughes.

Money is property of which a person can be a bailee so as to make him guilty of felony if he appropriate it to his own use. *Regina* v. *Mucy*, 13 C. P. 484.

Defendant hired a pair of horses from a livery stable to go to a particular place, and afterwards absconded with them. The jury found that at first he did not intend to steal, but having accomplished the object of hiring, he then made up his mind to convert them to his own use. Held, that he was a bailee under C. S. C. c. 92, s. 55, and that he was properly convicted on an indictment for larceny in the ordinary form. *Regina* v. *Tweedy*, 23 Q. B. 120.

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant, he found that he had absconded: that he then sued out an attachment against him as an absconding debtor; and that as he believed, defendant was at the time of the trial in gaol, charged with stealing the money. —Held, that this evidence sufficiently showed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny, under C. S. C., c. 92, s. 55; and a nonsuit was ordered. Hagarty, J., diss. *Livingstone et al.* v. *Mc* 23 Q. B. 166.

A mare was in the plaintiff's field, where it was killed by defendant's bull which had broken into the plaintiff's close; the mare had been put there by plaintiff's father, who said he had given it to the plaintiff. Semble, that the right of property was immaterial, as the plaintiff, even if only a bailee, could recover its value against a wrong-doer. *Mason* v. *Morgan*, 24 Q. B. 328.

The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with:—Held, that this was a bailment only of the wheat, which remained the claimants, to the insolvent: that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground: that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages. *In re Williams et al.*, 31 Q. B. 143.

BANKRUPTCY AND INSOLVENCY.

I. Assignment for the Benefit of Creditors.
1. *Execution of*, 371.
2. *Construction of*, 371.
3. *What Property Passes*, 373.
4. *Time and Mode of Accession by Creditors*, 374.
5. *Release of Debts*, 376.
6. *Provision for Carrying on Business*, 378.
7. *Preferential Assignments*, 379.
(a) *Fraudulent Conveyances*—*See* Fraudulent Conveyances.
8. *Consideration and Bona Fides*, 380.
9. *Filing and Re-filing*, 381.
10. *Private Stipulations with Particular Creditors*, 382.
11. *Other Special Provisions*, 383.
12. *Rights, Duties, and Liabilities of Trustees*, 383.
13. *Rectification of Mistake in*, 387.
14. *Other Cases*, 387.
15. *By Bill of Sale or Chattel Mortgage*—*See* Bills of Sale and Chattel Mortgages.
16. *Fraudulent Assignments*—*See* Criminal Law—Fraudulent Conveyances—Fraud and Misrepresentation.

II. Composition, 390.

III. Bankruptcy under 7 Vict. c. 10.
1. *Actions and Proceedings.*
(a) *By Bankrupt or Assignees*, 392.
(b) *Against Bankrupt*, 392.
2. *Operation of Executions*, 392.
3. *Fraud and Fraudulent Preferences*, 393.
4. *Other Cases*, 394.

IV. Acts for Relief of Insolvent Debtors before 1864,
1. *Decisions under 5 Will. IV. c. 3, and 10-11 Vict. c. 15, now C. S. U. C. c. 26.*
(a) *Weekly Allowance*, 397.
(b) *Application for Discharge*, 397.
(c) *Preferential Sales or Assignments under s. 18*—*See* Fraudulent Conveyances; also Col. 379.
2. *Decisions under 8 Vict. c. 48, and 19-20 Vict. c. 93, now C. S. U. C. c. 18; and under 7 Vict. c. 31*, 401.

V. Examination of Judgment Debtors.
1. *Under C. S. U. C. c. 24, s. 41*, 403.
2. *Under Division Courts Act, C. S. U. C. c. 19, ss. 160-173*, 408.
3. *To Attach Debts, under C. L. P. Act, s. 287*—*See* Attachment of Debts.

VI. Insolvent Acts of 1864, 1865, and 1869.
1. *Who may come under*, 409.
2. *Compulsory Liquidation*, 410.
3. *Assignees.*
(a) *Appointment of*, 413.
(b) *What property Vests in*, 415.
(c) *Rights, Duties, and Liabilities*, 418.
4. *Rights of Mortgagees*, 421.
5. *Proof of Debts.*
(a) *Creditors holding security*, 422.
(b) *Preferential Claims*, 422.
(c) *Partnership Debts*, 423.
(d) *Other Cases*, 424.
6. *Operation of Executions*, 426.
7. *Fraud and Fraudulent Preferences.*
(a) *Transactions Protected*, 430.
(b) *Transactions Avoided*, 437.
8. *Composition and Discharge.*
(a) *Grounds for Refusing Discharge*, 439.
(b) *Effect of Discharge*, 441.
(c) *Deed of Composition*, 443.
(d) *Other Cases*, 447.
9. *Procedure.*
(a) *Appeal*, 448.
(b) *Other Matters*, 451.
10. *Other Cases*, 452.

VII. Foreign Bankruptcy Laws, 453.

VIII. Miscellaneous Cases, 454.

IX. Incidental Proceedings.
1. *Arrest*—*See* Absconding Debtor—Arrest—Attachment of the Person—Examination of Judgment Debtors, *supra.*
2. *Discharge of Bail under Bankruptcy or Insolvency Acts*—*See* Bail.
3. *When Insolvent ordered to give Security for Costs*—*See* Costs.

4. *Cognovit*—*See* COGNOVIT—FRAUDULENT JUDGMENT.

5. *Judgments*—*See* FRAUDULENT JUDGMENTS.

6. *Bankrupt Mortgagor Party to Foreclosure Suit*—*See* MORTGAGE.

7. *Right of Trustee in Bankruptcy to Redeem*—*See* MORTGAGE.

8. *Sequestration*—*See* SEQUESTRATION.

9. *Receiver*—*See* RECEIVER.

X. FALSE REPRESENTATION OF SOLVENCY—*See* FRAUD AND MISREPRESENTATION.

XI. TAKING MALICIOUS PROCEEDINGS IN BANKRUPTCY—*See* MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

I. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Execution of.*

Execution by all the trustees is not absolutely necessary. *Haight et al.* v. *Munro*, 9 C. P. 462.

See I. 4, p. 374; I. 5, p. 376.

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2. *Construction of.*

W. being indebted to B. and to the plaintiff, absconded, and B. attached his goods; but he afterwards returned, and made an arrangement, on which the attachment was withdrawn. W. then executed an assignment to the plaintiff, which recited that he was indebted to him "in a large sum of money," and assigned "all and singular his stock in trade, chattels, debts," &c., and "all his personal estate and effects whatsoever and wheresoever," upon trust to sell and pay the plaintiff (the assignee) all indebtedness and moneys due and owing by W. to him, and to pay the surplus, if any, to W. He left the province again next day; the plaintiff took possession of the goods, and the defendant some weeks after sued out an attachment for a debt due to him by W. On an interpleader issue the jury found that the assignment was made in good faith to secure a debt due:—Held, that the assignment could not be upheld, for it neither specified the amount secured, nor gave any schedule of the goods and debts; and a new trial was granted. *Howell* v. *McFarlane*, 16 Q. B. 469.

Semble, that the second attachment could not prevent the assignment. *Ib.*

The assignment, in addition to the conveyance of the property, contained a power of attorney to the assignee to take and hold it, but was void under the statute as an assignment for want of filing:—Held, that the assignee's right could clearly not be sustained under the power of attorney. *Wilson* v. *Kerr*, 18 Q. B. 470, in Appeal.

In a schedule of debts appended to a deed of arrangement between a debtor and his creditors, a claim was inserted under the head of "Merchant's account:—Held, that the claim was not improperly described, although at the time of entering into such deed the account was fully secured by a mortgage on real estate and other securities. *Henderson* v. *Macdonald*, 20 Chy. 334.

Held, that an assignment for the benefit of creditors generally, which contained a clause reserving all rights and remedies against third parties, but releasing the assignor from his liability, operated only as a covenant not to sue, and not as a release. *Hall* v. *Thompson*, 9 C. P. 27.

R. being indebted to B. and V., the plaintiffs, in $979.76, gives his note in September, 185[illegible] at six months, payable at the Bank of Montreal in Guelph, with current rate of exchange on New York. In June, 1860, R. made an assignment, by which the plaintiffs were executing parties, which —after reciting an agreement by R.'s creditors to accept 5s. in the £, payable in six and twelve months, to be secured by notes satisfactorily endorsed, and a covenant by R. to pay that sum—contained an absolute release of R. from all those executing it. The plaintiffs before executing the instrument claimed the promised endorsed notes, or to hold the original note till the compromise was paid. On the 6th of August, 1860, another assignment was made by R., in trust, till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted, "the party that promised to become a partner drew back." This assignment the plaintiffs did not sign, because when the first offer fell through they sold the original note, and claimed to have nothing more to do with the matter:—Held, that the giving of the notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt. 2. That the deed of the 6th of August did not annul the former assignment. 3. That this action for goods sold, the consideration for the original note, being brought prior to the 1st of January, 1861, (when the first instalment became due on the assignment) and the release in the instrument being absolute, the non-payment of that instalment did not remit the parties back to their original position, and the validity of the original assignment was not in question. *Benedict et al.* v. *Rutherford*, 11 C. P. 213.

A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, and failing that plan of disposition, then in trust to sell as the trustees should deem most advantageous:—Held, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared. *Goodeve* v. *Maum[illegible]* Chy. 114.

Various proposals having been made for a composition by all the creditors of an insolvent person, A. executed a deed to a trustee, reciting that an agreement to that effect had been come to, and conveying certain property to the trustee to secure any person or persons who might indorse the composition notes which the debtor were to receive. B., a creditor, indorsed the notes of the other creditors, but was to receive payment in full of his own demand:—Held, that the trust deed was not a security for the notes indorsed, the deed being available only if the composition was accepted by all the creditors. *Clarke* v. *Ritchey*, 11 Chy. 499.

A trust was created for the benefit of creditors pro ratâ, in consideration of their discharging the debtor; all the creditors, except the

laintiffs, accepted from two creditors, who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands, in full; he estate yielded more:—Held, that the plaintiffs had no right to the whole of the difference. *Baldwin* v. *Thomas*, 15 Chy. 119.

The mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of the creditors under a trust deed, excluding all preference and priority, saying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee, with the view of charging the trustee with all payments made by him to simple contract creditors before satisfying specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency. The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the right of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than as on a præcipe decree:—Held, that as the trust deed excluded all preference and priority as to the payment of the debts, the rules applicable to the administration of the estates of intestates did not apply, and the mortgagee, for anything beyond what his mortgage would realize, could claim only the same as other creditors; and as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe he was declared entitled only to the costs of such a decree, and was ordered to pay to the trustee his costs of defending the trust estate. *Gore Bank* v. *Sutherland*, 1 L. C. N. S. 159.—Chy.

K. was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the Bank of Upper Canada for more than the value thereof. The trustee agreed for the sale of these parcels to a purchaser; the Bank, before becoming insolvent, assented to the sale and received the first instalment of the purchase money. The purchaser went into possession, but was in default in paying purchase money; the defendants were his assigns. By the trust deed, which the bank executed on becoming insolvent, (which deed was afterwards confirmed by statute), it was made the duty of the bank trustees to accept in payment and liquidation of any debt due to the estate the notes or bills of the bank. On a bill by the bank trustees for payment, it was held that as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par. *Trustees of the Bank of U. C.* v. *The Canada Navigation Co.*, 16 Chy. 479.

See *Heward* v. *Mitchell et al.*, 11 Q. B. 625, p. 634; *Anderson* v. *Gamble*, 8 Q. B. 437, p. 395.

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3. *What Property Passes.*

A deed was executed by John N. Kline & Son, of the first part, whereby, after reciting that they had proposed and agreed to assign all their personal estate and effects to certain parties of the second part, they conveyed and assigned to the said parties "all and singular the stock in trade and, merchandise, sum and sums of money, bonds, drafts, mortgages, books of account of what nature or kind soever, belonging to or due or owing to the said parties of the first part, and which are set forth in the schedule hereto annexed, marked with the letter A., and subscribed by the parties hereto of the first and second parts; and all the personal estate whatsoever, of the said parties of the first part, and all their estate and interest therein." No schedule was attached to the deed at the time of execution, but schedules were afterwards annexed, signed John N. Kline & Son, John N. Kline, jr., Anthony Kline:—Held, that, independently of of the schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline. *Heward* v. *Mitchell et al.*, 10 Q. B. 535.

A testator gave all his estate, real and personal, to his executors in trust, empowering them to continue his business, which they accordingly did for several years, and in doing so had acquired a large amount of property, and subsequently assigned the same, as well that portion remaining left by the testator (about one-ninth) as that acquired since his death, to certain trustees for all creditors of the estate, and each executor severally assigned for the benefit of individual creditors. The trustees took and continued in the possession of the chattels assigned under the several conveyances. The trusts declared were for the benefit pari passu of creditors coming in, and who were not bound to release their claims. A judgment having been recovered against the executors individually, upon a note made by them as executors, the judgment creditors claimed a right to seize the goods in the hands of the trustees, notwithstanding the assignments thereof. In an interpleader suit brought to try the question, the court below determined that the assignments were sufficient to pass and did pass the property to the trustees, who were therefore entitled as plaintiffs to a verdict; and that the judgment creditors were entitled, if their judgment and execution were against the executors, to claim as creditors upon the estate assigned by them as such, and if necessary on the separate estate of each, the joint estate being exhausted. On appeal the judgment below was affirmed. *Kerr* v. *Haldan*, 2 E. & A. 382; affirming *Haldan* v. *Kerr*, 12 C. P. 620.

See *Harris* v. *Commercial Bank*, 16 Q. B. 437, p. 382.

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4. *Time and Mode of Accession by Creditors.*

The assignment contained three parties, C. B., the assignor, being the party of the first part, the defendants, the assignees, of the second part, and "the several other persons whose names and seals are hereunto subscribed and fixed, creditors of the said C. B., of the third part." No creditor executed the assignment, but the defendants (assignees) admitted part of the plaintiff's claim by letter:—Held, that such admission made him a party to the assignment, although he had not executed it, and that they were liable for money had and received. *Burrows* v. *Gates et al.*, 8 C. P. 121.

If the assignee be not a creditor, the assignment is void against an execution coming in before any creditor has executed. *Maulson* v. *Topping et al.*, 17 Q. B. 183.

A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are either parties or privy to the deed; and when in its inception it is not so, subsequent dealings or communications between the debtor or his trustees and the creditors may render the trusts irrevocable. *Goodeve* v. *Manners*, 5 Chy. 114.

An assignment was made for the benefit of such creditors as should execute within a time named in it. One creditor, instead of executing, sued the debtors, and an interpleader issue having been found against him, a motion in the Queen's Bench for a new trial was refused. Thereupon, after the time limited for signing, the trustees allowed him to execute the deed. Upon a bill filed by a creditor who had previously recovered judgment and registered the same against the trust estate, the court declared the plaintiff entitled to payment of his claim out of the proceeds of the estate in the hands of the trustees; and that the creditor who had contested the validity of the deed, had thereby forfeited all right to participate in the benefit of the assignment. *Joseph* v. *Bostwick*, 7 Chy. 332.

In a suit instituted by the creditor of the estate of a deceased debtor who had made an assignment for the benefit of his creditors, certain other creditors, who had not signed or accepted the deed of assignment, sought to come in under the decree and partake of the benefit of the trusts. The trust deed had been made in 1857. The assignor had died in 1863, and the assignment was to be executed by the creditors within two months of its date. The accountants declined to receive proof of the claims; and an application in chambers for leave to come in and sign the deed, and participate in the residue of the estate, was refused. *Schreiber* v. *Fraser*, 2 Chy. Chamb. 271—Mowat.

Where a debtor made an assignment to trustees for the benefit of those creditors only who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and neglected to sign it, but had notified one of the trustees of his assent; and another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and another, though aware of the deed and its provision, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it:—Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse. It being objected that the application was made by petition in chambers, and not by a separate suit:—Held, that it was properly made in chambers by petition in the original suit. The statute of limitations being urged against the admission of the claims:—Held, that the relation of *trustee* and *cestui que trust* had been established between the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. There was also the additional reason in two cases that the statute had never begun to run, owing to the creditors' right of action having arisen after the debtor had absconded. *Gunn* v. *Adams*, 8 L. J. N. S. 211; 4 Chy. Chamb. 115.—Taylor, *Referee*.

A creditor who had not come in pursuant to advertisement, was allowed to do so after the master had reported as to the debts, and after a decree on further directions, but he was required to pay all costs of his application. *Andrews* v. *Maulson*, 1 Chy. Chamb. 316.—Mowat.

The mere fact that certain creditors had notice of an assignment does not make the deed irrevocable. *Spooner* v. *Jones*, 3 Chy. Chamb. 491.—Boyd, *Master*.

Where the assignee afterwards re-conveyed to the grantor, some of whose creditors had been informed of such assignment, but had done no act to alter their position, and the land was afterwards sold for taxes:—Held, that the assignment was revoked, and did not affect the title. *Ib.*

See *Taylor* v. *Whittemore*, 10 Q. B. 440, p. 378; *McKay* v. *Farish*, 15 Chy. 333, p. 366; *McDonald* v. *Wright*, 12 Chy. 552, p. 389; *Metcalf* v. *Keefer*, 8 Chy. 392, p. 379; *Wilson* v. *Kerr*, 17 Q. B. 168, p. 380.

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5. *Release of Debts.*

Assignments held fraudulent before 22 Vict. c. 96, s. 19, now C. S. U. C. c. 26, s. 18, for exacting a release in full from those executing. *Wilson* v. *Kerr*, 17 Q. B. 168, 18 Q. B. 479; *Maulson* v. *Topping*, 17 Q. B. 183; *McDonald* v. *Putnam*, 7 Chy. 395.

B. on the 31st of March, 1859, (after 22 Vict. c. 96,) assigned all his personal estate to trustees in trust for all his creditors; but the assignment contained a release to him from all further liability, and it was declared that any creditor refusing or neglecting within six months after notice to execute the deed or otherwise to discharge the assignor, should lose all benefit therefrom; and that the trustees might pay the amount of his claim to the assignor. This deed was executed by B. and the trustees, both of whom were creditors. Afterwards, and before the defendants' execution was placed in the sheriff's hands, B. executed a deed-poll, authorizing the trustees to pay all creditors unconditionally, without requiring them to execute the assignment or discharge him:—Held, that the assignment was void as against defendants, execution creditors, and that its validity was not restored by the second deed. Remarks as to the effect of a release in assignments before 22 Vict. c. 96. *Burritt et al.* v. *Robertson et al.*, 18 Q. B. 553.

Where a debtor, before 22 Vict. c. 96, assigned his estate and effects to trustees for the satisfaction of his debts, without reserve:—Held, following Bank of Toronto *v.* Eccles, 10 C. P. 282, that he might, under the then state of the law, stipulate for a release to himself from all further liability. Esten, V.C., and Spragge, V.C., dis. Held, also, that such release may still be insisted upon without any reference to the amount of the dividend to be paid by his estate. *Bank of Toronto* v. *Eccles*, 2 E. & A. 53.

An assignment for such creditors as should execute it within thirty days, and agree to release the assignor:—Held, void under 22 Vict.

c. 96, s. 19. *Darling et al.* v. *McIntyre*, 19 Q. B. 154; *Crapper* v. *Patterson et al.*, 19 Q. B. 160.

Held, that an assignment (duly filed) for the general benefit of creditors, containing a power to employ the assignor in winding up the business, giving those a share who should execute, and containing a release clause, except where those executing should add the words, "without release," amounted to a provision for the ratable payment of all the assignor's debts, and was valid. *Feehan* v. *Lee et al.*, 10 C. P. 385.

Debtors having obtained from their creditors an extension of time, covenanted to pay all the debts in full, and not to part with their effects except for the benefit of their creditors generally. Subsequently they made an assignment to one creditor for the benefit of all, the deed containing a release from all further indebtedness by the creditors executing. The court declared such assignment to be in contravention of the agreement, and that the creditors were entitled to participate ratably in the proceeds of the trust effects without releasing the balance of their claims. *Taylor* v. *Mabley*, 6 Chy. 570.

The creditors of an insolvent debtor, by deed, absolutely released him; but it appeared by a memorandum on the instrument that such release was intended to be in consideration of the debtor delivering [illegible] certain indorsed notes, which, however, he stated he was unable to procure, and in fact they were not delivered as agreed upon:—Held, that the creditors were entitled in this court to enforce payment of their original claim, notwithstanding that the debtor offered to pay the sum for which it was stipulated by the deed of composition that the notes should be given, or to give the notes agreed upon; and although the court of common law had held the right of the creditors to recover was gone. Spragge, V. C., [illegible]. *Hill* v. *Rutherford*, 9 Chy. 207.

S., by deed, executed by two of his creditors, conveyed all his real and personal estate, except his household furniture, to trustees, for payment of his debts, stipulating that after paying the expenses, and until the trusts should be carried out or the property exhausted, the trustees should, before payment of any of the debts, pay to him, out of the moneys realized from the estate, the sum of £375 a year for the support of his wife and family; that creditors, to have the benefit of the deed, must execute it within a limited time; that no dividend should be paid to the creditors till a sum had been realized sufficient to pay them 2s. 6d. in the £, and that the creditors should release S. from all future liability. Two creditors only executed, and subsequently S. made another deed to the same trustees, containing a similar release from all creditors who should become parties to it, and upon similar trusts, with the exception of the reservation in his own favour, which was considered questionable. The trustees acted under the second deed, and though both were inoperative to pass real estate, they proceeded to sell the lands, and the plaintiffs, the City Bank, became the purchasers, but the purchase was afterwards abandoned because of this defect in the deed of assignment. Afterwards a creditor, who had lodged an execution in the sheriff's office subsequently to the deed of assignment, filed a bill praying to have the first deed set aside, or, in the alternative, that he might be allowed to share in the proceeds of the estate without complying with the stipulation for a release:—Held, (in accordance with Bank of Toronto *v.* Eccles, 2 E. & A. 53,) 1. That the stipulation for release did not invalidate the deed. 2. That the provision for the payment of a dividend might, under certain circumstances, be considered unreasonable and fraudulent; and 3. That the second deed was not objectionable by reason of anything appearing on its face; although the validity of the first deed might be open to question. Under these circumstances the plaintiff was allowed to share under the deed in such portions of the property as had not already been divided among the creditors assenting thereto, upon his executing the deed; all other creditors who had not deprived themselves of the right to come in admitted on same terms. *Mulholland* v. *Hamilton*, 10 Chy. 45.

See *Hall* v. *Thompson*, 9 C. P. 257, p. 372; *Benedict* v. *Rutherford*, 11 C. P. 213, p. 372; *McDonald* v. *Putnam*, 7 Chy. 395, p. 381; *Mulholland* v. *Hamilton*, 15 Chy. 53, p. 380; *Gillespie* v. *Nickerson*, 6 Q. B. 628, p. 399.

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6. *Provision for Carrying on Business.*

The plaintiffs claimed under an assignment by M., the execution debtor, to them of all his real and personal property, upon certain trusts. This deed provided for payment—first, to certain privileged creditors of the sums mentioned; and next, to pay a ratable proportion to the same creditors of the residue of their demands, and also a ratable proportion to all creditors executing within two months. There were also provisions, that if the trustees should think it advisable, and a majority in value of the creditors signing the deed should consent, they might carry on the business for the benefit of such creditors, employing M. for this purpose, and making him an allowance; that from time to time out of the proceeds realized they might purchase new stock, but the business to be wound up, at all events, within two years; and that the trustees might permit M. to use such portions of his household furniture, for such time and on such terms as they should think proper. The furniture was left in M.'s possession, being used in rooms over the shop, where he continued to live. The deed was registered with the clerk of the County Court, but there was no affidavit verifying any debt:—Held, first, that it was properly left to the jury to say whether they believed that the assignment was in truth made for the benefit of the creditors, and that the plaintiffs had taken possession, and were acting bonâ fide under it. Secondly, that none of the provisions above mentioned could be considered as illegal or affording evidence of fraud. *Taylor* v. *Whittemore*, 10 Q. B. 440.

Held, that an assignment after 22 Vict. c. 96, purporting to be for the general benefit of creditors, with power to the assignees to make advances for conducting and winding up the business, no time being limited within which it was to be wound up; such advances to be the first charge upon the assets, with ten per cent. profit upon all moneys received as compensation for the advances and for the trouble in winding up, with power to employ the assignor at a

salary in their discretion, was void as against subsequent judgment creditors. *Hendry et al.* v. *Harty et al.*, 9 C. P. 520.

An assignment, gave the trustees power from time to time, as they should deem expedient, "to purchase stock for the purpose of enabling them to assort and sell off the present stock to the best advantage, for the benefit of the estate:"—Held, that creditors executing would not by this become partners in the business, and that the clause was not objectionable. *Maulson et al.* v. *Peck et al.*, 18 Q. B. 113.

The assignment, made before 22 Vict. c. 96, provided that the assignee might carry on the business for the benefit of the creditors executing, and employ the debtor to manage it, at such salary as might be agreed on, and supply goods to keep up the stock and for the more beneficial management of the business for the interest of the creditors, and pay for such goods out of the trust estate. Quære, whether this would make the executing creditors partners in the business. *Crapper* v. *Paterson et al.*, 19 Q. B. 160.

A provision for carrying on the business so as to render the creditors partners with the trustees quoad third persons, or one which may cause unreasonable or prejudicial delay to the creditors, renders the deed void. *Metcalf* v. *Keefer*, 8 Chy. 392.

See *Kerr* v. *Haldan*, 2 E. & A. 382, p. 374; *Feehan* v. *Lee*, 10 C. P. 385, p. 377.

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7. *Preferential Assignments.*

Held, that an assignment obtained by pressure, of all the trader's goods, in trust to secure the plaintiff in preference over other creditors, and to pay the residue to such trader, was not fraudulent, possession having been changed consistently with the deed. *McPherson* v. *Reynolds*, 6 C. P. 491.

Per Burns, J.—Under 22 Vict. c. 96, an assignment is invalid if made only for the benefit of creditors who execute it. *Burritt et al.* v. *Robertson et al.*, 18 Q. B. 555.

An assignment for such creditors as should execute it within thirty days, and agree to release the assignor:—Held, void under 22 Vict. c. 96, s. 19. *Darling et al.* v. *McIntyre*, 19 Q. B. 154; *Crapper* v. *Paterson et al.*, *Ib.* 160. See, also, *Wilson* v. *Kerr*, 17 Q. B. 168.

A provision appointing a time within which creditors must come in and execute, in order to receive the benefit of the trusts, does not render the deed void under 22 Vict. c. 26. *Metcalf* v. *Keefer*, 8 Chy. 392.

Semble, the 22 Vict. c. 26, has not altered the law except as to preferential assignments. *Ib.*

An assignment of all the assignor's property, including book debts, &c., in trust to pay, first, all executions in the hands of the sheriff or of any bailiff of any Division Court in the county, and, secondly, all debts due to the persons named in the schedule annexed, and all other creditors omitted there, but who should in due time come into the assignment; but in case (after satisfying the executions) there should not be enough to pay the same in full, then to distribute pro ratâ among the persons named in the schedule, and return the surplus, if any, to the assignor:—Held, void, under C. S. U. C. c. 26, s. 18, as not being for the purpose of paying all creditors without preference. *Watts* v. *Howe et al.*, 21 Q. B. 255.

E. L., being embarassed, in June, 1857, assigned his goods, lands, &c., to trustees, giving preference to certain creditors. Afterwards, wishing to resume business, he proposed that the personal estate should be re-conveyed to him, and time given under certain conditions for payment of the debts, the lands being conveyed to two creditors in trust for all. This was agreed to by the trustees and most of the creditors, and re-conveyances executed. The plaintiffs were indorsers on paper of E. L. held by M., a creditor preferred in the first assignment. M. refused to re-convey unless the plaintiffs renewed their liability to him on the paper then overdue, which they did, and M. then signed the re-conveyances. Plaintiffs had afterwards to pay the notes held by M., whereupon they filed their bill, claiming to stand in the place of M. as preferred creditors under the original assignment:—Held, that they could not claim such priority, or the priority provided for them by the first assignment, but must rank pari passu with the other creditors. *Lawson* v. *Moffatt*, 16 Chy. 328.

Where a debtor, before 22 Vict., c. 96, assigned his estate and effects to trustees for the satisfaction of his debts without reserve, Held, affirming Bank of Toronto *v.* Eccles, 10 C. P. 92, that he might, under the then state of the law, stipulate for the payment of some of his creditors in full and a ratable distribution as to the rest. *Bank of Toronto* v. *Eccles*, 2 E. & A. 33.

In 1857 A. made an assignment for the benefit of his creditors, and thereby provided for the preferential payment of all sums which other persons were liable for, as sureties or indorsers for him:—Held, that the creditors to whom these secured sums were due were entitled to the benefit of this provision, and would not lose it by executing the deed of assignment, though it contained a clause releasing the debtor. *Mc-holland* v. *Hamilton*, 15 Chy. 53.

See *Taylor* v. *Whittemore*, 10 Q. B. 440, p. 37[illegible]. *Thorne* v. *Torrance*, 16 C. P. 445, 18 C. P. 23; 388; *Squire* v. *Watt*, 29 Q. B. 328, p. 389.

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8. *Consideration and Bona Fides.*

An assignment or sale of personal property upon trust to pay creditors (or upon other trusts) is within the statutes requiring registration. The consideration for such assignment is "bona fide" within those acts, though some creditors may thereby lose their debts; for a debtor may prefer his creditors in such order as he may think proper. *Heward* v. *Mitchell et al.* 11 Q. B. 61[illegible].

On an interpleader issue to try the validity of an assignment in trust for creditors, the [illegible] being left to draw the same inferences as a jury—Held, that it was fraudulent for the assignor to assign on the understanding that he should keep possession of his household furniture. *Wilson* v. *Kerr et al.*, 17 Q. B. 168; 18 Q. B. 70[illegible].

Held, that the assignment in the above case was also fraudulent because it contained a stipulation that no creditors should share [illegible]

…ose executing within forty days, and a release …n full on condition of their getting the dividend …t of the proceeds of the goods assigned, with … proviso that the surplus should go to the …signor. *Ib.*

…A. on the 4th of January, 1858, conveyed his …al estate absolutely to defendants in considera… …n of 5s.; this deed was not executed by …efendants, and was registered on the 6th. On …e 5th A. made an assignment for creditors …nerally, which deed was executed by the de…endants and other creditors of the assignor, but …as not registered, and in the latter deed the …ests, on which the real estate was conveyed by …e former one, were fully declared:—Held, the …nveyance being impeached on the ground of …aud, that it was competent to those upholding …to shew the existence of considerations other …an the 5s. expressed, although the common …rds, "and for other considerations," were …itted. *Bank of Toronto* v. *Eccles et al.*, 10 … P. 282.

…C. S. U. C. c. 45, does not require a money …sideration. *Noell* v. *Pell*, 7 L. J. 322.—C. … Chamb.—Draper.

An assignment for the general benefit of credi…rs, as far as the effects will go, together with …e acceptance of the trust by the assignees, …o swear they are creditors, is a sufficient con…deration to support the assignment. *Ib.*

An assignment by an insolvent for the benefit …creditors set aside, as it contained a general …ase by the creditors, and was made to avoid …xecution about to be issued by one of them; … the creditors generally were declared enti… … according to their priority, to the proceeds …e property which had been sold by the …stee. *McDonald* v. *Putnam*, 7 Chy. 395.

See I. 6, p. 378; 7, p. 379; 11, p. 383.

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9. *Filing and Re-filing.*

… assignment or sale of personal property …r trust to pay creditors, (or upon other trusts) …within the statutes requiring registration. …ord v. *Mitchell et al.*, 11 Q. B. 625.

…ld, that the assignment in this case (the …iculars of which are set out in the report) …t be considered as an absolute sale, not a …gage, and therefore did not require to be …d under 12 Vict. c. 74. *Ib.*

… affidavit stated that the assignment was not … for the purpose of enabling the *assignor* (in… of the assignee) to hold the goods against …ors:—Held, bad. Semble, per McLean, J., …signees in trust for creditors cannot pro… take the affidavit required by 13-14 Vict. … *Olmstead* v. *Smith*, 15 Q. B. 421.

…affidavit that the assignment was made bonâ …itting the words "for good consideration:" …d, bad. *Mason* v. *Thomas*, 23 Q. B. 305.

… it was made "for the purposes and trusts … set forth," and not for the purpose of …, &c., "the estate and effects" mentioned … instead of "the goods," as in the sta… —Held, sufficient. *Ib.*

…, per Robinson, C. J., and McLean, J., …der 20 Vict. c. 3, a copy of an absolute …ent or bill of sale may be filed, as well … mortgage: per Burns, J., That the origi… nal must be filed. As to certain goods belonging to the assignor, but lying in the customs warehouse subject to duties, no change of possession having taken place, and no compliance being shewn with the formalities required by the Customs Act, 10-11 Vict. c. 31:—Held, that such goods did not pass by the assignment. Per Robinson, C. J., the statute requiring registration, does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the Customs Act had been followed. Of the household furniture mentioned in the assignment there had been no change of possession, and the court being left to draw the same inferences as a jury would: —Held, per Robinson, C. J.—That notwithstanding the registration of the assignment, such furniture did not pass: per Burns, J.—That it did not pass, because the assignment was not properly registered by filing a copy only. Quære, per Robinson, C. J., whether assignments in trust for creditors require registration; but held, that they do. See *Carscallan* v. *Moodie*, 15 Q. B. 92; *Harris et al.* v. *Commercial Bank*, 16 Q. B. 437.

An assignment registered, with a separate declaration of trust not registered:—Held, invalid. The decision in Arnold *v.* Robertson, 8 C. P. 147, affirmed. *Fraser et al.* v. *Gladstone*, 11 C.P. 125.

Where an assignment for the benefit of creditors is filed within the five days allowed by law, it relates back to its date, so as to prevent the effect of an execution placed in the sheriff's hands within the five days. *McInnes* v. *Benedict*, 8 L. J. 22.—C. C.—Hughes.

See, also, *Neeson* v. *Eastwood*, 4 Q. B. 271, p. 387; *Boynton* v. *Boyd et al.*, 12 C. P. 334; *Bank of Montreal* v. *McWhirter*, 17 C. P. 506, p. 433.

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10. *Private Stipulations with Particular Creditors.*

A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to indorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee. *Clarke* v. *Ritchey*, 11 Chy. 499.

The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any mortgage, hypothec, lien, or collateral security held by any such creditor as security for any of said debts:"—Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at or before executing the deed of extension. *Henderson* v. *Macdonald*, 20 Chy. 334.

See *Smith* v. *Dittrich*, 8 Q. B. 589, p. 394; *Ex p. Detlor*, 1 O. S. 278, p. 395; *Fowler* v. *Perrin*, 16 C. P. 258, p. 444.

11. *Other Special Provisions.*

A debtor, by deed, reciting that he had become embarrassed by endorsing and as security for others, assigned all his property, both real and personal, including land worth about £1500, in trust to pay—first, the parties named in a schedule annexed, being those to whom he had become indebted on his own account, whose claims did not exceed £110; and, secondly, the other creditors who should execute the assignment. There was no evidence of more than a few trifling debts, amounting to about £150:—Held, that there was nothing in the nature of the trusts created for which the deed could be held void in law; but the jury having found in favour of it the court granted a new trial, considering that there was much ground for suspecting that the few direct claims had been made a pretence for tying up all the debtor's property, and defeating other creditors. *Balkwell et al.* v. *Beddome*, 16 Q. B. 203.

A retail merchant assigned all his property real and personal to a trustee, then his clerk on a salary of £175 a year. The assignment provided that the assignee, as soon as conveniently might be, should collect the debts, and sell so much of the goods as should not be required to wind up the business, and afterwards should sell the lands on such terms as he might think best. He was authorized to employ the assignor at not exceeding £250 a year, and to allow him to use the household furniture until the other property should be exhausted. With the money he was directed, after paying expenses of the assignment, salaries, &c., and retaining ten per cent. for his own trouble, to pay the creditors ratably. The assignment was executed only by the assignor and the assignee, who was a creditor, but some other creditors had signified their assent. The debts to be collected amounted to $2877, and were due by about 160 debtors, and the lands formed the most valuable portion of the assets. On an interpleader issue, the court being left to draw inferences as a jury:—Held, that the assignment was fraudulent and void as against creditors, the chief objection being that the sale of the land was postponed till after collection of the debts. *Cornwall* v. *Gault et al.* 23 Q. B. 46.

See *Mulholland* v. *Hamilton*, 10 Chy. 45, p. 378; *Metcalf* v. *Keefer*, 8 Chy. 392, p. 385.

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12. *Rights, Duties, and Liabilities of Trustees.*

M. had a contract to supply wood to a railway company, for which he was to be paid when it had been inspected and accepted. While 152 cords were lying in the company's yard for inspection he assigned all the wood that belonged to him, with other property, to the plaintiff for the benefit of his creditors. He at the same time made over his interest in the contract to the defendant, who completed it, and the company afterwards by mistake paid defendant for these 152 cords as well as for what he had himself supplied:—Held, that the plaintiff might recover this sum as money had and received. Held, also, that defendant could not object that the assignment to the plaintiff was not properly filed. *Scott* v. *Kelly*, 17 Q. B. 306.

A trader being in insolvent circumstances, at a meeting of his creditors entered into a written agreement that he would execute an assignment to trustees, for the benefit of his creditors, of all his real and personal estate and effects, (except certain policies of life insurance,) and on the second day afterwards he did execute the deed agreed upon, which the trustees accepted, and several of his creditors joined in and executed the same. Afterwards it was discovered that on the day intervening between the date of the agreement to assign and the execution of the deed of assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Then upon the trustees filed a bill seeking to have this sale set aside as fraudulent and void as against them:—Held, that the trustees, being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the date of the execution of the deed of trust, and that the sale being binding upon the debtor and those claiming under him, the trustees were not entitled to the relief prayed. But, semble, that this sale would not have been sustained as against a judgment creditor who had sued out execution. *McMaster* v. *Clare*, 7 Chy. 550.

A mortgagee of unpatented land, after judgments were registered against him, assigned his estate for the benefit of his creditors. The trustee paid to the government out of the trust estate the balance of the purchase money. Held, that in respect of the sum so paid, he was entitled to priority over the judgment creditors. *McIntyre* v. *Shaw*, 12 Chy. 295.

Execution by all the trustees is not absolutely necessary for the validity of an assignment. *Haight et al.* v. *Munro*, 9 C. P. 462.

The declaration charged that the plaintiff having recovered judgment against A. & Co. had seized and was about to sell their goods under a fi. fa., and in consideration that the plaintiff would withdraw his writ defendant promised to pay the amount. A count was added for money had and received. It appeared that A. & Co., being indebted for rent, and three executions, of which this was one, having issued against them for other claims, they made an assignment to the defendants of all their goods, in trust *out of the proceeds* to pay the landlord and these executions, according to their legal priority, then to pay two preferred creditors named, and lastly to divide the surplus money among the other creditors executing the assignment. This assignment was executed by the defendants, but not by the plaintiff. It was put in at the trial by the plaintiff, and it was proved that the defendants had received money under it, but no promise was shewn by them except what was contained in the deed, by which it was recited that the defendants had agreed to pay the claims above mentioned out of the proceeds of the property assigned sufficient:—Held, that the plaintiffs could not recover: that the first count was not proved, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods; and upon the second count, defendants, as trustees, could be liable only in equity, or if at law in a special action on the case. *Harris* v. *Buntin et al.*, 16 Q. B. 59.

F. had a demand against one T. on notes and acceptances of about $20,000. The

agreed to transfer to him certain bank stock worth $2,550 as a loan, to secure which he agreed to assign, and afterwards delivered to them, $14,290 of these notes, all of which were negotiable, but some only were endorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect for them there. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $300 excepted) came into the defendant's hands:—Held, that the plaintiffs might recover from the defendant, as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt. *Lee et al.* v. *Woodside*, 22 Q. B. 15.

Certain creditors, with the concurrence of the debtor, and after notice of an assignment by him of every thing for the benefit of his creditors pari passu, entered up judgment, seized goods covered by the assignment, and refused to execute or have anything to do with it. It having been subsequently decided that the assignment was valid as against their execution, they desired to rank as creditors under the deed, and the trustee refusing to consent, and having divided most of the trust funds amongst the creditors, the excluded creditors filed a bill to have the benefit of the deed, the debtor being willing; and on the coming in of the answers moved for payment into court of the balance in the trustees' hands unappropriated; but the court considered the plaintiffs' equity so doubtful, that they refused the motion with costs. *McKay* v. *Farish*, 6 Chy. 333.

Neither an allowance of a reasonable remuneration to the trustees, though they may be creditors, under 13 Elizabeth, nor a provision for the employment of the assignor at a reasonable remuneration, renders the deed void under 22 Vict. c. 96. *Metcalf* v. *Keefer*, 8 Chy. 392.

A., being accommodation endorser for B. to a large amount, obtained from him, as indemnity, a confession, upon which judgment was entered up and duly registered. C. also recovered a judgment against B., which was registered subsequently on the same day, contemporaneously with the confession. B. also assigned to A. all his chattels and effects, and all debts due him. On hearing of the assignment C. notified A. that he would be holden accountable for what was assigned to him, but A. nevertheless permitted B. to use the property, and to receive the debts, just as if no assignment had been made, whereby C. was deprived of any benefit. On the usual reference to the master in a suit for foreclosure of lands of B., A. and C. both proved their debts, and in settling priorities the master preferred A. prior to C. On appeal by C. from the report, the court declared A. to be a trustee of the property assigned for C., and that having by his negligence permitted the property to be lost, A. ought to be postponed as to the fund, to the common fund of both. *Huntingdon* v. *Brocklin*, 8 Chy. 421.

Where a bill was filed by one of several creditors of a debtor, who had assigned his estate for the benefit of his creditors, against the debtor and the trustees, seeking an account of the estate and payment, without making any other creditor a party, the court overruled an objection for want of parties, on the ground of the absence of any such creditor. *Wood* v. *Brett*, 9 Chy. 78. See, also, *Wylie* v. *McKay*, 20 Chy. 421.

An assignment having been made to trustees for the benefit of creditors, a bill was filed against the assignor and his trustees by a privileged firm of creditors, for an account of the trust estate, and payment of their claim; in answer to which the defendants alleged that certain bills and notes had been taken in payment of their demand, not as collateral security only. The evidence on this point was contradictory, and the court referred it to the master to take an account of the claim of the plaintiffs against the estate, and to enquire as to the dealings of the trustees under the assignment. *Ib.*

Trustees made payments to one class of creditors over whom another class had priority, without providing for the prior class; and a suit for the administration of the trust estate having been instituted, the creditors paid were ordered to repay, and the unpaid creditors were held entitled to a lien on the trust funds in court in priority to the claims of the trustees, and all subsequent creditors, for debt and costs. *Wood* v. *Brett*, 14 Chy. 72.

Where a debtor assigned his estate to trustees on trust to sell for the benefit of creditors; and the trustees were guilty of delay in selling, and of other misconduct, it was held that the court had jurisdiction at the suit of a creditor to execute the trusts of a deed. *Quebec Bank* v. *Snure*, 16 Chy. 681.

The plaintiffs assigned all their effects to defendant, to sell the same and pay all their creditors, a list of whom was handed to defendant on the execution of the deed of trust. Subsequently the plaintiffs furnished another schedule of their liabilities, embracing several persons not mentioned in the original list. Defendant had paid several of those first named, and in doing so had expended a sum greater than he had collected, and had become answerable for more than the residue of the estate would realize. He refused to recognize the claims of the additional parties in the second list, and thereupon the plaintiffs filed a bill praying an account of the defendant's dealings with the estate and for an execution of the trusts of the deed; alleging that they had not any estate other than that assigned to defendant, and that they were insolvent and personally unable to pay anything. The court, in view of the facts that no fraud or improper conduct was alleged, that even if the whole estate were realized, defendant would still be a loser, that all the defendant had done, up to a date shortly before the filing of the bill, had been approved of by the plaintiffs, and that he had received but a small sum since, and not enough to repay himself,—refused the relief prayed, and dismissed the bill with costs. In such a case the defendant sought to shew that the creditors mentioned in the original schedule were the only ones he had agreed to pay, and that such was the agreement between himself and the plaintiffs on his acceptance of

the trust:—Held, that he was not at liberty to shew this, not having asked for a reformation of the deed of trust; and that even if he had, the absence of the parties sought to be excluded from the benefits of the trust, was an insuperable barrier to the defendant being permitted to do so. *Liddell* v. *Deacou*, 20 Chy. 70.

See *Burrows* v. *Gates*, 8 C. P. 121, p. 374; *National Bank of Albany* v. *Moore*, 21 Chy. 269, p. 391; *Gore Bank* v. *Sutherland*, 1 L. J. N. S. 159, p. 373; *Commercial Bank* v. *Wilson*, 11 C. P. 581. p. 388.

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13. *Rectification of Mistake in.*

When a debtor conveyed his lands to a trustee for his creditors, and a schedule annexed purported to contain the whole thereof, but it was afterwards discovered that, either designedly or by mistake, some of the lands had been omitted:—Held, that a bill would lie to correct the schedule, on the ground of fraud or mistake. *Gillespie* v. *Grover*, 3 Chy. 558.

A trader assigned his estate and effects to trustees for his creditors, some of whom were declared to have preferred claims, and to be paid in full. The claim of one was stated by the debtor to be "£3,500, or thereabouts," no account having been settled between the debtor and the creditor for a long time; and this sum was stated in the schedule as the amount, and the several creditors executed the assignment. The creditor afterwards, on balancing his account, ascertained that his claim was £5,062, which the trustees refused to pay; whereupon the creditor filed a bill to reform the deed, by introducing this sum as his claim, on the ground that the words "or thereabouts," were sufficient to include it. The court dismissed the bill with costs. *Chapin* v. *Clarke*, 7 Chy. 75.

See *Liddell* v. *Deacou*, 20 Chy. 70, supra.

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14. *Other Cases.*

When property is conveyed in trust to pay debts, it cannot be considered as a fraudulent conveyance against creditors not included with the creditors for whom the trust is declared. *Doe* d. *Laurason* v. *The Canada Company*, 6 O. S. 428.

The second clause of the Registry Act, 35 Geo. III., c. 5, did not apply to deeds given to trustees for the benefit of creditors. *Neeson* v. *Eastwood*, 4 Q. B. 271.

Under what circumstances an assignment to one or more creditors for themselves and others, may be upheld against another creditor, who has seized the same goods in execution upon a judgment confessed to him before the assignment. *Farish* v. *McKay*, 5 Q. B. 461.

Declaration upon four bills of exchange, for £500 each, drawn by R. H. & Co., upon one J. C., payable to and endorsed by defendant. Defendant pleaded, 1. Payment. 2. An assignment made by J. C. to one T. P., for the benefit of his creditors, with plaintiffs' assent and concurrence, and that T. P., with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied, on equitable grounds, that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a nolle prosequi as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500. Upon demurrer, held, that the executing of an assignment by the holder of a bill, without a special reservation of rights as to sureties, discharges them; and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C., in their hands to be applied upon the bills declared on, and until they had done that no cause of action accrued against the defendant. For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bills sued upon, and therefore the replication was bad. *Commercial Bank of Canada* v. *Wilson*, 11 C. P. 581.

Held, that one co-partner in trade cannot, without the express consent of his co-partner, execute a deed disposing of all the stock-in-trade, effects, and assets of the firm to a trustee to dispose of the same for the general benefit of the creditors of the partnership. *Cameron et al.* v. *Stevenson*, 12 C. P. 389.

A partner of a mercantile firm has no power, either during the existence or after the dissolution of a partnership, to make an assignment of the property and effects of the firm to a trustee for the benefit of creditors. *Stevenson* v. *Brown*, 9 L. J. 110.—Chy. Chamb.—Spragge.

Two assignments were made by J. and C. P. on the 1st and 5th of June, 1865, to the plaintiff, a creditor, for the benefit of creditors. On the 6th June, 1865, defendant, another creditor of J. and C. P., obtained judgment against them, and placed a fi. fa. in the sheriff's hands, and on the 1st July, 1865, he also caused a writ of attachment, under the Insolvent Act of 1864, to be issued against them. The goods assigned to plaintiff were seized under the fi. fa.:—Held, that the assignments in this case, which are fully set out in the report, not being made in accordance with the Insolvent Act, were acts of insolvency and could not be supported, and that they were by the issue of the attachment and the appointment of an official assignee displaced, and rendered void as to defendant's execution:—Held, also, A. Wilson, J., diss., that they were also void under C. S. U. C. c. 26. *Thorne* v. *Torrance*, 16 C. P. 445; affirmed on appeal, 18 C. P. 29.

A debtor being in difficulties assigned all his property to a creditor, who agreed to pay a composition of forty cents in the dollar within a year. This had been paid, except to defendant, who refused to accept, and issued execution. On an interpleader between the assignee and the defendant, to try the title to the goods assigned, the jury having found the transaction bona fide:—Held, affirming the judgment of the County Court, that such an assignment was not avoided by the Insolvent Act of 1864, s. 8, for that the statute applies only where proceedings are taken and as against a person claiming under it:—Held also, that the assignment was not invalid under

C. S. U. C. c. 26, s. 18. *Squire* v. *Watt*, 29 Q. B. 328.

Two partners, before the Insolvency Act, assigned their joint and separate estates together, for the benefit of their joint and separate creditors, pari passu. An assignee under the act, afterwards appointed, filed a bill to set aside these assignments, on the ground that, to put the separate creditors of each on an equality with the joint creditors in respect of the joint property and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing by evidence that both the separate estates were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs. *McDonald* v. *McCallum*, 11 Chy. 469.

Where a trust deed for the benefit of creditors contains no release clause, creditors who subsequently sue the settler on other securities are not thereby precluded from claiming the benefit of the trust deed. *Andrews* v. *Maulson*, 1 Chy. Chamb. 316.—Mowat.

The rule that the terms of a deed of composition must be strictly complied with, considered and acted on. *Hill* v. *Rutherford*, 9 Chy. 207.

As a general rule, an assignment for the benefit of creditors will be taken as a declaration of insolvency and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executors and two of the legatees, charging maladministration, and alleging that the executor, subsequently to the death of the testator, had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and receiver before answer, under the circumstances, granted an interim injunction and receiver, notwithstanding the executor denied any maladministration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Chy. 443.

In a suit for the administration of a debtor's estate under an assignment for the benefit of creditors, creditors who come in under a decree may rehear the cause, and this is the proper course where the alteration is such as might be effected in that way by a party to the cause. *Mulholland* v. *Hamilton*, 12 Chy. 413.

A bill was filed by A. and B. to enforce certain registered judgments. B.'s interest was as assignee of A. The assignment was for the benefit of creditors, but it did not appear that any creditor was party or privy to the assignment; and the assignee had sworn, in one of the affidavits filed, that his only interest was as trustee for A.:—Held, that any evidence admissible against A. was admissible against both plaintiffs. *McDonald* v. *Wright*. 12 Chy. 552.

Interest held to be allowable on a preferred debt consisting of drafts and promissory notes from the date until paid, and pending suit. *City Bank* v. *Maulson*, 3 Chy. Chamb. 334.—Boyd, Master.

A trust was created for the benefit of creditors pro rata, in consideration of their discharging the debtor; all the creditors, except the plaintiffs, accepted from two creditors who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands in full; the estate yielded more:—Held, that the plaintiffs had no right to the whole of the difference. *Baldwin* v. *Thomas*, 15 Chy. 119.

Where a bill is filed to impeach a conveyance to the trustees for the benefit of creditors, whether such an assignment is or is not in insolvency, the trustees are necessary parties: therefore where the cause of demurrer assigned was, that one G., to whom it was alleged in the bill that M. had conveyed his estate and effects for the benefit of his creditors, was not made a party, the court allowed the demurrer. *Wylie* v. *McKay*, 20 Chy. 421.

Quære, whether the bill was not also demurrable, on the ground that it did not distinctly shew the relation of trustee and cestui que trust between M. and his creditors to have been created by the conveyance to G., or that such conveyance was anything more than a deed of management. *Ib.*

See *Parsons* v. *Crabb*, 31 Q. B. 434.

II. Composition.

A general agreement of the defendant's creditors to accept a composition of 10s. as pleaded:—Held, not proved by evidence that the defendant, having become insolvent, had paid to some of his creditors one rate in the pound, and to other creditors another rate. *Forster* v. *Bettes et al.*, 5 Q. B. 599.

Action on three notes. Plea to the further maintenance of the action, a composition with the plaintiff and creditors, whereby it was agreed by the defendants with the plaintiff and their other creditors, that after assigning a certain building contract to the Bank of Upper Canada, in discharge of the bank's claim against them, defendants were to convey all their other estate, effects and contracts, to two persons in trust for the plaintiff and the other creditors, &c. The assignment, as completed after the action, was executed by many creditors, but not by the plaintiff. The subject matter assigned appeared to have been goods, chattels, and choses in action, far exceeding £10 in value, and yet at the time of the composition pleaded no part was delivered or accepted, no earnest paid, nor part payment made; nor was the agreement or composition pleaded in writing; and moreover the Bank of Upper Canada, a corporation, one of the alleged parties to the agreement, did not appear to have contracted under their seal:—Held, upon these grounds, that the plea was not supported. *Brunskill* v. *Metcalf et al.*, 3 C. P. 143.

Declaration, that the defendants undertook to give their promissory notes payable at certain periods, for 10s. in the pound of the debts due by one F. to such of his creditors as should within two months after the date of the deed express their consent to accept such composition. The 5th plea alleged that the plaintiffs did not demand of defendants to execute and deliver the said note:—Held, that defendants not being bound to anybody by name, and it not being averred that defendants had notice that these plaintiffs were creditors, or that as such they had consented to accept the composition, or what the debts of F. were, a demand was necessary; and the plea was therefore held good. *Matthewson* v. *Henderson et al.*, 13 C. P. 96.

Semble, that a creditor under a composition deed, either under the insolvent act or otherwise, cannot give a general release and subscribe for a particular sum, as being apparently his whole claim, and afterwards advance other demands as not included in this discharge, for this would be a fraud on the other creditors. *Fowler* v. *Perrin et al.*, 16 C. P. 358.

A trust was created for the benefit of creditors pro rata, in consideration of their discharging the debtor; all the creditors, except the plaintiffs, accepted from two creditors who had become responsible for the fidelity of the trustee, twenty-five per cent. of their demands in full. The estate yielded more:—Held, that the plaintiffs had no right to the whole of the difference. *Baldwin* v. *Thomas*, 15 Chy. 119.

Where J. H., R. M., and F. H. had agreed to give their promissory notes to the creditors of E. F. (who had already made an assignment for their benefit) in composition for the debts of E. F., at 10s. in the £, and for the benefit of the creditors had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one-half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods; and the goods were afterwards all delivered to C. with the knowledge and assent of E. F.:—Held, that the deed of J. H., R. M., and F. H. could not be avoided on the ground of fraud because there was subsequently a partial failure in the arrangement on the faith of which they had made the deed. *Matthewson* v. *Henderson*, 15 C. P. 90.

If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected. *Ib.*

Where a debtor, in order to effect a compromise with his creditors, offered a mortgage on certain property, which property he represented as belonging to another person who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that before it was executed the debtor had obtained a conveyance of the property to himself:—Held, that such conveyance was under the circumstances subject to the mortgage. *Fraser* v. *Sutherland*, 2 Chy. 442.

A trader in insolvent circumstances made an assignment of his property to several of his principal creditors, in trust, for the benefit of his creditors generally. Afterwards it was agreed that the creditors should accept twenty per cent. of their demand, and discharge the debtor, whereupon the plaintiffs and other creditors executed a deed to carry out this agreement. Before payment of the composition, however, the trustees re-assigned the property to the debtor on his undertaking to pay the several creditors the amount of their claims, which he did pay to the trustees, but failed to pay to the plaintiffs:—Held, that the trustees were liable to make good to the plaintiffs the sum coming to them, if the property which had been assigned to them by the debtor was sufficient to realize the amount of the composition agreed on; and as to this, if desired by the trustees, an inquiry by the master was directed. *The National Bank of Albany* v. *Moore*, 21 Chy. 269.

See *In re McRae*, 15 Chy. 408, p. 426; *Clarke* v. *Ritchey*, 11 Chy. 499, p. 372.

III. Bankruptcy under 7 Vict. c. 10.

[*The Bankrupt Act, 7 Vict. c. 10, under which the cases below were decided, was amended by 9 Vict. c. 30, and continued for certain purposes till the end of the session next after 1st January, 1860, See 31 Vict. c. 29, D.; 31 Vict. c. 17, O.*]

1. *Actions and Proceedings.*

(a) *By Bankrupt or Assignee.*

Where a plaintiff commences an action, and pending the proceedings becomes a bankrupt, he may, under 7 Vict. c. 10, ss. 31 and 32, continue the suit in his own name, unless the assignees intervene. *Ireland* v. *Wagstaff et al.*, 4 Q. B. 231.

See *Hughes* v. *Newcastle District Mutual Fire Insurance Co.*, 8 Q. B. 315, p. 394.

(b) *Against Bankrupt.*

Though a certificate of bankruptcy be no discharge till confirmed, an interlocutory judgment entered before confirmation will be set aside to allow the bankrupt to plead his certificate, or the court will relieve him by staying the execution of the fi. fa., on a proper application after judgment and execution issued. *Commercial Bank* v. *Culross et al.*, 3 Q. B. 176.

A plea, "that after the making of the promise, and after the action had accrued, defendant became a bankrupt:"—Held, good on special demurrer. *Short* v. *McMullen*, 6 Q. B. 407.

Held, (Draper, J., diss.) that the certificate obtained by a bankrupt under the ordinance of Lower Canada, 2 Vict. (3), c. 36, prior to the 7 Vict. c. 10, might be given in evidence under the general form of plea allowed by section 64. *Phillips* v. *Masson et al.*, 9 Q. B. 20.

So might fraud by the bankrupt in obtaining his certificate. *Ib.*

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2. *Operation of Executions.*

The seizure and levy in execution under 7 Vict. c. 10, s. 37, to avoid the effect of a commission subsequently issued, mean only the seizure, and not the actual levying of the money. *Hales* v. *Tracy*, 1 Q. B. 541.

If a seizure be made without notice of a prior act of bankruptcy, the sheriff may proceed and sell, and pay the proceeds to the execution creditor, though the commission be placed in his hands before sale. *Maulson* v. *Commercial Bank*, 2 Q. B. 338.

Where a party had confessed judgment to a bank before the bankrupt law, with the understanding that it would not be enforced on payment of a certain sum every fortnight; and it was agreed, after several payments, that the confession should stand also as a security for notes to be discounted for the party; and proceedings having been threatened by other creditors, the bank issued execution and sold:—Held, that the assignees of the bankrupt, on a commission issued after the seizure, but before the sale, could not recover the proceeds in an action for money had and received against the bank. *Ib.*

A fi. fa. placed in the sheriff's hands before the commission was sealed, but *on the same day* on which it was completed and delivered to the sheriff, has priority over the commission. *Beekman* v. *Jarvis*, 3 Q. B. 280.

Quære, what course is the sheriff to pursue upon an execution against the goods of one of two partners under the circumstances of one being a bankrupt, and the other not. *O'Neill* v. *Hamilton*, 4 Q. B. 294.

A notice to the execution creditor in general terms before the sheriff could have levied, without specifying any particular act of bankruptcy, is sufficient to protect the debtor's property for all his creditors. *French* v. *Kingsmill*, 5 Q. B. 30.

Notice of a declaration of insolvency having been filed, is notice of an act of bankruptcy from the time of its filing, provided a commission shall issue upon it within two months, and that the execution creditor or his attorney was aware of the fact before suing out execution. *Ib.*

Where defendant had obtained his certificate of discharge after judgment and before execution, the execution and all subsequent proceedings were set aside with costs. *Harris* v. *Bunnell*, 2 U. C. R. 103.—P. C.—Richards.

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3. *Fraudulent Preferences.*

A cognovit given, payable immediately, for a just debt, is not a voluntary or fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of 7 Vict. c. 10. *Beekman* v. *Workman et al.*, 1 Q. B. 531.

A cognovit given in contemplation of bankruptcy, and to give defendant a preference, is a security within sec. 19, and therefore void. *Grant* v. *Perry*, 7 Q. B. 24.

Where a cognovit has been given by a bankrupt in fraud of the bankruptcy law, and it is therefore, with all steps taken under it, void, the assignee of the bankrupt, in bringing an action against the sheriff, must be looked upon as contending for the interest of the creditors, and not merely as representing the person or estate of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud. *Johnson* v. *Moodie*, 7 Q. B. 301.

An assignment made bonâ fide by a person about to become a bankrupt to a creditor thirty days before commission issued, is good, if made without the creditor's knowledge of any act of bankruptcy, or that bankruptcy was in contemplation. *Armour* v. *Phillips*, 4 Q. B. 152.

Action by the assignees of a bankrupt. Plea, levying under a judgment and execution against the bankrupt before bankruptcy. Replication: that the judgment was recovered on a confession of judgment given "in contemplation of bankruptcy, and for the purpose of giving to several creditors a preference, and with intent to delay and defeat other creditors," insufficient, without adding that it was given within a month of the commission. *Brent* v. *Haggis*, 5 Q. B. 536.

Deed of assignment by bankrupt to one of his creditors, with a right of preference—Annexing of schedule to deed—Assignment on the face of the instrument of all bankrupt's estate to one creditor, an act of bankruptcy per se. Quære, anything short of this such an act. *Kerr* v. *Coleman*, 6 Q. B. 218.

Construction of our Bankruptcy Act 7 Vict. c. 10, clauses 2 and 19, also of proviso to clause 19, and also of clauses 37 and 38, as to the necessity the act imposes upon the assignee of a bankrupt seeking to invalidate an assignment to a particular creditor, to prove that the assignment was voluntary, besides being made in contemplation of bankruptcy, with the knowledge of the creditor, and for the purpose of a preference. *Ib.*

Semble, that a jury finding "that the assignment was executed in contemplation of bankruptcy, and that defendant knew when he took it that the other creditors would not be paid their debts," is sufficient to satisfy the Act, and avoids the assignment, without any direction or finding upon the assignment being voluntary. Sullivan, J. diss. *Ib.*

Where a bankrupt, thirty days before the commission, bonâ fide assigned part of his interest in a bond to A. B. (viz., to £400 out of £500): —Held, that the bankrupt, and not his assignee, should sue for the interest A. B. had in the bond. *Hughes* v. *Newcastle District Mutual Fire Ins. Co.*, 8 Q. B. 315.

A commission of bankruptcy issued against J. V., one of two joint makers of a promissory note to plaintiff. J. V. desired to compromise with his creditors, and the plaintiff agreed to this, provided the residue of the note was secured to him. Defendant gave plaintiff a bond to secure it on real estate:—Held, that the bond was void. *Smith* v. *Dittrich*, 8 Q. B. 589.

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4. *Other Cases.*

K. having become a bankrupt, and passed the several examinations required by the 7 Vict. c. 10, before the Judge of the Niagara District Court, and obtained from the commissioner his certificate, a petition was presented to the vice-chancellor by several of his creditors, praying a stay of the certificate, on grounds of fraud, &c.: —Held, that the commissioner of bankrupts is the only person who can exercise any discretion in granting or refusing the certificate to the bankrupt, under the statute. *In re Kissock*, 1 O. S. 225.—Jameson.

A party, being a creditor of a trader, served the notice of demand required to be served on the debtor, and obtained a summons of the commissioner, calling upon the debtor to appear and either admit or deny the claim of the creditor, according to the Bankrupt Act; and upon being served with such summons the debtor appeared and asked for further time, which was granted, after which, and before the time allowed for the party again appearing, the creditor settled with the trader, taking certain securities for his debt; the costs of the proceedings the trader promised to pay, but afterwards refused. The creditor thereupon applied to the commissioner (under sec. 71 of the act,) for an order upon the debtor to pay the costs, which

the commissioner refused, and upon appeal the refusal was affirmed. *In re Wallace*, 2 O. S. 233.

Where a trader had requested one of his creditors to sue out a commission of bankruptcy against such trader, and upon the promise of being afterwards paid his debt in full the creditor sued out the commission, and the judge below had refused to grant the bankrupt his certificate, the court of review refused to interfere. *Ex parte Detlor*, 1 O. S. 278.

Commission of bankruptcy superseded on application to the vice-chancellor in the first instance, and not by way of appeal. *In re Merritt et al.*, 1 O. S. 283.

Act of bankruptcy must be stated in affidavits filed with judge. *In re Gillespie*, 2 O. S. 2.

A party suing out a commission of bankruptcy, under 7 Vict. c. 10, must prove before the judge or commissioner, not only the act of bankruptcy, but also the trading. Such evidence cannot be afterwards received to uphold a commission issued without the proof having been given. *In re Rose*, 2 O. S. 14.

Under 7 Vict. c. 10, s. 74, a certificate of discharge under the ordinance passed in Lower Canada, is a discharge from debts in Upper Canada which were provable under the Lower Canada commission. *McDonald et al.* v. *Dickenson*, 1 Q. B. 15.

Under the 75th clause of our Bankruptcy Act, the 108th section of the British statute is not in force in Upper Canada. *Maulson* v. *Commercial Bank*, 2 Q. B. 338.

The effect of a legal assignment to trustees for creditors is, that it diverts the beneficial interest of the property assigned from the assignor, and subsequent assignees of his estate under the bankrupt laws do not take it as his assignees, for they acquire a legal interest in such property only as can be applied to the payment of his creditors generally under the bankrupt laws. *Anderson et al.* v. *Gamble*, 8 Q. B. 437.

Where the wife of a bankrupt in Lower Canada had a remainder in lands in Upper Canada, expectant on the death of her mother :—Held, that there was no interest which could vest in the assignees, and that his not disclosing such interest was not fraudulent. *Phillips* v. *Masson et al.*, 9 Q. B. 20.

Covenant to indemnify "generally and without exception" against a charter party which defendants had assumed :—Held, under the circumstances of this case not to be discharged by defendant's bankruptcy and certificate. *Jarvis* v. *Walker*, 9 Q. B. 136.

Assumpsit by assignees of a bankrupt on a note made by defendant, payable to one W. R. F., and endorsed by him to the bankrupt before his bankruptcy. Pleas, 1. That R. W. F. did not endorse; 2. Payment by defendant when due, but not stating to whom; 3. Payment before action to bankrupt before bankruptcy, in full satisfaction, &c. :—Held, first plea bad for the variance in the name. Second and third pleas good. *Moore* v. *Cook*, 9 Q. B. 261.

A note endorsed by the bankrupt before commission issued, though not due until after, may be proved as a debt, and the plea of bankruptcy is a defence to it. *Wood* v. *Hutt*, 9 Q. B. 344.

Debt on bond made by defendant and one W. as sureties for one S., conditioned that if said S. should not from time to time, &c., well and truly pay unto the plaintiff each and every of ten promissory notes on the respective days on which the same became due and payable, according to the tenor and effect of the said promissory notes respectively, then, if defendant and said W., or either of them, should well and truly absolutely and at all events pay or cause to be paid unto the plaintiff each and every of the said ten promissory notes on the respective days on which the same became payable, then, &c.; otherwise, &c., assigning breaches as to the last six notes. Plea, that S. did not pay the first and second of the said ten notes when the same became due and payable according to the tenor and effect thereof, and that thereupon the bond became forfeited; and that afterwards, and while the said notes remained due and unpaid—to wit, on, &c.—said S. became bankrupt; and that afterwards, and while the said notes remained due and unpaid, and after the said writing obligatory had become forfeited, the defendant became bankrupt, &c.; and that said debt accrued due and was payable before the defendant became bankrupt :—Held, on demurrer, that the bond being forfeited before defendant's bankruptcy, therefore the penalty became a debt which the plaintiff might have applied to have retained in the hands of the defendant's assignee till the contingency happened, and then have proved; and that the defendant was discharged, and the plea consequently good. Richards, J., diss. *Perrin* v. *Hamilton*, 5 C. P. 57.

C., one of the obligors in a bond of indemnity to the sheriff under a writ of attachment, obtained a final order for protection from process, judgment was obtained in an action against the sheriff, subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto :—Held, that C. was not discharged by such final order, the claim not being one which could have been proved against his estate either in insolvency or bankruptcy. *Moody* v. *Bull et al.*, 7 C. P. 15.

Where a bankrupt whose property had been sold under a commission of the court in Montreal, brought ejectment for the same land :—Held, that he was barred by 7 Vict. c. 10, and 9 Vict. c. 30. *Bradbury* v. *Wasley*, 9 C. P.

Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt by express contract or by statute bears interest, or where a contract to pay it is to be implied; but on no other debts. *Re Langstaffe*, 2 Chy. 165.

A debtor made an assignment of certain of his estate to B., a creditor, the deed being absolute in form, but intended as a security for the debt; and the debtor afterwards became bankrupt under 7 Vict. c. 10. Many years after he filed a bill against the mortgagee's administrator for an account, &c. The administrator, being ignorant of the bankruptcy, consented to a decree referring it to the master to take the necessary accounts on the footing of the assignment being a security; but on afterwards discovering the fact of the bankruptcy, he filed a petition setting up the bankruptcy, and claiming relief against the decree :—Held, that the consent was not

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and that the decree should be set aside, and the bill dismissed unless the assignee in bankruptcy was willing to adopt the suit and become bound by it. *Hatch* v. *Ross*, 15 Chy. 96.

The plaintiff swore that at the meeting of the creditors B. refused to give up the property without receiving from the creditors payment in full of his debt; and that they refused to pay:—Held, that this did not put an end to their right to the property, or authorize the bankrupt to sue for it to his own use. *Ib.*

IV. Acts for Relief of Insolvent Debtors before 1864.

1. *Decisions under 5 Will. IV. c. 3, and 10-11 Vict. c. 15.*

[*These Acts were Repealed and their Provisions Amended and Consolidated by 19 Vict. c. 43, now C. S. U. C. 26.*]

(a) *Weekly Allowance.*

Affidavit for.—The prisoner is sufficiently described in the affidavit as a prisoner in execution in the gaol of the Midland District, at the suit of the plaintiff. *Shuck* v. *Cranston*, Tay. 307.

An affidavit that defendant is not worth £5, besides the necessary wearing apparel, is sufficient. *Malone* v. *Handy*, 5 O. S. 75.

Other Cases.—The court will not grant an order for arrears which accrued pending an unsuccessful application for discharge. *Moran* v. *Foley*, Tay. 408.

Service of an order for allowance, under 2 Geo. IV. c. 8, s. 3, was not considered a service under 2 Geo. IV. c. 8. *Shuck* v. *Cranston*, Tay. 437.

Payment to a person acting as turnkey is good. *Wade* v. *Barnhart*, Dra. 53.

After a rule for allowance, plaintiff cannot file fresh interrogatories and suspend the payment, though he hear of property supposed to have been made away, of which when filing the first interrogatories he had no knowledge. *Ib.* 54.

Where a defendant after obtaining his allowance goes on the limits, he must give notice of his return to custody before he is entitled to further payment.—*S. C.*, Dra. 201.

A defendant rendered by his bail after the return of non est inventus to a ca. sa. is not in custody on mesne process, nor is he charged in execution, so as to obtain the weekly allowance. *Hagan et al.* v. *Vandecar*, M. T., 2 Vict.

A debtor in custody on a criminal charge cannot obtain a rule for the weekly allowance in a civil suit. *Thompson* v. *Hughson*, M. T. 6 Vict. C. C.—Jones.

The court will order the weekly allowance to be duly imprisoned for non-payment of costs. *Vancott* v. *Reid*, 4 Q. B. 125.

A judge in chambers cannot order the allowance to prisoners charged in execution on final process. *Re Melvin*, 1 C. L. Chamb. 25.—Macaulay.

(b) *Application for Discharge.*

Non-payment of Weekly Allowance.—The Court will not grant a rule absolute in the first instance for discharge for non-payment, unless the affidavit state that no interrogatories have been filed by the plaintiff. *Williams* v. *Crosby*, Tay. 10.

To detain a prisoner who has applied for his discharge the affidavit, must not only state his possession of property obtained since his imprisonment, (or his obtaining his allowance), but also that he has secreted or fraudulently parted with it. *Williams* v. *Crosby*, Tay. 18.

The court refused to discharge a defendant where the plaintiff died, and the allowance was tendered by a person who had usually paid it, although no administration had been granted. *Beard* v. *Orr*, Dra. 241.

Affidavits may be received contradicting the answers of a prisoner to interrogatories filed to deprive him of the allowance, and in answer to an application for his discharge; and the court will not discharge the prisoner unless they are satisfied that he has no means of support, and has not fraudulently secreted or conveyed, &c. *Montgomery* v. *Robinet*, 2 O. S. 506.

Payment of the allowance after answers filed to the plaintiff's interrogatories is a waiver of any objections to the answers, and the plaintiff cannot file further interrogatories without leave. *Malone* v. *Handy*, 5 O. S. 310.

The answers of a defendant in custody to interrogatories by the plaintiff after an order for the allowance, must not only be full, but satisfactory. *Sanderson* v. *Cameron*, E. T. 2 Vict.

The plaintiff may file interrogatories after his default in payment of the allowance, and before defendant has applied for his discharge. *Elwood* v. *Monk*, *Butler* v. *Thomas*, M. T. 3 Vict.

It is no excuse for not paying the allowance, that the defendant had it paid at the suit of another plaintiff, or that a co-defendant is not in custody, and has put in bail after the order granted. *Truscott et al. Walsh et al.*, 5 O. S. 79.

Where a defendant is arrested and has the allowance ordered in several causes, he is, under section 4 of C. S. U. C. c. 26, entitled to one sum of 10s. a week, but in default of payment he can properly claim to be discharged in all the causes. The fact of non-payment of the costs of a former application dismissed with costs, is no reason for refusing a second application made upon sufficient materials. *McInnes* v. *Webster*, 8 L. J. 21.—C. L. Chamb.—Richards.

Answers to interrogatories were filed and served in Toronto on Friday, 20th August; the allowance was not paid in Barrie on Monday 23rd:—Held, upon a summons to discharge the prisoner for non-payment, that a reasonable time had not elapsed between the filing of the answers and the non-payment. *Regina* v. *Heathers*, 1 C. L. Chamb. 52.—Macaulay.

An application for discharge must be supported by an affidavit of the turnkey that the money has not been paid, if the sheriff employ one; if not his affidavit should shew it. *Carpenter* v. *Tout*, 3 L. J. 151.—C. L. Chamb.—Robinson.

A prisoner in execution for seduction is not entitled to weekly allowance, or at all events not to be discharged for non-payment of it. *Upthe-*

grove v. *Winters*, 6 L. J. 88.—C. L. Chamb.—Draper; *Purcell* v. *McKeown*. *Ib.*, 58.—C. L. Chamb.—Richards.

Held, that upon the affidavits and facts in this case, it sufficiently appeared that an order for the allowance had been served, and default made in payment, so that defendant was entitled to his discharge. *Hutchinson* v. *Jackson*, 2 P. R. 276.—Chamb.—Richards.

Other Grounds.]—An insolvent debtor charged in execution for seduction:—Held, entitled to relief. *Perkins* v. *O'Connelly*, 5 O. S. 80.

A defendant in custody under a ca. sa. for not answering satisfactorily interrogatories on a judgment in an action of seduction:—Held, a debtor, entitled to his discharge under C. S. U. C. cc. 24, 26. *Boyd* v. *Bartram*, 3 P. R. 28.—Q. B.

A defendant in custody in execution for a sum not exceeding £100 is not entitled to his discharge unless he has been six months in confinement in gaol. *Denham* v. *Talbot*, 5 O. S. 79.

If not exceeding £20 he is entitled to his discharge on satisfying the court that he has been imprisoned more than three months, but the rule is not absolute in the first instance. *King* v. *Keogh*, 5 O. S. 326.

The notice required of intention to apply for discharge may be given before the full period of imprisonment has expired. *McPherson* v. *Campbell*, T. T. 4 & 5 Vict.—P. C.—Macaulay.

The debtor must shew that he has given the notice. *Averill* v. *Baker*, M. T. 5 Vict.—P. C.—Jones.

A prisoner in execution for debt cannot, by assigning his effects in trust for such creditors as choose to come in and on receiving a dividend discharge him, make himself an insolvent debtor within 10 & 11 Vict. c. 15. *Gillespie et al.* v. *Nickerson*, 6 Q. B. 628.

A debtor applying for his discharge must shew that he has not since judgment so disposed of his effects as to defeat the creditor's remedy. An assignment, after judgment, for the benefit of creditors generally, will therefore prevent his discharge. Quære, whether it would affect his claim to the privilege of gaol limits. *Aitkin* v. *Bullock*, 11 Q. B. 19.

On Saturday, the 14th of August, a debtor applied for his discharge, under the 10 & 11 Vict. c. 15, s. 3; on the 30th the plaintiff filed interrogatories:—Held, that the plaintiff had all Monday, the 30th, to file his interrogatories. Semble, also, that they must be filed *before* the expiration of the fifteen days limited by the act. *Bulkley et al.* v. *Grigge*, 1 C. L. Chamb. 50.—Macaulay.

Held, 1. Upon the answers of defendant to interrogatories and his oral examination, that, notwithstanding the statements of the debtor to the contrary, it sufficiently appeared he had wilfully contracted the debts for which the judgments were recovered, without having had at the time a reasonable assurance of being able to pay or discharge the same. 2. That it was the duty of the judge to whom application was made for discharge of the debtor, on the ground that he was not worth $20, under C. S. U. C. c. 26, s. 11, to recommit him which was done, until 1st June next—defendant having been in custody since 28th May, 1856, and having made his application for discharge before Michaelmas Term last. 3. That if plaintiff so desired, it should be a condition of the discharge that the debtor should assign his interest in the assets and effects of the firm of which he was a member. *Winks* v. *Holden*—*Ogilvy* v. *Holden*, 1 L. J. N. S. 100.—C. L. Chamb.—Richards.

An affidavit for discharge from close custody must, under sec. 8 of C. S. U. C. c. 26, be positive to the effect that the debtor is not worth $20 exclusive of his necessary wearing apparel, &c. *Dougall* v. *Yager*, 1 L. J. N. S. 133.—C. L. Chamb.—Richards.

Before a debtor can be discharged on interrogatories, he must disclose what he has done with his property by answers which are in the opinion of the judge sufficient, that is, full, complete and true. A disposition of property, though not necessarily a moral fraud, may be fraudulent as against, and calculated to injure, his creditors and therefore militate against the discharge. *Dougall* v. *Yager*, 2 L. J. N. S. 161.—C. L. Chamb.—A. Wilson.

Further explanations and a transfer of certain claims to the creditor were required. *Ib.*

Where a defendant in close custody under a ca. sa. in an action of crim. con. has not answered interrogatories, and appears to have the means of satisfying a large portion of the judgment, he is neither entitled to be discharged under C. S. U. C. c. 26, s. 8, nor to be re-committed under sec. 11 for twelve months, and then discharged. *Glennie* v. *Ross*, 15 C. P. 536.

Where a defendant applies for his discharge under 10 & 11 Vict. c. 15, affidavits may be received from the plaintiff contradicting the answers to interrogatories, or shewing that they cannot be true. *Clarkson* v. *Hart*, 9 Q. B. 346.

It was held otherwise in *Campbell* v. *Anderson*, 1 C. L. Chamb. 91.—Macaulay.

The answers of a prisoner being styled in the cause, and intituled in the proper court, were headed "The answers upon oath of," &c., and proceeded thus: "To the first interrogatory, he saith," &c. 2. To the second interrogatory, &c. not adding "he saith." To the fifteenth interrogatory only the figures "15" were prefixed. The jurat stated that the deponent was sworn, &c., "and made oath that the foregoing answers were true, on this 8th day of March, 1854." Held, that the forms of the answers and the jurat were defective. *Addy* v. *Brouse*, 1 P. R. 2—Chamb.—Richards.

The provisions of 5 Will. IV. c. 3, s. 4, having been re-enacted in the Consol. Stats., the law has been changed, and the debtor is now entitled to his discharge if he give the information called for by interrogatories or examination viva voce, and it appears that he is not worth $20 exclusive of the articles exempted, unless the case is brought within the provisions of C. S. U. C. c. 26, s. 11.—*Wallis* v. *Harper and Co.*, 3 P. R. 50.

This case, upon the result of the interrogatories and examination viva voce as stated in the report, was held not within any of the pro-

sions in that section, and the debtor was discharged; but it was made a condition that he should assign to the plaintiff certain claims. *Ib.*

The provisions of the C. S. U. C. c. 26, apply to the Court of Chancery, and a debtor confined under a writ of arrest may apply for his discharge under sec. 7. *Lawson* v. *Crookshank*, 2 Chy. Chamb. 413.—Taylor, *Secretary.*

Under the 7 Vict. c. 31, s. 6, the court would not punish defendant by commitment unless upon his examination the cause of action and the circumstances would clearly warrant such a course, and in this case it was refused. *McCue* v. *Todd*, 1 Q. B. 278.—P. C.—Jones.

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2. *Decisions under 8 Vict. c. 48, and 19-20 Vict. c. 93, now C. S. U. C. c. 18; and under 7 Vict. c. 31.*

[*8 Vict. c. 48, which repealed the 7 Vict. c. 31, has been disused since the Insolvent Act, 1864. It was extended by 19–20 Vict. c. 93, and, with the exception of a few sections repealed and effete, is now C. S. U. C. c. 18. 19–20 Vict. c. 93, was repealed by 20 Vict. c. 41.*]

Under 7 Vict. c. 31, the recognizance was not forfeited by the non-payment of the condemnation money on the recovery of judgment, unless the alternative condition was broken. The legislature having made no provision in the 8 Vict. c. 48, repealing 7 Vict. c. 31, for continuing the proceedings commenced under it, no proceeding can now be taken against bail under such recognizance. *Hardy* v. *Hall*, 2 Q. B. 976.

The final order under 8 Vict. c. 48, must be as well for the distribution of the effects of the bankrupt, as for protecting his person and goods from process. *Ferrie* v. *Lockhart*, 4 Q. B. 477.

The judge's order under the insolvent law need not be confirmed by the court of review, to operate as a discharge from actions. *Ib.*

Under 8 Vict. c. 48, the right to sue an attorney for negligence, vests in the assignee of an insolvent. *Alexander* v. *AB. & CD.*, 5 Q. B. 329.

To an action on a note defendant pleaded that after contracting the debt, and before this suit, a petition for protection from process was duly, and according to the statute, presented by him to a county judge, and filed in the insolvent court; and that thereupon, before action, a final order for protection and distribution was made by, &c.; and that the said debt was contracted before the date of filing said petition. The plaintiff replied that the promise was made, and the cause of action accrued, after the petition was presented—concluding to the country:—Held, on demurrer, replication bad; plea good. *Church* v. *Alexander*, 10 Q. B. 435.

Quære, whether a person having failed before the Bankruptcy Act, 7 Vict. c. 10, but continuing a trader, and unable to meet his engagements, and so being able to avail himself of its provisions, could still take advantage of the Insolvent Debtors' Act, 8 Vict. c. 48. Semble, per Draper C. J. and Burns, JJ., that he could not. Per Robinson C. J., that he could. But—Held, that a final order obtained under the above circumstances was conclusive, and not to be questioned in an action brought for a debt barred by it. *Stevenson* v. *Green*, 11 Q. B. 452; 12 Q. B. 290.

Where such an order is pleaded in bar of a debt, it must be averred that such debt was included in defendant's schedule. *Boulton* v. *Nourse*, 11 Q. B. 452.

Defendant was a trader, within 7 Vict. c. 10, but first became so after the expiration of that act, and became insolvent before the 19–20 Vict. c. 93:—Held, that he was clearly within the latter act. *Boulton* v. *Nourse*, 15 Q. B. 555.

The order recited the petition, and that the debtor was entitled to protection, and then certified that "this final order" was granted under 19–20 Vict. c. 93; the operative words of the order being omitted:—Held, that the order was insufficient. The effect of the order under 19–20 Vict. c. 93, is not confined to debts specified in the schedule. *Commercial Bank* v. *Cuvillier et al.*, 18 Q. B. 378.

C., one of the obligors in a bond of indemnity to the sheriff under a writ of attachment, obtained a final order for protection from process. Judgment was obtained in an action against the sheriff subsequently to the filing of the petition and the bond, but was not referred to in C.'s schedule thereto:—Held, that the sum recoverable by the sheriff on such bond was not a "debt contracted payable on a contingency," or a "liability" under 19–20 Vict. c. 93, from which C. was discharged by such final order. Held, also, that the obligees were not entitled to set-off against the sheriff's claim money which the sheriff had applied out of the proceeds of the sale under the attachment, to pay certain executions in his hands prior to such attachment. *Moody* v. *Bull et al.*, 7 C. P. 15.

Action on a bond to the limits against F., and his sureties. Sixth plea, that by an order made according to the 8 Vict. c. 48, and 19 & 20 Vict. c. 93, the defendant F. was duly discharged from the cause of action for which the arrest took place. Seventh plea, that before the said F. departed from the limits, and after his arrest and bail given, an interim order for protection was given to him, which was in full force at the time of his departure as alleged. Eighth plea, that before this suit, a petition for protection of said F. was presented to W. S., county judge, and filed in the insolvent court, and thereupon a final order for protection and distribution was made by said W. S., duly authorized; and that the debt for which the attachment issued, on which F. was arrested, was contracted before the filing of said petition:—Held, on demurrer, pleas bad. *Meyers* v. *Francis et al.*, 15 Q. B. 565.

To support an application by an insolvent to set aside an execution, a levy must be shewn upon some property not vested in the assignee, who would otherwise be the proper party to apply. *Mullens* v. *Burke*, 1 P. R. 271.—P. C.—Draper.

The plaintiff took defendant's note for advances made, for £366, on the 10th of March, at three months. On the 19th defendant obtained his final order for discharge under 8 Vict. c. 48, the plaintiff being mentioned in his schedule as a creditor for £150:—Held, that the order was not a bar to the note, even as to the £150, if included in it. *Greenwood* v. *Farrell*, 17 Q. B. 490.

Declaration on a note, and common counts. Plea, that defendant had been a trader in Upper Canada within the Bankrupt Act 7 Vict. c. 10, and since the expiration thereof became insolvent, &c., but not stating that he was insolvent at the passing of 19–20 Vict. c. 93, whereunder he filed his petition, and claimed to be exempt: —Held, not sufficient under 19–20 Vict., and that the clause in the order, "and it appearing that the said defendant by virtue of the statutes in that case (19 Vict.) made and provided, is entitled to the protection of his person," &c., could not be construed as an adjudication by the court that the petitioner was insolvent at the passing of the Act. *Smith et al.* v. *Dempsey et al.*, 10 C. P. 515.

A judge in chambers will not in general entertain a question as to the validity of an order of discharge under 19–20 Vict. c. 93, but will let it be determined by way of auditâ querela. *Schofield* v. *Bull*, 3 L. J. 204.—C. L. Chamb.—Burns.

V. Examination of Judgment Debtors.

(1) *Under C. S. U. C. c. 24, s. 41.*

A simple answer of "Yes" or "No" to a written interrogatory, is not proper, though it may do on a vivâ voce examination. *Ryan* v. *Cullen*, 1 C. L. Chamb. 229.—Burns.

Although a debtor in close custody assigns what purports to be all his debts and effects to the plaintiff, yet his answers may be so unsatisfactory as to warrant his further detention. *McLean* v. *Maitland*, 5 L. J. 279.—C. L. Chamb. —Robinson.

If a defendant, under an order for examination, &c., refuse to produce promissory notes, though under the advice of his attorney, a ca. sa. may be issued. *Davidson* v. *Gordon*, 5 L. J. 279.—C. L. Chamb.—Burns.

Semble, the common form of order for examination, blending the provisions of C. S. U. C. c. 22, s. 287, and c. 24, s. 41, is not proper. These acts have very different objects. The affidavit applicable to the one, by no means necessarily will be suitable to the other. *McInnes* v. *Hardy*, 7 L. J. 295.—C. L. Chamb.—Draper. See, also, *Bullen* v. *Moodie*, 13 C. P. 137; *Baird* v. *Story*, 23 Q. B. 624; *Switzer* v. *Brown*, 20 C. P. 193.

Where the debtor without excuse fails to attend, or refuses to answer when properly interrogated, or answers equivocally or evasively, the proper way is to punish him as for a contempt of the order, or to compel him to obey it by directing him to be imprisoned for a period within the discretion of the judge, not exceeding twelve months; but if, when attending, his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property, or made away with it, in order to defeat or defraud his creditors, the proper course is to allow a ca. sa. to issue. *Wallis* v. *Harper and Gibson*, 7 L. J. 72.—C. L. Chamb.—Robinson.

If a question or a series of questions be put, which the judgment debtor refuses to answer, there should be some statement to this effect in the certificate of the examiner, either general—that questions of such a purport were put, which the defendant refused to answer—or, better still, that some specific question or questions were put, setting them forth in substance, and that defendant would not answer them—or that defendant's answers to such and such questions were not satisfactory—or giving questions and answers, so that it might be determined whether they were satisfactory or not. Refusing to answer, or answering questions unsatisfactorily, are matters which, if not certified by the examiner, must be made specially to appear, either in the report of examiner, or in an affidavit setting forth questions which were put and were wholly unanswered, or that an answer given (stating it) was unsatisfactory. Semble, the former is the better course. The examiner should require answers to his questions, and the defendant's refusal to answer, or his unsatisfactory answer, should be entered in the report of the examination. *McInnes* v. *Hardy*, 7 L. J. 295.—C. L. Chamb.—Draper.

Declaration for false imprisonment, to which the defendant B. pleaded, that having recovered judgment in the Division Court against the now plaintiff for the sum of $60 odd, and the execution issued thereupon having been returned nulla bona, a transcript of the judgment was obtained and filed in the County Court: that upon this a writ of execution was issued, which being returned nulla bona, an order was made by the judge of the County Court, under C. S. U. C. c. 24, s. 41, calling on the now plaintiff to appear before the clerk of the court and be examined, &c., and a report and return was made in compliance with the order: that upon reading such report, &c., the judge of the County Court issued a summons calling upon this plaintiff to shew cause why he should not be committed, &c., and on return thereof, the plaintiff not appearing and no cause being shewn to the contrary, the judge ordered that a writ of ca. sa., should issue within five days, which was issued accordingly, whereupon plaintiff was imprisoned. To this plea, the plaintiff demurred: 1. Because the judgment and amount for which the ca. sa. issued, was less than $100. 2. That the judgment on which the ca. sa. issued, is founded on a judgment of the Division Court; that the plaintiff was not bound by the statute to attend to be orally examined; and even if he did so, he could not be arrested on such examination being unsatisfactory:— Held, 1. That though under sec. 12 the plaintiff could not sue out a ca. sa. for less than $100; still, under sec. 41, there is no such limitation: that the process awarded is not obtained by the plaintiff, but is given by the court or judge, and under C. S. U. C. c. 19, s. 143, by the filing and entry of the transcript, the judgment of the now defendant became a judgment of the County Court, and he was entitled to pursue the same remedy upon it as if it had been originally obtained in the County Court; and hence defendant was bound to appear and be examined, &c. *Kehoe* v. *Brown*, 13 C. P. 549.

The court, under the circumstances of this case, refused to order the commitment of defendant. *Hobbs* v. *Scott*, 23 Q. B. 619.

Answers are not unsatisfactory, within the meaning of the act, merely because they do not account for the application of defendant's assets in a proper manner. *Ib.*

Quære, whether a refusal to deliver property to the sheriff, that it might be taken in execu-

tion, when it is afterwards applied in satisfaction of another creditor, is a refusal to disclose such property, within the statute. *Ib.*

Remarks as to the difficulty of the court arriving at any satisfactory conclusion upon a defendant's examination. *Ib.*

Defendant had borrowed £500 from the plaintiff on mortgage, at a rate exceeding legal interest, and the time for payment had been extended at a higher rate. Disputes arose as to this extension. The plaintiff sued defendant on the covenant, and an award was made in his favour for £644 15s. 11d., on which he entered judgment, and the defendant filed a bill in Chancery to redeem, and for an account, allowing all excess above legal interest to go in reduction of principal. The defendant had a demand against a third person for £500, which the plaintiff desired to garnish, and with that object had the defendant examined, but in the meantime the defendant obtained payment of that sum from his debtor. This money he offered to pay to the plaintiff upon the original mortgage, but refused to pay upon the judgment. A summons having been obtained on defendant to shew cause why he should not pay to the plaintiff the £500, or in default be commited to close custody; or why a ca. sa. should not issue against him, or why he should not be again examined as to his effects:—Held, that there was no ground for interference. *Boswell* v. *Pomeroy*, 2 P. R. 310.—C. L. Chamb.—Burns.

Where, upon an application to commit a defendant to gaol, under 22 Vict. c. 96, s. 13, the judge ordered a ca. sa. to be issued instead, as allowed by that section, and the defendant thereupon gave bail to the limits:—Held, that he could not again be committed to close custody under the first alternative of the same clause. *Irwin* v. *Bowes*, 2 P. R. 348.—P. C.—Burns.

A County Court judge, having himself examined a defendant, informed him at the close of the examination that his answers were unsatisfactory, and that unless he assigned to the plaintiff certain property mentioned, if the plaintiff's attorney applied for his committal, it would be ordered. Ten days afterwards, without any further notice to defendant or summons, an order of commitment issued, under which the defendant was arrested:—Held, that the order was void: that the judge having himself heard the examination, and having the defendant before him, had a right then to adjudicate as he did: that it was unnecessary to issue the order at once; and though he had no power to compel execution of the assignment, yet the opportunity afforded to defendant to escape arrest by doing so could not vitiate the order. *Baird* v. *Story* et al., 23 Q. B. 624.

Held, affirming Bullen *v.* Moodie et al., 12 C. P. 137, that in proceeding to arrest and imprison party for the insufficiency of his answers on an examination as to his estate and effects, conducted before any other functionary than the judge who orders the arrest, it is necessary that a summons to shew cause should, in the first instance, be issued. Also, affirming the same judgment, that the fact of the judge who made the order to commit having authority to make such order, and that the same appeared to be regular on the face of it, was not a sufficient indication for the attorney of the party suing out such order, in an action brought against the attorney and his clients for assault and false imprisonment. *Ponton* v. *Bullen*, 2 E. & A. 379.

Held, that the judge of the County Court can direct the examination to take place outside of the county where the debtor resides; but the committal must be to the gaol of that county. The plea justified the arrest and imprisonment of plaintiff under an order made by the county judge, embracing the enactments of the garnishment clauses for the attachment of debts and production of books, &c., and those of sec. 41 C. S. U. C. c. 24, and also under an order of commitment by such judge, which recited that it appeared from the examination that the plaintiff had made away with his property in order to defeat or defraud creditors, especially the plaintiff, and had not made satisfactory answers respecting same, and had not produced his books, as required by the order under which he was examined; with an averment that plaintiff did not on examination make satisfactory answers as to his property, &c., and it appeared to the judge that plaintiff had made away with his property (specifying certain effects,) in order to defeat &c.:—Held, on demurrer, that inasmuch as if the proceeding had been under above section 41 alone, the plaintiff could have been properly required to produce his books, the court would not be warranted in presuming that their non-production was only a default under the garnishment branch of the order (for which there could be no commitment), but would, on the principle of Bullen v. Moodie, 13 C. P. 137, intend that the judge acted on that part within his jurisdiction, unless it appeared clearly the other way. *Switzer* v. *Brown*, 20 C. P. 193.

A plaintiff against whom a defendant has recovered judgment for costs only, in either of the Superior Courts of common law or a County Court, is not liable to be examined or committed under sec. 41 of C. S. U. C. c. 24. *In re Hawkins*, 3 P. R. 239.—Chamb.—A. Wilson; *Hawkins* v. *Paterson*, 23 Q. B. 197.

Quære, whether a defendant who recovers on a plea of set-off an excess above the plaintiff's demand, is entitled to examine the plaintiff. *Hawkins* v. *Paterson*, 23 Q. B. 197.

[But see 27-28 Vict. c. 25, since passed.]

Held, that a defendant cannot, notwithstanding 27–28 Vict. c. 25, on a judgment against a plaintiff for costs in ejectment, obtain an order to examine the plaintiffs. *Herr* v. *Douglass*, 4 P. R. 124.—Chamb.—Morrison.

Quære, must an order of committal made by a junior judge of a County Court under sec. 41, on the face of it shew the death, illness, unavoidable absence, or absence on leave of the senior judge. Semble, not; for the maxim omnia præsumuntur recte esse acta applies. *Re Hawkins*, 3 P. R. 239.—Chamb.—A. Wilson.

A County Court judge, on the 4th of Sept., granted a summons calling on a judgment debtor to shew cause why he should not be committed to the county gaol of Middlesex for not satisfactorily answering as to his estate and effects, &c., on an examination before a commissioner appointed by the judge. This summons having been enlarged until the 26th Sept., and no one attending on either side on that day, the judge on the follow-

ing day, on the plaintiff's application, enlarged it by endorsement until the 11th of Oct., of which defendant had no notice. On the 11th of Sept. the judge had made another order for the debtor to attend before him and be further examined on the 11th of Oct., but defendant having lost this order and believing it to be only a summons for further examination, on which an order would be afterwards made, did not attend upon it. On the 11th of Oct. the judge made an order *upon the summons of the 4th of September* for defendant's committal to the county gaol *of Lambton*, where he had resided since before the date of that summons. Defendant having been committed, applied for his discharge to the judge of the County Court, who refused, unless he would undertake to bring no action; and an order was signed for his discharge on these terms, which he declined to accept. The prisoner having been brought up by habeas corpus, it was objected, 1. That the summons having lapsed on the 26th, could not be enlarged; 2. That the summons was to commit to the county gaol of Middlesex, and the order to that of Lambton; 3. That the order of the 11th of Sept., for further examination, was a waiver of the previous summons to commit:—Held, that such enlargement could not entitle defendant to his discharge: that the second objection could have been available only on the return of the summons; and that the order was no abandonment of the previous summons. The defendant was therefore remanded. *In re Munn*, 25 Q. B. 24.

The rule for defendant's discharge, as above mentioned, was returned to the writ of certiorari, with a certificate by the judge that it had been refused by the defendant's attorney:—Held, that being so refused, it was as if it had not been granted. Quære, as to the validity and effect of the words in such rule restraining defendant from bringing any action. *Ib.*

An order to commit must be absolute, not conditional. *Chichester* v. *Gordon et al.*, 25 Q. B. 527.

A County Court judge, being dissatisfied with the answers of a judgment debtor on his examination, ordered that he should be committed for six months unless he should forthwith give a negotiable note for the debt, made by himself and endorsed by one C.:—Held, that the order was bad, as being conditional. *Ib.*

A county judge ordered an execution debtor to be committed for ten weeks, but the judge died before the order was enforced. The deputy judge then, upon the same examination, ordered a commitment for three months, and directed his warrant to all sheriffs, &c. Defendant was arrested and lodged in the gaol of a county in which he did not reside:—Held, 1. That the committal to any county other than that in which debtor resided, was irregular; and, Semble, that the order or warrant should shew the debtor's residence, and that he is to suffer imprisonment there. 2. That the deputy judge could not make a different order from that which had been made by the county judge. The prisoner, who was brought up on a writ of habeas corpus, was discharged. *In re Weatherly*, 4 P. R. 28.—Chamb. —Richards.

A commitment under this act is in the nature of a commitment for contempt, or as a punishment for fraud upon creditors; and as such the plaintiff has no such control over it, nor can he waive it in such way as was alleged in this case. *Ward* v. *Armstrong*, 4 P. R. 58.—Chamb.—Hagarty.

An order once acted upon by the attendance and examination of the debtor before the examiner under it, cannot be again used for the same purpose; it is spent. *Jarvis* v. *Jones*, 4 P. R. 341.—Chamb.—Morrison.

Nor can a stale order which has been partially acted upon. *McGregor* v. *Small*, 5 P. R. 56.—Chamb.—Richards.

An order will not be made for the examination of a judgment debtor whose home is in Quebec, though temporarily in Ontario as a member of Parliament. *Regan* v. *McGreevy*, 5 P. R. 94.—Chamb.—Hagarty.

When a debtor has been examined under C. S. U. C. c. 24, s. 41, and an order for his committal is applied for, the proceedings being of a penal nature, a clear offence under the act must be shewn to warrant the order. The debtor must have contumaciously refused to answer, or so equivocated as to render his answer no answer at all, before he can be said to have given "unsatisfactory" answers. In this case the order was refused. *Lemon* v. *Lemon*, 6 P. R.—Chy. Chamb. —Holmested, *Referee*, Strong. Not yet reported.

See IV. 1 (b). p. 397.

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2. *Under Division Courts Act, C. S. U. C. c. 19, ss. 160-173.*

The plaintiff demurred to the replication to a plea justifying an arrest under an order to commit, issued by a Division Court for disobedience of an order to pay a judgment debt within a named time. Defendant joined in demurrer and excepted to the plea:—Held, as to the plea—1. That it was unnecessary to state the proceedings before the judgment, so as to give the Division Court jurisdiction, the amount stated being clearly within it. 2. That the issue of execution in due course, and its delivery to the plaintiff and return, were sufficiently stated. Semble, that the issue and return of execution is not, under the Division Courts Act, a condition precedent to the examination of defendant. It was alleged that when the summons to examine issued the plaintiff resided in the county, but not that he continued so resident at the issue of the summons to commit:—Held, sufficient, for this would be presumed. It was not averred that the plaintiff was examined on oath before the judge, or any other evidence adduced. The warrant, set out in the replication, recited that it appeared to the satisfaction of the judge that he had contracted the debt under false pretences:—Held, sufficient, for it is not necessary in all cases to take evidence on oath, and the judge might have acted on the plaintiff's admission. Semble, that the omission of the clerk to enter an order of commitment in the procedure book, could not affect a defence under such warrant. —Held, also, that the judge had power to make an order to pay in nine weeks or for commitment on default; and as a summons and order to commit issued before the plaintiff's arrest, it was immaterial that the first order had not been entered or that three months had elapsed after it before the warrant issued. The order to pay

or for commitment issued in May. In October, on the return of a summons, an order was made to commit for non-appearance and disobedience of the order to pay. The warrant of commitment recited that the order of May issued because it appeared to the satisfaction of the judge that the plaintiff had incurred the debt under false pretences, and that on the return of the summons in October he had not appeared:—Held, that the ground for commitment sufficiently appeared. *Peck* v. *McDougall*, 27 Q. B. 353.

VI. INSOLVENT ACTS OF 1864, 1865, AND 1869.

1. *Who may come under.*

Held, that under sec. 9 of the Act of 1864, a consent to a discharge is operative even without an assignment, provided the insolvent files an affidavit that he has no estate or effects to assign. In this case the only notice given was the notice to discharge. *In re Perry*, 2 L. J. N.S. 75.—C. C.—Jones.

On application for a discharge:—Held, on the facts set out, that the insolvent had an estate to be administered under the Insolvent Act. Quære, whether, if there had been no estate, proceedings could have been taken by the debtor. *In re Smith*, 4 P. R. 89.—Chamb.—A. Wilson. See, also, *Green* v. *Swan*, 22 C. P. 307; *Re Thomas*, 13 Chy. 196.

The defendant having been arrested under a ca. sa. in April, 1373, applied for a discharge from custody, on the ground that when the order was made, and for a long time previous, he was an insolvent under the Act of 1869. It appeared that being sued by the plaintiff, who was his only creditor, the defendant, in September, 1873, made a voluntary assignment under the Act to the official assignee, having then no assets and no expectation of any; and that he had since acquired none; and his own statement was, that he was driven to take advantage of the Act on account of the plaintiff's alleged claim, which he had no means of paying. Semble, that he could not in this way become entitled to his discharge under the Act; and that the assignment, under the evidence, more fully set out in the case, must be regarded as a fraudulent device to defeat the plaintiff, by means of the abuse of the provisions of the Act. *Thomas* v. *Hall*, 6 P. R. (C. L. Chamb.—Gwynne. Not yet reported.

The plaintiff had been engaged in business in Canada, though not permanently resident there. He was arrested by defendant, a constable, who took possession of money found on him, and being discharged, he sued the defendant for the money. A writ of attachment having issued against him, one M., was appointed official assignee, and applied, under sec. 4, sub-s. 9 of the Insolvent Act of 1864, to be allowed to intervene and represent the plaintiff in the suit. The plaintiff objected, contending that as a foreigner he was not liable to the insolvent laws. The point being one of great practical importance, raised for the first time, the court, with a view to have it properly brought up, left the assignee to sue the defendant for the money, so that the defendant might apply under the Interpleader Act, and the question be presented on the record in a feigned issue. *Mellon* v. *Nicholls*, 6 P. R. 167.

Sec. 27 of the Insolvent Act of 1865, does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character. *In re Sharpe*, 20 C. P. 82.

A trader who had ceased to trade before 1st of September, 1864, cannot be proceeded against under sub-ss. 2, 3, and 4. *Bagwell* v. *Hamilton*, 10 L. J. 305.—C. C.—Logie.

A banker is a trader within sub-s. 2 of sec. 3 of the act of 1864. *Ib.*

An inn-keeper is not a trader within the meaning of the Insolvent Act of 1869. *Harman* v. *Clarkson*, 22 C. P. 291.

Nor is a barber. *Thomas* v. *Hall*, 6 P. R.—C. L. Chamb.—Gwynne. Not yet reported.

And the sale of perfumery, being merely incidental to his business; and a purchase of tobacco nine months before his assignment, which he sold again immediately, being an isolated transaction; were held, upon the evidence, insufficient to bring him within the Act. *Ib.*

See Pinkerton q. t. *v.* Ross, 33 Q. B. 508, in which of printing and publishing a newspaper was held to constitute the partners employed in it a partnership "for trading purposes," within the 33 Vict. c. 20, s. 10, and liable to the penalty for not registering such partnership.

A banker and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks:—Held, a trader, within the Act of 1869. *Smart* v. *Duncan*, Q. B., M. T., 1874. Not yet reported.

Remarks as to the meaning of the term insolvent. *Sutherland* v. *Nixon*, 21 Q. B. 629. See also *Hersee* v. *White*, 29 Q. B. 232.

See *Groves* v. *McArdle*, 33 Q. B. 252, p. 453.

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2. *Compulsory Liquidation.*

The Act of 1864 has not a retrospective effect, so as to make an act of insolvency committed before 1st September, 1864, sufficient to support an attachment issued after that day. *Worthington* v. *Hamilton*, 10 L. J. 304.—C. C.—Logie.

Refraining from entering an appearance to an action by a creditor on a specially indorsed writ, whereby he obtains judgment and a priority over other creditors, is not in itself a procuring of his goods, &c., to be seized or taken in execution within the meaning of the act; but it is open to the creditors to satisfy the judge that the taking in execution was through the procurement of the insolvent. *Ib.*

The fact of the trading as well as the act of insolvency must be proved by the affidavits of two credible witnesses, in addition to the affidavit of the creditor, to support an attachment issued on the act of insolvency, created by sub-ss. 2, 3 & 4 of sec. 3. *Bagwell* v. *Hamilton*, 10 L. J. 305.—C. C.—Logie.

A trader who had ceased to trade before 1st September, 1864, cannot be proceeded against under sub-ss. 2, 3, and 4. But it is not necessary for the plaintiff expressly to state in his affidavits for the attachment that the defendants were traders since the act came into force. *Ib.*

A creditor issuing an attachment under the Act of 1864, cannot after five days from the return day of the writ withdraw the attachment, so as to prevent another creditor from intervening for the prosecution of the cause. *Worthington* v. *Taylor*, 10 L. J. 333.—C. C.—Logie.

Where final judgment in default of appearance to a specially endorsed writ was entered on the 23rd January, and execution issued on the 30th of same month, and a writ of attachment under the Insolvent Act of 1864 issued on the 3rd February, an application on the 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service was held to be too late. *Dunn* v. *Dunn*, 1 L. J. N. S. 239.—C. L. Chamb.—Richards.

Leave to the official assignee to defend on the merits, which, if granted, would have had the effect of destroying plaintiff's priority as against the attaching creditors, was refused, and the official assignee left to his remedy, if any, in term, as against the judgment on the ground of fraud. *Ib.*

An assignment for the benefit of creditors, not made in accordance with the act, is an act of insolvency, and void as against an execution creditor, or the official assignee appointed in compulsory proceedings under that act, after such proceedings are taken, if finally sustained. Wilson v. Cramp, 11 Chy. 444, approved of. *Thorne* v. *Torrance*, 16 C. P. 445; affirmed in appeal, 18 C. P. 29.

Such proceedings render the assignment absolutely void as against creditors of the insolvent, so as to let in intermediate execution creditors. *S, C.* 16 C. P. 445.

One of two partners, a few days before an attachment against both under the Act of 1864 had issued, assigned his estate for the benefit of his creditors:—Held, void as against the official assignee. *Wilson* v. *Stevenson*, 12 Chy. 239.

A judge in insolvency has power to rescind an order made by him for substitutional service of a writ of attachment; and in this case the court, on appeal, refused to interfere with an order for such rescission. *Eaton* v. *Shannon*, 17 C. P. 592.

A creditor whose debt is not yet due may proceed against his debtor who is insolvent, as as he might have done if his debt had been overdue. But, in this case, it appearing that the debtor did not owe more than $100 beyond this debt, none of which was at the time due, and a portion not payable for several years, the court directed that he should be allowed further time to shew, if he could, that he was not in fact insolvent, and so not liable to have his estate placed in compulsory liquidation. *In re Moore* v. *Luce*, 18 C. P. 446.

An insolvent was ordered by a county judge to produce certain books and papers. These were at the time at Bruce Mines, and the insolvent did not feel called upon to go there for them, and an order was made ex parte for his committal for disobedience of the order. The insolvent had, however, in the meantime, taken the books to Montreal and given them to one H. to hand to the assignee. He was then arrested, and subsequently applied for his discharge, which was refused. The books were afterwards handed over to the proper person, though in a mutilated condition, which mutilation the insolvent said must have been done at Montreal. He then again applied for his discharge on the ground that he had complied with the order, and that the imprisonment was for compulsory purposes only. The county judge, however, made an order refusing the application, and the insolvent then appealed from this last order to a judge in chambers at Toronto. It was urged that the warrant of arrest was insufficient on its face: that no demand was made of the books, or refusal to give them shewn, and therefore no contempt; and that the power of imprisonment was only to enforce compliance with the order, and not in pœnam:—Held, under the Acts of 1864 and 5, that the judge at Toronto had no right to enquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment authorized by the statute, or whether the warrant was an order, and so an appealable matter under the acts: that the last order of the county judge was not improperly made, and the appeal was merely from that order. *McInnes* v. *Davidson*, 4 P. R. 183.—C. L. Chamb.—A. Wilson.

The purposes for which imprisonment is imposed enumerated. Quære, whether in this case the imprisonment was coercive or punitive. *Ib.*

Practice—Service of papers—Irregularity, who may object to—Setting aside proceedings—Affirmation by Quaker—Taken before plaintiff's attorney—Plaintiff, a surety and joint maker, taking up a note before due, so as to take proceedings in insolvency against joint maker. *Hilborn* v. *Mills et al.*, 5 L. J. N. S. 41.—C. C.—Hughes.

The mere intention on the part of a debtor to dispose of his property, and the apprehension of his sole creditor that he will not then, although perfectly able, and owing no one else, pay the creditor, does not bring the debtor within sec. 3, clause *c.* of the Act of 1864. *Sharpe et al.*, v. *Matthews*, 5 P. R. 10.—Chamb.—Gwynne.

In intituling affidavits for an attachment under this act, form F. should be followed. *Ib.*

Section 3, sub. 7, is complied with, although the creditor or his agent who swears to the debt is also one of the two persons testifying to the facts and circumstances relied on as constituting insolvency. *Ib.*

A trader having ceased to meet his liabilities, a demand was served upon him on 31st January, 1865, requiring him to make an assignment on February 6th, (the 5th being on a Sunday) an order was granted for and an attachment issued. One of the affidavits filed on the application for attachment was sworn to on 4th Feb. On an application to set aside the writ and all proceedings for irregularity, it was Held, 1. That the order for the issuing of the writ was not made too soon; 2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sub-s. 3, or for making an assignment in accordance with the demand; 3. That the attachment should have been endorsed with a statement that the same was issued by order of the judge of the county court; but an amendment was allowed on payment of costs by plaintiffs; 4. Objections that the affidavits of two credible witnesses were not filed at the time of

issuing attachment, that the proceedings were not taken three months, &c., and that sufficient time was not allowed to defendant to give notices required by the act for taking proceedings on a voluntary assignment, were overruled. *McInnes* v. *Brooks*, 1 L. J. N. S. 162.—C. C.—Lawder.

Where a trader in Ontario becomes insolvent, and an attachment in insolvency is issued to the sheriff of the county in which he resides, the county judge can issue another attachment to the sheriff of any county in Ontario, or of any district in Quebec, in which the insolvent has property. *Re Beard*, 15 Chy. 441.

An insolvent having made a voluntary assignment in 1867, compounded with his creditors, had his goods restored to him, and resumed his business with the knowledge of his assignee and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment under the Insolvent Act of 1869, was sued out by his subsequent creditors:—Held, that they were entitled in priority to the former creditors. *Buchanan* v. *Smith*, 17 Chy. 208.

See *Groves* v. *McArdle*, 9 L. J. N. S 126, p. 453.

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3. *Assignees.*

(a). *Appointment of.*

At a meeting of creditors held to give their advice upon the appointment of an official assignee, it was held that the creditors of the individual partners had the right, as well as the creditors of the firm, to vote in the choice of an assignee. *Luxton* v. *Hamilton and Davis*, 10 L. J. 334.—C. C.—Logie.

Appointment of agent for a creditor claiming to advise in the choice of an assignee must be in writing, and filed of record. *In re Campbell*, 1 L. J. N. S. 135.—C. C.—Hughes.

The act of 1865, sec. 2, does not authorize a voluntary assignment to an official assignee in any part of either Upper or Lower Canada; but means only that it may be made to any official assignee entitled to take it under the Act of 1864, without compliance with the formalities mentioned therein. *White* v. *Cuthbertson*, 17 C. P. 7.

A list of creditors need not be appended to an assignment to an official assignee. *Hingston* v. *Campbell*, 2 L. J. N. S. 299.

Held, following Hingston *v.* Campbell, 2 L. J. N. S. 299, and White *v.* Cuthbertson, 17 C. P. 7, that a voluntary assignment to an official assignee must be to one resident in the county in which the insolvent has his place of business; but Semble, that the creditors may acquiesce in an assignment to a non-resident official assignee, and thus constitute him their assignee. *Whirter* v. *Learmouth*, 18 C. P. 136.

Defendant's execution was handed to the sheriff on the 28th June, the assignment to the official assignee made on the 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent and did not object to the assignment, and at which it was resolved to discharge the insolvent, was held on the 4th August following:—Held, that even if the creditors had adopted plaintiff as their assignee, which did not appear, it would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting, not to that of the assignment. *Ib.*

Held, that the London board of trade, which was an organized body in operation before the Insolvent Act of 1864, had power, though not incorporated, to appoint official assignees under that act; and that such appointment was properly made by resolution. *Churcher* v. *Cousins*, 28 Q. B. 540.

The transmission of a copy of such resolution to the clerk of the County Court, under sec. 4, is directory only; and the omission to send it will not invalidate the appointment. *Ib.*

A bond to W. S., of, &c., President of the board of trade of the city of London, to be paid to him as president of the said board, his successors and assigns, and executed by the sureties, but not by the assignee:—Held, sufficient, under sec. 4, sub-s. 2. *Ib.*

Quære, whether a defect in such security, or the absence of it altogether, would avoid the assignee's appointment. *Ib.*

Held, that the plaintiff having proved his claim before the assignee and having obtained an order in this court to set aside the insolvents' discharge in the Insolvent Court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed *Allan* v. *Garratt et al.*, 30 Q. B. 165.

Official assignees cannot be appointed by unincorporated boards of trade formed after the passing of the Insolvent Act. *Newton* v. *Ontario Bank*, 15 Chy. 283, in Appeal; *S. C.* in court below, 13 Chy. 652.

Where a debtor assigns to an official assignee who has not been duly appointed, but the creditors generally accept and act upon the assignment: Quære, whether the irregularity in the appointment can be set up by an individual creditor as rendering void the assignment. *Newton* v. *Ontario Bank*, 13 Chy. 652.

The county judge of a county, in which no board of trade existed, appointed an official assignee for the county within three months after the Insolvent Act of 1869 came into force:—Held, that such appointment was valid under sec. 31 of the act, although a board of trade existed in an adjoining county, but had not appointed an assignee. *Blakely* v. *Hall*, 21 C. P. 138.

Quære, can a board of trade appoint an official assignee under section 31, *after* the lapse of three months from the time when the act came into force. *Ib.*

In pleading to a declaration, charging a sheriff with neglecting to make the money under a fi. fa., an allegation that the execution debtor made an assignment under the Insolvent Act of 1869, to an official assignee for the county, appointed under the act by the county judge, and that the sheriff had surrendered the goods to the assignee, is sufficient, without alleging that no board of trade existed in the county, or in an adjacent county, or that no assignee had been appointed by a board of trade; and it would be sufficient

to aver that the assignment had been made to an official assignee for the county, without shewing how the assignee was appointed. *Ib.*

A voluntary assignment to an official assignee under the Insolvent Act of 1864, s. 2, is not valid unless accepted by the assignee. *Yarrington* v. *Lyon*, 12 Chy. 308. See *Brown* v. *Wright*, Q. B. E. T. 1874, p. 418.

Every material allegation in a bill should be positive; and an allegation, that so far as the plaintiffs know, an assignee d not accepted the assignment executed by an insolvent, was held insufficient. *Yarrington* v. *Lyon*, 12 Chy. 308.

(b) *What property Vests in.*

Rights of action.]—The plaintiff, having held the defendant in the suit to bail, recovered a verdict for slander, for enticing away and detaining his wife, and for assaulting her. Before recovering judgment he made an assignment under the Insolvent Act, and he then sued the bail on their recognizance, not having yet obtained his final discharge. The defendants set up the rights of the assignee:—Held, on demurrer, that the plaintiff was entitled to recover, for the causes of action, being for purely personal wrongs did not pass to the assignee. Semble, also, that the proceeds of the suit when recovered could not be claimed by the assignee, and that he therefore could not in any way interfere with the suit. *White* v. *Elliott et al.*, 30 Q. B. 253.

On the 10th February, 1873, defendants obtained an order to stay proceedings until security was given for costs, on the ground that the plaintiff had become insolvent. The declaration contained three counts: 1. On a fire policy. 2. In trover, alleging as special damage that plaintiff's business was stopped, and he lost customers. 3. In trespass to goods, alleging similar special damage. No objection was made in chambers that the causes of action in the second and third counts did not pass to the assignee. On application to the court:—Held, that the causes of action under the first and second counts passed to the assignee, for as to the second, as the conversion, the primary cause of action, passed to the assignee, the special damage dependent upon it could not be sued for by the debtor; but that the cause of action in the third count did not pass, being for a personal claim of the debtor independent of his right of property:—Held, therefore, that as to the third count the order should not have been made: that being made without authority it might be rescinded as to that count; and that the action might be stayed on one count, leaving it to proceed on the others. *Smith* v. *Commercial Union Insurance Co.*, 33 Q. B. 529.

See *Alexander* v. *A. B. & C. D.*, 5 Q. B. 329, p. 401.

Other Property.]—V. and J. D. being in partnership, J. D. went out, and his father, D. D., took his place in the firm. About six months after this V. assigned to D. D. all the stock-in-trade, but the possession was not changed nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after plaintiff's title accrued did not appear:—Held, that they must succeed: that they were clearly entitled to the goods themselves, for defendant, as creditor of one partner could not seize them out of the possession of the assignees of the firm, although he might have a right to V's. share of the proceeds, if any, after paying the partnership debts. *Wilson* v. *Ver* 24 Q. B. 635.

The title of the official assignee appointed under compulsory proceedings does not, under the Act of 1864, relate back to the assignment which is held to be the act of insolvency; his appointment vests in him only the estate and effects of the insolvent "as existing at the date of the issue of the writ of attachment, in the same manner and to the same extent as if a voluntary assignment under the provisions of the act had been *at that date* executed in his favour by the insolvent." *Thorne* v. *Torrance* 16 C. P. 445; *S. C.* in Appeal, 18 C. P. 29.

Where a sale has been made under an execution against a judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditor. *Brand* v. *Bickle*, 4 P. R. 191.—Chamb.—Wilson

A sheriff has a right to an interpleader in such a case, when the proceeds are claimed by an official assignee.—*Ib.*

Knox being indebted to one Kyle, and Kyle to defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-s. 4, of the Insolvent Act of 186 but:—Held, not; for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the act, and so avoidable this would not entitle the plaintiff to the note *McGregor* v. *Hume*, 28 Q. B. 380.

The lessees under a lease containing a covenant not to assign without leave, in the statutory form, made a voluntary assignment in insolvency on 17th May, 1869. The assignee sold the stock in trade of the insolvents, who were dry goods merchants, and the purchaser took possession of the premises from him on the 2 May, the assignee also occupying a room there for the management of the estate:—Held, that such assignment was a breach of the covenant and a forfeiture; for the term passed to the assignee under the provisions of the Insolvent Act, and if any election to accept it were necessary on his part, it was shewn by his conduct. *Magee* v. *Rankin*, 29 Q. B. 257.

The plaintiff purchased barley from R., and him to consign it to C. and draw on C. for the purchase money. C. was to keep the barley as plaintiff's agent until the plaintiff directed him to sell, the plaintiff paying him such a sum as he might require by way of margin to pay

himself against a fall in price. C., to reimburse his advance on R.'s draft, obtained a discount from the bank on his own note secured by the warehouse receipt for the barley, which he transferred to the bank. While C. held the barley the plaintiff paid to him $540 as margin to hold it. The barley was shipped by plaintiff's instructions to Oswego, to the order of the bank, where it was sold; and the bank received the proceeds on the 2nd December, having previously had notice that the plaintiff owned the barley. About the 17th November C. left the country, and an attachment in insolvency having issued against him, an interpleader was directed to try whether the balance of such proceeds above the bank's advances belonged to his assignee or to the plaintiff:—Held, that the plaintiff was entitled to it, for the barley was his, and the money, the proceeds of its sale, never came into C.'s hands, or was mixed with his general assets. C. had advanced by paying R.'s draft more than the proceeds of the barley, and it was contended therefore that there was no surplus available for the plaintiff; but Held, that the plaintiff was entitled to deduct from such advance the sums paid by way of margin. After C. had absconded the plaintiff went to his office to ask about his barley, and there saw R., the manager of C.'s business, who went with him to the bank and had a conversation with the cashier:—Held, that their evidence of what passed was clearly admissible. *Cotter* v. *Mason*, 30 Q. B. 181.

Previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit in chancery, had an equitable interest, had been ordered to be sold, and were afterwards sold, and the purchase money paid to the plaintiff in equity. The assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors. It was held that such lands were subject to the order for sale, and the motion refused with costs, but the assignee was considered entitled to his costs out of the estate, as the question was a new one, and a proper one for him to raise in the interest of the general creditors. *Yale* v. *Tollerton*, 2 Chy. Chamb. 49.—VanKoughnet.

An insolvent's reversionary interest in an estate passes to his assignee, and entitles the assignee to maintain a suit in a proper case for the appointment of new trustees, and for an account of the estate; but the court refused to make an order for the sale of such reversionary interest. *Gray* v. *Hatch*, 18 Chy. 72.

An assignee in insolvency cannot acquire priority over a prior vendee of the insolvent by prior registration of the instrument appointing such assignee. *Collver* v. *Shaw*, 19 Chy. 599.

On the 10th May, 1873, K. executed a voluntary assignment to the official assignee, who, on being told of it, advised a private arrangement in order to save expense. On the 12th the plaintiff recovered judgment, and issued an execution against K., to defendant, a Division Court bailiff, who seized a pair of horses, and took a bond for their forthcoming. On the 2nd the defendant, having again taken the horses, advertised them for sale under the execution. The assignee finally received and acted under the assignment on the 7th June, and claimed the horses from defendant, who gave them up to him. In an action against defendant and his sureties for not selling sooner under the execution:—Held, 1. That the horses passed to the assignee on the execution of the assignment, though he did not assent to or act under it until the 7th June, and that there was no breach of duty, therefore, on defendant's part in not selling before the claim was made. 2. That even if defendant was guilty of neglec the plaintiff had sustained no damage, for if he had proceeded to sell, the assignee would no doubt have claimed, and no benefit could have resulted to the plaintiff. *Brown* v. *Wright et al.*, Q. B., E. T., 1874. Not yet reported. See *Yarrington* v. *Lyon*, 12 Chy. 308, p. 415.

See *Henry* v. *Douglass*, 1 L. J. N. S. 108, p. 426; *Converse* v. *Michie*, 16 C. P. 126, p. 427; *Brand* v. *Bickle*, 4 P. R. 191, p. 429; *Re McKenzie*, 31 Q. B. 1, p. 450; *Bank of Montreal* v. *Little*, 17 Chy. 313 p. 420.

(c) *Rights, Duties, and Liabilities.*

Liability to Actions.]—Held, that an action may be brought against an assignee for a dividend on a duly collocated and advertised claim which has not been objected to. *Simpson* v. *Newton*, 4 L. J. N. S. 46.—C. C.—Macdonald.

An official assignee in insolvency sued for trespass in taking and selling goods, is not entitled to notice of action. So held in accordance with the cases deciding that a sheriff is not entitled to such notice; but Wilson, J., but for these decisions would have thought otherwise. *Archibald* v. *Haldan*, 30 Q. B. 30.

When a defendant becomes insolvent after the service of the bill upon him, (but before the time for answering expires), and the suit is thereupon revived against the assignee in insolvency, it is necessary to serve the assignee with the bill as well as with the order to revive, or an order pro confesso cannot be obtained. *Smith* v. *Lines*, 1 Chy. Chamb. 398.—Mowat.

Goods are repleviable out of the hands of a guardian in insolvency, notwithstanding C. S. U. C. c. 29, s. 2. *Jameson et al.* v. *Kerr*, 6 P. R. 3. —C. L. Chamb.—Dalton—*C. C. & P.*, Gwynne.

Where the goods of A. having been seized by the sheriff under an execution against B., had been handed over by the sheriff to an assignee, to whom the debtor had made a voluntary assignment in insolvency:—Held, that A. might maintain replevin against the assignee:—Held, also, that sec. 50 of the Insolvent Act of 1859, could not apply against the plaintiff, who was not a creditor or in any way interested in the estate of the insolvent. *Burke* v. *McWhirter*, 35 Q.B. 1.

See VI. 4, p. 421.

Other Cases.]—The assignee has the sole right to select his own professional adviser, and cannot be made to change him, except upon reasonable ground. *In re Lamb*, 17 C. P. 173.

Held, under the Act of 1864, that the county town of the county in which the assignment is filed is the place where the assignee should call all meetings: that not less than two weeks should intervene between the first

publication of the notice and the day of meeting: that the notice must be published in a newspaper at or nearest the place where the meeting is to be held; and that all papers and minutes of proceedings in insolvency should be forthwith filed and entered of record in the proper office. *In re Atkins*, 2 L. J. N. S. 25.—C. C.—Jones.

A demand for wages was made as a preferred claim to an assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county judge, calling on the assignee to shew cause why he should not pay the claim, and the assignee not appearing, evidence was taken before the judge, and an order made the payment forthwith, with costs, of a sum less than the original demand. The assignee afterwards paid the claim as reduced, but refused to pay any costs; upon which the judge's order was made a rule of court, and execution issued thereupon against the goods of the assignee. Upon his application for a writ of prohibition to prohibit further proceedings on the writs or orders, &c.:—Held, 1. That the assignee should not have been ordered, so far as appeared, to pay costs; 2. That the power given to the judge by s. 4, sub-s. 16, of the Act of 1864 to control the assignee, is in the nature of giving him personal directions as to his duties, enforceable by imprisonment on default, but that the judge has no power to enforce his orders by judgment and execution, though he might possibly compel an assignee to pay costs incurred by his disobedience, by making it a condition that he should pay them before he could be considered purged of his contempt; and that the only remedy of the assignee was to apply for a prohibition. *In re Cleghorn and the Judge of the County of Elgin and Munn*, 2 L. J. N. S. 133.—C. L. Chamb.—Richards.

J. was appointed official assignee of B. under the Insolvent Acts of 1864, 1865. After the Insolvent Act of 1868 came into force, the creditors removed him and appointed another assignee in his place. Before his removal, J. rendered an account of his receipts and disbursements, with which the creditors were dissatisfied, and presented a petition to the judge to examine the account, to settle and adjust it, and to order J. to produce the books, papers, and vouchers of the estate, and to pay over all moneys which might be found to be in his hands. The judge held that the assignee, having already rendered an account, must be taken to have "fully accounted" within the meaning of the act of 1864; that he had no jurisdiction over the removed assignee under that act; and that he could not proceed under the act of 1869, as the relief sought was not a "matter of procedure merely," and he dismissed the petition:—Held, on appeal, 1. That the summary remedies given by the act of 1869 are applicable to assignees appointed under the acts of 1864 and 1865; 2. That the judge had jurisdiction, even under the act of 1864, to examine into and decide upon the correctness of the items of an assignee's account, and to adjust such account; 3. That this jurisdiction exists over a removed assignee until he has "fully accounted" for his acts and conduct while he remained assignee; 4. That an assignee has not fully accounted within the meaning of the act by rendering an account merely, but that the expression necessarily means accounting and paying over; 5. That the duties of an assignee are to conform himself to the law; and the performance of these duties may under either act be summarily enforced by the judge, and a removed assignee remains subject to this jurisdiction until he has fully accounted for his acts and conduct while he remained assignee. *In re Botsford*, 22 C. P. 65.

An assignee in insolvency employed a firm of attorney to perform certain services in connection with the estate. Subsequently he resigned the position and gave these attorneys the money of the estate remaining in his hands, with instructions to pay their own costs first, and then to hand the balance to the new assignee. This they did and rendered their bill of costs:—Held, that the estate of the insolvent was, within the meaning of C. S. U. C. c. 36, s. 38, the "party liable to pay," though "not chargeable as a principal;" and the second assignee was entitled to have the bill taxed. *In re A. & B., two &c.*, 6 P. R. 68.—C. L. Chamb.—Dalton, *C. C. & P.*

A voluntary assignment to an official assignee under the Insolvent Act of 1864, s. 2, is not valid unless accepted by the assignee. *Yarrington v. Lyon*, 12 Chy. 308.

M. deposited a sum with the plaintiffs, and soon afterwards absconded. The plaintiffs had given him a receipt, stating the money was payable on the production of that document. A writ of attachment issued against the depositor's property as an absconding insolvent debtor under the insolvent acts; and the defendant Little was appointed official assignee. He demanded the money without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of his appointment. He then sued the plaintiffs for the money. The action was restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant Little and another claimant of the money, whose claim accrued after the attachment, to interplead. The court, under the circumstances,—Held, that the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it with the costs occasioned to the estate by their refusal. *Bank of Montreal* v. *Little*, 17 Chy. 33

Advertisements by assignees in insolvency of the sale of property of the insolvent should describe the property and state the title with the distinctness required in equity in the case of advertisements by trustees and other officials. *O'Rielly* v. *Rose*, 18 Chy. 33.

In case of a sale by an assignee in insolvency being open to objection on the part of the creditors, the remedy of objecting creditors is by application to the County Court judge, not by suit in chancery in the first instance. *Ib.*

Remarks as to the conduct of an official assignee in assisting an insolvent, who had no assets and no expectation of any, in a fraudulent attempt to take advantage of the act, and as to the liability incurred thereby. *Thomas* v. *Ha* 6 P. R.—C. L. Chamb.—Gwynne. Not reported.

See *Yale* v. *Tollerton*, 2 Chy. Chamb. 49, p.

4. *Rights of Mortgagees.*

The defendant as official assignee, having taken possession of certain goods and premises, and being sued by a mortgagee, claimed a deduction from the plaintiff's damages for rent, insurance, and taxes paid by him out of the proceeds of sales :—Semble, that it should have been allowed only if due when he took possession ; but this did not appear, and under the circumstances the court refused to interfere. *Mathers* v. *Lynch*, 28 Q. Q. 354.

An official assignee sued for trespass in taking and selling goods pleaded (relying upon the 50th section of the Insolvent Act of 1869), that before the writ of attachment hereinafter mentioned, one C. mortgaged the goods to the plaintiff : that while said goods were in C.'s possession, the mortgage providing that he should retain them until default, the sheriff seized the goods under an attachment in insolvency issued at the suit of M., and placed them in the custody of defendant, being an official assignee and guardian, and defendant being afterwards duly made assignee of C.'s estate, sold the goods—which are the alleged trespasses :—Held, a bad plea, for *only* negativing a default by C. when the attachment issued, not when the defendant received and sold the goods. *Archibald* v. *Haldan*, 30 Q. B. 30.

Semble, that the section referred to only restrains a suit by creditors who have proved, or can prove, on the estate, and does not prevent a mortgagee from suing in trespass for a wrongful taking of the goods. *Ib.*

On the sale of a woollen factory and machinery, it was stipulated that, until the purchase money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, and the latter, to secure the unpaid purchase money, executed a mortgage which purported to be of the factory only, and did not mention the machinery. The purchasers resold, the vendee having notice of the covenant, and the vendee subsequently became insolvent :—Held, that the covenant against removing the machinery remained in force, and that the vendee's assignee in insolvency, was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise. *Crawford* v. *Findlay*, 18 Chy. 51.

Where goods were mortgaged, and after default remained with the mortgagor, who made an assignment in insolvency, and handed them over to his assignee :—Held, that the mortgagee could not take them out of the assignee's possession, but must enforce his claim under the Insolvent Act, and that he was a trespasser in so taking them. *Dumble* v. *White*, 32 Q. B. 601.

Declaration for entering a mill and taking and converting plaintiff's goods. Plea, in substance, that the plaintiff's claim to the goods and mill was only under a mortgage made by one W., who, before the grievances complained of, made an assignment under the Insolvent Act of 1869, to defendant of all his estate and effects, including the mill and goods, subject to plaintiff's mortgage ; that W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such assignee ; that except as assignee defendant has in no way interfered with the mill or goods ; that the plaintiff's alleged right of property can be determined by the county judge ; and that this court has no jurisdiction to try the same :—Held, on demurrer, plea good, the plaintiff, under the facts stated, being restricted by sec. 50 of the Insolvent Act of 1869, to the remedy there given :—Held, also, that that section was not beyond the power of the Dominion Parliament as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency. *Crombie* v. *Jackson*, 34 Q. B. 575.

See, *Re Hurst*, 31 Q. B. 116, infra; *Gordon* v. *Ross*, 11 Chy. 124, infra.

See VI. 7 (a), p. 430 ; VI. 7 (b), p. 437.

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5. *Proof of Debts.*

(a) *Creditors holding Security.*

The insolvent, in February, 1868, executed a mortgage on lands and an assignment of goods to trustees for the benefit of B. G. & Co., and other creditors named ; and in August following he made a voluntary assignment under the Insolvent Act. The trustees after this assignment sold part of the real estate under the power of sale and received part of the proceeds of the goods. B. G. & Co., then claimed to prove against the estate for the balance due to them above what they had received from the trustees. The official assignee held that they had lost their right, having elected to look to their security instead of bringing it in under sec. 5, sub-s. 5, of the Insolvent Act of 1864 ; and his award was confirmed by the county judge on appeal :—Held, Morrison, J., diss., that the mere fact of the sale did not necessarily exclude them from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced or were recompensed for any loss thereby, they should still be allowed to prove. *In re Hurst*, 31 Q. B. 116.

Where a mortgagor becomes insolvent, the mortgagee is not compelled to go in under the act, but may proceed under his power of sale. *Gordon* v. *Ross*, 11 Chy. 124.

See *Henderson* v. *Macdonald*, 20 Chy. 334, p. 382.

(b) *Preferential Claims.*

A demand for wages was made as a preferred claim to an assignee. The creditors, at a meeting, passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county judge, calling on the assignee to shew cause why he should not pay the claim, and the assignee not appearing the evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand :—Held, that the direction by the creditors to pay these preferential claims, without putting them on the dividend sheet, was illegal. *In re Cleghorn and the Judge of the County of Elgin, and Mann*, 31 U. C. J. S. 153.—C. L. Chamb.—Richards.

Defendant, in consideration of the yearly rents, covenants, and conditions in the lease contained, leased certain premises to one M. at an annual rent, and as one of the covenants or conditions, in consideration of which the demise was made, after reciting that M. had agreed to pay $700, *by way of additional rent*, for the purchase of the good-will of the demised premises, M. covenanted to pay the $700 in ten quarterly payments of $70 each, with a proviso that in case of forfeiture of any of his covenants, the said $700, or the balance thereof, was to become at once due and payable *by way of rent*, with a further covenant that if the term granted should be seized under execution or on attachment against M., or if M. should make an assignment or become bankrupt or insolvent, or take the benefit of any Insolvent Act, the then current quarter's rent should immediately become due and payable and the term become void. M. failed to pay any portion of the $700, and after the accrual of the third quarterly payment became insolvent:—Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of $70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the statute 8 Anne, c. 14, s. 6, or the 14th section of the Insolvent Act of 1865, distrain for the whole $700. *Griffith* v. *Brown*, 21 C. P. 12.

The 81st section of the Insolvent Act of 1869 restricts the landlord to one year's rent, even where he has distrained for more *before* the insolvency of the tenant. Griffith v. Brown, 21 C. P. 12, distinguished. *Mason* v. *Hamilton*, in appeal, 22 C. P. 411, reversing the decision of C. P. in 22 C. P. 190.

See *Re Fair and Buits*, 2 L. J. N. S. 216, p. 428; *Re Heyden*, 29 Q. B. 262, p. 428.

(c) *Partnership Debts.*

The appellants, in the matter of C. & Co., insolvents, had a claim upon a note made by C. & Co., payable to C., one of the firm, and by him endorsed to the appellants. They proved against the firm on the 3rd July, 1869, but afterwards withdrew it, and proved on the 11th January, 1870, under sec. 60 of the Act of 1869, specifying and putting a value on the separate liability of C.:—Held, affirming the decision of the county judge, that the appellants, under the act of 1864, could not rank both upon the separate estate of C. and on the estate of the firm, but must elect; but that they might prove against the joint estate for their whole claim, without deducting from it the value of C.'s separate liability:—Held, also, that the appellants could treat the payee and endorser as having incurred a separate liability by his indorsement, distinct from his joint liability as a maker:—Held, also, that the Act of 1869 could not apply, for the case was pending before it, and the question in dispute as to the right to prove was not a matter of procedure only, exempted from the exceptions in the repealing clause. *In re Chaffey et al.*, 30 Q. B. 64.

The doctrine against double proof applies only when both estates are being administered in insolvency. A creditor who has proved in insolvency upon a promissory note made by a insolvent firm, can prove as a creditor in an administration suit against one of the parties deceased who has separately endorsed the note. *Re Baker*, 3 Chy. Chamb. 499.—Boyd, *Master.*

The rule in equity as well as in bankruptcy is, that the separate estate of a partner is to be applied first in discharge of his separate debts; and in applying this rule, money paid by co-partners on a liability created by the fraud of the partner towards them, is treated as a separate debt provable and payable pari passu with the other separate creditors of such partner in case of his death insolvent. The mere liability so fraudulently created cannot be proved against the separate estate as a debt until the liability is paid, or until something equivalent to payment takes place. Where the fraud was in the use of the partnership name on bills, the other partners becoming insolvent, the holders of the bills proved them against the partnership estate; the assignee in a suit for administering the separate estate of the guilty partner claimed to prove the amount against the separate estate; but the master restricted the proof to the expected dividend from the partnership estate and the separate estate of the surviving partners; and the court held that the assignee was not entitled to prove for a larger sum. *Baker* v. *Dawbarn*, 13 Chy. 113.

See *Allan* v. *Garratt*, 30 Q. B. 165, p. 446.

(d) *Other Cases.*

Debts must be proved before the assignee and not before the judge. *In re Stevenson*, 1 L. J. N. S. 52.—C. C.—Logie.

Two assignments were made by J. & C. P. on the 1st and 5th of June, 1865, to the plaintiff, a creditor, for the benefit of creditors. On the 6th of June, 1865, defendant, another creditor of J. & C. P., obtained judgment against them, and placed a fi. fa. in the sheriff's hands, and on the 1st July, 1865, he also caused a writ of attachment, under the Insolvent Act of 1864, to be issued against them. The goods assigned to plaintiff were seized under the fi. fa.:—Held, that the defendant, although the attaching creditor, was not put to his election, but might proceed in insolvency as well as upon his fi. fa. *Thorne* v. *Torrance*, 16 C. P. 445. See S. C. in Appeal 18 C. P 29.

The insolvent, a miller, agreed to grind wheat for the claimants, and to deliver to them a barrel of flour of a specified quality for so many bushels of wheat, and he thus became liable to deliver to them 955 barrels of flour, as equivalent for wheat received by him and made away with:—Held, that this was a bailment only of the wheat, which remained the claimants', to the insolvent that such bailment was determined by the conversion of the wheat, so that the claimants might maintain trover for it either as wheat or as flour if ground: that they might waive the tort and sue for the value of the goods when they should have been delivered; and that the claim therefore was provable as being a debt within the Insolvent Act, not a claim for unliquidated damages:—Held, also, that a claim for compensation as to a certain number of barrels not of the quality agreed for was clearly a claim

for unliquidated damages, and could not be proved. *In re Williams*, 31 Q. B. 143.

Declaration. First count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance, defendant had granted one of the lots to S. Second count, on the covenant for quiet possession in the same deed. Breach, that before making it defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in Chancery and foreclosed his mortgage, by which the plaintiffs lost this lot. Third count, that defendant being possessed of a lot of land, mortgaged it one S. for £258 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee, for $22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs. Fourth count, common money count. Plea: that after the time when defendant is alleged to have become indebted and liable to the plaintiffs, and after the Insolvent Act of 1864, defendant made an assignment under it, and in his schedule the alleged claim of the plaintiffs, which was then, if they ever had any claim, provable against defendant's estate, was included; and that afterwards defendant duly obtained an absolute discharge under said Act from the claims of his creditors, including the plaintiffs, which was duly confirmed:—Held, plea bad, as to the first three counts; for the plaintiffs' claim under those counts could not, under the Act of 1864, have been proved against defendant's estate—not being a debt due and payable, or due but not then payable, nor upon a contract dependent on a condition or contingency which had not happened before the first dividend, but for unliquidated damages—and the discharge therefore did not release it. *Burrowes et al.* v. *DeBlaquiere*, 34 Q. B. 498. See *Perrin* v. *Hamilton*, 5 C. P. 57; *Moody* v. *Bull*, 7 C. P. 15, p. 396.

The creditors of one P., an insolvent, consented, by an agreement, that the plaintiff, as guardian of the estate, and the defendant should sell certain timber manufactured by the insolvent, and pay defendant out of the proceeds $5,500, which he claimed, upon defendant giving to the guardian his bond to repay the same, or so much as defendant might not be entitled to; defendant (it was said in the agreement) claiming such timber, or a lien on it and the creditors insisting that the estate owned or had some claim thereon. The bond recited this agreement, and the condition was that defendant should repay such portion of the $5,500 as he should not be entitled to. The plaintiff sued on this bond, averring the sale of the timber and payment to defendant of the $5,500; and that defendant was not entitled to the same, but had not repaid it. Defendant pleaded that he duly published his right to the $5,500 by filing with the assignee the particulars of his claim thereto, duly verified, as provided by the Insolvent Act of 1869. The plaintiff replied, setting out the particulars of defendant's claim and verification thereof (which shewed it to be the claim in question), and alleged that such claim had not been placed on any dividend sheet, nor in any manner adjudicated or awarded upon. To this the defendant rejoined, that it had not been contested or objected to, and the plaintiff, as assignee, had not prepared any dividend sheet of the estate:—Held, rejoinder good; for that, looking at the position of the parties and the agreement, the meaning of the bond was, that defendant should repay what, after a contestation of his claim, it might appear that he was not entitled to rank for; and the action, therefore, was premature. *Hall* v. *Dunsford*, 32 Q. B. 1.

By an agreement between a debtor and one of his creditors, the latter agreed to accept, by way composition, certain notes of the debtor, payable at specified dates; and it was provided that the debtor should also give his note for the whole debt, and that if he were guilty of any default in paying the composition notes, the creditor should rank on his estate for the whole debt. The notes were given accordingly, the debtor made default, and afterwards was proceeded against under the Insolvent Act of 1864:—Held, that the stipulation as to the whole debt was not illegal, and that there having been default before the insolvency, the creditor was entitled to prove for the whole debt. *In re McRae*, 15 Chy. 408.

Where a wife joins in a mortgage, she is not entitled, on the death of her husband insolvent, to have the debt paid in full out of the assets to the prejudice of creditors. *Baker* v. *Dawbarn*, 15 Chy. 113.

See *Dickinson* v. *Bunnell*, 19 C. P. 216, p. 429.

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6. *Operation of Executions.*

[*See now the Insolvent Act of 1869, s. 59.*]

Where an attachment under the Absconding Debtors Act was received by a sheriff and acted upon, and afterwards writs of fi. fa. were placed in his hands, and he subsequently received an attachment under the Insolvent Act of 1864:—Held, that defendant's property passed to the official assignee, but that he must give the execution creditors the priority to which they would be entitled. *Henry* v. *Douglass*, 1 L. J. N. S. 108.—C. C.—Jones.

Judicial proceedings and statutes take effect in law from the earliest period of the day upon which they are respectively originated and come into force. M. recovered a judgment and issued a fi. fa. goods against R. The writ was given to the sheriff at half-past ten and a levy made about 11 a. m. On the same day, but after the levy, C. sued out against R. an attachment in insolvency, which the sheriff received at 11.30 a. m. On the same day, also, the Insolvent Act of 1865, came into force (the Royal assent being given thereto on the same day, but not till the afternoon), by which in effect this execution, unless *theretofore* issued and delivered to the sheriff, was postponed to the attachment:—Held, that the fi. fa. could not be considered as having been so issued and delivered, and therefore, by virtue of the act, the attachment prevailed over the execution:—Held, also, that the execution creditor was not entitled to any lien for his costs. Semble, that the issuing of the attachment was a judicial act, and by it the property of the insolvent vested in the assignee by relation before it was seized under and before

any lien attached by virtue of the execution. *Converse et al.* v. *Michie*, 16 C. P. 167.

By sec. 13 of the Insolvent Act of 1865, the divesting of any lien or privilege, (i. e. priority of right) extends only to the levying upon or seizing under the execution, not to the sale thereunder. In this case an execution had been placed in the sheriff's hands on the 15th March, 1866, and on the 26th a sale thereunder, commenced at 10 a. m., was completed at 11 a. m., at which hour a writ of attachment was placed in the sheriff's hands against the defendant:—Held, that the attachment could not prevail over the execution. Converse *v.* Michie, 16 C. P. 167, distinguished. *Whyte* v. *Treadwell*, 17 C. P. 488.

Proceedings in compulsory liquidation taken after the execution of an assignment for the benefit of creditors not made in accordance with the Act of 1864, render it absolutely void as against creditors of the insolvent, so as to let in intermediate execution creditors. *Thorne* v. *Torrance*, 16 C. P. 445.

Held, affirming the previous case, that the assignment was an act of bankrupt and void, and could not be set up, on the issue joined, for any purpose; and that, therefore, the defendant the execution plaintiff, though petitioning creditor, solvency, could, notwithstanding his proceedings in insolvency, founded on his judgment and the assignment, enforce his execution against the debtor's estate, to the postponement of the rest of the creditors. Hagarty, J., A. Wilson, J., and Mowat, V. C., diss. Semble, that on application to the proper court, defendant might have been restrained from asserting any right under the execution at law. *Thorne* v. *Torrance*, 18 C. P. 29.

On 30th January, 1865, W. B. executed before a notary public in Lower Canada, to the plaintiff Rose, an instrument which purported to be an assignment under the act of 1864, but which was informal in several particulars. On the 24th of February following, defendant issued execution against the goods of W. B. and gave it to the sheriff. On the 10th of March following, the other plaintiffs issued an attachment under the Insolvent Act, under which an official assignee was appointed by the county judge, and on the same day the sheriff seized the goods of W. B., after the issue of the attachment, but under the defendant's execution:—Held, that the execution must prevail; for that the subsequent proceedings in insolvency avoided the assignment to Rose, and the execution, being in the sheriff's hands before the issuing of the attachment, bound the goods at common law from its date, and under the statute of frauds from its delivery to the sheriff. *Rose et al.* v. *Brown*, 16 C. P. 477.

An execution was delivered to a sheriff against the goods of the defendant, upon which he seized certain goods. These goods were claimed by the guardian in insolvency of the estate of the defendant, against whom a writ of attachment under the Insolvent Act had also issued to the same sheriff, The sheriff applied for relief under the Interpleader Act:—Held, that under 28 Vict. c. 19, s. 2, he was entitled to protection, and an issue was directed. *Burns* v. *Steel*, 2 L. J. N. S. 189.—C. L. Chamb—A. Wilson.

A stay of proceedings was given to a sheriff on an execution in his hands by the attorney for the execution creditors:—Held, that the execution, under which they claimed priority over an official assignee, had not been *placed in the sheriff's hands for execution* until too late to give them priority as regarded the balance due thereon, the assignment having been made within 30 days after the time the writ was given to the sheriff for execution; but that the execution creditors were entitled to their costs of suit to be proved as a privileged claim. *In re Fair and Buits*, 2 L. J. N. S. 216.—C. C.—Logie.

Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the Insolvent Acts; the conditions of the agreement having been so far performed:—Held, 1. That the writs were not in the sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the sheriff took priority. 2. That the seizing creditors had no lien for their costs under ss. 3, 12, 13, of the Act of 1865, the lien there given applying solely to the law of Quebec. [But see next case.] 3. That the sheriff had no lien or claim on the goods seized for his fees. *In re Ross*, 3 P. R. 394.—Chamb.—J. Wilson.

Held, overruling the above case, that under sec. 13, a judgment creditor who had an execution in the sheriff's hands at the making of the assignment, was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent. *In re Heyden, an Insolvent*, 29 Q. B. 262.

Defendant's execution was handed to the sheriff on the 28th June, the assignment to the plaintiff made on the 16th July, and the meeting of creditors, at which defendant attended, by his attorney, who examined the insolvent and did not object to the assignment, and at which it was agreed to discharge the insolvent, was held on 29th August following:—Held, that even if the creditors had adopted plaintiff as their assignee, which did not appear, it would not have divested defendant of his rights under the execution, as their ratification of the assignment related back only to the date of the meeting, not to that of the assignment. *McWhirter* v. *Learmouth*, 18 C. P. 135.

M., under a fi. fa. at his own suit against D., which was the first in the sheriff's hands, purchased certain land in September, 1867. D. had in April previous made a voluntary assignment under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale under the Amending Act, 29 Vict. c. 18, s. 17. M. claimed a conveyance from the sheriff, crediting the purchase money on his judgment. The court, under these circumstances, discharged with costs an application by M. for a mandamus to compel the sheriff to convey, to which the assignee was no party. *In re Moffatt and The Sheriff of the County of York*, 27 Q. B. 52.

The plaintiff issued a fi. fa. lands on the 7th June, 1865, and renewed it from time to time until 4th June, 1867. On 30th March, 1867, defendant obtained his discharge in insolvency. Plaintiff had proved his claim for the full amount

of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so. The court set the fi. fa. aside with costs. *Dickinson* v. *Bunnell*, 19 C. P. 216.

When a sale has been had under an execution against a debtor, who after the sale makes an assignment, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors. *Brand* v. *Bickle*, 4 P. R. 191.—Chamb.—A. Wilson.

Held, under sec. 13 of the Act of 1865, that where before the assignment the money had been made by the sheriff under a fi. fa. against the insolvent, the execution creditor was entitled to it; for that the section applied only where, but for its provisions, a lien would have existed on the property in question at the execution of the assignment, and not where it had been converted into money which belonged to the execution creditor. Held, also, that under the circumstances of this case, the money must be treated as received under the execution. *Sinclair et al.* v. *McDougall*, 29 Q. B. 388.

When an assignment is made under the Insolvent Act of 1869, it is the duty of a sheriff, who has seized goods under a fi. fa. against the insolvent, to surrender the goods to the assignee, leaving the execution plaintiff to assert his privilege for costs, if any he has, in the proceedings in insolvency. *Blakely* v. *Hall*, 21 C. P. 138.

In pleading to a declaration, charging a sheriff with neglecting to make the money under a *fi. fa.*, an allegation that the execution debtor made an assignment under the Insolvent Act of 1869 to an official assignee for the county, appointed under the act by the county judge, and that the sheriff had surrendered the goods to the assignee, is sufficient, without alleging that no board of trade existed in the county, or in no adjacent county, or that no assignee had been appointed by a board of trade; and it would be sufficient to aver that the assignment had been made to an official assignee for the county, without shewing how the assignee was appointed. *Ib.*

Where, previous to an act of insolvency, certain lands in which the insolvent, a defendant in a suit of chancery, had an equitable interest, had been ordered to be sold and were afterwards sold, and the purchase money paid to the plaintiff in equity, the assignee in insolvency moved that such moneys be paid into court for the benefit of the general creditors: Held that such funds were subject to the order for sale, and the motion refused with costs; but the assignee was considered entitled to his costs out of the fund, as the question was a new one, and a proper one for him to raise in the interest of the general creditors. *Yale* v. *Tollerton*, 2 Chy. Chamb. 49.—VanKoughnet.

The mortgagor of land having made an assignment in insolvency, subsequent, however, to the execution of the plaintiff, and it appearing that there was a surplus after payment of all claims proved against the lands in the suit by a prior mortgagee, it was held that, in the absence of proof of waiver by the plaintiff of his lien, the plaintiff was entitled to priority as against the creditors of the mortgagor under the assignment in insolvency. *Darling* v. *Wilson*, 16 Chy. 255.

In case of a debtor dying leaving insufficient to pay his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Meyers* v. *Meyers*, 19 Chy. 185

Sec. 59 of the Act of 1869 applies to judgment debts recovered in Division Courts, on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delivered to *the sheriff*. *Patterson* v. *McCarthy*, 35 Q. B. 14.

It was objected that defendant received the money only as clerk of the court, but it appeared that the sale had taken place after the assignment, and—Held, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be. *Ib.*

See *Davidson* v. *Perry*, 23 C. P. 346, p. 447; *McWhirter* v. *Learmouth*, 18 C. P. 136, p. 413; *Brand* v. *Bickle*, 4 P. R. 191, p. 416.

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7. *Fraud and Fraudulent Preferences.*

(a). *Transactions Protected.*

Payments or Securities given under Pressure.] —In this case the insolvent, about two months before the attachment against him and his assignment consequent thereupon, assigned to defendant, a creditor, a policy of insurance upon merchandise in security for a debt about to be placed in suit, and the insurance company upon a fire paid over the proceeds of the policy to the creditor to the extent of his debt. The plaintiff claimed as assignee to recover back this amount, and he called the insolvent, who swore that when he assigned the policy he had no contemplation of insolvency: that his intention was, with the remaining assets and the residue of the moneys from the policy after paying defendant, to reopen his business, but that he was driven into insolvency by the act of a creditor, who, though he had promised him time, sued out a writ of attachment against him:—Held, that the onus being upon the plaintiff of proving that the transfer of the policy was made by the debtor in contemplation of insolvency, (it not having been made within thirty days of the issue of attachment, or of the execution of the deed of assignment), the evidence produced by him failed to establish this fact, and that the verdict, therefore, for the defendant was right:—Held, also, that there was no fraudulent preference, it not being pretended that the assignment of the policy was the spontaneous act of the debtor, but the fair inference being that it was made in consequence of pressure by the creditor:—Held, also, that sub-sec. 5 of sec. 8 clearly did not apply to this case, the money received by defendant not having been a payment by a debtor unable to meet his engagements in full, but having been received under the assignment of the policy, and from the company; that the assignment being valid it was

quite immaterial whether when the money was paid the defendant knew, or had probable cause for believing in, the then inability of the insolvent to pay his debts in full. *McWhirter* v. *Thorne*, 19 C. P. 302.

Under sec. 89 of the Insolvent Act of 1869, the presumption that transactions within thirty days next before the assignment, &c., were made in contemplation of insolvency, is not conclusive, but may be rebutted. In this case the creditor, who lived twenty miles from the insolvent, had a mortgage on the insolvent's house for $900, of which $400 was due. On the 8th February he wrote to the insolvent to call and arrange matters the next time he was in, and on the 9th he purchased from the insolvent about $1,400 worth of pork, on condition that $600 should go upon the mortgage, and he paid the balance of the purchase money to other creditors. An attachment in insolvency issued on the 3rd March, and the assignee brought this suit against the creditor to avoid the transactiou. The creditor said he did not wish to press the debtor in any way, but wanted his money. The debtor owed about $3000, and his property produced only $1,000. There was contradictory evidence as to defendant knowing or having probable cause for believing that the debtor was unable to meet his engagements, and as to whether the property mortgaged was worth more than the balance left due upon it. The jury having found in favour of the defendant, the creditor, the court held that the transaction was not avoided by force of the statute; and upon the facts they refused to interfere:—Held, also, that the insolvent could not, under the circumstances, be said to have acted voluntarily, within the meaning attached to that word by the decided cases. *Campbell* v. *Barrie*, 31 Q. B. 279.

The insolvent, an innkeeper, on the 12th of August, 1869, gave the plaintiff a mortgage *upon the whole of his property*, payable in six months, for an over-due debt. The attachment in insolvency issued on the 6th December following, and the assignee seized and sold the goods. The evidence shewed that the mortgagor knew or had strong reasons to believe himself to be insolvent when he gave the mortgage, but that the defendant did not know it, and that the mortgage was given under pressure by defendant, and not with intent to defeat or delay creditors:—Held, that under these circumstances it was not void under the Insolvent Act as against the assignee. *Archibald* v. *Haldan*, 31 Q. B. 295.

An insolvent absconded to the United States, taking money with him. He was followed there by the agent of a person in this country who had become surety for him, and, by the threats of criminal proceedings, induced to pay the amount of the security. A bill, by the official assignee, to recover the money from the surety, was dismissed with costs. *Roe* v. *Smith*, 15 Chy. 344.

The Insolvent Act (1864) forbids mortgages of real estate to a creditor by way of preference. *Curtis* v. *Dale*, 2 Chy. Chamb. 184.

But where the mortgagor did not believe he was insolvent (though the mortgagee feared he was so) and made a mortgage of real estate under pressure on the part of the mortgagee, and in the belief that he (the mortgagor) would thereby be enabled to continue his business and pay his liabilities in full, the mortgage was held valid as against his assignee in insolvency. *Ib.*

A preference which a debtor is induced to give by threats of criminal or other proceedings, is not void under the Indigent Debtors Act of 1859, or the Insolvent Act of 1864. *Clemmow* v. *Converse*, 16 Chy. 547. See, also, *McPherson* v. *Reynolds*, 6 C. P. 491.

But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure for the mere purpose of giving effect to the debtor's desire and intention to give a preference. *Clemmow* v. *Converse*, 16 Chy. 547.

A mortgage was obtained by pressure from an insolvent person, a miller, three months before he executed an assignment in insolvency; the mortgage was for an antecedent debt, and was not enforcible for two years; it comprised the mortgagor's mill only, and left untouched about one-third of his assets; it was not executed with intent to give the mortgagees a preference; and at the time of obtaining it they were not aware of the mortgagor's insolvency. In a suit by the assignee in insolvency, impeaching the transaction, the mortgage was held to be valid. *McWhirter* v. *Royal Canadian Bank*, 17 Chy. 480.

The mortgagees, shortly after obtaining this mortgage, became aware of their debtor's desperate circumstances, and obtained from him by pressure a mortgage on his chattels used in his business. This mortgage was held void against the assignee in insolvency. *Ib.*

M. had in his warehouse 2500 bushels of rye belonging to T. & W. They owed him $1,600, made up of money due for storing that and other grain, for grain supplied to them, and for balance of account. T. & W. were insolvent, and their creditors pressing them, of which M. was aware. They demanded the grain more than once, alleging that it would enable them to meet their creditors' immediate demands, but M. refused, saying it was his only security; and in the end T. offered, if M. would give it up and a receipt of the debt due to him by T. & W., to assign to M. his interest in a vessel, then worth about $1,600. This M. assented to, and on the 20th November T. executed a bill of sale of his interest to M., and received the grain. This transfer, however, being informal, was returned by the custom house authorities, and another one executed on the 5th December. On the 7th January an attachment in insolvency was sued against T.:—Held, that as M. had demanded payment, and the transfer was made on the express condition that the rye should be given up, the transaction must be regarded as not a voluntary one, and therefore not one by which M. had obtained an unjust preference. Held also, that the transaction must be looked at as carried out on the 28th November. *McFarlane* v. *McDonald*, 21 Chy. 319.

Other Securities.]—On the 13th September 1866, S. agreed to deliver on account of K. at a railway station, when wanted, 600 boxes factory cheese, at a certain rate per pound, and to keep the same insured until wanted. The weight had not then been ascertained, in

all had not been manufactured. Subsequently, two warehouse receipts, dated respectively 21st September and 9th October, were given to K., one for 330, the other for 230 boxes, signed by S. and specifying the weight of the cheese. On the 22nd October, K. mortgaged to plaintiffs 400 boxes of cheese, purchased by him from S. on or about the 13th September, and then in the curing house of S., to secure moneys advanced to him by plaintiffs, upon the security of part of the cheese. This mortgage was not filed. S. became insolvent on the 19th October following, and K. became aware of it on the following day. The plaintiffs replevied 341 boxes of cheese:—Held, that even if the property did not pass before the 21st September, the subsequent insolvency of S. did not affect K.'s right; for that the Insolvent Act of 1864, s. 8, sub-s. 2, did not apply, as there was no evidence of obstructing or injuring creditors, but the contrary, the property having been sold at its full value; but, even if the case were within that clause the contract would be voidable only under the order of a competent tribunal, upon such terms as to the protection of the person from actual loss or liability as the court might direct:—Held also, that the mortgage to the plaintiffs was valid, having been taken "by way of additional security for a debt contracted to the bank in the course of its business," and therefore within C. S. C. c. 54, s. 4; that it could not be impeached by any one for want of filing but an opposing creditor of K., and that as S. could not impeach it, neither could the defendant, his assignee in insolvency. *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

Declaration in detinue and trover for goods. Plea, that one J., the owner, being a debtor unable to meet his engagements, and in contemplation of insolvency, mortgaged the goods to the plaintiff, and within thirty days thereafter made a voluntary assignment in insolvency to the defendant, the official assignee; that the mortgage was made to the plaintiff as a creditor and surety for J., whereby the plaintiff obtained an unjust preference over J.'s other creditors, who were thereby injured and obstructed, therefore the mortgage was void, and defendant as assignee took the goods. The plaintiff replied that J. being a retail dealer, and wanting goods to carry on his business, asked the plaintiff to endorse notes to enable him to purchase them: that the plaintiff consented, on condition that J. on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise the plaintiff might sell the goods for his own protection: that the plaintiff accordingly endorsed, and J. with the notes purchased goods, which he mortgaged to the plaintiff, as agreed on, with other goods, for the bonâ fide and valuable consideration of perfecting the said agreement; that J. afterwards, without the plaintiff's consent, assigned to the defendant, who took with notice of the mortgage, and was proceeding to sell the goods, when the plaintiff forbade him and demanded them:—Held, that the replication was good, for that the plaintiff only became a creditor by the actual transaction, in which he gave the equivalent in the new goods purchased and delivered on his credit; and under these circumstances, the plaintiff being ignorant of J.'s position, the mortgage was not avoided by the Insolvent Act, (sec. 8, sub-s. 1, 3, 4), though its effect might be to delay creditors. Quære, whether it was voidable under sub-sec. 2. *Mathers* v. *Lynch*, 27 Q. B. 244.

Held, that the mortgage in this case, given under circumstances fully set out in 27 Q. B. 244, was good as against creditors, the jury having found it to be bonâ fide; and that notice to the official assignee of the mortgagee's claim was immaterial. *S. C.* 28 Q. B. 354.

Knox being indebted to one Kyle, and Kyle to defendant, it was arranged that defendant should take Knox as his debtor, defendant crediting Kyle with the amount which Knox owed to Kyle, and Kyle discharging Knox; and Knox accordingly gave defendant his note for the amount. This took place within thirty days before Kyle made an assignment in insolvency, and his assignee brought trover for the note, contending that the transaction was avoided by sec. 8, sub-s. 4, of the Insolvent Act of 1864, but Held, not; for the note never was the insolvent's property, and so never passed to the assignee; and even if it was a transfer or payment by Kyle within the act, and so avoided, this would not entitle the plaintiff to the note. *McGregor* v. *Hume*, 28 Q. B. 380.

To avoid a transaction under sub-s. 4 of sec. 8, not only must there be a contemplation of insolvency, but coupled with it a fraudulent preference of the creditor to whom the transfer or payment is made over the other creditors. *McWhirter* v. *Thorne*, 19 C. P. 302.

A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheque. A cheque of A.'s had been dishonoured, and the holder called at A.'s office the same day, and a clerk, in the ordinary course of business, gave the holder B.'s cheque to pay the dishonoured cheque. The next day A. stopped payment:—Held, following McWhirter v. Thorne, 19 C. P. 302, that the transfer was not a fraudulent preference under the Insolvent Act of 1869. *City Bank* v. *Smith*, 20 C. P. 93.

The plaintiff claiming under a chattel mortgage for $2000, as against an execution creditor, called the mortgagor, who swore that when it was given he was not insolvent, having real estate, and a claim against a railway company for which two years previously he had refused $100,000; but there were several unsatisfied judgments and executions against him. He stated also, that the mortgage was given for the price of the property covered by it, household furniture, which he had bought from the plaintiff; and that the terms of his purchase were cash, but being disappointed in getting the money to pay, he had offered either to let the plaintiff take back the furniture or give him a mortgage on it, which latter the plaintiff accepted. The jury having found that this mortgage was given by the mortgagor being insolvent, with intent to give the plaintiff a preference over his other creditors:—Held, that there was evidence to go them of the mortgagor's insolvency, but that if the mortgage was given under the circumstances stated by him, it was not a preference. A new trial was therefore granted. *Hersee* v. *White*, 29 Q. B. 232.

A debtor, being in difficulties, assigned all his property to a creditor, who agreed to pay a composition of 40 cents in the $ within a year. This had been paid, except to defendant, who refused to accept, and issued execution. On an interpleader between the assignee and the defendant, to try the title to the goods assigned, the jury having found the transaction bonâ fide :—Held, affirming the judgment of the County Court, that such assignment was not avoided by the Insolvent Act, sec. 8, for that the statute applies only where proceedings are taken, and as against a person claiming, under it :—Held, also, that the assignment was not invalid under C. S. U. C. c. 26, s. 18. *Squire* v. *Watt*, 29 Q. B. 328.

A bank having cashed a bill of exchange, and taken by way of collateral security a bill of sale of certain goods of the drawer, this transaction was held not invalidated by the drawer's insolvent circumstances at the time. *Newton* v. *The Ontario Bank*, 15 Chy. 283. In appeal from *S. C.*, 13 Chy. 652.

A banking firm in Toronto, having become embarrassed by gold operations in New York, applied to the plaintiffs, to whom they owed $50,000, to advance them $15,000 more; and, in order to obtain the advance, they offered to secure both debts by a mortgage on the real estate of one of the partners, worth $30,000. The plaintiffs agreed, made the advance, and obtained the mortgage. In less than three months afterwards the debtors became insolvent under the act. They were indebted beyond their means of paying at the time of executing the mortgage, but they did not consider themselves so, nor were the mortgagees aware of it. The mortgage was not given from a desire to prefer the mortgagees over other creditors, but solely as a means of obtaining the advance which they thought would enable them to go on with their business and pay all their creditors :—Held, that as respects the antecedent debt the mortgage was valid as against the assignee in insolvency. *Royal Canadian Bank* v. *Kerr*, 17 Chy. 47.

In 1869 C. lent money to N. on an express agreement that it was to be secured by mortgage on certain property; and on the 3rd July following the mortgage was given accordingly; and on the 2nd August the mortgagor became insolvent :—Held, that the mortgage was valid. *Allan* v. *Clarkson*, 17 Chy. 570.

A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied :—Held, not such a preference as rendered the chattel mortgage void. *Risk* v. *Sleeman*, 21 Chy. 250.

Payments.]—Action by the assignee of B. & P., to recover back $190 paid by them to defendant within thirty days next before the assignment, they being then unable to meet their engagements in full, and defendant knowing such inability, or having probable cause for believing it to exist. Plea, on equitable grounds, that before the alleged payment, B. & P., being retail merchants, requested defendant to lend to them for the purpose of carrying on their business, and he did lend, from time to time, various sums of money, upon the express agreement that such moneys should be repaid to defendant out of the proceeds of the daily sales of goods thereafter made by B. & P., and that such proceeds should be held by B. & P. upon trust to repay, and should be charged with and applied in repaying, the defendant the amount lent by him; that at the time of the payments defendant was the creditor of B. & P. to an amount not less than the $190, for moneys advanced upon the said express agreement, and the moneys paid to defendant by B. & P. were paid out of and formed part of the proceeds of said daily sales, and were applied by defendant upon and on account of the moneys lent to defendant upon the said agreement, and not otherwise :—Held, on demurrer, Morrison, J., diss., plea good; for that the agreement between B. & P. and defendant gave defendant an equitable claim and mortgage on their goods, which, under the proviso to sec. 90 of the Insolvent Act of 1869, was a "valuable security given up in consideration of such payment," and which must be restored to defendant before a return of the payment to him could be demanded. Morrison, J., was of opinion that the "valuable security" mentioned in sec. 90 must be a security recognized in law, which would prevail in the hands of a holder against any creditor, which the creditor, when proving, could shew and describe and value, and capable when so valued of being assigned and delivered to the assignee for the estate; and that defendant's equitable claim here was not such a security. *Churcher* v. *Johnston*, 34 Q. B. 328.

See *Re Wallis*, 29 Q. B. 313, p. 441; *Re Lamb*, 4 P. R. 16, p. 439.

Other matters.]—The mere endorsement of renewal notes by a person insolvent is not a violation of sec. 8, sub-s. 7, of the Act of 1864. *In re Jones*, 4 P. R. 317.—C. L. Chamb.—A. Wilson.

A purchase of goods by persons unable to pay their debts in full is not fraudulent within sec. 8, unless such inability is concealed from the creditor with intent to defraud him. *In re Gowratt et al.*, 28 Q. B. 266.

Two partners, before the Insolvency Act, assigned their joint and separate estates together, for the benefit of their joint and separate creditors, pari passu. An assignee under the act, afterwards appointed, filed a bill to set aside these assignments, on the ground that they put the separate creditors of each on an equality with the joint creditors in respect of the joint property, and of the separate property of the other partner, was a fraud on the joint creditors. But it appearing that both the separate estates were solvent, and that the equality complained of was an advantage to the joint creditors, the bill was dismissed with costs. *McDonald* v. *McCallum*, 11 Chy. 469.

The Act of 1864 does not invalidate conveyances previously executed, and valid when executed. *Gordon* v. *Young*, 12 Chy. 318.

The insolvent had conveyed by way of settlement to his intended wife a lot of land on which he had commenced a house, but which was not completed until after the marriage. On a bill filed by the assignee in insolvency, the

declared that for so much of the building as was completed after the marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Chy. 156.

(b) *Transactions Avoided.*

S. on the 25th November, 1864, agreed to deliver certain timber to plaintiff at T. in New York, in May, June, July, and August, 1865, $1500 payable down, the same sum on the 15th of January, 1st of March, and 1st of April, 1865, and the balance on delivery at T. On the 14th December following he assigned the timber to L., as security for certain advances in goods which L. agreed to make to enable him to get it out, and on the 27th of February, 1865, formally delivered it to L.'s son, who, after consulting with L., wrote to the plaintiff that S. desired to deliver the timber to the plaintiff, but was in difficulty; that some of his creditors refused to wait until he could complete his contract, and had commenced actions, and recommending that the plaintiff should anticipate their action by taking delivery before they could interfere. On the 4th of March the plaintiff accordingly paid L.'s claim, and took a delivery. On the 3rd of March L. had served a writ on S., telling him it was to secure precedence; and an execution was obtained in this suit, under which the sheriff seized. On the 14th of April S. made an assignment under the Insolvent Act of 1864 to the defendant. He admitted that he was insolvent on the 11th of March, and long previous, though he said he did not then know it, and had not informed the plaintiff of it:—Semble, that these facts shewed the delivery to the plaintiff to be a transfer by S., "in contemplation of insolvency," the effect of which was to give him "an unjust preference over the other creditors," and that it was therefore void under sec. 8, sub-s. 4 of the Insolvent Act of 1864. *Adams* v. *McCall*, 25 C. P. 219.

A person being insolvent sold his property to a creditor, the consideration being a pre-existing debt and a sum in addition sufficient to make up the price agreed upon as the value of the property sold; the amount so received by the debtor was by him paid over, with the knowledge of the purchaser, to another creditor; and three days after this sale the debtor made an assignment under the Insolvent Act. On a bill filed by the creditor, the sale was set aside and a re-sale of the property ordered, the proceeds to be applied in payment of the plaintiff's claim, and the residue, if any, to be paid over to the assignee in insolvency. *Coates* v. *Joslin*, 12 Chy. 524.

An assignment for the benefit of creditors not made in accordance with the act, is an act of insolvency, and void as against an execution creditor, or the official assignee appointed in compulsory proceedings under that act after such proceedings are taken, if finally sustained. *Wilson* v. *Cramp*, 11 Chy. 444, approved of. *Thorne* v. *Torrance*, 16 C. P. 445; affirmed in appeal, 18 C. P. 29.

The mere fact of a person in insolvent circumstances not defending one action and delaying another, is not illegal, by the common law, but under the Insolvent Act it is fraud for an insolvent to cause his goods to be taken in execution to the prejudice of his general creditors, even though the preferred claim be a just one. It was not decided whether this would avoid the judgment; but if not, it was nevertheless an act of fraud for which some punishment should be awarded, though not necessarily to the extent of a perpetual refusal of the insolvent's discharge. *In re Jones*, 4 P. R. 317.—C. L. Chamb. —A. Wilson.

On the 18th of October the insolvents sold goods to one C., taking his note for the price, which on the same day was taken by C., and by the defendant, and one of the insolvents, to a bank, and there left to be applied in payment of notes made by the insolvents and endorsed by defendant. On the 20th the insolvents made a voluntary assignment, being pressed to do so by threats of compulsory liquidation:—Held, that the transaction being within thirty days before the assignment, was a transfer to defendant by way of payment, giving him an unjust preference, and therefore void under sec. 8, sub-s. 1; that there was evidence also that it was made by the insolvents when unable to pay, with a person knowing such inability, and therefore made with intent to defraud their creditors; and that it was also a payment to defendant under sub-s. 5: —Held, also, Morrison, J., dubitante, that under sub-ss. 4 and 5 the assignee might recover in trover for the goods sold, though before his title accrued the note had been discounted and the proceeds applied on defendant's endorsations. *Churcher* v. *Cousins*, 28 Q. B. 540.

Held, that a payment by an insolvent after attachment against him, on account of a draft discounted by defendants for him, and dishonoured by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from him. *Roe* v. *Royal Canadian Bank*, 19 C. P. 34; followed in *Roe* v. *Bank of British North America*, 20 C. P. 351.

A conveyance void against creditors was made in December, 1868, through a third party, to the owner's wife; the husband in November, 1869, became insolvent, and in June, 1870, joined his wife in a sale of the property to a purchaser without notice; a conveyance to the purchaser was executed and registered, and the purchaser gave the wife a mortgage for part of the purchase money, and paid her the residue in cash. On a bill by the assignee in insolvency he was declared entitled to the mortgage, and to any of the money which still remained in the wife's hands, and to any property, real or personal, which she had purchased with the residue, and still owned; but the court refused to direct an enquiry whether she had separate estate, in order to charge the same with any of the residue which had been spent by her, or with the costs of the suit. *Saunders* v. *Stull*, 18 Chy. 590.

Two mortgages were created by a debtor in favour of a creditor, whose claim consisted of

promissory notes then current. It appeared that the debtor was in insolvent circumstances, and the court considered that both the debtor and creditor contemplated the debtor going into insolvency, which he did shortly afterwards. On a bill filed by the assignee in insolvency to set aside these mortgages, the court held them void as an "unjust preference" under the Insolvent Acts of 1864 and 1869. *Payne* v. *Hendry*, 20 Chy. 142.

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8. *Composition and Discharge.*

(a) *Grounds for Refusing Discharge.*

Giving up part of stock to a creditor—Evidence of fraudulent preference—Discharge refused—Conditional discharge—Effect of insolvent not keeping proper books of account. *In re Beare*, 3 L. J. N. S. 294.—C. C.—Jones.

The judge in insolvency refused an insolvent his discharge on the grounds, 1. That he had made a preferential assignment in 1857. 2. Had kept no books of account shewing receipts and disbursements of cash, and other books suitable for his trade:—Held, that the first ground was not sustainable, for there was no law against it when made; and that as to the latter, considering that some three months only had intervened between the Act of 1864 and the application for discharge, and the inconsiderable nature of his business, the insolvent should not have been so severely dealt with, though this was wholly in the discretion of the judge. But as the judge, though doubtful as to it, had not enquired into the bona fides of the assignment of 1857, and the disposition of his property under it, the case was referred back to him for re-consideration on these points. *In re Parr*, 17 C. P. 621.

Semble, that such assignment, being valid when made, could be impeached, under sub-s. 6 of sec. 9 of the Insolvent Act, only upon the ground that by it the insolvent had fraudulently retained and concealed some portion of his estate, or had been guilty of evasion, &c., in his examination as to his effects. *Ib.*

Quære, whether fraud committed before the act is fraud within the meaning of the act, so as to be a valid ground of opposition to a discharge. *Ib.*

It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as was considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The county judge granted a discharge suspensively, to take effect four months after the order. *In re Lamb*, 4 P. R. 16.—C. L. Chamb.—Hagarty.

Upon appeal from this order by a creditor, the judge in chambers thought that the judge below had acted with extreme leniency, and though he would not interfere with the order, dismissed the appeal, but without costs. *Ib.*

Remarks upon the breach of duty in not keeping proper books of account. *Ib.*

The requirements of the act on debtors asking for their discharge should be peremptorily insisted on. *Ib.*

Held, that the facts set forth in this case though unfavourable to the insolvent, were distinguishable from acts or other misconduct constituting fraud, and that unless the latter be shewn, the insolvent is entitled to the benefit of the statute. *In re Smith*, 4 P. R. 89.—C. L. Chamb.—A. Wilson.

An insolvent had the possibility of an interest under a will (the construction of which was incidentally considered for the purpose of the appeal) which, however, was omitted from his schedule of assets, as being of no value:—Held, that this omission was not an act of fraud. *In re Jones*, 4 P. R. 317.—C. L. Chamb.—A. Wilson.

The mere fact of a person in insolvent circumstances not defending one action, and defending and thus delaying another, is not illegal by the common law; but under the insolvent act it is fraud for an insolvent to cause his goods to be taken in execution to the prejudice of his general creditors, even though the preferred claim be a just one. It was not decided whether this would avoid the judgment; but if not, it was nevertheless an act of fraud for which some punishment should be awarded, though not necessarily to the extent of a perpetual refusal of the insolvent's discharge, *Ib.*

The mere endorsement of renewal notes by a person in insolvent circumstances is not a violation of sec. 8, sub-s. 7, of the Act of 1864. *Ib.*

Gambling by a person who subsequently claims the benefit of the act, is not fraud within the meaning of the Act of 1864; and quære, whether gambling is fraud at all under that act. *Ib.*

Discharge refused, because assignment not made to the assignee where insolvent carried on business, and was not in duplicate, and insolvent had kept no proper accounts. *In re Sullivan*, 5 L. J. N. S. 71.—C. C.—Sherwood.

A purchase of goods by persons unable to pay their debts in full is not fraudulent within sec. 8, or a reason for refusing the discharge, unless such inability is concealed from the creditor with intent to defraud him. *In re Garrett et al.*, 28 Q. B. 266.

It appeared that the assignment was made on the 10th June, 1868: that on the 15th April previous the insolvents had paid to their bankers two promissory notes, made by them in July and August, 1867, at three months, for $2000. The father in his examination swore that these notes were given by the insolvents for their respective private debts bonâ fide due to him for money lent and paid, and for their board between 1863 and 1866; and that he had no knowledge of their business until the 25th April, 1868, when he was asked by one of them for an advance of $2000, which he refused, as being satisfied with the statement of their affairs then produced to him. His statement was confirmed by the insolvents. The learned County Court judge upon this evidence decided that the payments to the father were preferential, and made the discharge of the insolvents with three years conditional upon their payment of the amount so paid. Upon appeal:—Held, That the evidence could not be assumed to be untrue, and that the payments therefore could not be treated as preferential. 2. That if they were otherwise, the order could not be up-

for the statute only authorizes conditions within the power of the insolvent to comply with. *In re Wallis et al.*, 29 Q. B. 313.

Fraud in contracting debts before the act, (1864), is not to be excluded from consideration on an application to confirm the discharge. *In re Owens*, 12 Chy. 560.

Where a trader, all whose property was heavily mortgaged, and who had large over-due debts which he could not pay, obtained credit from Montreal merchants, concealing his true position, falsely alleging that he was worth $4,000 more than he owed, and that he had no engagements he could not meet; this was held such fraud as disentitled him to his discharge. *Ib.*

A trader, after discovering that he could not pay in full, continued his business, in the hope, which was not shewn to have been absurd or unreasonable, that he would thereby be able to do so; and in the course of the business so continued contracted some new debts; but was unsuccessful, and found it necessary to assign under the act:—Held, that he was not thereby disentitled to his discharge. *In re Holt et al.*, 13 Chy. 568.

In such a case it may or may not be his duty to discontinue his trade, according to circumstances; continuing may be a fraud but is not necessarily so. *Ib.*

The other provisions of the act being complied with, a discharge cannot be refused because of the neglect of the assignee to give notice, as required by sec. 11, sub-s. 1, of the Act of 1864, or because the insolvent had no estate.—*Re Thomas*, 15 Chy. 196.

The absence of any satisfactory statement how it came that a credit balance of $15,000 a short time before the insolvency was turned into a debit balance of nearly $13,000; the loan of $17,000 by the insolvent to his brother, to carry on a business which failed, and which was carried on without capital, the receipt of $1,250 by the insolvent a few months before his insolvency without any reasonable account of what had become of it; were considered to be circumstances which shewed that the insolvent was not entitled to his final certificate. *Hood* v. *Dodds*, 19 Chy. 639.

(b) *Effect of Discharge.*

Debts not mentioned in Schedule.—A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act. If it did, a party applying for protection from arrest should shew clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there. *In re Mackay et al.* v. *Goodson*, 27 Q. B. 268.

Plea to a promissory note, an absolute discharge duly obtained under the Act of 1864, from the judge, from plaintiff's and all other debts. Replication, that plaintiff's name, as a creditor, and the said note and cause of action, were not mentioned in defendant's schedule annexed to the assignment, nor in any supplementary schedule, as required by law, and the debt was never proved against the estate:—Held, on demurrer, replication good: that it is still necessary under the Insolvent Acts to have a schedule of creditors prepared or annexed to the deed of assignment; and that the effect of the discharge obtained under the Insolvent Act of 1864 by an insolvent, is limited to the debts and causes of action set forth in his schedule, either originally or by supplement. *King* v. *Smith*, 19 C. P. 319.

To an action of covenant in a mortgage to pay money, defendant pleaded that, becoming insolvent after execution of the mortgage, he made an assignment: that plaintiff's claim was known as that of the "Wood Estate," and was so described in the schedule submitted to the assignee and creditors: that the plaintiff resided abroad, and was represented in Canada by M., who had notice of the appointment of said assignee: that on the expiry of a year defendant obtained his discharge absolutely, by which he was discharged from plaintiff's claim. Replication, that the order for discharge was made before 1st September, 1869, and that the plaintiff's name was not mentioned as creditor in any schedule, and his claim was never proved against defendant's estate. Rejoinder, that plaintiff's claim was known as that of the "Wood Estate" (plaintiff representing and being entitled to said estate) and was so entered in the schedule filed by defendant with assignee, and that the plaintiff was represented by M., who had notice, &c.:—Held, on demurrer, rejoinder good. King *v.* Smith, 19 C. P. 319, distinguished. *Farrell* v. *O'Neill*, 22 C. P. 31.

To an action on a guarantee, defendant pleaded his insolvency and issue of an attachment, and that, not having procured assent of creditors, he did, after a year from date of issue of attachment, apply to a judge for a discharge, which was absolutely granted after hearing defendant and creditors. Replication, that defendant, before making of order of discharge, did not schedule plaintiff's claim, nor did he by a supplementary or any list of creditors, previous to making of said order, set forth plaintiff's claim, which was not, in fact, ever furnished to the assignee or proved against defendant's estate:—Held, following King *v.* Smith, 19 C. P. 319, and reversing the judgment of the County Court, replication good. *Palmer* v. *Baker*, 22 C. P. 59.

To an action for attorney's costs defendant pleaded his discharge under the Act of 1864, alleging that the plaintiff's name and residence, with a statement of defendant's indebtedness to him being for a balance of costs in two suits specified, were stated in his schedule filed, and that he was not aware before obtaining his discharge of the exact amount of such indebtedness. The plaintiff replied that his name was not mentioned in the schedule for any sum or amount whatever:—Held, on demurrer, that the debt due to the plaintiff was, under the circumstances, sufficiently stated in the schedule. *Cameron* v. *Holland*, 29 Q. B. 506.

The statute (Act of 1864) is substantially complied with if the debt is set out in such a manner as cannot mislead, and leaves no doubt as to the debt referred to, and the amount is capable of being ascertained by the creditor. *Ib.*

A creditor, although not named in the schedule annexed to the assignment, may oppose the con-

firmation of discharge. The insolvent should be present when application is made for confirmation. *In re Stevenson*, 1 L. J. N. S. 52.—C. C.—Logie.

Insolvency—Composition and discharge—Unnecessary for creditors to prove debts to enable them to execute deed of—Schedules conclusive—Confirmation refused. *In re Langs*, 4 L. J. N. S. 283.—C. C.—Wilson.

See *Burrowes et al.* v. *DeBlaquiere*, 34 Q. B., 498, p. 425.

When obtained by Fraud.—To a plea of discharge, confirmed by the judge, the plaintiff replied a corrupt agreement between the insolvent and D. & Co., parties to the deed of composition and discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition, for which the insolvent gave them his note; and that the plaintiff and other creditors had no knowledge of such agreement until after the confirmation:—Held, a good answer, the confirmation not being made conclusive by the act under such circumstances. *Thompson* v. *Rutherford*, 27 Q. B. 205.

In an action on a promissory note, with a plea of discharge under the Insolvency Act, and replication that the discharge was obtained by fraud, inasmuch as defendant had concealed from the assignee certain promissory notes, it appeared from his own evidence that defendant, several months before his assignment, which was voluntary, desiring to raise money on his farm, one-fifth of which belonged to his wife, the value of her interest not being stated, gave his wife at least $300 of notes of a third person, she otherwise refusing to consent to a mortgage of the farm. It further appeared that defendant had attempted to collect the notes, as he alleged, for his wife, and that the mortgage had been nearly paid off, but by what means was not shewn:—Held, that the plaintiff was on this evidence entitled to recover. *Golloghy* v. *Graham*, 22 C. P. 226.

Where an insolvent before the meeting of his creditors concealed a portion of his stock:—Held, (under the Insolvent Act of 1864) that his discharge was thereby avoided, and that it was not the less a fraud because he had valued his assets at a sum sufficient to cover the goods so concealed. The plaintiff, therefore, though he had signed a deed of composition and discharge, and the discharge had been confirmed, was held entitled to recover for his debt. *McLean* v. *McLellan*, 29 Q. B. 548.

See *Foster* v. *Taylor*, 31 Q. B. 24, p. 454.

(c) *Deed of Composition.*

Declaration, on a joint and several note made by defendants payable to plaintiff. Plea, (by two defendants) that the note was made by them as sureties for the other defendant, with notice thereof to plaintiff, who took the same upon the express agreement that they should be liable thereon only as such sureties: that the plaintiff, while holder of said note, without their knowledge or consent, after the accrual of the alleged claim, and before action, by deed released the other defendant, the said release being headed as follows: "Insolvent Act of 1864, &c." The release, also, in the body of it, referred to the "Insolvent Act of 1864:"—Held, plea bad; for the court was bound to look upon the plea as setting up a discharge under the Insolvent Act, and by s. 9, sub-s. 4 of that act, the plaintiff's rights were expressly preserved to him against all other persons liable for or with the insolvent:—Held, also, that if it was desired to rely on the release as valid at common law, it should have been accompanied with such averments as would have shewn it to be operative, or it should not have been set out in hæc verba, but its legal effect only should have been stated, and its efficacy left to be established by such facts as it was contended contributed thereto. Semble, that a creditor under a composition deed, either under the Insolvent Act or otherwise, cannot give a general release, and subscribe for a particular sum, as being apparently his whole claim, and afterwards advance other demands as not included in this discharge, for this would be a fraud on the other creditors. *Fowler* v. *Perrin et al.*, 16 C. P. 258.

On 2nd May, 1867, defendant B. made an assignment under the Insolvent Acts; and on the 27th, a deed of composition and discharge was executed by B. and by R. (who had been sued as B.'s surety) and other creditors, as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th February, 1868, plaintiff obtained judgment. On 13th February, R. took an assignment of the judgment from the plaintiff, paying part only of the judgment debt. On an application by defendant B. to have his name struck out of the proceedings and the judgment stayed as against him, on the ground that the plaintiff was a party to the deed of composition and discharge:—Held, that B. was entitled to this relief as well against the plaintiff as against R., and that he had accounted for his delay by a reasonable supposition that the plaintiff was proceeding on the judgment to recover the balance of the debt from defendant R. Semble, that the assignee of a judgment can not enforce it, if his assignor could not. *Martin* v. *Brumell et al.*, 4 P. R. 229.—C. L. Chamb.—A. Wilson.

To an action on a promissory note and on the common money counts, defendant pleaded, 1. That after making the note and incurring the liability he became insolvent, and a deed of composition and discharge, under the Insolvent Act of 1869, was entered into and executed by a majority of creditors, whereby defendant was discharged, which discharge was confirmed by the County Court judge; 2. That after making the note defendant became insolvent, assigned to an official assignee, and duly set forth plaintiff's claim, which plaintiff duly proved, after which a majority in number of creditors consented in writing to a discharge, which was duly confirmed, &c. Replication, to first plea, setting out the deed of composition, acknowledging the receipt from assignee of defendant's estate of certain promissory notes, indorsed, for certain amounts, and payable at certain dates, and accepting same in payment, and stating that the creditors therein named, (of whom plaintiff was not one) accordingly discharged him, and authorized the restoration of the estate to him. Replication to second plea, that the alleged consent in writing was the deed of composition and discharge in the above replication set out, and that, in pursuance of said deed, said assign-

restored to defendant his estate. Replication, on equitable grounds, that the composition was not made in good faith, nor for as large an amount as it should have been, as defendant well knew:—Held, on demurrer, that the replications to the 1st and 2nd pleas were good, the deed of composition as set out being insufficient, and that the first plea was bad; that the 2nd plea was not open to the objections taken to it, set out in the case, though, quære, whether good in all particulars against objections not taken:—Held, also, that the equitable replication was bad. *Shaw* v. *Massie*, 21 C. P. 266.

To an action upon notes by the payee against the maker the defendant pleaded that after giving the note he made a voluntary assignment for [illegible]ency, and thereby obtained a discharge by [illegible]f composition and discharge duly e[illegible] under the Insolvent Act of 1869, in the schedule to which the plaintiff appeared as a creditor. The plaintiff replied, setting out the composition deed verbatim. It purported to be made between defendant of the second part, and twenty-eight persons of the first part, described as "all the creditors of said insolvent constituting more than the majority in number of those of the creditors of said insolvent who are respectively creditors of said insolvent for sums of $100 and upwards, and representing more than three-fourths in value of their liabilities which are subject to be computed in ascertaining the proportion in number and value of his creditors who have executed these presents." From this it appeared that three creditors were named in the schedule for an aggregate amount of $1,276, who were not named in the deed as parties, though two of them had executed it. The replication was demurred to, and exceptions taken to the [illegible]:—Held, that the plea was bad in not [illegible] the deed was made for the benefit [illegible]tors; and that the replication to it, shewing that the deed was in fact not so made, and that it had not the assent of those creditors who represented three fourths of the value of his liabilities which were subject to be computed for that purpose, was good:—Held, also, that the plea was defective in not shewing that defendant was a trader; but that the replication, setting out the deed in which he was described a merchant, cured this defect:—Held, also, that it was not necessary here, though in some cases it would be, to aver that the parties to the deed were creditors within the meaning of the act, or to negative the plaintiff being a special creditor, appearing sufficiently from the nature of the claim sued for that he was not. *Dredge* v. *Watson*, 33 Q. B. 165.

It is not necessary that an assignee in insolvency should be a party to a deed of composition and discharge. *Ib.*

G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county judge on the 2nd December, 1868, but the confirmation was reversed in this court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the judge, and without re-filing it; and they then set it up as a defence to this action previously brought on a note:—Held, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence (set out in the case) shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts. Per Richards, C. J. The deed was invalid also, because not properly executed by the insolvents. Per Wilson, J. Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under sec. 9, sub-s. 2 of the Act of 1864, were necessary after the execution by the insolvents, and for want of this, it was ineffectual:—Held, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it:—Held, also, that the plaintiff was not prevented, by having proved his claim before the assignee, from going on with this action. *Allan* v. *Garratt et al.*, 30 Q. B. 165.

Held, 1. That a deed of composition and discharge under sec. 9 of the Insolvent Act of 1864, purporting to be between the majority of the creditors of $100 and upwards of the first part, and the insolvents of the second part, is valid, though the *non-assenting* creditors were not specially made parties to the deed. 2. A creditor who has accepted the terms of a deed of composition cannot afterwards contest the confirmation of the discharge. 3. The debt of a secured creditor who has elected to accept his security in full of his claim, and obtained the consent of the assignee to such election, is not to be estimated in considering the amount of indebtedness. *In re Lawson et al.*, 5 L. J. N. S. 232.—C. C.—Logie.

A deed of composition and discharge under sec. 8, sub-s. 4, of the Act of 1864, purporting to be between the insolvents of the first part, and a majority of the creditors of $100 and upwards, of the second part, was Held invalid, because not executed by the insolvents. *In re Garratt et al.*, 28 Q. B. 266.

Such a deed to be operative, must provide for the separate creditors of each partner, as well as those of the firm. *Ib.*

Held, on exceptions to the plea set out in the report, that a deed of composition and discharge, made without any proceedings in insolvency (before or after), without any assignee being appointed, and apparently wholly outside the insolvent court, cannot be a bar to non-assenting creditors. *Green* v. *Swan*, 22 C. P. 307.

In August, 1872, the plaintiff issued a fi. fa. against defendant's lands, a portion of which defendant, in November, sold to one K. On the 1st of May, 1873, defendant made an assignment in insolvency, and on the 31st obtained a deed of composition and discharge from the necessary proportion of his creditors. On the 12th of August this was confirmed by the county judge, and on the 15th of August defendant's estate was re-conveyed to him by the assignee. The plaintiff was one of the duly scheduled creditors, but took no part in the insolvency proceedings, and although requested to remove his writ re-

fused to do so, and advertised the lands for sale, contending that the sale to K. was a withdrawal of those lands from the defendant's assets, so that they never passed to the assignee:—Held that the plaintiff's debt was discharged by the insolvency proceedings: that the fact of the sale to K. could not alter the plaintiff's position; and that his only remedy was under the composition and discharge. The proceedings on the fi. fa. after the assignment were therefore set aside. *Davidson* v. *Perry*, 23 C. P. 346.

An insolvent having compounded with his creditors and had his goods restored to him, resumed business, with the knowledge of his assignees and creditors, and contracted new debts. It was subsequently discovered that he had been guilty of a fraud which avoided his discharge, whereupon he absconded, and an attachment, under the Insolvent Act of 1869, was sued out against him by his subsequent creditors:—Held, that they were entitled to be paid out of his assets in priority to the former creditors. *Buchanan* v. *Smith*, 17 Chy. 208; affirmed on rehearing, 18 Chy. 41.

In such a case the assignee, as representing the former creditors, was ordered to pay the costs of a suit brought by the subsequent creditors to enforce their rights. *S. C.* 18 Chy. 41.

Declaration on the common counts. Plea, that the plaintiff before action made an assignment under the Insolvent Act of 1869, to an official assignee, in whom the causes of action became vested. Replication, that before action the assignee, in conformity with a deed of composition and discharge duly executed, transferred to the plaintiff all the estate, &c., theretofore belonging to the plaintiff and then vested in the assignee. Rejoinder, that after the deposit of the deed of composition and discharge with the assignee by the plaintiff, the assignee did not immediately give notice of such deposit by advertisement as required by the act:—Held, on demurrer, rejoinder good, for by the statute the giving of such notice is a condition precedent to the reconveyance by the assignee, which without it does not bind non-assenting creditors. Held, also, replication good, for under the averment that the assignee *duly* reconveyed, the plaintiff would be bound to prove such notice, in the absence of a confirmation by the judge. *Nicholson* v. *Gunn*, 35 Q. B. 7.

(d) *Other Cases.*

The provisions of sec. 11 of the Act of 1864, with reference to notices, do not apply to an insolvent who has a consent from his creditors to his discharge, or has procured the execution by the requisite number of his creditors of a deed of composition and discharge, and who is applying for a confirmation of discharge. Sec. 9, sub-ss. 6 and 10, point out all that is to be done by the insolvent, to enable him to bring his application before the judge. *In re Waddell*, 2 L. J. N. S. 242.—C. C.—Logie; C. L. Chamb.—Draper.

On an application for a discharge under sec. 9, sub-s. 10, of the Act of 1864:—Held, unnecessary to mail notices to creditors under sec. 11, sub-s. 1. *In re Starling et al.*, 2 L. J. N. S. 303.—C. C.—Sherwood.

On application for a discharge:—Held, on the facts set out, that the insolvent had an estate to be administered under the Insolvent Act. Quære, whether, if there had been no estate, proceedings could have been taken by the debtor. —*In re Smith*, 4 P. R. 89.—Chamb.—A. Wilson.

Notice of application for discharge in Canada Gazette, and not in Local Gazette:—Held sufficient. *In re Huffman*. 5 L. J. N. S. 71.—C. C. —Sherwood.

Held, on exceptions to the plea set out in the report of this case, that a deed of composition and discharge made without any proceedings in insolvency (before or after,) without any assignee being appointed, and apparently wholly outside the insolvent court, cannot be a bar to non-assenting creditors. *Green* v. *Swan*, 22 C. P. 307.

An antecedent debt in respect of which an insolvent has duly received his discharge under the Insolvent Acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it. *Austin* v. *Gordon*, 32 Q. B. 621.

Held, following Yarrington *v.* Lyon, 12 Chy. 308, that a voluntary assignment to an official assignee under the Act of 1864, sec. 2, is not valid when the assignee has refused to accept or act under it; and in such a case a discharge obtained by the insolvent could have no effect. *Becher* v. *Blackburn*, 23 C. P. 207.

On an application for discharge, the insolvent is entitled to read his own examination, though taken at the instance of a friendly creditor; and the only question is, as to the weight to be attached to it. *In re Holt and Gray*, 13 Chy. 568.

Where creditors are called upon to accept a composition, they are entitled to know where the goods and money entrusted to the debtor are gone, and to what causes the loss is to be attributed. *Hood* v. *Dodds*, 19 Chy. 639.

An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts. *Ib.*

See *In re McRae*, 15 Chy. 408, p. 426. *Dickinson* v. *Bunnell*, 19 C. P. 216, p. 429.

See II. p. 390.

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9. *Procedure.*

(a) *Appeal.*

A demand for wages was made as a preferred claim, to an assignee. The creditors at a meeting passed a resolution authorizing the assignee to pay all claims for wages, but the assignee refused payment of this claim as made. At this time no dividend sheet had been prepared. A summons was subsequently issued by the county judge, calling on the assignee to shew cause why he should not pay the claim, and, the assignee not appearing, evidence was taken before the judge, and an order made for the payment forthwith, with costs, of a sum less than the original demand. The assignees afterwards paid the claim as reduced, but refused to pay any costs; upon which the judge's order was made a rule of court, and execution issued thereupon against the goods of the assignee. Upon an

application for a writ of prohibition to prohibit further proceedings in the County Court on the writs or orders, &c.:—Held, 1. That the county judge had no power to adjudicate upon the claim until it had been decided upon by the assignee, and in this case there was no decision of the assignee to appeal from. *In re Cleghorn and the Judge of the County of Elgin, and Munn*, 2 L. J. N. S. 133.—C. L. Chamb.—Richards.

The Insolvent Acts of 1864 & 1865, do not require the petition in appeal to be signed by the insolvent or his attorney. Notice must be served on the assignee of the day for presenting the petition to the court. The petition must be addressed to the court, not to the Chief Justice; but this irregularity may probably be corrected. The neglect by the assignee to file the papers on or before the day of presenting the petition is no reason for rejecting the appeal, though it may be for enlarging the hearing, and proceeding against the assignee for his neglect or contempt. Points not taken in the court below are not open to parties in appeal. Semble, that the more proper mode of raising such technical objections is to move a rule to set the proceedings aside, instead of urging the objections on the argument of the merits. *In re Parr*, 17 C. P. 621.

On an application to a judge in chambers for the allowance of an appeal from the decision of the judge in insolvency, an order was made referring the matter to this court, without directing a special case to be settled between the parties, but no objection was made on this ground:—Held, that this was only an irregularity which might be waived, and if not waived ought to have been objected to by a rule to set aside the proceedings on that ground, in accordance with In re Parr, 17 C. P. 621; and that as the petition of appeal had been filed by permission of the court, and the appellant authorized to serve notice of hearing of appeal for a day named, the case was properly before the court for adjudication. *In re Sharpe*, 20 C. P. 82.

An insolvent had been refused an absolute discharge by a county judge, from whose decision he appealed. The judge gave his reasons in writing, and concluded, "I must refuse his discharge absolutely, and must deny the prayer," &c.:—Held, an *order* which could be appealed from, no formal order having been drawn up and signed. *In re Jones*, 4 P. R. 317.—C. L. Chamb.—A. Wilson.

Notice of application for allowance of an appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days. *Re Owens*, 12 Chy. 446.

Where the notice was served in time, but named a day for the application which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable. *Ib.*

Objections to the security on an appeal from a County Court judge, under the Insolvent Act, 1864, are to be made to such judge. *S. C. Ib.* 560.

An application for a discharge was dismissed by the county judge on 17th September. On the 23rd the insolvent gave notice of an intended application on the 24th to a judge at Osgoode Hall for leave to appeal:—Held, that this notice was clearly insufficient, but on the authority of Re Owens, 12 Chy. 446 (which was, however, doubted), and in favour of the liberty of a subject, the notice was amended. Quære, as to the materials that should be before the judge on such an application. *In re Davidson*, 4 P. R. 153.—C. L. Chamb.—A. Wilson.

E., living at Brantford, and James and John G., living in Dundas, carried on business at Brantford under the name of E. & Co.; and James and John G. had also a separate business at Dundas, in which E. had no interest. On the 14th December, 1869, James and John G., as individuals, and as partners in the firm of James and John G., and as individual members of the firm of E. & Co., executed an assignment under the Insolvent Act of 1869, in Wentworth, of their and each of their estates to one F., an official assignee in that county. On the following day E. made an assignment of his estate, under the act, to an interim assignee in the county of Brant, and F. was afterwards appointed assignee by the creditors. K. & Co., creditors of E. & Co., filed a claim in Brant under E.'s assignment, which other creditors objected to, and the assignee, having heard the parties, made his award:—Held, that the county judge of Brant had jurisdiction to hear an appeal against such award, although James and John G., the co-partners of E., had not joined in his assignment; and a mandamus was ordered directing him to hear and determine such appeal. *In re McKenzie et al.*, 31 Q. B. 1.

When an insolvent, who has appealed from the decision of a county judge refusing to set aside an attachment against him, dies during the pendency of this appeal, and no personal representative has been appointed, the appeal fails. *Lavorie* v. *McMahon*, 6 P. R. 9.—C. L. Chamb. —Galt.

The county judge has a general jurisdiction in matters of insolvency, and may sanction a suit in the name of the assignee for the benefit of the estate, notwithstanding a majority, both in number and value, of the creditors pass a resolution forbidding further proceedings. *In re Lambe*, 13 Chy. 391.

The assignee appealed from such an order in the interest of the creditors, whose transactions the suit impeached for fraud, and the appeal was dismissed with costs; the court observing that it was not his duty to appeal from such an order at the expense of the estate. *Ib.*

Where the affidavits on which an allowance of an appeal from a County Court judge was sought were not intituled in any court, they were not allowed to be read. *In re Sharpe*, 2 Chy. Chamb. 67.—VanKoughnet.

An objection that no written order of discharge (against which it was sought to appeal) was produced, was considered fatal. *Ib.*

Where the appellant was described as Wm. Darling, and the opposing creditors appeared to be Wm. Darling & Co., it was considered ground for refusing to entertain the appeal. *Ib.*

An appellant in insolvency must apply promptly. *Ib.*

The decision of a County Court judge on an application by an insolvent for his discharge

from imprisonment, is appealable. *Hood* v. *Dodds*, 19 Chy. 639.

A petition of appeal from the decision of a County Court judge, acting in insolvency, need not set out all the evidence, documents and materials used before the judge. What is needed is, that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceedings appealed from, and the materials to be used on the argument of the appeal. *Ib.*

An order in insolvency was made on the 24th day of December. The fifth day thereafter fell on a Sunday:—Held, that service of notice of appeal on the Monday following was in time. *Ib.*

It is not necessary that the security to be given on an appeal in insolvency should be executed in presence of a judge. *Ib.*

See *In re Botsford*, 22 C. P. 65, p. 420; *In re Chaffey*, 30 Q. B. 64, p. 423.

(b) *Other Matters.*

A witness appearing upon an order granted by the judge under sec. 10, sub-s. 4, of the Act of 1864, is not bound to be sworn until his expenses are paid. *Worthington* v. *Taylor*, 10 L. J. 304.—C. C.—Logie.

The insolvent who appears by virtue of the same order, is not entitled to claim his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in subs. 1 of s. 10. *Ib.*

A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents, by alleging that he is a creditor. *In re Hamilton*, 1 L. J. N. S. 52.—C. C.—Logie.

A disagreement having arisen between the majority in number and the majority in value of the creditors, a motion to adjourn, under sec. 11, sub-s. 2, of the act of 1864, was opposed by the latter; whereupon application was made to the county judge to dispose of the matter, who ordered that the majority in number might proceed in Chancery, in the assignee's name, against the majority in value: Semble, that neither party could legally oppose the adjournment, if insisted upon by the other, as the objecting party might thus prevent the judge from adjudicating between them, as intended by the act; but that such adjournment should have followed as of course, and upon a similar division of opinion the judge should have decided between the two sets of resolutions, and might then have directed the assignee to proceed in Chancery, or otherwise contest the claim of those creditors whose debt was disputed. But held, that the judge had power to make the order in question, and it was not, therefore, advisable to interfere with it. *In re Lamb*, 17 C. P. 173.

Under the Insolvent Acts of this province a creditor, whose debt is immatured, may commence proceedings against his debtor who is insolvent, in like manner as he might have done if his debt had been over-due at the time. *In re Moore*, 18 C. P. 446.

An insolvent cannot legally be committed under sec. 29 of 29 Vict. c. 18, without an opportunity of shewing cause, and it should appear in the order of committal that he has had notice of the order for delivery, &c., for non-compliance of which committal is asked. *In re Hicks*, 5 P. R. 88.—C. L. Chamb.—Hagarty. See *McInnes* v. *Davidson*, 4 P. R. 183.

A bill was filed by assignees under the act to set aside a settlement by the insolvent, on the marriage of his daughter, with a secret trust in his own favour. The bill charged that the insolvent defendant was in the enjoyment of the property, and prayed costs against all the defendants. A demurrer by the insolvent, on the ground that he was not a proper party, was allowed. *Wilson* v. *Chisholm*, 11 Chy. 471.

Certain funds had come to the hand of an official assignee, but were payable to encumbrancers under claims arising before the insolvency; the judge in insolvency under the Act of 1864, had ordered certain costs of the insolvent to be paid thereout. On appeal such order was reversed. *Re Stewart*, 3 Chy. Chamb. 95.—Mowat.

See *Allan* v. *Garratt*, 30 Q. B. 165, ... *Nicholson* v. *Gunn*, 35 Q. B. 7, p. 447 ... re *Atkins*, 2 L. J. N. S. 25, p. 419; *O'Reilly* v. *Rose*, 18 Chy. 33, p. 420.

See VI. 2, p. 410; VI. 8 (d), p. 447.

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10. *Other Cases.*

Declaration on a note made by defendant, payable to plaintiff. Plea, on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against defendant, under "The Insolvent Act of 1864," for the same cause of action, subsequently to the declaration in this cause:—Held, bad. *Baldwin* v. *Peterman*, 16 C. P. 310.

Sale of goods by assignee not duly appointed.—Warranty of right to sell.—Liability. *Johnston* v. *Barber*, 20 C. P. 228.

Held, that sec. 50 of the Act of 1869 was not beyond the power of the Dominion Parliament, as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency. *Crombie* v. *Jackson*, 34 Q. B. 575.—A. Wilson.

Declaration by plaintiff as assignee in insolvency of McM., on the common counts. Plea, that McM. was not a trader within the meaning of the Insolvent Act of 1869. Replication by way of estoppel, setting out in full the proceedings and adjudication in the Insolvent Court, shewing that an attachment in insolvency issued against McM., that he petitioned the judge to set it aside on the ground, among others, that he was not a trader within the act, that the judge decided that he was a trader, and that such decision was affirmed on appeal by one of the judges of the Common Pleas:—Held, on demurrer, plea good; though the more formal plea would have been one denying that the plaintiff was assignee of McM. in manner and form, &c.:—Held, also, replication bad, as such adjudication and proceedings were not conclusive, at all events as against a debtor of McM., but were subject to question in this court. *Groves* v. *McArlly*, 33 Q. B. 252.

Leave to take issue on the plea, reply specially, and demur, was refused. *S. C.* 9 L. J. N. S. 18...

Held, that the Act of 1869 regulates the procedure, after its passage, in insolvency proceedings commenced under the Act of 1864, and consequently that the discharge of an insolvent, who had made an assignment under the Act of 1864, intituled "The Insolvent Act, 1869," was valid. *Carnegie* v. *Tuer*, 6 P. R. 165.—C. L. Chamb.—Dalton, *C. C. & P.*

A voluntary assignment to an official assignee under the Act of 1864, s. 2, is not valid unless accepted by the assignee. *Yarrington* v. *Lyon*, 12 Chy. 308.

An insolvent may be entitled to his discharge from arrest, though his conduct in trade may have been such as to disentitle him to a certificate of discharge from his debts. *Hood* v. *Dodds*, 19 Chy. 639.

VII. Foreign Bankruptcy Laws.

A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default, and is in execution. *Brown* v. *Hudson*, Tay. 346.

Where the person of an insolvent debtor is discharged from arrest by a foreign authority, this court will not set aside an arrest made under the process of this court for the same cause of action, it not being bound to model or restrain its course of proceeding by that of other countries. *Ib.* 390.

An "Act and Warrant" under Imp. Act 19-20 Vict. c. 79, (Scotch Bankrupt Act,) though containing no attestation clause, without a witness to its execution, and specifying no lands in Upper Canada, is capable of registration. *Robson* v. *Carpenter*, 11 Chy. 293.

To an action on notes against the makers, who were members of a firm carrying on business here and in Glasgow, one defendant pleaded, on equitable grounds, in substance, that proceedings in bankruptcy had been commenced against them in Scotland, in the proper court there, and sequestration of their estates awarded, and a warrant of protection granted to them; and that in such proceedings, which were still pending, the plaintiff duly proved his claim against them, including these notes. Another defendant set up a similar defence, but averring only that the plaintiff, who had notice of the proceedings, could and ought to have proved and still might prove therein for the notes declared on:—Held, on demurrer, both pleas bad, for that a sequestration and warrant of protection, under the Bankrupt (Scotland) Act, 1856, before a final discharge, form no bar to this suit. *Robinson* v. *McKeand et al.*, 23 Q. B. 359.

To an action on a promissory note made in the United States, defendant pleaded his discharge under the bankrupt laws there; to which the plaintiff replied, that by such law the discharge was fraudulent and void, because the defendant, in the schedule attached to his petition, had fraudulently, and with intent to prevent the plaintiff from sharing in his estate or opposing his discharge, omitted any mention of the plaintiff or his claim. The omission was proved, and the law of the U. S. was stated to be that such omission, unless fraudulent and wilful, would not avoid the discharge; but it was not shewn whether the assent of a certain number of creditors or the payment of a certain dividend was requisite, or whether there was any provision which would shew a motive for the omission. The defendant swore that his reason for the omission was, because he thought the claim was paid: that in 1865 he had left property with one C. to sell and pay it, among other debts, and told plaintiff's brother, who then held the note, that he had done so; and that as late as 1868 he had seen him, and he never mentioned the subject, nor had he at any time been asked for the money. The brother, in answer, said he had asked for payment, but did not state the time:—Held, leave having been reserved to move for a nonsuit upon the whole case, that the rule should be absolute; for though upon the plaintiff's evidence the mere omission, unexplained, might afford some evidence of fraudulent intent, yet this was repelled by the undisputed facts sworn to by defendant. *Foster* v. *Taylor*, 31 Q. B. 24.

An agent claimed to retain possession of property for his indemnification in respect of certain accommodation notes given to his principals living in England, before the bankruptcy there of the latter, on which, however, he had paid nothing; and he disputed any liability to the holders in respect thereof:—Held that the assignee in bankruptcy was entitled to a receiver. *Kemp* v. *Jones*, 12 Chy. 260.

In such a case the defendant set up a defence founded upon a verbal agreement proved by his own affidavit only, and inconsistent with a written instrument which purported to contain the agreement entered into between the parties, such agreement having been drawn by defendant himself, a practising attorney and solicitor, and executed by all the parties. The verbal agreement was said to have been omitted from the writing, through the confidence existing between the parties:—Held, that the defence ought not to prevail on a motion for a receiver. *Ib.*

A receiver granted, with liberty to defendant to propose himself as such without salary. *Ib.*

See *Phillips* v. *Masson*, 9 Q. B. 20, p. 392; *Maulson* v. *Commercial Bank*, 2 Q. B. 338, p. 395. See also *City of Glasgow Bank* v. *Murdoch et al.*, 11 C. P. 138.

VIII. Miscellaneous Cases.

A bill was filed on behalf of a married woman by her next friend, who was procured by her solicitor so to act, but without her privity; the next friend being at the time insolvent, and no security for costs being given, and no written consent of the next friend being filed with the bill. On an application to take the bill off the files, it was ordered that unless the plaintiff's bill be amended by substituting a proper person as the next friend, the bill should be taken off the files, and costs were allowed to defendant, *Waters* v. *Peters*, 8 L. J. 328.—Chy. Chamb.—VanKoughnet.

Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission, where the debt, by express contract or by statute bears interest, or where a contract to pay it is implied, but on no other debts will interest be allowed. *Re Langstaff*, 2 Chy. 165.

When a suit becomes defective by the insolvency of the plaintiff, subsequent proceedings are not wholly void, but on the fact being brought before the court such order will be made as may be just. *McKenzie* v. *McDonell*, 15 Chy. 442.

Where a suit was commenced in the name of a person who had previously assigned his interest to a creditor by way of security, and the plaintiff became insolvent before decree, but the cause proceeded to a hearing without any change of parties, and a decree for the plaintiff was pronounced, the court made an order at the instance of the defendant staying proceedings until all proper parties should be brought before the court. *Ib.*

Where certain creditors of a deceased insolvent sued his executor, recovered judgments sold his real estate, and got paid in full :—Held, that they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ under the act 29 Vict. c. 28. *The Bank of British North America* v. *Mallory*, 17 Chy. 102.

The insolvency of a trustee, or his leaving the country in debt to reside in a foreign country, is a sufficient ground to remove him from the trust. *Gray* v. *Hatch*, 18 Chy. 72.

This court has jurisdiction, and it will exercise it to prevent the creditor of one partner obtaining an undue preference over the creditors of the firm by means of proceeding in this court. When, therefore, a purchaser at sheriff's sale of the interest of one partner filed his bill for an account and receiver, and the receiver obtained possession of the stock in trade, leave was granted to a creditor of the firm to take proceedings in insolvency, and the receiver was directed to hand over the assets to the assignee in insolvency when he should be appointed. *Felan* v. *McGill*, 3 Chy. Chamb. 68.—Strong.

Delay for seven years in suing held no objection to a party's right to set aside a deed as fraudulent against creditors, where the position of the parties to the impeached conveyance had not been materially altered by the delay ; if that were shewn, the court has the power of modifying the relief given, so as not to wrong the parties ; or it might, in its discretion, refuse to give any relief. *Currie* v. *Gillespie*, 21 Chy. 267.

A motion by a defendant to dismiss after an abatement issued by the bankruptcy of a sole plaintiff and before revivor was refused ; his proper course being to serve the assignee of the plaintiff in insolvency with notice to revive within a limited time. *Cameron* v. *Eager*, 6 P. R. 117.—Chy. Chamb.—Holmested, *Referee.*

The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders ; and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders. *In re the Ætna Insurance Company of Dublin*, 17 Chy. 160.

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts, and paid proportionately, and are not entitled to be paid in priority to the debts. *Ib.*

BANKS.

I. Liability of Directors and Officers, 456.

II. Cheques, 457.

1. *Payment by—See* Payment.

III. Deposit Receipts, 458.

IV. Taking Collateral Security.

1. *Mortgages*, 460.
2. *Bills of Lading and Warehouse Receipts—See* Bills of Lading and Warehouse Receipts.

V. Duties in Connection with Bills and Notes, 460.

VI. Failure of, 461.

VII. Savings Banks, 462.

VIII. Special Charters.

1. *Bank of British North America*, 462.
2. *Bank of Upper Canada*, 462.
3. *Royal Canadian Bank*, 464.

IX. Miscellaneous Cases, 464.

X. Usurious Transactions—*See* Usury.

I. Liability of Directors and Officers.

A bond may be given up to be cancelled by the president and directors of a banking corporation, without their assent being signified under the corporate seal. *The President, &c., of the Bank of U. C.* v. *Widmer*, 2 O. S. 222.

Plaintiff was teller of a bank at which a note of defendant became due. Defendant paid in to plaintiff a sum afterwards discovered to be £25 short, and plaintiff was compelled to make it good to the bank :—Held, McLean, J., dissentiente, that he could recover it from defendant as money paid to his use. *Rivers* v. *Roe*, 4 C. P. 21.

Held, that the defendant (sued jointly with others as a member of a committee) was not responsible for the salary of a person employed by the committee (under a joint stock banking charter) prior to the time of his becoming a stockholder in the bank, and a member of the committee. *Mingaye* v. *Burton et al.*, 10 C. P. 60.

The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over estimating the assets and understating the liabilities, thereby inducing defendant to believe it sound and to purchase stock :—Held, upon the evidence set out in the case, 1. That there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed. 2. That the report was not a representation within C. S. U. C. c. 44, s. 10, as to require it to be signed by defendant; 3. That if the statements were false and fraudulent defendant would be liable, although they were made to the stockholders, for they were intended

and used for public information. *Parker* v. *McQuesten*, 32 Q. B. 273.

The directors and managers of incorporated banks are quasi trustees for the general body of stockholders, and if any loss should accrue to the bank by their infringing the statute against usury, they would be liable individually to make it good. *Drake* v. *Bank of Toronto*, 9 Chy. 116.

II. Cheques.

Where the plaintiff's agent had paid into an agency of the Gore Bank at Simcoe a sum of money, partly in cash and partly by cheque on the Commercial Bank at Toronto, to be placed to the credit of the plaintiff with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank or credited to the plaintiff:—Held, that the plaintiff could not maintain an action against the Gore Bank for the amount of the cheque as money had and received to his use. *Todd* v. *Gore Bank*, 1 Q. B. 40.

A cheque here may be post-dated, though in England it is prohibited by the stamp acts. Where such cheque is payable on demand, no days of grace are allowed. Where, on the same day that the cheque was dishonoured, defendant paid £150 to the holder on account of it:—Semble, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour:—Held, under the evidence, that the pleas setting up want of consideration, and denying plaintiff's property in the cheque, were not proved, *Wood* v. *Stephenson*, 16 Q. B. 419.

Detinue for a cheque. Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn: that they did present it, but payment was refused by the bank manager, who retained and keeps the same, alleging that the names of the drawers thereto are forged:—Held, a good defence; for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank. *Brown* v. *Livingstone et al.*, 21 Q. B. 438.

The plaintiff opened an account with defendants, as bankers, by getting them to discount for him two acceptances for $500 each, payable to and endorsed by him, and to place the proceeds to his credit. He afterwards paid in a further sum, and had drawn out by cheques all except $1, when the two bills were returned dishonoured:—Held, that defendants were entitled to apply the balance in hand in part payment of the acceptances; and therefore that, having done so, they were not liable for refusing to honour the plaintiff's cheque. *Jones* v. *Bank of Montreal*, 29 Q. B. 448.

A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, and the holder called at A.'s office on the same day, and a clerk in the ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment:—Held, that the holder could recover against B. on his cheque:—Held, also, that under a plea of not the holder, B. could not set up any supposed right in A.'s assignee, nor possibly under any pleading on these facts. *City Bank* v. *Smith*, 20 C. P. 93.

The plaintiff having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of C. on another bank in the same place, for $350, payable to the plaintiff or bearer, and not endorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment, and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. Defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent:—Held, that he could not recover, for defendants were not guilty of laches; and—Semble, that they could have recovered back the amount from the plaintiff, even if they had paid it to him. *Owens* v. *Quebec Bank*, 30 Q. B. 382.

If a bank refuse to pay a cheque having sufficient funds of the drawer for the purpose, the holder can compel payment in equity, But the fact of there being sufficient at the drawer's credit in the bank ledger when the cheque was presented, is immaterial, if the ledger did not shew the true state of the account. *Gore Bank* v. *Royal Canadian Bank*, 13 Chy. 425.

The Royal Canadian Bank held a draft payable in Buffalo, and accepted by a firm there, and for which they held in security certain flour. On the day before the draft matured, it being suggested by the drawer that the flour had not been sold, the bank agreed to discount a renewal draft on the same parties and on the same security, and passed the proceeds of the renewal to the credit of the drawer, but neglected to charge him with the original draft. Before the letter from the bank to their Buffalo correspondents respecting the transaction reached Buffalo, the flour was sold and the original draft paid by the drawees, and they therefore did not accept the renewal:—Held, that the drawer was not entitled to demand from the bank the proceeds of renewal; and that the holder of his cheque was in no better situation than the drawer. *Ib.*

III. Deposit Receipts.

To an action on the common money counts and account stated, defendants pleaded, by way of equitable defence, setting out a deposit receipt for moneys from them to plaintiff, to be accounted for by them to plaintiff, and, in substance, that the plaintiff had, for good and valuable consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, which defendants had paid over to the transferee. Replication, on equitable grounds, in effect, that defendants did not bonâ fide pay the amount of the claim, to a person or persons to whom plaintiff had, for good consideration, transferred all his right, title, and interest in equity, to receive and demand payment of the fund, but that he parted with the security under

circumstances which, at best, gave the transferees an equitable charge upon the fund, the extent of which had to be determined by certain acts to be done by them; and that they having taken no steps to ascertain the extent of the charge, the plaintiff, before the alleged further transfer by them to certain parties (set up by the plea) and before payment by defendants, notified them that he disputed the validity of the equitable charge, and not to recognize it or pay any of the fund in respect of it, which defendants agreed not to do, but afterwards paid the same: —Held, a good replication. *Mander* v. *Royal Canadian Bank*, 20 C. P. 125.

Deposit receipts for money, given by a bank, are not negotiable instruments in equity any more than at law, so as to entitle the holder to demand payment of the fund secured by them. *Ib.*

Plaintiff deposited with defendants a sum of money and received from them the usual deposit receipt, stipulating for payment of interest provided the money remained not less than three months from date of deposit, and providing for fifteen days' notice to be given of its withdrawal, on which notice interest was to cease. Subsequently plaintiff endorsed an order thereon to pay S. & Co., and delivered it to the endorsees. Before S. & Co. notified defendants of the transfer to them, the plaintiff gave them notice that he revoked and countermanded it, but defendants, notwithstanding, paid it over to S. & Co. on receiving an indemnity from them. Plaintiff subsequently made a formal demand upon defendants for the money, which was not complied with. Quære, in an action by plaintiff against defendants, how far defendants were authorized to set up, in answer, as a payment good in equity, that the deposit receipt had been transferred by plaintiff to S. & Co., and that they had paid S. & Co. accordingly. *S. C.* 21 C. P. 492.

M. deposited a sum with the plaintiffs, and soon afterwards absconded. The bank had given him a receipt, stating that the money was payable on the production of that document. A writ of attachment issued against the depositor's property under the insolvent acts, and the defendant Little was appointed official assignee. He demanded the money without producing the receipt, which never came into his possession, but the plaintiffs had notice of the attachment and of his appointment. He then sued the plaintiffs for the money. The action was restrained by an interim injunction issued in this suit, in which the plaintiffs required the defendant Little and another claimant of the money, whose claim accrued after the attachment, to interplead. The court, under the circumstances,—Held, that the plaintiffs ought to have paid over the money to the assignee, and decreed that they should pay it, with the costs occasioned to the estate by their refusal. *Bank of Montreal* v. *Little*, 17 Chy. 313.

A condition, on a bank deposit receipt, that the receipt should, on payment, be given up to the bank, may not be void; but it does not entitle the bank to retain the money in case the receipt is not forthcoming; the depositor is entitled, on proof of loss and indemnity (if required), to relief in equity. *S. C.*, 17 Chy. 685.

See *Todd* v. *Gore Bank*, 1 Q. B. 40, p. 457; *Hunter* v. *Wallace*, 14 Q. B. 205, p. 462; *Gissing* v. *Hopper*, 6 O. S. 505, p. 465.

IV. Taking Collateral Security.

1. *Mortgages.*

Held, that the mortgage of goods to the plaintiffs, taken under the circumstances stated in this case, was valid, having been taken by way of additional security for a debt contracted to the bank in the course of its business, and therefore within C. S. C. c. 54, s. 4. *Bank of Montreal* v. *McWhirter*, 17 C. P. 506.

The chartered banks of this province have a right to a decree of foreclosure upon a mortgage held by them as security. *Bank of U. C.* v. *Scott*, 6 Chy. 451.

The customer of a bank created a mortgage in favour of the institution by the deposit of title deeds. In a suit to realize the security the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the officer of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum endorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Chy. 627.

See *The Trustees of the Bank of U. C.* v. *The Canadian Navigation Company*, 16 Chy. 479, p. 464; *Commercial Bank* v. *Bank of U. C.*, 7 Chy. 423, p. 463; *McDonell* v. *Bank of U. C.*, 7 Q. B. 252, p. 463.

V. Duties in Connection with Bills and Notes.

Held, under the evidence in this case, that the bank were liable to the plaintiffs for want of presentment of a note endorsed to them by the plaintiffs for collection, notwithstanding a notice issued by them, and which the plaintiffs had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities, or mistakes in respect of such notes. *Browne et al.* v. *Commercial Bank*, 10 Q. B. 129.

A. having shipped grain to Oswego on behalf of one P., to the care of L. W. & Co., drew against it, and gives the draft and bill of lading to defendants, with the following endorsement on the latter, "Deliver to I. & J. Lewis, Oswego, subject to a draft drawn by me at 30 days from the 10th of August, for $2,259.10. Signed per R. A. G., D. E. McL." The defendants discounted the draft, and upon acceptance thereof handed over the bill of lading to the acceptors, who failed to pay the draft at maturity:—Held, that the defendants, under the circumstances, were not responsible for the loss. *Goodenough* v. *City Bank*, 10 C. P. 51.

A bill of exchange was sent by a banking institution in the United States, to a bank in Toronto, for "collection and remittance," &c., accompanying which was a bill of lading for

10,000 bushels of wheat, which, on the bill of exchange being accepted by the drawees, was delivered over to them, they being the consignees named in such bill of lading :—Held, affirming the judgment of the Queen's Bench, that it was not the duty of the bank here, as the agent of such foreign bank, in the absence of special instructions, to retain the bill of lading until the bill of exchange was paid. *The Wisconsin Marine and Fire Ins. Co. Bank* v. *Bank of B. N. A.*, 21 Q. B. 284 ; 2 E. & A. 282.

Evidence having been given as to the custom of merchants in such cases both in the U. S. and Canada :—Held, that the latter only could be material. *S. C.*, 21 Q. B. 284.

The declaration alleged that L. & Co., drew a bill of exchange for $69.72 on the plaintiff, payable to the order of themselves at defendant's bank, and endorsed it to the defendants, and that it was duly presented by the defendants to plaintiff, and was duly accepted by the plaintiff ; yet that defendants with full knowledge of the plaintiff having so accepted, negligently and without reasonable or probable cause, afterwards caused the said bill to be protested for non-acceptance by the plaintiff, whereby the plaintiff was injured in his credit and business with the drawers and others ; and his business was thereby impeded, &c. :—Held, on demurrer, that no cause of action was shewn, for there was no negligence shewn between plaintiffs and defendants nor any privity on which a duty or contract might arise ; and that the action, if maintainable at all, must be for a false representation knowingly made, which had injured the plaintiff in his business, and the declaration in this view was insufficient. *Irvine* v. *Canadian Bank of Commerce*, 23 C. P. 509.

Where C. shipped flour to the order of a bank for account of L., and at the same time drew on L., discounted the bill at the bank, indorsed and delivered to the bank the carrier's receipt, and signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the bank to sell the flour, applying the proceeds to pay the draft, and to place the property in charge of any respectable broker or warehouseman, without prejudice to the bank's claim upon any party to the draft :—Held, that the bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retainer of possession until payment was optional with the bank. Quære, whether if the bank was responsible for the flour under circumstances which prevented a set-off at law, that relief could be had in equity. *Clark* v. *Bank of Montreal*, 21 C. P. 211.

VI. Failure of.

Process was served upon A. as president of a bank ; he having been elected in June, 1866, for the year. No election of president or directors had taken place since then, and A. in fact never occupied his office. In September, 1866, the bank suspended specie payments, and before the days thereafter assigned their property to trustees, and ceased to do business as a bank. It was provided by the charter that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeiture of the charter, &c. :—Held, that the total annihilation of the bank was not contemplated by these provisions, and it did not follow from the loss of the charter that there must be a dissolution for all purposes : that some formal process was still necessary finally to determine and put an end to all the functions of the corporation : that the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts ; and that A. must still be looked upon as president ; and an application to set aside the service upon him was discharged with costs. *Brooke* v. *Bank of U. C.*, 4 P. R. 162.—C. L. Chamb.—A. Wilson.

A bill will lie in equity at the suit of a creditor to enforce the double liability of the shareholders of an insolvent bank. *S. C.*, 16 Chy. 249.

But such a bill must be on behalf of all the creditors. *Ib.*

The trustees of the bank were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *S. C.*, 17 Chy. 301.

VII. Savings Banks.

Defendants associated themselves together to conduct a savings bank, but before they were organized under 4 & 5 Vict. c. 32, their treasurer received a deposit from B. of £75, which he swore was made by B. with the express understanding that any person producing his pass-book should receive it. B. died, and this sum was afterwards paid to a connection of his, who presented the pass-book. The payment, it appeared, was made in pursuance of certain rules adopted by defendants, but which were not filed according to the statute for some months after :—Held, that defendants were liable to B.'s administrator for the money. *Hunter* v. *Wallace*, 14 Q. B. 205.

VIII. Special Charters.

1. *Bank of British North America.*

An action is not maintainable against the manager of this bank under 7 Will. IV. c. 34, in his individual character, for a cause of action accrued against him only as manager. *White* v. *Hunter*, E. T. 4 Vict.

This bank is entitled to sue in Upper Canada in its corporate name. *Bank of B. N. America* v. *Browne*, 6 Q. B. 490.

There is nothing in their charter which prevents their becoming parties as creditors to an assignment for the benefit of creditors. *Patton* v. *Foy*, 9 C. P. 512.

The local agents of the bank cannot grant powers of attorney to third parties to receive money ordered to be paid to the bank by a decree of the court. *Bank of B. N. America* v. *Rattenbury*, 1 Chy. Chamb. 65.—Spragge.

2. *Bank of Upper Canada.*

The president, not being an officer of the bank, within sec. 16 of 6 Vict. c. 27, may vote by proxy at the annual election of directors. *Regina* v. *Bank of U. C.*, 5 Q. B. 338.

The bank under 6 Vict. c. 27, s. 19, could not hold vessels for any purpose as security. *McDonnell et al.* v. *Bank of U. C.*, 7 Q. B. 252.

And as a consequence no implied assumpsit can arise against them as ship owners, nor could any express promise be binding. *Lyman* v. *Bank of U. C.*, 8 Q. B. 354.

Semble, they might take mortgages upon real estate to secure debts previously contracted. *McDonell* v. *Bank of U. C.*, 7 Q. B. 252.

Held, that under 6 Vict. c. 27, s. 19, the bank may take mortgages upon real estate as collateral security, for sums advanced bonâ fide in the way of their business, and that such debts need not have been contracted previously, but the advance and the security may be contemporaneous acts. *Commercial Bank* v. *Bank of U. C.*, 7 Chy. 250; affirmed in appeal. *Ib.* 423.

And—Held, that all chartered banks have the same power. *S. C. Ib.* 423.

It would be a question of fact for a jury to determine whether the mortgage was in truth taken to secure the transaction on the bill or note discounted, or the bill created for the mere purpose of upholding and giving colour to the mortgage. *Ib.*

A mortgage was created as collateral security for £2800, debts then past due, to one of the chartered banks, and also £1000 then advanced by the bank to the mortgagor, who afterwards created a second mortgage to the bank for £750, and interest; which instrument expressly provided, *that it and everything therein contained should be subject to the payment by the mortgagor of the amounts mentioned in the former mortgage:* —Held, affirming the decree of the court below, that the first mortgage was void as to the £1000, but valid to secure the £2800, notwithstanding that the notes held by the bank at the date of the mortgage had been retired by the discount of other paper from time to time; and also that the second mortgage was an existing security as to the £1000, though void as to the £750 advanced at its execution. *Ib.*

One P. having agreed to build certain cars for the Grand Trunk Railway Co., it was stipulated in the contract that the payments were to be made to the satisfaction of the Bank of U. C., who were to act as receivers. On the 24th of September, 1860, the bank and the railway company entered into an agreement, reciting the contract, and that the bank had made large advances on account of it, and had agreed to advance the necessary sum to complete it and acquire the title to the cars. The company then assigned all their interest in the agreement and cars to the bank, and the bank leased them back to the company for three years at a rent named, with a proviso that on payment of their debt to the bank, the cars should revert to the company. After this P. received moneys from the bank on account of the contracts:—Held, that the bank were not precluded by their charter from taking security upon them; and that they were entitled therefore as against an execution creditor of P. *Bank of U. C.* v. *Killaly*, 21 Q. B. 9.

Held, that under 19 & 20 Vict. c. 127, s. 21, the bank had a right to purchase goods at a sheriff's sale other than on an execution at their own suit, if in that way they wished to acquire an outstanding claim or charge on the property of a debtor of the bank. *Kingsmill* v. *Bank of U. C.*, 13 C. P. 600.

A debtor of the late pretended Bank of Upper Canada at Kingston having called upon the bank commissioners to arbitrate under 10 Geo. IV. c. 7, an award was made for £900, to be paid in notes and other securities of the bank:—Held, that the debtor had a right to pay in notes for which no certificates had been issued pursuant to the act. *Dalton* v. *McNider*, 5 Chy. 501.

K. was trustee for sale of certain lands belonging to M. Two parcels were subject to a mortgage to the bank for more than the value. The trustee agreed for the sale of these parcels to a purchaser; the bank, before becoming insolvent, assented to the sale, and received the first instalment of the purchase money. The purchaser went into possession, but made default; defendants were his assignees. By the trust deed which the bank executed on becoming insolvent (which deed was afterwards confirmed by statute), it was made the duty of the trustees to accept in payment of any debt due to the estate the notes or bills of the bank. On a bill by the trustees for payment, it was held that, as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par. *The Trustees of the Bank of U. C.* v. *The Canadian Navigation Co.*, 16 Chy. 479.

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3. *Royal Canadian Bank.*

Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than seven per cent., were not entitled to avail themselves of the provisions of their act of incorporation (27 & 28 Vict. c. 85, s. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than seven per cent., which was held to be the meaning of the act; and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than six per cent. from its maturity. *Royal Canadian Bank* v. *Shaw*, 21 C. P. 455.

IX. Miscellaneous Cases.

A stockholder merely as such has no right to inspect the stock or other books of the bank, nor will the court grant a mandamus for that purpose, although they have the power, unless some special ground be disclosed sufficient to warrant it. *In re Bank of U. C.* v. *Baldwin*, Dra. 55.

The Bubble Acts, 6 Geo. I. c. 18, and 14 Geo. II. are not in force in this province, as banks chartered by acts of the provincial parliament could not come within them. *Bank of U. C.* v. *Bethune*, 4 O. S. 165; *Bank of Montreal* v. *Bethune*, *Ib.* 193.

A foreign corporation, such as a bank, cannot sue upon notes received by them in the course of banking business in this province, although they may sue for money had and received by a person for whom such notes were discounted and to whom money was advanced on them. *Bank of Montreal* v. *Bethune*, 4 O. S. 341.

Bank of British North America v. *Sherwood*, 6 Q. B. 213; *Howe Machine Co.* v. *Walker*, 35 Q. B. 37.

The Bank of British North America in England received money there to be transmitted to A. in Upper Canada, and sent a letter of credit by post to A. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (A. having in the meantime died), and A.'s name forged on the letter of credit, and the money received by some person unknown:—Held, that A.'s executrix was entitled to recover the money from the branch at Toronto as money had and received to A.'s use. *Gissing* v. *Hopper*, 6 O. S. 505.

A forged paper purporting to be a bank note is a note, and equally so if there is no such bank as that named. *Regina* v. *McDonald*, 12 Q. B. 543.

One S. was treasurer of the county of Middlesex and agent of the Gore bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and having misapplied the moneys of the council, overdrew that account, without the knowledge or authority of the bank, nearly £8,000, to pay debts due by the county for interest on debentures and other claims, which he ought to have paid out of the moneys received by him as treasurer. The coupons on some of these debentures were stamped by S. as paid by the Gore bank. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use:—Held, that no portion of it could be recovered. *The Gore Bank* v. *Municipal Council of Middlesex*, 16 Q. B. 595.

A treasurer of a municipality should not be permitted to act also as agent of a bank. *Corporation of Ingersoll* v. *Chadwick*, 19 Q. B. 278.

The plaintiffs drew upon J. a bill for £200, payable to their order, which he endorsed to the Gore bank, by whom it was sent to the agent of defendants, the Bank of U. C., for collection. When it fell due, J., with the agent's consent, drew upon the plaintiffs to meet it, but the proceeds of this draft, contrary to J.'s direction, were placed to his credit with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received.—Per Burns, J. They might also recover as for money paid. Per Robinson, C. J., not. *Riddell et al.* v. *Bank of U. C.*, 18 Q. B. 139.

Great Western Railway Co.—Loan to Detroit and Milwaukee Railway Co.—Money advanced bankers for purposes beyond defendants' power—Right to recover for overdrawn account—Evidence—Res gestæ—*Commercial Bank of Canada* v. *Great Western Railway Co.*, 22 Q. B. 2 E. & A. 285; affirmed on appeal to the Council, 3 Moo. P. C. N. S. 295.

A banker is a trader within the Insolvent Acts. *Ex parte* v. *Hamilton*, 10 L. J. 305.—C. C.—*Ex parte*; *Smart* v. *Duncan*, ante p. 410.

Remarks as to the practice in this country of taking notes for discount, not from the last endorser, but from the maker, who brings them endorsed—thus suggesting not a business transaction, but accommodation endorsements. *Bank of Montreal* v. *Reynolds et al.*, 25 Q. B. 352.

Where a trustee had retained moneys of the estate in his hands instead of paying off debts of the estate, and had improperly mixed these moneys with his own at his bank, the court without saying what in future, according to the value of money or the amount of interest payable on investments, might be a fair rate to charge on moneys improperly withheld or used by a trustee, charged the trustee with interest at eight per cent. on all balances in his hands. *Wightman* v. *Helliwell*, 13 Chy. 330.

A bank agent being about to make advances on the security of certain stock of another bank, applied to the bank officers to ascertain what claims the bank held against such stock, when he was informed that there was overdue paper to the amount of $500: but before completing the transfer of the stock, another claim, which was then current in one of the agencies of the bank, was returned unpaid:—Held, that the bank had a right to retain its lien on the stock for the additional sum before allowing the transfer of the stock to be carried out in their books. *Cook* v. *Royal Canadian Bank*. 20 Chy. 1.

The owner of bank stock being about to assign the same, procured from one of the agents of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words: "No liability at Galt office:"—Held, that this was not such a representation, made to the intending transferee, as bound the bank; and that the bank were entitled to hold the stock for a draft of $500, which had been discounted at the Galt office, and then in the hands of an agency in Montreal. *Ib.*

BARGAIN AND SALE.

See DEED.

BARRISTER AT LAW.

I. QUEEN'S COUNSEL, 467.

II. PRIVILEGES AND LIABILITY, 467.

III. CONDUCT OF CAUSES, 468.

1. *New Trial for Mistakes of or Improperly conducting cause.—See* NEW TRIAL.

2. *Right to Begin and Right to Reply.—See* TRIAL.

IV. COUNSEL FEES.

1. *Right to Recover*, 469.

2. *Taxation of—See* COSTS.

V. MISCELLANEOUS CASES, 470.

VI. OTHER MATTERS.

1. *Attorneys.—See* ATTORNEY AND SOLICITOR.

2. *Attorney and Solicitor General.*—*See* ATTORNEY AND SOLICITOR GENERAL.

3. *County Attorney.*—*See* COUNTY ATTORNEY.

I. QUEEN'S COUNSEL.

A patent from the crown appointing a barrister a Queen's counsel, directed that he should take precedence after another Queen's counsel, who was subsequently appointed attorney general:—Held, that such patent did not then entitle him to precedence before the solicitor general. *In re Boulton*, 1 Q. B. 317.

Where, in an action on the case for a malicious prosecution, it was alleged in the declaration that the trial of the indictment took place before a court of Oyer and Terminer, and the indictment was at General Gaol Delivery:—Held, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Proudfoot*, E. T. 3 Vict.

II. PRIVILEGES AND LIABILITY.

A barrister cannot be arrested on mesne process. *Adams* v. *Ackland*, 7 Q. B. 211.

A barrister cannot insist upon being present at a coroner's inquest, and upon examining and cross-examining the witnesses, &c., and can maintain no action against the coroner for excluding him from the room. *Agnew* v. *Stewart*. 21 Q. B. 396.

The plaintiff declared in contract against an attorney, for negligence in conducting a suit for him against one P., alleging the breaches of promise to be, that although P. pleaded a set-off on a promissory note, yet defendant improperly denied the making of such note, whereas the plaintiff had paid it; and also, that although defendant had notice of this a reasonable time before the trial, and that the payment could be proved by two witnesses named, yet he neglected to subpœna them, and took the case to trial without instructions; and also, that defendant did not instruct counsel to act for the plaintiff at the trial, and inform him of the facts above mentioned, but acted as counsel himself, and neither applied for an amendment of the replication, nor suggested to the court that he could prove payment of the note, which he could have done, as the said witnesses were then there attending to other duties—wherefore the set-off was allowed. Defendant pleaded, as to so much of the declaration as alleged that he did not instruct counsel, but acted as such himself, that he was a barrister in Upper Canada, and that the plaintiff never objected to his so acting; and he demurred to so much as alleged that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer:—Held, (affirming the judgment of the County Court,) that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions. *Leslie* v. *Ball*, 22 Q. B. 512.

Quære, per Adam Wilson, J., whether, considering the union of the professions in this province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities. *Id.*

Rights of counsel to be heard before Courts of Revision and all other courts. *In the First Division Court in the County of Elgin*, 6 L. J. N. S. 295.—C. C.—Hughes.

No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in the Division Courts. *In re the Judge of the County of York*, 31 Q. B. 267. See 35 Vict. c. 8, O., since passed.

III. CONDUCT OF CAUSES.

A., a counsel at Nisi Prius, represented to B. another counsel, that a cause was undefended. B. thereupon took a brief from the plaintiff, and A. afterwards appeared for the defence and obtained a verdict. The court set aside the verdict for the want of good faith in defendant's counsel, and made him pay the costs of the application and trial. *Hamilton* v. *Notman*, T. T. 3 & 4 Vict.

Where a verdict was taken subject to the opinion of the court upon certain points as to whether the plaintiff was entitled to recover substantial or merely nominal damages, and there was a misunderstanding between the counsel of the respective parties as to the terms upon which the verdict was taken, a new trial was granted without costs. *McLeod* v. *Boulton*, 2 Q. B. 44.

Where in ejectment the plaintiff's counsel in opening his case stated it as a question of legitimacy, and that defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of counsel had rendered that unnecessary:—Held, that it ought to have been produced. *Doe Breakey* v. *Breakey*, 2 Q. B. 349.

A plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, when promptly retracted. *Jannett* v. *Great Western R. W. Co.*, 4 C. P. 488.

An attorney cannot act at the trial of the cause both as an advocate and a witness. *Benedict* v. *Boulton*, 4 Q. B. 96.

Where a counsel, upon stating to a jury facts he himself could prove, was reminded by the judge that he could not act both as an advocate and a witness, and then immediately sat down, ceased to act as counsel, and gave evidence in the cause, the court refused to set aside a verdict. *Cameron* v. *Forsyth*, 4 Q. B. 189.

Messrs. W. P. & P. acted in this cause as agents for the defendant's attorney, all the papers in the suit being served upon them. W., one of the members of the said firm, was counsel for defendants in the cause, both at Nisi Prius and before the arbitrator. It was agreed that on an undertaking of W., as counsel for defendants, not to raise any question of law, the terms of the reference were altered by consent of W., and of counsel for the plaintiff. A motion to set aside the award and final

ment:—Held, that W. had power, either as counsel or as agent for defendants' attorney, in his discretion in the matters of this suit to bind the defendants, and the award was upheld. *Wilson* v. *Corporation of the United Counties of Huron and Bruce*, 11 C. P. 548.

One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of the case, was suddenly seized with a fit, and incapacitated from proceeding any further. No adjournment was applied for, but the other, who was the senior counsel, continued to address the jury on the prisoner's behalf without raising any objection that he was placed at a disadvantage by reason of his colleague's disability; and it did not appear that the prisoner had been prejudiced by the absence of the counsel alluded to:—Held, no ground for a new trial. *Regina* v. *Fick*, 16 C. P. 379.

In an action for false imprisonment:—Held, that the counsel for the plaintiff had the right to open at the trial from the original judgment of the court, given on discharging the plaintiff from the arrest and setting aside the ca. sa., to shew the grounds upon which the judgment proceeded. *Robertson* v. *Meyers*, 7 Q. B. 423.

On the third trial of a case in which the verdict had been twice set aside as against the weight of evidence, the jury were urged by counsel to take the same course that former juries had done, and in effect to disregard the judge's charge. A similar verdict having been given rendered, the chief justice concurred in a new trial on account of this appeal made to the jury, although he would otherwise have felt disposed to let the verdict stand. *Case* v. *Benway*, 7 Q. B. 476.

It is no ground for setting aside a verdict that counsel merely referred to the verdict on a former trial, expressing a hope that the jury would give the same verdict as had been given there, but desisting when the allusion was objected to, unless the judge who tried the cause is satisfied that the matter was unfairly pressed, or with a view of exercising an improper influence on the jury. *Moore* v. *Boyd et al.*, 15 C. P. 513.

Counsel may read a reported case to the jury, in order to shew the law, and for that purpose may refer to the facts, but he cannot go into the facts to shew how a former jury treated the same or analogous facts, and thus argue as to what the verdict should be. *Dougherty* v. *Wilson*, 32 Q. B. 215.

Held, that, on plaintiff's counsel declining to call a nonsuit, the judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Veach, Anderson* v. *Walker, Murray* v. *Askin*, 22 C. P. 164.

IV. Counsel Fees.

1. *Right to Recover.*

Counsel can sustain actions for such fees, to be proved themselves by their clients, as are established according to the table of fees under the statute 2 Geo. IV. c. 2; but where the fees claimed are not such as come within the provisions of that act, the general principle of the law in England applies equally to this province, and counsel have no right of action for fees generally. *Baldwin et al.* v. *Montgomery*, 1 Q. B. 283.

Attorneys suing in person are allowed in this court fees for the same services as are allowed in like cases in England; but an attorney who is also a barrister cannot tax a counsel fee to himself when he sues in person and conducts his own cause at nisi prius. *Smith et al.* v. *Graham*, 2 Q. B. 268.

The rule that a person cannot tax a counsel fee in his own case against the opposite party, does not extend to partners. *Henderson* v. *Comer*, 3 L. J. 29.—C. L. Chamb.—Burns.

No retaining fee will be allowed to a solicitor who is himself also counsel. *In re McBride—Farley* v. *Davis*, 2 Chy. Chamb. 153—Taylor, *Secretary*.

V. Miscellaneous Cases.

Where a reference was made to a local master who had prior to his appointment been the counsel of one of the litigants, neither party objecting to his taking the reference, and, on the contrary, the master certified that he acted in the reference at the pressing instance of both parties, the court held that the other party, against whom the master reported, could not raise that objection on an appeal from the report, having taken the chance of the master finding in his favour. *Cotter* v. *Cotter*, 21 Chy. 159.

A master of the court, while in practice at the bar, had given an opinion upon the construction of a will, with a view to a settlement, at the request of the plaintiff in this suit, and both on behalf of the plaintiff himself and on behalf of all the other persons interested under the will. A settlement not having been arrived at, this suit was instituted for partition, and in the suit the construction of the will was declared by the court, which construction was more favourable to the defendant J. B. than that contained in the opinion of the master. The decree ordered a reference to the master to make partition among the parties in proportions specified. A motion was thereupon made by J. B. for the removal of the reference from before the master, on account of his having given an opinion in the case as above stated. The application was opposed by all the other parties interested, except one, but was granted, on the ground that the administration of justice should be above suspicion, and should not be exposed even to groundless mistrust. *Bigelow* v. *Bigelow*, 6 P. R. 124.—Chy. Chamb.—Spragge.

BASTARD.

I. Evidence of Illegitimacy, 471.

II. Custody of, 471.

III. Maintenance of, 472.

IV. Actions for Seduction—*See* Seduction.

V. Marriage—*See* Dower—Husband and Wife.

I. Evidence of Illegitimacy.

Whenever it is sought to bastardise a child, if it only appear that the child may be the offspring of the mother's husband, or of another man, the law presumes in favour of legitimacy, and does not sanction a discriminating enquiry upon the subject. The presumption in this case was sought to be negatived by proof of non-access. The facts adduced in evidence are fully given in the report; and—Held, that evidence offered of general reputation of intercourse with some person other than the husband three months before marriage, was properly rejected. The husband committed suicide five months after the marriage:—Held, that proof of the report in the neighbourhood as to its cause was also properly rejected:—Held, also, that it was in the discretion of the judge to refrain from committing the alleged father, who was examined as a witness, for contempt in not answering, because it was sought by questions put to him to elicit an admission of facts importing a scandal upon himself. Besides, the judge thought him intoxicated, and unfit to give evidence at all. Evidence of the resemblance of the child to the alleged father, if relevant to the issue, is admissible, but can only become relevant after a sufficient foundation has been laid to raise suspicion; and—Held, that such foundation appeared to have been laid, and the evidence was therefore admissible. *Doe* d. *Marr* v. *Marr*, 3 C. P. 36.

In an action for the seduction of the plaintiff's daughter it appeared by the evidence that defendant had had intercourse with her in January and up to June, 1860, but that she married one C. in October, 1860, and that the child was born on the 11th February, 1861. The plaintiff having obtained a verdict:—Held, that the child having been born in lawful wedlock the mother's evidence was inadmissible to prove it illegitimate, and a new trial was granted. *Ryan et ux* v. *Miller*, 21 Q. B. 202.

At a second trial the fact that defendant was father of the child was attempted to be proved by his admissions, and the jury again found for the plaintiff:—Held, that the verdict was not supported by the admissions stated in the case, and—Semble, no evidence could be received to rebut the presumption of legitimacy, the evidence being consistent with the fact of access by the husband before marriage. *S. C.* 22 Q. B. 87.

II. Custody of.

On a writ of habeas corpus to bring up an illegitimate child, issued for the mother against the putative father, a judge will not interfere, where it is shewn that the father obtained the child by agreement with and by the assent of the mother, and not by force or fraud. *In re Regina* v. *Armstrong*, 1 P. R. 6.—P. C.—McLean.

Held, that the mother of an illegitimate child is not entitled to all the rights of guardian for nurture: that the mother differs only from a stranger in this, that during the period of nurture (under seven) the child may not be separated from the mother by force or fraud. But when she has abandoned the child, and others have adopted it, or if she has placed it under the protection of others, and afterwards claims it as its mother or guardian for nurture, the court will not recognize such claim as a legal right, but will refuse to interfere if the interests of the infant will thereby be best protected. *In re Holeshed*, 5 P. R. 251.—C. L. Chamb.—Gwynne.

III. Maintenance of.

Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting but not proved to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried in York. Semble, per Draper, C. J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there. Quære, whether, if the woman had committed the offence, it should have been charged as a misdemeanour only, or as the statutory offence of perjury. *Regina* v. *Clement*, 26 Q. B. 207.

In an action for the maintenance of an illegitimate child, under C. S. U. C. c. 77, s. 4, it appeared that the plaintiff was a married woman, and that the affidavit filed by the mother stated that the defendant was the father of such child, not "really the father," as required by the Act:—Held, 1. That the plaintiff could not sue, for it must be presumed that the necessaries furnished were her husband's; and that she must fail on never indebted, no plea in abatement being requisite. 2. That the omission in the affidavit was fatal. A nonsuit was therefore ordered. The affidavit was produced from the office of the city clerk, and purported to be sworn before the police magistrate of Toronto, where she resided:—Held, sufficient evidence to go the jury that it was deposited by her in the proper office. It appeared probable from the statement of the mother that she was liable to the plaintiff for the demand sued for:—Held, that the jury should have been told that if she was so liable, her unsupported testimony would not sustain the action. *Jackson* v. *Kassel*, 26 Q. B. 341.

BATTERY.

See Assault.

BAWDY HOUSE.

A conviction, under C. S. C. c. 10[illegible] ing a house of ill-fame, or being an inma[illegible] a house, adjudicating that the accused sh[illegible] pay a fine of $50 forthwith, and be imprisoned for three months unless the fine be sooner paid, is not warranted by sec. 16. *In re Slater et al.*, 9 L. J. 21.—C. L. Chamb.—Hagarty.

The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep

a common disorderly bawdy house on Queen street, in the said city," and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the commitment, conviction, information, and depositions were brought up. On application for her discharge:—Held, no objection that the commitment charged that the prisoner "was the keeper of," &c., and the conviction "that she did keep," both differing from the statute, which designates the offence as "keeping any disorderly house," &c.; for all these expressions convey the same idea. Nor that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house; for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence. Nor that the offence of keeping a common disorderly bawdy house was not sufficiently certain, for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage. *Regina* v. *Munro*, 24 Q. B. 44.

BELLIGERENTS.

See CRIMINAL LAW.

Lawful acts of war against a belligerent, cannot be either commenced or concluded in neutral territory. *In re Burley*, 1 L. J. N. S. 34—C. L. Chamb.—Draper, Richards, Hagarty, J. Wilson.

BENCH WARRANT.

A bench warrant issued at the Quarter Sessions, tested in open sessions, and signed by the clerk of the peace:—Held, not invalid for want of a seal. *Fraser* v. *Dickson*, 5 Q. B. 231.

BEQUEST.

See LEGACY—WILL.

BETTING.

See GAMING.

BIGAMY.

See CRIMINAL LAW.

BILL.

I. ATTORNEYS' BILL—*See* ATTORNEY AND SOLICITOR.

II. OF COSTS—*See* COSTS.

III. OF EXCHANGE—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

IV. OF LADING—*See* BILLS OF LADING AND WAREHOUSE RECEIPTS—RAILWAYS AND RAILWAY COMPANIES—SHIP.

V. OF SALE—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

VI. OF INDICTMENT—*See* CRIMINAL LAW.

VII. IN CHANCERY.

1. *Generally*—*See* PLEADING IN EQUITY—PRACTICE IN EQUITY.
2. *Amendment of*—*See* AMENDMENT IN EQUITY.
3. *For Foreclosure*—*See* MORTGAGE.
4. *For Sale*—*See* MORTGAGE.
5. *To Redeem*—*See* MORTGAGE.
6. *For Account*—*See* ACCOUNT—BILL OF ACCOUNT.
7. *For Discovery*—*See* DISCOVERY.
8. *Of Interpleader*—*See* INTERPLEADER.
9. *For Partition*—*See* PARTITION.
10. *Supplemental*—*See* PLEADING IN EQUITY.
11. *Dismissal of*—*See* PRACTICE IN EQUITY.

BILL FOR ACCOUNT.

See ACCOUNT.

A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to the widow. The widow and son and an infirm daughter lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill by the widow against her son's representative for an account of her share of the produce was dismissed with costs. *Gilmore* v. *Gilmore*, 14 Chy. 57.

BILLIARD TABLES.

Semble, that the corporation of the city of Toronto has a right to suppress all billiard tables within its jurisdiction. *Rex* v. *Inspector of Licenses of the Home District*, 4 O. S. 9.

Held, that a by-law of the corporation of London, passed under the 10 & 11 Vict. c. 48, and providing that the owner of a billiard table shall pay £10 per annum for a license to keep the same, had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. c. 6, but must be considered as a regulation super-added for the purposes of the town of London. *Church* q. t. v. *Richards*, 6 Q. B. 562.

Held, that an action of debt would lie for the penalty, under 50 Geo. III. c. 6., for keeping a table without license, and that after verdict it need not be averred that the defendant had not paid the penalty. *Ib.*

Application of 3 Vict. c. 9, s. 9, and 3 Vict. c. 20, s. 10. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. PARTIES.

1. *Corporations*, 477.
2. *Agents*, 479.
3. *Executors*, 479.
4. *Partners*—*See* PARTNERSHIP.

II. FORM AND OPERATION.

1. *Parties to whom Payable*, 479.
2. *Amount or Time of Payment Uncertain*, 480.
3. *Not Payable in Money*, 481.
4. *Endorsements or Qualifying Stipulations*, 482.
5. *Other Points of Form*, 483.

III. STAMPS.

1. *Pleading and Evidence*, 485.
2. *Other Cases*, 487.

IV. ALTERATION AND CANCELLATION, 488.

V. TRANSFER.

1. *After Maturity*, 489.
2. *Other Cases*, 490.

VI. PRESENTMENT FOR PAYMENT.

1. *To whom, when, and where*, 492.
2. *Allegation and Proof*, 493.
3. *Other Cases*, 495.
4. *Cheques*—*See* BANKS.

VII. PROTEST, 495.

1. *Notary Public*—*See* NOTARY PUBLIC.

VIII. NOTICE OF DISHONOUR.

1. *Necessity for*, 496.
2. *Form and Sufficiency of*, 496.
3. *Time and Manner of Giving*, 498.
4. *Wrong or Insufficient Address*, 499.
5. *Proof of*, 500.
6. *Waiver of, or Excuse for*, 500.
7. *Instruments Drawn or Payable in Lower Canada*, 502.

IX. ACCEPTOR AND MAKER, 503.

X. DRAWER AND ENDORSER.

1. *Note Payable to Bearer, or not Negotiable*, 503.
2. *Discharge of*, 504.
3. *Other Cases*, 505.

XI. ACTIONS ON.

1. *At what Time*, 506.
2. *Joinder of Parties*, 507.
3. *Form and Requisites of Declaration.*
   (a) *Names and Description of Parties*, 507.
   (b) *Averment of Liability and Promise*, 508.
   (c) *Other Cases*, 508.
4. *Pleas and Replications*, 509.
   (a) *Amendment of Pleadings* — *See* AMENDMENT AT LAW.
5. *Evidence.*
   (a) *Production of Instrument*, 511.
   (b) *Proof of Consideration*, 511.
   (c) *Proof of Payment*, 513.
   (d) *Parties to as Witnesses*, 514.
   (e) *Other Cases*, 515.
6. *Amount Recoverable.*
   (a) *Interest*, 516.
   (b) *Damages and Exchange on Foreign Bills*, 517.
   (c) *Foreign Currency*, 518.
7. *Costs.*
   (a) *Under C. S. U. C. c. 42, s. 23, et seq. (formerly 5 Will. IV. c. 1,)* 519.
   (b) *Application for full Costs when Parties are in Different Localities*—*See* COSTS.
8. *Other Cases*, 520.

XII. DEFENCES TO ACTIONS.

1. *Plaintiff not the Holder*, 521.
2. *Reëndorsement*—*Plaintiff liable over*, 523.
3. *Denial of Making or Endorsing*, 525.
4. *Consideration as a Ground of Defence.*
   (a) *What is a Consideration*, 527.
   (b) *Accommodation or want of Consideration*, 528.
   (c) *Partial Failure of Consideration*, 531.
   (d) *Fraud and Illegal Consideration*, 533.
   (e) *Usurious Transactions*—*See* USURY.
5. *Contemporaneous or other Agreement.*
   (a) *Agreements to Renew*, 537.
   (b) *To Postpone Payment*, 537.
   (c) *That Defendant should not be Liable*, 538.
   (d) *Other Cases*, 540.
6. *Payment, Release, Satisfaction, and Discharge.*
   (a) *Payment and Satisfaction*, 542.
   (b) *By Merger*, 546.
   (c) *By Previous Action or Recovery*, 549.
   (d) *Set-off*, 550.
   (e) *Time given for Payment*, 552.
   (f) *Statute of Limitations*, 554.
   (g) *Other Cases*, 557.
   (h) *Accord or Satisfaction by Bills or Notes*—*See* ACCORD AND SATISFACTION.
   (i) *By Assignment or Bankruptcy*—*See* BANKRUPTCY AND INSOLVENCY.
7. *Other Defences*, 560.

XIII. FRIVOLOUS DEMURRERS, 561.

XIV. INDEMNITY OR CONTRIBUTION BETWEEN PARTIES, 561.

XV. LOSS OF NOTE, 564.

XVI. MISCELLANEOUS CASES, 564.

XVII. Duties of Banks in Connection with —*See* Banks.

XVIII. Affidavit to hold to Bail on—*See* Arrest.

XIX. Forgery of—*See* Criminal Law.

XX. Premium Notes—*See* Insurance.

XXI. Effect of as Evidence under the Common Counts–*See* Money Counts.

XXII. Effect on Vendor's Lien of Taking Bills or Notes–*See* Sale of Land.

I. Parties.

1. *Corporations.*

Under 1 Vict. c. 30, and 7 Vict. c. 16, the Kingston Marine Railway Co. may give and receive notes in transacting their legitimate business. *The Kingston Marine R. W. Co.* v. *Gunn*, 3 Q. B. 368.

Upon a bill drawn "P. C. DeLatre, Esq., President Niagara Dock and Harbor Company, Niagara, C. W.," and accepted thus,—"Accepted, payable at the office of the Bank of Upper Canada, Niagara.—Signed. P. C. Latre, Pres't N. H. & D. Co." :—Held, in an action by the payees, that the acceptor was personally liable. *Bank of Montreal* v. *DeLatre*, 5 Q. B. 362.

Quære—Supposing the drawer had been suing, would that have made a difference. *Ib.*

Where a bill is drawn by a person signing as agent of a company, the acceptance admits the signature and authority of the agent, and precludes any technical objections as to the company, or their ability to draw the bill. *Ib.*

The Buffalo, Brantford, and Goderich Railway Co., have no power under their charter or under the General Railway Act, to make notes. *Topping* v. *Buffalo, B. & G. Railway, Co.*, 6 C. P. 141.

Defendant accepted a bill drawn upon him as treasurer of the Wolf Island Railway and Canal Co., thus—"Accepted, W. A. Geddes, Treas. W. I. R. W. & C. Co.," adding the company's seal:—Held, that he was personally liable. *Foster* v. *Geddes*, 14 Q. B. 239.

Upon a note signed "Geo. H. Cheney, Pres't Gr. Trunk Telegraph Co. F. C. A. Whitney, Secretary C. Grand Trunk Telegraph Co.," with the seal of the company affixed :—Held, that the makers were not personally liable. Quære, whether the company were liable. *City Bank* v. *Cheney et al.*, 15 Q. B. 400.

The charter of the company enacts that all evidences of debt issued by them, shall be issued and signed by the president and treasurer. Semble, per Robinson, C. J., that this is directory merely. Per Burns, J., that the seal dispensed with the signatures. *Ib.*

G., being the secretary of an insurance company, gave this note for a loss :—"£1000 currency.—Sixty days after date I promise to pay to the order of W. £1000, value received by the Ontario Marine and Fire Insurance Company, payable at the Gore Bank in Hamilton." Signed C. Horatio Gates, Secretary O. F. Company :" Held, that he was personally liable thereon. *Mowat* v. *Gates*, 8 C. P. 548.

Held, that a bill drawn by one defendant as secretary, on, and accepted by the other defendant as president of a railway company, did not come within sec. 13 of 18 Vict. c. 182, as being accepted by the president and countersigned by the secretary; and that they were personally responsible. *Bank of Montreal* v. *Smart et al.*, 10 C. P. 15.

The plaintiffs declared against the acceptor on a bill as drawn in their favour, but which was payable to the order of Thomas G. Ridout, Esq., cashier. It was endorsed, "Pay to John Smart, Esq., cashier, or order. Thomas G. Ridout, cashier," but the name of Thomas G. Ridout had been struck out. At the trial the plaintiffs were allowed to amend by alleging that the bill was payable to the order of Ridout, who endorsed to Smart, and that they, R. & S., being the plaintiffs' agents and cashiers, received the bill for them, and as their property :—Held, that the plaintiffs could not recover, for the beneficial interest which they were alleged to have in the bill would not entitle them to sue on it in their own name. *Bank of U. C.* v. *Ruttan*, 22 Q. B. 451.

A company incorporated by C. S. C. c. 65, were empowered to borrow money for purposes specified, and through their president to make notes, &c. The president, acting upon a resolution of the directors, signed the note in question, but it appeared that the directors had not been appointed as required by the act :—Held, that the resolution sufficiently complied with the act; and that, as the statute empowered the directors to authorize the president to sign notes, and the plaintiff had accepted such notes in good faith, and the proceeds of which were applied for the benefit and purposes of the company, it might be presumed that the proper authority had been given. *Currier* v. *Ottawa Gas Co.*, 18 C. P. 202.

A mining company incorporated under C. S. C. c. 63, s. 57, has not, as a necessary incident, the right to draw, accept, or endorse, bills of exchange for the purposes of their business; and the power of "selling or otherwise disposing of their ores as the company may see fit," in their articles of association, will not give such right by implication. Bills directed to the secretary of the company, and so describing him, are in effect drawn on the company, and authorize him to accept on their behalf, if he has authority to bind them; and it is unnecessary to put the seal of the company to the acceptance. His authority, and the power of the company to accept, are put in issue by a traverse of acceptance by the company. Where there is no mention in the bills or acceptances of the amount of the capital stock the trustees, under C. S. C. c. 63, s. 57. are personally liable; but only where but for such omission the company would have been liable, which here they would not have been. *Gilbert* v. *McAnnany et al.*, 28 Q. B. 384.

Declaration on a note made by defendants, a building society, incorporated under C. S. U. C. c. 53:—Held, good on demurrer, for they might legally make notes under certain circumstances. *Snarr* v. *Toronto Permanent Building & Savings Society*, 29 Q. B. 317.

In an action against defendant as acceptor on the following bill of exchange :—"$800. —Montreal, Feb. 19, 1869.—Two months after date pay to the order of myself at the Jacques Cartier

Bank in Montreal, eight hundred dollars, value received, and charge the same to account of E. E. Gilbert. James Glass, Secretary, Richardson Gold Mining Company, Belleville, Ontario," and accepted "The Richardson Gold Mining Co., per James Glass, Secretary :"—Held, on demurrer, not to be the acceptance of defendant, and that he was not personally liable. *Robertson* v. *Glass*, 20 C. P. 250.

See *Corporation of Toronto* v. *McBride*, 29 Q. B. 13, p. 480 ; *Merritt* v. *Maxwell*, 14 Q. B. 500, p. 484 ; *Wilson* v. *Gates*, 16 Q. B. 278, p. 484.

2. *Agents.*

McC. & Bros., acting as agents for L. T. & P., purchased a load of coal, without stating to the vendor that they were acting as agents, and upon receipt of the coal sent in payment a draft drawn by them, and accepted by their principals, to which they signed their own names as drawers, adding the word "Agts :"—Held, that they were personally liable as drawers. *Reid* v. *McChesney*, 8 C. P. 50.

See previous sub-head.

3. *Executors.*

The defendants as executors purchased goods of the plaintiffs, and gave notes, "—— months after date we, as executrix and executors of the late B. P., promise," &c., signed by defendants, "executrix and executors of B. P., deceased :"—Held, that they were personally responsible. *Kerr et al.* v. *Parsons et al.*, 11 C. P. 513.

See *Gore Bank* v. *Crooks*, 26 Q. B. 251, p. 492.

II. Form and Operation.

1. *Parties to whom Payable.*

A note made payable to a person or his order, or to the order of a person, means the same thing. *Myers* v. *Wilkins*, 6 Q. B. 421.

"Three months after date we, or either of us, promise to pay E. S. R. (the plaintiff,) *or J. F. his guardian*, at the post office, Embro, £119 17s. cy., value received, in rent of farm," adding a count on an account stated. It was proved that the defendant had been in possession of the plaintiff's farm before and after the note was made, which was given for rent due ; and that the plaintiff was abroad at the time of making the note :—Held, that the writing was not a note, but would support a recovery under the account stated. *Reed* v. *Reed*, 11 Q. B. 26.

A note payable to A. "or to his wife, and to no other person," is the same as if payable to A. alone, and his executors may sue upon it. *Moodie* v. *Rowatt*, 14 Q. B. 273.

"We, or either of us, promise to pay to A. B., treasurer of, &c., or to his successor or successors in office, or order, &c. :"—Held, a good note, the words, "or to his successor or successors in office," being void. *McGregor* v. *Daly et al.*, 5 C. P. 126.

Held, that an instrument promising to pay "to J. P., Esq., treasurer of the building committee of the congregation of St. John's church, in the town of Prescott, and his successor duly appointed," was a note, and might be sued upon by his administratrix. *Patton, administratrix* v. *Melville*, 21 Q. B. 263.

Two trustees, desiring to purchase a new school site, petitioned the township council for a loan of $400, which was granted and secured by two instruments, as follows :—"We, the undersigned trustees of school section No. 11, do hereby promise to pay the treasurer of the corporation of Toronto township on," &c., signed M. & D., trustees, with the corporate seal affixed. The money was expended for the purpose mentioned :—Held, 1. That the township corporation could not recover on the notes, for they were payable to the treasurer, not to the plaintiffs, and were not negotiable ; 2. That the defendants were not personally liable upon them. *Corporation of the Township of Toronto* v. *McBride et al.*, 29 Q. B. 13.

Declaration on a note payable to G. or order. Plea, non fecit. The note when produced was payable to G. or order "for the use of M. :"—Held, no variance, for it was declared on according to its legal effect. Equitable plea, setting out facts which, if true, shewed that M. was not entitled to the money, and alleging that the plaintiff, the endorsee of G., took it with notice: Held, that the fact of the note being expressed to be for the use of M. was no evidence of such notice ; for this shewed only M.'s right as against G., whereas the plea was in denial of his right. *Munro* v. *Cox*, 30 Q. B. 363.

See *Corporation of Perth* v. *McGregor*, 21 Q. B. 459, p. 481 ; *Bank of U. C.* v. *Ruttan*, 22 Q. B. 451, p. 478.

2. *Amount or Time of Payment Uncertain.*

"Due to Mr. Robert Russell £500 for value received, by improvements, lumber, and servitude on Madawaska River, payable at the sale of the lumber marked P. A. in Quebec or elsewhere :"—Held, not a note, the payment being subject to a contingency. *Russell* v. *Wells*, 5 O. S. 725.

"Seventeen months after date, I promise to pay to H. or order, £50, without interest, or three years and five months after date, with two years interest, for value received :"—Held, a valid note, being payable certainly at the latest day. *Hogg* v. *Marsh*, 5 Q. B. 319.

A promise to pay a certain sum "with exchange on New York :"—Held, not a note ; the amount being rendered uncertain by the uncertainty of exchange. *Palmer* v. *Fahnestock*, 9 C. P. 172.

McLean, J., concurred in the above decision. Robinson, C. J., and Burns, J., expressed no opinion on the point. It was, however, held, that there was no right of action against the endorser as upon a guarantee. *Fahnestock* v. *Palmer*, 20 Q. B. 307.

Held, following Palmer *v.* Fahnestock, 9 C. P. 172, that an instrument purporting to be a promissory note, with the words, "with exchange not to exceed one-half per cent," was not a note. *Saxton* v. *Stevenson*, 23 C. P. 3[illegible]. See, also, *Wood* v. *Young*, 14 C. P. 250 ; *Gro[illegible]*

v. *Young*, 23 Q. B. 387; *Cushman* v. *Reid*, 20 C. P. 147.

"In the Queen's Bench. The Municipal Council of the county of Perth, plaintiffs, v. Thomas Smith, defendant. "Please pay E. R. attorney for the plaintiffs in this cause, the sum of £125, on account of plaintiffs' claim in this suit. Wm. Smith," addressed to and accepted by A. McG., county treasurer :—Held, not a bill of exchange, the amount payable being dependent upon the continuance of the plaintiffs' claim in the suit, and therefore subject to a contingency :—Held, also, that if a bill, the attorney only could sue upon it as payee, not the plaintiffs in the suit named. *The Corporation of the County of Perth* v. *McGregor*, 21 Q. B. 459.

Plaintiff declared on the common counts, and upon the two instruments following: "Frankfort, 26th Nov., 1861. Six months after date. I promise to pay P. Turley, or bearer, $125 for value received; and I also agree with said Turley to give him at any time he requires it any security he requires that is in my power to give, at my cost and charges, for the payment of the above amount of $125; and should I not comply with his request, then the above mentioned amount to be due to him from the date of such refusal." "Frankfort, 27th Nov., 1861. One year after date, I promise to pay P. Turley, or bearer, $80, with interest, for value received; and if said Turley should require any additional security for the payment of the above amount, I hereby agree to do so at my expense, and should I not comply with this request, then this note to be considered due from said date :"—Held, that if notes at all, the plaintiff could not recover upon them as such, as they would only become due as notes at the expiration of six and twelve months, which times had not expired; and that in the absence of a special count, stating the facts, with evidence to support it, the action must fail. *Turley* v. *Rosebush*, 12 C. P. 380.

See *McQueen* v. *McQueen*, 9 Q. B. 536, p. 538.

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3. *Not Payable in Money.*

An agreement to pay a certain sum in carpenter's or joiner's work, such as might be required, cannot be declared on as a note. *Downs* v. *McNamara*, 3 Q. B. 276.

A promise to pay "in cash or mortgage upon real estate," is not a note, not being an absolute promise to pay money; and it does not become a note by the maker's election to pay in cash. *Irving* v. *Barwick*, 16 Q. B. 45.

Quære, whether an instrument purporting to be a bill of exchange, payable in New York, "with current funds," if it mean other than lawful money of the U. S., is a bill of exchange. *Stephens* v. *Berry*, 15 C. P. 548.

Held, that a note made in this province, payable in current funds of the U. S. of America, was not a promissory note. *Bettis* v. *Weller et al.*, 30 Q. B. 23.

The plaintiff having declared upon such note, defendants pleaded, setting it out in hœc verba, and alleging that it was made in this province: that the current funds mentioned were paper notes issued by the U. S. government, and current there as money, but that the dollar named in them was not equal to the dollar of our money, nor of any fixed value; and that, except by endorsement of said notes by defendants, there was no contract between them and the plaintiff :—Held, that the plea was good, and not objectionable as varying the written contract by parol. *Ib.*

"Due J. G., or bearer, $482 in Canada bills, payable fourteen days after date," &c. :—Held, not a note; for such bills (issued under 29 & 30 Vict. c. 10) though currency, are not specie or money. *Gray* v. *Worden*, 29 Q. B. 535.

See next sub-head.

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4. *Endorsements or Qualifying Stipulations.*

"Ten days after date, we promise to pay M. N. £85 15s., for value received," upon which, when given, was indorsed, "It is agreed that this note is to be paid by a lawful mortgage, with interest on the same, having three months to run :"—Held, not a note as between the original parties, nor evidence of an account stated. *Newhorn* v. *Lawrence et al.*, 5 Q. B. 359.

Quære, would it be a note in the hands of an endorsee, who took it as a note for value? *Ib.*

"Toronto, 12th May, 1858. Six months after date, we promise to pay to J. B., or order, $400. (Signed)—N. J., W. W. B., E. W. D. The above note is to be paid in merchantable lumber, to be delivered in Toronto at cash price, and an additional quantity of lumber sufficient to pay the freight is to be sent in. If not so paid within the time, then the same is to be paid in cash." This memorandum was written on the face of the note when it was signed :—Held, not a note :—Held, also, that defendants were clearly not estopped from denying that it was a note by having, in addition to the plea of non fecerunt, denied in other pleas their liability to pay "the said promissory note." *Boulton* v. *Jones et al.*, 19 Q. B. 517.

A guarantee endorsed on a note at the time of its execution in the following words: "We guarrantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds. *Lock et al.* v. *Reid et al.*, 6 O. S. 295.

An endorsement on a note of a condition, made before the note is signed, is part of such note. If made after the signing, it will be considered merely as a memorandum to identify the note. *McKinnon* v. *Campbell*, 6 L. J. 58.—C. L. Chamb. —Richards.

"I guarantee the payment of the within," endorsed on a note, over the signature of the payee, treated as an endorsement of the note, and not as a guarantee or collateral engagement for its payment. *Walker* v. *O'Reilly et al.*, 7 L. J. 300.—C. C.—Mackenzie.

Action on a note made by defendant, payable to H. or bearer, and by him delivered to plaintiffs. Pleas, 1. That the note was made to secure the last instalment of purchase money of land sold by said H. and others to defendant, and when made was subject to a condition written thereon, that if the persons named should convey to the defendant said land, according to a certain bond given by them, then the note

should be valid, but otherwise should be void: that they did not convey, and that said note was altered by H. by erasing the condition, so as to obtain for it currency, and not to correct any mistake; 2. That at the delivery of said note to defendant there was written or endorsed thereon, with defendant's consent, a condition, &c., (as in the first plea): that the land was not conveyed: that H. afterwards fraudulently obliterated said condition, so as to render the note negotiable; and that plaintiff received the same with notice of the premises:—Held, both pleas good; and that the agreement must be looked upon as part of the instrument. *Campbell* v. *McKinnon*, 18 Q. B. 612.

The defendant owing the plaintiff delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee: "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note:"—Held, that the guarantee was sufficient within the 4th sec. of the Statute of Frauds; for although no promisee was named in it, yet the reference to "the within note," made it a promise enuring to the benefit of the bearer. Semble, that the guarantee created an absolute promise to pay at all events, and that defendant was not entitled to notice of dishonour; but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 302.

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5. Other Points of Form.

A note made and endorsed in a foreign country is negotiable here within the statute of Anne. *Thompson* v. *Sloan*, M. T. 2 Vict.

A note made in Upper Canada payable at Montreal, is an inland note, being in effect payable generally, under 7 Will. IV. c. 5, and may be properly protested the day after the third day of grace. *Bradbury* v. *Doole*, 1 Q. B. 442.

"A. & Co., by A. junr.," primâ facie imports that A. signs the note for, and not as one of, the firm. *Dowling* v. *Eastwood et al.*, 3 Q. B. 376.

A note payable to the order of the plaintiff, need not be endorsed by the plaintiff to himself to give it the effect of a note payable to him. *Meyers* v. *Williams*, 6 Q. B. 421.

Held, that a note payable to the maker's own order, and endorsed by the maker, could not be declared upon as payable to the plaintiff or bearer. *Burns* v. *Harper*, 6 Q. B. 509; *Wallace* v. *Henderson*, 7 Q. B. 88.

Semble, that a note in this form when endorsed by the maker becomes a note payable generally to bearer, but not to any particular person. *Burns* v. *Harper*. 6 Q. B. 509.

But to declare upon such a note that he (the maker) made an instrument in writing promising to pay to his own order, would be bad. *Wallace* v. *Henderson*, 7 Q. B. 88.

"Three months after date, pay to the order of W. T., at Port Hope, £228 7s. 6d., for value received:"—Held, not a note, for want of a promise to pay; nor a bill, for want of a drawee. *Forward et al.* v. *Thompson et al.*, 12 Q. B. 103.

Assumpsit upon a note, alleged to have been made by The Wolf Island Railway and Canal Co., payable to defendants, and endorsed by them to plaintiffs. Plea, that the writing sued on is an instrument under the seal of the company, and not a promissory note, or negotiable as such:—Held, on demurrer, plea good. —Held, also, declaration good, as the court could not assume that this company were not authorized to make notes. *Merritt et al.* v. *Maxwell et al.*, 14 Q. B. 50.

"For value received, we jointly and severally promise to pay to W. P. O. or bearer, the sum of £50 cy., in manner following," &c. "As witness our hands and seals, this 29th day of April, 1856. —M. M. Patman—[L.S.] E. H. Gates—[L.S.] Signed, sealed, and delivered, in presence of R. S.":—Held, clearly not a note, but a specialty. *Wilson* v. *Gates*, 16 Q. B. 278.

"Mr. O.—Mr. B. wants £25, twelve o'clock this day, i. e., 15th of February, 1860. I want you to get it him immediately out of S.'s money. Signed by H. and accepted by defendant:—Held, not a bill, because payable out of a particular fund; and that the plaintiff could not recover upon it under the common counts. *Ockerman* v. *Blacklock*, 12 C. P. 362.

Debentures or coupons cannot be considered promissory notes where the company which issues them have no authority to make notes. *Gelder* v. *Toronto Street R. W. Co.*, 14 C P. 513.

Defendant with others signed the following, his subscription being $100:—"We the undersigned do hereby severally promise and agree to pay to F. W. T. Esq. (the plaintiff,) agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal church and rectory in the town of Goderich." The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums for the purpose, &c., and that plaintiff would pay $100 for the same purpose, defendant promised to pay plaintiff $100 therefor; that W. and others did promise and pay accordingly, and the plaintiff paid $100, yet defendant had not paid. At the trial the plaintiff's promise to contribute $100 was not proved. Held, that on this ground defendant was entitled to succeed:—Held, also, that the instrument was the several promissory note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs. *Thomas* v. *Grace*, 15 C. P. 462.

"I promise to pay," signed by two, is joint and several. *Creighton* v. *Fretz et al.*, 26 Q. B. 627.

Held, (affirming the judgment of the C. P. Wilson, J., diss., that an instrument in this form "Good to Mr. Palmer for $850 on demand," was not a promissory note, and so requiring a stamp; but, Gwynne, J., diss., that without any evidence of the circumstances under which it was given it was primâ facie evidence to go to a jury as an account stated. *Palmer* v. *McLennan*, 25 C. P. 565, *S. C.* in Appeal, 22 C. P. 258.

See IX. p. 503; X. 1, p. 503.

III. Stamps.

1. *Pleading and Evidence.*

Where defendant neither denied the making of the note sued on, nor pleaded the absence of a stamp:—Held, that a defence on the latter ground could not be urged. *Baxter* v. *Baynes*, 15 C. P. 237.

Semble, 1. That the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact; 2. That such plea would be displaced by evidence shewing that the instrument had been properly stamped at the time of signature, and initialed by the maker, but had been rubbed off, defaced, or improperly removed by some one else; that on these facts being shewn the note would not be void, and defendant would be relieved from the penalty. *Stephens* v. *Berry*, 15 C. P. 548.

Baxter *v.* Baynes, 15 C. P. 237, as to pleading specially the want of a stamp adhered to. But as express leave had been given to enter a non-suit for want of proper stamps, and the case had been argued on that ground, the question as to such defence being admissible under the plea of non-acceptance, was not insisted upon. *Ib.*

Declaration against endorser. Plea, that at the time plaintiff became a party to said note, proper stamps were not affixed, and double stamps not affixed till a long time after. Replication, note endorsed in blank to plaintiff, who, while holder and before maturity, affixed double stamps:—Held, replication bad, as not averring that as soon as plaintiff became aware that proper stamps had not been affixed by the proper parties at the proper time, he affixed double stamps. *McCalla* v. *Robinson*, 19 C. P. 113.

The plea was, that no stamps were ever affixed to the note according to the statute:—Semble, that the defence that proper stamps were on it had not been cancelled was admissible under this plea; but, as an amendment would have been allowed, the point was not expressly decided. *Young* v. *Waggoner*, 29 Q. B. 35.

An action for a penalty for not affixing stamps under 27 & 28 Vict. c. 4, s. 5, must, by 31 Eliz. c. 5, be brought within a year. No right of action exists in the plaintiff until the action is so brought, and defendant, therefore, may take advantage of this latter statute under a plea of not guilty. *Mason* q. t. v. *Mossop*, 29 Q. B. 500.

The defendant was held not precluded from such defence by having marked in the margin of his plea the statute 21 Jac. I. c. 4, only. *Ib.*

A note not properly stamped cannot be used as an acknowledgment to take a case out of the Statute of Limitations, or as evidence of an account stated. *McKay* v. *Grinley*, 30 Q. B. 54.

In an action on a promissory note, by a subsequent holder, the only question raised by the plea was, whether or not, when he became the holder or received the note, the plaintiff had complied with the act by availing himself of the privilege of affixing the double stamps, the note having been formerly held to have been insufficiently stamped in the hands of a previous holder, who had in consequence failed to recover upon it. The evidence, however, clearly shewed that when the note was received by the plaintiff, which he swore it was in good faith and for value, he did affix the double stamps, which were also duly cancelled, but *that he was aware, when he took it, of the former difficulty about the stamps*:—Held, that defendant could not avail himself, under the pleadings, of this fact, if a defence; but that, as the record stood, the plaintiff came within the protection of sec. 9 of 27 & 28 Vict. c. 4. *Kirby* v. *Hall*, 21 C. P. 377.

To an action by payee against maker of a promissory note, the plea was, that there was not affixed thereto at the time of making an adhesive stamp or stamps of the required amount, or any stamps whatever, as required by the statute in that behalf:—Held, on demurrer, plea good. *Escott* v. *Escott*, 22 C. P. 305.

The payee of a note is not a "subsequent party thereto," who may give it validity by paying double duty. *Ib.*

Declaration on a foreign bill of exchange drawn in London, England, on defendants, and accepted by them in Canada, payable to the plaintiffs. Plea, that the bill was not stamped at the time of acceptance, nor the stamps cancelled, nor were double stamps affixed by the plaintiffs after they acquired the knowledge that it was not properly stamped. Replication, that the bill was duly stamped in England according to the law of England: that it was returned to the plaintiffs by defendants accepted, but not stamped; and that without any delay, and in a reasonable time, the plaintiffs transmitted the bill to S. & W. in this province, and caused them to pay the double duty, by affixing stamps to the amount thereof:—Held, on demurrer, replication good; for that upon delivery of the bill by defendants to plaintiffs after acceptance the plaintiffs became "subsequent parties to such bill," within 31 Vict. c. 9, s. 12, as amended by 33 Vict. c. 13 D, and were entitled therefore to make it valid by paying the double duty:—Held, also, that the replication sufficiently alleged the due payment by plaintiffs of the double duty through S. & W. as their agents:—Held, also, that the replication should have set out the amount of the double stamps affixed, and the mode of cancellation; but that this was not ground of general demurrer. *Woolley et al.* v. *Hunton et al.*, 33 Q. B. 152.

Held—following Woolley et al. *v.* Hunton et al., 33 Q. B. 152, and dissenting from Escott *v.* Escott, 22 C. P. 305, that a payee is a "subsequent party" to a promissory note, within the meaning of 31 Vict. c. 9, s. 12, who may pay the double duty provided by that section. The plea was, that at the time of making the note no adhesive stamp or stamps whatever were affixed to the note; to which the plaintiffs replied that they paid double duty "by affixing to the note stamps to the amount of double duty payable in respect thereof." Quære, whether the plea should not also have denied that the note was written on stamped paper; and semble, that the replication should have stated the amount in stamps affixed. *The Joseph Hall Manufacturing Company* v. *Harnden et al.*, 34 Q. B. 8.

Declaration, that defendant on, &c., became the holder of and a party to a note made by one E. payable to one T. or bearer, &c.—which note was made on unstamped paper, and was chargeable with duty under the 31 Vict. c. 9,—before

the duty chargeable by the statutes in that behalf had been paid by affixing thereto the proper stamps in that behalf; and such note then and immediately after the time when defendant became the holder thereof, not having thereon or affixed thereto the proper stamps, to the amount of the duty properly chargeable thereon, contrary to the said statute in that behalf, whereby and by force of the statutes in such case defendant forfeited $100. On motion to arrest judgment,—Held, declaration good: that it was unnecessary to negative the payment of double duty by defendant; for defendant's protection, if any, must arise, on the facts stated, under sec. 12 of the 31 Vict., not sec. 11, by which the penalty is imposed, and that it must therefore be pleaded. *Edmonds* q. t. v. *Hoey*, Q. B. M. T. 1874. Not yet reported.

The 36 Vict. c. 13, repeals secs. 11 and 12 of 31 Vict. c. 9, D., and substitutes others therefor: Quære, whether these sections should be pleaded as part of the first act generally, or stating specially that they are so by virtue of the last act. Semble, the latter. *Ib.*

It was objected that the reference here was to 31 Vict. c. 9, which was repealed when the alleged cause of action arose: but held sufficient. *Ib.*

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2. *Other Cases.*

A party becoming the holder of an unstamped bill, must affix the double stamp to it *before* sueing upon it. Per Richards, C. J., he should affix the proper stamp when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter. *Stephens* v. *Berry*, 15 C. P. 548.

Notes made in June, 1864, were antedated as of the previous year, before the Stamp Act came into force, and not stamped until April, 1866, after action:—Held, that they were void under 27 & 28 Vict. c. 4, s. 9. *Ritchie* v. *Prout*, 16 C. P. 426.

The plaintiff in September, 1865, sued the maker of a note, due in January, 1865, payable to H. or bearer, and by H. endorsed to the plaintiff. The jury were directed that it was sufficient if the stamps were put on before action brought:—Held, a misdirection, for the plaintiff became a party to the note by becoming the holder or endorsee, and was bound to stamp it then. *Henderson* v. *Gesner*, 25 Q. B. 184.

The Stamp Act does not require an instrument to be stamped which with stamps would not be valid for some purpose; or, semble, which would not be a promissory note, draft, or bill of exchange. *Taylor* v. *Golding*, 28 Q. B. 198.

No penalty, therefore, can be recovered under 27 & 28 Vict. c. 4, s. 9, for not affixing stamps to a note for money lost at play, for such note, under the statute of Anne, is utterly void. *Ib.*

In an action by endorsee against maker, it appeared that the proper stamps were upon the note, but they had not been cancelled:—Held, that under 29 Vict. c. 4, s. 3, the note was of no avail. *Young* v. *Waggoner*, 29 Q. B. 35.

A blank note made by F., payable to defendant or order, and endorsed by defendant, was sent by F. to the agent of the Bank of Montreal at Stratford, where it was payable, to retire a previous note. The agent received it on the 27th October, and on the 2nd November dated it 30th October, 1869, and affixed the proper stamps to it, which he obliterated on the same day, but marked the obliteration as of the 30th October, "30, 10, 69." In an action by the endorsee:—Held, that the note was invalid under 31 Vict. c. 9; for if made on the 27th or 30th October, it had not then the stamps affixed; and if on the 2nd November, the stamps bore a different date. *Hoffman* v. *Ringler*, 29 Q. B. 531.

The non-cancellation of some of the stamps, though the rest have been cancelled, invalidates the note. *Lowe* v. *Hall*, 20 C. P. 244.

Declaration against R. and H. for goods sold. Plea, by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership: that afterwards he retired, W. taking his place, and R. and W. assuming the debts of the old firm, including this claim; and that the plaintiff being aware of this arrangement, took the note of the new firm, R. and W., for his debt. The third plea alleged that the plaintiff had notice of the arrangement, as in the former plea, and that in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. and W. in place of defendants, and took their note and relinquished his claim against H. The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. and W. The plaintiff replied to these pleas, that the note was not duly stamped, the stamps thereon not having been properly cancelled:—Held, bad, for the plaintiff could have made the note valid by affixing double stamps, and could not take advantage of his own neglect to do so. *Watts* v. *Robinson et al.*, 32 Q. B. 362.

Where the holder of a note has reasonable notice of the want of proper stamps, he must repel the presumption of knowledge by reasonable evidence, or shew that as soon as he acquired knowledge, he affixed double stamps; or that he made due enquiry, and was thereby led to believe that the note had been duly stamped, or had not reason therefrom to believe that it had not been duly stamped; in either of which cases he may be justified in not attaching the double stamps until he has knowledge by and at the trial. The notice to or knowledge of his attorney or agent must be considered his. Upon the evidence, set out in this case, the court held that the double stamps had not been put on in time. *Waterous et al.* v. *Montgomery*, Q. B. M. T. 1874. Not yet reported.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when it was discounted, and the holder neglected to put on double stamps as required by the statute, it was held not to constitute an equitable assignment of the funds of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay such draft from the funds coming to him, such letter was held to constitute a good equitable assignment. *Roberton* v. *Grant*, 3 Chy. Chamb. 331.—Strong.

IV. Alteration and Cancellation.

Where a note originally joint was altered to joint and several without the consent of one

the makers, who was afterwards sued alone by an endorsee:—Held, that the plaintiff could not recover on the note on account of the alteration, nor on the money counts, as there was no privity between the maker and him. *Samson* v. *Yager*, 4 O. S. 3.

The plaintiff declared upon a note as made by the defendants jointly and severally. Quære, whether the interlineation of the words "jointly and severally," of which no explanation was offered, could be taken advantage of under non fecit, or whether a special plea was requisite. *Leslie* v. *Emmons et al.*, 25 Q. B. 243.

A., the holder, sued B., the acceptor, and C., the endorser, as upon a bill dated "1st of June, 1847, payable three months after date," which, when produced, appeared to have been in fact dated "November, 1841, and payable four months after date," and to have been altered by erasure to read as declared upon:—Held, that the alteration was fatal to the holder's recovery, though an endorsee for value, and not in any way privy to it:—Held, also that the alteration as to time of payment was properly given in evidence under the pleas "did not accept," and "did not endorse." But, quære, as to the alteration in the date. Draper, J., dubitante on this point. *Meredith* v. *Culver*, 5 Q. B. 218.

Where a note over due has been retired and settled by a renewal note, it is cancelled, and cannot be put in circulation again even by the payee who has taken up the renewal note out of his own funds.—Jones, J., diss. *Cuvillier* v. *Fraser*, 5 Q. B. 152.

Where an endorsee suing the endorser upon a note produces it at the trial from his own custody, with defendant's endorsement thereon, cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given the jury for rejecting the inference that the note had been satisfied by defendant whose name is thus cancelled. *Peel* v. *Kingsmill*, 7 Q. B. 364.

Held, that the alteration of a note by the holder (by placing the figure 1 before the figure 4 in the date), after it had become due, vitiated the same, and that the amount could not be recovered from either the makers or endorsers. *Gladstone* v. *Dew*, 9 C. P. 439.

See *Campbell* v. *McKinnon*, 18 Q. B. 612, p. 633.

V. Transfer.

1. *After Maturity.*

A second accommodation endorser who has paid a note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation endorser, and may endorse it over after it is due. *Breeze* v. *Baldwin*, 5 O. S. 444.

Held, 1. That set-off by endorsees against the holder, was no defence at law or equity, upon a note given for the accommodation of the endorser; 2. That the endorsee of an overdue bill or note, is liable to such equities only as attach to the bill or note itself, and to nothing collateral to it from the endorser to the maker, or endorsee to payee. *Wood et al.* v. *Ross et al.*, 8 C. P. 299.

Where an agent of the holder disposes of a note over due, without authority, though for good consideration, the person taking from him obtains no title as against the principal. *West* v. *MacInnes*, 23 Q. B. 357.

A valid agreement to give time is an equity which attaches to a bill as against a person taking it after maturity. *Britton* v. *Fisher*, 26 Q. B. 338.

To an action against the maker and endorser of a note, the maker pleaded, on equitable gounds, that there was an agreement not to negotiate the note after maturity; and that the note was first endorsed to the plaintiff, as in the declaration alleged, after maturity, with notice of its being an accommodation note:—Held, plea good, the agreement alleged being an equity attaching to such note after maturity. *Grant* v. *Winstanley*, 21 C. P. 257.

Defendant also pleaded that the note was endorsed by the payee during its currency to one R., who had notice of its being an accommodation note, and that defendant was only security for the payee: that R. held it till at and after maturity, but did not notify the payee as endorser, who never received notice of dishonour, and defendant was thereby discharged; and that the note was endorsed to plaintiff after maturity, with notice that it was an accommodation note:—Held, on demurrer, plea bad, for the want of notice could not prejudice defendant. *Ib.*

The plaintiff sued as bearer of a note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL. being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL. then held by said McD., which said note McD. transferred and delivered to the plaintiffs, and deposited the note in the declaration mentioned with the plaintiffs, after it became due as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plaintiffs as collateral security, and is the lawful holder of said note:—Held, on demurrer, plea bad, for, 1. The terms upon which the note was transferred to McD., which formed no part of the original consideration for which it was given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and, 2. That even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant. *Canadian Bank of Commerce* v. *Ross*, 22 C. P. 497.

See *Brooke* v. *Arnold*, Tay. 25, p. 550; *Davis* v. *Dunn*, 6 Q. B. 327, p. 526; *Rennie* v. *Jarvis*, 6 Q. B. 329, p. 532; *Clarkson* v. *Lawson*, 14 Q. B. 67, p. 530; *Pyper* v. *McKay*, 16 C. P. 67, p. 545.

See XII. 4 (d), p. 533.

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2. *Other Cases.*

An endorsement to pay to the trustees of an insolvent firm, without naming them, is sufficiently certain. *Auldjo* v. *McDougall*, 3 O. S. 199.

It is no ground for impeaching the endorsement of an administrator, that the debtor at the time of the intestate's death resided out of the jurisdiction of the Surrogate Court, by which the letters of administration had been granted. *Wright* v. *Meriam*, 6 O. S. 463.

Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in New York with the note in his possession :—Held, that his administrators appointed in that state might endorse the note so as to enable the endorsee to sue upon it in this country, without their having administered here. *Hard* v. *Palmer*, 20 Q. B. 208.

Where in a deed of separation the husband covenanted to pay his wife £150, and appointed trustees, who, being indebted to the husband in that amount, gave him their separate notes for payment to his order, which he endorsed in blank, and returned to them for the benefit of his wife, and one of the trustees then gave to the wife the notes signed by him, with an endorsement that they were not to be sold by her, and she assigned them to the plaintiff :—Held, that he could not recover against the trustee on the notes, as they having been returned by the husband to the trustee were cancelled ; and that the wife had, at any rate, no power to transfer them. *Wilson* v. *McQueen*, E. T. 3 Vict.

Declaration on a note made by defendant, payable to D. or order, and by D. endorsed to plaintiffs. Plea, that D. when the note was made was, and still is, defendant's wife. Replication, that defendant made the note with the intent that D. should endorse it away, and that she endorsed it to the plaintiffs by his authority :—Held, bad on demurrer. *McIver et al.* v. *Dennison*, 18 Q. B. 619.

It is no objection to the validity of a note, that when endorsed to the plaintiffs it was not signed by the maker ; the subsequent filling up of the maker's name, or of the amount, or of a payee's name, will be treated as if made before the endorsement. *Rossin et al.* v. *McCarty*, 7 Q. B. 100.

The bail of any one sued upon a bill or note, or any persons who pay it on account of any of the parties, become on payment holders ; and they hold as upon a transfer from the person for whom they pay, not as from the person they have paid ; and they stand with respect to other parties to the bill or note in the situation of the party for whom they pay ; and, consequently, unless he could have sued upon the bill or note, they cannot. *Hutchinson* v. *Munroe*, 8 Q. B. 103.

Plaintiffs sued defendant, who was an executor of E., as endorser of three notes payable to "the executors of the late E.," two being endorsed "J. M. B., agent of the executors of the late E," and the third "the executors late E., per pro. B." B. held a power of attorney from the executors, by which they as executrix and executors authorized him (among other things) for them as such executrix and executors to make and endorse all such promissory notes as might be requisite in the conduct and management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, endorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no enquiries as to the extent of B's. authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The court being left to draw inferences of fact, and the question being the personal liability of the defendant :—Held, 1. That the endorsements were sufficient in form ; but, 2, that not being for the purposes of the estate they were not within the authority given to B., the extent of which it was the plaintiffs' duty to ascertain ; and a nonsuit was ordered. *The President, Directors and Company of the Gore Bank* v. *Crooks*, 26 Q. B. 251.

See *Hammond* v. *Small*, 16 Q. B. 371, p. 538; *McCarthy* v. *Vine*, 22 C. P. 458, p. 567.

See X. p. 503.

VI. Presentment for Payment.

1. *To whom, when, and where.*

A note payable at a particular place must be presented there on the day it falls due, or the holder cannot recover against the endorser. *Truscott* v. *Lagourge*, 5 O. S. 134.

It is not necessary to present a bill drawn payable after date, for acceptance before it be due ; and where a bill is made payable at a particular place, presentment there for payment on the day it falls due is sufficient to charge the drawer, or to enable the person who took the bill to sue on his original cause of action. *Richardson* v. *Daniels*, 5 O. S. 671.

On a note payable at a particular place, without the words "and not elsewhere," it is sufficient to present it either at the place named, or to the maker himself. *Commercial Bank* v. *Johnston*, 2 Q. B. 126. See *Bank of U. C.* v. *Parsons*, 3 Q. B. 383. See, also, C. S. U. C. c. 42, ss. 5, 6.

A note due on a Christmas Day, being a Monday, must be presented on Saturday. *Holmes* v. *Ward*, T. T. 1 & 2 Vict.

[See now C. S. U. C. c. 42, s. 20; 35 V. c. 6, s. 8., D.]

A bill drawn in Toronto, on the 6th August, 1849, *by a party dealing in bills*, upon a party living in New York, payable at sight, in favour of a party living in Illinois, to be sent there as a remittance and for circulation, was presented in New York, on the 10th November following :—Held, that the delay could not, under the circumstances, be held to be laches on the part of the holder. *Boyes* v. *Joseph*, 7 Q. B. 503.

The plaintiffs sued on a note made by one C., payable at no particular place, and endorsed by defendant. The note was left at the bank in Cobourg, where C. then resided, for collection ; and the clerk who was to present it, stated that before the note became due he heard that the maker had left Cobourg : that on its becoming due he went to the house in which C. had resided, but could get no information respecting him. He enquired of more than one person who had known C. well, but their answers as to where he had gone were conflicting. Witness

for the defence, of whom C.'s partner was one, stated that no secret was made of his intended departure; that his furniture was advertised; and that they could at any time have given correct information as to his place of residence:—Held, that at least application should have been made at the places to which C. was said to have gone; that due diligence had not been used to discover his residence; and that the plaintiffs could not recover. And semble, that the question of diligence is not wholly a question for the jury. *Browne et al.* v. *Boulton*, 9 Q. B. 64.

Held, that under the evidence, the bank were liable to the plaintiffs for want of presentment of the note mentioned in the last case, which had been endorsed to them by the plaintiffs for collection, notwithstanding a notice issued by them, and which the plaintiffs had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, and that they (the defendants) would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities or mistakes, in respect of such notes. *Browne et al.* v. *Commercial Bank*, 10 Q. B. 129.

The law of Lower Canada is the same as the law here and in England, that as between the holder and endorsers a note must be presented, so as to bind them, on the day the statute makes it payable, and at the place where it is payable; but, as between holder and maker, it is enough to present it any time within the period fixed by the Statute of Limitations, and before action. *McLellan* v. *McLellan*, 17 C. P. 109.

In this case, between holder and maker, the note was made in Upper Canada, payable at the Bank of Montreal, in Montreal, and was not presented until five years after maturity, though before action:—Held, sufficient. *Ib.*

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2. *Allegation and Proof.*

Waiver or Excuse.]—Where a note was made payable at a particular place, although no averment of its being presented there for payment appeared upon the record, the court, after verdict for the plaintiff, and proof at the trial of a subsequent promise, refused a nonsuit. *McIver et al.* v. *McFarlane*, Tay. 113.

Where defendant, an absconding debtor, on the day a note became due, wrote to plaintiffs stating his inability to pay, and requesting further time:—Held, to render presentment unnecessary, although the note was payable at a particular place. *McDonnell et al.* v. *Lowry*, 3 U. S. 302.

A note must be presented, although the maker has no funds at the particular place, but as between the payee and maker presentment there any time before action will be sufficient, if there were no funds at the day. *Henry et al.* v. *McDonell*, H. T. 3 Vict.

Where a joint note was made payable at a particular place, and it was not shewn that it was presented there when due, but one of the makers afterwards promised to pay it:—Held, sufficient evidence of presentment to go to the jury. *Malloy* v. *McFarlane*, T. T. 3 & 4 Vict.

Upon the issues of non-presentment and non-payment, the holder of a note will be entitled to recover against the endorser by proving his subsequent express or implied promise to pay, even though the promise be made after the action brought and after issue joined. *McCunniffe* v. *Allen*, 6 Q. B. 377.

A., the endorsee, sues B. the endorser, alleging that *after* the note became due, to wit, &c., B. endorsed to A. There was no averment of presentment or of notice. B. pleaded that he did not endorse as alleged:—Held, that under this plea the endorsement only, and not the time, was in issue:—Held, also, that the note being endorsed when over-due was no excuse for non-presentment, and so the declaration shewed no cause of action; but nevertheless, as the plaintiff had been nonsuited for not proving the time of endorsement, the nonsuit must be set aside. The court, however, in such a case, may grant a new trial without costs, and then allow plaintiff to amend. *Davis* v. *Dunn*, 6 Q. B. 327.

Assumpsit against maker and endorser of a note. The first count alleged that the maker had absconded, and was absent from Canada when the note fell due. The second count averred as an excuse for presentment the absence of the maker and the plaintiffs' inability to find him. Pleas to first count, 1. That the note was not duly presented for payment; 2. That it was not duly presented at the maker's last place of abode. To second count, that the maker's last place of abode was well known to plaintiffs when the note fell due:—Held, pleas bad. *Forward et al.* v. *Thompson*, 12 Q. B. 194.

Immediately before the note fell due, the payee, and first endorser wrote to the plaintiff requesting him to waive protest, and agreeing to hold himself liable just as if the note had been presented:—Held, that though the endorser was precluded by this from setting up want of presentment, the maker was not. *McLellan* v. *McLellan*, 17 C. P. 109.

Other Cases.]—In an action on a note, the declaration must aver presentment where it is payable. *Ferrie* v. *Rykman*, Dra. 61.

An averment that the note was "duly presented" for payment to the maker, without specially stating either time or place, is sufficient to charge an endorser. *Bank of U. C.* v. *Parsons et al.*, 3 Q. B. 383; *Commercial Bank* v. *Cameron*, 3 Q. B. 363.

Semble, that even for the purpose of evidence, it is not necessary, in order to charge the endorser, since our statute 7 Will. IV. c. 5, to shew presentment at the particular place. *Bank of U. C.* v. *Parsons et al.*, 3 Q. B. 383.

Endorsees sue defendants separately as payees and endorsers of a note payable at a particular place. The declaration avers a joint endorsement by the defendants, and a due presentment, "of all which defendant had notice," and the liability of the *defendant*. Demurrer, because a joint liability with another endorser is shewn on the face of the declaration, and no excuse alleged for omitting him; and because *due* notice is not alleged:—Held, declaration good upon the first, but bad on the second ground. *Commercial Bank* v. *Cameron*; *Commercial Bank* v. *Culver*, 3 Q. B. 363.

Where a note is made payable by A. B. at a bank, a plea denying presentment to A. B. is good. *Bank of U. C.* v. *Sherwood*, 8 Q. B. 116.

In assumpsit by endorsees of a note against the maker, defendant pleaded that the only consideration for the note was a bill drawn by J. H. & Sons on one R. S. in Bacup, Lancashire, England, payable in London, which bill J. H. & Sons knew they had no right to draw, but imposed on defendant; and that the plaintiffs took the note with full knowledge of the facts; and that the bill was duly presented to R. S., who refused to accept, and was duly protested for non-acceptance. At the trial, to prove the presentment, R. S., defendant put in a protest which set out the bill and a letter from the son of R. S., stating that his father was disappointed in not receiving funds from J. H. & Sons, in consequence of which he declined to accept. The notary stated in this protest, that B. H. & Co., producing the bill, together with a certain original letter of which a copy was given, requested him to protest the said bill for non-acceptance, declaring that they had forwarded the said bill to R. S., Esq., Bacup, Lancashire, upon whom it was drawn, but had received it back unaccepted as by said copy of letter appeared, wherefore, &c., signed and sealed by the notary:—Held, that the presentment was not sufficiently proved. *Gooderham et al.* v. *Hutchison*, 6 C. P. 231.

Held, that a note made payable at the residence of D., at Strathroy, "only and not otherwise or elsewhere," did not require any special form of presentment, it being proved to have been on the day it matured at that place with D. *Harris et al.* v. *Perry*, 8 C. P. 407.

See *Driggs* v. *Waite*, 6 O. S. 310, p. 496.

3. *Other Cases.*

Where a bill is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by our law. *Buffalo Bank* v. *Truscott et al.*, M. T. 2 Vict.

12 Vict. c. 22, as to presentment of notes, does not apply to Upper Canada. *Ridout* v. *Manning*, 7 Q. B. 35.

Semble, that recovery should not be allowed in a Division Court against an endorser of a note without proving either presentment or notice. *Siddall* v. *Gibson*, 17 Q. B. 98.

VII. Protest.

Semble, a seal is not necessary to a protest. *Goldie* v. *Maxwell*, 1 Q. B. 424.

A protest without seal is admissible as evidence of the facts therein contained, under 13 & 14 Vict. c. 23, s. 6. *Russell* v. *Crofton*, 1 C. P. 428.

The certificate of a notary on the adjoining half sheet of the protest, that he had served on the endorser a notice of non-payment, is sufficient evidence of such notice. *Ib.*

Such certificate endorsed on the protest instead of being written on the foot of or embodied in it, sufficiently complies with 7 Vict. c. 4. *Lyman* v. *Boulton*, 8 Q. B. 323.

The annexing of a copy of the note to the protest, or affixing it to the notarial act, is sufficient. *Ib.*

A note made in Upper Canada payable at Montreal, is an inland note, being in effect payable generally under 7 Will. IV. c. 5, and may be properly protested the day after the third day of grace. *Bradbury* v. *Doole*, 1 Q. Q. 442.

7 Vict. c. 4, s. 2, makes a certificate of a notary primâ facie evidence of the protest; and s. 3 makes the protest primâ facie evidence of presentment. *Codd* v. *Lewis*, 8 Q. B. 242.

See *Gooderham* v. *Hutchison*, 6 C. P. 231, p. 495; *Sinclair* v. *Chisholm*, 5 P. R. 270, p. 520

See VIII. 5, p. 500.

VIII. Notice of Dishonour.

1. *Necessity for.*

Where defendant had guaranteed certain advances of goods and money, to be made to A. by the plaintiff, and the plaintiff took the note of A., payable at a particular place, for the amount:—Held, that he could maintain no action against defendant without proving presentment there, and notice of non-payment to the defendant. *Driggs* v. *Waite*, 6 O. S. 310.

Defendant C. had drawn on one S. C. in England, who had no effects, and did not accept, and the bill was protested for non-acceptance and non-payment. Defendant B. was an endorser for C.'s accommodation. Notices of non-acceptance and non-payment were duly given to the drawer, but of non-payment only to the endorser B.:—Held, that B. was discharged by the want of notice of non-acceptance, and that the facts of there having been no effects in the hands of the drawee, and of B. having endorsed for accommodation, made no difference. *Gore Bank* v. *Craig et al.*, 7 C. P. 344.

The defendant owing the plaintiff, delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee: "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note:"—Held, that the guarantee was sufficient within the 4th sec. of the Statute of Frauds; for although no promise was named in it, yet the reference to "the within note," made it a promise enuring to the benefit of the bearer. Semble, that the guarantee created an absolute promise to pay in all events, and that defendant was not entitled to notice of dishonour: but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 302.

See *Goldie* v. *Maxwell*, 1 Q. B. 425, p. 50; *Grant* v. *Winstanley*, 21 C. P. 257, p. 490.

2. *Form and Sufficiency of.*

A notice that a foreign bill has been returned protested, is a sufficient notice of non-acceptance without sending a copy of the protest with the notice. *O'Neil* v. *Perrin*, M. T. 3 Vict.

A notice to the endorser must, either in express terms or by necessary intendment, shew that

note has been presented for payment, and that payment has been refused. *Bank of U. C.* v. *Street*, M. T. 5 Vict.

Where a note is payable to and endorsed by several persons not partners, notice to one is notice to all. *Bank of Michigan* v. *Gray*, 1 Q. B. 422.

The following notice held insufficient, the note having been endorsed by defendant in his own name only, although he was one of the firm: "Messrs. P. M. Grover & Co. Gentlemen:—Take notice that the promissory note," &c., "on which you are endorsers, due this day, remains unpaid. Therefore the holders look to you for payment thereof as such endorsers." *Bank of Montreal* v. *Grover*, 3 Q. B. 27.

The following held sufficient, the note being payable at the bank:—"Sir: The note of A. B. for £50, at ninety days from the 20th January, 1841, endorsed by you and due this day, remains unpaid. You are therefore hereby notified that the bank looks to you for payment." *Bank of U. C.* v. *Street*, 3 Q. B. 29.

What is a sufficient notice of dishonour, when the facts are undisputed, is a question of law. *Bank of U. C.* v. *Smith*, 4 Q. B. 483.

Held, that the following notice of non-payment:—"London, November 22, 1846. Sir,—The promissory note of Peter Bowen for twenty pounds, at three months from the 19th of August, 1846, on which you are endorser, *is due this day, unpaid.* I therefore give you notice that as the holder of the said note I look to you for payment thereof. W. B."—given by the endorsee to the endorser, was sufficient, without stating that the note had been presented for payment, the note being payable at the plaintiff's office in London:—Held, also, that the notice being dated on Sunday—the note falling due on the Saturday, and the notice being delivered on the Monday,—was no objection. *Blinn* v. *Dixon*, 5 Q. B. 580.

A notice to an endorser stated that the note was duly protested for non-payment, not saying that it was presented:—Held, sufficient. *Blain* v. *Oliphant*, 9 Q. B. 473.

A notice of non-payment received by defendant, the first of four endorsers, stated the date and parties correctly, but described it as for £28, instead of £25. It was shewn that after the notice defendant had promised to pay. The jury were directed that the notice was insufficient, and that the subsequent promise could not avail, as it was not averred in the declaration:—Held, a misdirection on both points. *Thompson* v. *Cotterell*, 11 Q. B. 185.

Where the notice stated the amount accurately, but stated incorrectly the day when it became due:—Held, sufficient, defendant not having been misled. *Thorn* v. *Sandford*, 6 C. P. 462.

Where a note was properly presented and protested, but the notice being dated 20th November, stated the note to have been on that day presented and protested, whereas in fact it was the 19th:—Held, not sufficient to mislead the endorser, who was therefore not released. *Low* v. *Owen*, 12 C. P. 101.

The following notice held sufficient:—"Strathroy, 13th of October, 1857. John Ham Perry, Esq., Whitby, C. W. Sir,—A certain note for £350, and interest, given on the 10th day of April last, in favour of John Ham Perry, and endorsed by you, and signed B. F. Perry, in favour of Hiram Dell, of Strathroy, fell due on 10-13th instant; you will, in consequence of non-payment, be held responsible for all costs or damages for non-payment." *Harris* v. *Perry*, 8 C. P. 407.

A note fell due on the 25th July, on which day, as the evidence shewed at the trial, it was duly presented and protested for non-payment. The notice, dated the 26th, stated that the note was *this day* presented and protested:—Held, that the mistake did not discharge the endorser. *Cassidy* v. *Mansfield*, C. P. M. T. 1874. Not yet reported.

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3. *Time and Manner of Giving.*

Time of giving.]—It is sufficient if the endorser receive notice when he would have received it by post, although it was sent to him by private hand, and might have been delivered a day sooner. *Nussau* v. *O'Reilly*, H. T. 2 Vict.

A letter giving notice of the dishonour of a bill, though from misdirection it has been delayed, is nevertheless sufficient if, being posted sooner than was necessary, it has in fact been received within the period allowed by law. *Bank of British North America* v. *Ross*, 1 Q. B. 199.

Held, that a notice to the drawer from the holder living in Illinois, through his agent living in this province, of the bill being unpaid, by the latter calling upon him with the bill on the 24th December, the bill having been presented in New York on the 19th November, could not be considered, under the facts of this case given in the report, as laches on the part of the holder. *Boyes* v. *Joseph*, 7 Q. B. 505.

Plaintiff and defendant resided about three miles apart; the mail ran between both places, and closed where plaintiff resided on Monday, Wednesday, and Friday in each week; the bill was presented for payment on Monday the 4th, being the last day of grace, and not paid; there being no mail on the 5th, notice was served on defendant by a special messenger on the 6th, before it could have reached him had it been mailed on that day:—Held, in good time. *Chapman* v. *Bishop et al.*, 1 C. P. 432.

Notice of non-payment mailed in the proper post office between eight and nine in the evening of the day after protest:—Held, sufficient, though the post mark upon it was of the following day. *Wilson* v. *Pringle*, 14 Q. B. 230.

A note was presented for payment on the 9th of March, at G., where the endorser lived, and the notice was mailed on the following day at M., a village five miles distant, but not received at G. until the 13th:—Held, sufficient. *Taylor* v. *Grier*, 17 Q. B. 222.

Manner of giving.]—A notice deposited in the post-office of the city of Toronto, for any endorser residing there, is as good as if left at his residence. *Commercial Bank* v. *Eccles*, 4 Q. B. 336.

Delivering notice to an endorser by leaving it with an out-door servant cutting fire-wood, not known and proved to have been an inmate in

the family, is insufficient. It will be a question, however, for the jury, whether the subsequent conduct of the endorser shews him to have received the notice in due time; and where they find for the plaintiff, though rather against the judge's charge, the court will not set aside the verdict if the endorser file no affidavit denying notice. *Commercial Bank* v. *Weller*, 5 Q. B. 343.

Where a note payable at a bank is sent there for collection, the protest and notice may properly be given by them. *Wilson* v. *Pringle*, 14 Q. B. 230.

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4. *Wrong or Insufficient Address.*

Held, that a notice of non-payment sent to an endorser through the post office, addressed to him in "York township," in which he resided, was sufficient, there being no evidence as to whether there was one or more post offices in that township, nor any proof that a letter for any other person would have been usually addressed in a different manner, or ought in the common course to have been directed to any certain post office in the township, or in any other township near him. *Bank of U. C.* v. *Bloor*, 5 Q. B. 619.

A notice of non-payment addressed merely "to the executrix or executor of the late Mr. Jones, Toronto," is bad. *Bank of B. N. A.* v. *Jones*, 8 Q. B. 86.

In an action against the executors of a deceased endorser of a note, it appeared that some of the notices of dishonour were addressed, "Administrator of William Stinson's estate, Belleville, Ont.," while others were similarly addressed, "Canifton," the latter having been testator's place of residence. It was proved that the notices were posted in due time; and as to the receipt of them, one of the executors stated that he had received two, one several weeks after the maturity of the note, from testator's widow, who got it at Canifton, the other from his co-executor, but whether a day or a fortnight after the protest he could not say; while his co-executor stated that he had never received any notice at all, but was shewn one by the other as having been received by him:—Held, that the reasonable inference to be drawn was, that the notice had been received in due course. *McKenzie* v. *Northrop et al.*, 22 C. P. 383.

G. R. endorsed a note in blank. His agent being asked by plaintiff's agent where he, G. R., resided, gave an erroneous direction, which plaintiff's agent wrote in pencil under the endorser's name. Notice of non-payment sent to such place—Held, sufficient. *Vaughan* v. *Ross*, 8 Q. B. 506.

A. proposed to give his note, endorsed by defendant, in payment for goods, stating that defendant lived at Lindsay, and he subsequently transmitted such note to his creditor at Toronto:—Held, that he must be considered as the agent of the endorser: that his statement rendered further enquiry unnecessary; and therefore that a notice mailed to Lindsay was sufficient:—Held, also, that the above facts supported an allegation of due notice. *McMurrich* v. *Powers*, 10 Q. B. 481.

See *Bank of U. C.* v. *Smith*, 3 Q. B. 358, p. 500.

5. *Proof of.*

Notice of dishonour of a foreign bill is proved by producing the protest of the bill in which the notary certifies that he has given the parties notice. *Ewing* v. *Cameron*, 6 U. S. 541.

The certificate of a notary in Lower Canada, at the foot of the protest, that he had put a notice into the post addressed to the endorser, is evidence of that fact under 7 Vict. c. 4, s. 2. *Smith* v. *Hall*, 3 Q. B. 315.

In an action on a note, dated and payable at Ogdensburg, in the State of New York,—Held, that a protest of a notary of that state was no evidence of the facts therein stated; our statute, under which a protest is made primâ facie evidence of those facts, only applying to protests made by notaries of Upper and Lower Canada. *Griffin* v. *Judson*, 12 C. P. 430.

Assumpsit on two notes against the endorsers. Plea by one defendant, "no notice of non-payment." A separate protest of each note was produced. One protest was dated on the day when the note fell due, and the other on the day after. They both certified that the endorsers had been notified, but did not state when:—Held, notice sufficiently proved as to both notes. *Wood et al.* v. *Hutt et al.*, 9 Q. B. 344.

Where a notary (who had protested the note sued upon) under a plea of no notice, stated first that notice had been given, but upon referring to his book of notarial entries, and finding no notarials charged, stated that he felt "rather staggered," as to his having sent the notice:—Held, that the jury were warranted in finding for the defendant. *McDougall* v. *Wordsworth*, 8 C. P. 400.

A foreign post-mark on a letter is primâ facie evidence of the time when the letter was mailed. *O'Neill* v. *Perrin*, M. T. 3 Vict.

In order to charge the endorser, the holder need not prove the notice to have been absolutely received. Due diligence in putting a letter into the post-office, though the post miscarry, is sufficient. Though there is a post-office in the township in which the endorser resides, the holder need not direct his notice to that office, if there be a nearer office in the adjoining township to which the endorser's letters are generally sent. *Bank of U. C.* v. *Smith*, 3 Q. B. 358.

Where the holder is suing the drawer of a bill upon which there have been several intermediate endorsers, he need not in the first instance shew notice from each endorser to the other within the regular period, but only to the defendant. *Boyd* v. *Joseph*, 7 Q. B. 550.

One of two endorsers, who at the time of endorsing were partners, pleaded that neither he nor his partner had due notice of non-payment:—Held, that the fact of the partner of the party pleading having suffered judgment by default, did not operate as an admission of notice as against the defendant pleading. *Pengnet* v. *McKenzie et al.*, 6 C. P. 308.

See *McKenzie* v. *Northrop*, 22 C. P. 383, p. 499.

See next sub-head.

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6. *Waiver of, or Excuse for.*

Where no notice of dishonour was proved, but it was sworn that defendant, the endorser, had

asked for time, and promised to pay, although he said he had received no notice, the court refused to disturb a verdict for defendant. *Bank of U. C.* v. *Cooley*, 4 O. S. 17.

In a declaration against the drawer of a bill, notice of dishonour must be averred, and if to excuse such notice want of effects be averred, it must be shewn that there were no effects from the time of drawing the bill; and notice must also be averred where the defendant is only a guarantee for the bill. *Goldie* v. *Maxwell*, 1 Q. B. 425.

Whenever the endorser writes to the holder to make him believe it unnecessary to give him notice of non-payment, especially where he states the maker to be insolvent, such a letter, though written before the note has matured, will be construed as a dispensation of notice. *Beckett* v. *Cornish*, 4 Q. B. 138.

The first count against an administrator stated that defendant's intestate endorsed a note (which was set out, payable at a particular place,) and died before it became payable. The count shewed a due presentment, and averred that "at the time the said note became due, no letters of administration to the estate and effects of the intestate had been granted to any person, nor had any person administered thereto." There were other counts, and the declaration concluded with an averment that afterwards, &c., "the defendant, as administrator as aforesaid, in consideration of the premises respectively, promised the plaintiff to pay him the said several moneys on request":—Held, on demurrer, that assuming the excuse for the omission of notice to be insufficient, (and semble, that it was so,) the promise alleged must be taken to be an express promise, and was supported by a sufficient consideration. *Brown* v. *Marsh*, 1 C. P. 438.

In a similar case the count, after averring due presentment and non-payment, continued, "of all which due notice was given by placing a notice of non-payment in the post office of the city of Toronto, (being the place mentioned in the said promissory note, where the same was payable,) directed to "the intestate" at Richmond Hill, being the place where, before and until his death, he resided, and being his last place of residence." The count also shewed that administration was afterwards granted to the defendant, and stated a resulting legal liability on defendant's part as administrator, concluding with an averment that the defendant, "in consideration thereof, then promised the plaintiffs to pay them the amount of the said note on request :"—Held, that even if the averments as to notice were insufficient, the promise bound defendant as administrator. Remarks as to notice requisite in such cases. *Gillespie* v. *Marsh*, 1 C. P. 453.

A promise to pay made after action is as available as if made before. A conditional promise by an endorser to pay in land, or see that the plaintiff should lose nothing, waives any objection as to notice. *Burke* v. *Elliott*, 15 Q.R. 610.

Where there has been a subsequent unconditional promise to pay, with a knowledge of a default on the part of the holder, the evidence of notice is dispensed with; and such promise supports the averment in the declaration that due notice of dishonour has been given. *Bank of B. N. A.* v. *Ross*, 1 Q. B. 199.

Where defendant, an endorser, knowing that notice had not been given, promised to pay:—Held, that the plaintiff was entitled to a verdict on a plea denying notice. Semble, that it is only necessary to plead that notice was dispensed with, when an agreement to that effect had been made before the time for giving it. *Shaw* v. *Salmon*, 19 Q. B. 512. See *McMurrich* v. *Powers*, 10 Q. B. 481.

Upon a plea denying notice of non-payment, it appeared that the notice, though carelessly mailed by the notary on the day of protest to a wrong address, had been received by the defendant about a week after, and there was some slight proof of his having applied to the plaintiff for further time for payment. The jury were directed that the evidence was insufficient, but they found for the plaintiff; and the court, though agreeing with the direction, refused to interfere. *Leith* v. *O'Neill*, 19 Q. B. 233. See *Commercial Bank* v. *Weller*, 5 Q. B. 433.

The plaintiffs sued the drawer of a bill for $1,000, upon it and two notes, for $1,000 and $500 respectively. No notice of dishonor of the bill had been given, but the plaintiffs' agent swore that after its maturity, in conversations with him respecting the whole liability, defendant appeared willing to pay if time were given, and said that if he and his brother (the acceptor) got time it would be all right. He said, however, that this bill was never particularly mentioned, and no promise made relating to it specifically:—Held, not sufficient to warrant a verdict for the plaintiffs, and a new trial was granted unless the plaintiffs would consent to a stet processus on the count upon the bill. *Bank of Montreal* v. *Scott*, 24 Q. B. 115.

In an action by endorsee against endorser of a note, an averment of presentment and notice is supported by proof of a subsequent promise to pay, although it appears that there was in fact no proper presentment or notice. So held, in accordance with Kilby *v.* Rochussen, 13 C. B. N. S. 357. *McCarthy* v. *Phelps*, 30 Q. B. 57.

The plaintiff in this case having to shew an agreement to waive presentment and notice, or a promise to pay, the jury, upon the evidence offered, which is set out in the case, found for defendant, and the court refused to interfere. *Reed* v. *Mercer*, 16 C. P. 279.

See *Thompson* v. *Cotterell*, 11 Q. B. 185, p. 497; *Gore Bank* v. *Craig*, 7 C. P. 344, p. 496; *Smith* v. *Burton*, 11 C. P. 273, p. 550.

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7. *Instruments Drawn or Payable in L. Canada.*

Where a bill is drawn and endorsed in Upper Canada, but payable in Lower Canada, the law of Lower Canada governs the time within which notices may be sent. *Matthewson* v. *Carman*, 1 Q. B. 259.

In an action on a note drawn and payable in Lower Canada, the law of Lower Canada must govern as to the sufficiency of the notice of non-payment. *City Bank* v. *Ley*, 1 Q. B. 192.

The law of Lower Canada, with respect to giving notice, is to govern where the note is made payable and presented there, though the endorser reside in U. Canada. *Smith* v. *Hall*, 3 Q. B. 315.

IX. Acceptor and Maker.

A defendant cannot be charged as an acceptor of a bill that has already been accepted, though conditionally, by the drawee; and to make him liable for money received for the payee's use, it must be shewn that he did receive money which he could and ought to have applied by paying the acceptance. *Spalding* v. *McKay*, 5 O. S. 656.

Where A. made a note payable to B., or order, and C. wrote his name on the back, without B.'s first endorsement:—Held, that C. could not be considered as a new maker; and that the note would not support a recovery against him by B. on the common counts. *Steer* v. *Adams*, 6 O. S. 60. See *Wilcocks* v. *Tinning*, 7 Q. B. 372.

Where a note is payable to a fictitious payee, and not to his order or bearer, a person receiving it from a third party for value cannot declare against the maker as on a note payable to bearer. *Williams* v. *Noron*, 10 Q. B. 259.

The plaintiff proceeding against joint makers of a note, must prove a case against all. *Sifton* v. *McCabe et al.*, 6 Q. B. 394.

Parties to notes are now held liable, contrary to the older cases, in the order on which they stand on the note; and the last holder may so treat them, notwithstanding any agreement among themselves, and although some one of the latter parties may be the person for whose accommodation it was made, and who, therefore, is ultimately liable upon it; and this even when the holder is aware of the facts. *Elder* v. *Kelly*, 8 Q. B. 240. See *Ianson* v. *Paxton*, 23 C. P. 439.

Where the defendant signed, as maker, a printed form of a note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became endorsees of it for value without notice:—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. *McInnes* v. *Milton*, 30 Q. B. 489. See *Sanford* v. *Ross*, 6 O. S. 104.

Accommodation endorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter. The relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note. *Cunningham* v. *Lyster*, 13 Chy. 575.

Equitable defence, that one maker or acceptor was surety for the other, and was released by time given to the latter. See XII. 6 (e), p. 552.

See *Perry* v. *Lawless*, 5 Q. B. 514, p. 515; *Hanscome* v. *Cotton*, 16 Q. B. 98, p. 512.

X. Drawer and Endorser.

1. *Note payable to Bearer, or not Negotiable.*

A. makes a note payable to B. or bearer, and delivers it to B. B. endorses to C. The holder sues B. on his endorsement:—Held, that the action would lie. *Booth* v. *Barclay et al.*, 6 Q. B. 215; *Scott et al.* v. *Douglass*, 5 O. S. 207. See *Steer* v. *Adams*, 6 O. S. 60; *Wilcocks* v. *Tinning*, 7 Q. B. 372.

A party endorsing a note payable to A. or bearer, may be sued as endorser. He may also be sued jointly with the maker, under 3 Vict. c. 8. *Ramsdell* v. *Telfer et al.*, 5 Q. B. 508.

A. made his note payable to B. or bearer; before delivery to B., D. endorsed it; B. sued both A. and D., averring that A. made the note, &c., and a delivery to D., who became the lawful bearer thereof, who then, as such, endorsed and delivered to B.:—Held, that D., the endorser, was liable to B. as the holder of the note. *Vanleuven* v. *Vandusen*, 7 Q. B. 176.

An endorser of a note not negotiable, or if negotiable not endorsed by payee, cannot be sued as endorser by the payee. *West* v. *Bowes*, 3 Q. B. 290.

W. made a note payable to plaintiffs, but not negotiable, which defendants endorsed. It was proved to have been given for money lent to W. by the plaintiffs in defendants' presence, and for which they agreed to become security; that one of them had paid interest on it, and that both had promised to pay the note, when spoken to:—Held, that defendants could not be held liable as upon a note, nor as on an account stated. Quære, whether plaintiffs could have recovered as upon a guarantee. *Skilbeck et al.* v. *Porter et al.*, 14 Q. B. 430.

Defendant having endorsed in blank, as surety for the maker, a note payable to plaintiff, but not negotiable:—Held, that he was not liable as maker. *McMurray* v. *Talbot*, 5 C. P. 157.

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2. *Discharge of.*

Where the payee of a note endorsed the same to A. upon an usurious consideration, and A. afterwards failed in an action against the maker upon the ground of usury:—Held, that such payee might still recover against the drawer; and, Semble, that the ground of the failure, in the former action, might be proved by any person present at the trial; and it was not necessary to prove a re-endorsement by the usurer to the payee. *Bidwell* v. *Stanton*, Tay. 366.

A. made his note payable to B., or order, who endorsed to defendants, and defendants to plaintiff, who averred in his declaration a presentment of the note to B. instead of to A. The note was made solely for the accommodation of the defendants, without any consideration to A., the maker. The plaintiff compromised with A. for a portion of the note, discharging him, and striking his name out of the note. The jury gave a verdict against defendants for the balance of the note:—Held, verdict right. *Sifton* v. *Anderson et al.*, 5 Q. B. 305.

A. makes a note payable to B. or order: B. endorses to C., who endorses to D.: D., the holder, dies, leaving B. one of the executors: the executors of D. sue C.:—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against the subsequent endorser. *Jenkins* v. *McKenzie*, 6 Q. B. 34.

The holder of a note recovered judgment thereon against the makers and endorsers, which was duly registered so as to create a lien on the real estate of the makers; subsequently he accepted from the makers of the note a composition of fifty per cent., and discharged their bail from further liability, expressly retaining the right to go against their personal assets, and he

proceeded to execution against the goods of the endorser :—Held, a discharge of the endorsers from further liability ; and a perpetual injunction was granted restraining further proceedings in such action. *Mellish* v. *Green et al.*, 5 Chy. 655.

The acceptance by a creditor of part of his demand against his debtor, and agreeing not to sue him, with a reservation of the creditor's rights against a surety of such debtor, will not discharge the surety. Where, therefore, the holders of a bill received from the acceptor a composition of the debt, and executed a deed to that effect but expressly reserved their rights against the drawer :—Held, that the drawer was not discharged. *Wood* v. *Brett*, 9 Chy. 452.

The payee of a note endorsed for the accommodation of the maker, having obtained judgment against the maker and endorser, released the maker, reserving all his rights against the endorser :—Held, that he was entitled to do so, and might still enforce the judgment against the endorser. *Bell* v. *Manning*, 11 Chy. 142.

Discharge of, by time given to maker. See XII. 6 (e), p. 552.

3. *Other Cases.*

A note intended as the renewal of another note, but not so used, having been left in the maker's hands with an endorser's name upon it, was received by the plaintiff from the maker for value before it became due. The endorser was held liable. *Larkin* v. *Wiard*, 5 O. S. 661.

Where A. made a note payable to B. or order, and C. wrote his name on the back without B.'s first endorsement :—Held, that C. could not be considered as a new maker, and that the note would not support a recovery against him by B. on the common counts. *Steer* v. *Adams*, 6 O. S. 60.

Where the payee and endorser of a note endorsed it for the accommodation of the maker, leaving the date and sum blank, which were afterwards filled up by the maker, and the note dated of a time later than the blank was endorsed, but prior to the time when the note was actually filled up :—Held, that the note was good against the endorser, notwithstanding the alteration. *Sanford* v. *Ross*, 6 O. S. 104.

The endorser, like the drawer of a bill, is liable to the holder the moment the drawee has refused acceptance. *Ross* v. *Dixie*, 7 Q. B. 414.

The endorser is estopped from denying either the signature of the drawer or her competence, (being a feme covert in this case,) to draw the bill. *Ib.*

In an action by endorsee against maker and endorser, a verdict was found in favour of the maker, on the ground that his name had been placed to the note without authority, and against the endorser ; and a new trial was granted as to the endorser only :—Held, that the jury at such trial were rightly directed that the use of the maker's name without authority was a fact material for them to consider in connection with the evidence offered, to shew that the plaintiff took the note with knowledge of the circumstances. *Hanscome* v. *Cotton*, 16 Q. B. 98.

Semble, as to how far an endorser is estopped from denying the maker's signature. *Ib.*

Semble, that a defendant's endorsement made by his wife, though in her own name, but afterwards recognized by defendant, would make him liable to an action on the bill. *Ross et al.* v. *Codd*, 7 Q. B. 64.

No action lies upon a bill except against those who are in some shape parties to it. Where, therefore, A. drew upon B. in his own favour, and endorsed it to C., who in her own name endorsed to the plaintiffs : and it appeared that C. was a lady residing in Toronto, who had a brother, D., residing in Buffalo, for whom, though not a partner, or in any way transacting business in his name, she had negotiated bills at banks and with merchants : it was—Held in an action against D., upon an averment "that A. endorsed the said bill to one C., the agent of this defendant, or her order, and delivered it so endorsed to her as such agent, and that the said C., then being the agent of the defendant in that behalf authorized for and on behalf of the defendant, then endorsed and delivered the same to the plaintiffs ;" that the action could not be sustained, D.'s name not appearing upon the bill in any shape. *Ross et al* v. *Codd*, 7 Q. B. 64.

A note made by A., payable to B., or order, and endorsed by C. in blank, cannot be declared upon by B. as a note made by C. to him, the plaintiff. *Wilcocks* v. *Tinning*, 7 Q. B. 372.

Declaration, that S. & R., being indebted to plaintiffs, on, &c., by their note now overdue, promised to pay to the order of the plaintiffs £150, three months after date ; and for the better and more perfect securing and guaranteeing the payment thereof to the plaintiffs, *delivered* the said note to defendant, who endorsed the same to the plaintiffs, averring presentment, dishonour and notice :—Held, bad, as shewing no cause of action. *Moffatt* v. *Rees*, 15 Q. B. 522.

Plaintiff declared on a note as made by K. to M., and endorsed by M. to defendant, who endorsed to plaintiff. Plea, that defendant did not endorse to plaintiff as alleged. The name of defendant appeared as endorser on the note *before* that of M. :—Held, however, that on the pleadings this was immaterial, for M.'s endorsement to defendant was not denied, and his name appearing before defendant's could not affect the right of recovery. *Brightly* v. *Rankin*, 25 Q. Q. 257.

Accommodation endorsers, after the note on which they were liable had matured, filed a bill against the holder and maker to enforce payment by the latter. The relief prayed was granted, and the maker was ordered to pay the costs both of the plaintiff and of the holder of the note. *Cunningham* v. *Lyster*, 13 Chy. 575.

XI. Actions on.

1. *At what Time.*

Where one of several notes was not due until near the end of the term in which process had been issued and returnable, but was due before filing the declaration, which was intituled generally of the term :—Held, that such note could not be recovered in the action. *Kerr* v. *Jennings*, M. T. 4 Vict.

Declaration, that defendant on the 9th of March made his note payable to the plaintiffs

six months after date, which period had elapsed before this suit. In the commencement of the declaration the writ was stated to have been issued on the 10th of September:—Held, on demurrer, declaration bad, for it appeared that the action had been commenced before the days of grace had expired. *Hill* v. *Lott*, 13 Q. B. 463.

An endorsee of a note payable at a bank, having taken it there on the last day of grace, arrested defendant at five o'clock on the same day:—Held, not too soon. Semble, that under 14 & 15 Vict. c. 94, s. 1, he would have been also entitled to sue at any time after three o'clock, had the note been payable generally. *Sinclair* v. *Robson*, 16 Q. B. 211.

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2. *Joinder of Parties.*

Where three of four partners declared on a bill as endorsees, and averred an endorsement to themselves "trading under" the partnership name, and the bill was endorsed in blank:—Held, that the non-joinder of the other partner was not a ground of non-suit. *Anderson et al.* v. *Macaulay*, 6 O. S. 537.

The 5 Will. IV. c. 1, does not apply to parties signing notes as joint makers. *Sifton* v. *McCabe et al.*, 6 Q. B. 394.

Quære, whether C. S. U. C. c. 42, ss. 23, 28, authorizes the drawer of a bill to be sued in the same action with the executors of the testator. *Commercial Bank* v. *Woodruff et al.* 21 Q. B. 602.

Where plaintiff, the holder of a note made by one defendant and endorsed by the other, sued both in one action, under C. S. U. C. c. 42, s. 23, and at the same time declared for money paid and on account stated, the latter counts, on defendant's application were struck out. *Biggar* v. *Scott et al.*, 3 P. R. 268.—C. L. Chamb.—J. Wilson.

The C. S. U. C. c. 42, which permits the holder of a note or bill to sue all parties liable upon it in one action, does not affect the rights and liabilities of defendants as between themselves, but leaves them as if they had been sued separately. *Hamilton* v. *Phipps*, 7 Chy. 483.

See *Kerr* v. *Hereford*, 17 Q. B. 158, p. 548.

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3. *Form and Requisites of Declaration.*

(a) *Names and Description of Parties.*

In declaring upon a note made payable to and endorsed by a firm, it is necessary to aver that the maker promised to pay "to certain persons, using the name and style of," &c., and then that the said persons so using the name and style, &c., did by such name and style, &c., endorse. *Moffatt* v. *Vance*, 7 Q. B. 142; *City Bank of Montreal* v. *Eccles*, 5 Q. B. 508; *Gooderham* v. *Garden*, 12 Q. B. 521.

Wherever, in pleading, one Christian name shall be given to a party in full, with a capital letter before or after it, besides the surname, the court will not assume that the party so described has anything more of a name than is given to him, and this without distinction between vowels and consonants. *Bank of Upper Canada* v. *Gwynne*, 7 Q. B. 140; *Commercial Bank* v. *Roblin*, 5 Q. B. 498; *Dougall* v. *Reafisch*, 6 Q. B. 391; *Mair* v. *Jones*, 7 Q. B. 139.

In averring the making or endorsement of a note it is sufficient to describe the party by the initials of his Christian names, without alleging that the making or endorsement was by such initials. *Andrews* v. *Talbot*, 13 Q. B. 188.

(b) *Averment of Liability and Promise.*

The form given in 3 Vict. c. 8, must be adopted as to the liability of the several parties. *Bank of U. C.* v. *Gwynne et al.*, 4 Q. B. 145.

The plaintiffs declare against drawer and acceptors of a bill under £100. The acceptors sign as parties jointly liable. An averment that the parties became jointly and severally liable:—Held, bad. *Ib.*

It is not necessary, after stating the defendant's promise, to aver his legal liability to pay the bill or note to the plaintiff. *Acheson* v. *McKenzie*, 4 Q. B. 230.

A payee or endorsee declaring upon a note against the maker, need not aver any express promise in addition to that set forth as in the note itself, nor any liability to pay. *Whitney* v. *Woods*, 5 Q. B. 572.

Declaration against maker and endorser of a note, under 3 Vict. c. 8, stating "whereby the defendants became liable," &c.:—Held, bad on special demurrer, in not alleging, according to the form in the act, a joint and several liability. *Nordheimer* v. *O'Reilly et al.*, 6 Q. B. 413.

In an action by endorsees against endorsers, the declaration need not aver that defendants promised to pay. *Ib.* But see *Aitkin et al.*, v. *Leonard et al.*, 11 Q. B. 98.

If the party sued be the executor of the endorser, and the note has become due after the death of his testator, a promise to pay by the executor must be stated. *Bank of British North America* v. *Jones et al.*, 7 Q. B. 166.

Averment of liability—Joint and several makers and endorsers—Special demurrer—Declaration held sufficient. *Gibb* v. *Dempsey*, 3 C. P. 437.

In an action against maker and endorser of a note it is unnecessary to aver a joint liability. *Chapman* v. *Dubrey et al.*, 21 Q. B. 244.

See *Commercial Bank* v. *Cameron*, 3 Q. B. 363, p. 494.

(c) *Other Cases.*

A declaration on a note payable to bearer, need not aver that the note was "assigned over" and delivered to the plaintiff. *Duggan* v. *Borland*, 5 O. S. 461.

Where in an action against the maker and endorser, under 5 Will. IV. c. 1, and 3 Vict. c. 8, the plaintiff declared in the form given by the later statute, but did not aver presentment and notice:—Held, that the plaintiff was entitled to judgment against the maker, and the endorser to judgment against him. *Small* v. *Boyer et al.*, 6 O. S. 476.

Declaration against makers and endorsers of a note under 3 Vict. c. 8, with no allegation of time to the endorsement:—Held, insufficient. *Grant* v. *Eyre et al.*, 2 Q. B. 426. See also

Wallace v. *Henderson*, 7 Q. B. 88; *Beaty* v. *Jarvis*, 12 Q. B. 540; *Gooderham* v. *Garden*, 12 Q. B. 521.

Due notice must be averred. *Commercial Bank* v. *Cameron*, 3 Q. B. 363.

In declaring on a note drawn in a foreign language, it is not necessary to declare in such language, and where a foreign word is used, its meaning in English may be averred without any introductory statement. *Gibb* v. *Morisette*, 4 Q. B. 205.

The endorsee declares against the maker, "for that the defendant made his note and thereby promised to pay B. or order the sum of two hundred louis current money, meaning thereby the sum of two hundred pounds of lawful money of Canada:—Held, on demurrer for unwarrantably extending the meaning of the word "louis," that the declaration was good. *Ib.*

It is no ground of demurrer that a declaration upon a bill or note does not conform to the new rules, if it be otherwise good in itself. *Ackerson* v. *McKenzie*, 4 Q. B. 230.

A. makes a note, payable to his own order—B. sues him as endorsee, claiming by endorsement of A. made subsequent to the note:—Held, bad on special demurrer. *Brown* v. *Shaver*, 5 Q. B. 621.

Averment that note duly presented—Held to mean within a reasonable time. *Hall* v. *Francis*, 4 C. P. 210.

The declaration set out as inducement certain facts by which defendant, with C. and Y., became liable to pay plaintiff £60; and alleged that in consideration thereof defendant by an instrument in writing promised the plaintiffs to pay her the same:—Held, on demurrer, declaration good, for, 1. It was in effect a statement that defendant made his note, and if so, no averment of consideration was required; and, 2. If not a note, the consideration stated was sufficient. *Parsons* v. *Jones*, 16 Q. B. 274.

In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, s. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute; but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but semble, that it is not essential. *McDonald* v. *McDonald et al.*, 21 Q. B. 52.

4. *Pleas and Replications.*

A replication to a plea stating that a bill of exchange had been taken "in full satisfaction and at all hazards" by the plaintiff, that the bill was dishonoured when due, is bad on general demurrer. *Goldie* v. *Maxwell*, 1 Q. B. 425.

The rule making the plea of non-assumpsit to a bill or note bad, is confined to cases where the action is *between the parties to the bill or note*; it does not extend to executors, &c. *Masson* v. *Hill et al.*, 5 Q. B. 60.

The plaintiff sues the executors of the endorser of a note which had not become due till after the decease of the testator, averring due notice to the executors of dishonour, and then stating that by reason thereof they became liable to pay the note, and being so liable, they afterwards, as executors, promised to pay on request. Plea, *as to so much of the declaration as alleges that they promised to pay* the plaintiff, &c., that they did not promise, &c.:—Held, bad, as raising an immaterial issue, their promise to pay being *implied* from the facts averred in the declaration, and not denied in the plea. *Ib.*

Declaration, payee against the maker of a note for £50, dated 24th December, 1844, payable three months after date. Plea, as to £24 parcel, &c., accord and satisfaction, by defendant accepting an order on the 6th of March, 1847, in favour of J. C. S. as required by plaintiff; and as to the residue, a set-off:—Held, plea bad; 1. In leaving unanswered the plaintiff's claim for damages for non-payment of the amount for which the order was given, during the two years and more which had elapsed between the maturity of the note and the time of giving the order; and, 2. In not giving at length the Christian names of J. C. S., or stating that he was so described in the order. *Playter* v. *Turner*, 5 Q. B. 555.

Plea, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, the plaintiff agreed not to sue upon this note until the others should become due:—Held, upon general demurrer, plea bad. *Durand* v. *Stevenson*, 5 Q. B. 336. See, also, *Bown* v. *Hawke*, 5 Q. B. 568.

Declaration on a note for £100, claiming £200 damages for non-payment. Plea, as if to the whole cause of action, a defence applicable to the £100, and not to the £200 damages:—Held, bad. *Clapp* v. *Murdoff*, 5 Q. B. 565.

Where in an action against maker and the endorsers, under the statute, the defences clash, or the facts set up are not equally a defence to all the parties, they should plead separately; therefore, a plea by all the defendants that there was no consideration for the making of the note, nor for the respective endorsements, nor either of them, and that plaintiff holds the note without any consideration or value, is bad. *Hawke* v. *Salt et al.*, 3 C. P. 97.

Traverse by maker and endorser of due notice as alleged in two counts on separate notes:—Held, good on special demurrer, being distributive. *Tompkins* v. *Scott*, 9 Q. B. 103.

To an action on a bill of exchange by a remote endorsee, alleging the prior endorsements against the drawer and acceptor, the latter being under terms to plead issuably, pleaded that he was induced to accept by the fraud, covin, and misrepresentation of the drawer and endorsers, and without any consideration or value being given to him for his acceptance, and that the last endorser endorsed to the plaintiffs without any consideration or value being given by the plaintiffs to said endorser. The plaintiffs signed judg-

ment, treating the plea as not issuable, and on application in chambers, which was supported by an affidavit of merits, the judgment was set aside for irregularity with costs, the learned judge holding the plea to be issuable. The plaintiff then moved to rescind this order. The court refused to interfere, because, as merits had been sworn to in chambers, it was right at all events to relieve defendants from the judgment, and the only question was therefore one of costs. Quære, whether the plea was issuable or not. *Bank of Montreal* v. *Cameron et al.*, 17 Q. B. 45.

To displace a defence to a note by shewing the lex loci contractus as different from the law of our courts, such foreign law must be replied and set out on the record. *Hope* v. *Caldwell*, 21 C. P. 241.

Per Wilson, J., the plea in this case, setting up that the note sued on was given in Quebec for services to be rendered by the payees as attorneys, was bad for not alleging that the note, under the facts stated, was void by the law of Quebec, by which the validity of the note must be decided. *Robertson* v. *Caldwell*, 31 Q. B. 402.

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5. *Evidence.*

(a) *Production of Instrument.*

Before parol or secondary evidence can be given of a note being received by the plaintiffs in satisfaction of claim for work done, defendant must prove notice to the plaintiff to produce the note. *Heward* v. *McDougall*, 3 O. S. 647.

Where a note had been endorsed to an attorney's clerk in the course of business, and mislaid:—Held, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called, and sworn to his belief of its loss. *Grove* v. *Clark et al.*, 5 O. S. 208.

The plaintiff, in opening the case, stated that the notes were left by plaintiff with defendant as security, and had been given up by him to the makers improperly, before any demand on defendant or refusal by him to return them:—Held, that no notice to defendant to produce was necessary; and—Draper, J., diss.,—that the plaintiff was entitled to prove the contents of the notes without laying any foundation for secondary evidence. *Tilly* v. *Fisher*, 10 Q. B. 32.

In an action on a note, where the making of the note is admitted, for instance by a plea of payment. Quære, whether the plaintiff must produce and file the note before having his verdict recorded. *Mullholland* v. *Morley*, 7 L. J. 323.—C. C.—Mackenzie.

Where to an action on a note against the makers, defendants pleaded fraud:—Held, that the note must be proved, and that, as defendants had given no notice to produce, and it was not shewn that the plaintiffs or their attorney had the note in court, the defence could not be gone into. *Bank of Montreal* v. *Snyder et al.*, 18 Q. B. 492.

(b) *Proof of Consideration.*

In an action on a note, where defendant pleads no consideration, upon which issue is joined, the defendant must impeach the consideration; the plaintiff need not prove it in the first instance. *Sutherland* v. *Patterson*, M. T. 6 Vict.

To an action on a note, defendant pleaded that it was given on agreement by plaintiff to pay one M. a certain sum, which he had not done:—Held, that such defence was not divisible, and that as the note was not given wholly on such consideration the plaintiff must fail altogether. *Matthewson* v. *Carman*, 1 Q. B. 266.

Where in an action on a note payable to A., it was proved that B. endorsed it, and then brought it to A., who endorsed it merely for accommodation, never having received any value for it:—Held, that want of consideration could not, on these facts, be inferred, as between the maker and B., and that the plaintiff was not obliged to prove the consideration. *Mair* v. *McLean*, 1 Q. B. 455.

Endorsee against maker and first and third endorsers of a note. The third endorser let judgment go by default. Plea, by maker and first endorser, that the note was made and endorsed by defendants, setting out circumstances, owing to which, before the note was endorsed to the plaintiff, and before suit, the defendant, by agreement with R. G. and O. G. (the second and third endorsers), made, and indorsed, and delivered to them another note, which was accepted in full satisfaction and discharge of the note sued upon, but which note remained in the hands of the said R. G. and O. G. without the fault of the defendants—with an averment that there never was any value or consideration for the endorsement by the said R. G. and O. G. to the plaintiff. Replication, that the plaintiff took the note for a good and valid consideration, and became and is the holder thereof in good faith:—Held, that on this the introductory facts were admitted, and the proof of consideration lay on the plaintiff. *Manson* v. *Arrol et al.*, 11 Q. B. 81.

Where the endorser endorsed the note while in blank, there being no maker's name attached to it, nor any sum nor payee expressed in it, and it appeared that the name of the maker was afterwards signed without authority:—Held, that the endorsee suing must shew himself a bonâ fide holder for value. *Hanscome* v. *Cotton*, 15 Q. B. 42.

In an action by endorsee against maker and endorser, a verdict was found in favour of the maker, on the ground that his name had been signed to the note without authority, and against the endorser; and a new trial was granted as to the endorser only:—Held, that the jury at such trial were rightly directed that the fact of the maker's name having been used without authority was a fact material for them to consider in connection with other evidence offered to shew that the plaintiff took the note with knowledge of the circumstances. *Hanscome* v. *Cotton*, 15 Q. B. 98.

Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay. *Davis* v. *Mesherv*, 1 Q. B. 490.

To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry* v. *Hall*, 11 Q. B. 296.

(c) *Proof of Payment.*

In assumpsit for goods sold and delivered, the defendant pleaded that he made his note to the plaintiffs for part, and paid the note when due; and the plaintiffs replied, that when the note became due the defendant only paid part, to wit, £93 in money, and gave an acceptance on A. for the residue, £50, which was dishonoured when due, of which due notice was given, concluding with a special traverse; and the defendant reiterated the defence in the plea:—Held, that he could not on the trial shew that the plaintiffs had made the £50 acceptance their own through laches, but was bound to shew actual payment. *Ross et al.* v. *McKindsay*, 1 Q. B. 507.

Where A., the endorsee of a note, sued B. the payee, and it was proved by C., the maker, that the note was made an item in the current account between A. and C. (the maker); that it was long before charged to the maker as a debt due by him, and that when it was so charged the balance was in the maker's favour:—Held, that the note must be taken to have been paid by the maker, and that it must be so taken as soon as subsequent credits are admitted by A. sufficient to cover the note, though when the note was charged the balance was not in C.'s (the maker's) favour. *McGillivray* v. *Keefer*, 4 Q. B. 342.

Defendants made the note sued on, payable to D. *or bearer*, for $348 40, with interest at 15 per cent. The note was made to D., and delivered to him as reeve of the township, for money loaned by the latter, and was left with S., the treasurer, for plaintiffs. Subsequently the defendant Moore gave his own note for $278, payable to S. (but not to order) S., without authority from plaintiffs, giving up to him the former, the difference between the two notes being a loan to S. himself, though included in defendants' note. S. having died, his accounts with plaintiffs were adjusted by plaintiffs with his surety, who was charged with the note sued on, which he arranged by giving the note for $278 and his own note for £50; and a balance of $183 was, as agreed to by plaintiffs, paid by and a receipt therefor given to him in full of plaintiff's claim against S. After this settlement, plaintiff's, by a resolution in council, recognized this note for $278 as amongst their existing securities, thus shewing that they were aware of its having been received in substitution of the note sued on:—Held, that, taking the whole transaction together, there was such a ratification of the acts of S. by plaintiffs in the subsequent adjusting of his accounts with his surety that, coupled with the receipt of the note for $278 with other notes and money in full satisfaction of all claims on the note sued upon, it was evidence to go to the jury of the payment of this note under a plea of payment. Held, also, that the plaintiffs could enforce payment of the note for $278 in the names of the representatives of S. *Corporation of North Gwillimbury* v. *Moore et al.*, 15 C. P. 445.

Plaintiff holding defendant's note, (not negotiable,) payable on demand, for £500, in transaction with one R., (a partner of defendant) gave it to R., taking in return his note for £1,000, for this and other transactions. In dissolving partnership, it was arranged that this £1,000, or note of R.'s, should be paid by the defendant. R. being subsequently called upon for payment, obtained defendant's cheque for £500, and returned defendant's original note for £500 to plaintiff in payment of the note for £1,000. Upon an action brought for the amount of the note of £500, defendant pleaded satisfaction thereof by the taking of R.'s note for £1,000:—Held, that the facts did not amount to a payment, and that defendant was liable. *Booth* v. *Ridley*, 8 C. P. 464.

Action upon a note made by defendant payable to one M., and endorsed by M. to the plaintiff. Third plea, that the note was made for the accommodation of M., and before suit was paid by M. to the plaintiffs. At the trial it appeared that defendant made the note for M.'s accommodation, of which the plaintiffs were aware, and that there was an agreement between the plaintiffs and M, to which defendant was not a party, and by which, if on a final settlement of accounts the plaintiffs were indebted to M., such balance should be applied first in liquidation of this and other notes, and, in the event of a loss, it was to be borne pro ratâ by the several endorsers. It also appeared that there had been a settlement between M. and the plaintiffs, signed by them, by which M. was found to be indebted in a large sum; but M. in his evidence stated that he had not got credit in that balance for some of his timber taken by plaintiffs. Defendant offered evidence to prove that under the accounts between M. and the plaintiffs there was a balance due to M., which, under the agreement referred to, would shew this note to be paid by M. Per Morrison, J.—Such evidence was properly rejected, and could not be given under the plea of payment by M., but the agreement and facts relied on should have been pleaded specially. Per Wilson, J.—The evidence was admissible, and it was competent to defendant to open up the account between M. and the plaintiffs. *Roche et al.* v. *Kempt*, 33 Q. B. 387.

See *Peel* v. *Kingsmill*, 7 Q. B. 364, p. 489; *Ianson* v. *Paxton*, 22 C. P. 505, p. 563.

(d) *Parties to as Witnesses.*

The digests of cases relating to the competency of parties to bills and notes as witnesses in suits upon such instruments, are omitted, as by 33 Vict. c. 13, O., no person is now excluded from giving evidence by reason of interest. The following cases may be referred to: *Ferrie* v. *Starkweather*, Dra. 413; *Dudley* v. *Moore*, 3 O. S. 71; *Phinney* v. *Smith*, 6 O. S. 498; *Bradbury* v. *Loney*, M. T. 5 Vict.; *McLaren* v. *Muirhead et al.*, 3 Q. B. 59; *Jordan* v. *Smith*, 17 Q. B. 590; *Perley* v. *Loney et al.*, 18 Q. B. 429; *Commercial Bank* v. *Cuvillier et al.*, 18 Q. B. 378; *Moffatt* v. *Robertson*, 19 Q. B. 401. 1 E. & A. 459; *Adams* v. *Toland*, 12 C. P. 119: *Bank of Montreal* v. *Reynolds*, 25 Q. B. 352; *Shannon* v. *Daly*, 27 Q. B. 458.

The effect of 12 Vict. c. 70, commonly called The Evidence Act, was not to repeal 5 Will. IV. c. 1. Where, therefore, the maker and endorser of a note were sued together in one action, and each pleaded a plea setting up want of consideration for making and endorsing the note respectively:—Held, that this did not preclude the one defendant calling and examining his co-defendant to prove the truth of such plea in favour of the party so calling him. *Robertson* v.

Moffatt, 1 E. & A. 459. See, also, *Bank of U. C.* v. *Upton et al.*, 10 C. P. 455.

(c) *Other Cases.*

In assumpsit to recover the amount of a note, the declaration contained the common money counts only. Judgment having gone by default, the plaintiffs, on assessing damages, proved that a copy of the note was attached to the declaration filed, and to the copy sent to the sheriff to be served, without proving defendants' signature:—Held, sufficient under 5 Will. IV. c. 1. *Saxon et al.* v. *McFarlane et al.*, 5 O. S. 142.

In an action against the acceptor, on an averment that it was directed to and accepted by him, it was held no variance that the bill was directed to and accepted by a firm in which the defendant was a partner. *Stackweather et al.* v. *Andrews*, 6 O. S. 135.

The admissions of the holder of an overdue note, are admissible, without calling him, against a person suing upon the note, to whom he has subsequently transferred it. *Myers* v. *Cornell*, 2 Q. B. 279.

Where the holder of a note proceeds under 5 Will. IV. c. 1, he must prove at the trial that copies of the note were annexed to the declarations filed and served. *Malloch* v. *Norton*, M. T. 2 Vict.

Where a note is declared on, an error in its date when given in a bill of particulars, is immaterial. *Barney* v. *Simpson*, 6 O. S. 96.

In an undefended action against an absconding debtor (the maker of a note) the plaintiffs, A., P. & A., proved the handwriting of the defendant, but could not shew that J. W. P. & Co., the parties to whom the note was made payable, were the three plaintiffs in the suit. A verdict was taken subject to the opinion of the court as to this point:—Held, that in the absence of any cause shewn by defendant the debt was sufficiently proved to satisfy the 7th sec. of the Absconding Debtor's Act, 2 Will. IV. c. 5. *Appleton et al.* v. *Dwyer*, 4 Q. B. 247.

The plaintiff proceeding upon a note against several defendants as joint contractors, chargeable on the same contract and in the same capacity, must prove a case against all of them. *Sifton* v. *McCabe et al.*, 6 Q. B. 394.

Semble, that under the pleas in this case, given in the report, the cancellation of the first note, by the substitution of the second, could not be given in evidence. *Curillier et al.* v. *Fraser*, 5 Q. B. 152.

Defendant, sued as maker of a note by the endorser, had before the endorsement admitted his making to the plaintiff, and induced the plaintiff to take it:—Held, that the subscribing witness need not be called, as defendant was estopped. *Perry* v. *Lawless*, 5 Q. B. 514.

Declaration by the holder of a note payable to A. B. or bearer, against the maker. Plea, that A. B. and others in collusion with him, obtained *the note declared* upon by fraud, &c.:—Held, that evidence was properly rejected; that the original note for which the note sued upon had been substituted, had been fraudulently obtained from the testator, (the executor having given the note sued upon), by a party who had no connection with the note in suit. *Dougall* v. *Post*, 5 Q. B. 554.

Quære, as to how far an endorser is estopped from denying the maker's signature. *Hanscomb* v. *Cotton*, 16 Q. B. 98.

It is not necessary in an action on a note, due and payable in the United States, to prove the value of dollars and cents in the States, we having a corresponding currency, and no par value for the American currency being fixed by law. *Griffin* v. *Judson*, 12 C. P. 430.

The terms of a note cannot be varied by parol agreement. *Harper* v. *Paterson*, 14 C. P. 538.

Defendant made a note payable to T. or bearer, who died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife to recover the assets. A bill was filed by defendant to restrain this action, and in his answer the plaintiff swore that in consequence of the difficulties with the administrator, he had returned the note to G. before this action: that he had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit, and the plaintiff had recognized it, saying that he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder, a new trial was refused in the County Court:—Held, 1. Affirming the judgment below, that the plaintiff's answer in Chancery, though very strong evidence, was not conclusive; 2. Reversing such judgment, that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought: 3. That upon the evidence the plaintiff should have been found to be the holder. Ancona v. Marks, 7 H. & N. 686, distinguished. *Coates* v. *Kelly*, 27 Q. B. 284.

Where several persons severally liable on a note or bill are jointly sued at law by the holder one of the defendants in the action at law, cannot obtain discovery against the plaintiff at law and the other defendants; the defendants as between themselves not being litigating parties, but witnesses; a bill filed for the purpose is demurrable. *Hamilton* v. *Phipps*, 7 Chy. 483.

See *Grove* v. *Clarke*, 5 O. S. 208, p. 564; *Michie* v. *Oliver*, 11 C. P. 363, p. 524.

6. *Amount Recoverable.*

(a) *Interest.*

Interest made payable by a note is part of the debt, not merely damages for detaining it. *Crouse* v. *Park*, 3 Q. B. 458.

Interest is recoverable on a note at the rate specified in it till payment. *Howland* v. *Jennings*, 11 C. P. 272.

And the jury should be directed, as a matter of law, to allow such rate when allowing interest in the nature of damages, from the maturity of the note to the entry of judgment. *Montgomery* v. *Boucher*, 14 C. P. 45.

The agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant it may be. *Young* v. *Fluke*, 15 C. P. 360.

A loan of money was made for two months at two per cent. a month, at the expiration of which time it was contemplated a new arrangement would be made. After the two months, no other arrangement having been effected, the court held the lender entitled to claim interest at the rate originally agreed upon, and to sell the notes held by him as security to repay himself the amount of his claim; subject only to the question whether he had sold the notes for the best price that could be obtained for them, and as to which the court directed an enquiry before the master. *O'Connor* v. *Clarke*, 18 Chy. 422.

Though interest does not usually run until demand made upon such a note, yet where payments have been made on account the jury should presume that they were made in consequence of a demand, and interest on the balance will then accrue. *Hard* v. *Palmer*, 21 Q. B. 49.

Interest at the rate allowed by our law is chargeable upon a note dated and made payable in the United States. *Griffin* v. *Judson*, 12 C. P. 430.

See, also, *Harper* v. *Paterson*, 14 C. P. 538.

(b) *Damages and Exchange on Foreign Bills.*

[See now C. S. U. C. c. 42, Consolidating 12 Vict. c. 76.]

A foreign bill may be referred to the master for computation. *Commercial Bank* v. *Allan*, 5 O. S. 574.

Ten per cent. damages under 51 Geo. III. c. 9, s. 2, cannot be recovered on a foreign bill returned for non-acceptance, nor can re-exchange, unless declared for specially; although postage may under a count for money paid. *O'Neill* v. *Perrin*, M. T. 3 Vict.

Under 51 Geo. III. c. 9, s. 2, the ten per cent. damages allowed on protested bills is not to be considered as a substitute for the difference of exchange, but is to be paid in addition to the sum paid for the bill, which would always include exchange.—Sullivan, J., diss. *Nichols* v. *Raynes*, 6 Q. B. 273.

Where a bill is drawn in Upper Canada addressed to a resident there, and payable in England, ten per cent. on it can be collected under 12 Vict. c. 76. *Ross* v. *Winans*, 5 C. P. 185.

Six per cent. damages held chargeable upon a protested bill drawn and accepted in Upper Canada, payable in the United States, upon the authority of the above case. *American Exchange Bank* v. *McMicken*, 8 C. P. 59.

A note made in Upper Canada, payable in Glasgow, not adding, "and not otherwise or elsewhere," is payable generally; and the plaintiff cannot recover the difference of exchange on such note. *Wilson* v. *Aitkin*, 5 C. P. 376.

Under 12 Vict. c. 76, ten per cent. damages recoverable on all bills drawn in Upper Canada on England, and protested for non-payment. *Royal Bank of Liverpool* v. *Whittemore*, 16 Q. B. 429.

A note made here, payable in New York, but not there only, is not within sec. 3 of 12 Vict. c. 76, so as to entitle the holder to four per cent. damages on protest for non-payment. *Meyer* v. *Hutchinson*, 16 Q. B. 476.

In an action on a sterling bill, drawn by the plaintiffs in London upon the defendant living in Upper Canada, accepted in this province payable in London, and returned to England:—Held, that no damages could be recovered, as the bill could not be said to have been negotiated in Upper Canada, but only the value of the bill at 24s. 4d. to the pound sterling. *Foster* v. *Bowes*, 2 P. R. 256.—C. L. Chamb.—Richards.

Action on sterling bill drawn by plaintiffs in London upon defendants in Upper Canada, accepted by defendants in London, (one of them being at the time in London,) payable in London:—Held, that plaintiffs were entitled to recover the current rate of exchange. *Gratorex et al.* v. *Score et al.*, 6 L. J. 212.—C. L. Chamb.—Robinson.

White *v.* Baker, 15 C. P. 292, followed as to the damages, in the shape of exchange, to which the holder of the bill is entitled against the acceptor. *Stephens* v. *Berry*, 15 C. P. 548.

Damages which may be claimed on non-payment of a bill cannot be so claimed on its non-acceptance. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.—C. L. Chamb.—Draper.

(c) *Foreign Currency.*

On a note made and payable in Ogdensburg, N. Y., which matured on the 9th of August, 1861, the act of Congress making United States treasury notes a legal tender in the United States not having there become law until the 25th of July, 1862:—Held, that the plaintiff was entitled to the sum made payable by the note at the time it matured, without reference to the rate of exchange existing between this province and the United States at the time of the trial. *Judson* v. *Griffin*, 13 C. P. 350.

To the first and second counts of a declaration on two notes, dated respectively 11th September and 29th November, 1860, for the respective sums of $500.24 and $388.85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid when due in United States currency, and alleged a tender by defendant before action of $606.12 of lawful money of Canada, which was at the time last aforesaid equal to plaintiffs' claim, and a refusal by plaintiff to accept same:—Held, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiffs' claim on the day of tender, before action brought, instead of at the time of the maturity of the notes sued upon, with subsequent interest, &c.; and, secondly, for alleging that the amount tendered was equal to plaintiffs' claim, instead of "equal in value to a certain sum of the currency of the United States," &c.; though, semble, this might be only ground of special demurrer. *White et al.* v. *Baker*, 15 C. P. 292.

A note made here payable at a place in the United States, but not "not otherwise or elsewhere," is payable generally, and the law and currency of the place of contract must govern. *Hooker* v. *Leslie*, 27 Q. B. 295. See also *Meyer* v. *Hutchinson*, 16 Q. B. 476.

Declaration on a note made at Toronto, payable to plaintiffs for $302.79. Plea, that the note was payable in Rochester, in the United States; that when it fell due Treasury notes of the U. S. Government were a legal tender in payment of all notes; that if defendant had then tendered the amount of the note in Treasury notes, it would have been a good tender; that $144.53 of lawful money of Canada, then equalled in value Treasury notes to the amount of the note; and defendant brings that sum into court:—Held, assuming the note to be payable at Rochester, but without the words, "not otherwise or elsewhere," that the plea was bad. *Hooker* v. *Leslie*, 27 Q. B. 295.

See *Griffin* v. *Judson*, 12 C. P. 430, p. 517.

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7. *Costs.*

(a) *Under C. S. U. C. c. 42, s. 23, et seq., formerly 5 Will. IV. c. 1.*

If there be two endorsers, and the holder bring several actions against them, he will be entitled to his full costs in only one suit, and his disbursements in the other. *Shuter* v. *Dee*, 1 Q. B. 292.

Where the plaintiff sued separately the acceptor and endorser, and the acceptor paid the claim against him, but without the costs, and judgment was entered and execution issued against him for their amount and the costs of the suit against the endorsers, the execution was restrained to the costs against the acceptor alone. *Gillespie et al.* v. *Cameron*, 3 Q. B. 45.

A., at the assizes in Toronto, sues B. as one of the endorsers on two notes—one for £27, and the other for £76. A. recovers on the note for £27, but having mislaid the note for £76, he enters a nolle prosequi as to that part of his claim. A. also brings another action in the District Court of the Niagara district against C., the maker, and D., another of the endorsers, on the note for £27. On motion under 5 Will. IV. c. 1, to restrain plaintiff from recovering more than the full costs of one suit:—Held, that the act did not apply. *Geddes* v. *Rogers*, 5 Q. B. 1.—P. C.—Draper.

Nor does it apply where one of the parties to the note not sued with the other, is at the commencement of the suit out of the jurisdiction. *Bank of B. N. A.* v. *Elliott*, 6 L. J. 16.—C. L. Chamb.—Richards.

Where separate actions were brought against maker and endorsers of a note, and upon a demurrer to the replication, judgment was given for defendants, and the plaintiffs made one application to amend in the three cases:—Held, that defendant was only entitled to the costs as for one case, in attending to oppose it:—Held, also, that as to the ordinary fee disbursed to counsel, to argue the demurrer in the three cases, and the ordinary taxable costs occasioned to defendant by the demurrer in each case, that they might be allowed to defendant. *Bank of B. N. A.* v. *Ainley*, 7 Q. B. 521.

Where the maker and endorser, being sued together under 5 Will. IV., c. 1, join in a defence, the second endorser may recover from the first the costs of such suit, without a special count or any further proof of an express request to defend. *Fox* v. *Soper*, 18 Q. B. 258.

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8 *Other Cases.*

Where a person in possession of a note sued in the name of the payee, the court refused to set aside the proceedings after judgment, upon an affidavit by the supposed payee that he had never possessed such a note, the defendant at the same time not swearing that he had never given such a note. *Taylor* v. *Rawson*, Tay. 481.

A note made in Albany, U. S., may be declared on under the common counts, under the statute of Anne. *Kirk* v. *Tannahill*, Tay. 619.

Action on a note made by M. and endorsed by C. Pleas by M., general issue and set-off, and by C., general issue, set-off, and release. The plaintiffs took issue on M.'s pleas, and entered a nolle prosequi as to C.:—Held, by Robinson, C. J., and Macaulay, J., that inasmuch as the plaintiffs confessed by their nolle prosequi that C. had a set-off sufficient to meet the note, they could not recover the amount against the other defendant; and by Jones, J., and Hagerman, J., that they were not precluded from doing so. *Robertson et al.* v. *Moore et al.*, 6 O. S. 646.

A note declared on need not be mentioned in a bill of particulars. *Street* v. *Cameron*, H. T. 2 Vict.

Where the plaintiffs declared against the drawer of a lost bill payable to plaintiff's order, on a promise to pay it, but did not state any new consideration for the promise, nor allege that the bill was unendorsed at the time of the loss, the declaration was held bad on general demurrer. *Russell* v. *McDonald*, 1 Q. B. 296.

The payee of two notes for £25 each, having absconded, is not thereby disabled from suing the maker upon them on his return to the province, because in his absence an attachment had been taken out against him for £21, by A., a creditor. *Slattery* v. *Turney et al.*, 7 Q. B. 578.

Plaintiff, as executor, sued to recover money received by defendant for his testator on a note payable to the testator. The maker swore that he had paid defendant, who handed him the note, which was still in his possession, though with the name torn off:—Held, not necessary to produce the note. *Van Allan* v. *Fryner*, 14 Q. B. 579.

A writ of summons may be specially endorsed as for a balance due on a bill of exchange, even though some of the items forming part of the amount are unliquidated, there being a balance due on the bill itself. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.—C. L. Chamb.—Draper.

A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft:—Held, that the endorsement was right as to the interest, but not as to protest charges. Bank of Montreal *v.* Harrison, 4 P. R. 331, explained. *Sinclair* v. *Chisholm*, 5 P. R. 270.—L. C. Chamb.—Dalton, *C. C. & P.*

A note payable in the United States, in American currency, and all the parties to which reside in this country, may be sued upon here. *Greenwood* v. *Foley*, 22 C. P. 352.

XII. Defences to Actions.

1. *Plaintiff not the Holder.*

Replications to pleas setting up this defence—Form of. *Morton* v. *Thompson*, 1 Q. B. 178; *Bank of B. N. A.* v. *Ainley*, 7 Q. B. 33.

Payee against maker. Plea, that before suit, &c., the plaintiff endorsed to A., who became the holder, and to whom, therefore, plaintiff was liable. Replication, re-affirming that plaintiff was the holder, and specially traversing that A. was, as asserted:—Held, replication good. *Dickenson* v. *Clemow et al.*, 7 Q. B. 421.

The maker of a note, sued by payee, pleaded that before suit the plaintiff endorsed the note for value to a person who is unknown, who is the holder. Replication, that the plaintiff did not so endorse:—Held, bad. *McIntyre* v. *Skead*, 8 Q. B. 300.

Plea, that before the note became due, plaintiff endorsed it to a person unknown, who is the holder. Replication, that plaintiff was when suit brought, and is the holder, without this, &c.:—Held, bad, on special demurrer. *Brunskill* v. *McGuire*, 3 C. P. 408.

Payee of a bill against the drawer. Plea, that the plaintiff at the commencement of this suit, was not the holder, without averring specifically an endorsement to some one else:—Held, bad. *Boyes* v. *Joseph*, 8 Q. B. 273.

To an action on a note by plaintiff as bearer against the makers, defendants pleaded that after the making of the note, and before it became due, the plaintiff, for a valuable consideration, delivered it to certain persons to defendants unknown, who lost the said note, and the same came into the hands of the plaintiff by finding, and not by assignment or delivery for consideration; and that the said persons unknown were and still are entitled to said note, and the money due thereon:—Held, a good defence. *Wanzer* v. *Stoutenburgh et al.*, 13 Q. B. 184.

The plaintiff, as coroner, sued upon a note made by defendant payable to B. or order, alleging that while it remained unpaid one M. recovered a judgment against B., C., and D., and issued a fi. fa. directed to the plaintiff, under which he seized the note. Defendant pleaded, that after the making of the note, and before this suit, B., being the owner and holder of said note, delivered it to C. to receive the amount thereof, and pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the judge of the County Court as to the debts due them, &c., and the note was then filed in the Court of Common Pleas; that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others in collusion with him, and the plaintiff, at the commencement of this suit was the holder of the said note by fraud:—Held, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vict. c. 57, s. 22; plea bad, as shewing no defence. *Brown* v. *Gordon*, 16 Q. B. 342.

In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, sec. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute; but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but Semble, that it is not essential. *McDonald* v. *McDonald et al.*, 21 Q. B. 52.

Defendant made a note payable to T. or bearer, who died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife to recover the assets. A bill was filed by defendant to restrain this action, and in his answer the plaintiff swore that, in consequence of the difficulties with the administrator, he had returned the note to G. before this action, that he had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit, and that plaintiff had recognized it, saying that he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder, a new trial was refused in the County Court:—Held, 1. Affirming the judgment below, that the plaintiff's answer in Chancery, though very strong evidence, was not conclusive: 2. Reversing such judgment, that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought; 3. That upon the evidence the plaintiff should have been found to be the holder. *Ancona v. Marks*, 7 H. & N. 686, distinguished. *Coates* v. *Kelly*, 27 Q. B. 284.

One M. made a note on the 17th November, 1863, payable to T. or order, at three months, at the Quebec Bank, for $4,000, which was endorsed by T. and the plaintiff, and discounted by the bank for T. On the 24th November, 1868, a note for $1,500 made by W. payable to T., and endorsed by M. for T.'s accommodation, was handed to the bank by T. as collateral security for the $4,000 note, and the bank also advanced on it $1,000 to T. This note, when it fell due on the 27th January, 1869, was retired by the note sued on, which was for $1,500, at two months, made by W., payable to T. and endorsed by T. and by M. to the bank, and was given, as the bank manager swore, for the same purpose as the previous $1,500 note. The bank received $1,200 from T. on account of the $4,000

note, and the plaintiff paid the balance on the understanding that the bank would hold the $1,500 note for his benefit, and they afterwards, at his request, gave it to their solicitor to sue. In an action on this note by the plaintiff against W. & M.:—Held, that he was entitled to recover; for, 1. He was the holder of the note; 2. The note being deposited with the bank as collateral security for the $4,000 note, and not merely for the $1,000 advanced on it, the bank held it for the full amount; 3. If the note could not be said, when taken on the 27th January, 1869, to be a security for value because the $4,000 note had not then matured, it became so when the latter note fell due on the 20th February, 1869, and value arising at any time during the currency of a note is sufficient. *Blake* v. *Walsh et al.*, 29 Q. B. 541.

See *Ross* v. *Tyson*. 19 C. P. 294, p. 560.

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2. *Reendorsement—Plaintiff liable over.*

Where in an action by the payee against the maker and endorser of a note, it appeared that the endorser put his name on it as a surety for the maker:—Held, that the plaintiff could not recover against him, as he was a party to the note subsequent to the plaintiff himself. *Jones* v. *Ashcroft et al.*, 6 O. S. 154.

Semble, That though, under Bishop *v.* Hayward, 4 T. R. 470, where a plaintiff suing is liable over to the defendant by reason of a prior endorsement, he cannot recover; yet if he sue with others, as an executor, he may. *Jenkins et al.* v. *McKenzie et al.*, 6 Q. B. 544.

A. being indebted to the plaintiffs, offered them a note with an endorser. The plaintiffs agreed to accept one, and A. made a note payable to the plaintiffs—procured the defendant to endorse it in blank, and delivered it to the plaintiffs. The plaintiffs discounted the note, having endorsed it under the defendant's endorsement. The note having been dishonoured, the plaintiffs took it up, struck out their endorsement, and again endorsed it above defendant's name, adding to their own name "without recourse," and then sued the defendant:—Held, that though the plaintiffs had not endorsed the note when the defendant endorsed it, and though their endorsement, making them stand as first endorsers on the note, was not written on it until after action brought, yet that such endorsement was sufficient. Semble, also, that the defendant was estopped from denying that the plaintiffs' name was endorsed when it ought to have been. *Peck et al.* v. *Phippon*, 9 Q. B. 73.

Declaration on a note made by P. payable to F. & F. or order, endorsed by them to defendant, and by defendant to the plaintiffs. Plea, that F. & F. are the plaintiffs, and no other persons. Replication, that at the time of making said note and endorsement by defendant, the maker was indebted to the plaintiffs, and it was thereupon agreed between them, that in consideration that the maker would procure defendant to endorse said note and become surety thereof to the plaintiffs, the plaintiffs would give time to the maker until the note matured; that the note was made in pursuance of such agreement, and defendant for the accommodation of the maker endorsed it to the plaintiffs, with the intention of thereby becoming surety to them as endorser; that the maker delivered the note so endorsed to the plaintiffs, who thereupon gave time to him as agreed on, and that the debt is unpaid:—Held, replication good. *Foster et al.* v. *Farewell*, 13 Q. B. 449.

Declaration, by G. M. & Co., on a note made by S. & R. payable to G. M. & Co., or order, endorsed by them to defendant and by defendant to plaintiffs. Plea, that G. M. & Co. are the plaintiffs, and payees of the note, and the same persons who endorsed it to defendant, and are liable to defendant as such endorsers, if he should be made to pay. Replication, that the plaintiffs' names were used as payees for form only; and it was understood by all parties to the note, that, although nominally made payable to the plaintiffs, it was substantially to be paid to defendant, because, by a special agreement between plaintiffs and defendant, notwithstanding the form of the note, the plaintiffs were not to become liable to defendant by endorsing to him. The evidence shewed that the note was given to enable the makers to get goods on credit from the plaintiffs, and that defendant knew he was endorsing for that purpose:—Held, that the plaintiffs could recover. *Moffatt et al.* v. *Rees*, 15 Q. B. 527.

W., the first endorser of a note, sued M., the second endorser, and proved that the note had been given by the maker, one C. R., upon the dissolution of a partnership between himself and the plaintiff, as security to the plaintiff for the amount of the note due to him upon such settlement, and with the understanding that an endorser should be given. M. endorsed the note after the plaintiff, with notice of these facts:—Held, that he was liable to the prior endorser. *Wordsworth* v. *Macdougall*, 8 C. P. 403.

Declaration by G. against M. & W. on a note for $100, made by M., payable to G. or order, by G. endorsed to W., and by W. to the plaintiff. Plea, by W., that G., the payee and endorsee, and the plaintiff is the same person, and as such payee endorsed to defendant W. Replication, that before the making of said note the plaintiff agreed to lend to defendant M. $100, provided he would procure W. to endorse said note as surety for the payment thereof to the plaintiff: that in pursuance of such agreement M. made, and W., for his accommodation, endorsed, and M. delivered said note to the plaintiff so endorsed, and plaintiff lent M. the $100, which has not been paid:—Held, replication good. *Gunn* v. *McPherson et al.*, 13 Q. B. 244.

Plaintiff, payee and first endorser of a note, sues a subsequent endorser, and calls him to prove the replication that he endorsed with the intention to become liable to plaintiff as endorser and surety for maker, &c. Defendant expressly denies this. There being no other evidence,—Held, that there was nothing to go to the jury to warrant a finding for plaintiff. *Mickle* v. *Oliver*, 11 C. P. 363.

Held, J. Wilson, J., diss., that the payee of a note endorsed in blank cannot, by merely writing his name above the endorser, maintain an action as endorsee against the latter, unless he shew authority from the endorser so to do, with the

express object of creating between them the relationship and consequent liability of endorser and endorsee. *Robertson* v. *Huebach*, 15 C. P. 298.

Endorsee against endorser. Plea, that the note was endorsed by payee without consideration by defendant to him: that defendant, for the accommodation of maker and payee, endorsed in blank and delivered it to payee, and there never was any consideration for the endorsement of the note to defendant; and that payee, in fraud of defendant, delivered the note to plaintiff without value or consideration, and solely for the purpose of endeavouring, through plaintiff's agency, to recover against defendant. The evidence shewed that the maker, being indebted to the payee, procured defendant to endorse it *as surety to the payee*, who had previously endorsed it in blank, and afterwards "without recourse." It further appeared that plaintiff held the note without valuable consideration, the payee being in fact beneficially entitled, and the note being sued on his behalf:—Held, that the evidence did not sustain the pleas, and the plaintiff was entitled to recover, within the principle of Morris *v.* Walker, 15 Q. B. 588, and our own cases from Peck v. Phippon, 9 Q. B. 73. *Smith* v. *Richardson*, 16 C. P. 210.

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3. *Denial of Making or Endorsing.*

Denial of making or accepting.]—In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability, without producing the partnership deed; and when a company is formed for purposes which do not render the drawing and accepting of bills of exchange and notes necessary, it will be sufficient to establish the liability of a partner, on bills and notes drawn or accepted in the name of the company by their secretary, that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee* v. *McDonald*, 6 O. S. 130.

Defendant having been arrested, requested the plaintiff to join him as maker of a note to M., his creditor, for the debt, which he did, and the plaintiff was obliged to pay the same with costs, &c. The plaintiff then sued to recover this amount, alleging in his declaration that in consideration of the plaintiff joining the defendant in signing as maker, a note jointly and severally promising to pay M., or order, the sum of, &c., for defendant's use and benefit, defendant promised the plaintiff to indemnify him, and that he did join him accordingly:—Held, that the making of the note by plaintiff was not put in issue by the plea of non-assumpsit. *Blake* v. *Harvey*, 2 C. P. 310.

Declaration on a note alleged to have been made by the defendants under the name of A. B. & Co. Plea by A. B., that he did not make. Demurrer, that defendants being sued as joint makers, it is no answer for one of them to say that he did not make the note:—Held, plea clearly good. *City Bank* v. *Kellar et al.*, 2 C. P. 508.

Quære, as to how far an endorser is estopped from denying the maker's signature. *Hanscome* v. *Cotton*, 16 Q. B. 98.

Quære, whether under a plea of non fecit to a note signed by the firm, defendant was entitled to shew a limited partnership; but where he was allowed to do so:—Held, that the plaintiff might, in answer, object to the description of the business; and, Semble, that he might also object that the special partner had not paid in his share. *Benedict et al.* v. *Van Allen et al.*, 17 Q. B. 234.

Where the defendant signed, as maker, a printed form of note, and handed it to A., by whom it was filled up for $855, and plaintiff afterwards became endorsee of it for value without notice:—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. *McInnes* v. *Milton*, 30 Q. B. 489. See *Sandford* v. *Ross*, 6 O. S. 104.

Where in an action against the maker of a note, the plaintiff produced several witnesses who swore to the defendant's signature, which two of them said he had admitted, but the jury found for the defendant on his own evidence alone, the court granted a new trial, with costs to abide the event. Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence is less strict than it was before the parties were admissible as witnesses. *Canadian Bank of Commerce* v. *McMillan*, 31 Q. B. 596.

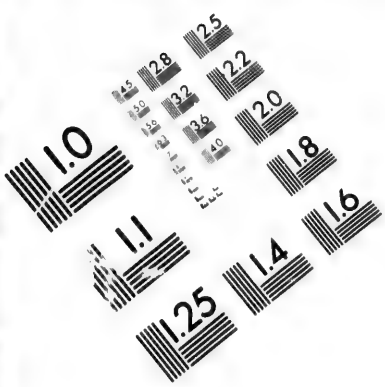
Per A. Wilson, J., the evidence, set out in this case, was insufficient to shew that the defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited. *Hand* v. *Agnew*, 32 Q. B. 559.

Denial of endorsing.]—A., the endorsee, sues B., the endorser, alleging that after the note became due, to wit, on, &c., B. endorsed to A. There was no averment of presentment or of notice. B. pleaded that he did not endorse as alleged:—Held, that under this plea the endorsement only, and not the time, was in issue:—Held, also, that the note being endorsed when over due was no excuse for non-presentment, and so the declaration shewed no cause of action; but, nevertheless, as the plaintiff had been nonsuited for not proving the time of endorsement, the nonsuit must be set aside. The court, however, in such a case, may grant a new trial without costs, and allow the plaintiff to amend. *Davis* v. *Dunn*, 6 Q. B. 327.

Declaration against maker, payee, and second endorser of a note. Plea by the payee and second endorser, that they did not endorse it in manner and form:—Held, bad, on special demurrer. *Rossin et al.* v. *White*, 12 Q. B. 634. See also *Hawke* v. *Salt*, 3 C. P. 97.

Declaration against L. and A. as endorsers of a note payable to the order of L., averring that defendants duly endorsed said note, and that A. delivered it so endorsed to plaintiff:—Held, on demurrer, that A. must be taken to be the immediate endorsee of L., and could not deny L.'s endorsement. *Griffin* v. *Latimer*, 13 Q. B. 187.

Where a note not signed by any one was endorsed by defendant, and delivered by him to the plaintiff, upon condition that A. and B. should sign it as makers, and it was signed only



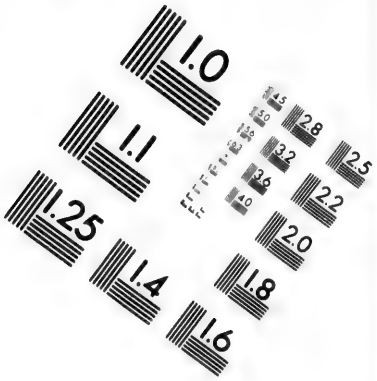
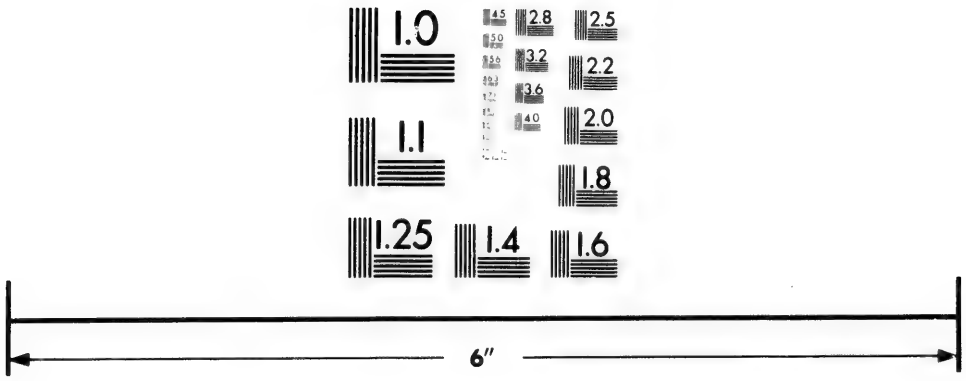
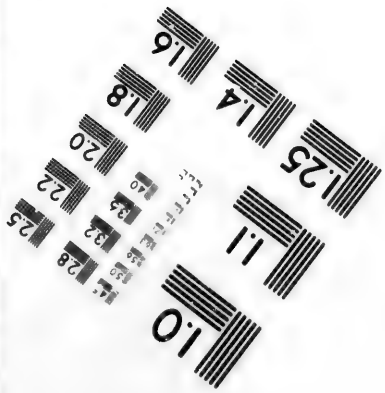
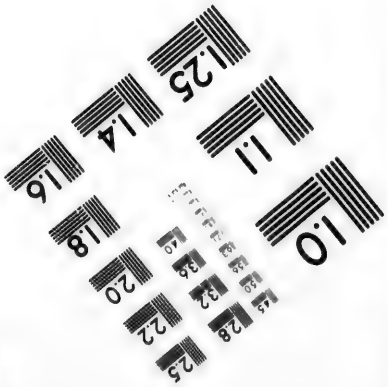


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by C. :—Held, that these facts might be shewn by defendant under a plea denying his endorsement. *Austin* v. *Farmer*, 30 Q. B. 10.

In an action against the endorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority ; but it was proved that defendant had before and afterwards endorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded from him he had asked for time, and had not denied his endorsement until some months afterwards, when the maker had absconded. His excuse was, that he kept no memorandum of his endorsements, and supposed it was right :—Held, that the defendant had precluded himself by his conduct from disputing his liability, and the jury having found in his favour, a new trial was granted without costs. *Pratt* v. *Drake*, 17 Q. B. 27.

See *Peck* v. *Phippon*, 9 Q. B. 73, p. 523.

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4. *Consideration as a Ground of Defence.*

(a) *What is a Consideration.*

A debt due to a bankrupt estate, is a good consideration for notes given to the trustees and assignees of the estate. *Gates* v. *Crooks*, Dra. 459.

A member of a joint stock company, not incorporated, lending, with the assent of the company, a sum of money out of the joint fund to another member, and taking from him a note payable to himself, individually, for re-payment, can recover on the note, notwithstanding that the funds were advanced from the common stock. *Comer* v. *Thompson*, 4 O. S. 256.

A note given by A. to B. for a debt due by C., upon a consideration of forbearance, and upon no privity shewn between A. and C., cannot be enforced. *McGillvray* v. *Keefer*, 4 Q. B. 456.

Semble, that a debt due by a third party, but not yet payable, may form a valid consideration for a note. *Dickenson* v. *Clemow*, 7 Q. B. 421.

A note promising to pay the Church Society of the diocese of Toronto or bearer, £50, with interest, towards providing a fund for the support of a Bishop of the western diocese of Canada, who should be appointed in pursuance of an election by the clergy and laity :—Held, to be founded upon a sufficient consideration, and recoverable in the hands of a bonâ fide holder. *Hammond* v. *Small*, 16 Q. B. 371.

A pre-existing debt is a good consideration in whole or in part for a note or bill. *Gooderham* v. *Hutchison*, 5 C. P. 241 ; *Hillis* v. *Templeton*, 7 L. J. 301.—C. C.—Hughes.

And not the less so from a mortgage on real estate having been taken to secure the same debt. *Bank of U. C.* v. *Bartlett et al.*, 12 C. P. 238.

Semble, That there is no distinction as regards consideration, between a note given for a pre-existing debt and for a new consideration. *Evans et al.* v. *Morley*, 21 Q. B. 547.

A note was given by defendant, secretary of an insurance company, for a loss, the policy having been marked "cancelled," and left in the possession of the company, and the note was not payable until three days after the loss would be payable by the policy. Semble, that this shewed a sufficient consideration ; but there was other evidence of plaintiff being a holder for value. *Armour* v. *Gates*, 8 C. P. 548.

Value arising at any time during the currency of a note, is sufficient. *Blake* v. *Walsh et al.*, 29 Q. B. 541.

(b) *Accommodation or want of Consideration.*

Pleading.]—Plea of accommodation and no consideration. Replication, traversing no consideration, but not the accommodation :—Held, bad on special demurrer. *Gilmore* v. *Edmunds*, 2 Q. B. 419 ; *Brown* v. *Wheeler*, 6 Q. B. 393 ; *Allen* v. *Skead*, 9 Q. B. 217.

Endorsee against maker. Plea, that the note was made and delivered to plaintiff in payment of 200 hats and caps, to be delivered by plaintiff to defendant, and that they remained undelivered, but not averring any request for their delivery :—Held, bad on demurrer. *Anderson* v. *Jennings*, 2 Q. B. 422.

A plea that defendant endorsed without consideration from the maker or the plaintiff, is bad. *Bank of B. N. A.* v. *Sherwood*, 6 Q. B. 213.

A plea that defendant made the note to the plaintiff as a gratuity, and that defendant never received any consideration therefor, is good. *Poulton* v. *Dolmage*, 6 Q. B. 277.

Where the plaintiff sets out the consideration on which defendant's promise was made, a plea that there was never any consideration for the promise, is bad. *Bradford* v. *O'Brien*, 6 Q. B. 417.

Defendant pleaded that he made the note on account of payment of a piece of land, which the plaintiff then agreed to sell and convey to him, and to which the plaintiff then professed to have a title ; whereas the plaintiff never had any right in or to the said land, and could not, and did not, convey the same to defendant pursuant to the agreement ; and that there never was any consideration for making said note, except as aforesaid :—Held, on demurrer, plea bad, for not shewing when a title was to be made, or what the agreement was. *Blanchfield* v. *Birdsall*, 7 Q. B. 141.

Payee against maker. Plea, note made for plaintiff's accommodation without consideration. Replication need not shew what the consideration was. *Gravely* v. *Jones*, 8 Q. B. 606.

Payee against maker. Plea, that the note was given for plaintiff's title to land, and that he had no title at the time of making the note or since, and so there was no consideration for the note :—Held, on demurrer, plea bad, for for all that appeared the plaintiff might have got all he expected, and it might be assumed that plaintiff had conveyed by deed with covenants, in which case, there would not be an entire failure of consideration. *Lundy* v. *Carr*, 7 C. P. 371.

On an action by endorsees for value, against a firm of M. and C., on a bill drawn by S. & Co., in their own favour, accepted by the defendants and endorsed by S. & Co. to plaintiffs, the defendant C. pleaded that the bill was accepted by his partner M. in the name of the firm as an accommodation for S. & Co., and without his, C.'s authority, and was not within the scope and

objects of the partnership business, and that the plaintiffs took it with notice. Also, equitably, that the plaintiffs *after* the bill had matured, having notice of the accommodation acceptance, agreed with S. & Co., the drawers, without the consent of defendant, to accept a composition from S. & Co., which composition was paid to plaintiffs, who thereupon discharged S. & Co. from liability; and that defendants were discharged in equity thereby. On demurrer—Held, 1. That the first plea was insufficient in not stating that the acceptance had no reference to any dealing between S. and the firm of M. & C. 2. That the equitable plea was bad, for the plaintiff, having notice only *after* the bill matured, might release the drawers without releasing the accommodation acceptors. *City of Glasgow Bank* v. *Murdock et al.*, 11 C. P. 138.

See *Hawke* v. *Salt*, 3 C. P. 97, p. 510.

Other Cases.]—Payee against maker. Plea, that defendant made and the plaintiff received the note from him, and thence hitherto held the same, on certain terms and for a special purpose only, to wit, that the plaintiff should take care of it for him, and should not negotiate or part with it to any other person, and that there never was any value or consideration for the note except as aforesaid:—Held, a good defence. *Wismer* v. *Wismer, Executor*, 22 Q. B. 446.

The payee of a note given for goods sold by C. to the maker, and endorsed by the payee and C. for the maker's accommodation, and discounted by C. at a bank, may sue the maker on non-payment of the note, although he has himself paid it only by giving new notes (to which the maker is not a party) in satisfaction, which are unpaid, and no consideration ever passed between the maker and him. *Latham* v. *Norton*, 6 O. S. 82.

A second accommodation endorser who has paid a note discounted at a bank for the benefit of the maker, may maintain an action on the note against a prior accommodation endorser, and may endorse it over after it is due. *Breeze* v. *Baldwin*, 5 O. S. 444.

A. being seized in fee of lands, made jointly with B. a lease of those lands to C., taking notes from C. for the rent, payable as it would become due. The day after the execution of the lease A. died intestate, and then B. died, and B.'s executors sued C. on the notes:—Held, that they could not recover, the consideration for which the notes were given having failed. *Merwin* v. *Gates*, E. T. 7 Will. IV.

The payee of a joint and several note, made by two, can only be treated as holding one as a surety for the other upon his express consent to do so at the time of taking the note. *Ball* v. *Gilson et al.*, 7 C. P. 531.

Endorsee against maker: Plea, as to part of the sum, that defendant made the note only for the accommodation of the payee, and that the endorsee gave only a certain sum for it, to secure which it was transferred to him. The plaintiff replied that that sum was to be paid at a particular time, but if not so paid, the plaintiff was to hold the note for the whole sum secured by it:—Held, replication bad in substance, as the defendant being only an accommodation maker, could not be charged with more than the plaintiff gave for the note. *Strathy* v. *Nicholls*, 1 Q. B. 32.

It is no defence by the maker that the plaintiff, endorsee, gave no value to the endorser for his endorsement, or that he took the note knowing that it was endorsed for the accommodation of the maker, without denying that he is a holder for value. *Miller* v. *Ferrier*, 7 Q. B. 540.

Declaration against maker of a note payable to bearer, and delivered by defendant to plaintiffs. Plea, that the note was made for the accommodation of A. and C.; that there never was any consideration or value for the payment of it by defendant; and that the plaintiffs held and hold the same without value or consideration:—Held, bad. *Muir et al.* v. *Cameron*, 10 Q. B. 356.

Held, that upon the evidence set out in this case, those pleas were supported which set up as a defence that the note was made and endorsed for plaintiffs' accommodation. *Bowes et al.* v. *Holland et al.*, 14 Q. B. 316.

Assumpsit on a bill drawn by one defendant on the other two, and accepted. Fourth plea, that the bill was delivered by the acceptors to Messrs. H., who transferred it to one G. as security for flour to be sold by him to them; that G. refused to deliver said flour, and in consequence Messrs. H. were entitled to receive back the bill, and G. held it without consideration, and as their agent: that while he so held it the acceptors made their note payable to the drawer, or order, which was duly endorsed, and delivered by the acceptors to Messrs. H. in satisfaction of the bill: that H. afterwards, in fraud of defendants, directed G. to deliver the bill to the plaintiff, and that he thereupon, and without consideration from the plaintiff, and as the agent of H., delivered said bill to the plaintiff, who received it without consideration, and after it was due. The fifth plea was, that the bill was endorsed to G. in part payment for the flour; that after G.'s refusal to deliver he held without consideration, and while it was so in his hands defendants paid it, as alleged in the last plea: that the acceptors were then entitled to receive it from G., and that he thereafter held as agent for them, and that it was overdue when it came into the plaintiff's hands:—Held, upon the evidence set out in the case, that the plaintiff must recover; that the defendants had acted negligently in paying as they did, and that neither of the pleas were proved; for, as to the fourth, G. did not receive the bill as security, but rather in part payment for the flour, nor did he deliver the bill to the plaintiff by Messrs. H.'s directions; and as to both pleas, he could not be said to hold the bill after refusal to deliver the flour as the agent of Messrs. H., and without consideration, because they had not treated the contract for the sale of the flour as rescinded, but had assumed to hold him liable upon it by making over his flour acceptance; and, as he was a bonâ fide holder for value, it was of no consequence whether the plaintiff taking from him knew that the bill had been paid by Messrs. H. or not. *Clarkson* v. *Lawson et al.*, 14 Q. B. 67.

An endorsee without value is entitled to recover on a bill or note if any intermediate party is a holder for value. *Wood et al.* v. *Ross et al.*, 8 C. P. 299.

Defendant endorsed a note for $1230, for the purpose of enabling the maker to obtain, as an additional advance from an estate of which the plaintiff was receiver, the difference between that sum and a loan of $918, advanced to him before the making of the note, which additional advance was, however, not made :—Held, that defendant was not liable as endorser for the $918 originally loaned, and that a plea setting up the above facts was good. *Greenwood* v. *Perry*, 19 C. P. 403.

Remarks as to the practice in this country of taking notes for discount, not from the last endorser, but from the maker, who brings them endorsed—thus suggesting not a business transaction, but accommodation endorsements. *Bank of Montreal* v. *Reynolds et al.*, 25 Q. B. 352.

Where the debtor died owing more than he had the means of paying, and a month afterwards his mother, who wished to pay all his debts, was induced to give her note to one of the creditors for an amount which was less than one-eighth the value of her property, it was—Held, that in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity. *Campbell* v. *Belfour*, 16 Chy. 108.

See *Wightman* v. *Daniels*, 13 Q. B. 487, p. 541 ; *Stultzman* v. *Yeagley*, 32 Q. B. 630, p. 539 ; *Leitch* v. *Leitch*, 11 Chy. 81, p. 561.

For other cases arising upon accommodation paper, see V. 1, p. 489 ; IX. p. 503 ; X. p. 503 ; XII. 6 (a), p. 542 ; XII. 6 (g), p. 557 ; XIV. p. 561 ; XV. p. 564.

(c) *Partial Failure of Consideration.*

A. and B. exchanged horses, and B. gave A. a note for a difference in the exchange ; A. sold the horse he got from B. almost immediately, and after two years, during which nothing appeared to have been done by either party, B. was sued upon the note by A. :—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

Defendant proved that the note had been given by him to the plaintiff for the balance of purchase money on a sale of some hams warranted good by the plaintiff, and that many of the hams were bad. The jury found for defendant on the ground that the hams were not worth more than the money paid :—Held, Robinson, C. J., dissenting, that the partial failure was no defence, without evidence of fraud. *Kellogg* v. *Hyatt*, 1 Q. B. 445.

Partial failure of consideration is no defence to a note. *Dixon* v. *Paul*, 4 O. S. 327 ; *Hill* v. *Ryan*, 8 Q. B. 443.

Nor that the consideration proved less beneficial than was represented. *Dalton* v. *Lake*, 4 O. S. 15.

Where an action was brought for breach of contract in refusing to sign certain notes, the sale and delivery to defendants of shares in a schooner being alleged as the consideration for the promise ; and it appeared that the plaintiff had surrendered his interest to the defendants ; and that they had continued in exclusive possession of the vessel ; but that no assignment had been made as the statute directs, and no transfers endorsed on the registry, nor any new certificate of ownership granted ; the court ordered a nonsuit. But if the defendants had given their notes, they could not have resisted payment on the ground that they had not received a valid title, for there would only have been a partial failure of consideration. *Orser* v. *Mounteny et al.*, 9 Q. B. 382.

To a declaration on a note, the defendant pleaded as to £157 10s., part, &c., that the plaintiff represented that he owned certain lands, and was the equitable owner of lot 14, &c., through one R., who held it as trustee for him ; and that defendant was induced by his false and fraudulent representations to buy the same from plaintiff, whereupon the plaintiff conveyed all his interest in said lands to the defendant : that defendant paid part down, and gave his two notes for the balance, one of which is the note declared upon : that the plaintiff had no interest in said lot, and that R. refused to assign his interest in said lot to the defendant :—Held, no answer to the action, the contract being entire, and the failure of consideration not being definite as to this note. *Coulter* v. *Lee*, 5 C. P. 201.

See the remarks of Macaulay, C. J. C. P., as to the avoidance of a security by fraud in a part of the consideration ; repudiation of contract by defendant, &c. *Ib.* 204.

Assumpsit on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety : that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound but unsafe and rotten, as the plaintiff well knew, and the said A. and B., immediately after the sale, discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her. Semble, that the facts did not shew a total failure of consideration, and therefore formed no defence. *Henderson* v. *Cotter*, 15 Q. B. 345.

The plaintiff sued upon a bill drawn by A. upon B. for £30, payable to his own order, accepted by B., by A. indorsed to C. and by C. to the plaintiff. A. pleaded as to £15, part, that the plaintiff accepted the bill from him on an undertaking that he was to collect it and apply £15 out of the proceeds to pay that amount due to the plaintiff, wherefore, except as to £15, there was no consideration for the bill :—Held, plea bad. *Brown* v. *Garrett et al.*, 5 Q. B. 243.

Endorsee of an overdue note against maker. Plea, setting out the special circumstances under which the note was originally given, and denying thereupon the right of the payees to negotiate the note :—Held, plea no defence as to a certain portion of the note, but a good defence as to the balance. *Rennie* v. *Jarvis*, 6 Q. B. 329.

To an action on two notes, defendant pleaded that they were given for the assignment to him

of the plaintiff's right to two lots of crown land, of which the plaintiff falsely and fraudulently represented that he was locatee : that the plaintiff had no claim to said land, and the notes were obtained from defendant by fraud :—Held, that on shewing the plaintiff's title to one of the lots to have been bad, without proving fraud, the defendant was entitled to succeed as to that part of the claim for which the consideration had failed. Such a defence, however, should properly be pleaded only to that part of the demand covered by it. *O'Brien* v. *Ficht*, 18 Q. B. 241.

Declaration by payees against makers of a note for $1000, payable at three months. Plea, on equitable grounds, that the plaintiffs falsely and fraudulently represented to the defendants that they had the right to cut hardwood timber under a crown license, on certain lands of which they gave defendants a list : that defendants, wishing to purchase such right, had all the lots examined, and thereupon, relying upon and believing plaintiffs' said representations, and being induced thereby, as plaintiffs well knew, defendants agreed with the plaintiffs to purchase the right for $2,800, of which $1,800 was paid down, and this note given for the balance ; that defendants relying, &c., cut and made timber on the lots ; that the plaintiffs had no such right in respect of a large quantity of said lands, by reason whereof defendants' rights acquired under said agreement, were worth less by more than $1,000 than the plaintiffs represented they were possessed of and pretended to sell : that defendants first became aware of the fraud after they had paid the money and given the note, and expended a large sum, and they are likely to lose the money expended by them in manufacturing a large quantity of the timber cut by them ; and defendants prayed that it might be declared they were not liable to pay the note ; and that the plaintiffs might be required to pay them a fair compensation for their loss by reason of such representations :—Held, on demurrer, plea bad ; that it shewed only a partial failure of consideration, and not of any definite sum : that it was not a case of either legal or equitable set-off ; and that the defendants could not prevent the plaintiff's recovery until their right to damages or compensation, and the amount of it had been ascertained ; and, semble, that it should have shewn a tender of or readiness to pay the value of, or an offer to give up to plaintiffs, the timber cut by them on the lots to which plaintiffs had no right ; and perhaps, that since discovering the fraud they had cut no timber on such lots. *The Georgian Bay Lumber Co. of Ontario* v. *Thompson et al.*, 35 Q. B. 64.

See *Lundy* v. *Carr*, 7 C. P. 371, p. 528.

(d) *Fraud and Illegal Consideration.*

Gaming.]—In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value, also, after it was due, it is no defence that the note was assigned to the plaintiff's transferror in payment of a gambling debt and through fraud. *Burr* v. *Marsh*, M. T., 4 Vict.

Assumpsit on a note made by A. payable to B., endorsed by B. to C., and by C. to plaintiff. A. pleaded—5. That he gave the note to the payee as part of the consideration for the purchase of a lottery ticket, contrary to the statute ; and, 6. The same defence, with the averment that the plaintiff became endorsee with full knowledge :—Held, both pleas bad. Held, also, that under the facts and pleadings there was no defence under the statutes against gambling. *Wallbridge* v. *Becket*, 13 Q. B. 395.

Declaration on a note for £15, payable to G., or bearer. Pleas : 1. That G. corruptly and against the statute held a lottery of land, and disposed of the tickets for £15 each, and defendant purchased one, for which this note was given. 2. The same facts, adding, that the plaintiffs took the note with knowledge of the premises, and after it fell due, without consideration. 3. That the note was given for land, which was won by unlawfully gaming and playing, contrary to the statute. 4. That defendant was induced to make the note by the fraud of said G. and others, and the plaintiffs took it after it became due, without consideration, and with full knowledge of the premises :—Held, on demurrer, first and third pleas bad, second and fourth pleas good. *Evans et al.* v. *Morley*, 20 Q. B. 236.

Held, affirming the last case, that under 12 Geo. II. c. 28, securities given for the price of tickets are not void in the hands of a bonâ fide holder of value. *S. C.* 21 Q. B. 547.

Where the jury found that the plaintiffs had not notice of the illegality, the court refused a new trial, holding the defence not one to be favoured. *Ib.*

Other Cases.]—Where the defendant signed as maker a printed form of a note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became endorsees of it for value without notice :—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. *McInnes* v. *Milton*, 30 Q. B. 489. See *Sanford* v. *Ross*, 6 O. S. 104 ; *Larkin* v. *Wiard*, 5 O. S. 661.

Commissioners of a turnpike trust, appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, make a demise beyond the scope of these powers ; the tenant is put into possession and enjoys his term ; the commissioners, at the expiration of the term, take a promissory note from the tenant for the rent, giving time for payment :—Held, that the commissioners, by their clerk, could not sustain an action upon such note, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise.—Robinson, C. J., diss. *Ireland* v. *Guess et al.*, 3 Q. B. 220.

Where a note endorsed *generally* was put into the hands of A. to get it discounted for the maker, B., and, instead of this, B. owing him (A.) a debt, he discounted it for his own benefit, and, as found by the jury, after the note had matured :—Held, in an action by endorsee against maker and endorser, that the plaintiff could not recover. *Kerr* v. *Straat*, 8 Q. B. 82.

In assumpsit upon a note, transferred by the payee to plaintiff after it became due, on non-assumpsit the defence set up was that the defendant and payee had a settlement, when defendant agreed to convey a lot of land within six months, to give over certain stock, and to give this note,

the payee agreeing to deliver to the plaintiff certain notes, according to a schedule: that the defendant delivered the stock, gave his note, and mutual receipts were exchanged: and that it then appeared the payee had only part of the notes in the schedule, which the defendant refused to accept. It did not appear that the land had since been conveyed, nor what amount of the notes was deficient; but the jury found that the payee at the settlement concealed from defendant that he had not all the notes:—Held, a defence to this action on his note. *McCollum* v. *Church*, 3 O. S. 356.

An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a note. *Dwight* v. *Ellsworth*, 9 Q. B. 539.

To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry* v. *Little*, 11 Q. B. 296.

Under 8 Vict. c. 45, s. 2, a note made on Sunday in payment of goods sold on that day, is void, as between the original parties, but not as against an endorsee for value and without notice. *Houliston* v. *Parsons*, 9 Q. B. 681; *Crombie* v. *Overholtzer*, 11 Q. B. 55.

A note was made payable to the treasurer of, and endorsed by him to a municipal corporation, to secure a balance due the corporation on a past transaction, is not void under the Municipal Acts. *The Corporation of Belleville* v. *Fahey*, 5 L. J. N. S. 73.—C. C.—Sherwood.

J. H. & Sons in Toronto had been in the habit of drawing on their correspondent in England, and of covering such bills by shipments of flour and remittances. They had largely overdrawn, and their correspondent had repeatedly requested them to desist from drawing. In December, 1854, they drew several bills, which they sold or exchanged for notes, and amongst others the note sued upon; this note they gave with several others in payment of their account to G. H. & Co., and a few days afterwards failed. The bill for which the note was given was returned dishonoured, and T. H., the maker of the note, set up that it was procured from him by fraud without consideration:—Held, that there was evidence that the note had been procured by fraud: that if J. H. & Sons drew the bill for which the note was given, having no expectation or right to expect that it would be honoured, they practised fraud in procuring the note. *Gooderham* v. *Hutchison*, 5 C. P. 241.

Action on a bill drawn by K. upon and accepted by defendant C., endorsed by K. to E., by E. to D., and by D. to plaintiffs. Plea, by C., that he was induced to accept by the fraud and misrepresentation of said K., E., and D., and without any consideration, and that D. endorsed to the plaintiffs without any consideration or value given by them to him:—Held, good, without averring that the plaintiffs were *holders* without value. *Bank of Montreal* v. *Cameron*, 17 Q. B. 636.

Action by endorsee against maker of a note.—A plea on equitable grounds that a note was given as collateral security for a mortgage for the same amount, and was endorsed over after it became due by the original holder and mortgagee, who was proceeding to foreclose the mortgage in fraud of the defendant, with full knowledge:—Held, no defence either in law or equity. *Shaw* v. *Boomer*, 9 C. P. 458.

One W., as agent for J., sold to defendant two lots of land for $1000, receiving $100 down and taking defendant's notes for the balance. This land had been purchased from the crown in 1854, by one W., who had assigned his right to C., and C. to J. The instalments had all been paid to government, and W. told defendant that when he did the settlement duties he could get the patent. He also handed to defendant the assignments and receipts, with an assignment from J. to defendant. The lots were then vacant, and defendant soon after went into possession and performed the settlement duties, but when he applied to the crown lands department for his patent, he was informed that the original sale to W. had been cancelled, as having been obtained in fraud of their regulations; and to avoid losing the land he again purchased it from government for $550. In an action brought by J.'s agent upon the notes, W. swore that he believed what he told the defendant to be true, and had no doubt J. also believed it, and there was no proof to the contrary:—Held, that there was no evidence to sustain a defence on the ground of fraud: that there was not a total failure of consideration; and that the plaintiff therefore was entitled to recover. *Walker* v. *Douglas*, 23 Q. B. 9.

In an action against the maker of a note, evidence was given to shew that defendant was induced to give the note upon misrepresentations, on the part of the payee and endorser, as to the formation of a company for the sale of a patent right controlled by the payee, the note being given in consideration of a share which defendant was to have in such company, of which plaintiff's testator was alleged to be one; but it was doubtful whether any such company existed at all, or if so, whether defendant was ever placed in the position of becoming a shareholder:—Held, that the defendant not having repudiated and rescinded the contract under which the note was given, did not preclude him from setting up the defence that it had been obtained from him by the fraud, of the payee, with notice; and that the latter had endorsed it without value to the testator; for that from the nature of the transaction there was nothing on defendant's part to be repudiated or rescinded. *Waddell* v. *Jaynes*, 22 C. P. 212.

A. gave B. & C. a note signed by himself, which they discounted. When it matured B. and C. delivered to the holder, by way of renewal, a note purporting to be made by A., like the other note, and which such holder on that faith accepted, and delivered up the old note. It being afterwards alleged that the renewal was not signed by A., but by another person of the same name, unknown to the holder, and resident in a foreign country:—Held, that A. could not take advantage of this fraud: that his liability in respect of the note still existed in equity; and that the holder could sue within six years from the discovery of the fraud. *Irwin* v. *Freeman*, 13 Chy. 465.

See *Bank of Montreal* v. *Snyder*, 18 Q. B. 402, p. 511; *Brown* v. *Gordon*, 16 Q. B. 342, p. 522; *Campbell* v. *Belfour*, 16 Chy. 108, p. 531; *Metro-*

politan Bank v. *Snure*, 10 C. P. 24, p. 552; *Campbell* v. *McKinnon*, 18 Q. B. 612, p. 483.

See XII. 4 (c), p. 531.

See also next sub-head, 5.

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5. *Contemporaneous or other Agreement.*

(a) *Agreements to Renew.*

The maker cannot set up an alleged parol agreement by the holder to renew the note upon being paid half the amount. *Hayes* v. *Davis*, 6 Q. B. 396.

Action on a note. Plea, an agreement that when it became due plaintiffs would renew it for one half, and give three months for the other half; but that they claimed the whole instead of half, which the defendants were ready to pay:—Semble, no defence. *Bank of U. C.* v. *Jones et al.*, 1 P. R. 185.—C. L. Chamb.—Burns.

Action on a note, to which defendants pleaded, in substance, that the plaintiff, who at the time held a note for the same amount, agreed on certain conditions to renew it from time to time for three years: that it was repeatedly renewed as agreed; and that when the note sued on became due, a renewal note and the interest were tendered and refused, though the three years had not expired. At the trial it was shewn that previous renewals had been made by leaving the renewal note at the agency of the Bank of Montreal in Cobourg, paying the interest and taking up the old note, and when the note now sued upon became due, a renewal note and the interest was tendered to M., the agent of the bank, who refused to accept the same, alleging he had no instructions. All the renewals except one, which was made with the testator personally, were made at said bank:—Held, that the tender of the renewal note and the interest to M., the agent of the Bank of Montreal, where the note was payable, was a sufficient tender, as all the other renewals were made there; and that defendant was not bound to tender another renewal and the interest, at the expiration of the three months from the last tender, as the plaintiff had, by his refusal to accept the former tender, repudiated the agreement, and defendant was not informed that he would accept such renewal. Held, also, on demurrer, that the pleas were bad, as varying the note by parol agreement prior to ... *Harper* v. *Paterson*, 14 C. P. 538.

(b) *To Postpone Payment.*

Parol evidence cannot be received to shew that a bill of exchange accepted payable three days after sight, was not to be paid till a further time had elapsed. *Bradbury* v. *Oliver*, 5 O. S. 703.

Plea, that in consideration of certain notes of a certain party being deposited with the plaintiff as a security, the plaintiff agreed not to sue upon this note until the others should become due:—Held, upon general demurrer, plea bad. *Conrad* v. *Stevenson*, 5 Q. B. 336. See, also, *Brown* v. *Hawke*, *Ib.* 568.

"For value received I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102.15, cy., to be paid in yearly proportions:"—Held, that the effect of this was to give two years for payment; and that no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiffs' father. *McQueen et al.* v. *McQueen*, 9 Q. B. 536.

E., holding B.'s note, agreed to take collateral security by mortgage on road stock, and give one year's time on the note. B. mortgaged the stock and assigned it to E., but for two years instead of one. E. refused to carry out this arrangement, and sued on the note, at the same time holding the security, and refusing to transfer it:—Holding that it was for the jury to say whether E., by retaining the security, did not consent for two years. *Evans* v. *Bell*, 8 C. P. 378.

The plaintiff declared on the following, as a note: "Three months after date, we, or either of us, promise to pay to Elias S. Reed (the plaintiff) or John Fraser, his guardian, at the post office, Embro, £119 17s., cy., value received in rent of farm;" adding a count on an account stated. It was proved that the defendant had been in possession of plaintiff's farm before and after the note was made, which was given for rent due, and that the plaintiff was abroad at the time of making the note:—Held, that evidence was inadmissible of a verbal understanding that the note was not to be enforced until the plaintiff's return, or until he could send a power of attorney to some one to collect it. *Reed* v. *Reed*, 11 Q. B. 26.

(c) *That Defendant should not be Liable.*

A plea setting up a parol agreement that defendant should not be liable, inconsistent with the endorsement on the note, is bad. *Hart* v. *Davy*, 1 Q. B. 218.

Where a man draws a bill to pay a debt, he cannot set up against the endorsee that the bill was given upon a prior verbal understanding between himself and the plaintiff, that the drawees would not pay unless they chose, and that in that event he was not to be liable as drawer. *Adams* v. *Thomas*, 7 Q. B. 249.

The jury having found for defendant, on evidence improperly received, of an alleged understanding that defendant should be called upon for the interest only, a new trial was granted. It was objected that the Church Society had no power to hold or transfer notes; but:—Held, immaterial, the note being payable to bearer. *Hammond* v. *Small*, 16 Q. B. 371.

Endorsee against the endorser. Plea, that the note was intended to have been made to the plaintiff or order, and endorsed by him to the defendant, to secure a debt due to the defendant by the maker, but by mistake it was made payable to the defendant or order; and he thereupon endorsed it to the plaintiff, in order to enable him to sue the maker, and on the understanding that the plaintiff should have no recourse against him as endorser:—Held, a good defence. *Blain* v. *Oliphant*, 9 Q. B. 473.

Declaration upon a note payable to defendant or order, and endorsed by defendant to plaintiff after it became payable. Plea, setting up a collateral agreement that defendant should not be liable, not alleging it to have been in writing:—Held, bad. *Hall* v. *Francis*, 4 C. P. 210.

To an action upon two notes against the maker by the endorsee of the payee, K., the defendant pleaded that the notes were given when he and the plaintiff and K. were in partnership, and in respect of transactions between defendant and K. as partners and of matters involved in the said partnership, and with the understanding and agreement between defendant and K. and the plaintiff, that the notes were to be held by K. and the plaintiff merely as evidence of such transactions, &c., and as security for any sums which might be found due to K. or the plaintiff, on accounts being taken and settlement made between them and defendant as partners, and upon the terms and condition of such an account being taken at or after the dissolution of the partnership; but that the partnership had since been dissolved, and no such account taken or settlement made:—Held, on demurrer, plea bad, for it admitted a good consideration for the notes, and did not allege expressly that they were not to be sued upon Semble, that it was also defective in not negativing any other consideration than that appearing on its face. *Stultzman* v. *Yeagley*, 32 Q. B. 630.

To an action upon a note by an endorsee against the maker, who signed the note in his private capacity, a plea that the defendant made the note as president, &c., of a company, to be binding only upon the company, and on the understanding with the payee that there was to be no recourse upon the defendant:—Held, bad as setting up a verbal understanding contrary to what the maker's signature to the note would import. *Ewart* v. *Weller*, 5 Q. B. 610.

A plea that the note was taken for a liability of the company, as secretary of which the defendant signed, and with the understanding that they were to pay the same:—Held, bad, as setting up a contemporaneous verbal agreement. *Armour* v. *Gates*, 8 C. P. 548

To an action by the executors of V., on a note made by defendant payable to V. or bearer, defendant set up as a defence, that by his last will V. devised to each of his children, of whom defendant's wife was one, £250, to be paid by his executors as soon as possible; and declared that in case he should advance money during his life-time to any of his children on account of such legacies, a receipt therefore should be sufficient as payment of so much on account of the sum bequeathed; that on the 4th of April, 1856, the testator advanced to defendant £100 on account of the sum devised to his wife, and defendant then delivered to him the note sued on as evidence of such advance, it being agreed between them that defendant should not be called upon to pay said note, but that it should be held as a receipt for so much of the legacy; and defendant alleged that he had always been willing, and had offered to sign a receipt for that sum. The will when produced was in the terms alleged, but a codicil was added, made after the note, directing that none of the legacies should be paid until the completion of payments on certain lands due by his son:—Held, that the plaintiff must recover, for verbal evidence could not be received of such an agreement as alleged, and the statement of the will in defendant's plea was incorrect. *Street* v. *Beckwith*, 20 Q. B. 9.

Declaration on a note by payee against maker. Plea, that the note was made under an agreement with the plaintiff that he should get the same discounted, but should never call upon defendant to pay it; and further, that after it became due it was agreed that defendant should sell to plaintiff certain lands at their cash value, in full satisfaction of all demands by plaintiff against defendant, and the plaintiff accepted said agreement in full satisfaction of the note:—Held, on demurrer, plea bad, for the first defence set up was a verbal agreement inconsistent with the note; and, as to the second, the agreement to sell the land was not alleged to be in writing. *Moore* v. *Sullivan*, 21 Q. B. 445.

To an action on a note for $800, defendant pleaded, in substance, that D. & Co. had contracted with defendant for delivery to him of plaster to the value of $1,000, for which defendant agreed, on delivery, to pay by accepting D. & Co.'s draft at three months, payable to their own order; that D. & Co., after having delivered but $200 worth of plaster, requested defendant, who agreed to accept, and did accept their draft, upon their agreement that defendant should, upon its maturity, pay no more of it than he had received value in plaster; that thereupon D. & Co., being indebted to plaintiffs in $50,000, endorsed and delivered the draft so accepted to plaintiffs, who received it as security for and on account of said debt, with the full knowledge and notice of the facts hereinbefore stated; that when said draft matured, D. & Co. had delivered to defendant no more plaster than the said value of $200, and plaintiffs and D. & Co. agreed that defendant should only pay $200, and that defendant should make and deliver to D. & Co. or order, and D. & Co. should endorse and deliver to plaintiffs, said note for $800, and that said note should be taken and received by D. & Co. and plaintiffs upon the same agreement and terms, as to delivery of plaster, as the draft for $1,000 had been made and delivered upon:—Held, on demurrer, a bad plea. *Royal Canadian Bank* v. *Minaker*, 19 C. P. 219.

(d) *Other Cases.*

Evidence of a verbal agreement to allow the price of lands sold by verbal agreement, to be set off against a note:—Held inadmissible. *McCollum* v. *Jones*, Tay. 442.

Where in assumpsit by the holder of a note payable to A. or bearer *on demand*, the maker pleaded an agreement with A. when the note was made, that it should be held by A. as a security for the settlement of their future accounts, and that it was retained by A. after it was due, and then transferred to the plaintiff, and that on settlement A. was largely indebted to the defendant:—Held, bad on general demurrer, as shewing an agreement contrary to the note; and because no demand of payment was alleged, so as to shew the note overdue. *Harvey* v. *Geary*, 1 Q. B. 483.

A. being the owner of a schooner, mortgaged it to different persons, including the plaintiff and defendant respectively. A. failed, and B. was appointed his assignee; and a suit was commenced in Chancery to ascertain the rights of the parties. During the pendency of the suit, all the parties thereto agreed to sell the schooner to one C., without prejudice to the issues raised, for the sum of £1,350, for which sum C.'s notes

were taken. The defendant, desirous of participating in C.'s securities to the amount of £400, was allowed by the other mortgagees to take C.'s notes to that amount, on condition that he substituted notes of his own, endorsed in blank by D., for the same amount, which he did. These notes, it was agreed, should abide the result of the Chancery suit. The result of the Chancery decree was the rejection of all the mortgagees except the plaintiff; the plaintiff then sued the defendant on his notes. The defendant, after plea pleaded, but, before trial, appealed from the Chancery decree. He did not plead the appeal puis darrein continuance:—Held, on the agreement and other evidence produced, that the plaintiff was entitled to recover against the defendant on his notes. *Coleman* v. *Sherwood*, 3 C. P. 372, 381.

Assumpsit on a note for £50 by payee against makers. Plea, that defendants were in partnership, and it was agreed that they should admit the plaintiff into their firm on his advancing £1,000; that defendants in part performance caused alterations to be made in their store, and the plaintiff afterwards became proprietor of the same, and advanced £50 on account thereof; and to assist defendants in making such alterations, and for securing the same to the plaintiff, defendants, on the understanding that said note was to form part of the consideration money for accepting plaintiff as a partner, signed said note for the accommodation of the plaintiff, and have always been ready to receive plaintiff as a partner on his paying the balance of said money; but plaintiff has always refused to pay such balance, or become a partner, or pay for the alterations made in consequence of the agreement:—Held, plea clearly bad, as setting up three defences repugnant to each other, and a parol agreement at variance with the note. *Adams* v. *Forde et al.*, 13 Q. B. 485.

Assumpsit against the endorser of two notes made by B. Plea, that the plaintiff held a judgment and execution against B., and it was agreed that on the endorsement of said notes by the defendant he should discharge B. from all liability upon said judgment and execution, &c., which he did not do, &c. On a special case stated, it was admitted that B. arranged with the plaintiff that upon these notes being given the execution should be withdrawn: that defendant endorsed the notes and enclosed them to the plaintiff with a letter, stating that he was informed by B. that the plaintiff held an execution against him which the plaintiff had agreed "to discharge by his giving you the notes," that he endorsed them on that understanding, and if not his endorsement must be erased. The plaintiff answered, acknowledging the receipt of the notes "on account of an execution against B.," and stating that further proceedings against him would be suspended during their currency, but that default of payment he should feel himself in position to enforce execution. No further communication took place between them. These notes having been protested, the plaintiff issued an alias fi. fa. upon his judgment:—Held, that the plea was not proved. *Wightman* v. *Daniels*, 3 Q. B. 487.

Action by payee against the maker of a note. Plea, on equitable grounds, that the plaintiff was captain of a rifle company organized according to law: that defendant being a member of it and a tailor, was employed to make the uniforms, which it was agreed between plaintiff and defendant should be paid for out of the moneys coming to the said company for their drills according to the statute: that in order to raise the necessary sum at once, it was also agreed that a note should be discounted, to be reduced from time to time by the moneys so received, and renewed until paid off: that in pursuance of such agreement a note was made by defendant payable to plaintiff, which was discounted, and reduced by payment of the money derived from the first ten days' drill, and renewed by the note declared upon, which it was understood should be in the same way reduced, and renewed or paid off by the proceeds of the second drill: that before said drill the plaintiff wrongfully disbanded the company, so that they were unable to draw any more pay, whereby, owing to the plaintiff's wrongful act, it became impossible to perform said agreement and retire said note:—Held, that the plea afforded no defence. *Vidal* v. *Ford*, 19 Q. B. 88.—Burns.

Payee against maker on a note for $101.50. Plea, that when defendant gave said note he owed plaintiff $75, and plaintiff then requested him to make this note, and agreed to pay him the difference, and plaintiff then accepted the note on that condition, but did not pay the said money, or any part thereof; and defendant says that plaintiff is not entitled to to recover upon that count of the declaration a greater sum than $75:—Held, on demurrer, a bad plea, as shewing no defence. *Kelly* v. *Lisk*, 18 Q. B. 418.

See II. 4, p. 482.

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6. *Payment, Release, Satisfaction and Discharge.*

(a) *Payment and Satisfaction.*

Where defendant purchased personal property from the plaintiff, and gave him back a mortgage on it to secure the purchase money, and agreed that if default were made in the payment he would give up the property, and plaintiff should sell it to pay himself, and give the overplus, if any, to defendant, and at the same time defendant gave the plaintiff his notes for the purchase money, which were not to be acted on if the property were given up; on default having been made, the property was given up and sold by the plaintiff for less than the mortgage money, and an action was then brought on one of the notes to recover the difference:—Held, that it would not lie, the notes having been satisfied by the surrender of the property according to agreement. *Smith* v. *Judson*, 4 O. S. 134.

Where a note over due has been retired and settled by a renewed note, it is cancelled, and cannot be put in circulation again even by the payee who has taken up the renewal note out of his own funds.—Jones, J., diss. *Cuvillier* v. *Fraser*, 5 Q. B. 152.

Declaration, payee against the maker of a note for £50, dated 24th December, 1844, payable three months after date. Plea, as to £24 parcel, &c., accord and satisfaction, by defendant accepting an order on the 6th of March, 1847, in favour of J. C. Spragge, as required by plaintiff; and as to the residue, a set-off:—Held, plea bad; 1. In leaving unanswered the plaintiff's

claim for damages for non-payment of the amount for which the order was given, during the two years or more which had elapsed between the maturity of the note and the time of giving the order; and, 2. In not giving at length the Christian names of J. C. Spragge, or stating that he was so described in the order. *Playter* v. *Turner*, 5 Q. B. 555.

Assumpsit by the assignees of a bankrupt on a note made by defendant, payable to one W. R. F., and endorsed by him to the bankrupt before his bankruptcy. Pleas, 1. That R. W. F. did not endorse. 2. Payment by defendant when due, but not stating to whom; 3. Payment before action to bankrupt before bankruptcy, in full satisfaction of all causes and rights of action, &c. :—Held, on demurrer, first plea bad for the variance in the name. Second and third pleas good. *Moore* v. *Cook*, 9 Q. B. 261.

Endorsees against makers and endorser. Plea, that before plaintiffs got the note it was delivered to H., and by him to the plaintiffs as security for certain moneys and flour to be delivered by H. to the plaintiffs; that after it became due, and while in plaintiffs' possession, H. and the plaintiffs had an accounting together in which this note was included and satisfied, and plaintiffs afterwards held it only as agents for H. : that while they so held it, the makers accounted with H., and satisfied this note to him. The plaintiffs replied, that they received the note from the endorser; absque hoc that it was delivered by H. to them for the special purpose mentioned :—Held, replication bad, as tendering an immaterial issue. *Goderham et al.* v. *Lawson*, 13 Q. B. 288.

The plaintiff sued defendants, H, M. & S., as joint makers of a note. H. & M. did not appear and judgment was signed by mistake against all but afterwards set aside as against S., who pleaded, 2. That a judgment had been obtained in this suit against all three defendants, and set aside as against S., but under the fi. fa. sued out upon it the sheriff had seized goods of H. & M. *more than sufficient to satisfy the judgment* and costs, and that he had made thereout £50, and still held the rest of the goods, out of which he could make the residue :—Held, 2. That an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused. 3. That the second plea was not supported, the evidence being that all the goods seized brought only £9 at the sale. Quære, whether the plea formed a good defence. 4. That if by taking judgment against the defendants not appearing, the plaintiffs, under C. L. P. A., s. 66, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. Semble, however, that the plaintiff had not elected within the meaning of that clause to proceed against the others separately, the judgment against S. having been set aside. *Kerr et al.* v. *Hereford et al.*, 17 Q. B. 158.

Action by endorsees on a note made by L. payable to defendant, G. W., and endorsed by him to defendant, F. W. The pleas were, in substance, that the plaintiffs accepted from G. W. another note in satisfaction of the note sued on :—Held, on the evidence stated in the case, that this defence was not proved. *Whittemore et al.* v. *Lines et al.*, 7 C. P. 403.

In an action by the endorsee against the acceptor of a bill not appearing to have been accepted for the accommodation of the drawer, a plea of payment by the drawer is no defence, unless shewn to have been made on the acceptor's account and adopted by him at the time of payment or subsequently. *Bank of Montreal* v. *Armour*, 9 C. P. 401.

Declaration on three notes given by testator in his lifetime for £21 5s., £55, and £40 16s., respectively. Plea, that after the testator died and the notes fell due, the plaintiff and defendants accounted together and struck a balance, for which defendants gave their bond to pay out of the first moneys they should receive from the estate within eighteen months :—Held, bad, as not shewn to be given in satisfaction of the notes or of cross-demands, and therefore not more than a payment pro tanto for the amount of it. *Muir* v. *Lawrie et al.*, 11 C. P. 252.

To an action on certain notes and bills of exchange, and on the common counts, against defendant as jointly liable with one H., defendant pleaded satisfaction and discharge of plaintiff's claim before action, by executing with H. an assignment of their joint effects to plaintiff and another for the benefit of creditors, and that plaintiff accepted this in full satisfaction and discharge of the causes of action in question. At the trial parol testimony was admitted of the agreement to accept the assignment in satisfaction and discharge :—Held, that it had been properly received, the effect of it being not to vary the terms of the writing, but merely to prove a collateral fact. *Whitney* v. *Wall*, 17 C. P. 474.

To a declaration on a judgment recovered against defendant in the Court of Queen's Bench for damages and costs, defendant pleaded that the judgment was recovered upon a note made by defendant, payable to the order of one Scott, who endorsed to one Scanlon, who endorsed and delivered to plaintiffs, who became and were the holders at the time of the recovery of said judgment: that defendant made the note and Scanlon endorsed for Scott's accommodation, and as his surety, to secure a debt due from him to plaintiffs, and that when the note was made, endorsed, and delivered, it was agreed between defendant, Scott, Scanlon, and plaintiffs, that defendant and Scanlon should be liable thereon to plaintiffs as sureties for Scott, and that except as aforesaid there was no value or consideration for the making, endorsing, or payment of the note by defendant or Scanlon; that Scott having made default in payment of his debt, plaintiffs sued Scanlon as endorser, and recovered judgment against him, being the same debt for which the judgment declared upon in this action was recovered, and Scanlon afterwards and before action satisfied the amount of the said judgment and costs by payment to plaintiffs, and therewith and thereby paid and satisfied plaintiff's claim in respect of the cause of action in the introductory part of the plea mentioned: —Held, on demurrer, a bad plea. *Bank of U. C.* v. *Mercer*, 18 C. P. 300.

A., being sued upon a note by the executors of W., as bearer, pleaded that F., the acting executor, being the holder, accepted an order

drawn by one D. on him, in favour of M., for £50, and that M. being the defendant's agent, it was agreed between F. and M. that the note should be paid out of the £50, and F. thereupon cancelled said note. The evidence shewed that defendant went with the order to F., which F. said he would accept, and pay the note out of it, but there was no acceptance in writing, the note was not given up, and the order was obtained again some months after by M.'s executor :—Held, that the plaintiffs were entitled to recover. *Williams et al.* v. *Marshall*, 20 Q. B. 230.

Declaration on a note made by defendant payable to the order of S. T. & Co., and endorsed by them to plaintiff. Pleas : 4, that the note was made by defendant for the accommodation of the payees, to raise money thereon, and endorse the same to their own use before its maturity, and not otherwise ; and that there never was any value or consideration to defendant except as aforesaid ; that the payees endorsed and negotiated it with the Commercial Bank for their own use according to said terms ; that it was afterwards protested, and S. T. & Co., on behalf of defendant, subsequently paid it to said bank, and it was then returned to S. T. & Co., by the bank for and on account of defendant ; that S. T. & Co. afterwards, and in fraud of defendant, first endorsed it to plaintiff. The 5th plea was similar to the 4th, only that it concluded thus : "And S. T. & Co., without defendant's authority, first endorsed the note to plaintiff after the payment and discharge :"—Held, on demurrer, pleas good. *Pyper* v. *McKay*, 16 C. P. 67.

Declaration against R. & H. for goods sold. Plea, by defendant H., on equitable grounds, in substance, that he and R. purchased the goods while in partnership ; that afterwards he retired, W. taking his place, and R. & W. assuming the debts of the old firm, including this claim ; and that the plaintiff, being aware of this arrangement, took the note of the new firm, R. & W. for his debt :—Held, a good plea. *Watts* v. *Robinson et al.*, 32 Q. B. 362.

The third plea alleged that the plaintiff had notice of the arrangement as in the former plea ; and that, in consideration that W. would assume the liability of H. for this debt, the plaintiff accepted R. & W. in place of defendants, and took their note, and relinquished his claim against H. :—Held, good. *Ib.*

The fourth plea averred satisfaction of the plaintiff's claim by the delivery and acceptance of the note of R. & W. :—Held, clearly good. *Ib.*

In the absence of express agreement to that effect, a creditor taking the note of one partner for a debt of the partnership, and suing thereon, but failing to recover the amount of the note, is not precluded from afterwards claiming the amount of the note against the partnership. *Carruthers* v. *Ardagh*. 20 Chy. 579.

J. C. and T. A. formed a partnership under style or firm of "C. & A." Both parties were illiterate and unused to business, and in giving notes for debts of the partnership were in the habit of each signing his own surname, thus forming the partnership name. One of such notes being about to fall due, and the partnership being unable to retire it, the holder agreed to renew it ; and he, together with C., endeavoured to find A. to procure his signature in the usual way to the new note, but being unable to find him, C. gave his own note for an amount sufficient to cover the old note and an account for goods furnished the partnership by the holder. This note being unpaid, an action was brought by the holder against C., and a small portion of the amount realized by sale of his goods under execution. Subsequently a suit was brought by C. against A. to wind up the partnership, and the holder of the note sought to prove for the amount of the note against the partnership estate, which the master refused to allow, and on appeal his order was affirmed. The holder thereupon re-heard the appeal motion :—Held, that the holder, by the proceedings he had taken, was not precluded from claiming the amount against the partnership assets. Blake, V. C., diss. *Ib.*

(b) *By Merger.*

Where a person, having a note of a third party endorsed by the debtor as security for a portion of his debt, takes a mortgage from his debtor for the whole sum due, not referring to and payable after the note, and with the usual covenant to pay the money :—Held, that the remedy against the debtor on the note is extinguished. *Matthewson* v. *Brouse*, 1 Q. B. 272.

Endorsee against the maker of a note. Plea, that with the note a mortgage was taken by the payee, with a proviso for its payment according to the tenor of certain notes bearing even date therewith, payable to the payee, of which this was one, and was endorsed to the plaintiff after it was due :—Held, bad, as by the terms of the mortgage, it was evidently taken as collateral security only. *Murray* v. *Miller*, 1 Q. B. 353.

Held, on the facts stated in this case, that the mortgage was clearly no merger, the right to sue on the note being expressly reserved. *Commercial Bank* v. *Curillier*, 18 Q. B. 378.

Defendant endorsed to the plaintiffs a note, made by one P., due on the 13th of May, 1857. On the 13th of April P. executed to the plaintiffs a mortgage, payable on the 1st of November, 1857, for a sum including the note ; but it was expressly agreed in the mortgage that it should operate as a collateral security only :—Held, that the plaintiffs might sue upon the note when due, although the mortgage was not yet payable. *Shaw* v. *Crawford*, 16 Q. B 101.

Defendant owing plaintiff a large sum on bills, some overdue, some maturing, gave him a mortgage on land, reciting the debt on the bills, and the plaintiff's agreement to accept further security by way of mortgage, and containing a proviso that it should be void on payment of the bills, and that on default of payment for twelve months the plaintiff might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant, with counts upon the bills :—Held, that there was clearly no merger of the claim upon the bills. *Gore Bank* v. *Eaton*, 27 Q. B. 332.

Held, that the mortgage in this case being expressed to have been given as further security, and providing that it should stand as security for any renewal of the bills sued on, was collateral

only, not a merger. *Gore Bank* v. *McWhirter*, 18 C. P. 293.

Held, also, that the remedy on the specialty and simple contract not being co-extensive or between the same parties, the doctrine of merger did not apply. *Ib.*

Held, upon the deeds, pleadings, and facts, as given at length in the statement of the case, that the defendants, endorsers, were discharged from the notes sued upon, (though not so intended by the plaintiffs,) by the plaintiffs having taken from the maker a mortgage of certain steamboats, with a power of sale in case of default in the payment of the notes, and upon which the plaintiffs had sold the boats to third parties for the amount of the defendants' liabilities on the notes, giving credit to the purchasers for the purchase money, and taking their notes and a mortgage on the same boats as security. *Bank of B. N. A.* v. *Jones et al.*, 8 Q. B. 86.

The effect in equity of the instruments which came in question in the last case considered, and held by the Chancellor to be the same, as that case decided it to be at law. Per Esten, V. C.—The effect in equity is a mere transfer of the rights of the bank as mortgagees, and per Spragge, V. C.—The effect in equity is prima facie an absolute sale of the notes and steamboat, not subject to redemption; and the plaintiffs to do away with this effect must impeach the deed, which was not done by the bill in this case. *Sherwood* v. *Bank of B. N. A.*, 3 Chy. 457.

The holder of a mortgage security may take in addition a note from the mortgagor with an endorser; and the fact that the time mentioned for the defeasance of the mortgage is a period beyond the maturity of the note is, in the absence of fraud, no defence to the endorser. *Bank of U. C.* v. *Sherwood*, 8 Q. B. 116.

To a declaration on five bills by endorsee against the drawer and acceptor, the drawer, W., pleaded that after one of the bills became payable, and while the others were running, it was agreed that W. should mortgage certain lands to secure all the bills, and that twelve months from the date of the said indenture should be given to defendant for payment of the same, and all interest, damages, &c., by reason of the non-payment. The plea then set out the mortgage, whereby,—after reciting that the defendant W. had drawn bills upon and accepted by defendant P., and of which a portion was overdue, which bills were endorsed by W. to the plaintiffs; and that the defendant, being unable to pay said bills, had agreed to make this security to M. (one of the plaintiffs) to secure them against the non-payment of the said bills,—in consideration of the premises and of 5s. W. conveyed to M. (one of the plaintiffs) certain leasehold property, subject to a proviso that if said W. should retire the said bills, and pay unto the said firm of the plaintiffs, or the parties legally entitled, all sums of money, damages, &c., by reason of said bills, within twelve months from the date of the said indenture, and if he should then indemnify the plaintiffs of and from all payments, &c., by reason of the premises, then the mortgage should be void, &c.; containing also a covenant by W. to perform the covenants in the said proviso, and a proviso for possession until default:—Held, that such mortgage was only a collateral security for the bills; that there was no merger; and that the plaintiffs might sue upon the bills before the expiration of the twelve months. *Ross et al.* v. *Winans*, 5 C. P. 185.

The plaintiff holding defendant's note, takes a chattel mortgage, intending it as a collateral security:—Held, that the right to sue on the note was extinguished. *Parker* v. *McCrea*, 7 C. P. 124.

The plaintiff sued defendants, H. M. & S., as joint makers of a note. H. & M. did not appear and judgment was signed by mistake against all, but afterwards set aside as against S., who pleaded: 1. A mortgage given for the same money by M., M. and S. being sureties for H.:—Held, 1. That the giving a mortgage by M., one of the two sureties, did not of itself discharge S., the other surety. 2. That an application to strike out the names of H. & M. from the record, so that they might be called as witnesses for S., was properly refused. *Kerr et al.* v. *Hereford et al.*, 17 Q. B. 158.

H. & Co. holding several notes of F., all overdue except one, take a mortgage for the total amount thereof:—Held, that the remedy on the notes was extinguished. *Fraser* v. *Armstrong*, 10 C. P. 506.

Declaration on three notes given by testator in his lifetime. Plea, that after testator died and the notes fell due, the plaintiff and defendants accounted together and struck a balance, for which defendants gave their bond, to pay out of the first moneys they should receive from the estate within eighteen months:—Held, bad, as not shewn to be given in satisfaction of the notes or of cross demands, and therefore only a payment pro tanto for the amount of it. *Muir* v. *Lawrie et al.*, 11 C. P. 252.

A debtor gave to his creditor a mortgage and notes for the same debt, payable at the same times, and no allusion made in either instrument to the other. The creditor subsequently passed both instruments to separate parties, as collateral securities for debts. Upon ejectment for an instalment on the mortgage, the defendant proved the facts, and that he had paid the note given for the instalment:—Held, that the plaintiff was entitled to recover. Semble, that the note merged in the higher security. *Fairman* v. *Maybee*, 7 C. P. 467.

A cognovit payable immediately, given by the maker of a note before it fell due, and judgment entered upon it and registered, forms no defence for the endorser. *Bank of Montreal* v. *Douglas*, 17 Q. B. 208.

To an action on a joint note made by M. and K., each pleaded separately, that after the note fell due, M. by indenture covenanted with the plaintiff to pay him $319, (a sum less by $2.80 than the amount of the note,) with interest at 15 per cent., in one year, and delivered said indenture to the plaintiff, who accepted it; and that the money mentioned in the declaration and in the indenture was the same:—Held, plea good, though the indenture was not alleged to have been accepted in satisfaction, and the sum secured by it was less than the note. *McLeod* v. *McKay*, 20 Q. B. 258.

Held, that in taking a mortgage for $1,300, and subsequently a note for $1,353.75, there could be no merger. *Bank of U. C.* v. *Bartlett*, 12 C. P. 228.

Defendant owing the plaintiff on bills and notes, executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land, but on searching at once he found a prior incumbrance, and told defendant he would not accept the mortgage :—Held, that plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a re-conveyance. *Adams* v. *Nelson*, 22 Q. B. 199.

Action on a note for $350. Plea, that the note had been taken as collateral to a mortgage, in satisfaction of which defendant and plaintiff had come to a settlement, and defendant had given a new mortgage for what he owed the plaintiff, in which the note had thus become merged :—Held, that the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover ; and that from the evidence stated in the case it appeared that the note was given for a sum quite distinct from the mortgage debt. *Boulton* v. *McNabb*, 14 C. P. 598.

See next sub-head.

(c) *By Previous Action or Recovery.*

Action on a note and bill against two of the special partners of a partnership formed under the Limited Liability Act, 12 Vict. c. 75, who had jointly made the note and accepted the bill for the accommodation of the general partner. Defendant pleaded a prior judgment recovered upon and taken in full satisfaction of all the causes of action in the declaration mentioned, against the general partner alone :—Held, that the recovery against one of several joint contractors operated as a merger at law of the inferior remedy of action for the same debt. *Hollowell* v. *Macdonell et al.*, 8 C. P. 21.

Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest; and at the trial, to support this count, he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months time. The learned judge ruled, that, the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this and satisfied, he sued defendant, on his undertaking to recover twenty-four per cent., the balance of interest agreed to be paid by it :—Held, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay* v. [illegible], 20 Q. B. 268.

Upon an action by the endorsee against the third endorser of a bill :—Held, that final judgment in a previous action on the same bill, in which all parties thereon were sued and served, and judgment of non pros. not signed, or a discontinuance entered as to any,) but in which the special endorsement and judgment only shewed cause of action against the drawer and acceptor, did not prevent a separate action against the endorser. *Bank of U. C.* v. *Lizars*, 11 C. P. 176.

Declaration on a note made by A., payable to B., (defendant) endorsed by him to C., who endorsed to D., who endorsed to plaintiff ; and on the common counts. Pleas, that said note before it became payable was endorsed by plaintiff to one J. H. C., who endorsed to S. B. H., who endorsed it to the Commercial Bank, who were the holders when it matured, and until the recovery by defendant of a judgment upon an action brought by the said bank ; and that the notice of dishonour alleged to have been given by plaintiff to defendant is an alleged notice said to have been given by the Commercial Bank to defendants in their suit, and no other notice ; and that defendant in the suit between the bank and himself recovered a judgment against the bank, and that plaintiff had notice of the action between the bank and defendant, before he became the holder of the note :—Held, on demurrer, bad, the action between the bank, the original holder, and the defendant being no answer to an action by any other party on the note who was a subsequent holder to the defendant. *Smith* v. *Burton*, 11 C. P. 273.

It is no defence to an action by endorsee against the maker of a note, that a prior endorsee, while the holder and before the plaintiff took it, recovered judgment against defendant and the payee. *McLennan* v. *McMonies*, 23 C. B. 114.

Endorsee against endorser. Plea, that the payee had before sued defendant and the maker, and obtained a verdict against the maker, and that by a rule of court it was declared that the payee was not intitled to recover against defendant. The evidence shewed that the payee having sued the maker and defendant, the judge ruled that he could not recover against defendant, whereupon defendant's name was ordered to be struck out of the record :—Held, that neither the payee nor the plaintiff, who sued on his behalf, was barred from prosecuting this action. *Smith* v. *Richardson*, 16 C. P. 210.

Declaration, on a note by defendant payable to plaintiff. Pleas, on equitable grounds, in bar to the further maintenance of the action, averring the pendency of proceedings commenced by plaintiff against the defendant, under the Insolvent Act of 1864, for the same cause of action, subsequently to the declaration in this cause :—Held, on demurrer, plea bad. *Baldwin* v. *Peterman*, 16 C. P. 310.

See *Bidwell* v. *Stanton*, Tay. 366, p. 504; *Moore* v. *Andrews*, 13 C. P. 405, p. 552; *Leitch* v. *Leitch*, 11 Chy. 81, p. 561; *Campbell* v. *Holmes*, 21 Q. B. 465, p. 566.

(d) *Set-off.*

Where the plaintiff, endorsee of a note payable on demand, had taken it two years after its date, and was cognizant of an agreement between the holder, from whom he took it, and the defendant, (the maker) that the same should be set off against a bond, of which the defendant was obligee, and the holder obligor :—Held, that a plea stating these facts was good upon general demurrer. *Brooke* v. *Arnold*, Tay. 25.

Where a note of a judge of a District Court was placed in the hands of an attorney for collection, and he agreed to give the judge credit

on the note for fees payable by him for business done in the Court, and did endorse part on the note as payment, and subsequently the whole amount was paid by such fees, but the attorney refused to credit more than the sum first endorsed, and afterwards absconded:—Held, in an action by the owner of the note, that the judge could not give the payment by fees in evidence against the plaintiff. *Ketchum* v. *Powell*, 3 O. S. 157.

To an action on a note the defendant pleaded a set-off for goods sold and delivered, but the evidence shewed that the set-off claimed was for goods sold to plaintiff by defendant on a special agreement that the plaintiff should pay a third party for them, and not the defendant:—Held, that the goods so delivered could not form the subject matter of a set-off, but that the plaintiff ought to have been sued on the special undertaking. *Matthewson* v. *Carman*, 1 Q. B. 266.

If the holder of a note sue the maker and endorser in a joint action, under 5 Will. IV., c. 1, the separate debt of the plaintiff to the maker or endorser cannot be set off under a joint plea of set-off. *Paterson* v. *Howison*, 2 Q. B. 139.

A sold to B. certain goods, and a claim on one C. of £25, taking a horse in payment for the goods, and B.'s note for the claim. B. took from A. an order for the goods on the warehouseman in whose charge they were, but on presenting the order he was unable to obtain them:—Held, in an action by A. against B. on the note, that the defendant might set off the value of the horse. *Wright* v. *Cook*, 9 Q. B. 605.

To a plea of a set-off on a note:—Held, that the plaintiff, under a replication of nunquam indebitatus, might shew that the note was given by him to the defendant while they were in partnership, to raise money to pay off a debt of the firm. *Miller* v. *Thompson*, 10 Q. B. 391.

Held—1. That set-off by endorsees against the holder, was no defence at law or equity, upon a note given for the accommodation of the endorser. 2. That the endorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and to nothing collateral due from the endorser to the maker, or endorsee to payee. *Wood et al.* v. *Ross et al.*, 8 C. P. 299.

Held, that in this action against maker and endorsers of a note, upon a plea of set-off by two of the endorsers, the jury, under the evidence set out in the case, could only give them a verdict, but could not find for them any sum beyond the note. *Nowlan* v. *Spawn et al.*, 16 Q. B. 334.

Action against executors on a note by testator payable to S. or bearer, and by him transferred to plaintiff. Plea, that the note was transferred to the plaintiff after the death of testator, and that S. at the commencement of the suit was and still is indebted to defendants as executors in an amount equal to the note, for, &c.:—Held, plea bad. *Smith* v. *Nicholson et al.*, 19 Q. B. 27.

In an action by endorsee against maker and endorsers, a plea that the note was made and endorsed to third parties, who sent it to plaintiffs for collection; that such third parties, before it fell due, were and are indebted to defendants in more than the amount of the note, and became insolvent, and plaintiffs are suing for and in collusion with them to deprive defendants of their set-off:—Held, bad, on the authority of Ould v. Harrison, 10 Ex. 572. *Metropolitan Bank* v. *Snure et al.*, 10 C. P. 24.

In an action against the maker and endorser:—Held, that neither could plead separately a set-off not arising out of or connected with the note. *Hughes* v. *Snure et al.*, 22 Q. B. 597.

Action on a joint and several note. Set-off by agreement of a separate demand. Demurrer. Equitable pleading. *Holmes* v. *McLean*, 9 L. J. 216.—C. C.—Cooper.

Upon action by A. against M. on a note for $340, in the county court, the defendant pleaded, on equitable grounds, a joint and several note made by the plaintiff and three others, payable to defendant for $1,000, averring a suit brought against the makers thereof, and offering to set off and allow so much of A.'s liability upon this instrument as would cover his claim in this action. Upon demurrer:—Held, that the maxim "nemo debet bis vexari pro una et eadem causa" did not apply against the plea, and that it was good. *Moore* v. *Andrews*, 13 C. P. 405.

On a sale of lands the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to re-sell the land in consequence of the mortgage:—Held, not allowable. *Stevenson* v. *Hodder*, 15 Chy. 578.

See *McCollum* v. *Jones*, Tay. 442, p. 540; *Robertson* v. *Moore*, 6 O. S. 646, p. 520; *Georgian Bay Lumber Co.* v. *Thompson et al.*, 35 Q. B. 68, p. 533; *Parsons* v. *Crabb*, 34 Q. B. 136, p. 557.

(e) *Time given for Payment.*

Discharge of Acceptor or Maker.]—One of two joint makers of a note cannot plead that he made the note with the knowledge of the plaintiff, the endorsee, only as surety for the other maker; that the plaintiff gave time to the other maker without his knowledge or consent; and that he was thereby discharged. *Davidson* v. *Bartlett*, 1 Q. B. 50. See *Ball* v. *Gibson*, 7 C. P. 531.

A joint acceptor of a bill cannot be heard to say that he was surety for the other acceptor and is on that account discharged by time given to his principal. *Nafis* v. *Soules*, 2 C. P. 412.

Action on a note made by defendants payable to T. or bearer, and by her delivered to plaintiffs. Plea, on equitable grounds, by one of the defendants, M., that he made the note as a surety for the others; that after it became due, T., in consideration of a certain sum paid to her, gave time to them without his, M.'s, consent; and that plaintiff took the note after it became due, with knowledge of the premises:—Held, good. *Perley* v. *Loney et al.*, 17 Q. B. 279.

Plea, setting up a similar defence:—Held, bad, as shewing only a mere forbearance to principal debtor, not a binding agreement to give time. *Thompson* v. *McDonald*, 17 Q. B. 304.

A replication that when the time complained of was given it was expressly understood and agreed that the plaintiffs should reserve all their rights against the acceptor:—Held, good on demurrer. *Bank of U. C.* v. *Jardine*, 9 C. P. 332.

Declaration on a note made by defendant and endorsed by one M. to plaintiffs. Plea, on equitable grounds, that the defendant was surety for M., and made the note for his benefit, without value, of which the plaintiffs became aware after they became the holders thereof, and after notice thereof gave time to M., and thereby released defendant. On demurrer, held, bad. *Bank of U. C.* v. *Thomas*, 11 C. P. 515.

Endorsee against maker. Special plea on equitable grounds, held good on demurrer, on the authority of Bailey *v.* Edwards, 9 L. T. N. S. 646, as averring that the plaintiffs gave time to an endorser, knowing that defendant was only an accommodation maker. *Bank of U. C.* v. *Ockerman*, 15 C. P. 363.

Action by endorsees against the maker of a note payable to J. W., by him endorsed to G. W., and by G. W. to plaintiffs. Plea, that J. W. endorsed the note to G. W. for safe-keeping only, and not to be negotiated, and G. W. so received it; but after it fell due, and without J. W.'s authority, he endorsed it to the plaintiffs, who then had notice of the premises; and that while J. W. held it, and after it fell due, he, for value, gave time to defendant for payment until a day after the commencement of the suit:—Held, after verdict, a good plea. *Britton* v. *Fisher*, 26 Q. B. 338.

Discharge of Endorser.]—A plea by endorser of time given to the maker must shew that the plaintiff was then the holder. *Commercial Bank* v. *Johnston*, 2 Q. B. 126.

One A., holding a note endorsed by defendant, agreed with the maker that upon payment of an extra amount of interest he would take another note at a longer date; all the extra interest except $3 was paid. The note being then sent, was refused, on account of the non-payment of the balance of interest. The maker of the note afterwards declined giving the note. Upon an action brought by the holder against the endorser of the original note, held, that he was released. *Arthur* v. *Lier*, 8 C. P. 180.

Declaration against the Oshawa Manufacturing Company as makers, and G. as endorser of a note. Plea by endorser, that it was agreed between plaintiff and the makers, by their president, without the consent or knowledge of the endorser, that the plaintiff should give the makers time for payment of the note, in consideration of interest at £14 per cent. which the makers, by their president, agreed to pay for the extension:—Held, a good defence. *Farrell* v. *Oshawa Manufacturing Co. et al.*, 9 C. P. 239.

To an action on notes against maker and endorser, the latter pleaded a set-off in the common form for work done by him for the plaintiffs,—a plea held bad on demurrer in Hughes *v.* Snure, 22 Q. B. 597. The plaintiffs, however, did not demur, but took issue, and on the trial the jury found the plea proved. A verdict having been directed for the plaintiffs, with leave to move to reduce it by the amount of set-off proved, a rule was obtained by the defendants on this leave, and a cross rule by the plaintiffs for a new trial on the evidence. This court made the latter rule absolute, but on payment of costs by the plaintiffs, as the whole difficulty had been caused by their going to trial on an insufficient plea:—Semble, that if the evidence had supported the plea, the rule to reduce would have been made absolute, and the plaintiff allowed to move for judgment, non obstante,—following Lumby *v.* Allday, 1 C. & J. 301. *Commercial Bank of Canada* v. *Harris et al.*, 27 Q. B. 526.

The holder of a note sued maker and endorser, and after execution placed in the sheriff's hands against both, the plaintiff, upon the application of the maker, extended the time for payment of the amount, without the consent of the endorser:—Held, a discharge of the endorser. *VanKoughnet* v. *Mills*, 5 Chy. 653.

(f) *Statute of Limitations.*

The right of action on a note payable to A. or bearer, does not accrue to a third person as bearer till an actual delivery to him; and when C., being in the United States, purchased a note payable to bearer, and on his coming into this province got possession of it:—Held, that the cause of action accrued to him when he received the note, and not when he made the purchase. *Shaw* v. *Matthison*, 3 O. S. 74.

Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties:—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity of the note was to be presumed. *Reynolds* v. *O'Brien*, 4 Q. B. 221.

A promise to pay by one of several joint and several makers of a note, will take the case out of the statute of limitations. *Sifton* v. *McCabe et al.*, 6 Q. B. 394.

Held, that the following expressions of the defendant, "The notes are genuine; that is, I made them; but I am under the impression that they were paid through Messrs. A. and B., and I don't think I am called upon to have any further conversation with you about them," were not sufficient to take the case out of the statute. *Grantham* v. *Powell*, 6 Q. B. 494.

In assumpsit on a note, defendant pleaded the statute of limitations. At the trial, the plaintiff proved the following acknowledgement by the defendant: "I received your letter dated January 31. I am sorry to say I cannot do anything for you at present, but shall remember you as soon as possible:"—Held, not sufficient to import a promise to pay on request. *Gemmell* v. *Colton*, 6 C. P. 57.

Payments made by one of two joint and several makers will not take the case out of the statute as against the other, unless made expressly as his agent and by his authority, and such agency must be proved by the plaintiff

apart from the fact of payment. In this case, there being no such proof, a nonsuit was ordered as to one of the two joint makers, and the verdict allowed to stand as against the other. *Creighton* v. *Allen et al.*, 26 Q. B. 627.

Held, that a memorandum in writing signed by the maker of a note, admitting the amount to be due to the payee, which in the opinion of the court was sufficient in an action by the payee to prevent the operation of the statute, enured to the benefit of a subsequent holder of the note. *Marshall* v. *Smith*, 20 C. P. 356.

Action on a note made by defendant and L., payable to C., and by him endorsed to plaintiff, due in July, 1859. Plea, statute of limitations. To take the case out of the statute, the plaintiff proved that one T. C., owing the defendant $30, got an order with defendant's assent from C., who then held the note, on L., requesting L. to pay defendant $30, which he, C., would credit on the note; and this sum was accordingly so paid, and credited:—Held, clearly a payment by L. on his own account, and not by or for defendant, so as to take the case out of the statute as against defendant. *Cowing* v. *Vincent*, 29 Q. B. 427.

The limitation provided by 12 Vict. c. 22, s. 31, as to debts due in Lower Canada must be specially pleaded, and cannot be proved under a plea of payment. *King* v. *Glassford*, 11 C. P. 490.

Held, that the parties being residents in Upper Canada when the notes payable in Lower Canada were made, when they became due, and when they were dishonoured, the 12 Vict. c. 22, s. 31, did not bar the plaintiffs' recovery; and that that statute applies to the remedy, and not to the contract itself. Richards, J., diss. *Hervey et al.* v. *Pridham*, 11 C. P. 329.

An endorser of a note, made, endorsed, and payable in Lower Canada, who was resident in Upper Canada, was sued there as such endorser, after a lapse of five years from the maturing of the note; the period prescribed as that within which an action must be instituted upon a note or bill of exchange in Lower Canada:—Held, that the plaintiff was not entitled to recover; the lapse of time under the statute operating as an extinguishment of the debt, without suit, not as a bar to the remedy only. *Sheriff* v. *Holcomb*, 2 E. & A. 516, affirming *Sheriff* v. *Holcombe*, 13 C. P. 590.

To an action on a note made by defendant, payable to A. H., and by him endorsed to the plaintiffs, defendant pleaded that it was made in Lower Canada where he resided, payable in Montreal, and that the suit was not brought within five years after it fell due. The plaintiffs replied, that when the note was made and endorsed to them, A. H. lived in Upper Canada, and at the time of said endorsement one plaintiff lived in Upper Canada, and the other in the United States. Defendant rejoined that after the note fell due, while A. H. held it, and more than five years before suit, A. H. carried on business in Lower Canada, that he and defendant met at Montreal, and A. H. might then have sued him:—Held, on demurrer, that by 12 Vict. c. 22, the note, owing to the lapse of time, must be taken to be absolutely paid and discharged; and that the plaintiffs could not recover. *Hervey et al.* v. *Jacques*, 20 Q. B. 366.

A., residing in Upper Canada, made a note there payable to B., also a resident of Upper Canada, at the Bank of British North America in Montreal, and B. endorsed it to the plaintiffs, who carried on business in Montreal. Neither A. nor B. had ever resided in Lower Canada. 12 Vict. c. 22, s. 31, enacts that all notes payable in Lower Canada shall be held and taken to be absolutely paid and discharged, unless sued upon within five years after they became due:—Held, reversing the decision of the Q. B., founded upon Hervey *v.* Jacques, 20 Q. B. 366, that the plaintiff, suing here after the lapse of five years, was not barred. A. Wilson, J., diss. *Darling* v. *Hitchcock*, 28 Q. B. 439, in appeal. See also *S. C.* 25 Q. B. 463.

Draper, C. J., held that the statute, being applicable to Lower Canada only, did not change the limitation of actions on contracts made in Upper Canada by persons resident there; and that this note being payable in Montreal, without any limitation of not otherwise or elsewhere, was payable generally, and so not within the statute. The rest of the court proceeded upon the latter ground only. *S. C.*, 28 Q. B. 439.

Declaration on an agreement to pay $450 by a note: breach, non-payment. Sixth plea, set-off, on two notes made by plaintiff, and endorsed to defendant. Seventh plea, in substance: that the same set-off was pleaded by the defendant in a former action by plaintiff against him for the same causes of action as in this suit; and the plaintiff not having replied thereto, and the defendant being in a position to sign judgment of non pros it was agreed that the plaintiff should pay defendant $20 and costs in full settlement, and in case of non-payment, that defendant should be at liberty to proceed for the recovery thereof in said suit; and that plaintiff accepted said agreement in full satisfaction and discharge of plaintiff's claim. The plaintiff replied equitably; 2. That defendant waived the agreement by giving the plaintiff notice of his intention to enter judgment of non pros in said action for want of a replication, and accepting his costs of defence:—Held, replication bad, for by the agreement defendant was entitled to force the plaintiff on as he did. To the sixth plea of set-off, the plaintiff replied; 2. The Statute of Limitations. The defendant rejoined in substance to the second replication to the seventh plea, that in the former suit, the same subjects of demand and set-off were in dispute; that the former suit was commenced on the 6th December, 1862, and was kept pending until the plaintiff, on his own mere motion, discontinued it on the 8th October, 1868; that when the plaintiff commenced this suit on the 9th October, 1868, the Statute of Limitations had operated against the set-off; and that the defendant on the 15th March, 1869, and within a reasonable time, to wit, within one year from the discontinuance of the former action, pleaded the said set-off in this action:—Held, that the rejoinder was good, for that in this province a set-off, on which the defendant may recover a balance, is as much within the equity of the statute as an action for the same demand would be. To the fourth rejoinder (above set out) to the second replication, of the Statute of Limitations, to the seventh plea, of set-off, the plaintiff surrejoined; 2. That the two notes were drawn and payable in the Province of Quebec, and by the law there

the cause of action thereon became extinguished after five years from the accruing thereof, and that such cause of action became extinguished pending the former action:—Held, bad as a departure. *Parsons* v. *Crabb*, 34 Q. B. 136. See, also, *S. C.*, 31 Q. B. 435.

See *Irwin* v. *Freeman*, 13 Chy, 465, p. 536.

(g) *Other Cases.*

Where a stockholder in a joint stock company had given notes for his stock, which he afterwards forfeited by not complying with the conditions of the association:—Held, that he could not set up such forfeiture as a defence to an action on the notes for the benefit of the company. *Glassford* v. *McFaul*, T. T. 3 & 4. Vict.

Where, in trover for notes against the maker, it appeared that the notes had been given by him on a purchase of land: that the payee afterwards agreed to deliver them up to him on a good consideration: that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party; and that the defendant afterwards received them, having first had notice of the assignment; and, no fraud having been shewn, the jury found for the defendant:—Held, on motion for a new trial, that as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right, in the absence of proof of fraud. A new trial was therefore refused. *Small* v. *Bennett*, T. T., 3 & 4 Vict.

Endorsees against endorser of a note. Plea, that before and at the time when the note became due, and at the commencement of the suit, the plaintiffs, as bankers and agents, had in their hands divers sums of money of the maker amounting to £500, and were then indebted to the maker in that amount, and that the maker then directed the plaintiffs to retain to their own use the amount of said note out of said moneys, which exceeded the amount of said note, &c.:—Held, plea bad, among other reasons, for not averring the particular time when the direction was given. *Bank of Upper Canada* v. *Lewis*, 3 Q. B. 325.

Assumpsit on common counts. Pleas, as to £227, parcel, &c., that the plaintiffs in payment of that sum drew on intestate in favour of M. or order, which defendant as administratrix accepted; and that after such acceptance, and while M. was the holder, he, M., cancelled the said bill and returned it to defendant. Replication, that M. received such bill as plaintiff's agent: that while he held it, defendant being entitled to certain insurance moneys for the loss of the goods for which said bill was drawn, and it being customary for plaintiffs in such cases to receive the insurance moneys, and apply them on the payment of the goods, and M. being aware of such custom, and presuming that the insurance moneys would be received by the plaintiffs, returned the said bill to the defendant to be cancelled, without intending to discharge defendant unless such insurance money should be paid: that said insurance moneys were not paid to plaintiffs; and the price of said goods and the bill still remains unpaid:—Held, replication bad. *Waters* v. *Lyon, Administratrix*, 15 Q. B. 194.

Declaration upon four bills of exchange for £500 each, drawn by R., H. & Co., upon one J. C., payable to and endorsed by defendant. Defendant pleaded, 1. Payment; 2. An assignment made by J. C. to one T. P., for the benefit of his creditors, with plaintiffs' assent and concurrence, and that T. P., with the consent of J. C. and his other creditors, conveyed and assigned certain property to the plaintiffs, and plaintiffs accepted such conveyance and assignment in full satisfaction of the causes of action in the declaration. The plaintiffs replied, on equitable grounds, that the property assigned was not equal to the whole of J. C.'s indebtedness to plaintiffs, and that plaintiffs accepted the same on account of such indebtedness with defendant's assent, and that the proceeds of such estate are still applicable to pay a portion of the causes of action against defendant, to wit, £500, with a nolle prosequi as to that portion; and defendant promised to pay the residue of defendant's indebtedness to plaintiffs over and above the said £500. Upon demurrer, held, that the executing of an assignment by the holder of a bill, without a special reservation of rights as to sureties, discharges them; and that the pleadings shewed it was the plaintiffs' duty duly to administer the assets of J. C. in their hands to be applied upon the bills declared on, and until they had done that, no cause of action accrued against the defendant. For all that was shewn by the pleadings, the assets in plaintiffs' hands might cover the bills sued upon, and therefore the replication was bad. *Commercial Bank of Canada* v. *Wilson*, 11 C. P. 581.

Held (affirming Hamilton *v.* Holcomb, 12 C. P. 38), that where the holder of a bill or note sues, under the statute, the drawers, acceptors, and endorsers, in one action, he may discharge the drawers or endorsers (or accommodation acceptors) after an arrest under a ca. sa., without losing his remedies against the other defendants liable in priority to those discharged. McLean, J., and Draper, C. J., diss. *Holcomb* v. *Hamilton*, 2 E. & A. 230. See, also, *Hamilton* v. *Holcomb*, 11 C. P. 93, to same effect.

The holder of a bill for value, though having subsequently become aware of its being an accommodation bill, may release the drawer without releasing the acceptor. *City of Glasgow Bank* v. *Murdock*, 11 C. P. 138.

In an action by a second indorser against the maker and prior indorser on a note, the maker suffered judgment by default, and the indorser pleaded that the note was given by the maker to one H., to whom the maker was indebted, and endorsed by himself and plaintiff as sureties for the debt, and that upon action brought by H. against all the parties thereto, the plaintiff paid the same, and thereby released all the other parties from their common liability. Upon demurrer—Held, no defence, for the facts shewed no release. The question of contribution between plaintiff and defendant as co-sureties did not arise upon the pleadings. *Niblock* v. *McGregor et al.*, 12 C. P. 566.

Declaration on a note made by defendants P., W., & D., jointly and severally, payable to plaintiff. Equitable pleas, 1. By defendant D., that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due, the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W., that he and defen-

dant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P. : that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. & D. should be liable only as sureties ; and that the plaintiff, without W.'s consent, by deed released P. Equitable replications, 1. That the pleas each refer to the same deed ; that at the time of making it P. was indebted to the plaintiff in $250 on an account stated, as well as for the amount of the note ; that it was intended and agreed only to release the $250, and not the note ; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "$250, not any sureties on this ;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed. 2, That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties :—Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed ; but that on equitable grounds it was sufficient :—Held, also, that the second replication was bad. *Fowler* v. *Perrin et al.*, 25 Q. B. 227.

Declaration against defendants as executors of one K., upon a note for $2,600, made by K. on the 17th of September, 1867, payable to the plaintiff, or bearer, four months after date. Plea, on equitable grounds, that the plaintiff in 1869 brought an action against K. on a note for $5,000, alleged to have been made by K., payable to plaintiff : that after K.'s death the case was revived against defendants, who pleaded that the note sued on therein was not made by K. : that such cause of action was settled before trial between the plaintiff and the defendants by a compromise, and defendants paid $2,000 in full satisfaction of the plaintiff's claim on said note ; and the defendants averred that this settlement was agreed upon as a compromise and settlement of all claims of the plaintiff against K. and his estate, and upon the assertion of the plaintiff that the claim in said action was his whole and only claim against such estate. Replication upon equitable grounds, that the agreement mentioned in the deed is in the words following,—setting forth verbatim a deed poll executed by the plaintiff, whereby, after reciting that the plaintiff had commenced an action against the defendants upon a note for $5,000, and that it had been agreed "*to settle said suit*" for $2,000, the plaintiff for the consideration aforesaid, released the defendants and the estate "from all the payments of said note," and from all costs connected therewith, and the prosecution of said suit. Rejoinder, upon equitable grounds, that the release set forth in the replication was executed by the plaintiff and accepted by defendants, and the moneys therein mentioned agreed to be paid and paid, upon the plaintiff's assertion and assurance that the claim in said action in the plea mentioned was the whole and only claim against the estate of K., and it was only on the faith thereof that defendants accepted the said release, and agreed to pay the said money. Upon demurrer to the rejoinder, and exceptions to the plea and replication :—Held, 1. That the rejoinder was bad (1), as admitting that the agreement, alleged in the plea to have been a compromise of all claims, was the document set out in the replication, which was confined to the other suit, and yet relying on the averment that such compromise was procured by the plaintiff's assertion that he had no other claim ; and (2) because the compromise of a claim upon the plaintiff's assertion that it is the only one, will not of itself form an equitable defence to another claim, the right to recover in respect of which is not otherwise contested ; 2. That the replication was bad, as it admitted that the compromise, which was stated in the plea to include all claims, was the release set out in the replication, which was confined to a particular suit, and as offering no answer to the plea ; 3. That the plea itself was bad, and open to the exceptions taken to it. *King* v. *Miller et al.*, 22 C. P. 450.

See X. 2, p. 504.

7. *Other Defences.*

In an action by the last endorsee against the last endorser of a note, it is no defence that the names of the maker and of the prior endorsers are forged. *Eastwood* v. *Westley*, 6 O. S. 55.

A replication to a plea stating that a bill had been taken in full satisfaction and at all hazards by the plaintiff, that the bill was dishonoured when due, is bad on general demurrer. *Goldie* v. *Maxwell*, H. T. 4 Vict.

Commissioners for a turnpike trust appointed under a statute limiting their powers with respect to demises, and to the collection and appropriation of rent when due, made a demise beyond the scope of their powers ; the tenant in put into possession and enjoys this term ; the commissioners at the expiration of the term, take a note from the tenant for the amount of rent, giving time for payment :—Held, that the commissioners by their clerk, could not sustain an action upon such note, because the commissioners had no power, though the demise were legal, to give time for payment of rent already due. Robinson, C. J., diss. *Ireland* v. *Gurn et al.*, 3 Q. B. 220.

Defendant delivered to the wife, since deceased, of the plaintiff, a note in payment of a legacy bequeathed to her, and she died before payment :—Held, that a plea that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action on the note. *Robinson* v. *Cripps*, 6 C. P. 381.

Held, on demurrer to the equitable plea set out in the report of this case, that apart from the objection as to a perpetual injunction not being obtainable, the holder of notes, transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before the liability arises, and that the payee cannot enlarge or vary the maker's liability to pay them :—Held, also, that the plaintiff, who held the notes endorsed to him in blank, as his father's agent, could as such agent, sue upon them in his own name. *Ross* v. *Tyson*, 19 C. P. 294.

Held, that an equitable plea to an action upon a note, that the plaintiff had covenanted to pay defendant's debts, which covenant he had broken, whereby defendant was damnified to an amount equal to the amount of the note, is bad, and will be struck out as embarrassing. *Griffith* v. *Griffith*, 6 P. R. 172.—C. L. Chamb.—Gwynne.

Where the maker of a note was sued thereon, and instead of raising the defence at law, that the note had been given without consideration, save as to part, pleaded that the plaintiff in the action was not the holder of the note, and a verdict was rendered against the defendant for the full amount thereof, for which execution against lands was sued out and placed in the sheriff's hands, whereupon the defendant in the action filed a bill to restrain proceedings at law. A demurrer for want of equity was allowed. *Leitch* v. *Leitch*, 11 Chy. 81.

XIII. Frivolous Demurrers.

For instances of frivolous demurrers in actions on bills or notes, See *Bank of Montreal* v. *Hopkirk*, 1 Q. B. 418; *Commercial Bank* v. *Denwoodie*, 1 C. L. Chamb. 32; *Bank of Montreal* v. *Down*, 1 C. L. Chamb. 37; *Milburn* v. *Smith*, 1 C. L. Chamb, 54; *Ward* v. *Street*, 1 C. L. Chamb. 172; *Parker* v. *Clark*, 1 P. R. 133.

XIV. Indemnity or Contribution between Parties.

Where the defendant drew two bills on England for the accommodation of the plaintiffs' bankers, who endorsed and sold them here, giving the defendant a draft payable in England, to meet them, which defendant transmitted to the drawee of the bills, an officer in the customs, by whom it was discounted before it became due, and the money placed by him with the public moneys left in his charge, from whence part of it was stolen; and in consequence, one of defendant's bills came back protested and was paid by plaintiffs:—Held, that although it was an accommodation transaction, the drawee was defendant's, not plaintiffs', agent, and the defendant was responsible to them for the amount of the bill. *Truscott et al.* v. *Billings*, 5 U. S. 529.

A. and B. gave a joint and several note to C., who endorsed it to D., B. signing as surety for A.; and an action was brought by the holder against A., B., and C., for the amount of the note, which was paid by B., together with the costs of suit:—Held, that B. was entitled to recover the amount of debt paid by him, being a mere surety, and also a moiety of the costs as jointly liable. *Blake* v. *Harvey*, 1 C. P. 417.

Action by one of several accommodation endorsers against another for contribution on special agreement—Statement of consideration, and cause of action—Special demurrer—Declaration held insufficient. *Dempsey* v. *Miller*, 3 C. P. 431.

An endorser of a note cannot pay the amount of a judgment obtained thereon against a prior endorser, and enforce it for his own benefit. It was contended in this case that the judgment was not enforced for the benefit of the endorser, but of a person to whom it had been assigned, &c.—Held, that upon the affidavits and facts stated this was not made out. *Carr* v. *Coulter*, 2 P. R. 317.—C. L. Chamb.—Burns.

G. made a note to S., who endorsed it. DeG., D., and W., also endorsed it. B. discounted the note, which was sued, and judgment and execution obtained against all the parties to it. W. satisfied the execution, whereupon G. and D. paid him (he having been a mere accommodation endorser) S. and DeG. contributing nothing towards the payment. G. and D. thereupon applied to B., under 26 Vict. c. 45, ss. 2, 3, for an assignment to them of the judgment so obtained by him, in order to levy from S. and DeG. their share of the liability. This B. refused, S. and DeG. having informed him that by agreement they were to be relieved of liability:—Held, on application by G. and D. for an order to compel B. to assign to them the judgment under 26 Vict. c. 45, ss. 2, 3, that the court had no power to grant the order. *Brown* v. *Gossage*, 15 C. P. 20.

The holder of certain accommodation drafts, after having obtained judgment and execution against the payee thereof, was paid the amount of them by the accommodation acceptor, and thereupon expressed his intention of directing the sheriff to credit that sum on the execution in his hands, the amount of which he had made by sale under execution of the goods of the payee for whose accommodation the bills had been negotiated. The acceptor hearing of this gave the sheriff notice of his claim, and filed a bill to compel the payment of the amount which he had advanced:—Held, that as surety the acceptor had a right to receive the amount of his claim out of the proceeds of the execution, to the exclusion of the subsequent execution creditor. *Rigney* v. *Vanzandt*, 5 Chy. 494.

Plaintiff endorsed notes for W. B., since deceased, which were discounted at two different banks. To indemnify plaintiff against these endorsements W. B. mortgaged certain real and personal property to him. The notes were subsequently paid when due, at these banks, with the proceeds of other notes of W. B., endorsed by plaintiff, and discounted at a third bank:—Held, that the indemnity secured plaintiff against his endorsements at W. B.'s request, on paper discounted at the third bank to keep outstanding the amounts of the former notes. *Burnham* v. *Burnham*, 10 Chy. 485.

Semble, that the indemnity given to an endorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker to keep the amounts of the notes outstanding. *Burnham* v. *Burnham*, 10 Chy. 485.

The accommodation endorser of several bills and notes obtained from the maker and acceptor thereof a conveyance of certain lands by way of indemnity against such endorsations. Certain of these bills were subsequently endorsed by another, and were discounted; and such subsequent endorser, on the bills maturing, was obliged to retire them. On a bill by the second endorser claiming to have the benefit of the trust by having the estate administered, and the amount so paid by him to retire the notes refunded:—Held, that he was not entitled to such relief: and, Quære, whether, under the circumstances, he had a right to claim such relief, subject to the grantee in the deed being relieved

from all liabilities incurred on the faith of it. *Smith* v. *Fralick*, 5 Chy. 612.

As between accommodation endorsers, the court will enforce the right of contribution, as in cases of other co-sureties. *Clipperton* v. *Spettigue*, 15 Chy. 269.

Where a firm of two or more endorse in the partnership name, the liability as sureties is a joint liability, and not the several liability of each partner. *Ib.*

Where two persons endorse a note for the accommodation of the maker, and the second endorser knows when he endorses that the first endorser is, like himself, an accommodation endorser, he must share equally the loss occasioned by the maker's default. *Cockburn* v. *Johnston*, 15 Chy. 577.

Accommodation endorsers, like other co-sureties, are liable to mutual contribution, unless this liability is controlled by contract; but such a limitation, if stipulated for, is binding. *Mitchell* v. *English*, 17 Chy. 303.

A note, endorsed by B. and C. for the accommodation of the maker, being overdue, the maker, to provide funds for taking it up, procured another person, D., to endorse for his accommodation a new note, and on applying to his former endorsers for their signatures, untruly stated that he had sold goods to D., who would be in funds to take up the note at maturity. The note was taken up by D., who was the first endorser:—Held, that he was entitled to contribution. *McKelvey* v. *Davis*, 17 Chy. 355.

D.'s suit for contribution was not brought for five years, nor until C. had become insolvent:—Held, that B. must share with D. the loss: that he might have had his liability ascertained, and might have paid the amount before D. sued. *Ib.*

Held, that where first and second endorsers on a note have, in fact, endorsed as mere sureties for the maker, the second not expressly stipulating for any right of recourse against the first, the first endorser, having paid the note, is entitled to contribution against the second; and it is immaterial that the first endorser did not endorse on the faith that there was to be another endorser, or that the second endorser believed that the first would be liable to him, and believed, also, that he (the first endorser) was a partner with the maker. *Ianson* v. *Paxton*, 22 C. P. 505.

Where one I., at the request of the plaintiff, (the first endorser) took up the note, and the plaintiff afterwards repaid him:—Held, that this was a payment by plaintiff in discharge of the liability which he and defendant (the second endorser) had undertaken; and was sufficient to entitle him to recover:—Held, also, that the evidence, set out in the report of this case, warranted the finding that the plaintiff did endorse merely as surety for the maker, and that I. paid the money for the plaintiff, intending to look to him for repayment. *Ib.* But

Held, reversing the above decision,—Draper, C. J. of Appeal, and Wilson, J., diss., and Spragge, C., and Richards, C. J., doubting,—that the successive endorsers of a note, merely on proof that it was made for the accommodation of the maker, are not necessarily to be regarded as co-sureties, and so liable to contribution; but that in the absence of any agreement to the contrary, the parties on such proof may be considered as having entered into a contract of suretyship in the terms in which the note and the endorsements are known to create; and that the first endorser having paid the note, could not recover contribution from the second. *S. C.* in appeal, 23 C. P. 439.

See, also, *Breeze* v. *Baldwin*, 5 O. S. 444, p. 489; *Niblock* v. *McGregor*, 12 C. P. 566, p. 58[illegible]

XV. Loss of Note.

Where a note had been endorsed to an attorney's clerk in the course of business, and mislaid:—Held, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called and sworn to his belief of its loss. *Grove* v. *Clarke et al.*, 5 O. S. 208.

Where the plaintiffs declared against the drawer of a lost bill payable to plaintiff's order, on a promise to pay it, but did not state any new consideration for the promise, nor allege that the bill was unendorsed at the time of the loss, the declaration was held bad on general demurrer. *Russell* v. *McDonald*, 1 Q. B. 296.

Payee against maker. Plea, loss of the note by plaintiff before suit, and that he hath been and is unable to produce the same. Replication, denying the loss only:—Held, good. *Campbell* v. *McCrea*, 11 Q. B. 93.

A person suing on a lost note should, before action, tender an indemnity to the maker. If he neglect this, it will be at the risk of costs to defendant. *Banque Jacques Cartier* v. *Strachan*, 5 P. R. 159.—C. L. Chamb.—Gwynne.

XVI. Miscellaneous Cases.

A general power to an agent to sign bills, notes, &c., and to superintend, manage, and direct all the affairs of the principal, gives him a power to endorse notes. *Auldjo* v. *McDougall*, 3 O. S. 199.

It was proved that one D. was clerk or agent for the defendant keeping a store at L., and that defendant had sanctioned his purchasing certain goods:—Held, that the circumstances gave no implied authority to D. to sign the defendant's name to negotiable paper, and that the jury were warranted in finding that the defendant had given D. no authority to purchase goods of the plaintiff. *Heathfield* v. *Van Allan*, 7 Q. B. 346.

A foreign corporation, to wit, a bank, cannot maintain an action upon notes discounted and received by them in the course of conducting banking business in this Province, although they may maintain an action for money had and received to their use against the party for whom such note was discounted, and to whom money was advanced upon it. *Bank of Montreal* v. *Bethune*, 4 O. S. 341. See *Howe Machine Co.* v. *Walker*, 35 Q. B. 37.

A note made and endorsed in a foreign country, is negotiable here, within the statute of Anne. *Thompson* v. *Sloan*, M. T., 2 Vict.

A partner in a joint stock company, the notes of which are suppressed by 7 Will. IV. c. 3[illegible], having retired their notes which were in circula-

tion after the suppression, cannot put them into circulation again so as to bind the partnership. *Hall* v. *Buck*, T. T. 2 & 3 Vict.

Where, in trover for notes against the maker, it appeared that the notes had been given by him on a purchase of land; that the payee afterwards agreed to deliver them up to him on a good consideration; that afterwards, and before their delivery, the payee assigned them by deed to the plaintiff, the notes themselves being in the possession of a third party; that the defendant afterwards received them, having first had notice of the assignment, and no fraud having been shewn the jury found for the defendant:—Held, on motion for a new trial, that as these facts would have constituted a good defence in an action by the payee on the notes, the verdict was right in the absence of proof of fraud; a new trial was therefore refused. *Small* v. *Bennett*, T. T. 3 & 4 Vict.

A note made by the plaintiff to the defendant falling due after the service of the plaintiff's writ, but before declaration filed, may be set-off in the action. *Thorne* v. *Haight*, H. T. 6 Vict.

Where in an action against the maker and endorser of a note under 5 Will. IV. c. 1, one defendant pleaded the general issue, and the other allowed judgment to go by default, and at the trial the plaintiff was nonsuited as to both, no one being present in the court on his behalf:—Held, that the nonsuit might have been right as to the one pleading, and it was therefore set aside on payment of costs. *Small* v. *Powell et al.*, 1 Q. B. 427.

Where a plaintiff takes up a note which defendant had given him, and which he was bound to pay at maturity, he may recover against the defendant as for money paid. *McNab* v. *Wagstaff*, 5 Q. B. 588.

Payment in "good notes" does not necessarily mean "good negotiable notes." *McArthur* v. *Winslow*, 6 Q. B. 144.

Where a plaintiff contracts to receive for work done at its completion, a certain sum of money, and then agrees to accept from the defendant the note of B. for the sum, he may sue for the money, if the note be not tendered *at the time specified*, a subsequent tender of the note and refusal, will be no defence to such action. *Fisher* v. *Ferris*, 6 Q. B. 534.

In an action against the makers and endorsers of a note, it is not necessary that all the defendants should concur in an application for a new trial. *Moulson* v. *Arrol et al.*, 11 Q. B. 81.

In an action against the maker and endorser of a note, a new trial was granted as to one defendant, leaving the verdict to stand as to the other. *Hanscome* v. *Cotton*, 15 Q. B. 42.

A forged paper purporting to be a bank note is a note, and equally so, if there is no such bank as that named. *Regina* v. *McDonald*, 12 Q. B. 542.

Where in an action on a note against defendant as administrator of the maker, who died before the note fell due, it was left to the jury to say on the whole evidence whether defendant at any time after the note was due, promised without condition, or only in reference to the assets of the estate to pay the note; and the jury found for the defendant, the court refused to disturb such finding. *Adams* v. *Capner*, 6 C. P. 277.

The plaintiff drew upon J. a bill for £200, payable to their order, which he endorsed to the Gore Bank, by whom it was sent to the agent of defendants, the Bank of Upper Canada, for collection. When it fell due, J., with the agent's assent, drew upon the plaintiffs to meet it, but the proceeds of this draft, contrary to J.'s directions, were placed to his credit, with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received.—Per Burns, J., they might also recover as for money paid.—Per Robinson, C. J., not. *Riddell* v. *Bank of U. C.*, 18 Q. B. 139.

Declaration, that in consideration that the plaintiff, for the accommodation of the defendant, would sign a certain note made by C., payable to the defendant, for £100, defendant promised to obtain and deliver to the plaintiff accounts due to C. by different persons to that amount as security; that the plaintiff signed the note, but the defendant did not obtain the accounts; by reason whereof the plaintiff was obliged to pay the note, with interest, and the costs of a suit brought by the defendant thereon. Defendant pleaded, by way of estoppel, that in the suit by him on the note this plaintiff pleaded as a defence the same agreement now declared upon: that issue having been taken thereon the jury found that no such agreement was made, and that judgment entered on that verdict still remained in force:—Held, on demurrer, a good defence. McLean, J., diss., on the ground that, as the agreement could have formed no defence to the action on a note, the verdict on an immaterial plea formed no estoppel; and that the declaration was bad, for the damages alleged did not arise from the non-delivery of the accounts promised, but from the non-payment of the note. *Campbell* v. *Holmes*, 21 Q. B. 465.

Remarks as to the practice in this country of taking notes for discount, not from the last endorser, but from the maker, who brings them endorsed—thus suggesting not a business transaction, but accommodation endorsements. *Bank of Montreal* v. *Reynolds et al.*, 25 Q. B. 352.

Declaration, that on an accounting between them, defendant's indebtedness to plaintiff was fixed at a certain sum, to be paid off in a stipulated manner and at a stipulated time, one of which payments defendant undertook to make to A. & Co., to whom plaintiff was liable to that amount, it being also agreed that the plaintiff should towards that liability provide an additional sum by a day named, to be repaid by defendant to him: that it was further agreed that any error in the said accounting should be corrected, and plaintiff should give up to defendant all notes and securities belonging to defendant, which plaintiff before and at the time of the accounting held, except, &c. Breach, that although a reasonable time had elapsed, &c., defendant had not paid A. & Co. Plea,—after alleging errors in the said accounting, specifying them; that after said accounting, and before action, plaintiff endorsed said notes to A. & Co. in settlement of their claim, of which A. & Co. had given defendant notice:—Held, on demurrer, plea bad, as not shewing that the

notes, which had been endorsed away, had been given for the cause of action stated in the declaration. *Jones* v. *Cameron*, 16 C. P. 271.

Action for converting certain notes, with a special count, alleging in substance that defendants held the notes as collateral security for certain paper in their hands to which the plaintiff was a party, and after they had collected part of them, and the paper had been retired, they collected and applied to their own use the remaining notes, to which they had ceased to have any claim. Defendants pleaded, on equitable grounds, that after receiving the notes they were applied to by the plaintiff to accept in payment of a debt due by him to them, the note of one A. D., for $1,147, which they refused to do unless one J. D. would endorse it; that J. D. would not endorse without security, and the plaintiff thereupon got defendant's agent to write to J. D., agreeing to hold the notes in question, to apply when collected on the note for $1,147; that J. D., on the faith of this, endorsed said note, which, defendants accepted in payment, and which was renewed from time to time by the proceeds of the notes collected and reduced in July, 1862, to a note for $477, which note J. D. took up, and defendants thereupon transferred to him such of the notes in question as remained, as they lawfully might, and were bound to do:—Held, on demurrer, that the plea was good, as shewing a legal defence. Quære, whether it could be supported as an equitable plea, for J. D. would have been a necessary party to a bill by the plaintiff, for the recovery and account of the notes. *Maybee* v. *Bank of Toronto*, 29 Q. B. 566.

Contract with express company to carry and present notes for payment—Delivery to notary—Failure by notary to notify endorser of non-payment—Company not liable. *McQuarrie* v. *Fargo*, 21 C. P. 478.

In an action on an agreement by which, in consideration of the plaintiff giving defendant his note for $438, payable four months after date as the purchase money for a note for $730, made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note: and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said $730 note, by giving their seven notes for equal amounts payable to my order, and payable in one, two, and three months," &c.:—Held, that the words, "payable to my order," did not necessarily import an unconditional endorsement by defendant of the seven notes, but might mean only such an endorsement as would pass the property in them to the plaintiff; that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for $730, also payable to defendant's order, was endorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional endorsement as to the others:—Held, that he could claim only that these notes should be endorsed as the first one was. *McCarthy* v. *Vine*, 22 C. P. 458.

The declaration alleged that L. & Co. drew a bill of exchange for $69.72 on the plaintiff, payable to the order of themselves at defendants' bank, and endorsed it to defendants, and that it was duly presented by defendants to plaintiff, and was duly accepted by the plaintiff; that the defendants, with full knowledge of the plaintiff having so accepted, negligently, and without reasonable or probable cause, afterwards caused the said bill to be protested for non-acceptance by the plaintiff, whereby the plaintiff was injured in his credit and business with the drawers and others, and his business was thereby impeded, &c.:—Held, on demurrer, that no cause of action was shewn; for there was no negligence shewn as between plaintiff and defendants, nor any privity on which a duty or contract might arise; and that the action, if maintainable at all, must be as for a false representation knowingly made, which had injured the plaintiff in his business, and the declaration in this view was insufficient. *Irvine* v. *Canadian Bank of Commerce*, 23 C. P. 509.

Where a corporation having a debt to pay, which it was to their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note or to repay; relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. *Burnham* v. *Peterborough*, 8 Chy. 366.

The vendor on the sale of land took notes for the purchase money, endorsed and sold some of them, and was liable on these in case of non-payment by the makers:—Held, that on the sale of the property these were entitled to priority of payment over the notes retained by the vendor. *O'Donoghue* v. *Hembroff*, 19 Chy. 95.

In such a case notes endorsed without recourse are payable pari passu with the retained notes. *Ib.*

BILLS OF LADING AND WAREHOUSE RECEIPTS.

I. BILLS OF LADING.

1. *As connected with the Carriage of Goods*—*See* RAILWAYS AND RAILWAY COMPANIES—SHIP.

2. *Duties of Banks in connection with*—*See* BANKS.

II. WAREHOUSE RECEIPTS—*See* WAREHOUSEMEN.

III. AS AFFECTED BY C. S. C. c. 54; 24 VICT. c. 23; 29 VICT. c. 19, D.; 31 VICT. c. 11, D.; 33 VICT. c. 11, D., AND 34 VICT. c. 5, D., REPEALING IT.

Where two partners, not carrying on the business of warehousemen, have their partnership stock in their own cellar, a receipt given by one to the other for that stock, though in the form of a warehouse receipt, is not a warehouse receipt within the C. S. C. 54. *Ontario Bank* v. *Newton*, 19 C. P. 258.

The plaintiff declared that one G. had deposited with defendant certain wheat, and obtained from him a warehouse receipt therefor: that by

the course of trade such receipt was transferable by endorsement, and the property in the wheat would pass to an endorsee: that G. sold said wheat to the plaintiff, and endorsed to him the receipt; but that when he presented it to the defendant, the latter refused to deliver to him the wheat. Defendant pleaded that before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.:—Held, a good defence; for at common law the endorsement and transfer of the receipt would clearly not pass the property, and the C. S. C., c. 54, relied upon by the plaintiff, has no application to an absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted, when the receipt is endorsed over. *Glass* v. *Whitney*, 22 Q. B. 290.

The declaration alleged that the plaintiff by his agents delivered to the defendants 8,000 bushels of his corn, to be carried from Chicago to Stratford, &c., and to be delivered to the Bank of Montreal or their assigns; that the bank assigned the corn to the plaintiff, yet that defendants neglected for an unreasonable time to carry and deliver it, whereby the plaintiff lost a market and was afterwards obliged to sell for a less price than he would otherwise have done. It appeared that the corn was shipped by M. & Co., "as agents and forwarders," on account of whom it might concern, to be delivered to the Bank of Montreal or their assigns, and the bill of lading was endorsed by the agent of the bank to the plaintiff, with whom the defendants treated as the owner, and delivered it to him after some delay caused by a charge made and afterwards remitted by them. It was objected that the consignor or consignee could only sue upon this contract, not the plaintiff; that the bank could not assign to him; and if they could, the right of action would not pass. There was no evidence to shew what interest the bank had in the corn:—Held, there being no plea denying plaintiff's property in the corn, that he was admitted to have been the owner when it was shipped; that the bill of lading did not transfer the property to the bank, in whom no other right was shewn; that their endorsement was therefore unnecessary, and that he was entitled to maintain the action. Semble, however, that if he had first acquired his title by such endorsement, he might have sued defendants for any negligence occurring after they had recognized him as owner. *Kyle* v. *Buffalo & Lake Huron R. W. Co.*, 16 C. P. 76.

A bill of lading is not conclusive proof of the change of property, like a bill of sale; it is a question of evidence whether such an operation should be given to it. *Ib.*

M. & Co. being indebted to plaintiffs on certain overdue notes, it was agreed that plaintiffs should discount a further note for them, with the proceeds of which the overdue paper should be retired; and that M. & Co. should hand over to them certain warehouse receipts for wool stored in their warehouse as collateral security. This note was accordingly, on the 23rd January, 1868, discounted by plaintiffs, and the old notes duly retired, an agreement being signed by M. & Co., reciting that they had endorsed over the receipts as collateral security for the note, &c. The receipts, nearly all in the same form, were as follows:—"Warehouse Receipt.—Received in store in our warehouse, at * * * *from sundry parties*, 17,900 pounds batting, to be delivered pursuant to the order of the Bank of British North America, to be endorsed hereon, &c." Neither M. & Co. nor the bank, endorsed the receipts:—Held, that they were not warehouse receipts under the C. S. C. c. 54, 24 Vict. c. 23, and that the bank, therefore, could not claim the property covered by them. Semble, also, that the transaction of the 23rd January was not, in substance, though in form, a present advance to M. & Co., but merely a mode adopted of paying off an already existing debt. *Bank of British North America* v. *Clarkson*, 19 C. P. 182.

The plaintiffs on the 20th September, received a note for $5,800, payable to and endorsed by L., with L.'s warehouse receipt for wool attached, which they discounted on the 4th October, 1867. On the 21st October, $1,179 only remaining due, they took a note for this sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.'s previous receipt. It was not discounted, however, on that day, because M. did not pay the discount, and on the 5th December, M. made another note for the same sum, at ten days, in place of it, which was discounted with the same two warehouse receipts attached. It was renewed on the 24th, with the same receipts, and not being paid, the plaintiffs in April sold the wool, through a broker, who was unable to get it; and they thereupon replevied on the 9th May:—Held, following Bank of B. N. A. *v.* Clarkson, 19 C. P. 182, that the warehouse receipts, being taken directly to the bank, and not by endorsement, were not within the C. S. C. c. 54, s. 8, and that the plaintiffs therefore could not recover. Richards, C. J., and Adam Wilson, J., however, dissented from that decision, though following it in accordance with the established practice:—Held, also, that the transaction of the 5th December might be considered as a new one, and that the plaintiffs therefore had not held the wool more than six months, so as to defeat their title, under s. 9. If they had, defendants might shew that fact under a plea of not possessed. *The Royal Canadian Bank* v. *Miller et al.*, 28 Q. B. 593.

Held, on appeal, from the last case—affirming the decision, but dissenting from the opinions expressed in the Q. B.—that the receipt, given directly to the plaintiffs, and acknowledging to have received the wool *from them*, was not within the statute, which authorizes only a transfer by endorsement; and that the plaintiffs therefore could not recover. *The Royal Canadian Bank* v. *Miller et al.*, 29 Q. B. 266, in appeal.

B. held a bill of lading in duplicate for 100 barrels of flour on board the steamer "Corinthian," consigned to his order at Kingston. He sold the flour to H. at $7 per barrel, and went with him to the plaintiffs' bank, where he endorsed the two bills in blank, and gave them to H. H. attached one to his draft for $500, which he discounted, and applied the proceeds towards paying B. The duplicate bill of lading H. kept, and the next day he got B. to write on it, over his endorsement, "Deliver to order of H." This duplicate got into the possession of defendants at Kingston, not endorsed, and they

obtained the flour there from the wharfinger by representing that they had B.'s order. Plaintiffs brought trover, and the jury found that there had been no sale of the flour by H. to defendants. On objections taken to the plaintiffs' title:—Held, 1. That the bill of lading was valid, though signed by the purser, not by the master; 2. Morrison, J., diss., that the endorsement of the bill of lading in blank was sufficient, without specifying that it was endorsed to secure the note discounted; 3. That the alteration, by converting the general into a special endorsement was immaterial; 4. That under the circumstances, the endorsement by B. to the bank was sufficient without H.'s endorsement, either because B. was in truth the owner, or because H. having so represented to the plaintiffs, he and defendants claiming under him were estopped; 5. That the plaintiffs were entitled to recover the full value of the grain, not merely the $500 advanced by them. *Royal Canadian Bank* v. *Carruthers et al.*, 28 Q. B. 578.

Held, on appeal from the last case, affirming the judgment of the Q. B., 1. That the bill of lading was sufficient under C. S. C. c. 54, s. 8, and otherwise, though signed by the purser and not by the master; 2. That the endorsement by B. was sufficient; 3. That the endorsement in blank was sufficient, the statute not requiring a special endorsement setting forth the object of the transfer. 4. That the plaintiffs were entitled to recover the full value of the flour, $700, being accountable to the proper party for the overplus. *S. C.* 29 Q. B. 283.

A., a warehouseman, insured certain wheat with defendants' company, and assigned the policy to a bank, to whom he gave a warehouse receipt, signed by B., his clerk, and endorsed by himself. In an action on the policy, on behalf of the bank:—Held,—reversing the judgment of the Common Pleas, 18 C. P. 192, Spragge, C., Mowat, V. C., and A. Wilson, J., diss.—that the bank had no insurable interest, as B. was not a warehouseman within the C. S. C., c. 54, s. 8; and that the receipt was not in compliance with 24 Vict. c. 23, s. 1, not being signed by the *warehouseman*. *Todd* v. *Liverpool and London Globe Insurance Company*, 20 C. P. 523.

A condition of a policy provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, endorsed to certain banks. Per A. Wilson, J.—Such banks were the owners by virtue of these receipts, not the plaintiff; and the condition was broken. *McBride* v. *The Gore District Mutual Fire Ins. Co.*, 30 Q. B. 451.

M. & Co., at Guelph, bought a car load of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own names as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was endorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at 15 days sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat and ground; and 55 barrels of flour, the equivalent, was delivered by him to defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-endorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they, in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co. The case having been tried without a jury:—Held, that M. & Co., on the re-endorsement by the bank to them, were in as of their former title, not as assignees of the bank with the rights given to the latter by the statute, and that their rights must be considered as if the bank had never intervened. *Mitson* v. *Great Western Railway Co.*, 31 Q. B. 73.

The plaintiffs sued for non-delivery of certain goods received by defendants from one G. W., to be carried from Paris, Ont., to St. Johns, N. B., and there delivered to one R. W., or to such persons as he should direct, alleging that the said R. W. duly endorsed the shipping note of the said goods in manner and form provided by statute to the plaintiffs, who then became and are the lawful and bonâ fide holders of the same for valuable consideration, and entitled to the possession of the said goods. Plea, setting out the alleged shipping note verbatim, which was in the usual form, dated at Paris station, G. T. R. acknowledging the receipt of the goods from G. W., addressed to R. W., St. Johns, subject to the terms and conditions stated. It was signed, "W. S. Martin, Agent, G. T. R.," and on the face of it was written, "Deliver to order of Royal Canadian Bank—R. Wallace." The plea then averred that the endorsement to the plaintiffs mentioned in the declaration was that mention in the plea on the face of the shipping note, and that there was no other endorsement; and that G. W. did not, at any time before this suit, deliver the flour in the said shipping note mentioned, or any part thereof, to the defendants, in manner and form as in the declaration and shipping note mentioned:—Held, on demurrer, that the plea was bad, not being either in denial of the plaintiffs' title as endorsees for value, or of the defendants having signed or given the shipping note as alleged; and that it was not so framed as to enable the court to determine whether the defendants were estopped from denying the delivery to them of the goods mentioned in the bill of lading, which was the point argued. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

Semble, however, that the shipping note was a bill of lading, within 33 Vict. c. 19, s. 3, O.; and that the insertion of the word "train" in the act (not found in the English statute, 18 & 19 Vict. c. 111) clearly makes it applicable to railways. *Ib.*

Semble, also, that it was unnecessary to allege in the declaration that the plaintiffs, being bankers, acquired the shipping note as collateral security, as authorized by the 34 Vict. c. 5, D.; though the plaintiffs would have to shew this under a denial of the endorsement. *Ib.*

Semble, also, that under the Interpretation Act 31 Vict. c. 1, s. 7, sub-s. 9, O., the defendants, though a corporation, would be "persons

signing" the bill of lading, if signed by their authorized agent. *Ib.*

A warehouse receipt, endorsed to a bank, described the goods as "40 bales of corks," not distinguishing them by separate marks or values. Some of these were taken out and replaced by others. It appeared that the bales had all distinguishing marks, and were of varying values, some twice that of others:—Held, that the receipt only extended to the particular bales in the warehouse when the receipt was given, and did not cover other bales which came in afterwards in lieu of those taken away. *Lludo* v. *Morgan*, 23 C. P. 517.

See also *Clark* v. *Western Assurance Co.*, 25 Q. B. 209; *Gore Bank* v. *Royal Canadian Bank*, 13 Chy. 425.

BILLS OF SALE AND CHATTEL MORTGAGES.

I. Who may be Mortgagee, 573.

II. Construction of, 574.

III. Registration and Change of Possession.

1. *Affidavits of Bona Fides and Execution.*
   (a) *Who may Make*, 575.
   (b) *Other Cases*, 576.
2. *Affidavit and Statement on Refiling*, 578.
3. *Registration*, 579.
4. *Change of Possession*, 581.
5. *Re-filing*, 585.

IV. Description of Goods, 587.

V. Consideration and Bona Fides.

1. *Mortgages to Secure Advances, or as Indemnity*, 591.
2. *Other Cases*, 592.

VI. Rights and Liabilities of Mortgagor and Mortgagee.

1. *As to Possession*, 594.
2. *Other Cases*, 596.
3. *Insurable Interest of Mortgagee — See* Insurance.

VII. Assignment for the Benefit of Creditors—*See* Bankruptcy and Insolvency.

VIII. Fraudulent Conveyances—*See* Fraudulent Conveyances.

IX. Sale or Mortgage of Ships—*See* Ship.

I. Who may be Mortgagee.

A person advancing money belonging to others, but for which he is responsible, may take a mortgage for it in his own name. *White* v. *Brown*, 12 Q. B. 477.

A treasurer of a mutual insurance company, may take a mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have power to take it. *Brodie* v. *Ruttan*, 16 Q. B. 207.

The Queen may take a chattel mortgage from any of her subjects, (under our acts,) through and in the name of the head of the department to which the debt is due. *McGee* v. *Smith*, 9 C. P. 89.

See *Baldwin* v. *Benjamin*, 16 Q. B. 52, p. 575; *Taylor* v. *Ainslie*, 19 C. P. 78, p. 578.

II. Construction of.

Party of "first" part, instead of "second" part in the assignment,—Held, immaterial. *Taylor et al.* v. *Commercial Bank*, 4 C. P. 447.

A mortgage on saw-logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of them. *White* v. *Brown*, 12 Q. B. 477.

The plaintiff and W. made an agreement, by which plaintiff was to make advances to W., to enable him to draw out and to make and get to market a quantity of timber. It was agreed that the timber then made, and all thereafter made, should be delivered to the plaintiff as security, and in proof of such delivery should be marked as specified, and that it should be rafted to market under W.'s directions. The timber was seized by defendant as sheriff under an execution against W.; and the plaintiff, claiming under this deed, replevied:—Held, that W. could not be looked upon merely as agent of the plaintiff, and the timber regarded as the plaintiff's from the first, for that would be inconsistent with the deed:—Held, also, that the statute requiring registration could apply only to that part of the timber in existence as timber, and owned by W. at the execution of the instrument, but that it clearly applied to that portion, and therefore for want of registration the deed must be held void altogether; but, at all events, it could have operated to pass only the timber made and capable of delivery at the time of its execution, and such as, being made afterwards, was delivered to the plaintiff and marked for him. *Short* v. *Ruttan*, 12 Q. B. 79. See, also, *Ruttan* v. *Short*, 12 Q. B. 485.

The plaintiffs held a mortgage from one C. of 700 pieces of timber, "together with whatever quantity of squared timber the said party of the first part may manufacture during the remainder of the season." The timber made after this mortgage was marked as it was got out, with the plaintiffs' mark, but remained in C.'s possession, and was seized there by the defendant, an execution creditor:—Held, that the plaintiffs could not recover for it under their mortgage. *Cummings et al.* v. *Morgan*, 12 Q. B. 565.

L. mortgaged to the plaintiffs for £140 2s. 5d., reciting that he was indebted to them in £214 10s. 11d.; and that they had become security for him as endorsers of a note for £25 11s. 6d., making together £240 2s. 5d., for £100 of which he had previously given them another mortgage. In trespass against the sheriff for seizing the goods under an execution:—Held, that the mortgage was defective in not shewing the terms, nature, and effect of the liability incurred by endorsing. *Boulton et al.* v. *Smith*, 17 Q. B. 400; affirmed in appeal, 18 Q. B. 458.

The mortgagor had agreed to deliver lumber to plaintiff, at specified prices, up to September, 1870, which plaintiff was only bound to pay

for as delivered, and not to make advances; but at the date of the mortgage plaintiff had advanced about $250 beyond the value of the lumber delivered, and to assist the mortgagor still further he advanced $450 more, on his agreeing to execute the mortgage to secure both amounts, which were to be repaid by lumber or money in two months, the security covering the goods in dispute as well as the lumber:—Held, that the mortgage was an independent contract, an advance of money to be repaid at an earlier date than that named for the delivery of the lumber: that it was not invalid, as not shewing the true dealing between the parties; that the affidavit, which was in the common form, as for a debt due, was sufficient. *Clarke* v. *Bates*, 21 C. P. 348. See, also, *Beecher* v. *Austin*, 21 C. P. 334, p. 577.

The owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was —Held not to be prejudiced by his subsequent mortgage of the land. *Ross* v. *Hope*, 22 C. P. 482.

See *Closter* v. *Headley*, 12 Q. B. 364, p. 594. See, also, *Corporation of Lanark* v. *Cameron*, 9 C. P. 109.

III. Registration and Change of Possession.

1. *Affidavits of Bona Fides and Execution.*

(a) *Who may Make.*

An affidavit made by one of several bargainees or assignees of goods (before 20 Vict. c. 3):—Held, sufficient. *Balkwell et al.* v. *Beddome*, 16 Q. B. 203; *Heward* v. *Mitchell*, 11 Q. B. 625.

13 & 14 Vict. c. 62, requires that the mortgagee himself shall make the affidavit; therefore a mortgage filed upon an affidavit of his agent was held void. *Holmes* v. *Vancamp*, 10 Q. B. 510.

A. mortgaged to B. for a debt due by C., and C., to secure A., gave him a chattel mortgage conditioned to be void on his paying the amount of the debt either to A. or B., or indemnifying A. against his suretyship. This was registered under 13 & 14 Vict. c. 62, on an affidavit in the form prescribed, that C. was "justly and truly indebted to A." in the amount of the mortgage. It was objected that such mortgage was void as against the plaintiff, a creditor of C., because the affidavit could not have been made consistently with the facts; but—Held, 1. That A. could properly make the affidavit; and, 2. That if he could not, then the mortgage, not being within the statute, would not have required registration at all. *Baldwin* v. *Benjamin*, 16 Q. B. 52. See *Mathers* v. *Lynch*, 28 Q. B. 354; *Walker* v. *Niles*, 18 Chy. 212.

Held, under 12 Vict. c. 74, that it was not essential that the affidavit of execution should be of a subscribing witness; and that where the original had no subscribing witness, but in the copy filed the name of the person who made the affidavit was inserted as a witness, the variance was not material. Robinson, C. J., diss. *Armstrong* v. *Ausman*, 11 Q. B. 498.

Where a bill of sale was made to two jointly, and filed on an affidavit of bona fides made by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately:—Held, sufficient. *McLeod et al.* v. *Fortune et al.*, 19 Q. B. 100.

Held, Richards, C. J., hesitante, that the president or other principal officer of a corporation taking a mortgage for and in the name of the corporation does not act as its agent, but as principal in the exercise of its corporate powers; and may therefore make the affidavit of bona fides under C. S. U. C. c. 45, without authority in writing. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

See *Taylor* v. *Ainslie*, 19 C. P. 78, p. 573; *Olmstead* v. *Smith*, 15 Q. B. 421, infra.

(b) *Other Cases.*

Affidavits under 13 & 14 Vict. c. 62, need not be made on the day the mortgage is executed. *Perry* v. *Ruttan*, 10 Q. B. 637.

The words, "sworn and affirmed," without saying which of the two deponents swore, and which affirmed, and omitting the word "severally" in the affidavit to a mortgage:—Held, sufficient. *Moyer* v. *Davidson*, 7 C. P. 521.

It is not necessary in affidavits sworn under a statute to conform to the technicalities required by rules of court. *Ib.* *De Forrest* v. *Bunnell*, 15 Q. B. 370.

An affidavit that the deed was not made to enable the *assignor* (instead of the assignee) to hold the goods against creditors:—Held, bad. Semble, per McLean, J., that assignees in trust for creditors cannot properly take the affidavit required by 13 & 14 Vict. c. 62. *Olmstead* v. *Smith*, 15 Q. B. 421.

Where a witness to a mortgage by two swears that he saw both execute, when in fact he only saw one, and the mortgage has been registered on such affidavit, it is sufficient. *DeForrest* v. *Bunnell*, 15 Q. B. 370.

It is no objection that the second Christian name of the deponent is not written in full, but the initial only given. *Ib.*

The jurat was as follows: "Sworn before me at the Brantford of —— in the —— county of Brantford, this 13th day of October, A.D., 1855; George W. Malloch, a commissioner for taking affidavits in the Queen's Bench in and for the said county of Brant:"—Held, sufficient. *Ib.*

An affidavit of execution sworn before the mayor of a foreign town is useless. *Ib.*

Held, that recitals which used the singular instead of the plural number, and an affidavit which stated that the conveyance was not for the purpose of enabling "the bargainee to hold," &c., there being two bargainees, did not vitiate the instrument. *Tyas* v. *McMaster*, 8 C. P. 446.

Omission of deponent's addition—Held, no objection. *Brodie* v. *Ruttan*, 16 Q. B. 207.

"Secretary of the Board of Arts and Manufactures,"—Held, a sufficient addition. *Noel* v. *Pell*, 7 L. J. 322.—C. L. Chamb.—Draper.

A person who prepared the assignment may take an affidavit as commissioner. *Ib.*

An affidavit that the mortgagor was justly and truly indebted to the mortgagee in the sum

of £800, or thereabouts, as fully set forth in the mortgage; that the mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the mortgagee for his said endorsement, and not for the purpose of protecting the goods against the creditors of the mortgagor:—Held, sufficient, under the decision in Baldwin *v.* Benjamin, 16 Q. B. 52. *Valentine* v. *Smith*, 9 C. P. 59.

A mortgage purported to secure $1,600, acknowledged to have been paid by the mortgagees, the property mortgaged being 2,500 logs, and the proviso for redemption being on payment of $1,600, at seven per cent., on or before 1st of September, or by delivering lumber of first and second classes, as agreed between the parties, to that value. The agreement, which was of even date, declared that in consideration of the $1,600 then paid and advanced to the mortgagors by plaintiffs, "which sum is collaterally secured to the parties by chattel mortgage bearing even date herewith," &c., the mortgagors agreed to deliver to plaintiffs all the first and second class lumber made at their mill on or before 1st October then next; and plaintiffs agreed to pay at the prices named, "or, if the advance now made is not exhausted, to allow them for the lumber so delivered at rates aforesaid." The affidavit of the mortgagees was in the usual form, under sec 2 of the Chattel Mortgage Act:—Held, that the mortgage was one within secs. 1 and 2, and not sec. 5 of the Chattel Mortgage Act: that it was therefore not open to objection for not truly shewing the real transaction between the parties; and that the affidavit was sufficient. Baldwin *v.* Benjamin, 16 Q. B. 52, followed. *Beecher et al.* v. *Austin*, 21 C. P. 334. See, also, *Clarke* v. *Bates*, *Ib.* 348, p. 575.

An affidavit that the mortgage was executed in good faith, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage, or preventing the creditors of the said L., (the mortgagor,) from obtaining payment of any claim against him:—Held, insufficient, for not stating that it was not made to protect the goods "against the creditors of the mortgagor," as required by the act, 20 Vict. c. 3. *Boulton* v. *Smith*, 17 Q. B. 400; affirmed in appeal, 18 Q. B. 458.

That the mortgage was not made to prevent "the creditor," (instead of creditors) "of such mortgagor obtaining payment of any claims against him:"—Held, insufficient. *Harding* v. *Knowlson*, 17 Q. B. 564.

That the mortgage was executed for the purpose of securing the payment of the money so justly "due or accruing due:"—Held, sufficient, being in the terms of the act. *Squair* v. *Forune*, 18 Q. B. 547.

Held, no objection that the affidavit of execution did not state the date of the bill of sale or on what day it was executed. *McLeod* v. *Fortune*, 19 Q. B. 100.

An affidavit stated that an assignment for the benefit of creditors was made "bonâ fide," omitting the words, "for good consideration:"—Held, bad. *Mason* v. *Thomas*, 23 Q. B. 305.

That it was made "for the purposes and trusts therein set forth," and not for the purpose of holding, &c., "the estate and effects mentioned therein," instead of "the goods," as in the statute:—Held, sufficient. *Ib.*

That a mortgage by two was not executed to secure the goods against the creditors of the mortgagors, nor to prevent such creditors from recovering, &c., is sufficient, without adding, "or either of them," as regards the mortgagors, or "or any or either of them" as regards the creditors. *Fraser* v. *Bank of Toronto*, 19 Q. B. 381, followed in *Taylor* v. *Ainslie*, 19 C. P. 78.

An affidavit that the "bill of sale was executed in good faith and for good consideration," instead of, "that the sale is bonâ fide and for good consideration:"—Held, under the circumstances of this case, insufficient. *Boynton* v. *Boyd*, 12 C. P. 334.

An affidavit that the mortgage was made to secure the mortgagee against the payment of such liability "of," instead of "for," the mortgagor, by reason of the notes to secure against the endorsement of which it was given:—Held, sufficient. *Mathers* v. *Lynch*, 28 Q. B. 354.

H. and I. being indebted to a bank, gave to T., the agent of the branch at H., and to the other plaintiff, their general manager, as trustees, a mortgage to secure it. T. had no express power to take this security, the other plaintiff was absent, and the bank on hearing of the transaction repudiated it. The mortgage, made by H., I., and S. of the first part, recited that they were indebted to the mortgagees, and had agreed to secure payment of their indebtedness, but H. alone assigned the goods, with a proviso to be void if *they* should pay. The affidavit was that H., I., and S., "the mortgagors," were indebted, that the instrument was not executed for the purpose of protecting the goods against the creditors of the said H., I., and S., "mortgagors therein named, or preventing the creditors of the said mortgagors," &c.:—Held, that describing the three as mortgagors, when only H. conveyed anything, was not a fatal objection. Quære, per Gwynne, J., whether the mortgage was within the statute at all, having been taken without the assent of the bank, and whether the self-constituted trustees could make the necessary affidavit. *Taylor et al.* v. *Ainslie*, 19 C. P. 78.

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2. *Affidavit and Statement on Refiling.*

The affidavit of execution need not be repeated, or any copy of it filed, on re-filing a mortgage. *Beaty* v. *Fowler*, 10 Q. B. 382.

No affidavit is necessary to verify the statement of the mortgagee's interest required by the act on re-filing. *Armstrong* v. *Ausman*, 11 Q. B. 498.

A statement made on the 28th of January, stated the amount due for interest as it would be on the 31st, the day of re-filing:—Held, no objection. *Fraser* v. *Bank of Toronto*, 19 Q. B. 381.

"Statement of amount still due from the mortgagor named in the original bill of sale by way of mortgage, of which the annexed is a true copy: that is to say, $212 for principal, and the sum of $12.50 for interest, amounting in the whole to the sum of $224.56:"—Held, not to sufficiently exhibit the interest of the mortgagee in the

goods claimed, nor shew the principal and interest due thereon. *O'Halloran* v. *Sills*, 12 C. P. 465.

Held, the question being referred to a judge in chambers by consent, that the statement set out in this case, filed upon the renewal of a mortgage, was sufficient. *Saulter* v. *Carruthers*, 9 L. J. 158.—C. L. Chamb.—Hagarty.

The statement annexed to the affidavit filed with the copy of mortgage, did not give distinctly all the information required by the act, but the affidavit and statement together contained all that was necessary:—Held, sufficient. *Walker* v. *Niles*, 18 Chy. 210.

The statement contained an item of $2.25, as paid for refiling, which the mortgagee had no right to charge:—Held, not to avoid the refiling. *Ib.*

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3. *Registration.*

Held, That 12 Vict. c. 74, applies only to mortgages of movable goods, and that there was therefore no necessity to register a mortgage of a term for years. *Fraser* v. *Lazier*, 9 Q. B. 679.

The mortgage in this case was filed upon an insufficient affidavit. The defendant was shewn to be a creditor of the mortgagor when the mortgage was given:—Held, therefore, that it was void as against him at the first; and the court refused, on the suggestion of the mortgagee, to question the regularity of the defendant's judgment entered after the date of the mortgage, or an attachment issued upon it. *Holmes* v. *Vancamp*, 10 Q. B. 510.

The description of the mortgagor in the mortgage is at most only primâ facie proof of his residence; and—Held, that in this case, upon the evidence set out, the jury were warranted in finding that he had changed his residence to the county in which the mortgage was registered, though he had left his family in the county as of which he was described. *Mellish* v. *Van Norman*, 13 Q. B. 451.

Under 12 Vict. c. 74, and 13 & 14 Vict. c. 62, a bill of sale of an execution debtor's goods executed by a shoriff to a purchaser, whether plaintiff in the execution or not, need not be filed. *Kissock* v. *Jarvis*, 6 C. P. 393.

Held, before 20 Vict. c. 3, that an execution coming in before the filing of an assignment is entitled to prevail, though a reasonable time for filing may not have elapsed. *Carscallen* v. *Moodie*, 15 Q. B. 92.

Assignments for the general benefit of creditors must be registered, unless there is a sufficient change of possession. *Ib.*; *Maulson* v. *Joseph*, 8 C. P. 15; *Heward* v. *Mitchell*, 10 Q. B. 535; *S. C.* 11 Q. B. 625; *Harris* v. *Commercial Bank*, 16 Q. B. 437.

Held, that a bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given. *Arnold* v. *Robertson*, 8 C. P. 147; followed in *Fraser et al.* v. *Gladstone*, 11 C. P. 125.

The fact that the debt is not due to the mortgagee himself for his own benefit, does not prevent the mortgage from being registered under the statute. *Brodie* v. *Ruttan*, 16 Q. B. 207. See also, *Baldwin* v. *Benjamin*. *Ib.*, 52.

Held, that the furniture, glass, crockery, table linen, beds, &c., on board a steamboat used for carrying passengers on Lake Ontario, passed under a mortgage of the vessel with all her apparel, furniture, &c., as part of the vessel; and that the mortgage, being of a registered vessel, was exempt from registry under the Chattel Mortgage Act. *Patton* v. *Foy*, 9 C. P. 512.

Held, that the assignment in this case was not avoided by a delay of eight days in registering it. *Balkwell* v. *Beddome*, 16 Q. B. 203.

Held, that the registry of a mortgage does not cause it to relate back to its date: *Feehan* v. *Bank of Toronto*, 10 C. P. 32; *Shaw* v. *Gault*, 10 C. P. 236; *Haight* v. *McInnes*, 11 C. P. 518.

In *Feehan* v. *Bank of Toronto*, 19 Q. B. 474, the Queen's Bench came to a different conclusion.

[26 Vict. c. 46, now enacts that the mortgage shall take effect from its date.]

One T. B. being indebted to J. B., the plaintiff, gives him a mortgage, covering the goods in question in this interpleader, to secure $640, dated the 5th of February, 1858, which was filed on the 8th, and was not subsequently refiled; on the 12th February, 1858, T. B. executed an assignment to R. and C. for the benefit of creditors, subject to this mortgage. On the 29th of January, 1859, T. B. made an absolute bill of sale to J. B. of the same goods, which was filed on the 2nd of February, 1859. B. and A., the defendants in this suit, recovered a judgment against T. B. on the 12th of September, 1861, upon which a fi. fa. was issued, and the goods in dispute seized on the 30th of December, 1861. J. B., the mortgagee, never had possession of the goods in question:—Held, 1. That J. B. never having taken possession of the property, and no copy of the mortgage having been filed within thirty days before the year expired from its first filing, it ceased to be valid against the creditors of T. B., or any subsequent purchaser or mortgagee in good faith for value. 2. That the due execution and proper filing of the assignment for the benefit of creditors made it a valid instrument, and that upon the expiration of the mortgage at the end of the first year, this assignment would take precedence, and cut it out, notwithstanding it was expressed on its face to be subject to the mortgage. 3. That the bill of sale of the 29th January, 1859, vested no title in the plaintiff, inasmuch as the interest of the grantor was vested in the trustees for creditors, from whom the plaintiff did not purchase bonâ fide and for value. The verdict for defendants was therefore upheld. *Boynton* v. *Boyd et al*, 12 C. P. 334.

Held:—Burns, J., diss., that under 20 Vict. c. 3, a copy of an absolute assignment may be filed, as well as of a mortgage. *Harris et al* v. *Commercial Bank*, 16 Q. B. 437, followed in *Perrin* v. *Davis*, 9 C. P. 147.

As to certain goods belonging to the assignor, but lying in the customs warehouse sub-

ject to duties, no change of possession having taken place, and no compliance being shewn with the formalities required by the Customs Act, 10 & 11 Vict. c. 31:—Held, that such goods did not pass by the assignment. Per Robinson, C. J.—The statute requiring registration does not apply to such goods, as they are not capable of delivery, and they would therefore have passed if the directions of the Customs Act had been followed. *Harris et al.* v. *Commercial Bank*, 16 Q. B. 437.

Goods covered by mortgage were removed from the county, either on an alleged sale by mortgagor, or against his will, or stolen from him, and were sold in another county to defendant, the mortgagor being, at all events, no party to the removal. Just over two months from removal, the mortgagee, on hearing where they were, went and demanded them from defendant:—Held, that such a removal was not within the statute, requiring a copy to be filed within two months of the permanent removal of the goods from the county. *Clarke* v. *Bates*, 21 C. P. 348.

One R. agreed with defendants to quarry and get out for them a quantity of stone for works in progress. To carry out the agreement defendants advanced money, and by the contract between them, it was stipulated, "that upon all materials upon which the parties of the second part (defendants) shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all moneys advanced upon the same, or under this contract, and the same shall become, from the time of their preliminary construction, the absolute property of the parties of the second part, subject to the right of the parties of the second part to reject the same, should the same be rejected as hereinbefore mentioned; nor shall the same, unless afterwards rejected, be removed by the said party of the first part, R. or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as tools, instruments, and other things, shall be in the charge and at the risk of the party of the first part:"—Held, that this clause must operate in defendant's favour, if at all, as a mortgage or bill of sale, and as it had not been registered, and the facts, stated in the case, shewed no sufficient change of possession; that the defendants claiming stone quarried under it as against a subsequent bonâ fide purchaser could not succeed. *Howitt* v. *Gzowski*, 5 Chy. 555.

See *Baldwin* v. *Benjamin*, 16 Q. B. 52, p. 575; *Armstrong* v. *Ausman*, 11 Q. B. 498, p. 575.

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4. *Change of possession.*

Assignments for the benefit of creditors.]—In considering whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purposes of the assignment, and the circumstances of the case; and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignees should remove the goods or take exclusive possession, as in the case of an ordinary sale. The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact for the jury as evidence to shew that the transfer was colourable:—Held, that here the jury were warranted in finding a sufficient change. *Maulson* v. *Commercial Bank*, 17 Q. B. 30.

Where a debtor just before several executions issued against his property, assigned it all to trustees for the benefit of his creditors, delivering to the agent of the trustees one article in the name of all, and then took down his name from over his shop door, but remained with his clerks in the possession of the goods, selling them as if his own, but accounting to the trustees for the proceeds; and the property was taken under the executions by the sheriff:—Held, in trespass by the trustees against the sheriff, the jury having negatived their possession, that a verdict for the defendant was correct. *Armstrong et al.* v. *Moodie*, 6 O. S. 538.

The evidence, as stated in this case, was held not sufficient to shew an actual and continued change of possession. *Heward* v. *Mitchell*, 10 Q. B. 535.

The plaintiffs, assignees for the benefit of creditors, proved clearly a delivery of the goods; but it was shewn that they had employed the assignor's clerk as their agent to keep and sell the goods in the shop, and that he had in some instances, without their knowledge, permitted the proceeds to be applied in payment of some small claims against the assignor, and once had paid money into the bank to the credit of the assignor, that he might draw a check for it immediately, to pay a privileged claim which they had instructed their agent to pay; but the plaintiffs knew nothing of the deposit in the bank, or of the drawing the check. It also appeared that their agent took no steps to give public intimation of the change of possession, either directly or by removing the assignor's name as the party carrying on the business, though he made weekly returns of sales to the assignees; and this seemed to have been done at the solicitation of the assignor, who represented to him that he hoped to make arrangements again to resume the business. It appeared, too, that the fact of any change having been made was generally unknown in the neighbourhood:—Held, that upon this evidence it was properly left to the jury to say whether there was an actual and continued change of possession, and that they were warranted in finding that there was. *Foster et al.* v. *Smith*, 13 Q. B. 243.

As to the goods in the warehouse of the assignor, C., who had been his clerk and bookkeeper, was employed by the plaintiffs, assignees for the benefit of creditors, as their agent to dispose of the stock, and collect the debts due, &c.; and he took possession accordingly, opened new books in the name of the assignees, and sold and collected the assets under their instructions, but continued in the same place, the name of the assignor remaining above the door as usual:—Held, a sufficient change of possession within the meaning of the Act. *Harris et al.* v. *Commercial Bank*, 16 Q. B. 437.

Held, that the facts, stated in this case, did not shew a sufficient change of possession to dispense with filing. *Wilson* v. *Kerr*, 17 Q. B. 168.

Other Cases.]—Quære, per Robinson, C. J., whether, when as to part only of the goods assigned there has been no change of possession, the assignment, unless filed, is void altogether.

Olmstead v. *Smith*, 15 Q. B. 421. See *Short* v. *Suttan*, 12 Q. B. 79; *Harris* v. *Commercial Bank*, 16 Q. B. 437.

Held, that although the deed in this case, for want of registry, could have no effect with respect to the furniture, of which there had been no sufficient change of possession, yet that it was not thereby avoided as to those goods which went into and remained in possession of the assignees. *Taylor* v. *Whittemore*, 10 Q. B. 440.

An interpleader issue is to be taken distributively, and an assignee should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registry. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

M., a ship builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose, some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M.'s men, when A. distrained both it and the vessels for rent:—Held, there had been a sufficient change of possession of the timber to dispense with a registered assignment, and that both it and the vessels were exempt from distress. *Gildersleeve* v. *Ault et al.*, 16 Q. B. 401.

One Robins agreed to make for Ruthven, the execution debtor, an iron fence for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance, G. advanced the money, taking Ruthven's note, and the fence, which was then in Robin's yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written agreement. When the note fell due Ruthven authorized G. to sell the fence, but it remained until it was seized under an execution against Ruthven:—Held, that the execution could not prevail against G.'s claim. *Gurney et al.* v. *James*, 19 Q. B. 156.

On an interpleader to try the title to two locomotives, it appeared that when they were half finished, plaintiff verbally agreed to buy them from the manufacturer for a certain sum, for which he was to finish them:—Held, that the Chattel Mortgage Act did not apply, a change of possession being impossible under the circumstances. *Burton* v. *Bellhouse*, 20 Q. B. 60.

A mortgage to secure the mortgagee against endorsement or contingent liabilities, unless there is a delivery and change of possession, must be registered; and the liability for which it is given must accrue due within one year from its date. *Turner* v. *Mills*, 11 C. P. 366.

Plaintiff, on the 31st May, 1861, purchased and paid for a carriage from F., a carriage maker, for $175, but did not remove it from the shop. Shortly after the plaintiff's wife saw another carriage building, which she preferred, and it was agreed that the plaintiff should have it if he chose, for an additional sum, the one first purchased to be his if he did not take the other. At the time of the sale the defendant, as sheriff, held an execution against F., of which F. had notice, and he received another after the sale. F. carried on business as usual, with defendant's consent, and defendant did not seize till the 11th June:—Held, that the plaintiff, having left the carriage in the vendor's hands more than a reasonable time for its removal, the sale came within the act, C. S. U. C. c. 45, and there being no delivery and change of possession, nor any bill of sale filed, the property remained in F.'s hands liable to seizure. *Carruthers* v. *Reynolds*, 12 C. P. 596.

Plaintiff bought from R. a number of sheep, paying him part at the time and the balance within a few days. Upon the first payment being made plaintiff marked the sheep with red paint as his property, and they were then placed apart from the rest of R.'s sheep in a separate field on the latter's farm, where they were to remain until required by plaintiff. Plaintiff was a butcher, and it appeared to be the custom among butchers to leave with farmers stock purchased from them until convenient to remove it. This had also been the course of dealing between plaintiff and R. on previous occasions. The sheep thus remained on R.'s premises until seized under an attachment against R., as an absconding debtor:—Held, that the mere marking of the sheep, or the removal of them from one field of the seller to another, did not constitute a sufficient delivery or change of possession: Held also, that there was no evidence of a sufficiently established custom or mode of dealing among farmers of treating as their own, property really belonging to others, to put third parties upon enquiry as to the actual ownership. Quære, whether such enquiry would be admissible in a case arising under the statute in question. *Doyle* v. *Lasher*, 16 C. P. 263.

The defendants, warehousemen, holding certain grain for one M., gave him a warehouse receipt, which on the 3rd September he endorsed to the plaintiff, who had purchased the grain either from or through him. On the 5th September, the sheriff received a fi. fa. against M., under which he seized, and M. having on the 22nd made a voluntary assignment in insolvency, the sheriff gave an order for the grain to the assignee. The plaintiff brought detinue and trover against defendants, who had shipped a portion of the grain to him on the 23rd October, but retained the rest:—Held, that he was entitled to recover: that the grain passed to the plaintiff by the sale; and there was a sufficient change of possession, and the only one that the nature of the case permitted, in the fact that upon and after the sale the defendants held the grain for the plaintiff, instead of for M., who was not himself in actual possession when he sold. *Richardson* v. *Gray et al.*, 29 Q. B. 360.

To make valid against creditors of the vendor a sale of timber to be cut down by him, there must be an actual delivery to the purchaser, after the timber is cut down, followed by an actual and continued change of possession, as in the case of other chattels. *McMillan* v. *McSherry*, 15 Chy. 133.

It is not a question of law, but for the decision of a jury, under all the circumstances, whether there has been an immediate and continued change of possession sufficient to satisfy the statute. *Waldie* v. *Grange*, 8 C. P. 431.

The assignor remained in his store after the assignment, having the same clerk, and his sign remained over the door, nor were any goods re-

moved. There was no evidence of change of possession that could be apparent to others than parties concerned, and the bill of sale was not filed :—Held, not sufficient change of possession. *McLeod* v. *Hamilton*, 15 Q. B. 111.

Where the land and buildings on which the chattels are conveyed by the same deed as the chattels, the assignee, though held to be in possession of the land by virtue of his deed, is not to be looked upon as having taken possession of the chattels also, so as to dispense with filing the assignment; he must either actually take possession of the buildings, or the assignor must go out. *Carscallen* v. *Moodie*, 15 Q. B. 92.

C. owning a mill, with the machinery in it, assigned the whole property, both real and personal, including the lumber, stock in trade, &c., on the premises, to the plaintiff, in trust for himself and other creditors. The deed was registered on the day of execution, but not filed in the County Court, when, on the day after the execution, the sheriff seized the machinery, &c., under a fi. fa. against goods; nor was the deed afterwards filed. The assignor did not leave the mill, but continued to work it with his men for the benefit of the assignee :—Held, 1. That there was not an actual and continued change of possession; and, 2. That for want of filing the assignment the fi. fa. must prevail. *Ib.*

Held, that the change of possession in this case was sufficient, and being complete before the defendants' fi. fa. was placed in the sheriff's hands, the plaintiffs were entitled to recover. *Taylor et al.* v. *Commercial Bank*, 4 C. P. 447.

Held, under the facts of this case, that if the mortgage had come within the act it would have been void, not having been kept in force by registry, or accompanied by change of possession. *Frazer* v. *Lazier*, 11 Q. B. 679.

On the 18th of July, 1851, one M. gave the plaintiff a mortgage on certain goods, which was duly registered on the following day. On the 16th of July, 1852, he executed another mortgage, but to secure a smaller sum, the goods assigned being, with a few exceptions, the same as the first; this was registered on the 19th. On the same day, and before the registry, a fi. fa. against M. was placed in the sheriff's hands. There was not in the case of either assignment any actual delivery of goods :—Held, that the fi. fa. was entitled to prevail; that the first mortgage was waived by taking the second, and was therefore out of the question, though in any case it would have ceased to be in force after the 18th of July, and the second filing would have been too late. *McMartin* v. *McDougall*, 10 Q. B. 399

See *Short* v. *Ruttan*, 12 Q. B. 79, p. 574; *Cumings* v. *Morgan*, 12 Q. B. 565, p. 574; *Harris* v. *Commercial Bank*, 16 Q. B. 437, p. 581; *Howell* v. *McFarlane*, 16 Q. B. 469 p. 588; *Hutchison* v. *Roberts*, 7 C. P. 470, p. 588; *Mills* v. *King*, 14 C. P. 223, p. 590.

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5. *Re-filing.*

Where a mortgage was re-filed forty-seven days before a year from the first filing, it was held insufficient, the statute requiring that such re-filing shall take place "within thirty days next preceding" the expiration of one year. *Beaty* v. *Fowler*, 10 Q. B. 382.

Held, that where the first filing was on the 15th May, 1852, a re-filing on the 14th May, 1853, was clearly in time. *Armstrong* v. *Ausman*, 11 Q. B. 498.

Held, that a mortgagee, to retain his priority, must, under 12 Vict. c. 74, continue to re-file his mortgage after the first re-filing at the end of the first year. *Kissock* v. *Jarvis*, 9 C. P. 156.

Mortgages filed under 12 Vict. c. 74, held not to require re-filing under 20 Vict. c. 3, which repeals it. *Culloden* v. *McDowell*, 17 Q. B. 359; *Grand Trunk Railway Co.* v. *Lees*, 9 C. P. 249.

Where possession had been taken under default in the mortgage within a year from its filing :—Held, that re-filing was not necessary. *Ross* v. *Elliott*, 11 C. P. 221.

E. mortgaged a horse to defendant in April, 1864, with a proviso that if he should attempt to dispose of it defendant might take possession and sell. E. did dispose of the horse to the plaintiff within a few weeks. The mortgage was not refiled, but the defendant took another in February, 1865, for the same money, with other advances. In July, having first discovered the sale, he seized under the proviso :—Held, that having neglected to refile the mortgage and taken another, he had lost his right to seize. *Courtis* v. *Webb*, 25 Q. B. 576.

One S., on 25th March, 1868, executed a mortgage to plaintiff, payable the following October, with a proviso that on default the plaintiff, instead of selling the goods, might take possession as absolute owner. On default being made plaintiff accordingly went through a form of taking possession, without, however, any change in the possession, or any assignment of the mortgagor's interest taken or registered, and executed a lease of the goods to the mortgagor. After default, and before this taking of possession by plaintiff, an execution against the goods was placed in the sheriff's hands, but no seizure was made until November, 1869, after the expiration of the mortgage, which had not been renewed :—Held, that the transaction between the parties was void, and that the execution took the goods. *Chamberlain* v. *Green*, 20 C. P. 304.

The owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held, not to be prejudiced by his subsequent mortgage of the land. The mortgage was not re-filed within the year, but within the year, the mortgagor having sold the fixtures, the purchaser gave the mortgagee a mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid :—Held, that the omission to refile did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration," within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect. Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures. *Rose* v. *Hope*, 22 C. P. 482.

An immaterial variation between a mortgage and the copy filed does not invalidate the re-filing. *Walker* v. *Niles*, 18 Chy. 210.

A mistake in the copy in the number of the lot where the chattels were, was held to be immaterial under the circumstances. *Ib.*

The statement contained an item of $2.25 as paid for re-filing, which the mortgagee had no right to charge :—Held, not to vitiate the instrument. *Ib.*

See *McMartin* v. *McDougall*, 10 Q. B. 399, p. 585 ; *Boynton* v. *Boyd*, 12 C. P. 334, p. 580.

IV. Description of Goods.

A mortgage on saw logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out of them. *White* v. *Brown*, 12 Q. B. 477.

Held, before 20 Vict. c. 3, that goods in a mortgage were sufficiently described as "all the stock of dry goods, hardware, crockery, groceries, and other goods, wares, and merchandise in the store and premises occupied by the mortgagor at," &c., if it were clearly made out that those in question were in the mortgagor's store, and his, at the execution of the instrument ; and—Held, also, that the evidence of identity in this case was sufficient. *Ross* v. *Conger*, 14 Q. B. 525.

A deed was executed by J. N. Kline & Son, of the first part, whereby—after reciting that they had proposed and agreed to assign *all their personal estate and effects* to certain parties of the second part—they conveyed and assigned to the said parties "all and singular the stock in trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to or due or owing to the said parties of the first part, *and which are set forth in the schedule hereto annexed, marked with the letter "A," and subscribed by the parties hereto of the first and second parts : and all the personal estate whatsoever of the said parties of the first part*, and all their estate and interest therein." No schedule was attached to the deed at its execution, but schedules were afterwards annexed, signed John N. Kline & Son, John N. Kline, junr., Anthony Kline :—Held, that independently of the schedule, the words of the assignment were large enough to include both the individual and joint personal property of John N. Kline. *Heward* v. *Mitchell*, 10 Q. B. 535.

Plaintiff claimed under an assignment which had a schedule of goods attached, intended to be passed thereby. The goods in question had gone into the store prior to the execution of the assignment, and were not in the schedule :—Held, that the assignment only passed what was contained in the inventory. *Gunn* v. *Ruttan*, 7 C. P. 516.

All the goods, chattels, furniture, and household stuff "now in Sword's Hotel, Toronto, or particularly mentioned and expressed in a certain schedule marked A, hereunder written or hereunder annexed," will not include goods not in the schedule. *Kingston* v. *Chapman*, 9 C. P. 130.

N. & Co. by deed assigned to M. all and singular the "furniture," &c., "and effects of them, the said N. & Co., and which will be more particularly mentioned and described in the schedule to these presents hereafter to be annexed, marked A., and all other their personal estate and effects whatsoever and wheresoever situated." The schedule was not filled up at the time of executing or filing the assignment, but was afterwards filled up by a third person without reference to the assignors, and the books in question were mentioned in it, but remained in their possession. Afterwards N. & Co., by another deed, assigned to the plaintiff all the debts owing to them, giving him power to examine and take extracts from their accounts for the purpose of making up and adjusting such debts properly. The books were handed to the plaintiff by N. & Co., in pursuance of this deed, and having been taken from him by defendant, he replevied. Defendant set up M.'s right :—Held, that the plaintiff was entitled to recover, for the schedule to the first assignment, filled up as it was, could have no effect, and the books did not pass under the operative words. *Crawford* v. *Brown*, 17 Q. B. 126.

A trader, in consideration of a debt, by deed assigned to the plaintiff all his stock in trade, &c., on certain premises, "or in course of delivery to him :"—Held, to pass his interest in goods lying at the wharf in the town where he resided, but not actually delivered to him. *McPherson* v. *Reynolds*, 6 C. P. 491.

"All my stock in trade, goods, wares, and merchandise in my store situate at," &c. Semble, not sufficient ; but it was unnecessary to decide the question, as there had been a change of possession. *Hutchison* v. *Roberts*, 7 C. P. 470.

"All and singular his stock in trade, chattels, debts," &c., and "all his personal estate and effects whatsoever and wheresoever :"—Held, as there had been a change of possession, that the 20 Vict. c. 3 did not apply, otherwise the description would have been insufficient. *Howell* v. *McFarlane*, 16 Q. B. 469.

All the assignor's "stock in trade, wares, merchandise, groceries, household furniture, and movable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf, and tenement in Ontario street, in the city of Kingston, or elsewhere (save and except and excluding the goods and chattels of the said J. F.," the assignor, "in the possession, control, or charge of D. McW. of Adolphustown only,) and also all his stock in the Kingston Marine Railway Company :"—Held, that shares in the Bay of Quinte Steamboat Company would not pass. *Hewitt* v. *Corbett*, 15 Q. B. 39.

"All the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, and every other article or thing on or about the south half of lot 24, in," &c. :—Held, sufficient. *Balkwell* v. *Beddome*, 16 Q. B. 203.

All the goods, &c., of the assignor being in and about his warehouse on Y. street, and all his furniture in and about his dwelling-house on W. street, and all bonds, bills, and securities for money, loans, stock, notes, &c., whatsoever, and wheresoever, belonging, due, or owing to him :—Held, sufficient. *Harris* v. *Commercial Bank*, 16 Q. B. 437.

"All and singular the stock in trade of the said W.," the assignor, "situate on Ontario street, in said town of Stratford, and also all his other goods, chattels, furniture, household effects, horses and cattle, and also all bonds, bills, notes, debts, choses in action, terms of years, leases, and securities for money :"—Held, insufficient as to all the goods. *Wilson* v. *Kerr*, 17 Q. B. 168 ; affirmed in Appeal, 18 Q. B. 470.

"Seven horses, three lumber waggons, one carriage, one pleasure sleigh, all the household furniture in possession of the said party of the first part, and being in his dwelling-house, all the lumber and logs in and about the saw mill and premises of the said grantor, and all the blacksmith's tools now in possession of the said party of the first part, six cows and four stoves :"—Held, a sufficient description as to the household furniture, lumber and logs, and insufficient as to the other goods. *Rose* v. *Scott*, 17 Q. B. 385.

Held, that the furniture, glass, crockery, table linen, beds, &c., on board a steamboat used for carrying passenge. Lake Ontario, passed under a mortgage of the vessel with all her apparel, furniture, &c., as part of the vessel ; and that the mortgage, being of a registered vessel, was exempt from registry under the Chattel Mortgage Act." *Patton* v. *Foy*, 9 C. P. 512.

A mortgage not sufficiently describing the goods is void as against subsequent purchasers in good faith, and notice of such mortgage to the purchaser will not affect his right. *Moffatt* v. *Coulson*, 19 Q. B. 341.

The goods were described as set forth in the schedules annexed. Schedule C was headed, "Household furniture in J. E. W.'s residence," and specified the several articles in detail, giving a list of those contained in each room, from which the sheriff said he had no difficulty in identifying them :—Held, sufficient. Schedule D was headed, "Household furniture and property of J. R. McDermott," and the several apartments containing the furniture were specified. Held, also, sufficient, as it might be assumed to refer to the party's residence. *Fraser* v. *Bank of Toronto*, 19 Q. B. 381.

Held, if it were necessary to determine that point, that the two locomotives sold were sufficiently described in the deed set out in this case. *Burton* v. *Bellhouse*, 20 Q. B. 60.

In an assignment the goods were described as "all the household furniture, goods, chattels, and effects belonging to and being in the dwelling-house of the said Burrowes, and which are enumerated and set forth in the second schedule hereunto annexed ; and also the stock in trade, implements of business, and machinery in the said schedule enumerated and set forth." In the margin of the schedule different localities were mentioned, and opposite to them the goods specified, the articles in question being as follows :—Stable and coach house : three horses, three sets of harness, one straw-cutter, one cow, one cutter, two buggies, &c. Lumber yard : two waggons, one pair bob-sleighs, four wheel-barrows, tressels and scaffolding, *old lumber, &c., two thousand feet of oak and hardwood plank and boards, sixty thousand feet of prime assorted sizes, two thousand feet of flooring, one pair of timber wheels, one land cart, two yard dogs, cut stone* :—Held, that the articles in italics were sufficiently described, and passed as stock in trade, and that the description as to the others was insufficient. *Haworth* v. *Fletcher*, 20 Q. B. 278.

An assignment of "all the stock in trade, merchandise, goods, and effects," in the shop occupied by the assignor, situate on the south side of King street, in the city of Toronto, and known and numbered 77, which said goods and chattels are particularly mentioned in the schedule annexed hereto, and marked A :" which schedule began, "stock in workshops," and went on describing what was therein, and next described what was in the front store :—Held, sufficient to pass not only what was contained in the front shop first described, but what was contained in a continuous shop consisting of the front store and two workshops. *Noell* v. *Pell*, 7 L. J. 322. —C. L. Chamb.—Draper.

"14,415 feet of prepared moulding :"—Held, a sufficient and full description under the statute. *Ib.*

The property was described as "the goods, chattels, furniture, and household stuff expressed in the schedule hereunto annexed," which schedule was headed, "An inventory of goods and chattels in the possession of one J. R.," on a named day. It proceeded to mention certain rooms and the articles therein contained : then jewellery, blankets, household linen, silver, &c., the locality of the house in which the goods, &c., were contained not being mentioned :—Held, sufficient. *Powell* v. *Bank of U. C.*, 11 C. P. 303.

C. and J., by mortgage, dated 6th February, 1863, conveyed certain goods, mentioned and described in schedules attached thereto, to the plaintiff. Some of the goods mentioned therein were in possession of the manufacturer, one R. ; other portions were in certain rooms in the American and Burlington hotels. The description given merely designated a portion of the property by locality, giving no particular description, and was as follows : "All and singular the goods and chattels, furniture, household stuff, and articles particularly mentioned and expressed in the schedule hereunto annexed, and which are now in the warehouse of James Reid, in the city of Hamilton, and are about to be placed in the building known as the Burlington Hotel." The schedule began : "Schedule mentioned and referred to in the annexed indenture : one set parlour furniture," &c. (describing some articles), "in parlour H. One walnut bedstead," &c. (describing several articles) "in parlour C :"—Held, 1. Upon the authority of Frazer *v.* The Bank of Toronto, 19 Q. B. 381, and Powell *v.* The Bank of Upper Canada, 11 C. P. 303, that all the goods in the schedule described as having been in certain rooms in either of the hotels, passed by the mortgage ; 2. That all the goods described as being in certain rooms, and which were not in those rooms at the time, did not pass ; 3. That goods described specifically (as one omnibus, &c.,) without any local description, passed, under the authority of the same cases ; also, because the description would be sufficient in detinue ; 4. That all the goods which were made at the time of executing the mortgage, and were the property of the mortgagors in Reid's warehouse, passed under the mortgage as a distinct grant from those in the schedules. *Mills* v. *King*, 14 C. P. 223.

Some goods not mentioned in the schedules were delivered by one of the mortgagors to the plaintiff's agent, on the 4th May, 1863; the sheriff received the execution on the 27th:—Held, that such delivery was good against the sheriff. *Mills* v. *King*, 1 C. P. 223.

The goods were specified as particularly mentioned in a schedule annexed, in which they were described as one buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter; and the following household furniture, namely, in the small parlour, one stove, &c., enumerating the articles in different rooms:—Held, sufficient as to the furniture, but insufficient as to the other goods. *Sutherland* v. *Nixon*, 21 Q. B. 629.

"One set of double harness, four cows, one yoke of steers, four yearling calves, eighteen sheep, one sow and pigs, two waggons, one cutter, one sleigh, two ploughs, one harrow, one cultivator, one straw cutter, three stoves, two dozen chairs, four tables, five bedsteads, bed and bedding, two bureaux, one side-board, two carpets," called goods, chattels, furniture, and household stuff, without stating where they were situate or in whose possession:—Held, insufficient; but semble, that the mortgage was good to pass other property properly described. *Hiscott* v. *Murray*, 12 C. P. 315.

Quære, are the words, "all bills, bonds, rates, securities, accounts, books, book debts, and documents securing money," in a general assignment for the benefit of creditors, sufficient to pass a policy on the life of the assignor held by him for his own benefit. *Lee* v. *Gorrie et al.*, 1 L. J. N. S. 76.—C. L. Chamb.—Richards.

The goods were described as "all the goods in the house of the mortgagor; in bedroom No. 1, one bureau," &c., describing the articles in each room, and adding, "all the hereinbefore described goods and chattels being in the dwelling house of the party of the first part, situate on Queen street, in the town of Brampton; also, one bay mare, one covered buggy," &c., "being on the premises of the party of the first part on said Queen street; also the following goods and articles, being in the store of the party of the first part, on the corner of Queen and Main streets, in the said town of Brampton; that is to say, eighty-five gallons of vinegar," giving a long list; "and also the following goods, being of the stock in trade of the party of the first part, taken in the month of April last; that is to say, sixteen pieces of tweed," &c.:—Held, that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store. *Mathers* v. *Lynch*, 28 Q. B. 354.

Remarks as to the insufficiency of description of goods by locality. *Ib.*

See *Corporation of Lanark and Renfrew et al.* v. *Cameron*, 9 C. P. 109.

V. Consideration and Bona Fides.

1. *Mortgages to secure Advances or as Indemnity.*

The mortgage was given, as appeared by the recitals in it, to secure the plaintiff against endorsements for the mortgagors, and before the re-filing he had taken up most of the notes and renewed them by his own notes, to which the mortgagors were not parties:—Held, that the mortgage was not thereby invalidated. *Fraser* v. *Bank of Toronto*, 19 Q. B. 381.

Quære, per McLean, C. J., whether a mortgage to secure advances in flour is within C. S. U. C. c. 45, s. 5, or whether only advances in money are intended. Semble, per Burns and Hagarty, JJ., that the act extends to advances either in money or goods. *Sutherland* v. *Nixon*, 21 Q. B. 629.

Where advances were to be made in sums and at times specified, and a mortgage taken to secure their repayment:—Held, that a departure from the agreement in the times and manner of such advances could not alone defeat the mortgage, though it might be urged to the jury as against the bona fides of the transaction. *Strange* v. *Dillon*, 22 Q. B. 223.

A mortgage under C. S. U. C. c. 45, s. 5, may be given as security against past or concurrent, but not against future, endorsements or liabilities. If it did not apply to past liabilities, then a mortgage to secure against them would not be avoided by the act for want of compliance with its provisions. *Mathers* v. *Lynch*, 28 Q. B. 354.

A recital that the plaintiff had endorsed three notes made by J., giving the dates, sums, and the time of payment, for the accommodation of J., and that J. had agreed to enter into the mortgage to indemnify and save harmless the mortgagee of and from payment of said notes, and from all liability or damage in respect thereof:—Held, clearly sufficient. *Ib.*

See *Boulton* v. *Smith*, 17 Q. B. 400, 18 Q. B. 458, p. 574; *Clark* v. *Bates*, 21 C. P. 348, p. 575; *Beecher* v. *Austin*, 21 C. P. 334, p. 577; *Robinson* v. *Paterson*, 18 Q. B. 55, p. 593.

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2. *Other Cases.*

The facts that a bill of sale, on the face of it absolute, is in truth only a mortgage, and that the vendor after the sale is allowed to remain in possession of the goods, are both badges of fraud to be weighed by a jury, not conclusive proofs of fraud. *Hunt* v. *Corbett*, 7 Q. B. 75.

The mortgage in this case was filed upon an insufficient affidavit. The defendant was shewn to be a creditor of the mortgagor when the mortgage was given:—Held, therefore, that it was void as against him at the first; and the court refused, on the suggestion of the mortgagee, to question the regularity of the defendant's judgment entered after the date of the mortgage, or an attachment issued upon it. *Holmes* v. *Vancamp*, 10 Q. B. 510.

By the mortgage the mortgagor was to continue in possession, selling the goods, and accounting to the mortgagee for the proceeds on demand:—Held, not to invalidate the mortgage, or afford per se any evidence of fraud. *Ross* v. *Conger*, 14 Q. B. 525

Held, that a bill of sale (registered) for the consideration of 5s., with a separate declaration of trust referred to and forming part of the instrument (not registered) was invalid, and that the conveyance registered must shew the true and full consideration for which it is given.

Arnold v. *Robertson*, 8 C. P. 147; followed in *Fraser et al.* v. *Gladstone*, 11 C. P. 125.

The plaintiff claimed goods under a mortgage duly filed. The main question was the consideration for such mortgage. The plaintiff proved that it arose mainly for goods left in the mortgagor's possession by the plaintiff's grandfather. The jury having found for the plaintiff, the court refused to interfere. *Harrington* v. *Marsh*, 8 C. P. 227.

Where a debtor mortgaged all his personal property, including the most trifling articles, to secure a debt very small in proportion to their value:—Held, that although no evidence of value was given, and the bona fides of the debt was not disputed, it should have been left to the jury to say whether these circumstances were not sufficient to shew that the deed was made, not for the security of the assignee, but for the purposes of the debtor, and to shield his property from other creditors. *Fleming* v. *McNaughten*, 16 Q. B. 194. See, also, *Balkwell* v. *Beddome*, 16 Q. B. 203.

Of the household furniture there had been no change of possession, and the court being left to draw the same inferences as a jury would:—Held, per Robinson, C. J.—That notwithstanding the registration of the assignment, such furniture did not pass:—Per Burns, J.—That it did not pass, because the assignment was not properly registered by filing a copy only. *Harris et al.* v. *Commercial Bank*, 16 Q. B. 437.

The consideration in the mortgage being stated at £10,000 and upwards:—Held, good, the amount being certain as to £10,000, and it not being shewn that there were more goods than would satisfy that amount. *McGee* v. *Smith*, 9 C. P. 89.

A provision that the household furniture of one partner is not to be sold for the purposes of the deed until the partnership effects are exhausted, is in law no badge of fraud. *Ib.*

Under 20 Vict. c. 3, a mortgage cannot be supported which is given in great part for a debt not existing, but for advances which the mortgagee has merely promised verbally to make, and had not made when the mortgage was executed or the affidavit for registry made. *Robinson* v. *Paterson*, 18 Q. B. 55.

In an action against the sheriff for goods seized, the plaintiffs claimed under a mortgage of the 12th November, 1857, and defendant under an execution of the 18th. The time for payment had not arrived, but the mortgage provided that if the mortgagor should sell any of the goods, the mortgagee might take possession; and the plaintiffs, who were in possession at the seizure, claimed to have taken the goods under this condition, though the breach of it and the plaintiffs' entry therefor was not proved:—Held, Burns, J., diss., that the plaintiffs need not prove the consideration for his mortgage in the first instance, but that it must be presumed until impeached. *Squair et al.* v. *Fortune*, 18 Q. B. 547.

Where a bill of sale was made to two jointly, and filed on an affidavit of bona fides by one, but the evidence shewed that the consideration was made up of two debts, due to the vendees separately:—Held, sufficient. *McLeod* v. *Fortune*, 19 Q. B. 100.

In an interpleader issue, the court being left to draw the same inferences as a jury:—Held, that it was fraudulent for the assignor to assign on the understanding that he should be allowed to keep possession of his household furniture. *Wilson* v. *Kerr*, 17 Q. B. 168.

Affirmed on appeal.—Draper, C. J., saying, that the reasonable conclusion was that it had been returned to the assignor for his own use, and was therefore subject to execution. *S. C.*, 18 Q. B. 470.

Interpleader, to try the right of plaintiff to goods seized under an execution against one Lafler at defendant's suit. A verdict was given for plaintiff for the part of the goods contained in a mortgage to one Lawrence. The judgment debtor mortgaged certain goods to Lawrence, under a power of sale in which mortgage the goods were sold to F., as agent for plaintiff and defendant. It was held, upon the facts and evidence set out in the case, that the verdict was not sustained, there being reason to infer that the plaintiff had given up his interest in the goods to Lafler; and a new trial was granted on payment of costs. *May* v. *Routlege*, 14 C. P. 534.

A mortgage was given for $1070. It afterwards appeared that the amount was made up in part of a note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage, and not paid for some months afterwards:—Held, that in the absence of fraud the mortgage was valid. *Walker* v. *Niles*, 18 Chy. 210.

VI. Rights and Liabilities of Mortgagor and Mortgagee.

1. *As to Possession.*

An action of trespass will not lie by a mortgagee against a sheriff for seizing goods which were subject to a mortgage, but of which the mortgagors had possession. *Street* v. *Hamilton*, 5 O. S. 658.

Plaintiff mortgaged to defendant, with a proviso for redemption on payment of £125 on the 20th of October, and an agreement that the plaintiff should account to defendant for the price of any of the goods sold by him in the course of business before that day, and that on default, or in case plaintiff should attempt to sell or dispose of the goods without defendant's consent in writing, defendant might enter and take said goods. On the same day defendant gave the plaintiff a writing authorizing him to proceed to sell the goods that day mortgaged to him, "and to continue selling the same until further notice in writing, subject nevertheless to the proviso of the said bill of sale in other respects." The plaintiff, on the 17th of October, mortgaged the same goods to one C. to secure a debt:—Held, a violation of the agreement between plaintiff and defendant, and that defendant was entitled to enter and take possession of the goods. *Closter* v. *Headley*, 12 Q. B. 364.

A mortgagee who has not taken actual possession, is not liable in trespass for an injury occasioned by the goods mortgaged. *Campbell* v. *Reid*, 14 Q. B. 305.

M. & Co. having wrongfully placed a quantity of stone on the plaintiff's land, afterwards

mortgaged it with other property to defendant. Default had been made in payment, but the defendant had not taken possession, or interfered in any way with the stone; when asked to remove it, however, he had refused, and forbade the plaintiff doing so himself:—Held, that as mortgagee he was not liable to the plaintiff in trespass for allowing the stone to remain. *Ib.*

The treasurer of an insurance company, for whom he has taken a mortgage in his own name, may sue a wrong doer for taking the goods mortgaged, although he has no beneficial interest in them. *Brodie* v. *Benjamin*, 16 Q. B. 207. See, also, *Baldwin* v. *Benjamin*. *Ib.* 52.

A mortgagee may maintain an action against a person seizing and selling the property mortgaged, the right of possession of the goods at the time of such sale being rightfully in the mortgagor, and the reversionary estate in the plaintiff as mortgagee. *McLeod* v. *Mercer*, 6 C. P. 197.

B. mortgaged to plaintiff certain goods, with a covenant that in case of default in payment, or of B.'s attempting to dispose of the goods, the plaintiff might take possession and sell or retain them for his own use, but there was no clause authorizing B. to remain in possession until default:—Held, that the plaintiff had a sufficient right to possession to maintain trespass against the sheriff seizing under a fi. fa. against B., the jury having found the mortgage to be bonâ fide. *Porter* v. *Flintoff*, 6 C. P. 335.

Plaintiff owning a stock of goods and some furniture and shop fixtures, sold out to one S., taking a mortgage in security, which was duly filed. S. continued to carry on business, bringing in other goods, till he became involved and absconded, when the sheriff under an attachment seized all the property in the store:—Held, the property being distinguishable, that the sheriff was liable for trespass. *Boys* v. *Smith*, 8 C. P. 248.

The sheriff being in possession under the attachment refused to execute a writ of replevin at the suit of the plaintiff, two instalments of whose mortgage were overdue:—Held, that the sheriff was liable for not executing the writ. *S. C.*, 9 C. P. 27.

Semble, that under an execution against a mortgagor, the sheriff may seize goods in the possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption. *Smith* v. *Cobourg and Peterborough R. W. Co.*, 3 P. R. 113.—C. L. Chamb.—Burns.

M. sold goods to P., and took back a mortgage on them for the price, together with P.'s note. Afterwards, and after the 22 Vict. c. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor:—Held, that the assignment of the mortgage to F. was void under 22 Vict., c. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore, having possession, was entitled to hold the goods as against the execution creditor. *Ferrie* v. *Cleghorn*, 19 Q. B. 241.

The plaintiff mortgaged his goods to A., of whom the defendant was administratrix. The goods came into the possession of defendant, but under what circumstances did not appear. The mortgage contained an agreement that on default the mortgagee might take possession, and a statement that a delivery of possession was given at the time of executing the mortgage. There was no evidence that the mortgage money had been paid. The plaintiff afterwards executed three other mortgages of the same goods to other parties, each containing a similar agreement upon default, and a similar statement as to delivery of possession:—Held, that the plaintiff could not recover either in trover or detinue, and that the defendant might, as against him, set up the right of the other mortgagees. *Ruttan* v. *Beamish*, 10 C. P. 90.

Held, following Porter *v.* Flintoff, 6 C. P. 333, and Ruttan *v.* Beamish, 10 C. P. 90, that an action will not lie, at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession by the mortgagor until default; and that even if an action would lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer. *McAulay* v. *Allen*, 20 C. P. 417.

Remarks by Gwynne, J., as to the right of the mortgagor to possession until default, by implication, from the nature of the property mortgaged and other circumstances. *Ib.*

A. and S. mortgaged to the plaintiff, with a proviso for redemption if they should within twelve months pay the plaintiff a certain debt, and duly retire and pay a certain protested bill of exchange endorsed by the plaintiff, &c., but in default of either of said provisoes, the plaintiff might enter and take possession and sell. Messrs. A. and S. did not retire the bill:—Held, that the plaintiff had a right to enter and take possession without waiting for the twelve months. *Eccles* v. *Small*, 6 C. P. 479.

A mortgagee having taken possession, as he alleged, under his mortgage, the sheriff seized the property under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again:—Held, that there was no power to make such order. *Smith* v. *Cobourg and Peterborough R. W. Co.*, 3 P. R. 113.—C. L. Chamb.—Burns.

A bailiff seized certain goods under a landlord's warrant, for rent in arrear, but did not remain in possession, or take any further steps to execute it, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, a person having a mortgage on the goods took possession under it, and removed the goods, for which the landlord replevied:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

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2. *Other Cases.*

One D. held a mortgage with a power to sell upon default, the mortgagor still to be responsible for any balance. Upon default he sold and re-purchased some of the goods, which he subse-

quently exchanged for land. Upon an action for the balance over the amount realized by the original sale, the defendant contended that the plaintiff must be considered a trustee for him in the re-purchase, and having sold at an advance, must account for the balance:—Held, that to obtain relief, application must be made to equity. *Annes* v. *Dornan*, 10 C. P. 299.

The mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure. *Cook* v. *Flood*, 5 Chy. 463.

Where a party held a mortgage on chattel property, and also mortgages on real estate, the court refused to decree a sale of the chattels and foreclosure as to the realty. *Ib.*

On the 9th of January M. & Co. mortgaged goods to R., which on the 19th the sheriff seized under a fi. fa. On the 22nd of February, while the sheriff was in possession, M. & Co. made a bill of sale to the plaintiff. The mortgage to R. was satisfied after the seizure, and before the sale by the sheriff, (which took place by consent of all parties,) but whether before or after the execution of the bill of sale to the plaintiff did not appear:—Held, that the fi. fa. was entitled to prevail over the plaintiff's claim. *Taylor* v. *Jarvis*, 15 Q. B. 21.

H. and I. being indebted to a bank, arranged with the plaintiff, T., the bank's agent at H., where the debt arose, that in order to secure the same a mortgage should be given to him and the other plaintiff, the bank's general manager in Canada. T. had no express power to bind the bank to take this security, and his co-plaintiff was at the time absent from the country, and ignorant of the transaction. A mortgage was accordingly drawn up, dated 22nd June, 1867, and purported to be made between H., I., and S., of the first part, and the plaintiffs, as trustees for the bank, of the second part, reciting that the parties of the first part were indebted to the bank in certain bills of exchange, and witnessing that H. in consideration, &c., assigned to the plaintiffs the household furniture in his residence, with a proviso that the mortgage was to be void on payment by parties of the first part of the bills of exchange. On the court of directors in England being apprised of the transaction both by T. and his co-plaintiff, in a report made to them by the latter in condemnation of it, they at once repudiated it, and on 22nd August following wrote T. distinctly to that effect; and when their letter reached him, on the 5th September, the goods were still in H.'s possession, and nothing had been done under the mortgage beyond recording it. On the 7th September T. resigned his position in the bank, and on 16th September defendant's execution against the goods of H. and I. was placed in the sheriff's hands. In the following October the bank instructed T.'s successor to realize the security:—Held, that the bank by their repudiation of the mortgage had let in defendant's execution, and that their subsequent ratification of T.'s acts and adoption of the security could not defeat the writ. *Taylor et al.* v. *Ainslie*, 19 C. P. 78.

BINBROOK, (TOWNSHIP OF.)

Under the statutes passed to remedy an erroneous public survey in Binbrook, 1 Will. IV. c. 8, 7 Will. IV. c. 59, an inhabitant living in the front concession cannot be dispossessed by ejectment after a prior submission to arbitration by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these acts apply. *Doe* d. *Crooks* v. *Ten Eyck*, *Doe* d. *Crooks* v. *Calder*, 7 Q. B. 581.

BIRTH.

See BASTARD.

BOND.

I. CONSTRUCTION AND OPERATION, 599.

II. BONDS FOR THE DISCHARGE OF AN OFFICE, 602.

1. *Administration Bonds — See* EXECUTORS AND ADMINISTRATORS.
2. *By Clerk or Bailiff of Division Court —See* DIVISION COURTS.
3. *By Municipal Officers.*
   (a) *Tax Collectors—See* ASSESSMENT AND TAXES.
   (b) *Other Municipal Officers — See* MUNICIPAL CORPORATIONS.
4. *By Receiver—See* RECEIVER.
5. *By Sheriff—See* SHERIFF.
6. *By Other Persons—See* PRINCIPAL AND SURETY.

III. PROCEEDINGS ON BONDS.

1. *Pleading*, 604.
2. *Damages and Verdict*, 607.
3. *Other Cases*, 609.

IV. INDEMNITY BOND.

1. *Pleading and Evidence*, 610.
2. *Other Cases*, 611.
3. *To Sheriffs—See* SHERIFF.

V. CANCELLATION OF BOND, 612.

VI. MISCELLANEOUS CASES, 612.

VII. AMENDMENT IN STATEMENT OF IN PLEADINGS—*See* AMENDMENT AT LAW.

VIII. PENALTY OR LIQUIDATED DAMAGES ON—*See* PENALTY BY CONTRACT.

IX. PARTICULAR BONDS.

1. *Annuity—See* ANNUITY.
2. *Appeal—See* APPEAL—COUNTY COURT —ERROR AND APPEAL.
3. *Arbitration — See* ARBITRATION AND AWARD.
4. *Bail—See* ARREST—BAIL.
5. *Debentures—See* DEBENTURES.
6. *Guarantie—See* GUARANTIE AND INDEMNITY.
7. *Security for Costs—See* COSTS.
8. *Interpleader—See* INTERPLEADER.
9. *Municipal—See* MUNICIPAL CORPORATIONS.
10. *Surety—See* PRINCIPAL AND SURETY.

11. *Recognizance—See* RECOGNIZANCE.
12. *Replevin—See* REPLEVIN.
13. *For Conveyance of Land—See* SALE OF LAND.

I. CONSTRUCTION AND OPERATION.

In debt on a bond conditioned on delivery of *good merchantable* grain to deliver a certain quantity of whiskey, an averment in the declaration of a delivery of good *distillery* grain, but that defendants did not deliver the whiskey, was held bad on general demurrer. *Cowper* v. *Fairman*, 3 O. S. 568.

The condition of a bond must be construed as a whole, and any apparent repugnance may be reconciled by giving it effect according to the intent apparent on the whole instrument. *Nicolls* v. *Madill*, 6 Q. B. 415.

A condition will not be restrained by the recital, unless the intention of the parties as apparent on the whole instrument require it. *Canada P. B. & S. Society* v. *Lewis et al.*, 8 C. P. 352.

A bond recited that L. had mortgaged to plaintiffs certain premises held by him by lease; and that doubts had arisen whether the lessor was authorized to grant such lease, and the condition was to indemnify the plaintiffs against any loss which they might sustain by reason of the lease turning out invalid, or by reason of the nonpayment of the mortgage:—Held, that the recital did not so qualify the condition as to avoid that part of it providing for payment of the mortgage. *Ib.*

The omission to say expressly to whom money payable is to be paid, may be supplied by intendment. *Allen* v. *Coy*, 7 Q. B. 419.

So may the conclusion of the condition, "then this obligation shall be void." *Day* v. *Spafford*, 5 O. S. 57.

Where defendant agreed to lend the plaintiff £2,000, to be advanced as it might be required, and received from plaintiff a conveyance of land to secure the advances, and gave back a bond reciting the agreement, and binding himself to re-convey the lands on repayment of the sum advanced on a certain day, and defendant before that day made further advances to £10,000, and received timber, &c., on account to £7,000:—Held, that the bond was a continuing security, and that defendant was not obliged to re-convey on payment of the £2,000 first advanced. *Wells* v. *Ritchie*, 6 O. S. 13.

One M. and his sureties gave a bond to F., the plaintiff, reciting that F. had "appointed the above bounden M. his agent to sell certain articles and things, which the said F. is to manufacture and send to the said M. for that purpose, at and for the prices the said F. may put upon such articles and things in his instructions to said M., and has also appointed the said M. his agent to collect and receive all moneys arising out of such sales to the use of said F." The condition then was, "that if the above bounden M. shall in all things well and faithfully carry out the said agency on his part, and shall well and truly make correct and faithful returns to the said F. of all moneys arising out of the sale of any of the articles or things aforesaid, *and of all other moneys the said M. may at any time during the continuance of the said agency collect for the said F., at the time and in the manner mentioned in the instructions of the said F., and agreed to by the said M., then*," &c.:—Held, that the words in italics did not refer only to such moneys as were to be derived from the proceeds of sales effected by M., and that upon default for other moneys than those arising from such sales collected by him the sureties were liable to F. *Fleury* v. *Moore et al.*, 34 Q. B. 319, in appeal.

Debt on bond, conditioned that defendant should "pay to the plaintiff £43 15s. in building stone, at 15s. per cord, to be delivered for that sum in the town of Hamilton, at such times and in such places as should be required by plaintiff; twenty cords to be delivered by the 20th of September then next, and the remainder in one year. Plea, that from the making of the bond until the expiration of one year, defendant had always been ready and willing to deliver the said stone at such times and places as should be required by plaintiff, &c., yet that the plaintiff did not, within one year from the date of the bond, require him to deliver the said stone or any part thereof:—Held, on demurrer, a good defence. *Stinson* v. *Branigan*, 10 Q. B. 210.

Declaration on a bond whereby defendants covenanted to pay R. or the holder, at, &c., £200, on, &c., and interest thereon semi-annually on the delivery at the Gore Bank of the warrants therefor to the bond annexed, and that the plaintiffs became the holders, and have always been ready and willing to deliver said warrants at, &c., but £12 for interest is now due:—Held, bad, in not averring an actual delivery of, or an offer to deliver, the warrants at the bank. *Osborne et al.* v. *Preston and Berlin R. W. Co.*, 9 C. P. 241.

The bonds produced acknowledged defendants to be "indebted to the holder hereof in the sum of £——, and do hereby promise to pay the same to such holder *at the agency of the Bank of Montreal, at Ottawa, on, &c., on the surrender of this bond*, with interest, at the rate of, &c., payable, &c., *upon presentation of the several warrants or coupons hereunto annexed, at the agency of the Bank of Montreal at the city of Ottawa* aforesaid." The declaration stated that defendants, by their bond, sealed, &c., became bound to the holder thereof in the sum of, &c., with interest, &c., to be paid to such holder thereof, on, &c., and the plaintiff became holder thereof, &c., yet said sum with interest had not been paid. It was admitted at the trial that the bonds were not presented at the place where they were made payable; and it was proved that if they had been so presented, defendants had not funds there to meet them:—Held, that there was no variance between the bonds declared on and those produced; in the former being stated as payable to holders generally, while the latter were payable only on surrender and at a particular place:—Held, also, that it was not necessary for plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place, and a tender of the surrender of the bonds, or a readiness to surrender them. *Fellowes* v. *Ottawa Gas Co.*, 19 C. P. 174.

The plaintiffs sued for interest on two bonds made by defendants on the 27th of January, 1855, for the payment to the plaintiffs or order

of the principal money named, on the 1st of November, 1855, at the agency of the Bank of U. C. in Hamilton, together with interest thereon. Both counts alleged that although defendants paid the principal on the 29th of January, 1861, with interest up to the 1st of November, 1855, yet they had not paid any interest after that day. In the second count it was averred that the bond was in defendants' possession and cancelled by them, and the plaintiffs therefore could not present it on the day appointed for payment; and that on that day defendants had no money at the agency, and gave no instruction to the manager there to pay. Defendants pleaded, to the first count, that they were always ready to pay the principal and interest according to the bond, and did pay the same when presented, but that the bond was not presented at the said agency on the day appointed for payment, nor at any other time; and that defendants never owed nor covenanted to pay the plaintiffs interest after that day, when they were ready to have paid both principal and interest. And to the second count, that they had money at the said agency to pay the bond, but the plaintiffs had no one there, nor was anyone there on that day or at any time after to receive the same; and that they never owed, &c., (as in the last plea):—Held, on demurrer, both pleas good; and that the omission to aver presentment in the first count was cured by the plea. The eighth plea was leave and license; and was held bad, as no answer to an action of covenant. *McDonald et al.* v. *The Great Western R. W. Co.*, 21 Q. B. 223.

At the trial it appeared that the bond declared on in the first count had never been in the plaintiffs' custody, having been retained at their request by defendants' solicitor, and it was proved that when the bonds fell due, and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented. Held, that the pleas were proved: that defendants were not liable to pay interest after the bonds matured; and that the judge properly directed a verdict in their favour. *Ib.*

The defendant gave plaintiff a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C.:—Held, that the condition was broken. *McCormick* v. *McRae*, 11 Q. B. 187.

Declaration on a bond conditioned to convey to the plaintiffs, within three months, a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1. Not conveying within three months; 2. An eviction by one O. S. G. under a mortgage derived from defendants. Pleas, to the first breach, that said steamboat was mortgaged to J. H. C. at the execution of the bond, for the same amount as plaintiffs had agreed to pay defendants, and that defendants had handed him the notes given by plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiffs thereupon discharged defendants from procuring such conveyance. Plea, to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by non-payment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an encumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corby et al.* v. *Cotton et al.*, 7 C. P. 209.

A bond to a municipal corporation, "We, G. B., &c., are jointly and severally held and firmly bound, &c., unto, &c., in the several penal sums of money hereinafter mentioned, that is to say, the said G. B. in £3,000, the said J. P. in £500, the said J. H. W. in £500, (and all the rest in £500 each,) for which several payments, &c., we and each of us bind ourselves, and each and every one of our heirs, executors, and administrators," &c.:—Held, a several, not a joint, or joint and several, bond. *Corporation of Essex* v. *Bullock et al.*, 11 C. P. 323.

A bond is, ex vi termini, taken to be a deed; therefore, a declaration that a defendant became bound, &c., whereby the said bond became forfeited, sufficiently discloses an obligation by specialty; though the mere expression "bound" would not. *Provincial Insurance Co.* v. *Walton*, 16 C. P. 62. See, also, *Leith* v. *Freeland*, 24 Q. B. 132.

II. Bonds for the Discharge of an Office.

Sci. fa. on a bond to the Queen for performance of duty by a pork inspector. The assignment of breaches shewed an agreement to refer pork to the inspector for his inspection, and then alleged that he wrongfully branded pork of inferior quality with the words "prime mess pork," &c., contrary to the statute and to his duty. Demurrer, for not alleging that the acts complained of were breaches of his duty or were done by him knowingly, willingly, or designedly, or that he did not in respect of such matters use the best of his skill, judgment and ability:—Held, that the breaches were sufficiently assigned. *Regina* v. *Mowat*, 3 C. P. 228.

Debt on bond against two defendants, conditioned that A., as a bank agent, should account as often as called upon. Pleas: that before action brought A. ceased to be agent, and that while he was agent he kept all the clauses, &c., in the condition; 2. that A. paid the plaintiffs the amount of the penalty in the bond:—Held, bad on general demurrer, the first plea not answering the condition, and the second not being pleaded as accord and satisfaction, nor any release shewn. *Bank of U. C.* v. *Boulton et al.*, 4 O. S. 158.

In debt on bond for the performance of the duty of deputy sheriff for six months, and for such period as the sheriff and deputy should agree upon and endorse upon the bond, in answer to a plea of performance the plaintiff replied that the period had been extended, not alleging during the six months:—Held, bad. *Hamilton* v. *Anderson*, 2 Q. B. 452.

Debt on bond given by defendant as one of five joint and several obligors, for the discharge, by one A., of his duties as secretary and treasurer. Pleas, 2. Not damnified; 3. If plaintiffs damnified, damnified by their own default; 5. That the affairs of the plaintiffs were managed

by certain directors: that until the 31st of January, 1850, A. fulfilled the condition: that from that time till A. ceased to be secretary and treasurer, plaintiffs managed the affairs of the said society contrary to its rules, &c., whereby his liability was greatly increased; by reason whereof he became discharged; 7. The affairs were managed, &c.: that said directors, without defendant's consent, ordered that one of the obligors should be released, which order became binding on said society, whereby such obligor was discharged:—Held, on special demurrer, second and third pleas clearly bad. Fifth plea bad, because it was not shewn that the observance of the condition was qualified or affected by some matter existing and in the knowledge of both parties when bond given. Seventh plea bad, as shewing no release properly authorized in law. *Farmers and Mechanics' Building Society* v. *Langstaff*, 9 Q. B. 183.

Action on a similar bond to that in the last case. —Plea of performance—Replication, assigning breaches for money received and not paid over, and for fraudulently inducing plaintiffs to grant a certain loan:—Held, good on special demurrer. *Farmers' & Mechanics' Building Society* v. *Whittemore*, 9 Q. B. 297.

Debt on bond given by C. and R., conditioned for the due performance by one D. of the office of secretary and treasurer of the Brantford building society. 7th plea: That the office is an annual one; that the said D. was appointed for one year; that the defendants became sureties for the term of one year and no longer; and that during such term, D. faithfully performed the duties. Replication: That the defendants did not become sureties for the period in the plea mentioned, or for any other specified time. 9th plea: that D. did not, before his appointment, become bound in a bond for the due performance of his office, in pursuance of the statute, 9 Vict. c. 90. 10th plea: That the said bond is not a security taken in pursuance of the statute, by a bond entered into by the said D. with two sufficient sureties:—Held, on demurrer, both pleas bad for uncertainty. 11th plea, That the rules of the society did not provide that the treasurer or other principal officer should, once in every year, prepare a general statement of the funds and effects, according to the statute. Replication: That the rules of the society did provide that the statement referred to in the plea, should be made at least once in every year according to the form of the statute:—Held, on demurrer, replication good. *Wilkes et al.* v. *Clement et al.*, 9 Q. B. 339.

Action on bond by collector of taxes for the performance of his duties—Form of declaration. *Judd* v. *Petrie*, 6 C. P. 48.

A bond by a collector to the "treasurer of a town and his successors in office:"—Held, valid, without naming any individual therein. *Judd* v. *Read*, 6 C. P. 362.

In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of F., for the performance by defendant P. of his duties as collector:—Held, affirming Judd *v.* Read, 6 C. P. 362, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality. *Todd* v. *Perry*, 20 Q. B. 649.

A plea that the bond sued on was given for the due performance of the duties of plaintiff's secretary and treasury by A., and that before breach A. was appointed plaintiff's president and director:—Held, bad, for not shewing that the offices were incompatible, by alleging that the plaintiffs were incorporated under the C. S. U. C. c. 49, if that act would make them incompatible or otherwise. Admitting them to be incompatible,—Quære, would the acceptance of one vacate the other. *Trent and Frankford Road Co.* v. *Marshall*, 10 C. P. 329.

A municipal council elected B. as their treasurer on the 25th of January, and by a by-law passed on the 28th appointed him, and directed that he should enter on his duties as soon as he should have executed the necessary bond. On the same day they passed a resolution accepting his bond, which was dated on the 26th:—Held, that no objection would lie to such a bond, as having been executed before his appointment. Held, also, that the treasurer was clearly liable for defalcations in the wild land tax, being the proper person to receive it. *Corporation of the County of Essex* v. *Strong*, 21 Q. B. 149.

The condition was, that a treasurer, his executors or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, and should pay and deliver over all balances due:—Held, that the words, "upon request to him or them made," applied both to the giving an account and to the paying over. *Provisional Corporation of the County of Bruce* v. *Cromar*, 22 Q. B. 321.

See *Buell* v. *Whitney*, 11 C. P. 240, p. 608.

III. Proceedings on Bonds.

1. *Pleading.*

In debt on bond, a plea that the plaintiffs had not made a conveyance according to agreement, was held bad on special demurrer, for not shewing what the agreement was, although it was referred to and its contents might be collected from the condition of the bond as set out on oyer. *McGilvray* v. *McDonnell*, Tay. 139.

Debt on bond conditioned that "the defendant, his heirs and assigns, should permit the plaintiff to cut down and carry away all the firewood from certain lands, without let, suit, hinderance, &c. Plea, that defendant always permitted, &c. Replication, that defendant conveyed the land in fee to a stranger, who would not permit plaintiff to cut the wood, &c.:—Held, bad, on demurrer, as shewing no breach, the bond being a license under seal binding on defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no actual obstruction. *Fowke* v. *Fothergill*, 4 O. S. 185.

Non est factum and a set-off may be pleaded together, to debt on bond. *Atkins* v. *Clark*, 4 O. S. 33.

Where the plaintiff declared in debt on bond as "Governor-General of Canada and judge of the Court of Probate in U. C.," on a bond made by the defendants to "Sir John Colborne, at the time of the execution thereof being lieutenant-governor of U. C., and judge of the Court of

Probate therein, and to his successor in office," and assigned as a breach, the non-payment of the penalty to the said "Sir John Colborne or any other person or persons whatever," whereby an action had accrued to the plaintiff as "Governor-General, and judge of the Court of Probate, and successor of Sir John Colborne," the declaration was held bad on special demurrer, for not shewing where or when the plaintiff became the successor of Sir John Colborne, and for not negativing payment of the penalty to plaintiff, and for averring that the action had accrued to the plaintiff as "Governor-General and judge of the Court of Probate." *Bagot* v. *McKenzie et al.*, 6 O. S. 580.

An obligor who is called by a wrong name in a bond, but executes it by his right name, must be sued by his name in the bond. *Ketchum et al.* v. *Brady*, M. T. 3 Vict.

Where the condition requires something to be performed after the making of the bond, a plea of performance will be sufficient if it appear that the thing must necessarily have been performed *after the making of the bond*, though these words be not used. The condition was to pay over moneys. Plea, payment of all moneys collected, without shewing how much collected:—Held, sufficient. *Denison, one, &c.*, v. *Donnelly*, 2 Q. B. 395.

Condition, to account once in six months. Plea, that defendant did account, not alleging once in every six months:—Held, bad, on special demurrer. *Small* v. *Beasley*, 3 Q. B. 40.

To an action on a bond, defendant cannot set up a separate cotemporaneous agreement not under seal, varying the condition from that which the bond itself imports. *Cramer* v. *Hodgson*, 3 Q. B. 174.

A., upon being appointed clerk of the market to the board of police of London, entered into a bond to pay a certain sum in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for non-payment, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat;" and then averred that the plaintiffs had no such authority, and that on this account, the bond was void:—Held, bad, in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *The Board of Police of London* v. *Talbot*, 3 Q. B. 311.

Debt on a bond, conditioned to make certain payments at the times *stated in the condition*. Breach, that £125, parcel *of the sum demanded*, was not paid, &c.:—Held, bad, in not negativing the payment of the money mentioned in the condition. *Beckett* v. *Oill*, 4 Q. B. 489.

Where the plaintiff has bound himself to advance money to A. upon certain conditions, and defendant has in the same bond guaranteed the repayment, the plaintiff in suing on the bond should set out with certainty the conditions on which A. was to obtain the money. The averment that A. had not kept all the conditions on his part, without stating them, is bad. A plea also that the plaintiff had not kept *all* the conditions on his part, when it nowhere appeared what they were, is also bad. Where the plaintiff was either to "secure *or* advance" the money, a plea stating that he had not "secured *and* advanced," is bad. *Wright* v. *Benson*, 5 Q. B. 249.

To debt by an executor on an annuity bond made by defendant to the testator, payable during the lifetime of testator, defendant pleaded: 2. That before the commencement of this suit, to wit, on the first of November, he paid to the testator all and every the sums of money which before then were due, &c. The plaintiff replied that defendant did not pay testator all sums of money at any time before the commencement of this suit due, &c., by virtue of, &c. Defendant pleaded: 3. That before the commencement of this suit he owed plaintiff upon the said writing obligatory £35, and that the testator at the time of his decease was, and plaintiff, since the death of testator, still is indebted to defendant in £100, for use and occupation, &c., which he offered to set off. Plaintiff replied that he was not nor is indebted modo et formâ. Issue was joined on these pleas. No breach was alleged in the declaration nor assigned in the replication, nor suggested under the statute 8 & 9 Will. III., c. 11, s. 8; nor was there an award of venire to assess damages. The jury found for the plaintiff, and assessed the damages generally:—Held, that the issues tendered by the replications were sufficient, and that the allegations in the pleadings were sufficient to warrant the assessment. *Smith* v. *Muirhead*, 13 Q. B. 9, in appeal.

Action on a bond. Plea, that it was obtained by H. *and* others in collusion with him, by fraud, &c. Replication, that it was not obtained by fraud of H. *and* others, &c.:—Held, good, though not in the disjunctive. *Turner* v. *Ham*, 9 Q. B. 255. See, also, *Miller* v. *Hamilton*, 1 Q. B. 428.

The obligor of a bond which by the plaintiff's own shewing is clearly fraudulent, need not plead fraud to prevent a recovery. *Smith* v. *Dittrich*, 8 Q. B. 589.

Defendant executed in favour of plaintiff a bond in the penal sum of £700, conditioned to pay £350, with interest, by instalments. Plaintiff obtained a verdict on the bond for the penalty, 1s. damages for detention, and £21 damages, assessed on breaches assigned, after which defendant paid the damages and costs. Instead of entering judgment for the penalty as a security for future breaches, the plaintiff commenced a second action for another instalment and interest. Defendant without intimating that he intended to plead in abatement, as a favour asked plaintiff for a further time to plead, which was granted. Sixteen days after declaration defendant pleaded the pendency of the former action, and prayed judgment whether plaintiff ought a second time to implead him for the same cause of action, attaching to the plea an affidavit of its truth. The plea was set aside with costs, and plaintiff allowed to sign judgment by default unless defendant should pay costs and plead within four days. *Carlisle* v. *Hostel*, 7 L. J. 99.—C. L. Chamb.—Robinson.

In an action on a bond, where the plea is that the bond was conditioned to perform an award, and no award made, the plaintiff must either deny the condition as alleged, or reply specially setting out an award and assigning a breach. He will not be permitted to take issue on the plea under the 108th sec. C. S. U. C. c. 22, and

such a replication will be struck out under sec. 119, as embarrassing. *Cowan* v. *White*, 9 L. J. 131.—C. L. Chamb.—Draper.

A bond is, ex vi termini, taken to be a deed. Therefore, a declaration that a defendant became *bound*, &c., whereby the said bond became forfeited, sufficiently discloses an obligation by speciality, though the mere expression "bound" would not. *Provincial Insurance Co.* v. *Walton*, 16 C. P. 62. See, also, *Leith* v. *Freeland*, 24 Q. B. 132.

Debt on bond conditioned to deliver to plaintiff certain wood. Breach, non-delivery. Defendant pleaded, as to part of the breach, payment of $25 into court, and as to the remainder, performance :—Held, on demurrer, a bad plea. Thompson *v.* Kaye, 13 C. P. 251, distinguished. *Lowe* v. *Morice*, 19 C. P. 123.

See II., p. 602.

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2. *Damages and Verdict.*

A plaintiff on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty. *McMahon* v. *Ingersoll*, 6 O. S. 301.

In an action for the breach of a condition, assigned in the words used in the bond, "in not having duly rendered all accounts which ought to have been rendered," the plaintiff may recover whatever moneys defendant ought to have received, though in fact he received none. *Small* v. *Stanton*, 3 Q. B. 148.

In debt on bond, where breaches have not been suggested or assigned in the replication, and the bond comes clearly under the 8 & 9 Will. III., it is irregular to take a verdict for the penalty, and the verdict may be set aside. *Brock District Council* v. *Bowen*, 7 Q. B. 471.

Semble, that the breaches may be suggested even after verdict, and then the plaintiff may go down before a jury and assess his damages. *Ib.*

The question being raised on the facts and pleadings in this case stated in 7 C. P. 209, ante p. 602, whether the plaintiffs were entitled to the damages as assessed by the jury, £6,675, the defendants contending that the measure of damages should have been the amount necessary to redeem the steamboat, the court held that the damages were properly assessed. *Corby et al.* v. *Cotton et al.*, 7 C. P. 392.

Where non est factum is pleaded, and breaches assigned in the declaration : Semble, no special entry of ven. fac. to assess damages is necessary, but if required the court will allow it to be made afterwards. *Corrigal et al.* v. *Boulton*, 16 Q. B. 529.

Where in debt on bond for the payment of money in two instalments only one was due when process issued, but the plaintiff assigned breaches for both, the second being due before declaration :—Held, that he could assess his damages on both breaches ; and Semble, in such a case the declaration is the commencement of the action. *Leach* v. *Stevenson*, 3 O. S. 310.

Defendants gave a bond to plaintiff for £45, conditioned to pay him £45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question raised. He then sued for the seventh year, and the question of defendants' liability was left to the court without pleadings :—Held, that covenant clearly would not lie ; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defence ; and that the defendants therefore were entitled only to have satisfaction entered on payment of the penalty and costs. *Niven* v. *Jardine et al.*, 23 Q. B. 470.

The plaintiff had recovered £16 as damages for breach of the condition, the penalty being £500. Judgment had been entered for the debt and damages, and duly registered. An application, shewing payment of the damages and costs, to have satisfaction entered, was refused with costs, as the plaintiff was entitled to the judgment as a security for further breaches. *Hill* v. *Hill et al.*, 1 P. R. 268.—P. C.—Draper.

A. & B., having become sureties for C., the receiver in a suit in Chancery, and who was to account yearly, were sued for C.'s default on a specially endorsed writ, and judgment signed for £490 16s. 10d :—Held, upon a motion on affidavit, as to the facts, that £92 11s. 9d. was all that was due ; and that the claim was not such that a judgment upon a specially endorsed writ could be signed. *Buell* v. *Whitney*, 11 C. P. 240.

On a bond for the conveyance of land, the verdict was taken for the plaintiff for $1000, and 20 cents for the detention, no evidence of damage having been given. Defendant moved to restrain the execution to 1s. damages, the bond being within the 8 & 9 Will. III. c. 11 :—Held, that such application, before the entry of judgment, was premature. *Greer et ux.* v. *Johnson*, 32 Q. B. 77.

Defendant gave a bond to plaintiff to abide by the award of arbitrators. The arbitrators awarded $400 to be paid in three instalments, the two last to be secured by defendant upon real estate, and payable at a future day. Defendant neither paid the first instalment, nor secured the second and third in the manner directed :—Held, that plaintiff was entitled to assess his damages for the whole three instalments, although the last two were not due. *Bond* v. *Bond*, 16 C. P. 327.

Action on a bond conditioned to pay money by instalments, to recover the first instalment. Pleas, non est factum and payment. After issue joined, defendant paid the sum then due ; and to another suit for the second instalment, he pleaded in abatement the former action :—Held, that he was entitled to succeed ; for, 1. The plaintiff might have proceeded with the previous action and obtained judgment, as the payment after action could not cure the breach ; and, 2. The cause of action, which is the penalty, was the same in both suits. *Randall et al.* v. *Burton et al.*, 23 Q. B. 268.

Sci. fa. on a bond conditioned to pay $2732.68, in five equal annual instalments, with interest on the whole amount from time to time remaining due, on the 1st June in each year. The declaration recited that the first instalment and

interest, due on the 1st June, 1862, had been paid: that on 30th November, 1864, damages were assessed for the second and third instalments, and interest on the unpaid principal, $2,226, up to 1st June, 1864, which were paid on 15th April, 1865: that there was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st June, 1865, with interest on the said $2,226, from 1st June, 1864, to 15th April, 1865, and interest from said 15th April, on the principal remaining unpaid on that day, to 1st June, 1865. The plaintiffs claimed execution for the damages to be assessed on this further breach:—Held, that interest on the $2,226, could not be recovered, for the plaintiffs on their sci. fa. for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that sci. fa., 30th November, 1864, which would include interest; and their execution for such damages would bear interest also. Held, also, that the objection might be taken by demurrer to so much of the breach as claimed such interest, for the award of execution being claimed for three separate sums, each claim might be treated as the assignment of a separate breach. *Randall et al.* v. *Burton et al.*, 25 Q. B. 9.

Action on bond payable by instalments. Judgment was entered for the penalty. Proceedings were had from time to time by sci. fa.:—Held, that defendants were bound to pay the expense of levying the sum due, but that the whole amount the plaintiffs were entitled to recover was limited to the penalty. *Randall et al.* v. *Burton et al.*, 4 P. R. 9.—P. C.—Morrison.

The plaintiff may not charge interest on the penalty, or amounts remaining due thereon *Ib.*.

See *McDonald* v. *Great Western R. W. Co.*, 21 Q. B. 223, p. 601; *Smith* v. *Muirhead*, 13 Q. B. 9, p. 606.

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3. *Other Cases.*

To debt on bond for £400, setting out the condition and assigning breaches, defendant craved oyer and demurred, and the plaintiff having succeeded on the demurrer, entered judgment for the penalty and issued execution. Defendant then moved to set aside the proceedings, but the plaintiff had leave to amend, by substituting an interlocutory for the final judgment, and entering an award of venire to assess damages, and inquire of further breaches, although three years had elapsed from the entry of judgment. *Douglass* v. *Powell*, 2 O. S. 87.

Where a bond is pleaded with a profert, the admission of its execution, under a judge's summons, does not dispense with its production at trial. *Lesslie* v. *Leahy*, 5 O. S. 482.

A. and B. entered as co-sureties into separate bonds to the crown for C.; C. became a defaulter. The crown proceeded by sci. fa. on each bond, and obtained a separate judgment against each surety. A. satisfied the judgment against himself. B. moved to be allowed, on paying the judgment against himself in full, to stand in the place of the crown, and to have the benefit of the crown process against his co-surety for a moiety of the judgment:—Held, that the Court would not thus relieve B.: that they might have allowed him to proceed in the name of the crown to enforce the judgment which had been obtained on a sci. fa. against A., but this they could not now do, as it appeared the crown had already enforced that judgment. *Regina* v. *Land*, 3 Q. B. 277.

Debt on a bond for the payment by S. of ten notes, assigning breaches as to the last six. Plea, that S. did not pay the first two notes, whereupon the bond became forfeited, and afterwards S. became bankrupt, and afterwards defendant became bankrupt, and the debt accrued before his bankruptcy:—Held,—Richards, J., diss.,—that the bond, being forfeited before defendant's bankruptcy, the penalty became a debt, which the plaintiff might have applied to have retained in the hands of defendant's assignee till the contingency happened, and then have proved; and that the plea was good. *Perrin* v. *Hamilton*, 5 C. P. 57.

IV. Indemnity Bonds.

1. *Pleading and Evidence.*

To debt on an indemnity bond defendant pleaded non damnificatus, and the plaintiff having replied, shewing how she was damnified, defendant rejoined that the injury arose through plaintiff's own fraudulent act. The rejoinder was held a departure, and bad on general demurrer. *Hamilton* v. *Davis et al.*, 1 Q. B. 490.

The plea of non damnificatus to a declaration on a bond containing specific conditions, not to indemnify generally, is bad. *Kingsmill* v. *Gardiner et al.*, 1 Q. B. 223; *McDonald* v. *May et al.*, 5 Q. B. 68.

Defendant may plead that the payment by the obligee was without necessity, and made in his own wrong. *Hamilton* v. *Davis et al.*, 1 Q. B. 176.

Where in debt on an indemnity bond defendant pleaded that if the plaintiff was damnified she was damnified of her own wrong, on which the plaintiff took issue, and did not assign any breach:—Held, that the issue was on the plaintiff. *Hamilton* v. *Davis et al.*, 2 Q. B. 137.

Debt on a bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A. to the plaintiff, through the agency of B., and which sum was also claimed to have been paid to the plaintiff by one C., and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified of his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C., for the same sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shewn that the recovery by C. had been on admissions made by plaintiff after the execution of the bond:—Held, not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. *Powell* v. *Boulton*, 2 Q. B. 487.

The plaintiff having in the last case assigned two breaches, setting out a judgment for the sum of money in the condition mentioned, and not specifying any particular sum for which judgment had been recovered:—Held, sufficient, on motion in arrest of judgment. *Powell* v. *Boulton*, 3 Q. B. 19.

A party suspected of stealing a horse was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner (the prosecutor), but before doing so took a bond of indemnity :—Held, that such bond was not necessarily void, as contrary to the general policy of the law. *Ballard* v. *Pope*, 3 Q. B. 317.

Where A. is liable to pay B. a certain sum on a particular day, and C. covenants with A. to pay it, A. on default may recover the whole sum from C., although he has paid nothing. The plaintiff conveyed land to B., subject to a mortgage to one S., which contained a covenant to release in parcels. The plaintiff had previously sold to N. part of the land mortgaged, and B. agreed to release this part by a day named, and pay off the mortgage as it should fall due. Defendant gave his bond to plaintiff conditioned that B. should do this. To an action on the bond, averring B.'s default in both respects, defendant pleaded, on equitable grounds, that the bond was given only to indemnify the plaintiff from damage by B.'s non-performance : that the plaintiff had not paid or been called upon to pay anything, and had suffered no damage : that the defendant was ready to indemnify him according to the true meaning of the bond ; and that he ought not in equity to enforce it until he had been damnified :—Held, on demurrer, no defence :—Held, also, that such a bond was clearly within the 8 & 9 Will. III. c. 11. *Leith* v. *Freeland*, 24 Q. B. 133.

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2. *Other Cases.*

A plaintiff on a bond of indemnity cannot recover interest as damages beyond the penalty. *McMahon* v. *Ingersoll*, 6 O. S. 301

A party giving a bond to hold harmless in any actions that may be brought, and to pay all costs and charges thereby accruing, is bound to indemnify, as well against the legal result of any such actions, as for the trouble and expense occasioned by them to the party to be indemnified. *Hamilton* v. *Davis et al.*, 1 Q. B. 176.

Construction of an indemnity bond, as to whether it made the obligor liable for old debts, or only for new advances from the date of the bond. *Wright* v. *Benson*, 6 Q. B. 131.

Held, that the value of goods sold under a judgment recovered upon a mortgage made by the plaintiffs, against which they held a bond of indemnity from defendants, did not form the measure of damages, but they were held entitled to recover the amount of such judgment. *Raymond et al.* v. *Cooper et al.*, 8 C. P. 388.

Held, also, that the action accrued on the bond upon defendants' default, according to the covenant in the mortgage, and it was not necessary to shew a payment. *Ib.* See, also, *Carlisle* v. *Orde*, 7 C. P. 456.

Upon a bond by the retiring partner on a dissolution, conditioned to save harmless and keep indemnified the continuing member against all actions, charges, damages, &c., which might be commenced against him, or which he might have to pay or become subject or liable to, by reason of the debts of the late firm :—Held, that the obligee was entitled to recover the full amount of judgments obtained against him afterwards for partnership debts, though he had paid nothing on them :—Held, also, that the facts stated in the case with regard to one of the judgments formed no ground for diminishing the amount to be recovered against defendants on account of it. *Smith* v. *Teer et al.*, 21 Q. B. 412.

Defendant was a creditor of one T. H., and at defendant's request one L., on receiving the bond of indemnity sued on in this action, executed a power of attorney to defendant to collect certain rents due by T. H. to L. Defendant then requested L. to sign a distress warrant against T. H., which L. did, and defendant placed it in plaintiff's hands with instructions to seize certain property which defendant had caused to be placed on the demised premises, as well as some other property elsewhere. The plaintiff seized, and shortly afterwards obtained a bond of indemnity from L. The property was claimed by J. H., a son of T. H., but was sold by defendant's instructions, who became the purchaser of a large portion. J. H. brought an action against L. and the plaintiff, and recovered against them. Plaintiff paid the damages and costs, and commenced an action against L. on his bond. This L. settled by conveying to plaintiff a lot of land, and assigning to plaintiff by deed defendant's bond, and the plaintiff then sued defendant on this bond :—Held, that the defendant was liable, for although the distress warrant was executed by L., yet it was done at defendant's request, who assumed the entire direction of the seizure and sale. *Wallace* v. *Gilchrist*, 24 C. P. 40.

Held, also, that L. was damnified, in having to settle the plaintiff's action against him by conveying the land and assigning defendant's bond ; and that he was not bound to defend the suit, for the plaintiff having acted under express instructions from defendant, L.'s agent, and having been guilty of no wilful neglect or default, L. had no defence. *Ib.*

Held, also, that as the plaintiff's act in seizing and selling was done under defendant's direction, and in good faith, and was not apparently illegal in itself, the rule of no contribution among wrong-doers did not apply. *Ib.*

Held, also, that J. H. had a right of action against plaintiff and L., and it mattered not whether T. H. or J. H. was injured, so long as the plaintiff acted under the warrant, and was in consequence made responsible. *Ib.*

Held, also, that the plaintiff was entitled to recover the costs of defence incurred by him and L. *Ib.*

V. Cancellation of Bond.

A bond may be given up to be cancelled by the president and directors of a banking corporation, without the appointment of an attorney. *The President of the Bank of U. C.* v. *Widmer*, 9 O. S. 222.

VI. Miscellaneous Cases.

Bonds to obtain supersedeas under 2 Will. IV. c. 5, and 5 Will. IV. c. 3. Amount of penalty. *Heather* v. *Wallace*, 4 O. S. 131.

Trover may be maintained against the obligor of a bond for securing the fidelity of a clerk, the obligor having torn off the seal (and this although the bond might be considered as still subsisting and sufficient to sustain the action of debt), and damage may be recovered against the obligor to the amount of the penalty. *The President of the Bank of U. C.* v. *Widmer*, 2 O. S. 222.

The jurisdiction of equity in the case of lost bonds, exists also in the case of bonds which have been destroyed. *County of Frontenac* v. *Breden*, 17 Chy. 645.

A. gave a voluntary bond to B. for £5,000, and a few days afterwards a like bond to C.; neither was given for any fraudulent purpose. C. recovered judgment on the second bond; and the obligor had not property enough to pay both bonds:—Held, that B., whose bond was prior in date, had no equity to restrain proceedings by C. to enforce the judgment recovered; nor to set aside a conveyance made by A. of land of less value than the judgment, and which C. had accepted in discharge thereof. *Newenham* v. *Mountcashel*, 19 Chy. 530.

BOOKS.

IN EVIDENCE—*See* EVIDENCE.

Trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the judge in the County Court directed that the plaintiff was not entitled to maintain the action because the phamphlet was a scoffing and indecent attack on Christianity, and ordered a nonsuit. On appeal:—Held, that the defendant could not rely on the illegality of the publication under not guilty, but should have pleaded it specially: that the plaintiff held property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefore: that the judge should have directed the jury as to the nature of works the law protects and what it prohibits; that if the pamphlets were not illegal, they should give damages for their value as a literary production; if they were illegal, they should give nominal damages to the value of paper, &c., irrespective of the words upon it. A new trial was therefore ordered. *Boucher* v. *Shewan*, 14 C. P. 419.

Agreement to edit a magazine—Construction—Pleading—Written agreement allowing absence of editor—Collateral stipulation as to time of release—Pleading. *Elmore* v. *Hind*, 24 Q. B. 136.

BOUGHT AND SOLD NOTES.

See SALE OF GOODS.

BOUNDARY.

I. TRIAL OF QUESTIONS OF BOUNDARY IN EJECTMENT, 614.

II. MISCELLANEOUS CASES, 615.

III. BOUNDARY LINE COMMISSIONERS — *See* BOUNDARY LINE COMMISSIONERS.

IV. DESCRIPTION OF LAND—*See* DEED.

V. POSSESSION UNDER MISTAKE IN BOUNDARY—*See* LIMITATION OF ACTIONS AND SUITS.

VI. OF SCHOOL SECTIONS—*See* PUBLIC SCHOOLS.

VII. SURVEYS—*See* SURVEY.

VIII. BY WATER — *See* WATER AND WATERCOURSES.

I. TRIAL OF QUESTIONS OF BOUNDARY IN EJECTMENT.

In ejectment to try disputed boundaries, the plaintiff has to shew, beyond any reasonable doubt, that he is entitled to some land at least of which defendant is in possession. Where the point is a doubtful one he must shew a survey carefully made, and the proper steps taken which the law requires for ascertaining the exact position of any posts along the line which can still be discovered by inspection, or established by evidence, in order that the court and jury may see whether the two lots in question are, by the survey which the plaintiff is seeking to establish, made to occupy their proper position on the concession line. *Doe* d. *Strong* v. *Jones*, 7 Q. B. 385; *Babaun* v. *Lauson*, 27 Q. B. 399.

In ejectment, where the plaintiff proves his title to possession of any part of the premises sued for, he must obtain a verdict, and the court will not go into the question of boundary, in order to determine the precise quantity of land he is entitled to recover. *Doe* d. *Sheldon* v. *Ramsay et al.*, 7 Q. B. 446.

In ejectment the plaintiff claimed the land in his writ as part of lot six, and defendant defended for it as part of five. No notices of title were attached to the record:—Held, that the plaintiff was not bound to prove his title to lot six. *Cascaden* v. *Conway*, 17 Q. B. 598.

The court will discourage (except when bound by well established rule), the practice of trying questions of boundary by actions of ejectment, the legitimate object of which is to try titles. *Peters* v. *Nixon*, 6 C. P. 451.

Held, that a question of boundary may be tried in an action of ejectment. *Irwin* v. *Soger et al.*, 21 Q. B. 373; *S. C.*, 22 Q. B. 22. See also *Boules* v. *Taughney*, 21 Q. B. 391.

The court of C. P. in the same term came to a different decision. *Lund* v. *Savage*, *Lund* v. *Nesbitt*, 12 C. P. 143.

The plaintiff described the land claimed as part of lot 10, "commencing at a post planted by Y., provincial land surveyor, at the north-west angle of the said lot, then S. 16° E. 35 chains, more or less, to the centre of the concession; then N. 70° E. 2 chains 35 links, to a certain blazed line; thence along the said line N. 13° W. 35 chains, more or less, to the rear of the concession; then S. 75° W. 2 chains 6 links, to the place of beginning." Defendant claimed it all as part of lot 9:—Held, that the plaintiff's land being clearly described in the writ so as to be discoverable on the ground, the question of boundary should have been tried, to ascertain

whether it formed part of lot 9 or 10. *Sexton* v. *Paxton*, 21 Q. B. 389. Followed in *Boules* v. *Taughney*, 21 Q. B. 391.

Held, in appeal, affirming the judgment of the court below, that in ejectment the question of boundary may be tried, to ascertain whether the land in question forms part of the lot claimed by the plaintiff.—Draper, C. J., and Morrison, J., diss. *Sexton* v. *Paxton*, 2 E. & A. 219; followed in *Hunter* v. *Baptie*, 23 Q. B. 43, and in *Mozier* v. *Keegan*, 13 C. P. 547.

II. Miscellaneous Cases.

In moving to set aside service of process, because served in the wrong district, the affidavit on which the motion is made must state that the service was not on the confines, or that there was no dispute about boundaries. *Crysler* v. *Thompson*, M. T. 3 Vict.

Plaintiff and defendant own adjoining lots of land, with a fence between them supposed to be on the true division line; a correct line is however run, and defendant is found to encroach some acres on the plaintiff's land; the plaintiff takes possession of the disputed piece and under a protest from defendant, and cultivates it. When the crop is fit to cut, the defendant enters and takes it away:—Held, that the plaintiff had such a possession as would enable him to maintain trespass. *Gallagher* v. *Brown*, 3 Q. B. 350.

Held, that while two persons are in difference about the boundary, and shew by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, and to hold accordingly, either party may make a conveyance to a third person, which will enable the alienee to hold according to the true boundary, though at the time of the conveyance there might be some of his land in the possession of the other, in consequence of the line between them having been mistaken. Macaulay, J., dubitante. *Doe Beckett* v. *Nightingale*, 5 Q. B. 518.

A road company incorporated to make a road from the town of Sandwich to the town of Windsor:—Held, not authorized to go beyond the entrance of Windsor from Sandwich. Held, also, that as no limits had been assigned to the town of Windsor when the defendants were incorporated, the court would look to what the proprietor of land on which a part of what was commonly called Windsor stood, had designated Windsor on a plan which he had filed in the registry office, and referred to in giving deeds; and to the popular understanding as to what constituted Windsor. *Dougall* v. *Sandwich and Windsor Road Co.*, 12 Q. B. 59.

Trespass q. c. f., describing the locus in quo by metes and bounds, and as part of "what has heretofore been known as lot 15, first concession, Delaware." The defendant gave no evidence of title. The plaintiff claimed by virtue of his possession, and it appeared that more than twenty years ago, relying on an erroneous survey, he had fenced in a part of the defendant's lot 14 in the broken front concession. This fence, if continued, would have included the part in question, but it had never been extended to any part of lot 14, in the first concession:—Held, that the plaintiff could not be considered as having any such possession of the locus in quo as would entitle him to recover. *Weld* v. *Scott*, 12 Q. B. 537. See *O'Hearn* v. *Donelly*, 13 C. P. 513.

In the case of a disputed boundary line between two farms, conflicting evidence was given as to how far an old line, which was admitted to have been part of the original survey of the township, extended. Defendant proved acts of ownership by himself and predecessors over the locus in quo in putting up a brush fence more than twenty years before action brought, and cutting timber since, but the jury found in favour of the plaintiff. The question as to possession having been fairly left to the jury, and the weight of evidence as to the true boundary, appearing to be in the plaintiff's favour, the court refused to interfere. *Creighton* v. *Chambers*, 6 C. P. 282.

Trespass q. c. f. The division line between two lots being in dispute, the plaintiff proved that the line he contended for had been run by a surveyor and fenced for about forty rods fifty years ago, and that it had been the recognised boundary between the parties. Lately defendant employed a surveyor who ran a different line (probably right, although not done in strict accordance with the statute), and defendant moved his fence in accordance with it. The jury having found for defendant, the plaintiff moved for a new trial on affidavits that the fence moved had been standing more than twenty years. The court granted a new trial on payment of costs, the Chief Justice stating, that "compacts and arrangements of old standing, the maintenance of which prevents litigation, should be favourably viewed." *Wideman* v. *Bruel*, 7 C. P. 134.

Defendants claimed under a lease of 50 acres, described as commencing in the rear of 150 acres of the lot, and running back 43 chains 75 links, executed in 1824 by S., who in 1826 conveyed the remaining 150 acres to one I., describing it as commencing in front on lake Erie at the south-east angle of the lot, and running back 131 chains 25 links. I. had a survey made in 1828, and a post was then planted to mark his north boundary. It appeared that defendants never questioned this limit, but in 1858, when having their own 50 acres surveyed, they directed the surveyor to assume it as their southern line. They afterwards moved their north fence further back, which gave rise to this action:—Held, that the defendants, who appeared to have their full 50 acres according to the old limits, must shew their right to change the boundaries so long acquiesced in, and that it was unnecessary for the plaintiff in the first instance to prove his claim by actual survey. *Iler* v. *Nolan et al.*, 21 Q. B. 309.

Trespass, to try the boundary line between plaintiff and defendant; the former claimed title to part of N. W. part of lot No. 20, in the sixth concession of South Dumfries, by metes and bounds; the defendant claimed the east half. The descriptions in the deeds did not conflict. A line was originally run by a Mr. Ball for the prior holders of the property, one of them at the time claiming title through the original patentee, under an agreement for purchase, but was not acquiesced in by the plaintiff. In 1849, one M., a P. L. S., at plaintiff's request, ran a line sup-

posed to be acquiesced in by defendant, but upon the erection of a fence thereon by the plaintiff the defendant objected, and it was removed. In 1863 a Mr. P. ran a line, claimed by the plaintiff as the true line, and which caused this dispute; and two surveyors being present at the time on defendant's behalf, concurred in opinion that this line was correct. The jury having found for the plaintiff:—Held, that the line originally run, and now contended for by defendant, was not binding upon the parties, and that the evidence shewed the line run by P. and acquiesced in by the defendant, to be the correct one; and therefore the verdict was right. *McNaught* v. *Turnbull*, 13 C. P. 426.

The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto, lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch of the river:—Held, that the city limits extended to the middle of the river. *In re McDonough*, 30 Q. B. 288.

Where two properties or municipalities are divided by a river or highway, the limit of each is prima facie the centre of the river or road. *Ib.*

J. L. conveyed to G. L. a piece of land extending 103 ft. 6 in. along the south side of Wellington street easterly, from its intersection with Elgin street, covenanting that should the line of Wellington street be shifted to the north he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 ft. to the north, and as Elgin street intersected it at an acute angle, the intersection was about 11 ft. further west than before. G. L. having obtained a conveyance in accordance with the covenant:—Held, that he was entitled to have his eastern boundary produced on its original course, at right angles to Wellington street, though he would thus have more than 103 ft. 6 in. on the street; for the intention was to give all the land in front of that first conveyed to him, and between it and the street as altered. *Lang* v. *Mathewman*, 32 Q. B. 126.

In trespass q. c. f. it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the north-east angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to boundary between lots one and two. *Crossthwaite* v. *Gage*, 32 Q. B. 196.

In trespass q. c. f. it appeared that about twelve years since one W., defendant's tenant, having moved the fence between plaintiff and defendant, an agreement in writing was entered into between W. and the plaintiff, that they would employ B., a surveyor, to establish the original line between lots one and two, and would be bound by it; and defendant by a memorandum, signed by him at the foot of this agreement, agreed to abide by it. The land in dispute was then in W.'s possession, and it was alleged that B. had not completed his survey:—Held, no evidence to support defendant's plea of leave and license. *Ib.*

BOUNDARY LINE COMMISSIONERS.

[*The Boundary Line Commissioners' Acts, 1 Vict. c. 19, 3 Vict. c. 11, expired in 1842.*]

The boundary line commissioners have no authority in cases of estates less than freehold. *Vanderlip* v. *Mills*, 6 O. S. 62.

Nor to establish the side lines between lots which are at neither end of the concession as the governing side lines of the several lots in the concession. *Morgan* v. *Simpson*, 6 O. S. 132.

In determining the side lines between lots they are bound by the rule laid down by 59 Geo. III. c. 14. *Delong* v. *Striker*, 6 O. S. 137; *Caldwell* v. *Wright*, E. T. 5 Vict.

In trespass q. c. f. defendant justified his entry under an award of the commissioners, awarding the possession to him, and averred that he entered into the land under the award as his freehold:—Held, bad on general demurrer, as the commissioners had no power to award the possession, and the plea did not amount to liberum tenementum. *Villaire* v. *Cecille*, 6 O. S. 406.

They cannot establish new concession lines varying from those which have existed for upwards of fifty years. *In re Detlor*, T. T. 3 & 4 Vict.

They have authority to cause surveys to be made when the boundaries of lots, &c., are in dispute. *Gauder* v. *Hill et al.*, 6 O. S. 101.

Semble, that the eastern boundary line of lot 25 in the first concession of the township of Kingston, is a line drawn from the north-west to the south-east angle of said lot. Award of the boundary line commissioners set aside. *Murney* v. *Markland et al.*, 6 O. S. 220.

A rule for a mandamus will be granted against the boundary line commissioners, if they do not return the proceedings had before them within fourteen days after notice of appeal. *Delong* v. *Striker*, E. T. 3 Vict.

The commissioners must shew in their award the course of the line run to mark the boundary and the position of the point of departure, or their award will be defective and void. *Caldwell* v. *Wright*, E. T. 5 Vict.

Where there is a disputed boundary between two districts, and one of the districts appoints an agent for settling the boundary under 1 Vict. c. 19, the court will not, on the refusal of the justices of the Quarter Sessions of the other district to appoint an agent on their behalf, direct a mandamus to them to do so, as the act leaves it discretionary with them to proceed or not. *In re Boundary Line between Eastern and Johnstown Districts*, M. T. 6 Vict.

The award of the commissioners on a subject within their jurisdiction in which both parties interested were heard, and not appealed against:—Held, conclusive between the parties. *Havens* v. *Donaldson*, 1 Q. B. 371.

The minute of the boundary line commissioners produced in this case, held not a judgment

within the 3 Vict. c. 11, and that the defendant should therefore have been permitted to give evidence contradicting it. The second section is directory only, and the omission to file will not affect the validity of the judgment. *Regina* v. *Rose*, 12 Q. B. 637.

The judgment of the commissioners under 1 Vict. c. 19:—Held, binding when not appealed against as required by the statute; and that it was not overruled by 12 Vict. c. 35, s. 38. *Raile* v. *Cronson*, 9 C. P. 9. See, also, *Keeley* v. *Harrigan*, 3 C. P. 173.

On ejectment to recover part of a lot in the first concession of Thurlow, it appeared on the Quebec map that the road in front of the first concession, was marked out from one end of the township to the other, but no original monument could be found further east than the south-east angle of lot 13. The defendant, in 1835, had received instructions for the survey of an Indian reserve of lots 28, 29, 30 & 31, on the broken front on the bay of Quinte, and to run the lines thereof butting their rear on the 1st concession, and this was the first survey on the ground. In 1841, the boundary line commissioners made an award as to the broken front, and ordered stone boundaries to be entered where the defendant had planted posts "on the rear of the Indian reserves, and in front of lots 28, 29, 30, and 31, in the 1st concession." It was held, on the evidence, that the plaintiff could not draw a side line between lots 27 and 28, commencing at the post planted in front of the broken front in preference to one deduced from the monuments on the road in front of the first concession. *Vivian* v. *Campbell*, 7 C. P. 175.

The point in dispute being the boundaries of the N. E. quarter of lot 21, it was sworn that there were no original posts between 20 and 21, nor at lot 19, and the plaintiff then offered to prove that a requisition had been made to the boundary line commissioners to settle the line between 19 and 20, by the parties interested; and that they did so, and planted monuments; but as no award had been filed, and no record of the proceedings could be found, he relied upon oral testimony only, and upon acts and work on the ground:—Held, inadmissible: for 1. There was nothing to shew that the documents required had ever been drawn up, so as to let in the secondary evidence; 2. The owner of 21, not being necessarily interested, would not be bound by the award, unless a party to the proceedings, of which no proof was offered; and 3. Posts between 19 and 20, if planted by the commissioners, would not be equivalent to original posts, by which the site of the lost monument, shewing the boundary of 21, could be determined. The omission to file the award, if the evidence had been in other respects sufficient, would not have been fatal. *Barr* v. *Canada Life Assurance Co.*, 26 Q. B. 614.

BRACERY.

See CHAMPERTY AND MAINTENANCE.

BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

BREWER.

A brewer, licensed as such by the government of Canada under 31 Vict. c. 8 D., requires no license under the Tavern and Shop License Act of Ontario, 32 Vict. c. 32, s. 1, as amended by 33 Vict. c. 28, for selling ale manufactured at his brewery. Whether the statute, if applicable to licensed brewers, would have been within the power of the provincial legislature, was a question raised but not decided. *Regina* v. *Scott*, 34 Q. B. 20.

BRIBERY.

I. AT PARLIAMENTARY ELECTIONS—*See* PARLIAMENT.

II. AT MUNICIPAL ELECTIONS—*See* MUNICIPAL CORPORATIONS.

BRIDGE.

See RAILWAYS AND RAILWAY COMPANIES—WAY.

The Desjardins Canal Company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the Great Western Railway Company:—Held, that they, and not the railway company, were bound to keep such bridge in repair:—Held, also, that evidence of the state of the bridge a few days before the trial was admissible, as confirming the other witnesses who swore to its state at the time laid in the indictment, and as shewing such state by inference. *Regina* v. *Desjardins Canal Co.*, 27 Q. B. 374.

The suspension bridge across the Niagara river at Clifton, with the stone towers, &c., supporting it, is land and real property within the Assessment Act, 29 & 30 Vict. 52, s. 3. *Niagara Falls Suspension Bridge Co.* v. *Gardner*, 29 Q. B. 194.

As to the rights and powers of the respective corporations, Canadian and American, owning this bridge. See *Attorney-General* v. *Niagara Falls International Bridge Co.*, 29 Chy. 34, 491.

BRITISH NORTH AMERICA ACT, 1867.

See CONSTITUTIONAL LAW.

BROCKVILLE POLICE ACT.

The court will not grant a mandamus to try an election of corporate officers chosen under the Brockville Police Act, but will leave the parties contesting the validity of such election to their remedy by information in the nature of a quo warranto. *The Election of Members of the Board of Police of the town of Brockville*, 3 O. S. 173.

BROKER.

I. BOUGHT AND SOLD NOTES—*See* SALE OF GOODS.

II. COMMISSION MERCHANTS—*See* COMMISSION MERCHANTS.

Held, that when to the ordinary business of a broker, some special employment and undertaking is superadded by express contract, his liability results from such contract, and not simply from his character of broker. *Deady* v. *Goodenough*, 5 C. P. 163.

Action against defendant as broker and commission agent, for negligence in delivering goods to the purchaser without the price being paid, and for not using due care that the purchaser was solvent. Evidence—Verdict for plaintiff—New trial granted on payment of costs. *Ib.*

A banker and exchange and money broker, and a dealer in foreign and uncurrent money, and buying and selling stocks :—Held, a trader, within the Insolvent Act of 1869. *Smart* v. *Duncan*, Q. B. M. T. 1874. Not yet reported. See, also, *Bagwell* v. *Hamilton*, 10 L. J. 305.

BUBBLE ACTS.

The Bubble Acts, 6 Geo. I. c. 18, and 14 Geo. II. c. 37, are not in force in this province. *Bank of Montreal* v. *Bethune*, 4 O. S. 165, 193.

BUFFALO BRANTFORD AND GODERICH RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

BUFFALO AND LAKE HURON RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

BUILDINGS.

I. COURT HOUSES—*See* COURT HOUSES.

II. FIXTURES—*See* FIXTURES.

III. COVENANT TO REPAIR AND REBUILD—*See* LANDLORD AND TENANT.

IV. LEVYING RATES TO ERECT—*See* MUNICIPAL CORPORATIONS.

By 4 Will. IV. c. 23, the corporation of Toronto is empowered, among other things, to regulate and prevent the incumbrance of the streets; and a city ordinance, made in pursuance of that power, allowing persons building houses to occupy a certain portion of the streets with their building materials, is good; but any person who is building, leaving their materials in the streets, under the ordinance, must provide lights in the night, or he will be responsible for any accident that may occur from his neglect. *Hervey* v. *French*, E. T. 3 Vict.

In a action under 10 & 11 Vict. c. 6, by an administratrix for negligently causing the death of her husband, the declaration stated that the defendant was possessed of a close, and one T. A. was possessed of another close adjoining the defendant's; that upon defendant's close a wall was standing, which before and at the times when, &c., was to the knowledge of defendant in a dilapidated and dangerous state, and leaning towards the close of T. A., by reason whereof it became the duty of the defendant to take reasonable precautions to prevent the wall from falling; but that well knowing the premises, he wrongfully permitted the wall to remain in that state, and that afterwards, by reason of such neglect, and while, &c., the said wall fell upon the close of T. A. and in falling killed deceased, who was then lawfully in the said close of T. A. Defendant pleaded not guilty:—Held, that the declaration disclosed a legal liability in defendant, and that the evidence (which is set out in the report) warranted a verdict for the plaintiff. Semble, that under this issue defendant was at liberty to shew that the accident was caused either wholly or in part by the negligence by the deceased, or of others for whom the defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence; and that, supposing the state of the wall as alleged in the declaration to be admitted in the pleadings, yet the defendant might, in evidence, shew its actual condition, as bearing upon the question of negligence. *Kinney* v. *Morley*, 2 C. P. 226. See also, *Mitchell* v. *Harper*, 4 C. P. 147; *Gooch* v. *Snarr*, 34 Q. B. 616.

The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he also had agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all the buildings thereon:—Held, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere. *Cleaver* v. *Culloden*, 15 Q. B. 582.

The plaintiff, a mortgagee, filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that though the building had been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an enquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 15 Chy. 616.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. *Lazarus* v. *The Corporation of the City of Toronto*, 19 Q. B. 9.

Defendants, a city corporation, owning land in the city, leased it to one H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H., and the upper story and garret by defendant. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured

while passing along the street by snow falling from the roof :—Held, that defendants were not liable. *Ib.*

By the municipal act the corporation of Toronto was authorized to pass by-laws, among other things, to prevent the erection of wooden buildings within such parts of the city as the corporation might define. The city council accordingly passed a by-law defining what were termed the fire limits of the city, and prohibiting the erection of any building within such limits other than of stone, brick, iron, or other material of an incombustible nature :—Held, that the by-law was void, as not being confined to wooden buildings, and therefore unauthorized. *Attorney General* v. *Campbell*, 19 Chy. 299.

BUILDING CONTRACT.

See WORK AND LABOUR.

A builder has no lien upon a house built by him on the land of his employer for the price of the building. *Johnson* v. *Crew*, 5 O. S. 200.

[See now 36 Vict. c. 27 ; 38 Vict. c. 20.]

BUILDING SOCIETIES.

I. IN WHAT NAME TO SUE, 623.

II. FINES, SHARES, AND SUBSCRIPTIONS, 624.

III. MORTGAGES AND SECURITIES, 625.

IV. MISCELLANEOUS CASES, 626.

[*See C. S. U. C. c. 53; 29 Vict. c. 38; 37 Vict. c. 50, D.*]

I. IN WHAT NAME TO SUE.

Under 9 Vict. c. 90, s. 12, the president and treasurer of a building society may sue in their proper names without further description. *Doe* d. *Barwick et al.* v. *Clement*, 7 Q. B. 549.

But the president and treasurer suing must be such when commencing the action. *Doe* d. *Morgan et al.* v. *Boyer*, 9 Q. B. 318.

Building societies may sue in their corporate name. *Farmers' and Mechanics' B. S.* v. *Langstaff*, 9 Q. B. 183 ; *Canada Permanent B. S.* v. *Bank of U. C.*, 10 Chy. 203.

Plaintiffs, under a power in a mortgage to them by B., sold the land to L., who paid the president, but had received no conveyance ; and the president, with his concurrence, then brought ejectment in the name of the society against the mortgagor, to enable them to give the purchaser possession. Defendant, after verdict, applied to set aside the proceedings as brought without the plaintiffs' authority :—Held, that there was clearly no pretence for such an application. *Essex B. Society* v. *Beeman*, 19 Q. B. 509.

Remarks as to the right of a society to bring ejectment in their corporate name, on a mortgage to the president and secretary. *Ib.*

II. FINES, SHARES, AND SUBSCRIPTIONS.

A by-law provided, that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of one year, when the share or shares in default shall be declared forfeited to the society ; that a month before the expiration of such year, the secretary should notify the defaulter, calling his attention to the by-law ; that in case of the defaulter being a borrower, these fines should be trebled, and that at the end of six months' default the mortgage should be liable to forclosure, and to be declared forfeited :—Held, that the by-law being penal should be construed strictly ; and that the fines could be imposed on borrowers only for twelve, and on non-borrowers for six months, the right to forfeit or to foreclose being then substituted :—Held, also, that such fines could not be recovered on a common count, but that the declaration should set out the by-law. *Ottawa Union Building Society* v. *Scott*, 24 Q. B. 341.

A rule of the society declared, that, in case of default in the monthly subscriptions, the defaulter should pay a fine of 3d. per share for the first month, 6d. for the second month, and 1s. for the third month, doubling the fine for each succeeding month, till the expiration of the first six months ; and that after that time the share should become forfeited :—Held, that no fine was chargeable after the first six months. Such a rule cannot be waived by the directors. *Wilson* v. *Upper Canada B. S.*, 12 Chy. 206.

Where the members ceased paying their monthly subscriptions in ten years after the establishment of the society, under the supposition, on the part of all, that the society should then terminate, and did not resume paying, but it was subsequently found that, from mismanagment and losses, further payments were necessary :—Held, that the rule as to fines was not to be enforced as regarded monthly subscriptions falling due after all had ceased to pay. *Ib.*

Where a building society should, if properly managed, have terminated in ten years, but did not :—Held, that borrowing as well as non-borrowing members were bound to continue paying their monthly subscriptions, if necessary, until they reached the amount of their shares. *Wilson* v. *Upper Canada B. S.*, 12 Chy. 206.

In January, 1864, a non-borrowing member died intestate. No one administered until June, 1867. In that interval his shares ran into arrear, and in consequence the society in November, 1865, declared them forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused :—Held. 1, that the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal ; 2, that the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture and the procuring letters of administration was no answer to the claim. —Draper, C. J., Hagarty, C. J., Wilson, J., and Gwynne, J., diss. *Glass* v. *Hope*, 16 Chy. 420, in appeal from *S. C.*, 14 Chy. 484.

III. Mortgages and Securities.

Under 9 Vict. c. 90, it is not essential to a bond for the performance of the treasurer's duties, that he should join in it with his sureties. Two pleas intended to set up this defence were held bad for uncertainty. 11th plea, that the rules of the society did not provide that the treasurer or other principal officer should, once at least in every year, prepare a general statement of the funds and effects, according to the statute. Replication, that the rules did provide that the statement referred to in the plea should be made at least once in every year according to the form of the statute, &c. :—Held, replication good. *Wilkes et al.* v. *Clement et al.*, 9 Q. B. 339. See, also, *Farmers' and Mechanics' B. S.* v. *Langstaff*, 9 Q. B. 183.

Building societies can take only real property security, and cannot take collateral security for loans on real property. *Canada Permanent B. and S. S.* v. *Lewis*, 8 C. P. 352.

But even before 22 Vict. c. 45, they might take a bond as additional security for money overdue on mortgage. *Hope* v. *Glass*, 23 Q. B. 86.

The plaintiffs sued defendant on a mortgage, by which he covenanted to pay them £200 and interest, by monthly instalments of £4 10s., with all fines and forfeitures imposed upon defendant as a member of the society, &c. Defendant set up as a defence, in various pleas, that the transaction was usurious; and that he became a member merely to evade the statute, &c. :—Held, that the plaintiffs, on the evidence set out in the case, were entitled to recover, for what the defendant did was authorized by the statute incorporating these societies. *Canada P. B. and S. S.* v. *Rowell*, 19 Q. B. 124.

Covenant upon a mortgage. The pleas, after stating that plaintiffs were a building society duly constituted before 16th August, 1858, then set out the mortgage verbatim, which was dated 28th December, 1864, and recited that defendant being an owner of shares and a member of the society, had borrowed therefrom $8,000, and given a mortgage to plaintiffs, prior to that sued on; that defendant had made default thereunder, and it had been agreed that an extension of time should be given on his executing the mortgage in question by way of further security; and it was witnessed that, in consideration of the extension of time, and "for the further consideration of $8,483 due and owing," defendant had granted, &c.; that defendant covenanted to pay on the 2nd April, 1865, $675, portion of the principal, with interest thereon at 8 per cent. from the date thereof, and $7,808, balance of principal, in forty quarterly payments, with interest upon the principal, at 6 per cent. from the first day of November, 1864, a day anterior to the date of the mortgage. The plea then went on to aver that the mortgage was a corrupt and unlawful deed, whereby it was corruptly, &c. and against the form, &c., agreed between the plaintiffs and defendant, *as in the mortgage mentioned and contained*, that plaintiffs should loan to defendant the $8,483 at an unlawful rate of interest; that is to say, $675, portion thereof, at 8 per cent., and the balance $7,808, at 6 per cent per annum, to be calculated from a day anterior to that on which the money was advanced :—Held, pleas bad; for, 1. plaintiffs being authorized as a building society before the 16th August, 1868, to lend money, were within the exception of sec. 6 of the "Act respecting Interest;" but that they could, however, lend only as authorized by their act of incorporation, and, next, it did not appear from the mortgage, that the $7,808 was not due at the time from which the interest had been reserved, for the expression in the deed, "now due," did not shew this; and as to the reservation of 8 per cent., it sufficiently appeared that the mortgage was given to secure an advance by the society to one of its members, and was within the protection of the "Act respecting Building Societies;" for the bonus authorized by the Act to be charged, might be properly spread over the period of the loan, in the form of an increased rate of interest :—Held, also, that such a transaction cannot properly be called a loan, but is correctly described by sec. 4, of the act of incorporation. Mode in which such a transaction could alone be impeached indicated. Canada P. Building and Savings Society *v.* Rowell, 19 Q. B. 124, observed upon :—Held, that the question of usury or no usury, upon facts properly pleaded, is for the jury, and not for the court. *Canada P. B. Society* v. *Harris*, 16 C. P. 54.

Building societies are virtually exempted from the usury laws. *Freehold Permanent B. and S. S.* v. *Choate*, 18 Chy. 412.

Mortgages taken for advances to borrowing members need not express how much of the interest reserved is a bonus in respect of the sum advanced, and how much for interest. *Ib.*

It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell under a power of sale in a mortgage; the entry in the books of the society is sufficient for that purpose. *Osborne* v. *Farmers' and Mechanics' B. S.*, 5 Chy. 326.

Where a mortgage by a borrowing member recited that he had purchased seven shares of £100 each, and was conditioned for the payment of the monthly subscriptions upon such shares, and of interest upon said £700, by equal monthly payments of £3 10s. each, and provided for sale of the property in case of default, and for the society's retaining out of the proceeds the remainder of the £700 then unpaid, and all interest, fines, and other sums due or payable, giving credit for subscriptions theretofore paid and interest thereon at six per cent. from the time of payment, and for payment of the surplus to the mortgagor :—Held, that the mortgagor was not liable to pay £3 10s. a month, or 10s. per share for the interest for the whole period, but only at that rate on so much of the £700 as from time to time was due after giving credit for the monthly subscriptions paid. *Wilson* v. *Upper Canada B. Society*, 12 Chy. 206.

IV. Miscellaneous Cases.

Declaration on a note made by defendants, a building society, incorporated under C. S. U. C. c. 53:—Held, good on demurrer; for they might legally make notes under certain circumstances. *Snarr* v. *Toronto P. B. and S. Society*, 29 Q. B. 317.

A decree was obtained in a suit by a shareholder on behalf of himself and all other share-

holders, for the administration of the assets of the society, and charging the directors with losses sustained:—Held, that persons who had ceased to be directors before the suit could not be made parties in the master's office. *Rolph* v. *Upper Canada B. S.*, 11 Chy. 275.

BURGLARY.

See CRIMINAL LAW.

BY-LAWS.

I. MUNICIPAL BY-LAWS—*See* MUNICIPAL CORPORATIONS—ASSESSMENT AND TAXES—SURVEY—WAY.

II. QUASHING BY-LAWS—*See* MUNICIPAL CORPORATIONS.

III. PROOF OF—*See* MUNICIPAL CORPORATIONS.

IV. OF SCHOOL BOARDS—*See* PUBLIC SCHOOLS.

V. TAVERNS AND SHOPS—*See* TAVERNS AND SHOPS—TEMPERANCE ACT.

CALLS, ON STOCK.

See CORPORATIONS.

CANADA COMPANY.

Process to compel an appearance by the company could not be served on their attorneys here, the directors and common seal being in England. *Cooper* v. *Canada Company*, Dra. 413.

Held, 1, that the recitals in the imperial statute 6 Geo. IV. c. 75, were sufficient proof of the charter of the company; 2. That the company had power to appoint a special seal for the execution of deeds by their commissioners here, and the proof of such seal given in this case was held sufficient; 3. That the production of a document within the powers of the corporation, with the seal attached, is sufficient prima facie evidence of its proper execution. *Woodhill* v. *Sullivan et al.*, 14 C. P. 265.

Under the 27 & 28 Vict. c. 100, a deed from the company, dated 17th February, 1835, in the form given by the Imperial Act, 9 Geo. IV. c. 51, and under the seal of the attorneys of the company, was held proved by its mere production, and sufficient to pass the fee. *Fell* v. *South*, 24 Q. B. 196.

The company, by their charter, are not exempted from giving to purchasers of the lands granted to them by the crown the usual covenants against their own acts; and as to lands purchased from private individuals, the company will be required to give the same covenants as another vendor. *Scarlett* v. *Canada Co.*, 1 Chy. Chamb. 90.—Esten.

CANAL.

See DESJARDINS CANAL—RIDEAU CANAL—ST. LAWRENCE CANAL—WELLAND CANAL.

A railway company had the control of a swing bridge over a canal. The plaintiff's ship was navigating the canal when trains were about passing and repassing the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the company's servants by signal that the bridge could not then be swung, and the plaintiff's vessel was injured by running against the bridge while it remained closed:—Held, that as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge and were not liable for such injury, to which the plaintiff had contributed by his own negligence. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536. See *Desjardins Canal Co.* v. *Great Western R. W. Co.*, 27 Q. B. 303.

The declaration set out certain regulations, made in pursuance of the statute, for the proper use of the Welland canal, directing that boats waiting to enter a lock should lie in single tier, and advance in the order in which they lay; and that all vessels approaching a lock, while any other vessel going in a contrary direction was about to enter it, should be stopped and made fast as directed, and remain there until such vessel should have passed, under a penalty named. It then alleged that defendant's vessel, which was waiting to enter a lock with two other vessels, passed them out of its order, and endeavored to enter first, and while it was so approaching, the plaintiffs' steamboat, going in a contrary direction, was in the lock; but defendant did not stop or make fast his vessel, but wrongfully, and in violation of the regulations, went on and endeavored to enter the lock, whereby it was driven against the plaintiffs' boat, which was forced against the side of the lock and injured:—Held, bad, for the contravention of the regulations formed no cause of action, and no negligence on the defendant's part was alleged. *Jacques et al.* v. *Nicholl*, 25 Q. B. 402.

Injunction granted, at the suit of the creditors of a canal company, who had a lien on the canal, against a sale thereof under a subsequent execution. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Chy. 27.

An act of parliament having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep and maintain, a safe and commodious bridge across the canal, and the bridge after being erected having become unsafe through the default of the canal company, an incorporated road company, which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would impede the navigation of the canal:—Held, reversing the decision below (17 Chy. 31), that they had no right to do so, and a permanent injunction was granted. Spragge, C., and Mowat, V. C., diss. *Town of Dundas* v. *Hamilton and Milton Road Co.*, in appeal, 18 Chy. 311.

CANCELLATION.

I. OF BONDS—*See* BONDS.

II. OF DEEDS—*See* DEED.

III. Of Leases—*See* Deed.

IV. Of Wills—*See* Will.

V. Of Bills or Notes—*See* Bills of Exchange and Promissory Notes.

CAPIAS.

I. Writ of—*See* Arrest.

II. Bail on—*See* Bail.

III. Ca. Re.—*See* Capias ad Respondendum.

IV. Ca. Sa.—*See* Capias ad Satisfaciendum.

V. Maliciously Suing Out—*See* Malicious Arrest, Prosecution and Other Proceedings.

CAPIAS AD RESPONDENDUM.

I. Writ and Copy, 629.

1. *Amendment of Writ*—*See* Amendment at Law.

II. How Issued, 630.

III. Miscellaneous Cases, 630.

IV. Malicious Arrest—*See* Malicious Arrest, Prosecution and Other Proceedings.

V. Indorsement on Bailable Writs—*See* Bail.

I. Writ and Copy.

Where, by the operation of provincial enactments, a plaintiff was unable to give a proper date to the notice at the foot of a ca. re., a general notice to appear on the first day of the term was held sufficient. *Brown* v. *Smith*, Tay. 187.

A ca. re. issued in vacation must be tested the last day of the preceding term. *Armstrong* v. *Scobell*, M. T. 4 Will. IV.

A bailable ca. re. must be tested in the name of the chief justice, or, in his absence, in the name of the senior puisne judge. *Case* v. *McVeigh*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

The original ca. re. must be presumed to correspond with the copy till the contrary be shewn. *McIntosh* v. *Cummings*, 1 C. L. Chamb. 68.—Macaulay.

The service of a copy of ca. re. will be set aside, unless a notice to appear be written thereon pursuant to the statute. Quære, must this notice be endorsed on the copy of the writ; may it not be written on a piece of paper attached to it? *McTierman* v. *McChesney*, 5 Q. B. 631.—P. C.—Draper.

Semble, that the writ of capias mentioned in 12 Vict. c. 63, s. 24, may properly be called a ca. re., as it is in 16 Vict. c. 175, s. 3. *Tyson* v. *McLean*, 1 P. R. 339.—C. L. Chamb.—Richards.

"Oath for £—," instead of "bail for £— by affidavit," is sufficient. *Gillespie et al* v. *Deming*, 1 P. R. 387.—C. L. Chamb.—Robinson.

II. How Issued.

A ca. re. issued on the last day of one term, on an affidavit made after the first day of the following term is irregular. *Westover* v. *Burnham*. T. T. 3 & 4 Vict.—P. C.—Macaulay.

Practice in issuing testatum ca. re. *Patterson* v. *Calvin*, 1 Q. B. 409.—P. C.—Hagerman.

As to the issue of a bailable ca. re. by a commissioner, and its service. *Story* v. *Durham*, 9 Q. B. 316.

An original ca. re. may, under 8 Vict. c. 36, issue out of the office of the deputy clerk of the crown of one district, directed to the sheriff of another district. *McMan* v. *Patterson et al.*, 9 Q. B. 631.

III. Miscellaneous Cases.

A plaintiff cannot, after taking out his ca. re. in one district, file his declaration in another. *Throop* v. *Cole*, Tay. 214.

The ca. re. is not the first and original process in a real action, such as dower. *Phelan* v. *Phelan*, Dra. 386.

A ca. re. not bailable must be served by the sheriff or his officer, though the deputy sheriff be a party to the suit. *Ruttan* v. *Ashford*, 3 O. S. 302.

Where a defendant moved to set aside the service of a writ of ca. re. for irregularity, and it appeared that the process served was a testatum, and not an *original* writ, the rule was discharged with costs. *Tool* v. *Low*, 2 Q. B. 95.—P. C.—Jones.

Where there have been several writs of ca. re. sued out and the last served, the plaintiff to have the action considered as being commenced by the first writ, must shew at the trial that it *was returned*. Semble, that the continuance between the intermediate writs may be entered at any time. *McLean* v. *Knox*. 4 Q. B. 52.

Where the defendant, being a married woman, and known to be so by the plaintiff was arrested on a ca. re., both writ and arrest were set aside with costs. *Foley* v. *White et ux.*, 2 C. L. Chamb. 51.—Macaulay.

When the ca. re. is only against the wife, and is irregular against her, the husband cannot be compelled to appear. *Ib.*

CAPIAS AD SATISFACIENDUM.

I. Affidavit for Writ, 631.

II. Effect of Arrest under, 632.

III. Miscellaneous Cases, 632.

IV. Arrest Under—*See* Arrest.

V. Writ.

1. *Amendment of*—See Amendment at Law.

2. *Poundage on*—*See* Sheriff.

VI. Bail—*See* Bail.

VII. On Examination of Judgment Debtor—*See* Bankruptcy and Insolvency.

VIII. Malicious Arrest—*See* Malicious Arrest, Prosecution and Other Proceedings.

IX. Proceedings Against Prisoners—*See* Prisoner.

I. Affidavit for Writ.

A ca. sa. may issue on an affidavit sworn before a judge in Lower Canada, whose signature is verified by affidavit here. *Coit* v. *Wing*, 3 O. S. 439.

The affidavit need not state plaintiff's second Christian name, where he is described as the above plaintiff. *Perkins* v. *Connolly*, 4 O. S. 2.

Where a plaintiff sued out a ca. re., and without executing it took a cognovit and entered common bail and judgment against defendant, and arrested him on a ca. sa., without filing a fresh affidavit, the ca. sa. and arrest were set aside with costs. *Brown* v. *Bethune*, 4 O. S. 331.

Where a defendant was arrested on mesne process and committed to prison, and afterwards charged in execution in the cause without a new affidavit, before 7 Vict. c. 31, the court held that he was not entitled to his discharge, as the plaintiff could issue a ca. sa. against him without a new affidavit, as well when he had been committed to prison on mesne process, as when he had been held to special bail. *Hamilton* v. *Mingay*, 1 Q. B. 22.

A ca. sa. cannot be issued since the Insolvent Act, 8 Vict. c. 48, on an affidavit filed before. *Sewell* v. *Dray*, 2 Q. B. 179.

An affidavit for a ca. sa. that the defendant has made some secret *and* fraudulent conveyance, &c., and not some secret *or* fraudulent conveyance, is good under the statute. *Ewing et al.* v. *Lockhart*, 3 Q. B. 248.

Where the plaintiff, pending the suit, took out a ca. re. upon which defendant was not arrested:—Held, that under 2 Geo. IV., c. 1, a ca. sa. might issue after judgment upon the same affidavit. Semble, that such writ may include the costs, although the sum taxed will exceed that sworn to. *Beatty* v. *Taylor*, 2 P. R. 44.—C. L. Chamb.—Burns.

But under the C. L. P. Act, 1856:—Held, overruling the last case, that such a proceeding was irregular and should be set aside. The affidavit must relate to the present belief of the party making it, and must therefore be sworn at the time of issuing the writ. *Moss et al.* v. *Reid*, 7 C. P. 429.

It is sufficient to swear either fact, that the debtor has parted with his property to prevent its being taken in execution, or that he has made some secret or fraudulent conveyance for that purpose, &c.:—Held, that in this case, under the facts stated, defendant was amply justified in swearing to the first alternative. *Maxwell* v. *Ferrie*, 8 C. P. 11.

After a voluntary escape from the sheriff of a prisoner held under mesne process, plaintiff may proceed with his action; and, Semble, may issue a ca. sa. without affidavit, if he has had a capias pending action, or an alias ca. sa. if the ca. sa. to fix bail has been returned non est inventus, and take the defendant thereunder; and at all events, plaintiff may have a ca. sa. issued on a new affidavit and re-arrest defendant. *Heaton* v. *Ward*, 17 C. P. 667.

II. Effect of Arrest under.

The arrest upon a ca. sa. and subsequent discharge of one of several defendants by the plaintiffs in an action against the drawer and acceptors of a bill of Exchange:—Held, not to be a satisfaction of the judgment, so as to prevent the subsequent issue of a fi. fa. thereon against the other defendants. *Hamilton et al.* v. *Holcomb et al.*, 11 C. P. 93. See *S. C.*, 7 L. J. 40.

Held, affirming the judgment of the C. P. 12 C. P. 38, that where the holder of a bill of exchange or promissory note sues, under the statute, the drawers, acceptors and endorsers in one action, he may discharge the drawers or endorsers (or accommodation acceptors) after an arrest under a ca. sa., without losing his remedies against the other defendants liable in priority to those discharged. McLean and Draper, C.JJ., diss. *Holcomb* v. *Hamilton*, 2 E. & A. 230.

III. Miscellaneous Cases.

A defendant, in whose favour a verdict is rendered, is entitled, under the equity of the King's Bench Act, 2 Geo. IV. c. 1, to a ca. sa. for the costs of his defence. *Thomson* v. *Leonard*, 3 O. S. 151, 610. See *Johnson* v. *Smadis*, Tay. 138.

The ca. sa. lodged in the sheriff's office to charge the bail is not a charging in execution. *Dorman* v. *Rawson*, Tay. 265.

The court refused to set aside upon motion a ca. sa. issued upon a judgment more than a year old without a sci. fa. to revive it. The ca. sa. was clearly irregular, yet not void, but voidable, and the proper remedy would seem to be a writ of error. *McNally* v. *Stephens*, Tay. 263.

It is irregular to issue a ca. sa. upon a judgment more than a year old, even though a fi. fa. has been issued within the year, but not returned, without a sci. fa. *Wilson* v. *Jamieson*, 6 O. S. 481.

On a return of "devastavit," a ca. sa. does not issue as a matter of course without enquiry. *Willard* v. *Woolcut*, Dra. 211.

Where one defendant had been arrested, and the other served on mesne process, the court, after judgment, allowed a ca. sa. to issue against both, but to be executed only against the one arrested. *McIntyre* v. *Sutherland et al.*, 5 O. S. 153.

An alias ca. sa. may be issued by a deputy clerk of the crown in an outer district; and it is no ground for setting aside such writ that the deputy has not transmitted the affidavit and præcipe, within one month after they were filed, to the principal office, according to the statute. *Scott et al.* v. *Macdonald*, M. T. 7 Vict.

An al. test. ca. sa. is still a ca. sa.; and therefore when a defendant justified under the alias, and the plaintiff replied that the said writ had been set aside, and then proved a rule of court discharging the arrest under a ca. sa.:—Held, no variance. *Robertson* v. *Meyers*, 7 Q. B. 423.

Semble, that no ca. sa. can be acted upon while a fi. fa. on which proceedings have been taken remains out; and that where goods have been seized and a ven. ex. issued, they must be sold before defendant can be arrested for the residue. *Billings et al.* v. *Rapelje et al.*, 2 P. R. 200.—P. C.—McLean; *Ross* v. *Cameron*, 1 C. L. Chamb. 21.—Macaulay.

The plaintiffs having obtained a judgment against the defendant on the 7th June last, issued a ca. sa. on the judgment, directed to the sheriff of Oxford, but did not then place it in the sheriff's hands. On the 12th June, they issued a fi. fa. goods to the same sheriff, which was on the same day returned nulla bona. On the 14th June, they issued writs of fi. fa. lands to the respective sheriffs of Oxford and Haldimand. On the same day, they filed a bill in Chancery to charge certain equitable interests of defendant in lands which could not be directly reached through the writs at law. On the 16th September, they, for the first time, placed their ca. sa. in the hands of the sheriff of Oxford, the writs against lands then being in his hands and the proceedings in Chancery still pending. The ca. sa. was not properly styled in the cause, and was not tested in the name of the chief justice or the other judge of the court from which it issued:—Held, that the plaintiff's proceedings violated the spirit of the law, in charging defendant in execution on a ca. sa., whilst endeavouring to enforce a remedy against his lands through an execution issued since the ca sa. and since a fi. fa. goods returned nulla bona. Such being the case, the application to amend the writ of ca. sa. was refused, and the writ set aside for irregularity with costs, defendant undertaking not to bring an action for arrest. Semble, the irregularities were amendable, and would, on terms, have been amended under ordinary circumstances. *Curry* v. *Turner*, 8 L. J. 296.—C. L. Chamb.—Richards.

Semble, fifteen days need not elapse between the teste and return. *Beatty* v. *Taylor*, 2 P. R. 41.—C. L. Chamb.—Burns; *Beattie* v. *McKay et al.*, 2 C. L. Chamb. 56.—Draper.

When a judgment is against two, a ca. sa. upon it must include both, or shew some reason for the omission. *Turner* v. *Williams*, 1 P. R. 360.—C. L. Chamb.—Robinson.

A ca. sa. cannot be issued in U. C. on a judgment for costs only. Under 22 Vict. c. 96, s. 13, on such judgment an order for committal for contempt only will be granted, and not for a ca. sa. *Meyers* v. *Robertson*, 5 L. J. 254.—C. L. Chamb.—McLean.

A writ of ca. sa. tested in the name of a retired chief justice, after his successor has been gazetted, but before acceptance of office by taking the necessary oaths of office:—Held, irregular, but amendable. *Nelson* v. *Rey*, 3 P. R. 226.—C. L. Chamb.—Morrison.

Delay in issuing a ca. sa. to fix the bail, cannot be pleaded in bar to an action against them on the recognizance. *Carroll* v. *Berryman et al.*, 16 Q. B. 520.

Where a party arrested under capias pending action, and before judgment, gives bail, and after judgment and ca. sa. to fix bail returned non est inventus, is rendered to the sheriff's custody by his bail in their own discharge, such prisoner is still under mesne process, and is not confined in execution. *Hesketh* v. *Ward*, 17 C. P. 667.

The English statutes, 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape warrants are not in force in this province. *Ib.*—A. Wilson, diss.

CARRIAGE OF DECREE.

See PRACTICE IN EQUITY.

CARRIERS.

I. WHO ARE COMMON CARRIERS, 634.

II. LIABILITY AS CARRIERS OR WAREHOUSEMEN, 634.

1. *Of Railway Companies—See* RAILWAYS AND RAILWAY COMPANIES.

III. CONVEYANCE OF PERSONS.

1. *By Coach or Horse Railways*, 635.
2. *By Railway—See* RAILWAYS AND RAILWAY COMPANIES.
3. *By Water—See* SHIP.

IV. CONVEYANCE OF GOODS.

1. *By Coach or Express*, 636.
2. *Other Cases*, 637.
3. *By Railway—See* RAILWAYS AND RAILWAY COMPANIES.
4. *By Water—See* SHIP.

V. MISCELLANEOUS CASES, 638.

I. WHO ARE COMMON CARRIERS.

A forwarder is a common carrier, and not liable for loss from the act of God or the King's enemies. *Smith* v. *Whiting*, 3 O. S. 597.

A person engaging to transport goods for hire is not, by virtue of such engagement merely, a common carrier. *Benedict* v. *Arthur*, 6 Q. B. 204.

The plaintiff proved a receipt signed by defendants, contracting to carry on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in G. had arrangements with defendants for the carriage of fish:—Held, some evidence that defendants were common carriers. *Leonard* v. *American Express Co.*, 26 Q. B. 533.

II. LIABILITY AS CARRIERS OR WAREHOUSEMEN.

When in an action against common carriers from Kingston to Montreal, it was proved that the plaintiff had sent his goods to defendants at a season when they could not be forwarded, and defendants received them into their store at Kingston to be forwarded at the earliest opportunity, and before the navigation had opened, or time for transportation had arrived, they were destroyed in defendants' storehouse without their default, by an accidental fire, and a verdict was found for the plaintiff:—Held, that it ought to have been distinctly left to the jury to find

whether the defendants received the goods only as warehousemen until the opening of the navigation, or whether their liability as carriers commenced from the moment of their receipt; and it not having been so left to them, the court granted a new trial. *Ham* v. *McPherson et al.*, 6 O. S. 360.

Held, on a subsequent trial, that it was a question for the jury whether defendants received the goods as carriers or warehousemen, and that the circumstance of the navigation being closed by the ice every year at the season of the receipt of the goods, and also at the time of the fire, did not necessarily determine, as a matter of law, that the defendants must be looked upon as having acted in their character of warehousemen only. *S. C.* H. T. 6 Vict.

Where flour was delivered to defendants, who were warehousemen and carriers, with directions to sell as much of it as they could during the winter, and put the remainder in transitu for plaintiff in the spring, and some sales having been made before the navigation opened in the spring, an accidental fire destroyed the remainder, without any default or negligence of defendants:—Held, that as the flour at the time of the fire was in the hands of defendants as warehousemen, and not as common carriers, they were not responsible. *Thirkell* v. *McPherson et al.*, 1 Q. B. 318.

III. Conveyance of Persons.

1. *By Coach or Horse Railways.*

In an action against a coach proprietor for injury to a passenger by upsetting, it is no misdirection to tell the jury that unless the driver exercised a sound discretion at the time the accident happened the owner is responsible; and if he could have exercised a sounder judgment or better discretion than he did, as by driving slower or faster, or by directing his passengers to get out at any dangerous or difficult passage, the proprietor is liable. *Stanton* v. *Weller*, H. T. 6 Vict.

In an action against the proprietors of a railroad car drawn by horses, for an accident to the plaintiff by the carelessness of the driver, an averment that the contract was to carry safely, is supported by proof that the accident arose from the driver's want of care and skill. *Thompson* v. *Macklem et al.*, 2 Q. B. 300.

In an action against four, the declaration stated that defendants were proprietors of a stage coach for carrying passengers; that they received the plaintiff as a passenger for reward: and by reason thereof it became and was their duty to use due care in conveying him; yet they, not regarding their duty, did not use due care, &c., but by reason of the carelessness and improper conduct of the defendants, by their servant, he was thrown off and injured, &c.:—Held, that upon this declaration a verdict might be given against three of the defendants, and for the other. *Gunn* v. *Dickson et al.*, 10 Q. B. 461.

The plaintiff, standing on the front platform of one of the defendants' cars, which was crowded, was thrown off by a jolt and injured, but it did not appear whether, at the time of the accident, he was holding on to the iron rail on the platform or not:—Held, that the fact of the plaintiff not proving affirmatively that he was so holding on, was not a ground for nonsuit. *Cornish* v. *Toronto Street R. Co.*, 23 C. P. 355.

IV. Conveyance of Goods.

1. *By Coach or Express.*

Held, that the stage coach proprietor (who was also the contractor for carrying the mail) was not liable, under the facts of this case, for the loss of a letter containing a note. *Holman* v. *Weller*, 8 Q. B. 202.

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiff's witness, their agent, proved that within a week after his delivering the parcel to defendant he found that he had absconded: that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in gaol, charged with stealing the money:—Held, that this evidence sufficiently shewed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny under C. S. C. c. 92, s. 55, and a nonsuit was ordered. Hagarty, J., diss. *Livingstone et al.* v. *Massey*, 23 Q. B. 156. See *Regina* v. *Massey*, 13 C. P. 484.

The plaintiff proved a receipt signed by defendants contracting to carry, on certain conditions, and that they had carried fish for one witness called, as well as for the plaintiff, on an arrangement made by their agent in their office for a month. This witness also said the other fishermen in G. had arrangements with defendants for the carriage of fish:—Held, some evidence that defendants were carriers, and that if so, they were liable to an action at common law for refusing to carry except upon conditions limiting their common law liability. Held, also, that to support such action it must be shewn that the plaintiff tendered the goods to be carried, as well as the fare. Held, also, that the contract to be inferred from the evidence stated in the case, was a limited not a general one as declared upon. *Leonard* v. *American Express Co.*, 26 Q. B. 533.

Plaintiff sued defendant, an agent of an express company, on an alleged undertaking to take and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the endorsers. Breach, that defendant did not present or notify, in consequence of which the endorsers refused to pay the note. The evidence shewed no demand by the plaintiff upon the endorsers for payment, nor refusal by them to pay:—Held, that without such evidence, &c., the plaintiff could at most recover only nominal damages; but that defendant was entitled to a verdict, for that on the evidence he had fulfilled his contract by carrying the note to the place agreed upon, and placing it in the hands of a notary for presentment and protest. *McQuarrie* v. *Fargo*, 21 C. P. 478.

The declaration alleged that the defendant before the committing of the grievance, &c., was a carrier and express agent: that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S., and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to

his own use; and by reason of such false and fraudulent representation W. obtained time to and did abscond, and the plaintiff lost said money, which he would otherwise have recovered from W.:—Held, on demurrer, that a sufficient cause of action was shewn; that it was unnecessary to allege that defendant knew the representations to be false, the words *falsely* and *fraudulently* being equivalent to *knowingly*; or that defendant was a carrier at the time when, &c., for the ground of action being the fraud, his being a carrier was immaterial. *Young* v. *Vickers*, 32 Q. B. 385.

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2. *Other Cases.*

Construction of a contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use in the time, mode, and place of shipping the goods. *Fowler* v. *Hooker*, 4 Q. B. 18.

It is no defence for a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent he had done so, and no objection was made by the agent. Aliter, if he had told the agent of his intention before the deviation, and could shew that the agent had any discretion in the matter. *Ib.*

Where a person delivers a parcel to carry to a person on board a boat, not as to a servant of the owners, but to be carried by such person himself, either for reward or otherwise, the person so engaging to carry it is alone responsible for its loss. *McLeod* v. *Eberts et al.*, 7 Q. B. 244.

If, however, the parcel is delivered to the person on board to be carried, not on any private undertaking, but as an officer of the boat, the owners of the boat would be chargeable with the loss, though they were to have no reward for carrying; but then, to establish the liability of the owners, it would be necessary for the jury to find gross negligence in the owners or their servants, or at least a want of that ordinary care which a prudent man would take of his own goods. *Ib.*

Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, *according to the custom and usage of forwarders and carriers at T.*, paid the plaintiffs' claim:—Held, plea bad, for not averring *notice* of the custom to the plaintiffs. *Torrance et al.* v. *Hayes et al.*, 2 C. P. 338; 3 C. P. 274.

Declaration for work and labour by carriers by water. Plea, that a wharfinger, to whom goods were delivered by plaintiffs for defendants, was agent of plaintiffs to receive payment, and that they paid him accordingly:—Held, that from the course of dealing between such parties, as set out in the evidence, the wharfinger was such an agent. Held, also, that *after* delivery of the goods without exacting freight, the wharfinger still continued plaintiffs' agent to demand and receive the freight till his authority was revoked. *Torrance et al.* v. *Hayes et al.*, 3 C. P. 278.

Action for the value of 50 kegs of butter delivered by plaintiff to defendants to carry from G. to T. Defendants relied upon a tender of the butter to plaintiff, as preventing the recovery of more than nominal damages. The tender was made in writing by defendants' solicitor, two days before the Assizes, offering for plaintiff's acceptance the 50 kegs of butter, which had been sold by plaintiff to M., and for which M. had recovered against the plaintiff, stating same to be at T. at plaintiff's own risk:—Held, wholly illusory, and not to partake of any of the incidents of a legal tender, and that plaintiff was entitled to recover the full value of the property. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 440.

V. Miscellaneous Cases.

In an action on the case against carriers, the venue cannot be changed on the common affidavit. *Ham* v. *McPherson*, M. T. 6 Vict.—P. C.—Jones.

Action against several defendants charged as common carriers, in case. A traverse of the delivery to the defendants of the parcel, without saying "or any or either of them:"—Held, good. *Parke et al.* v. *Davis et al.*, 6 Q. B. 411.

In an action on the case (by the plaintiffs in ejectment) against defendants as common carriers, for not delivering within a reasonable time the record of Nisi Prius at the assize town:—Held, that defendants could not put in issue the plaintiffs' title to the land. *Ib.*

Held, 1. That it is not illegal to deliver a money letter to a private friend on his journey, provided such letter be delivered by such friend to the party whom it is addressed; 2. That such friend as a gratuitous bailee would be bound to take as much care of the letter as he would have of his own; 3. That if lost where he does take such care he is not responsible. *Tindall* v. *Hayward*, 7 L. J. 243.—C. C.—Hughes.

It is an established rule of English law that negligence or breach of duty cannot be set up as a defence in action for the recovery of freight, where the defendant has derived a partial benefit under the contract, but defendant must bring a cross action for damages. *Brown* v. *Muckle*, 7 L. J. 298.—D. C.—Duggan.

Such rule must be taken to prevail in Division Courts, notwithstanding the provisions of the Division Courts Act enabling the judge to decide according to equity and good conscience. *Ib.*

A different rule prevails in several states of the neighbouring republic, and is highly convevient as calculated to prevent multiplicity of suits. *Ib.*

CASE, ACTION ON.

See Action.

CASSETUR BILLA.

After judgment for defendant on demurrer to a plea in abatement, and leave to amend on payment of costs, plaintiff cannot enter a cassetur billa before the costs are paid. *Commercial Bank* v. *Jarvis*, 6 O. S. 320.

CATTLE.

See ANIMALS—HORSE.

CERTIORARI.

I. IN CIVIL CASES.

1. *To Remove from District and County Courts*, 639.
2. *To Remove from Division Courts*, 640.
3. *Proceedings after Removal*, 641.
4. *Costs*, 643.

II. IN CRIMINAL CASES.

1. *To bring up Convictions, Depositions, and Orders.*
   (a) *When it lies*, 643.
   (b) *Notice of Application*, 644.
   (c) *Depositions*, 645.
   (d) *Other Cases*, 645.
2. *To bring up Indictments or Recognizances*, 646.

[*See 33 Vict. c. 7, O.*]

I. IN CIVIL CASES.

1. *To Remove from District and County Courts.*

A judgment for defendant cannot be removed from a District Court into the King's Bench under 19 Geo. III. c. 70. *Gregory* v. *Flanneyan*, 2 O. S. 518.

A certiorari will not lie to an inferior court—e. g. a District Court—after verdict, although this court may be of opinion that evidence rejected should have been received. *Tully* v. *Glass*, 3 O. S. 149.

A certiorari under the 19 Geo. III. c. 70, may issue to remove a cause from a District Court into the Queen's Bench. *Baldwin* v. *Roddy*, 3 O. S. 166.

The court set aside a certiorari, to remove proceedings from a District Court after judgment and execution, and without any application to this court or a judge, laying any especial ground. *Douglas* v. *Hutchinson*, 5 O. S. 341.

A certiorari must have been delivered to the proper officer before the entry of final judgment, or, after interlocutory judgment, before the jury have been sworn on the assessment; otherwise a procedendo will be ordered, even though the record has been returned and filed in the court above. *Barnes* v. *Cox*, 16 C. P. 236.

A. brought replevin in the County Court and obtained a verdict, which was set aside because title to land came in question. Nothing was said in the rule about a new trial, but he served another notice of trial, and the cause was made a remanet. The surety being sued in this court on the replevin bond for not prosecuting the suit with effect, moved for a mandamus to compel the County Court to proceed with the action, or a certiorari to remove it, and in the meantime to stay proceedings in this court; but the court refused to interfere. Semble, that a certiorari imports jurisdiction in the inferior court, and will not lie to determine whether it exists, at least not at the instance of the plaintiff who sued there. *Meyers* v. *Baker*, *Hargreaves* v. *Meyers*. 26 Q. B. 16.

The 23 Vict. c. 44, prohibits a certiorari unless the debt or damages claimed exceed $100. Quære, therefore, whether replevin is within the act. *Ib.*

The mandamus was refused, among other reasons, because the applicant had a remedy by appeal from the rule in the County Court setting aside the verdict. *Ib.*

Where in replevin in a County Court the plaintiff shewed clearly that he had reason to believe that the title to the land would be brought in question by defendant, a certiorari was granted. *Heaton* v. *Cornwall*, 4 P. R. 148. —C. L. Chamb.—A. Wilson.

Where an action has been brought in the County Court beyond its jurisdiction, or when being rightly brought there the jurisdiction has been determined by matter of pleading or evidence, the whole proceedings coram non judice and void, and they cannot be removed by certiorari. *O'Brien* v. *Welsh*, 28 U. C. B. 394.

Certiorari granted to remove a cause, defendant having been arrested. *Winaker* v. *Pringle*, 1 P. R. 357.—P. C.—Richards.

A certiorari does not lie to remove an interpleader issue. If such a writ do improvidently issue, the application should be to quash the certiorari, and not for a procedendo. *Jones* v. *Harris*, 6 L. J. 16.—C. L. Chamb.—Burns.

Sec. 57 of the County Courts Act C. S. U. C. c. 15, does not authorize the removal of a case to the Court of Chancery, where such removal is desired on account of the existence of a subsequent mortgage upon the premises exceeding the jurisdiction of the court. *Mitchell* v. *Martin*, 2 L. J. N. S. 249.—Chy. Chamb.—Mowat.

2. *To Remove from Division Courts.*

Affidavits under 13 & 14 Vict. c. 53, s. 85, to remove a cause from the Division Court, must be intituled in the court in which the motion is made, not in the Division Court. *Smyth* v. *Nicholls*, 1 P. R. 355.—C. L. Chamb.—Robinson.

Held, that in this case no sufficient ground for a removal was shewn. *Ib.*

A suit brought by an incorporated company will be removed, if it be shewn that difficult questions of law will arise as to the powers conferred by the act of incorporation. *Cataraqui Cemetery Co.* v. *Burrowes*, 3 L. J. 47.—C. L. Chamb.—McLean.

A certiorari was granted under 13 & 14 Vict. c. 53, where defendant resided in a part of the province far distant from the division in which the suit was commenced, and also on account of a difficult question of law. *Nugent* v. *Chambers*, 3 L. J. 108.—C. L. Chamb.—Burns.

A certiorari will not be granted after judgment and execution regularly issued and money made and paid over, although a new trial may have been granted subsequently in the Division Court. *McKenzie* v. *Keene*, 5 L. J. 225.—C. L. Chamb.—Robinson.

An interpleader issue in a Division Court held not within sec. 51 of the Division Courts Act, and so not removable by certiorari. *Russell* v. *Williams*, 8 L. J. 277.—C. L. Chamb.—Richards.

Held, that the Imperial Statute 43 Eliz. c. 5, applies to cases in Division Courts, and a certiorari was held too late where a jury was empannelled by the judge, and a verdict rendered before delivery of certiorari to the judge. *Black* v. *Wesley*, 8 L. J. 277.—C. L. Chamb.—Richards.

Semble, the act in spirit applies to cases where plaintiff's witnesses are sworn, although no jury is called. *Ib.*

After the hearing of a cause has been proceeded with before the judge, though no jury is sworn, it is too late to serve a writ of certiorari. *Gallagher* v. *Bathie*, 2 L. J. N. S. 73.—C. L. Chamb.—A. Wilson.

A cause was heard and evidence taken, and judgment was postponed to be given at the clerk's office on a future day. Afterwards, and before that day, a writ of certiorari was served:—Held, too late, and a procedendo was awarded. *Ib.*

A plaintiff is not entitled to remove his own plaint from a Division Court. *Prudhomme* v. *Laxure*, 3 P. R. 355.—C. L. Chamb.—Morrison.

Held, that a judge of a Division Court having expressed an erroneous opinion in a case, is no ground for removal. *Holmes* v. *Reeve*, 5 P. R. 58.—C. L. Chamb.—Richards.

Where a defendant knows all the facts before the trial, but, nevertheless, argues the case and obtains an opinion from the judge, the case should not be removed, even though the judge desire it. *Ib.*

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3. *Proceedings after Removal.*

[See now 33 Vict. c. 7, s. 9, O.]

The court will not direct how proceedings are to be carried on after the removal of a cause from a District Court to the Queen's Bench. *Copping* v. *McDonell*, 5 O. S. 311.

Where cases have been brought up from the Division Court of an outer county, into one of the superior courts at Toronto, by certiorari, the papers should be filed in the crown office at Toronto; but the venue need not be laid in the county of York. *Chambers* v. *Chambers*, 3 L. J. 205.—C. L. Chamb.—Draper.

Where a cause is removed from the County Court after issue joined: Semble, that the plaintiff should declare de novo. In this case the plaintiff did so declare, and signed judgment, though defendants had not appeared. Defendants moved to set aside the judgment, but made no objection for the want of appearance:—Held, that they were precluded from afterwards objecting on that point. *Hankey* v. *Grand Trunk R. W. Co.*, 17 Q. B. 472.

A case being at issue in the County Court, was removed into the Queen's Bench by certiorari, and the plaintiff proceeded upon the pleadings as they stood, filing no new declaration, and entering no appearance above:—Held, that defendants having gone to trial without objection, could not object after verdict. *Fulton* v. *Grand Trunk R. W. Co.*, 17 Q. B. 428.

Where a certiorari is regularly issued for the removal of a cause from the Division Court after new trial granted, a previous alleged understanding between the parties that the cause should be tried in the Division Court is no ground for interfering with the certiorari. *Help* v. *Lucas*, 8 L. J. 184.—C. L. Chamb.—Hagarty.

Where the plaintiff, pending an issue in law, removed the case by certiorari to the Queen's Bench, and defendant refused to enter an appearance after notice, an order to compel him to do so, or to assist the plaintiff to proceed, was refused. Quære, as to the plaintiff's right to remove his own cause under such circumstances. *Dennison* v. *Knox*, 3 P. R. 150.—C. L. Chamb.—Draper.

A judge, having all the material facts before him, has a right to grant a certiorari and impose such terms as he may think fit, but not to deprive the plaintiff of his legal rights in regard to the position of the cause. When a defendant removes a cause, the plaintiff has the option to proceed or not, but if the pleadings be removed and stand as pleadings in the Superior Court, the defendant will be in a position to compel the plaintiff to proceed. The plaintiff must declare de novo. A judge has no power to change the venue by the order granting the writ of certiorari; it should be a substantive motion, when the plaintiff has shewn where he will lay his venue after the cause has been removed. Per J. Wilson, J., dissenting from the judgment of the court, when a cause is removed from a County Court, the proceedings there should stand and be the proceedings in the court to which the cause is removed. *Patterson* v. *Smith*, 14 C. P. 525.

Held, 1. That although a plaintiff may, after removal of his plaint from a Division Court, declare in the superior court in a different form of action, he cannot declare for a different cause of action; 2. That if he vary his cause of action, the declaration may be set aside with costs; 3. That where plaintiff sued for injuries done to a filly by defendant's bull, and afterwards declared in the superior court for entry by defendant on plaintiff's land with the bull, and tearing up the soil, &c., the cause of action was varied. *Mason* v. *Morgan*, 3 P. R. 325.—C. L. Chamb.—Draper.

A claim in the Division Court for $40, for detention of plaintiff by defendants on a journey from Toronto to Detroit and back, (the journey occurring between 28th Nov., when he started from Toronto, and 3rd Dec., when he got back,) was removed by certiorari into the Queen's Bench, where the declaration was in contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar, considering the want of technicality in Division Court pleadings. *Hunter* v. *Grand Trunk R. W. Co.*, 6 P. R. 67.—C. L. Chamb.—Dalton, *C. C. & P.*

An application made below after the removal to set aside the final judgment entered, because the claim was unliquidated, had been refused, because, having complied with the certiorari, the judge had no longer jurisdiction in the cause:—Held, that the subject matter of the suit being within the jurisdiction of the judge below, his judgment could not be reviewed on the proceeding before this court; but, semble, that if it

appeared on the face of the record that the judgment was final when it ought to have been interlocutory, a writ of error would lie. Semble, that any proceedings in the court below after removal of the cause into this court, could not be sustained :—Held, also, that after the return of the record, &c., under the procedendo, to the court below, the judge there had power to set aside the judgment and let defendant in, upon terms, to plead. *Barnes et al.* v. *Cox*, 16 C. P. 236.

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4. *Costs.*

Where the judgment of a Court of Requests had been removed into this court by certiorari, and set aside upon defendant's application, without any interference by plaintiff, the court refused an attachment against him for non-payment of costs of removing the proceedings. *Cramer* v. *Nelles*, Tay. 36.

An order for a certiorari to bring up a case into a superior court, entitles defendant to the full costs of that court, if he succeeds in the action, without any certificate of the judge who tries the cause. Costs for superfluous or irrelevant matter introduced into affidavits will not be allowed, and in extreme cases the judge will disallow costs for the whole affidavit. *Corley* v. *Roblin*, 5 L. J. 225.—C. L. Chamb.—Richards.

Where the case was removed from the Division Court into the Common Pleas by defendant, who obtained a verdict, and the order for the certiorari was silent as to the costs, defendant, on entering judgment, was not allowed the costs of removal. *Kerr* v. *Cornell*, 1 L. J. N. S. 326.—C. L. Chamb.—Morrison.

II. In Criminal Cases.

1. *To bring up Convictions, Depositions and Orders.*

(a) *When it lies.*

A certiorari lies to remove orders of sessions relating to the expenditure of the district rates and assessments, at the instance of the attorney-general, without notice. *Rex* v. *Justices of Newcastle*, Dra. 114.

Defendant was convicted under 8 Vict. c. 45 for working on Sunday at his ordinary calling. He appealed to the Quarter Sessions, where the question was tried before a jury and the conviction affirmed. The proceedings having been removed by certiorari to this court :—Held, that a certiorari would lie, not to examine the finding of the jury on the facts, but to determine whether the justices had exceeded their jurisdiction. *Hespeler* v. *Shaw*, 16 Q. B. 104.

Where it is shewn to a judge in chambers that there is a reasonable doubt as to the legality of a conviction under the Master and Servant's Act, he will order a certiorari for the removal of the conviction, notwithstanding the confirmation of it by the sessions on appeal. *In re Sullivan*, 8 L. J. 276.—C. L. Chamb.—Richards.

A. engaged B. and his hired man C. to build a house for him, and agreed to pay B. his ordinary wages, and $1 per diem for C. A. making default, was convicted before a magistrate under the Masters and Servants Act, and ordered to pay B. $15.50 for C.'s services. A. appealed, but the appeal was adjourned to another session when the conviction was quashed. B. then obtained a summons to shew cause why a certiorari should not issue to return the order quashing the conviction, &c., in the Queen's Bench :—Held, that the applicant had a right to the certiorari ; but—Semble, that the proceedings to reinstate this conviction were unnecessary. *In re Doyle and McCumber*, 4 P. R. 32.—C. L. Chamb. —Draper.

Where a defendant, having been convicted of evading toll, appealed to the Quarter Sessions, where he was tried before a jury and acquitted, this court refused a certiorari to remove the proceedings, the effect of which would be to put him a second time upon his trial. *Stewart* v. *Blackburn*, 25 Q. B. 16.

Semble, that although the Temperance Act of 1864, 27 & 28 Vict. c. 18, s. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise. *In re Watts and In re Emery*, 5 P. R. 267.—C. L. Chamb.—Gwynne.

Where a conviction affirmed on appeal to the sessions, was brought up by certiorari, contrary to the 32 & 33 Vict. c. 31, s. 71, D., as amended by 33 Vict. c. 27, s. 2, which enacts that in such case no certiorari shall issue :—Held, that the court could not quash the conviction (the case being one in which the magistrate had jurisdiction), though it was clearly bad, and no motion had been made to quash the certiorari. *Regina* v. *Johnson et al.*, 30 Q. B. 423.

A conviction having been brought up by certiorari, when, under the 32 & 33 Vict. c. 31, D., no such writ could issue : Per Richards, C. J., and Morrison, J., it could not be quashed, but the court could only discharge the defendant. Semble, per Wilson, J., that being before the court it might be quashed. *Regina* v. *Levecque*, 30 Q. B. 509.

(b) *Notice of Application.*

Notice of application for a certiorari must be given to the convicting magistrate, and the want of it is good cause against a rule nisi to quash the conviction. *Regina* v. *Peterman*, 23 Q. B. 516.

Quære, whether the certiorari in this case was properly issued without the notice, &c., required by 13 Geo. II. c. 18, though the object was to obtain the prisoner's discharge, not to quash the conviction. *Regina* v. *Munro*, 24 Q. B. 44.

Notice of application for a certiorari to remove a conviction confirmed by the Quarter Sessions, must be given to the chairman and his associates, or any two of them, by whom the order affirming such conviction was made ; and where a certiorari had been obtained without such notice, and a rule nisi obtained to quash such conviction and order, the certiorari was set aside. *Regina* v. *Ellis*, 25 Q. B. 324.

Held, that, under the circumstances of this case, no notice to the chairman of the sessions of the defendant's intention to move for a certiorari was necessary. *Regina* v. *Caswell*, 39 Q. B. 336.

Semble, that in a notice under 13 Geo. II. c. 18, of application to remove a conviction the grounds of objection to such conviction need not be stated. *In re Taylor* v. *Davy*, 1 P. R. 346.—C. L. Chamb.—Robinson.

Where the application for a certiorari is made by the prosecutor, no notice to the justices is necessary. *Regina* v. *Murray*, 27 Q. B. 134.

(c) *Depositions.*

Quære, as to the power of a judge in chambers, on an application of a prisoner for his discharge on a bad warrant, to remand him, and in aid of the prosecution to order a certiorari to bring up the depositions, &c. *In re Carmichael*, 10 L. J. 325.—C. L. Chamb.—Draper, Morrison.

Per Draper, C. J.—The certiorari to bring up the depositions cannot properly be issued in vacation, returnable before a judge in chambers. *In re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.

Where a magistrate, on a summary trial, took no written depositions, but the conviction returned to a certiorari set out the evidence:—Held, in the absence of anything to shew that there was any other or different evidence given, that the return must be taken to be a true and full statement. Semble, that had there been proof of any other or different evidence given, the magistrate might have been required to return it, or to amend the conviction by setting it out. *Regina* v. *Flannigan*, 32 Q. B. 593.

The defendant having been convicted for selling liquor without a license, the depositions returned to the court by the convicting magistrate under a certiorari shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash stated that the party had a license in fact, and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved or given in evidence:—Held, that the return to the certiorari was conclusive, and that the court could not go behind it. *Regina* v. *Strachan*, 20 C. P. 182.

Semble, that if material evidence be given before a magistrate, but unintentionally omitted from such a return, an amendment may be allowed to supply it, but only with the concurrence of the parties, and of the witness by whom the deposition was signed, in the correctness of the additions but it cannot be supplied by affidavit. *Regina* v. *McNaney*, 5 P. R. 438.—C. L. Chamb.—A. Wilson.

Where a certiorari simply requires a return of the evidence, the magistrate need not return the conviction or a copy of it. *Regina* v. *McNaney*, 5 P. R. 438.—C. L. Chamb.—A. Wilson.

(d) *Other Cases.*

On application for a certiorari to remove conviction of one J. B., for selling liquor without license:—Held, 1. That the rule nisi was properly intituled "In the matter of J. B.;" and that it need not state into which court the conviction was to be removed, this being sufficiently shewn by the intituling it in the court in which the motion was made. *In re Barrett*, 28 Q. B. 559.

In shewing cause to the rule nisi to quash the conviction, it was objected that the recognizance was irregular, being dated before the conviction, but—Held, that this was ground only for a motion to quash the certiorari, or the allowance of it. *Regina* v. *Hoggard*, 30 Q. B. 152.

Held, that the defendant appearing on the evidence returned to have bonâ fide asserted a claim to the land which he had enclosed, it was not a proper case for the adjudication of the mayor of B., under secs. 72 or 185 of 12 Vict. c. 82; and that consequently the mayor's summary conviction of the defendant, under that act, might be quashed by certiorari. *Regina* v. *Taylor*, 8 Q. B. 257.

Owing to a mistake in the crown office, a rule to return the certiorari, and afterwards a rule for an attachment issued, although a return had in fact been filed. More than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Joice and Anglin*, 19 Q. B. 197.

The only evidence offered in proof of an objection that the magistrate before whom the recognizance in this case had been taken, was not properly qualified, was a certificate, purporting to be under the hand and seal of the clerk of the peace, that he did not find in his office any qualification filed by the magistrate:—Held, insufficient. *Regina* v. *White*, 21 C. P. 354.

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2. *To bring up Indictments or Recognizances.*

An indictment cannot be removed by certiorari from the court of General Quarter Sessions to the Queen's Bench after verdict, even by consent of the parties. *Regina* v. *Lafferty*, 9 Q. B. 306.

Nor from the Assizes after judgment pronounced, for the purpose of applying for a new trial. *Regina* v. *Smith*, 10 Q. B. 99; *Regina* v. *Crabbe*, 11 Q. B. 447.

After an acquittal in a criminal case, the court refused a certiorari to remove the indictment with a view of applying for a new trial; or to stay the entry of judgment, so that a new indictment might be preferred and tried without prejudice. *Regina* v. *Whittier*, 12 Q. B. 214.

After acquittal for nuisance a motion was made for a certiorari to remove the indictment, with a view to new trial, no ground being shewn by affidavit; and the new trial was moved for on the same day, being the fourth day of term:—Held, that the certiorari, after acquittal, could not issue as of course; but that if it could, it would have been unnecessary to move for a new trial within the first four days of term. *Regina* v. *Gzowski*, 14 Q. B. 591.

A defendant applying for a certiorari to remove an indictment from the Sessions must shew that it is probable the case will not be fairly or satisfactorily tried in the court below, and if difficulties on points of law form the ground of application, they must be specifically stated. *In re Kellett et al. and Porter*, 2 P. R. 102.—P. C.—Richards.

The proper proceeding to reverse a judgment of the court of Quarter Sessions on an indictment is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 Q. B. 215.

Held, that a recognizance to appear for trial on a charge of perjury at the Sessions was wrong, as the court had no jurisdiction in perjury, but a certiorari to remove it was refused, as the time for the appearance of the party had gone by. *Regina* v. *Currie*, 31 Q. B. 582.

CESTUI QUE TRUST.

I. Generally—*See* Trust and Trustee.

II. Parties to Bill in Equity.

1. *Foreclosure*—*See* Mortgage.
2. *Other Suits*—*See* Pleading in Equity.

CHALLENGE OF JURY.

See Criminal Law.

CHAMBERS, JUDGES'.

See Practice at Law — Practice in Equity.

CHAMPERTY AND MAINTENANCE.

I. Generally, 647.

II. Bracery, or Buying of Titles, 649.

I. Generally.

The plaintiffs having a judgment against B. & P., agreed with defendant that if such judgment, or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one-third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if successful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized, were found, on an interpleader issue, to be the claimant's. The plaintiffs thereupon sued defendant on the agreement, for their costs of defence in the interpleader, &c.:—Held, that if such agreement extended to these costs, it was illegal as being contrary to public policy, if not within the definition of champerty; and if it did not so extend the plaintiffs could not recover. *Kerr et al.* v. *Brunton*, 24 Q. B. 390.

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between plaintiffs and T., one of the now defendants, pending such suit, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for the security for costs, which the plaintiffs had been ordered to give in said suit, and pay all costs incurred or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs having sued defendants on the last mentioned covenant:—Held, upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance, and they therefore could not recover. *Carr et al.* v. *Tannahill et al.*, 30 Q. B. 217.

The plaintiffs replied to the plea on equitable grounds, that in the Chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the hearing the cause was compromised, and a decree made by agreement by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties and treated by the court as valid. Remarks by Wilson, J., as to the effect of this replication. *Ib.*

The plantiffs having amended their declaration, it was held on demurrer to be still bad, for the promise as stated was not based on the transactions subsequent to the agreement which had been held void for champerty, but that agreement was alleged to be part of the consideration, and being bad avoided the whole contract. *S. C.* 31 Q. B. 201.

Held, also, that the denial by these defendants, in their answer in Chancery, that the agreement was illegal, could not estop them from asserting such illegality here. *Ib.*

In ejectment the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure the plaintiff for future services of the same kind; and of £25 already paid and advanced by plaintiff to him, &c., he (M.) covenanted, granted, and agreed that he would stand seised and possessed of the land in question to the use of plaintiff, his heirs, and assigns, by way of charge, security, and mortgage on the land for said money and costs; and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a charge, mortgage and security upon the land for the amount so to be ascertained, or M. would, and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c. Semble, that the instrument was not void for champerty or maintenance. *Miller* v. *Still et al.*, 17 C. P. 559.

It is not a champertous transaction, that an association of persons with whom the petitioner in an election petition was politically allied, agreed to pay the costs of the petition. Even if the agreement were champertous, that would not be a sufficient reason to stay the proceedings on the petition. *In re North Simcoe Election Petition, Edwards* v. *Cook*, 10 L. J. N. S. 232.—E. C.—Richards.

Where an assignment was executed by a puisne incumbrancer to another, for the purpose of filing a bill to impeach a prior mortgage for fraud, and which bill was accordingly filed; the court

without determining what might have been the result of a suit brought simply to redeem, or one instituted by the puisne incumbrancer himself, dismissed the bill with costs, notwithstanding the right to redeem formed one alternative of the prayer, it being evident that the alleged fraud was the ground upon which the plaintiff principally relied, and the agreement between the parties savouring strongly of champerty and maintenance. *Muchall* v. *Banks*, 10 Chy. 25.

An heir-at-law being supposed to have a right to call trustees to account and to impeach sales made by them, such supposed right being considered very doubtful and being one which could only be reached through a suit in this court, he, being himself unwilling to litigate the question, assigned his interest to a third person; and, by the agreement, the consideration for such assignment was only to be paid in case of success:—Held, that a merely speculative purchase of this kind savouring of maintenance or champerty, could not be enforced in equity. *Little* v. *Hawkins*, 19 Chy. 267.

The plaintiff admitted himself to have been a mere speculative purchaser, buying for less than one-sixth of its value a piece of land which he knew to be in the occupation of another person who claimed to be the owner, from a vendor whom he sought out, and who did not pretend to be the owner of the subject of the purchase, whom the plaintiff agreed to indemnify against the costs of the litigation which both anticipated, and who was to share in the fruits of the contemplated law suit:—Held that this contract savoured of maintenance and champerty, and was not that honest bonâ fide purchase which alone the registry law was intended to protect. *Wigle* v. *Setterington*, 19 Chy. 512.

II. Bracery, or Buying of Titles.

[*By the 32 Hen. VIII. c. 9, and by the common law, before 14 & 15 Vict. c. 7, no person could buy or sell any pretended right or title to land unless he, or those under whom he claimed, had been in possession for a year, or any title to land of which another person, not claiming under or in privity with the buyer or seller, was at the time of such sale or purchase in actual possession, claiming the fee; and the act imposed as a forfeiture the full value of the lands, to be recovered in a qui tam action. The 32 Hen. VIII. was virtually repealed, at all events where an actual legal right of entry exists, by the 14 & 15 Vict. c. 7, s. 5, now C. S. U. C. c. 90, s. 5, which enacts that a contingent, an executory, and future interest, and a possibility coupled with an interest in any land, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, may be disposed of by deed.*]

The mortgagor being in possession at the time of a conveyance in fee by the mortgagee, is no objection to the conveyance, the doctrine of disseisin not applying as between the mortgagor and mortgagee. *Doe* d. *Dunlop* v. *McNab*, 5 Q. B. 289; *Doe* d. *Dunlap* v. *McDougal*, Tay. 464.

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, was not a disseisin of the grantee. *Doe* d. *West* v. *Howard*, 5 O. S. 462.

Held, that while two persons are in difference about their boundary, and shew by their conduct that they are uncertain about the true line, but agree with each other to have it ascertained, and to hold accordingly, either party may convey to a third person so as to enable the alienee to hold according to the true boundary, though there may be some of his land in possession of the other, in consequence of the line between them having been mistaken. Macaulay, J., dubitante. *Doe* d. *Beckett* v. *Nightingale*, 5 Q. B. 518.

To bring the giving of a note in payment of land within the 32 Hen. VIII. c. 9, care must be had to allege enough to meet the provisions of the statute. Where, therefore, the defendant merely averred that the plaintiff was not, for a year next before the bargain, "in receipt of the rents and profits," without saying that he was not "in possession of the land, or of the reversion or remainder thereof:"—Held, plea bad. *Nicolls* v. *Madill*, 6 Q. B. 415.

A mere verbal bargain for the sale of land would not subject a person to the penalty under 32 Hen. VIII. c. 9, for buying a pretended title. *Aubrey* q. t. v. *Smith*, 7 Q. B. 213.

A person could not be convicted merely on his own admission, that he had taken a deed from a party out of possession; some evidence aliunde must be adduced of the existence of such a deed. *Ib.*

A tenant holding over is in no case a disseisor. *Doe Charles* v. *Cotton*, 8 Q. B. 313.

A deed by the reversioner was good, though another person, holding under the life estate of the tenant by the curtesy, was in actual possession. *Doe Burnham* v. *Bowyer*, 8 Q. B. 607.

An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury and with knowledge of his claim. One M., in 1839, having a right of purchase of a lot from the crown, mortgaged to DeB. to secure payment of a sum by instalments, the last of which would fall due in 1849. Soon after this mortgage, M. gave to B. a bond for a deed, on certain conditions to be fulfilled by B., who took possession. In 1850, the plaintiff went in under an agreement for purchase from B., who had not fulfilled the conditions of his bond. In 1851, the defendant took an assignment of DeB.'s mortgage, and in the same year he claimed before the heir and devisee commission, making the usual affidavit of ignorance of any adverse claim, and obtained a patent. The plaintiff thereupon brought an action on the case, alleging in the first and second counts that the defendant, maliciously contriving and intending to injure him, represented himself as assignee of the original nominee of the crown and claimed as such before the commission; and in order to defraud the plaintiff, and not having himself any well founded claim, and knowing the plaintiff's claim, made affidavit that he was not aware of any adverse claim, and procured his own claim to be allowed—whereby, &c. The third and fourth counts, founded on the statute 32 Hen. VIII. c. 9, were for buying M.'s pretended right, the defendant being in possession claiming title:—Held, that on the evidence the allegations were not supported; and that admitting them all to be true, no ground of action would be shewn. *Shields* v. *DeBlaquiere*, 12 Q. B. 386.

A., the owner of lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds; the defendant, A.'s son and heir-at-law, subsequently released to S., which was also recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff sued defendant for the penalty under 32 Hen. VIII. c. 9, for selling a pretended right:—Held, that the 14 & 15 Vict. c. 7, would not apply in defendant's favour, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right; but,—Held, also, affirming Major q. t. *v.* Reynolds, H. T. 6 Vict., that by the registry of the deed to S. the conveyance to the plaintiff became fraudulent in its inception, and therefore he could not recover. Semble, that the effect of the 14 & 15 Vict. c. 7, is to repeal the 32 Hen. VIII., and not merely to permit the sale of a right of entry subject to the penalty. *Baby* q. t. v. *Watson*, 13 Q. B. 531.

Held, in ejectment, that the defendant being in possession of the land at the date of the deed to the plaintiff, 16th March, 1842, nothing passed to the plaintiff by that deed, as the statute authorizing the conveyance of a right of entry was not then passed. *Bishop of Toronto* v. *Cantwell*, 12 C. P. 607.

See *Little* v. *Hawkins*, 19 Chy. 267, p. 649; *Wigle* v. *Setterington*, 19 Chy. 512, p. 649.

For other decisions under the 32 Hen. VIII. and the law as it stood before the 14 & 15 Vict. c. 7, see *Purdy* q. t. v. *Ryder*, Tay. 236; *Doe Dixon* v. *Grant*, 3 O. S. 511; *Major* q. t. v. *Reynolds*, H. T. 6 Vict.; *May* q. t. v. *Dettrick*, 5 O. S. 77; *McKenzie* v. *Miller*, 6 O. S. 459; *Doe* d. *Dunn* v. *McLean*, 1 Q. B. 151; *Doe* d. *Dettrick* v. *Dettrick*, 2 Q. B. 153; *Doe* d. *McMillan* v. *Brock*, 2 Q. B. 270; *Benns* q. t. v. *Eddie*, 2 Q. B. 286; *Beasley* q. t. v. *Cahill*, 2 Q. B. 320; *Baldwin* q. t. v. *Henderson*, 2 Q. B. 388, 3 Q. B. 287, 4 Q. B. 361; *Doe* d. *Peterson* v. *Cronk*, 5 Q. B. 135; *Doe* d. *Bonter* v. *Savage*, 5 Q. B. 223; *Doe* d. *Clark* v. *McInnis*, 6 Q. B. 28; *Doe* d. *Moffatt* v. *Scratch*, 5 Q. B. 351; *Doe* d. *Simpson* v. *Milloy*, 6 Q. B. 302; *Nicolls* v. *Madill*, 6 Q. B. 415; *Doe* d. *McKenzie* v. *Fairman*, 7 Q. B. 411; *Ross* q. t. v. *Meyers*, 9 Q. B. 284; *Doe Spafford* v. *Breackenridge*, 1 C. P. 492; *Fraser* v. *Fraser*, 14 C. P. 70; *Smith* v. *Hall*, 25 Q. B. 554.

CHANCERY.

I. Court of—*See* Court of Chancery.

II. Sale—*See* Sale of Land by Order of the Court.

CHARACTER.

I. Defamation of—*See* Defamation.

II. Evidence of—*See* Evidence.

III. Representations as to—*See* Fraud and Misrepresentation.

CHARGING IN EXECUTION.

See Prisoner.

CHARITY.

I. Conveyances to—*See* Mortmain.

II. Devises or Bequests to—*See* Will.

To a bill either to establish or impeach the legality of charitable bequests, the attorney-general may be made a party. *Davidson* v. *Boomer*, 15 Chy. 1. See, also *Long* v. *Wilmotte*, 2 Chy. Chamb. 87.—Esten.

A voluntary bond to a charity, purporting to bind the obligor and his heirs, and payable six months after the obligor's death, cannot be enforced against the obligor's lands. *Anderson* v. *Paine*, 14 Chy. 110.

A judgment having been recovered against the obligor's executors on a voluntary bond in favour of a charity, and execution having been issued thereon against his lands, the court, at the suit of the heirs, restrained further proceedings on such execution. *Ib.*

CHARTER.

I. Corporate—*See* Corporations.

CHARTER PARTY.

See Ship.

CHATTEL MORTGAGE.

I. Generally—*See* Bills of Sale and Chattel Mortgages.

II. Insurable Interest of Mortgagee—*See* Insurance.

CHATTELS.

I. Gift of—*See* Gift.

II. Assignment of—*See* Bills of Sale and Chattel Mortgages.

III. Conversion of—*See* Trover.

IV. Mortgage of—*See* Bills of Sale and Chattel Mortgages.

V. Specific Perfomance of Agreement Concerning—*See* Specific Performance.

CHEQUE.

I. Generally—*See* Banks.

II. Payment by—*See* Payment.

III. Usurious Transactions—*See* Usury.

The production of a cheque is not even prima facie evidence of money lent by the drawer. *Foster* v. *Fraser*, M. T. 4 Vict.

A cheque in this country may be post-dated, though in England it is prohibited by the stamp acts. Where such cheque is payable on demand

no days of grace are allowed. Where on the same day that the cheque was dishonoured, defendant paid £150 to the holder on account of it: Semble, sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour. In this case, however, no notice was necessary, the banker being solvent:—Held, under the evidence, that the pleas setting up want of consideration, and denying plaintiffs' property in the cheque, were not proved. *Wood et al.* v. *Stephenson*, 16 Q. B. 419.

To an action on a cheque by the bearer against the maker, defendant pleaded that the cheque was given to one B., who had always been the lawful holder thereof, and that the plaintiffs held the same as his agents; that it was given for bills of exchange drawn by B. on H. & Co., and since overdue and dishonoured, whereof B. had notice; that the cheque was held by plaintiffs as B.'s agents, and B. was liable to pay defendant, as drawer of said bills, the amount of said cheque, and defendant offered to set off the same:—Held, on demurrer, plea bad, for not alleging that the bills were dishonoured before the commencement of this suit. *Wood et al.* v. *Stevenson*, 16 Q. B. 527.

CHILD.

I. GENERALLY—*See* INFANT.

II. ILLEGITIMACY—*See* BASTARD.

III. UNDUE INFLUENCE—*See* FRAUD AND MISREPRESENTATION.

IV. CONTRACT OF HIRING—*See* MASTER AND SERVANT.

CHOSE IN ACTION.

I. ASSIGNMENT OF.

1. *At Law.*

(a) *Before 35 Vict. c. 12, O.*, 653.

(b) *Under 35 Vict. c. 12, O.*, 654.

2. *In Equity*, 655.

II. MISCELLANEOUS CASES, 657.

III. RELEASE OF—*See* RELEASE.

IV. EFFECT OF SEQUESTRATION—*See* SEQUESTRATION.

V. ATTACHMENT OF DEBTS—*See* ATTACHMENT OF DEBTS.

I. ASSIGNMENT OF.

1. *At Law.*

(a) *Before 35 Vict. c. 12, O.*

A party may assign a chose in action so as to make himself a trustee for the assignee, and give the latter the right to use his name to collect the debt. *Ham* v. *Ham*, 6 C. P. 37.

A recovery by one of two counties, after dissolution, for moneys paid during the union:—Held, to be allowed by 12 Vict. c. 78, s. 15, notwithstanding the technical rule of law against assignment of debts. *Municipal Council of the County of Wellington* v. *Municipality of the Township of Wilmot*, 17 Q. B. 82.

K. owned a propeller which had been employed by government, for whom S. was acting as agent. He sold her to the plaintiff, and addressed the following letter to S.: "Dear Sir,—As owner of the pro. 'S. C. Ives,' now employed by you on account of the Canadian government in conveying materials to Point au Pelé light house, I beg to inform you that I have this day conveyed to E. J. Sterling, Esq., of Cleveland, all my right to the payment of moneys for services performed by said boat under our contract. You will therefore, after presentation of this, account to him or his agent for such sums as said boat may be entitled to on account of work performed under our contract." At the foot of this the plaintiff signed an order to pay the money to the captain of the vessel. This money was afterwards seized by the sheriff under an attachment against K., which was subsequently set aside. Whether it was so seized in the hands of S. or of the captain did not appear:—Held, reversing the judgment of the Queen's Bench, (17 Q. B. 361,) that the plaintiff could not maintain an action for the money in his own name against the sheriff. *Sterling* v. *McEwan*, 18 Q. B. 496, in appeal.

Defendant having pleaded a set-off to an action upon a covenant for the payment of money, the plaintiff replied on equitable grounds, in substance, that the deed declared on, and the moneys sued for, were before this action, and before the alleged set-off had accrued, duly assigned for value by plaintiff to D., and by D. to B.: that defendant had notice of and assented to both assignments, and that this action was brought for B.'s benefit, the plaintiff being a nominal plaintiff only: that after the said assignments and notice thereof B. sued defendant in the plaintiff's name on the same covenant for another breach, to which defendant pleaded non est factum, and a verdict and judgment were recovered against him, which he paid; and it is inequitable that he should now set up the defence pleaded:—Held, on demurrer, replication good. *Dennison* v. *Knox*, 24 Q. B. 119.

Defendants agreed with R. to sell and deliver to him a quantity of lumber by a certain day. After that day R., with defendants' assent, assigned the contract and all his interest in it to plaintiff, and defendants afterwards told the plaintiff's agent they would carry out the contract, and delivered some of the lumber to plaintiff:—Held, the suit being commenced before the 35 Vict. c. 12, O., that the plaintiff was only the assignee of a chose in action, and could not sue defendants for not delivering the rest of the lumber. *Eakins* v. *Gawley et al.*, 33 Q. B. 178.

(b) *Under 35 Vict. c. 12, O.*

Plaintiff sued on an arbitration bond, alleging an award that defendant should pay the plaintiff a sum of money, and convey to him certain lands, and assigning as breaches non-payment and neglect to convey. Defendant pleaded as to the first breach, that since the 35 Vict. c. 12, O., the plaintiff had assigned to one B. the money awarded, of which defendant had notice:—Held, a good plea; for that such assignment of the money alone, without the bond, was valid under the act. *Wellington* v. *Chard*, 22 C. P. 518.

An averment in a declaration that a chose in action "was duly assigned in the manner re-

quired by the act,"—Held, sufficient. *Cousins* v. *Bullen*, 6 P. R. 71.—C. L. Chamb.—Galt, Dalton, *C. C. & P.*

On an award directing defendant to pay to the plaintiffs $320, one of the plaintiffs, H., endorsed the following memorandum :—"I hereby assign the within award in this matter to W. N., to secure payment of the sum of $130, this day lent and advanced by him to me, and I hereby authorize him in my name to take all necessary steps for the collection of the amount of said award for me, and retain thereout his $130." B., the other plaintiff, endorsed a memorandum under seal on the award confirming the above assignment :—Held, that the assignment did not, under 35 Vict. c. 12, s. 1, O., enable the assignee to sue in his own name, for it was not an absolute assignment of the assignor's whole interest in the award, but a pledge to secure a much smaller sum, and the words of the assignment shewed that the assignee was not intended to have such right. *Hostrawser et al.* v. *Robinson*, 23 C. P. 350.

B. assigned to his partner and to himself a debt due from defendant to himself for goods sold, &c. :—Held, that under 29 Vict. c. 28, and 35 Vict. c. 12, O., B. and his partner could sue for this debt in their joint names. *Blair et al.* v. *Ellis*, 34 Q. B. 466.

Held, that the 35 Vict. c. 12, O., applies to assignments made and causes of action accrued before as well as after the passing of the act; and that the declaration in this case shewed a sufficient assignment. *Wallace* v. *Gilchrist*, 24 C. P. 40.

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2. *In Equity.*

The plaintiff being liable as surety for P., P. gave him an order for the amount on the government, for whom P. was working. This order P. countermanded before any acceptance by the government. The debt having been paid by a sale of the plaintiff's property, and P.'s contract having been assigned to M., who received from the government the money due upon it :—Held, that M. was bound to pay the amount of the order. *Foote* v. *Matthews*, 4 Chy. 366.

To enable the assignee of a chose in action to proceed in equity for its recovery, he must shew the existence of some difficulty or obstacle to prevent him from recovering at law. *Ross* v. *Munro*, 6 Chy. 431.

The holder of a debenture issued by the trustees of a Methodist church, transferred it without consideration, by signing an endorsement as follows :—"Pay to J. G. or order," and delivered the same to the endorsee :—Held, that such transfer did not vest the debt in the transferee so as to prevent the claims of the creditors of the original holder attaching upon it. *Gott* v. *Gott*, 9 Chy. 165.

The Trust and Loan Co., being the holders of a mortgage bearing 8 per cent. interest, transferred the same to a private individual :—Held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest. *Reid* v. *Whitehead*, 10 Chy. 446.

Where a person having a demand against another, gave to a creditor of his own an order on his debtor for a portion of his demand, which order the debtor was notified of, but did not accept :—Held, notwithstanding, that the order and notice formed a good equitable assignment of the portion of the claim which it covered. *Farquhar* v. *City of Toronto*, 12 Chy. 186.

Although an order operates as an equitable assignment of a debt due to the drawer, and that without any acceptance by the drawee ; still, if the person to whom the order is given accepts it conditionally, agreeing only to give up his claim against the drawer on the order being accepted and paid, and if not paid to return the order, and he subsequently proceeds against the drawer, in respect of such claim, he cannot afterwards enforce his equitable claim against the drawee. *Muir* v. *Waddell*, 14 Chy. 488.

Where a party gave a draft on a corporation indebted to him, but the proper stamps were not on the draft when it was discounted, and the holder neglected to put on double stamps as required by the statute, it was held not to constitute an equitable assignment of the fund of the drawer in the hands of such corporation. But the drawer having written to the corporation directing them to pay such draft from the fund coming to him, such letter was held to constitute a good equitable assignment. *Robertson* v. *Grant*, 3 Chy. Chamb. 331.—Strong.

It is no objection to an assignment in equity of a claim against a third person, that the work upon which the claim is to arise has yet to be performed. *Buntin* v. *Georgen*, 19 Chy. 167.

A printer being about to execute a contract of printing for a customer, applied to a paper maker for a supply of paper, but which he refused to supply unless secured therefor ; thereupon a memorandum was signed with the printer's name, by one, with the cognizance of the other, of two persons having the general management of the printer's business, agreeing to hand over to the manufacturer a draft upon their customer for the amount of the account, payable at three months from the completion of the work :—Held, that such document was a sufficient assignment of the claim in equity, and that the giving thereof was within the general authority of the managers of the business. *Ib.*

The customer, after having been notified of this arrangement, paid the amount to the printer :—Held, that such payment was made in his own wrong ; and he was ordered to pay the amount to the plaintiff, the assignee. *Ib.*

A bond was executed for the conveyance of real estate, which by the contrivance of the agent of the obligee, falsely stated that the purchase money agreed upon had been all paid to the obligor, which bond the obligee transferred to a bonâ fide assignee for value, who filed a bill to enforce the execution of a conveyance. The court, however, following the rule that the assignee of a chose in action takes subject to all equities affecting the same, refused a decree except upon the terms of payment of such sum as might, on taking an account, be found due to the obligor in respect of the purchase money. *Gould* v. *Close*, 21 Chy. 273.

The assignee of a mortgage, like the assignee of a note (after maturity) or other chose in action,

takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument. *Elliott* v. *McConnell*, 21 Chy. 276.

II. Miscellaneous Cases.

Held, that writs of execution only bind moneys, choses in action, or securities for money from the time of seizure by the sheriff, and not from the time either of the issue of the writs or delivery thereof to the sheriff. *McDowell* v. *McDowell*, 10 L. J. 48.—Chy. Chamb. — Van-Koughnet.

Land having been conveyed in consideration of the grantee agreeing to convey a certain portion to a third person, who was no party to the transaction, it was held that this person could maintain a suit in his own name for such portion. *Shaw* v. *Shaw*, 17 Chy. 282.

CHURCHES.

I. Church of England.

1. *Clergy Reserves*, 657.
2. *Rectory and Glebe Lands*, 657.
3. *Church Temporalities*, 660.
4. *Churchwardens*, 662.
5. *Church Society*, 662.
6. *Synod*, 663.

II. Church of Rome.

1. *Diocese of Sandwich*, 663.
2. *Nun—See* Nun.
3. *Separate Schools—See* Public Schools.

III. Other Churches, and Religious Institutions, 663.

IV. Pews, 667.

V. Disturbances in, 667.

VI. Conveyances to—*See* Mortmain.

VII. Devises or Bequests to—*See* Will.

VIII. Sacrilege—*See* Criminal Law.

I. Church of England.

1. *Clergy Reserves.*

The 18th clause of 4 & 5 Vict. c. 100, does not apply to clergy reserves. *Byers* v. *Moore*, 5 Q. B. 4; *Doe* d. *Weisenberger* v. *McGlennon*, 5 Q. B. 138.

2. *Rectory and Glebe Lands.*

In ejectment by a rector for glebe land, he must prove presentation, institution and induction. *Doe Creen* v. *Friesman*, 1 Q. B. 420.

Quære, in the case of successive incumbents, as to the necessity of such proof in the case of each. *Henderson et al.* v. *White*, 23 C. P. 78.

A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Hill* v. *McKinnon*, 16 Q. B. 216.

On the 19th January, 1824, the crown granted to O. S., G. M., and J. M., in fee, certain land, which had formerly been set apart for a rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and his successors forever, upon the same trusts thereinbefore expressed. On the 21st January, 1836, letters patent issued erecting a rectory in Kingston. Before the 10th of May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day by deed poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust, conveyed the land to the said O. S., as rector and incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them. To this was appended another deed poll of the same date, executed by O. S., and declaring for himself and his heirs, that as one of the trustees named in the patent of 1824, he agreed to this assignment, and held the same in his capacity of rector and incumbent of Kingston, and not otherwise. In 1842 O. S. leased the land for twenty-one years, with certain covenants for building and renewal. In this lease he was described as rector, and it recited the two patents of 1824 and 1836. The successor of O. S. brought ejectment against defendants, claiming under this lease:—Held, on the authority of Doe d. Bowyer v. Judge, 11 East 288, that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that; for, Semble, in a court of law the ground that the trust to convey being joint was incapable of severance could not arise, the legal estate only being in question. *Lyster* v. *Kirkpatrick et al.*, 26 Q. B. 217.

But for that decision, Semble, that if the appointment of O. S. as rector rendered him ipso facto incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate vested in him in trust in his natural capacity, to himself as a rector and corporation sole: that whether the grantees in the patent were to be treated as taking a power or as trustees owning the fee, the conveyance by two only of the three was inoperative; and, Semble, that they were trustees. *Ib.*

The two-thirds having passed to O. S. as rector by the conveyance, he still held the remaining third in his natural capacity, and the joint estate was thus severed, for as rector he could not be joint tenant with a natural person. *Ib.*

The law of England in respect to the rights and powers of rectors as to the land vested in them as such, is in force in this country; and in this case the provisions in the defendants' lease

respecting renewal were not binding on the plaintiff, as the successor of O. S., the lessor and first rector. *Lyster* v. *Kirkpatrick et al.*, 26 Q. B. 217.

Held, that defendants were not estopped by the lease from denying the power of O. S. to lease, for the recitals professed to shew what title he had. *Ib.*

By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the incumbent whenever the governor should erect a parsonage or rectory in K. and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those thereinbefore expressed. In January, 1836, a rectory was created in K. In May, 1837, the trusts for which the patent of 1824 had been issued having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842 this incumbent created a lease for twenty-one years (under which the plaintiffs claimed), whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises :—Held, that the incumbent, either as trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which a priori would extend the lease beyond the twenty-one years. *Kirkpatrick et al.* v. *Lyster*, 13 Chy. 323; affirmed in appeal, 16 Chy. 17.

Held, also, that the mere demand of rent by the successor of the lessor (after the expiration of the 21 years) was not such an affirmance of the covenants in the lease as would estop him from disputing them. *S. C.* 13 Chy. 323.

A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Ins. Co.*, 20 C. P. 170.

One G., a rector, in 1861, leased land to plaintiff for twenty-one years, at an annual rent, with a proviso for reëntry on non-payment. Semble, that such lease was binding on the rector and those claiming under him until forfeited. *O'Hare* v. *McCormick*, 30 Q. B. 567.

Under the Constitutional Act 31 Geo. III. c. 31, and the royal commission, Sir J. C., the lieutenant-governor of U. C., had authority to create and endow rectories without any further instructions. The public events in the province of Upper Canada between 1826 and 1836, were not sufficient to warrant the presumption that such authority had been revoked or suspended. *Attorney-General* v. *Grasett*, 5 Chy. 412.

Under 31 Geo. III. c. 31, a patent establishing and endowing a rectory or parsonage is not void for want of a grantee being named in it; nor for not defining the limits of the parish within which the rectory was to be, it being established in and for a certain township. *Ib.*

The above decree declaring that the endowment of rectories in the manner the lieutenant-governor had ordered them was valid, affirmed in appeal. *S. C.* 6 Chy. 200.

By 31 Geo. III. c. 31, his Majesty and his successors were empowered to authorize the governor of the province of Quebec to erect parsonages or rectories therein according to the establishment of the Church of England; and in pursuance thereof Sir John Colborne in 1836, then lieutenant-governor, erected and endowed the rectory of K. By a subsequent provincial statute the church society of the diocese of T. was incorporated, and by a later statute the right of presentation was vested in it. Subsequently the legislature erected the diocese of O. out of the diocese of T., and the bishop, clergy and laity of the diocese were incorporated under the name of the "Incorporated Synod of the Diocese of Ontario," who, by a by-law in 1862, invested the then bishop with the right to appoint to all rectories during his incumbency. The bishop afterwards, on the death of the incumbent, presented to the rectory of K.; whereupon an information was filed by the attorney-general, on the relation of certain of the parishioners, against the bishop and the rector, praying to have such by-law of the synod declared void and set aside. A demurrer by the bishop and rector for want of equity was allowed, the court considering that under the several acts and proceedings which had been passed and taken the right of presentation was vested in the bishop during his incumbency. But, quære, if the church society of the diocese of T., before the setting off of the diocese of O., had passed a by-law similar to the one passed by the synod of O., whether the right to make such presentation did not remain with the bishop of T. *Attorney-General* v. *Lauder*, 9 Chy. 461.

Lease by rector—Covenant as to cutting timber and clearing—Construction. *Lundy* v. *Tench*, 16 Chy. 597.

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3. *Church Temporalities.*

A will is in contemplation of law a "conveyance." Therefore under the words of sec. 16 of 3 Vict. c. 74, "by deed or conveyance," a person may devise, as well as grant by deed, lands to the Church of England for the purposes of that act. *Doe* d. *Baker* v. *Clark*, 7 Q. B. 44.

A. made his will in 1843; in 1846 he added a codicil merely appointing a new executor "of his will written above :"—Held, that the codicil was a confirmation and not a revocation of the will, which must be still considered as a will made in 1843. Held, McLean, J., diss. the will as a conveyance is perfect at the execution, though its effect cannot ... the death of testator, and that ... the condition of sec. 16, of 3 Vict. c. 74, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will. *Ib.*

A devise under the 3 Vict. c. 74, made to the bishop *and* the rector, is good, notwithstanding the statute speaks of a conveyance to the bishop *or* rector, &c. *Ib.*

Defendant, being the holder of pews in the church of St. James in Toronto, belonging to the Church of England, conveyed the same by deed to plaintiff, a member of that church. The deed was in reality so made to plaintiff in trust for a corporation, to secure a loan by them to defendant, and several members of the corporation belonged to other religious denominations. Plaintiff was not described in the deed as a member of the Church of England, but the evidence at the trial shewed that he had been in the habit of attending the services of that church:—Held, that there was sufficient evidence that the plaintiff belonged to the Church of England, and that it was not necessary that he should have been so described in the deed. *Ridout* v. *Harris*, 17 C. P. 88.

Held, also, that the deed, even if clothed with an unexpressed trust in favour of a corporation incapacitated under the Church Temporalities Act from being pew holders, by reason of their not belonging to the Church of England, was nevertheless not void in the eye of a court of law because it was apparently good on its face, and it was therefore binding between the parties. Semble, that a court of equity would set aside the deed on account of the existence of such secret trust, but that a court of law would not recognize it even if it were set out. *Ib.*

Held, also, that plaintiff could not maintain ejectment for pews because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal nature, and possession of it could not be given by the sheriff. *Ib.*

Case is the proper remedy for the disturbance of the right to occupy a pew. *Ib.*

Definition of the words "absolute purchase," contained in sec. 7 of the Church Temporalities Act. *Ib.*

The court in banc, after verdict and exception taken, amended the record in ejectment by adding the words, "lands and premises," to the property sued for. *Ib.*

The church of St. J. having been destroyed by fire, it was agreed that the pew holders who had purchased the right to their pews, subject to a ground rent, should pay a certain sum and be reinstated as nearly as circumstances would permit in their pews in a new church, to be built on the site of that destroyed. After the new church was built one of such pew holders refused to pay the sum of £25, agreed to be subscribed by him towards rebuilding the church, and for which he had given his note; whereupon the churchwardens, in pursuance of a resolution of the vestry, removed the door from the pew claimed by h[illegible], and the holder thereof instituted an action on the case against the churchwardens for disturbance of his easement:—Held, affirming the decision of the court below, that he was not entitled to recover. Macaulay, C. J., and Burns, J., diss. *Brunskill* v *Harris*, 1 E. & A. 322.

The 3 Vict. c. 74, for the management of the church temporalities, is not confined to parish churches, but embraces all churches in communion with the united Church of England and Ireland. *Sanson* v. *Mitchell*, 6 Chy. 582.

The incumbent of a church, without the consent of the bishop or churchwardens, took a deed of land in his own name as such incumbent, the property having been previously contracted for by the bishop and certain members of the congregation for the site of a church, and on his retirement refused to execute a release. The court ordered him to execute such a release of the estate; and, as his conduct had been unreasonable, refused him his costs, although in strictness the bill, so far as it sought a conveyance, ought to have been dismissed, title having already vested in his successor *Ib.*

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4. *Churchwardens.*

Plaintiff sued defendants as churchwardens for his stipend as the incumbent of a church. It appeared that several resolutions were adopted in vestry as to the salary of the clergyman, but only one subsequent to the defendant's acceptance of office, which related to an old balance:—Held, that as plaintiff's claim rested on a voluntary undertaking of the vestry, and the evidence shewed no contract between plaintiff and defendants founded upon a consideration between them, the defendants were entitled to judgment. *Carry* v. *Wallace et al.*, 12 C. P. 372.

Upon an action against two churchwardens, (by name,) describing them as as "the churchwardens of Christ's church, in the village of W.," &c., for the use and occupation of a house rented by the previous churchwardens for the rector:—Held, that under sec. 6 of 3 & 4 Vict. c. 74, the action was properly brought; 2. That the taking of the premises and occupation by the clergyman under the previous churchwardens, with the sanction of the vestry and the defendants, was sufficient to bind them as churchwardens. *Maynard* v. *Gamble et al.*, 13 C. P. 56.

This case having been again tried and a verdict found for the plaintiff, the decision on the former rule was upheld. A. Wilson, J., although differing in opinion from the rest of the court, considered himself concluded by the former judgment. *S. C. Ib*, 467.

A bill was filed by the churchwardens, and during the progress of the suit the churchwardens were changed at the vestry meeting; the new churchwardens were not made parties. The suit not being brought to a hearing within the time required by the practice, it was held that a notice to dismiss the bill served on the plaintiffs' solicitor was regular. Quære, was it necessary to make the new churchwardens parties. *McFeeters* v. *Dixon*, 3 Chy. Chamb. 84.—Mowat.

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5. *Church Society.*

By the act of incorporation, 7 Vict. c. 68, the church society of Toronto is enabled to hold real estate without any license for that purpose. *Church Society of the Diocese of Toronto* v. *Crandell*, 8 Chy. 34.

A bill will lie by a member of the corporation of the church society of the diocese of Toronto, on behalf of himself and all other members of the society, to correct and prevent alleged breaches of trust by the corporation; and to such a bill the attorney-general is not a necessary party. *Boulton* v. *The Church Society of the Diocese of Toronto*, 15 Chy. 450; *S. C.* 14 Chy. 123.

6. *Synod.*

The church society of the diocese of T. had become united to and incorporated with the synod of the diocese by act of parliament. A bond for security for costs of appeal, &c., had been filed, and a motion made to allow such bond, which was objected to on the ground that such bond could not be properly executed without the concurrence of at least one-fourth of the diocese, and unless at least one-fourth of the congregation were represented:—Held, that the synod was bound by what had been done by the proper officers of the former corporation, without waiting for the action of the synod, and that there was an implied authority in the act authorizing them to take such a proceeding as that in question on behalf of and in the name of the synod; and a stay of proceedings, pending the appeal, was granted. *Boulton* v. *The Incorporated Synod of the Diocese of Toronto*, 2 Chy. Chamb. 377.—Mowat.

II. Church of Rome.

1. *Diocese of Sandwich.*

Held, that the R. C. bishop of S., incorporated by 8 Vict. c. 82, as "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada," had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such bishop, which was used in the construction of the episcopal residence and for the purposes of the church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation. *Ruitz* v. *The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 Q. B. 269.

The bishop was described in the instrument as "R. C. bishop of Sandwich:"—Held, that this variance from the corporate name was immaterial. *Ib.*

III. Other Churches and Religious Institutions.

Trespass was held to be maintainable by the trustees of a Methodist chapel against a person who was a trustee, but having ceased to be a member of the society could not hold the trust under the provisions of the deed which created it; and some of the plaintiffs, who were not the original trustees, but had been elected as their successors under the same provisions, were properly joined in the action. *Everett et al.* v. *Howell et al.*, 5 O. S. 592.

Where real property was given by deed in trust for the Methodist Episcopal Church in Canada, according to the rules adopted by the general annual conference, and that when any of the trustees or their successors should cease to be a member of that church, that such trustee should vacate his trusteeship; and at a general conference the majority did away with episcopacy, and having appointed new trustees, claimed the property from the old trustees on the ground that, as they had not conformed to the rules of the general conference, they had ceased to be trustees according to the terms of the trust deed, and the new trustees took possession of the property:—Held, on ejectment brought by the old trustees, that they were entitled to recover, the conference having no power to do away with episcopacy, and the old trustees by continuing in the original church having complied with the terms of the deed. *Doe* d. *Trustees of the Methodist Episcopal Church* v. *Bell*, 5 O. S. 344. But

This decision was afterwards reversed in *Doe* d. *Reynolds* v. *Flint*, M. T. 4 Vict., (not reported, which was upheld in *Doe* d. *Methodist Episcopal Trustees* v. *Brass*, 6 O. S. 437.

Ejectment cannot be maintained on a demise of a Methodist church, as a corporate body: the demise must be in their names as individuals. *Doe* d. *Methodist Trustees* v. *Carwin*, T. T. 1 & 2 Vict.

Where, by deed of bargain and sale, land was conveyed to certain persons named as trustees, and "to others" not named, and their successors, to hold to the persons as named, and "to others, trustees as aforesaid, and their successors in office in fee simple absolute forever, to the only proper use and behoof of the said (the persons named), and others, trustees as aforesaid, and their successors in office for ever, for the use of the minister of the Presbyterian Church, Galt, in connection with the church of Scotland, and his successors in office," &c.:—Held, that no action would lie on a demise in the name of the trustees of the Presbyterian church at Galt, as in a corporate capacity, but that a demise might be laid by those named in the deed, though they were not in fact trustees as the deed assumed them to be. *Doe* d. *Trustees of the Presbyterian Church in Galt in connection with the Church of Scotland et al.* v. *Bain*, 3 Q. B. 198.

The plaintiff sued five defendants, describing them as the committee of the Presbyterian Church at P., for his salary as minister from January, 1857, to August, 1858. It was proved by verbal evidence of different members of the congregation, that the committee usually consisted of eight persons chosen annually; and that a record of their proceedings was kept; that at a meeting of the congregation in 1856, it was agreed to give the plaintiff a call, and afterwards, at another meeting, that he should receive £100 a year, to be paid to him from the pew rents, which it was customary for the committee to collect half-yearly. It was not shewn who composed the committee in 1856, or that all the defendants were members of it in 1857 or 1858:—Held, that the action could not be maintained. *Stewart* v. *Martin et al.*, 18 Q. B. 477.

Under 12 Vict. c. 91, the trustees of lands held in trust for the benefit of religious bodies, with the consent of the governing body, can alone exercise the powers given by the act. A contract for the sale of such lands made in compliance with a resolution of the congregation, by a member of a committee appointed to dispose of such lands, is invalid. *Irving* v. *McLachlan*, 5 Chy. 625.

The land in question was conveyed to five persons as trustees of the Coloured Wesleyan Methodist Church in Canada, to hold to them and their successors, according to the rules and discipline of the said church. The deed provided that when any of the trustees should die or cease to be a member of said church, a successor should be nominated by the coloured Wesleyan minister or preacher having charge of the station in

which the land was, and thereupon appointed by the surviving trustee or trustees, if they should think proper to appoint the person so nominated: and that if it should happen at any time that there should be no surviving trustee, then it should be lawful for the coloured minister in charge of the station to nominate, and for the quarterly meeting of the station, if they should approve of the nomination, to appoint the requisite number of trustees; and the persons so appointed should be the legal successors of those named in the deed. The Wesleyan Methodist Church assumed control over this church, alleging that the deed was intended for the coloured members of their church, there being no such body as the Coloured Wesleyan Methodist Church. Four of the original trustees were living, but two were absent, having left this congregation, by which, according to the rules of the Wesleyan Methodist Church, they ceased to be trustees; one had joined another body; and the fourth, one of the defendants, had been expelled from that church. The plaintiffs were then nominated as trustees by one W., a minister appointed by the Wesleyan Church to take charge of this chapel, but not a coloured man, and their appointment was confirmed at a quarterly meeting. They thereupon brought ejectment against A., one of the original trustees named in the deed, and a person who had taken possession under him:—Held, that they could not recover, for the expulsion of A. from the Wesleyan Methodist Church could not deprive him of his character of trustee under the deed; and the plaintiffs were not properly appointed, not having been nominated by the coloured minister in charge of the church, as required by the deed. *Smallwood et al.* v. *Abbott et al.*, 18 Q. B. 564.

In a deed conveying land to trustees for a dwelling house for the use of the Methodist minister for the time being, there was provision made for a new appointment in the case of a trustee ceasing to belong to the Methodist Episcopal Church:—Held, that upon the happening of that event in the case of the last surviving trustee, the estate did not ipso facto become divested, but the intention of the grantor plainly being that it should go over to new trustees, this could only be effected by the surviving grantee conveying to them. *Hambly* v. *Fuller*, 22 C. P. 141.

In 1833 lands situate in Cobourg were conveyed to certain parties, and "the Kirk session of the Presbyterian Church of Canada in connection with the Church of Scotland in Cobourg," upon trust for the use of that congregation, who erected a church thereon and used and enjoyed the same until the disruption of the Presbyterian Church of Canada in 1844, similar to that which had previously occurred in Scotland. In Canada, as there, the Presbyterian Church became divided into two churches, one retaining its identity with the Presbyterian Church of Canada, in connection with the Church of Scotland; the other forming a new church, called "The Presbyterian Church of Canada," similar in principle to the Free Church of Scotland, and to which the congregation at Cobourg almost unanimously adhered, and they continued to use the same church as hitherto until 1857, there being in the interval no congregation of the Presbyterian Church of Canada in connection with the Church of Scotland. In this year certain residents professing to belong to that church applied to the surving trustees to have the trust estate devoted to the purposes intended by the donor, by allowing them the use thereof for the purpose of religious worship, which was refused. On an information and bill filed by the attorney-general and certain persons so claiming to be entitled to the use of the said trust estate, the court declared that the only persons entitled to the use of the said church were those in communion with the Church of Scotland, and the fact that there had ceased to be a "Kirk session" at Cobourg was immaterial:—Held, also, that the congregation for the use of whom the trust had been originally created having ceased to exist, any new congregation in connection with the Church of Scotland which might be afterwards organized were proper objects of the gift; and to be such, it was not necessary that the present should be a continuation of any previously existing congregation. *The Attorney-General* v. *Jeffrey*, 10 Chy. 273.

The owner of land agreed to sell a site for a burial ground and church, in connection with the Free Church of Scotland, if a congregation thereof could be gotten together. A church was built thereon, and a congregation in connection with the Free Church assembled and performed divine service therein. Several years afterwards the great body of the congregation abandoned their connection with the Free church; and they, in conjunction with the vendor, assumed to hold possession of the church to the exclusion of such of the members as continued to adhere to the Free church. On an information filed in the name of the attorney-general:—Held, that although at first conditional, the contract, by reason of a congregation having assembled in the church, had become absolute, and that so long as even one member remained to claim the site and church on behalf of the Free church, the right of that body continued, notwithstanding the change of opinion in the body of the members; and, under the circumstances, an injunction was decreed restraining any further interference with such right, and also a specific performance of the contract, with costs. *The Attorney-General* v. *Christie*, 13 Chy. 495.

Held, that the trustees under C. S. U. C. c. 69, may maintain ejectment in their individual names with the subjoined description, "as trustees," &c., stating the name of the congregation for whom they are trustees. At the trial, evidence was tendered to shew that the congregation named in the deed, which was made to the trustees on their appointment in 1864, had ceased to exist before the execution of the deed;—Held, that this was properly rejected; as also evidence to shew that defendant held under the obligees of a bond, in discharge of which the deed was executed. *Humphreys et al.* v. *Hunter*, 20 C. P. 456.

Where plaintiffs sued in their individual names, describing themselves as trustees of the Wesleyan Methodist Church of Brussels, an amendment was allowed at the trial by striking out the names and allowing them to sue as a corporation incorporated under C. S. U. C. c. 69:—Held, that the amendment was authorized. *The Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

Land vested in trustees for the use of, and as a place of residence for, a minister of a religious body, and for such other purposes as the ministers of such body, at their general conference, might from time to time appoint, is not "land held by trustees for the use of a congregation or religious body" within C. S. U. C., c. 69. *In re The Methodist Episcopal Church Property in Churchville*, 1 Chy. Chamb. 305.——Mowat.

To effect a sale by trustees under C. S. U. C. c. 69, all the requirements of the statute must be complied with, and the public notice must state the terms of the intended sale. *In re The Second Congregational Church Property, Toronto*, 1 Chy. Chamb. 349.—Mowat.

A deed to come within 24 Vict. c. 43, extending the time for registration of deeds to religious institutions, must have been registered within a year after the passing of it. *In re The Baptist Church Property of Strat'ord*, 2 Chy. Chamb. 388.—Taylor, *Secretary*.

The advertisement required by the act should specify the terms of sale. *Ib.*

A deed of church property ought to shew how the successors to the trustees named are to be appointed. *Ib.*

36 Vict. c. 36, s. 18, after repealing C. S. U. C. c. 69, and other acts, contained the following words: "Saving any rights, proceedings, or things legally had, acquired or done under the said acts, or any of them:"—Held, that these words preserved to rights, proceedings and things completely had, acquired or done, the efficacy which they had under the act repealed, but did not continue the operation of the repealed act for the purpose of perfecting rights, proceedings or things not completely had, acquired or done. *Re United Presbyterian Congregation of London*, 6 P. R. 129.—Chy. Chamb.—Holmested, *Referee*.

Where there was a material error in a confirmation deed of lands sold with the sanction of the court under C. S. U. C. c. 69, an application made after the repeal of that act for an order authorizing the execution of a new deed was refused. *Ib.*

IV. Pews.

Conveyance of pews—Action for disturbing the right to occupy—Ejectment for pews. *Kidout* v. *Harris*, 17 C. P. 88, p. 661; *Brunskill* v. *Harris*, 1 E. & A. 322, p. 661.

V. Disturbances in.

Action for assault and battery against fourteen defendants. Special plea of justification on the ground that defendants were committing a disturbance in church. *Reid* v. *Inglis et al.*, 12 C. P. 191.

1 Will. & M. c. 18, relating to disturbances in church, &c., is in force in this province, and not superseded by C. S. U. C. c. 92. *Ib.*

Defendant, a justice of the peace, convicted the plaintiff under C. S. U. C. c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to the defendant, and a boy living with his parents, and having no property:—Held, that the action would not lie, for defendant was authorized by C. S. C. c. 103, s. 59, to commit in the first instance, that statute applying to this conviction. *Moffat* v. *Barnard*, 24 Q. B. 498.

CIRCUITY OF ACTION.

I. Avoidance of.

1. *Generally—See* Action.
2. *In Actions on Bills or Notes—See* Bills of Exchange and Promissory Notes.

CLEARING LAND.

I. By Fire—*See* Fire.

II. Rights of Tenant to Clear Land—*See* Landlord and Tenant.

III. Rights of Tenant for Life—*See* Estate.

IV. Cutting Wood or Timber—*See* Timber.

CLERGY RESERVES.

See Churches.

CLERK OF ASSIZE.

A clerk of the County Court, being also ex officio deputy clerk of the crown and clerk of assize, is privileged from arrest only while engaged in his official duties, or while going to and returning from his office; and this court, therefore, discharged a rule to prohibit the County Court judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodeon*, 27 Q. B. 263.

CLERK OF THE CROWN.

See Crown Office.

CLERK OF DIVISION COURT.

See Division Court.

CLERK OF THE PEACE.

Where the treasurer of the district council refused to pay the account of the clerk of the peace for certain services, and returned to a mandamus nisi that such charges were not shewn by the clerk of the peace to be connected with the administration of justice, or to have been specifically provided for by law, so as to render it necessary that they should be audited by the district council; and returned further, that there were no funds in his hands out of which he could pay those charges; the return was allowed.

Clerk of the Peace v. *Western District Municipal Council*, 1 Q. B. 162.

The payment of certain fees by a district council in accounts rendered for services in former years, will not prevent their disputing the charges in subsequent years. *Askin* v. *London District Council*, 1 Q. B. 292.

The clerk of the peace cannot charge fees for any service for which no fee is given by 43 Geo. III. c. 11, or otherwise. *Ib.*

If he accept a salary in lieu of all fees, he is entitled only to such salary. *Ib.*

A municipal council, in 1850, assigned to a clerk of the peace a fixed salary for that year, "in lieu of all fees :"—Held, (the Jury Act 13 & 14 Vict. c. 55, having been subsequently passed,) that he could still claim the fees allowed by the statute for preparing the jury books for the following year. *Pringle* v. *McDonald*, 10 Q. B. 254.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury *Hooker* v. *Gurnett*, 16 Q. B. 180.

In this case the question was whether certain fees, classified in schedules in a special case submitted, could legally be claimed, and how far the county having paid them during several years upon accounts duly audited and passed, could recover back such as he was not entitled to. Besides deciding as to the different charges the following general principles were laid down : Where the clerk, at the request of the justices or municipality, or of the county auditors, renders services which he is not bound to render, and for which no fee is allowed, though he might be unable to sue for his charges, yet, when they have been duly audited and paid under no misunderstanding, the municipality cannot recover them back ; and the same rule is applicable to disbursements, as for stationery, office furniture, &c. *The Corporation of the County of Lambton* v. *Poussett*, 21 Q. B. 472.

The C. S. U. C. c. 119, making it penal in the clerk to receive more than the legally established fee for services performed by him, does not apply to services or disbursements not properly belonging to his office ; but the enactment is not confined to fees demanded of individuals for public services, nor does the penalty imposed interfere with the right to reclaim fees received contrary to the act. *Ib.*

Where the fees are within that act, and have been paid, they may be recovered back as money illegally received. though his accounts containing them have been audited and passed. *Ib.*

Under C. S. U. C. c. 120, the clerks of the peace and other officers are not to make out accounts against the government in the first instance, but against the county, who are to be paid or reimbursed by government after proper audit. *Ib.*

The schedule appended to that Act was not intended to embrace all the expenses of criminal justice chargeable against the Government, but only to remove all doubt as to those specified. *Ib.*

In 1858 the plaintiff was appointed county attorney for W. In May, 1862, the person who had for many years been clerk of the peace for that county died, and in August following defendant was appointed to succeed him in such office. C. S. U. C. c. 106, s. 7, enacts that any clerk of the peace appointed after that act "shall be ex officio county attorney for the county of which he is clerk of the peace :"—Held, that defendant upon his appointment as clerk of the peace became also county attorney, although the plaintiff's commission had not been otherwise revoked, and he had received no notice of any change in his position. *Robertson* v. *Freeman*, 22 Q. B. 298.

The magistrates in Quarter Sessions, not the county auditors, are to audit the accounts of the clerk before payment, and the treasurer should pay them upon the chairman's order. *In re Poussett and the Corporation of the County of Lambton*, 22 Q. B. 80. See, also, *In re Sheriff of Lincoln*, 34 Q. B. 1.

It was decided in The Corporation of Lambton *v.* Poussett, 21 Q. B. 472, that the clerk is not to look to the government for the expenses payable by them under C. S. U. C. c. 120, but to the county, who are to be reimbursed by the government. Where the clerk applied to the county auditors instead of to the sessions, and they refused on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus calling upon the county to pay. *In re Poussett and the Corporation of the County of Lambton*, 22 Q. B. 80.

The clerk under C. S. U. C. c. 124, and the tariff of 1862, No. 57, is entitled only to $1 for each quarterly return of convictions made by him to the minister of finance, not to $1 for the list of convictions sent to him by each justice included in such return. *In re Poussett and the Court of General Q. S. for the Co. of Lambton*, 22 Q. B. 412.

Drafting the panel from the jury list under C. S. U. C. c. 78, is not a special session of the peace, and the clerk therefore is not entitled to charge for it under No. 66 of the tariff. *Ib.*

The clerk is required by C. S. U. C. cc. 19, 120, to record and notify to the government and to the clerks of each Division Court only the acts of the Quarter Sessions with regard to the limits of the different divisions, not the orders of the judge as to the times and places of holding the courts ; and he is not entitled therefore under the tariff, Nos. 38 to 42 inclusive, to charge for such last-mentioned orders. *Ib.*

The table of fees established and promulgated by the courts contains all the services for which clerks are entitled to charge, in addition to such as are specially authorized and provided for by any statute. No local tariff or user in particular counties can give any additional right *In re Dartnell and the Court of General Q. S. of Prescott and Russell*, 26 Q. B. 430.

Where the Quarter Sessions have audited the account of such clerk, this court will not interfere by mandamus to compel the allowance of particular items. *Ib.*

The county attorney and clerk of the peace may maintain an action against the corporation of the county for breach of duty in not providing necessary and proper accommodation for him as such officer, as required by 29 & 30 Vict. c. 51,

s. 419, and may recover by way of damages in such action rent paid by him to procure such accommodation. *Lees* v. *The Corporation of the County of Carleton*, 33 Q. B. 409.

The court house in which the plaintiff previously had his office was burned, and the county council informally offered him certain rooms in another building leased by them. The plaintiff considering them insufficient, as in fact they were, hired others at $11 per month; and having sent in his bill to the council for seventeen months, they passed a resolution to pay him $93.50 (being one half) in full of his claim, which sum he afterwards received, and signed a receipt and the check therefor, which purported to be in accordance with the resolution:—Held, that he was bound by such settlement, and could not recover more in respect of the seventeen months rent; but that he might recover the full rent paid by him subsequent to the resolution. *Ib.*

CLOUD ON TITLE.

See SALE OF LAND.

COBOURG HARBOUR.

See HARBOUR COMPANIES.

COBOURG, PETERBOROUGH AND MARMORA RAILWAY AND MINING COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

COACH.

See CARRIERS.

CODICIL.

See WILL.

COGNOVIT.

I. WHO MAY EXECUTE.
1. *Partners*, 672.
2. *Attorneys*, 672.
3. *Executors*, 672.
4. *Affidavit of Execution*, 672.
II. WHEN IT MAY BE TAKEN, 672.
III. INTERVENTION OF ATTORNEY IN TAKING, 673.
IV. FILING, 673.
V. JUDGMENT ON.
1. *Application to Enter*, 673.
2. *Application to set Aside*, 674.
3. *Other Cases*, 675.
4. *Obtained by Fraud—See* FRAUDULENT JUDGMENT.
VI. MISCELLANEOUS CASES, 676.

[*See C. S. U. C. c. 26, s. 17, since which Cognovits have been seldom taken.*]

I. WHO MAY EXECUTE.

1. *Partners.*

A partner cannot sign a cognovit in the name of the firm without special authority, and a judgment entered upon such cognovit will be set aside. *Holme* v. *Allan et al.*, Tay. 348; *Hug* v. *Cameron*, 1 P. R. 255.—P. C.—Burns.

Where one partner gave a cognovit for himself and partner, without his partner's concurrence, and there was strong evidence of collusion with the plaintiffs to defraud other creditors, the court set aside the cognovit and judgment entered thereon with costs. *Joyce* v. *Murray*, M. T. 6 Vict.

But where eighteen months had elapsed since the judgment entered on a cognovit so signed had been acted upon, and it seemed most probable that the other partner was an assenting party, the court refused to set aside the judgment. *Brown* v. *Cingmars*, 2 P. R. 205.—P. C.—Burns.

2. *Attorneys.*

A cognovit may be executed by the attorney of the party giving it. *Richmond* v. *Proctor*, 3 L. J. 202.—C. L. Chamb.—Robinson.

3. *Executors.*

One of several executors has no power to bind the other by giving a cognovit, and where judgment had been entered on such a confession it was set aside as against all. *Commercial Bank of Canada* v. *Woodruff et al.*, 21 Q. B. 602.

The drawer of a bill accepted by the testator having joined in a confession thus given, the court refused to set aside the judgment as against him. *Ib.*

See *Gorrie* v. *Beard et al.*, 5 Q. B. 626, p. 675; *Doe Lyon* v. *Legè*, 4 Q. B. 360, p. 677; *Beatty* v. *Maxwell*, 1 P. R. 85, p. 675.

3. *Affidavit of Execution.*

An affidavit of execution of cognovit made by "William D. Baby," signed "W. D. Baby:"—Held, sufficient. *Folger* v. *McCallum*, 1 P. R. 352.—C. L. Chamb.—Robinson.

II. WHEN IT MAY BE TAKEN.

May be taken in a cause although no process has issued; and a defendant who has given such cognovit with a stay of execution to a certain day, may be arrested on a ca. re. before that day. *Walton* v. *Hayward*, 2 O. S. 468. See now C. L. P. Act, s. 236.

A plaintiff giving time to defendant by accepting notes may, as an additional security, take a cognovit for the whole debt, with power to issue execution thereon at any moment. *Parker* v. *Roberts*, 3 Q. B. 114.

A verbal agreement, however, restricting such power, will be acted upon by the court. *Ib.*

The fact that none of the notes had become due when the cognovit was put in force, will not affect the judgment or execution on such cognovit. *Ib.*

A cognovit may be taken as a continuing security for future acceptances, and will be good as against other creditors. *Potter* v. *Pickle*, 2 P. R. 391.—P. C.—Burns.

III. Intervention of Attorney in Taking.

The following cases were decided under the rule of court of E. T. 9 Geo. IV. requiring the intervention of a practising attorney in taking cognovit, now superseded by rule of T. T. 1856, No. 26, making more effectual provision for the same purpose. *McLean* v. *Cumming*, Tay. 184; *Jones* v. *Barnes*, T. T. 7 Will. IV.; *Lodor* v. *Heathcote*, H. T. Will. IV.; *Thompson* v. *Zwick*, 1 Q. B. 338.—P. C.—McLean; *Clarkson* v. *Miller*, 2 Q. B. 96.—P. C.—Jones; *Paterson* v. *Squires*, 1 C. L. Chamb. 234—Sullivan; *Kay* v. *Grant*, 8 Q. B. 517; *McLeod* v. *Mead*, 1 P. R. 285.—P. C.—Richards.

Neglect to explain the nature of a cognovit to the defendants by an attorney expressly chosen by them, will not vitiate the confession properly attested. *Case* v. *Benson et al.*, 3 L. J. 132.—C. L. Chamb.—Hagarty.

Defendants sending for an attorney, named by the plaintiff or his attorney, will be deemed to have adopted him as their attorney within the meaning of the rule No. 26. *Ib.*

IV. Filing.

Where judgment has been entered upon a cognovit it need not be filed within the periods respectively limited by the 17th and 18th sections of the C. L. P. A., 1857. *Commercial Bank of Canada* v. *Fletcher*, 8 C. P. 181; *Armour* v. *Carruthers*, 2 P. R. 217.—Q. B.; *McLean* v. *Stuart*, 2 P. R. 367.—Q. B.

Immaterial discrepancies between the sworn copy filed and the original, constitute no ground for setting aside the judgment. *Irvin* v. *Ham*, 9 L. J. 80.—C. L. Chamb.—Draper.

A defendant seeking to set aside a judgment on a cognovit, as not being filed in the county where he resided at the time of giving the cognovit, must shew that he was not so resident. *Ib.*

Where parties dispute as to the balance due on a judgment, a reference may be made to the master. *Ib.*

V. Judgment on.

1. *Application to Enter.*

Granted, where the witness to a cognovit had left the province. *King* v. *Robins*, Tay. 299.

Refused, on a cognovit more than fifteen years old, when it appeared that the plaintiff had once accepted property from defendant, and discharged the action, though the property proved unproductive. *Grant* v. *McIntosh*, 4 O. S. 184.

Cognovit given by one attorney and witnessed by another, who was absent. Leave given to enter judgment upon proof of the handwriting of defendant and the witness. *Cleal* v. *Latham*, 1 Q. B. 412.—P. C.—Macaulay.

Granted upon a cognovit seven years old, upon affidavit from plaintiff of the whole being due, and that having received a letter from defendant he believed him to be still alive, though the affidavit did not state that defendant wrote or signed the letter. *Oliphant* v. *McGinn*, 4 Q. B. 170.—P. C.—Macaulay.

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2. *Application to set Aside.*

Where a cognovit was given with a stay of execution to a future day, and a memorandum was endorsed deferring payment of part for a longer time, and at the day judgment was entered for the whole, the court restrained the levy, according to the memorandum, with costs. *Alexander* v. *Hervey*, T. T. 7 Will. IV.; *Fisher* v. *Edgar*, 5 O. S. 141.

After a cognovit given by the principal and his surties jointly, the court will not set aside a judgment entered against all because time has been given to the principal without the consent of the sureties. *Mowat* v. *Switzer*, M. T. 3 Vict.

Where a cognovit intituled in the cause against several defendants, is executed by some only, judgment cannot be entered against these latter only. *Roach* v. *Potash et al.*, T. T. 2 & 3 Vict.

A judgment entered on cognovit without filing common bail, is irregular. *Goslin* v. *Tune*, 1 Q. B. 277.—P. C.—Jones.

Where the plaintiffs are styled in proceedings upon a cognovit as they are named in the cognovit itself, the defendant, having recognized the plaintiffs' names in his cognovit, cannot object that the christian and surnames of the plaintiffs have not been used in the proceedings. *Parker et al.* v. *Roberts*, 3 Q. B. 114.

Judgment entered and fi. fa. issued in an outer district, where suit not commenced, were set aside. *Commercial Bank* v. *Brondgeest*. 5 Q. B. 325.

Semble, that the assignees of a bankrupt defendant may take the above exception to a judgment. *Ib.*

A judgment entered upon a cognovit in an outer district, no previous proceedings having been had there, is void. Semble, however, that if it had been transmitted to Toronto, and an entry made there, so as to constitute an entry of judgment on the face of the judgment roll, or so as, in the terms of 8 Vict. c. 36, s. 4, to enter judgment of record, and docket it in the principal office, it might have been upheld. *Laverty* v. *Patterson*, 5 Q. B. 641.

Held, per Sullivan, J., that the styling of a cognovit thus, "Thomas Paterson, plaintiff, *v.* Philemn Squires and Willian Squires, defendants," leaving out the letter *o*, and omitting part of the letter *m*, was not an irregularity, (there being no doubt as to the identity of the parties,) upon which a judgment and execution upon the cognovit could be set aside. *Paterson* v. *Squires et al.*, 1 C. L. Chamb. 234.—Sullivan.

In a cognovit (containing the usual undertaking not to bring error or file any bill in equity) damages were confessed at £500, and the declaration on the roll laid them at that sum; the

entry of judgment confessed damages to £1,000, "as by the declaration is above alleged;" and the conclusion was, that the plaintiffs do recover £500:"—Held, no irregularity, the judgment being supported by the confession. *Folger et al.* v. *McCallum*, 1 P. R. 352.—C. L. Chamb.—Robinson.

Where judgment was entered on a cognovit duly executed, but without filing an affidavit of execution:—Held, not a nullity, so that the judgment might be set aside at the instance of other creditors of defendant, but an irregularity only; and the affidavit was allowed to be filed afterwards. *Potter* v. *Pickle*, 2 P. R. 391.—P. C.—Burns.

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3. *Other Cases.*

In a cognovit (containing the usual undertaking not to bring error or file any bill in equity) damages were confessed at £500, and the declaration on the roll laid them at that sum; the entry of judgment confessed damages at £1,000, "as by the declaration is above alleged;" and the conclusion was, that the plaintiffs do recover £500:—Held, no irregularity, the judgment being supported by the confession. *Folger et al.* v. *McCallum*, 1 P. R. 352.—C. L. Chamb.—Robinson.

Semble, that it is not necessary to enter an appearance for defendant in signing judgment on cognovit, the defendant coming into court and confessing being a sufficient appearance; and that the court would at all events allow such appearance to be entered nunc pro tunc:—Held, however, that in this case the want of an appearance was not sufficiently shewn, and that the application was too late. *Ib.*

A. and B., executor and executrix, having given a cognovit signed by them as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only in their representative character:—Held, that though the cognovit might bind them personally in its terms, a personal judgment entered up against them must be set aside. *Gorrie* v. *Beard et al.*, 5 Q. B. 626.—P. C.—McLean.

Semble, also, that the judgment roll, alleging "a debt due by the testator in his lifetime on an account stated, in consideration of which the defendants promised to pay," would not warrant a judgment against the defendants personally, but only against them as executor and executrix. *Ib.*

M., the testator, died in November, 1847, indebted to the plaintiff in £35, having appointed the defendant his executrix. The account was continued after his death, and was afterwards rendered to the defendant and headed as against widow Maxwell, and further advances were made to her from time to time and payments made by her on account, down to August, 1849; the payments amounting to far more than the debt due from the testator. In December, 1849, a confession of judgment was obtained from the defendant, as executrix of the testator. On a rule nisi to set aside the judgment entered on the confession:—Held by McLean, J., that the plaintiff, having transferred his claim against the estate to the individual account with the defendant, and with her assent, and having since received more than sufficient to cover the debt of the estate, he could not sever the two accounts and fall back upon the estate for the amount due at the testator's death, and that the rule to set aside the judgment must be made absolute, without costs. *Beatty* v. *Maxwell*, 1 P. R. 88.—P. C.—McLean.

To debt on judgment a plea was pleaded in effect alleging that the judgment was entered upon a cognovit in which, though the nominal debt was admitted to be £200, as sued for, the true debt was only £79, which sum was paid in satisfaction of the judgment:—Held, on demurrer, plea bad. *Crooks* v. *Wilson*, 8 Q. B. 114.

In a defence like this the proper course for defendant to take is to apply to have satisfaction entered on the judgment, or to stay proceedings in the suit upon the judgment. Principles of pleading prevent the defence being urged in the shape of a plea. *Ib.*

Where defendant gave a confession on the 13th of May, 1856, containing an agreement that judgment might be entered at once, but no execution to issue until default in payment of a sum named on the 1st of June then next, "with interest thereon from this day till paid," and judgment was not entered till 28th April, 1857: Held, that the plaintiffs were entitled to interest from the date of the cognovit, not from the entry of judgment only. *Ramsay et al.* v. *Carruthers*, 23 Q. B. 21.

VI. Miscellaneous Cases.

Where one of the bail to the sheriff had, in consequence of the defendant leaving the province, and under an apprehension that he would not return to defend the cause, given a cognovit in his own name to the plaintiff, the court, upon an affidavit of merits, stayed the proceedings upon cognovit. *Roberts* v. *Hasleton*, Tay. 32.

Such order being conditional "upon payment of all costs incurred by proceedings against the sheriff's bail," the court determined that the costs of the proceedings upon the cognovit should be considered as such costs. *Hasleton* v. *Brundige*, Tay. 84.

Where a debtor, who absconded from this province, before his departure gave his cognovit for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the sheriff, and some paid to the plaintiff's attorney, the court, on the affidavits and application of several bona fide creditors of the absconding debtor, ordered the attorney to pay to the sheriff the money he had received, and the sheriff to divide all the money between the creditors who had executions in his hands, ratably, according to their several claims. *Bergin* v. *Pindar*, 3 O. S. 574.

Giving a confession of judgment, payable immediately, for a sum which is justly due to a creditor who has pressed for payment, there being other creditors, is not a voluntary and fraudulent procuring of the debtor's goods to be taken in execution in contemplation of bankruptcy, within the meaning of the Bankruptcy Act 7 Vict. c. 10. *Beekman* v. *Workman*, 1 Q. B. 531.

When a party had confessed judgment to a banking institution before the passing of the bankrupt law, with the understanding that it

would not be enforced so long as he continued to pay to the plaintiff a certain sum every fortnight, and it was subsequently agreed, after several payments, that the confession should stand also as a security for notes to be discounted for the party; and proceedings having been threatened against him by other creditors, the bank issued execution upon the judgment and sold:—Held, that the assignees of the bankrupt, on a commission issued after the seizure, but before the sale, could not recover the proceeds in an action for money had and received against the bank. *Maulson* v. *Commercial Bank*, 2 Q. B. 338.

A confession of judgment stated in the pleadings to have been given "in contemplation of bankruptcy, and for the purpose of giving one of several creditors, a preference, and with the intent to delay and defeat other creditors," is well pleaded, without further adding that it was given within a month of the issuing of the commission against the bankrupt. *Brent* v. *Perry*, 5 Q. B. 538.

A cognovit given in the opinion of the jury by a bankrupt in contemplation of bankruptcy, and for the purpose of giving to the defendant a preference or priority over his (the bankrupt's) general creditors, is a security within the 19th clause of the bankrupt law, and therefore void. *S. C.* 7 Q. B. 24.

Where a cognovit has been given by a bankrupt in fraud of the bankrupt law, and is therefore with all steps taken under it void, the assignees of the bankrupt in bringing an action against the sheriff must be looked upon as contending for the interest of the creditors, and not merely as representing the person or estate of the bankrupt; they therefore will not be estopped, as the bankrupt might, from disputing the validity of the cognovit and subsequent proceedings on the ground of fraud. *Ponton* v. *Moodie*, 7 Q. B. 301.

Where the plaintiff had been guilty of gross usury in taking a confession of judgment from the defendant, the court stayed proceedings on the payment of the true debt and interest, although the judgment had been assigned, the assignee having been shewn to have had notice of the usury complained of before he took the assignment. *Knapp* v. *Forrest*, 6 O. S. 557.

Semble, that lands may be sold under a judgment confessed by an executor. *Doe* d. *Lyon* v. *Leyè*, 4 Q. B. 360.

Under what circumstances an assignment made by a debtor of his goods to one or more of his creditors, for the benefit of themselves and others, may be upheld against another creditor, who has seized the same goods in execution upon a judgment confessed to him before the assignment: See *Farish* v. *McKay*, 5 Q. B. 461.

Plaintiffs were nonsuited for not confessing lease, entry, and ouster. Subsequently to the trial defendant executed a cognovit:—Held, per cur., on motion for a new trial, that the fact of the defendant having confessed judgment was a waiver of any formal exception he might have. *Doe* d. *Kerr et al.* v. *Shoff*, 9 Q. B. 180.

The acceptance of a confession of judgment with stay of execution until a period not later than the plaintiff could otherwise, and in the ordinary course, have obtained execution, will not discharge the defendant's bail. *Carter* v. *Sullivan*, 4 C. P. 298.

Where the object in an action is to set aside a confession, or a portion of the sum confessed, the plaintiff in the confession may shew in support of it the circumstances that constituted the consideration, and that such confession was to operate as a continuing security to cover future as well as past advances. *Douglass* v. *Mayer*, 5 C. P. 377.

A cognovit payable immediately, given by the maker of a note before it falls due, and judgment entered upon it and registered, forms no defence for the endorser. *Bank of Montreal* v. *Douglas*, 17 Q. B. 208.

COIN (OFFENCES RELATING TO.)

See CRIMINAL LAW.

COLLATERAL SECURITY.

I. TAKEN BY BANKS—*See* BANKS.

II. TAKEN BY BUILDING SOCIETIES—*See* BUILDING SOCIETIES.

III. MERGER OF BILLS OR NOTES—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

IV. EFFECT OF, ON VENDOR'S LIEN—*See* SALE OF LAND.

Held, that the deed as set out in the pleadings in this case shewed clearly an intention on the part of the bank to take it as collateral security, and not as an assignment in satisfaction of the notes sued on. *Bank of British North America* v. *Sherwood*, 6 Q. B. 552.

Defendant endorsed to the plaintiffs a note made by one P. for $125, due 13th May, 1857. On the 13th April P. executed to the plaintiffs a mortgage, payable on the 1st November, 1857, for a sum including the amount of the note; but it was expressly agreed in the mortgage that it should "operate and take effect as a collateral security only:"—Held, that the plaintiffs might sue upon the note when it fell due, although the mortgage was not yet payable. *Shaw et al* v. *Crawford*, 16 Q. B. 101.

Action by H. against M. on a guarantee of a mortgage made by one G., and assigned by M. to H. Plea, on equitable grounds, that the mortgage was given by G. as collateral security for two notes of £100 each, made by G. to one W., and endorsed by him, and that said notes were given to H. (plaintiff) with the mortgage, and that one note having become due H., without notice of presentment and dishonour, and without defendant's consent, gave G. time, for a valuable consideration:—Held, on demurrer, good, and that the defendant as surety was thereby discharged. *Howee* v. *Mills*, 10 C. P. 194.

Action on a note for $350. Plea, that the note had been taken as collateral to a mortgage, in satisfaction of which defendant and plaintiff had come to a settlement, and defendant had given a new mortgage for what he owed the plaintiff, in which the note had thus become

merged.—Held, that the note having been taken by the plaintiff as payment of part of the mortgage, and thus separated from the mortgage debt, the plaintiff was entitled to recover; and that from the evidence stated in the case it appeared that the note was given for a sum quite distinct from the mortgage debt. *Boulton* v. *McNabb*, 14 C. P. 598.

Semble, that defendant's remedy (if any) should be either to have the settlement reopened on the ground of mistake or fraud, and get the amount of the note added to the mortgage debt, and extended for ten years, or to treat the settlement as evidence of everything having been paid, which latter defence would be covered by a plea of payment. *Ib.*

Held, on demurrer to the equitable plea set out in the report of this case, that apart from the objection as to a perpetual injunction not being obtainable, the holder of notes, transferred by the payee as collateral security against a future liability on the holder's part for the payee, can collect the notes at maturity before the liability arises, and that the payee has no control over them so as to enlarge or vary the maker's liability to pay them. *Ross* v. *Tyson*, 19 C. P. 294.

One M. made a note on the 17th November, 1868, payable to T. or order, at three months, at the Quebec Bank, for $4,000, which was endorsed by T. and the plaintiff, and discounted by the bank for T. On the 24th November, 1868, a note for $1,500 made by W. payable to T., and endorsed by M. for T.'s accommodation, was handed to the bank by T. as collateral security for the $4,000 note, and the bank also advanced on it $1,000 to T. This note, when it fell due on the 27th January, 1869, was retired by the note sued on, which was for $1,500, at two months, made by W., payable to T., and endorsed by T. and by M. to the bank, and was given, as the bank manager swore, for the same purpose as the previous $1,500 note. The bank received $1,200 from T. on account of the $4,000 note, and the plaintiff paid the balance on the understanding that the bank would hold the $1,500 note for his benefit, and they afterwards, at his request, gave it to their solicitor to sue. In an action on this note by the plaintiff against W. & M.:—Held, that he was entitled to recover; for, 1. He was the holder of the note; 2. The note being deposited with the bank as collateral security for the $4,000 note, and not merely for the $1,000 advanced on it, the bank held it for the full amount; 3. If the note could not be said, when taken on the 27th January, 1869, to be a security for value because the $4,000 note had not then matured, it became so when the latter note fell due on the 20th February, 1869, and value arising at any time during the currency of a note is sufficient. *Blake* v. *Walsh et al.*, 29 Q. B. 541.

Action for converting certain notes, with a special count, alleging in substance that defendants held the notes as collateral security for certain paper in their hands, to which the plaintiff was a party; and after they had collected part of them, and the paper had been retired, they collected and applied to their own use the remaining notes, to which they had ceased to have any claim. Defendants pleaded, on equitable grounds, that after receiving the notes, they were applied to by the plaintiff to accept in payment of a debt due by him to them the note of one A. D. for $1,147, which they refused to do unless one J. D. would endorse it; and J. D. would not endorse without security, and the plaintiff thereupon got defendants' agent to write to J. D., agreeing to hold the notes in question to apply when collected on the note for $1,147; that J. D. on the faith of this, endorsed said note, which defendants accepted in payment, and which was renewed from time to time by the proceeds of the notes collected, and reduced in July, 1862, to a note for $477, which note J. D. took up, and defendants thereupon transferred to him such of the notes in question as remained, as they lawfully might and were bound to do:—Held, plea good, as shewing a legal defence. Quære, whether it could be supported as an equitable plea, for J. D. would have been a necessary party to a bill by the plaintiff for the recovery and account of the notes. *Maybee* v. *Bank of Toronto*, 29 Q. B. 566.

To an action on a promissory note, the defendant, an endorser, pleaded, "that he endorsed the note as surety for the makers; that it was agreed that the makers should transfer to the plaintiffs, as security for the payment of the note, by way of mortgage, a certain schooner, and that the plaintiffs agreed to hold the said vessel for the benefit and indemnity of the defendant; that in pursuance of such agreement the vessel was assigned to the plaintiffs, and it thereby became the duty of the plaintiffs, when requested by the defendant, to sell the vessel, under a power of sale contained in the mortgage, for the benefit of the defendant: that the defendant requested plaintiffs to sell said vessel: that the plaintiffs refused and neglected to comply with such request, and that the vessel was subsequently lost, whereby the defendants lost the benefit of the security of the said vessel:—Held, that if the plea intended to assert that wherever a creditor takes a mortgage from a principal debtor with power of sale, accompanied with the personal obligation of a surety, it becomes an imperative duty imposed upon the mortgage creditor, upon the request of the surety, at any time to sell the mortgaged property upon default committed, at the peril, if he does not do so, of losing the benefit of the contract of suretyship, such proposition cannot be sustained in law; and that if the defendant intended to rely on an express agreement to this effect, the evidence would not sustain such contention. *Bank of Montreal* v. *Davy*, 21 C. P. 179.

The plaintiff sued as bearer of a note made by defendant payable to one McL., or bearer. Defendant pleaded, on equitable grounds, that McL. being the holder of said note, deposited it with one McD. as collateral security for the payment by said McL. of a certain note of the said McL. then held by said McD., which said note McD. transferred and delivered to the plaintiff, and deposited the note in the declaration mentioned with the plaintiffs, after it became due, as collateral security; and that the said McL. did, before the commencement of this suit, retire, pay, and satisfy his said note, and was and is entitled to a return of the note now sued on, so held by the plaintiffs as collateral security, and is the lawful holder of said note:—Held, on demurrer, plea bad, for, 1. The terms upon which the note was tranferred to McD., which formed no part of the original consideration for which it was

given, and to which the defendant was no party, did not constitute an equity attaching to the note in the plaintiffs' hands of which defendant could take advantage; and, 2. That even if it were assumed that the plaintiffs had no better title than McD., still McD., being the holder at maturity, had a vested right of action against the defendant. *Canadian Bank of Commerce* v. *Ross*, 22 C. P. 497.

Certain sale notes were deposited with defendants as collateral security for the payment of a note endorsed by the plaintiff, for the accommodation of one M., and discounted by defendants for M. The collaterals were of the same value as the principal note, and were to be paid into the bank, and applied on the note, so that when they were paid, the note also was to be paid, and the plaintiff's liabilities to cease. After the principal note became due, defendants denied that they held the sale notes as collaterals, and refused to give the plaintiff any information as to what had been paid on them, and the plaintiff then paid the note in full, and demanded an assignment of the collaterals. The plaintiff's payment being made by a part payment in cash, and his note for the balance, which he paid at maturity:—Held, that the plaintiff could not maintain trover against defendants for the collaterals; for although under 26 Vict. c. 45, s. 2, he was entitled to the immediate possession of them, he had not, until assignment, any property in them vested in him. *Cornish* v. *The Niagara District Bank*, 24 C. P. 262.

Semble, that the plaintiff's remedy would be by a special action on the case for not assigning the notes to him after demand duly made. *Ib.*

Held, however, that the plaintiff was entitled to recover as money had and received to his use, the amount paid to defendant on the collaterals, and the fact of his only paying part of the principal note in cash, and giving his note for the balance, did not take away his right. *Ib.*

Semble, also, that his right would not be affected even if the payment on the collaterals was after his payment. *Ib.*

B., the holder of £2,000 government debentures, assigned them to defendants, and delivered to them his bond to secure the interest, upon which they passed the full amount to his credit. Subsequently defendants obtained from B. security by mortgage for the principal as well as the interest, and for another debt which he owed them. B., about the same time, assigned his interest in the debentures to G. S. B.; and the defendants afterwards accepted a release of part of the mortgaged property in part payment of the amount secured by the mortgage. The mortgaged property was then sold by defendants for much less than the amount of the debentures, which were afterwards paid in full by the government. It appeared, from the defendants' books and their communications with the government, that they did not consider themselves entitled to both sums:—Held, that the plaintiff, who was the assignee of G. S. B.'s interest in the debentures, was entitled to the proceeds of the property sold. *Covert* v. *Bank of Upper Canada*, 3 Chy. 246.

A judgment creditor coming in to redeem a mortgage incumbrancer is entitled, upon payment of the amount due to the mortgagee, to an assignment not only of the mortgaged premises, but of all collateral securities, whether the same be subject to the lien of the creditor under the judgment or not. Therefore where judgment had been recovered and duly registered against a party who had a contingent interest in real and personal property, subject to a mortgage executed by way of security for advances, and the debtor having effected an insurance upon his life, which he had also assigned to the same person as an indemnity against loss in respect of a bond executed by him as surety for the debtor:

Held, that the judgment creditor of the mortgagor upon paying the amount due under the mortgage and indemnifying the mortgagee in respect of his liability as surety, was entitled to a transfer of the policy of insurance, and also of the mortgage upon the contingent interest, and to foreclose the mortgagor in default of payment. *Gilmour* v. *Cameron*, 6 Chy. 290.

Land scrip was deposited with a party as collateral security, who sold the same at a discount:—Held, that if on taking an account it should appear the sale had been effected before any default in payment, he must be charged with the amount of the present value, but if after default, then with the value at the time of the sale. *Hart* v. *Bown*, 7 Chy. 97.

A person who is surety for another, and holds collateral securities, is not bound to wait until he had paid the debt of the principal before he assigns such securities, but may do so at any time to the creditor in discharge of his liability. *Paton* v. *Wilkes*, 8 Chy. 252.

A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default; the only decree to which he is entitled is to sell, allowing the mortgagor the usual time for redemption. *Ib.*

Where bonds were given for the payment of a certain sum of money and interest in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds:—Held, that a breach of covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages; but they were entitled to a decree for sale of other bonds given as collateral security. *Great Western R. W. Co.* v. *Galt and Guelph R. W. Co.*, 8 Chy. 283.

An action at law having been brought upon a promissory note, the defendant pleaded that it had been given as collateral security for another debt which had been paid, but adduced no evidence to establish this fact:—Held, in a suit afterwards instituted in the court of Chancery to enforce the charge of the judgment against lands, that he was precluded from shewing any payment prior to the time of plea pleaded. Esten, V.C., diss. *Carpenter* v. *The Commercial Bank*, 2 E. & A. 111.

A debtor gave a mortgage to his creditor as collateral security for a debt for which another person (H.) was surety. The creditor afterwards obtained judgment against the surety (H.) for the debt, and placed an execution in the sheriff's hands against his goods. A creditor of the surety subsequently placed an execution in the same sheriff's hands; and, there not being goods enough to pay both executions, he paid off the

first execution and took an assignment of the mortgage :—Held, that he was entitled to hold the mortgage to the extent of such payment, as against the plaintiff, to whom the surety, H., after both executions were delivered to the sheriff, had assigned his interest in the mortgage to secure another debt. *Garrett* v. *Johnstone*, 13 Chy. 36.

A decree was made for the foreclosure of a mortgage of £100 with interest. It appeared by defendant's evidence in the master's office that no money was advanced by the mortgagees ; and the court held, chiefly on the conduct of the parties, and the circumstances of the case, that the mortgage was intended as a security for a note of the mortgagor's, endorsed by the mortgagees contemporaneously with the execution of the mortgage, and for any subsequent transactions with the mortgagor growing out of it. *Brownlee* v. *Cunningham*, 13 Chy. 586.

A mortgage was given by the maker of certain notes as collateral security to an accommodation endorser, which notes were duly retired by the maker. Subsequently the mortgagor gave other notes to the mortgagee, when it was verbally agreed that the mortgage should be retained by the endorser as an indemnity for such subsequent notes :—Held, that the endorser was entitled to retain such security to the exclusion of other creditors of the mortgagor. *Morrison* v. *Robinson*, 19 Chy. 480.

The rule in respect of compositions between a debtor and his creditors is, that a creditor cannot appear to concur in the composition and sign the deed, and at the same time stipulate for a separate benefit to himself outside thereof. However, where upon an agreement between a debtor and his creditors for an extension of time for payment of his liabilities, the deed of agreement stated that it should not "affect any mortgage, hypothec, lien, or collateral security held by any such creditor as security for any of said debts :"—Held, that a creditor whose claim was fully secured by a mortgage on real estate and other collaterals, was not bound to communicate that fact to the other creditors at or before executing the deed of extension. *Henderson* v. *Macdonald*, 20 Chy. 334.

COLLECTORS.

I. Of Taxes.

1. *Generally*—*See* Assessment and Taxes.
2. *Roll of, in Municipal Elections*—*See* Municipal Corporations.

II. Of Customs—*See* Revenue.

A collector who commits a trespass while acting under a warrant issued by a competent authority is entitled to notice of action, and the action should be brought within six months. *Spry* v. *Mumby*, 11 C. P. 285.

A collector is responsible for the acts of his bailiff holding legal authority (by warrant) from him so to act, and an action will lie against them jointly. *Corbett* v. *Johnston et al.*, 11 C. P. 317. See, also, *Fraser* v. *Page*, 18 Q. B. 327.

COLLEGES.

See Huron College—King's College—Queen's College.

COLLISION.

I. On Railways—*See* Negligence—Railways and Railway Companies.

II. On Water—*See* Ship.

COMMISSARIAT.

See Ordnance.

COMMISSION.

I. To Examine Witnesses—*See* Evidence.

II. Of Lunacy—*See* Lunatic.

III. To Examine into Municipal Affairs—*See* Municipal Corporations.

COMMISSION MERCHANTS.

I. Brokers—*See* Brokers.

II. Factors—*See* Factors.

On the following guarantee signed by defendant :—"Whereas H. H. & Co. of Albany have authorized S. and J., of Houghton, Canada West, to draw on them to the amount of $5,000 ; and whereas the said S. and J. promise and agree to ship to the said H. H. & Co., a sufficient quantity of lumber in the months of May, June, July and August next, to pay the same. Now, therefore, in consideration of $1 to me in hand paid, I hereby guarantee to Messrs. H. H. & Co. that the lumber shall go forward agreeably to contract, and in default of the same, I will be responsible to them to the amount of the advances, the same not exceeding $5,000 :"—Held, that the defendant was not entitled to credit, as against his guarantie, for the gross value of the lumber sent, but that the plaintiffs were entitled to deduct their charges. *Higby* v. *Cummings*, 10 Q. B. 222.

Action against defendant as broker and commission agent, for negligence in delivering goods to the purchaser without the price being paid, and for not using due care that the purchaser was solvent. Evidence—Verdict for plaintiff—New trial granted on payment of costs. *Deady* v. *Goodenough*, 5 C. P. 163.

"Received of ——— six boxes of axes, to be sold for him on commission, and when sold, I agree to account to him for those sold at the rate of, &c., and to return the remainder unsold on demand :"—Held, that an action for goods sold and delivered would not lie for any of the axes not returned. *Dodds* v. *Durand*, 5 Q. B. 623.

Quære, as to the measure of damages recoverable on a breach of contract by defendants, commission merchants, to advance money to plaintiff, a miller, for the purpose of carrying

on his business, upon the security of flour consigned by him to defendants for sale. *Hyde* v. *Gooderham et al.*, 6 C. P. 21.

Held, under the facts proved in this case, that the mortgage by plaintiff to defendants of his mill, to secure advances on his flour to be made by defendants as commission merchants, was not to be treated as superseding the parol agreement for such advances, or as shewing a different agreement from that evinced by the letters. *Ib.*

Held, also, that the defendants were entitled, subject to plaintiff's choice of market, to reimburse themselves for advances already made by the sale of all such flour as they had obtained delivery orders for from plaintiff. *Ib.*

H., a miller, employed G. & Co., commission merchants, to dispose of his manufactured flour, on commission. He also exercised a control over the market in which the flour was to be sold, and in B. and other certain markets allowed G. & Co. the charge for agency for effecting sales there, in addition to their usual commission :—Held, that although G. & Co. were not factors with a del credere commission, they and not H. were liable for a loss occasioned by the failure of brokers whom they employed, and who had received the proceeds of sales of H.'s flour at B. *Gooderham* v. *Hyde*, 6 C. P. 341.

Plaintiff being employed to purchase and ship lumber for defendant on commission, attempted to purchase a large quantity from P., but was unable to agree as to terms, and the negotiation was broken off. Afterwards P. and defendant agreed on terms of sale, and defendant purchased. The court set aside a verdict for plaintiff for his commission, with costs to abide the event, on the ground that the evidence did not sustain it. *Boydell* v. *Snarr*, 6 C. P. 94.

Declaration, that in consideration that the plaintiff, at defendants' request, had consigned and shipped certain wheat to Messrs. C. & B. at Oswego, defendants promised to advance him a certain sum thereon, and to sell it for him within thirty days, and pay over the proceeds, less the advance and charges, &c. ; that the defendants did make the advance, but did not sell the wheat :—Held, bad, on demurrer to the pleas, as not shewing a sufficient consideration. Held, also, that if the promise had been binding, it would be a good defence that the wheat was lost before it came into defendants' possession. See the pleas set out in the case, and the impression of the court upon them, though their validity is not expressly decided. *Marlatt* v. *Gooderham et al.*, 14 Q. B. 221.

Defendant obtained an advance from plaintiffs on wheat which he had shipped from Oakville to Oswego, consigned to them, to the care of C. & B. The plaintiffs were to sell the wheat for defendant, and pay him the proceeds, deducting the advance and charges, &c. The wheat having been lost on the passage,—Held, that defendant was bound to refund the sum advanced, as the wheat still continued his property. *Gooderham et al.* v. *Marlatt*, 14 Q. B. 228.

Defendant at the trial desired to prove that when the advance was made the plaintiffs were spoken to about insuring the wheat, and replied that they were their own insurers, and took the risk of wheat shipped on their account :—Held, that such evidence was rightly rejected ; and that if admitted it would not have affected defendant's liability. *Ib.*

Plaintiffs, being commission merchants in N. Y., received from defendants a quantity of wheat, with instructions to ship it to L. for sale there, not limiting them as to price, nor directing the employment of any particular agent ; and they made advances upon it, which as they alleged exceeded the net proceeds of the sales, one cargo having realized more than the advances, the other two cargoes much less. In an action for the excess thus advanced, the plaintiffs proved that they had mailed to defendant the account sales received by them from their L. agents, with an account between plaintiffs and defendants founded upon them, and that these account sales were afterwards seen in his possession ; and evidence was given that the wheat was in a bad condition when shipped, as defendant knew ; that the prices realized were what might have been expected, and the charges such as were usual. It appeared, also, that part of the wheat belonged to one J., and that on receiving the first account sales shewing a profit, the defendant had settled with him. This cargo, however, had not been consigned to the same agents as the other two. The jury having found for the plaintiffs :—Held, that the evidence was not sufficient to shew the price for which the wheat was sold, nor the amount of charges connected with the sales ; and a new trial was therefore granted, with costs to abide the event. *Craig* v. *Corcoran*, 23 Q. B. 441.

Defendant living at C., consigned to the plaintiff at M. certain tobacco for sale, and, without authority, drew upon him at the same time for $250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in M., and the plaintiff therefore shipped the tobacco to E., where it was sold. The net proceeds, after deducting freight and charges, were only £14 sterling, and he sued defendant upon the common counts for the difference, $278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due defendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from E. had been sent the defendant, who said, on receiving them, that he did not think he ought to bear the whole loss, but offered $150, The jury gave a verdict for $200 :—Held, there being no evidence of any special contract, that the plaintiff was entitled to recover his advances without waiting for the sale of the tobacco ; and that if he had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld. *Stewart* v. *Lowe*, 24 Q. B. 434.

Defendant, at B., consigned for sale to the plaintiff, a commission merchant at M., a lot of butter for sale, and drew upon him at five days for $2,000, which the plaintiff accepted, and paid at maturity. At that time his instructions were not to sell for less than 18½c. per lb., which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agent at H., who wrote that no sale could be effected there, and advising J. Plaintiff then sued defendant upon the com-

mon counts for the money paid by him :—Held, that he was entitled to recover, and that there was nothing in the facts, more fully set out in the case, to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected. *Cowie* v. *Apps*, 22 C. P. 589.

At the trial defendant tendered evidence to shew the meaning of cash advances made by commission merchants on account of goods consigned to them for sale, and the usual practice as to commission merchants reimbursing themselves for such advances :—Held, that such evidence was properly rejected. *Ib.*

The declaration stated that defendants covenanted with plaintiffs that the plaintiffs should make them advances either in money or wool: that defendants would buy wool with moneys advanced: that the plaintiffs should have a lien on all the wool, and might insure it and charge the premium as advances: that the wool as manufactured should be consigned to the plaintiffs for sale: that the plaintiffs should be entitled to 1½ per cent. commission on advances, and 5 per cent. on sales, and that the plaintiffs should credit proceeds of sales to defendant after deducting the advances and commission. Averment, that the plaintiffs made advances, paid insurances, and made sales, and credited defendants with the proceeds, less the advances and commission, whereby plaintiffs became entitled, in addition to the balances due to them for advances and interest, to large sums for commission under the agreement; and that upon the closing of the agreement there was due to the plaintiffs a large sum, as a balance due thereunder, which defendants had not paid :—Held, on demurrer, 1. That upon the sale of all the goods delivered by defendants to the plaintiff, an action might lie on the covenant for any balance due to the plaintiffs for advances and commission, as a liability to be implied from the tenor of the agreement; 2. That the expression "upon the closing of the agreement," was not equivalent to an averment that plaintiffs had no goods of the defendants still on hand to be sold; and that the declaration was therefore insufficient. *Young et al.* v. *Crossland et al.*, 18 C. P. 312.

Held, that upon the evidence set out in this case the defendants were acting as principals, not as agents for the purchasers, and therefore could not charge commission. *Macklem et al.* v. *Thorne et al.*, 30 Q. B. 464.

Defendant agreed with the plaintiff that if the plaintiff would find him a purchaser for his farm at $6,000, and get not less than $1,000 down, he would pay him $200. The plaintiff found a purchaser at $6,000, who paid only $500 down, but the defendant accepted and sold to him, and it was proved that after the sale defendant promised the plaintiff to pay him the $200. The judge of the County Court, before whom the case was tried without a jury, having found for the plaintiff for $200 upon the common count :—Held, on appeal, that defendant having accepted and dealt with the purchaser found by the plaintiff, though not such a purchaser as the agreement called for, the plaintiff was entitled to recover the value of his services on the common count; and that as the defendant had promised to pay the $200, the verdict was right. *Wycott* v. *Campbell*, 31 Q. B. 584.

The defendants, wishing to introduce an ore called blue ore into Pennsylvania, corresponded with the plaintiff at Pittsburg. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st of August, 1872, with an option to O. & Co. to order any number of tons from 10,000 to 30,000 during the five years from the 1st of February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of fifteen cents per ton would be paid him on that sale, and that he would make him the following offer for the future: "I will give you a commission of ten cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of five cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st of January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania." The defendants paid plaintiff the fifteen cents on the 15,000 tons; but O. & Co. having exercised their option, and ordered the 30,000 tons, plaintiff claimed that he was entitled to a commission of five cents per ton on the 30,000 tons, and brought this action therefor :—Held, that he could not recover, as the agreement to give five cents per ton on all sales during the five years, referred to future sales, and not to any amount ordered by O. & Co. under their contract. *Taylor* v. *The Cobourg Peterborough and Marmora Railway and Mining Co.*, 24 C. P. 200.

Held, also, that proof merely that C. was defendants' managing director was not sufficient evidence under 16 Vict. c. 253, ss. 10, 20, of C.'s authority to enter into the contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him. *Ib.*

Held, also, that the plaintiff was not an agent within sec. 17, so as to require his appointment by by-law. *Ib.*

A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him at Q. for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, he, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff :—Held, that interest could not be charged. Mowat, V. C., diss. *De Hertel* v. *Supple*, 13 Chy. 648; 14 Chy. 421.

Where parties entered into an agreement that they should purchase goods on joint account, and at the joint risk, and that one of the parties should furnish the funds in the first instance, it was—Held, that interest could not be charged on the funds so furnished. *Jardine* v. *Hope*, 19 Chy. 76.

In such a case a firm in C. was to advance the funds, and the goods were to be consigned for

sale to their firm in L., which went by a different name:—Held, that they could not charge commission on their sales. *Ib.*

Three months before the filing of a bill respecting the partnership, accounts had been furnished in which interest and commission were charged, and none of the partners had before suit suggested their objections to those charges:—Held, that they were not precluded by this delay from objecting thereto in the suit. *Ib.*

COMMISSIONERS.

I. For Taking Affidavits.
  1. *Generally*—*See* Affidavit.
  2. *To hold to Bail*—*See* Arrest.
II. Boundary Line — *See* Boundary Line Commissioners.
III. Of Indian Lands—*See* Indian Lands.
IV. For Forfeited Estates—*See* Inquisition.
V. For Inquiry into Municipal Finances —*See* Municipal Corporations.
VI. Of Police—*See* Police.
VII. Of Turnpike Trust — *See* Turnpike Trust.

Commissioners, appointed under an act of parliament, employing persons to make a macadamized road, are not personally responsible. *Neve* v. *Burn et al.*, T. T. 3 & 4 Vict.

Assumpsit does not lie against the commissioners of the St. Lawrence canal, under 3 Will. IV. c. 17, for the work done on the canal on a contract made with them, unless it can be specially shewn that they made themselves personally liable, as they must be considered merely as the agents of the government. *Tait* v. *Hamilton*, 6 O. S. 89.

Held, that the commissioners for the town of Peterborough, appointed by 24 Vict. c. 61, are not a corporation, and cannot be sued as such. Upon this objection to the declaration, the action was held not sustainable, this court being of opinion that they should be sued by name, adding their statutory designation. *The Commissioners of the Peterborough Town Trust, Appellants, and Cochrane, Respondent*, 13 C. P. 111.

COMMITMENT.

I. Arrest—*See* Arrest.
II. By Attachment—*See* Attachment of the Person.
III. To Close Custody—*See* Bail.
IV. By Magistrates — *See* Justices of the Peace.
V. Action for Wrongful Commitment—*See* Trespass.

COMMITTEE.

I. Personal Liability of Members — *See* Contract.
II. Of a Lunatic—*See* Lunatic.

COMMON CARRIERS.

See Carriers.

COMMON COUNTS.

See Money Counts—Sale of Goods—Sale of Land—Work and Labour.

Indebitatus assumpsit will lie for chattels, if their value be set forth in the declaration. *Lister* v. *Warren*, 6 O. S. 256.

COMMON SCHOOLS.

See Public Schools.

COMMONS, HOUSE OF

See Parliament.

COMPANY.

See Corporation.

COMPENSATION.

I. Damages Generally—*See* Damages.
II. In Actions for Specific Performance —*See* Specific Performance.
III. For Taking Lands or Executing Works—*See* Railways and Railway Companies.
IV. For Improvements—*See* Improvements on Land.
V. To Agents—*See* Principal and Agent.
VI. To Executors—*See* Executors and Administrators.
VII. To Trustees—*See* Trusts and Trustees.

The growing crops on land are part of and go with the freehold when it is sold. When, therefore, a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money; and the same order was made to extend to taxes due on the land and unpaid. *Stewart* v. *Hunter*, 2 Chy. Chamb. 335.—Taylor, *Secretary.*

The claim of a debtor to compensation for misrepresentation of parties in obtaining a patent of land is not liable to be seized, attached, or sequestered before the amount is determined by decree or otherwise. *Roberts* v. *The Corporation of the City of Toronto*, 16 Chy. 236.

A purchaser by taking a conveyance or vesting order waives all objections to the title. He also takes upon himself the responsibility of obtaining possession, and if evicted by a title to which his covenants do not extend, he has no

right to compensation on that account. *Bull* v. *Harper*, 6 P. R. 36.—Chy. Chamb.—Holmested, *Referee.*

Misdescription in the advertisement is a ground for compensation even after conveyance. *Ib.*

COMPOSITION.

See BANKRUPTCY AND INSOLVENCY.

A composition where lands are not concerned, or an assignment of goods which would not fall within the Statute of Frauds, is valid by parol. *Brunskill* v. *Metcalf*, 2 C. P. 431.

COMPOUNDING.

I. PENAL ACTIONS—*See* PENAL ACTION.

II. PROSECUTIONS—*See* COMPROMISING.

COMPROMISING.

I. PROSECUTIONS, 691.

II. ACTIONS.

1. *Generally*, 691.
2. *Penal Actions*—PENAL ACTIONS.
3. *Authority of Attorney or Solicitor*—*See* ATTORNEY AND SOLICITOR.

I. PROSECUTIONS.

An agreement not to proceed in a prosecution for permitting unlawful gambling in a tavern, is an illegal consideration for a promissory note. *Dwight* v. *Ellsworth*, 9 Q. B. 539.

To support a plea that a note was given in consideration of forbearance to proceed in a prosecution for felony, the particular nature of the charge should be proved. *Henry* v. *Little*, 11 Q. B. 296.

The legislature of Ontario having passed an act to regulate tavern and shop licenses, 32 Vict. c. 32, under the power given to them by the B. N. A. Act, 1867, s. 92, sub-ss. 9, 16:—Held, that they had power under sub-s. 15, to enact that any person who, having violated any of the provisions of the act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, sub-s. 27, by which the criminal law is assigned exclusively to the Dominion parliament. *Regina* v. *Boardman*, 30 Q. B. 553.

II. ACTIONS.

1. *Generally.*

The plaintiffs sued the defendant for $150, money lent, to which the defendant pleaded a set-off against L., one of the plaintiffs, accepted by L. in satisfaction. It appeared that the defendant having built a house for L., cross demands arose out of the contract, and their solicitors negotiated for a settlement: that the $150 was mentioned, and L.'s solicitor offered to pay $650 in full of all matters, taking this $150 into account as a credit to L. The defendant refused to take less than $700, and sued L., whose solicitor, before he was aware of the suit, paid $650, and afterwards paid $50 into court, which was taken out. The jury were asked whether L. or his attorney agreed absolutely to allow the $150 as a payment on the contract, or only for the sake of a settlement, which was not arrived at; to which the defendant objected, that if the negotiations proceeded on the supposition that the $150 was to be so allowed, and L. afterwards paid the $700 on a different understanding, he was bound so to state at the time:—Held, that the direction was right, and a verdict for the plaintiff was upheld. *Young et al.* v. *Taylor*, 25 Q. B. 583.

It is the duty of a party setting up that a settlement of a claim for injuries has been obtained by misrepresentation, to establish not only that the settlement has been so obtained, but also that the amount paid is an inadequate compensation for such injuries; and where there was an entire failure of evidence on the latter point, a new trial was granted on payment of costs. *Rowe* v. *Grand Trunk R. W. Co.*, 16 C. P. 500.

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between plaintiffs and T., one of the now defendants, pending such suit, that certain persons should purchase said mine from the plaintiffs: that they should deposit the money required for the security for costs, which the plaintiffs had been ordered to give in said suit, and pay all costs incurred or to be incurred therein, or any other suit brought or defended by them respecting said mine, and pay all the moneys due for the purchase thereof, and allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit; and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs sued defendants on the last-mentioned covenant: and to a plea setting out the transaction, which was held void for champerty and maintenance, the plaintiffs replied, on equitable grounds, that in the Chancery suit defendants were added as plaintiffs, and defendants therein in their answer set up against them that this agreement was void for champerty, which they denied, and on the hearing the cause was compromised, and a decree made by agreement, by which defendants were allotted a certain portion of the land, for which they received a conveyance, and the agreement declared on was treated and acted upon by all parties, and by the court, as valid. Remarks by A. Wilson, J., as to the effect of this replication. *Carr et al.* v. *Tannahill et al.*, 30 Q. B. 217.

The compromise of a claim upon the plaintiff's assertion that it is the only one, will not of itself form an equitable defence to another claim, the right to recover in respect of which is not otherwise contested. *King* v. *Miller*, 22 C. P. 450.

W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A ver-

tion of the land so conveyed was subsequently claimed by one R., and an action of ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances W. executed to his vendee a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R. respecting his claim:—Held, that W.'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise. *Hart* v. *Bown*, 7 Chy. 97.

A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and the husband had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother. Under these circumstances the wife was advised to take proceedings against her husband, under the statute, for not providing her and her children with food, &c., and also to file a bill against him for alimony. In order to compromise these threatened proceedings the husband made a settlement in favour of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof:—Held, that the settlement could not be impeached under the statute 13 Eliz. *Mason* v. *Scott*, 20 Chy. 84.

COMPULSORY LIQUIDATION.

See BANKRUPTCY AND INSOLVENCY.

COMPULSORY REFERENCE.

See ARBITRATION AND AWARD.

COMPUTATION OF AMOUNT DUE.

I. FOR INTEREST—*See* INTEREST.

II. ON JUDGMENTS—*See* JUDGMENT.

COMPUTATION OF TIME.

See TIME.

CONCESSION LINES.

See BOUNDARY LINE COMMISSIONERS—SURVEY.

CONDITIONS.

I. PRECEDENT AND SUBSEQUENT — *See* CONTRACT—PLEADING AT LAW.

II. CONTRARY TO PUBLIC POLICY—*See* CONTRACT.

III. IN CONTRACT OF SALE BY AUCTION — *See* AUCTION AND AUCTIONEER — SALE OF LAND BY ORDER OF THE COURT.

IV. IN WILLS—*See* WILL.

CONFESSION.

I. BY PARTIES ACCUSED— *See* CRIMINAL LAW.

CONFESSION OF JUDGMENT.

See COGNOVIT.

CONFLICT OF CASES.

See COURTS.

CONFLICT OF LAWS.

See FOREIGN LAW.

CONSENT RULE.

See EJECTMENT.

CONSIDERATION.

I. IN BILLS OR NOTES — *See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. IN BILLS OF SALE AND CHATTEL MORTGAGES—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

III. IN CONTRACTS—*See* CONTRACT—GUARANTEE AND INDEMNITY.

IV. INADEQUACY OF.

1. *Generally*—*See* FRAUD AND MISREPRESENTATION.
2. *In Sale of Lands by Sheriff*—*See* EXECUTION.

V. IN FRAUDULENT CONVEYANCES—*See* FRAUDULENT CONVEYANCES.

VI. USURIOUS—*See* USURY.

CONSOLIDATING ACTIONS OR SUITS.

See PRACTICE AT LAW — PRACTICE IN EQUITY.

CONSPIRACY.

See CRIMINAL LAW.

An action on the case in the nature of a conspiracy does not lie against a person supplanting another in the purchase of goods which had first been contracted for by the latter; and in every action on the case in the nature of a conspiracy the declaration must expressly aver malice on the part of defendant. *Davis* v. *Minor*, 2 Q. B. 464.

The averment of a conspiracy in an action on the case is no objection, though the facts stated would not support an action for conspiracy, if on the whole declaration a good ground of action on the case is shewn. *Municipality of the Township of East Nissouri* v. *Horseman*, 16 Q. B. 556.

To induce a woman to go through the ceremony of a pretended marriage. See *Wright* v. *Skinner*, 17 C. P. 317.

Declaration, that the defendant and one L. did unlawfully and fraudulently combine, conspire, and agree together to defraud the plaintiff of $100, and in pursuance and furtherance of said combination and conspiracy the said L. did procure and induce the plaintiff to lend him $100 on his promissory note, and in pursuance and by means of such combination and agreement the said L. procured the said $100 from the plaintiff, without any intention of repaying the same, and with intent to defraud the plaintiff, whereby the plaintiff lost the said $100:—Held, insufficient, on demurrrer, for not shewing what representations were made or means used, or what the facts were which constituted the alleged fraud or cause of action. *Armstrong* v. *Lewin*, 34 Q. B. 629.

CONSTABLE.

I. Liability for Escape, 695.

1. *Negligent Escape—See* Criminal Law.

II. Power and Duty of in Making Arrests, 695.

III. Actions Against.

1. *Pleading*, 696.
2. *Demand of Copy of Warrant*, 697.
   (a) *Actions against Division Court Bailiffs—See* Division Court.
3. *Notice of Action to—See* Action.

IV. Miscellaneous Cases, 697.

V. Bailiff—*See* Bailiff.

I. Liability for Escape.

Quære, whether a constable can be compelled to execute a warrant of attachment sued out in a County Court from a commissioner, as it is not directed to him but to the sheriff, and the statute gives him no fee. But if he undertake the service and arrest the defendant, he is liable for an escape. *Story* v. *Durham*, 9 Q. B. 316.

II. Power and Duty of in Making Arrests.

A constable who arrests under a commissioner's writ cannot take bail, but if he do, and the sheriff accept the bail, the bond is good. *Price* v. *Sullivan*, 6 O. S. 640.

Where defendant justified under a warrant from the president and board of police at Cobourg, under the Cobourg Police Act, for the nonperformance of statute labour by the plaintiff, the justification was held bad because the plaintiff was imprisoned after part of the fine had been paid, and the warrant to imprison being for an absolute time, without any reference to the earlier payment of fine and costs, was illegal and void. *Trigerson* v. *Board of Police of Cobourg*, 6 O. S. 405.

Semble, that a constable may allow a debtor whom he has arrested to go at large, so long as before the return of the writ he deliver him to the sheriff. *Ross* v. *Webster*, 5 Q. B. 570.

Semble, that a constable in a civil proceeding has no colour or pretence for arresting without authority specially given by some process. *Brown* v. *Shea*, 5 Q. B. 141.

An arrest by a constable on mesne process directed to the sheriff is not legal by the 2 Geo. IV. c. 1, s. 9, unless the affidavit of the debt be annexed to the process. *Ross* v. *Webster*, 5 Q. B. 570.

To a declaration for imprisoning the plaintiff, defendant pleaded that when he made the arrest he was a peace officer for the county, and as such was informed that the plaintiff had committed a felony, and was then a fugitive from justice therefor; that, as he lawfully might, he arrested the plaintiff, and immediately caused him to be brought before the nearest justice to answer the said felony, and that the plaintiff was detained in the police station by said magistrate, which is the trespass complained of:—Held, plea, good. *Rogers* v. *Van Valkenburgh*, 20 Q. B. 218.

At the trial it appeared that the plaintiff had committed a gross fraud in Detroit, in the United States: that the defendant having received a telegram from a public officer there, arrested him in this province, and took him to the police station in London; and that after three days' detention he was discharged, the offence not being within the Ashburton Treaty. Defendant had been chief of police in London, and afterwards appointed, from year to year, constable for the county. He had acted for the present year, and there was some evidence of his having been sworn in, but his name was not upon the list of the clerk of the peace of those appointed for that year. The jury were told that defendant having no warrant, and not being a peace officer at the time, the arrest was not strictly legal, and the plaintiff, therefore, entitled to recover. They found, however, for defendant, and the court refused to disturb the verdict. *S. C. Ib.* 220.

Held, that a constable executing a warrant issued under the Fishery Act, 31 Vict. c. 60, D., directing him to convey plaintiff to gaol, and the gaoler to hold him for 30 days (absolutely, and not until the fine, &c., be sooner paid for the nonpayment of which the warrant was issued), had no authority to receive the money and discharge the prisoner. *Arnott* v. *Bradly*, 23 C. P. 1.

III. Actions Against.

1. *Pleading.*

To a plea of "son assault demesne," a replication that defendant committed a breach of the peace, and that the plaintiff being a constable, and having view thereof, arrested him, is a good answer. *Fido* v. *Wood*, 5 O. S. 558.

Plea justifying arrest, as a constable, without a warrant, under the Hawkers and Pedlars' Act, 58 Geo. III. c. 5—Requisites of. See *Oviatt* v. *Bell*, 1 Q. B. 18.

Quære, whether to a declaration for arresting, bruising, beating and illtreating the plaintiff, a justification of the mere arrest will be sufficient. *Jones* v. *Rose*, 3 Q. B. 328. Semble, not. *Bemer* v. *Darling*, 4 Q. B. 211.

Declaration for assault, &c., and false imprisonment. A., one defendant, justified, alleging that upon suspicion that the plaintiff had stolen his goods he laid his information before a justice of the peace, who granted a warrant to the constable: that B., another defendant, being the constable, searched the plaintiff's house, found the goods, and arrested the plaintiff, and at the request of A. carried her before a magistrate:—Held, plea bad, in assuming to answer the whole injury, and yet not denying nor confessing or avoiding the arrest. *Jones* v. *Ross*, 3 Q. B. 328.

A defendant in trespass for false imprisonment cannot urge that he arrested as a constable, and that the action was brought in a wrong county, if he has omitted to insert in the margin of his plea, "by statute," unless the court can say upon the facts proved at the close of the plaintiff's case, that the defendant was acting as constable. *Brown* v. *Shea*, 5 Q. B. 141.

A constable claiming the benefit of a statute in justification of an alleged breach of the law must plead it specially. Clear proof of a warrant to arrest must be given in an action for assault and battery, but its production will not justify gross and unnecessary violence in the execution of it. *Belch* v. *Arnott*, 9 C. P. 68.

2. *Demand of Copy of Warrant.*

The proof by the plaintiff of an admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he acted, is not sufficient evidence as against the justices to entitle the constable to an acquittal under 24 Geo. II. c. 44, s. 6. *Kalar* v. *Cornwall*, 8 Q. B. 168.

Where the plaintiff demanded from the constable the perusal and copy of the warrant:—Held, no excuse for non-compliance, that he had lodged it with the gaoler. On the argument in term, it was urged for the first time that the defendant, the constable, being placed by such non-compliance in the same position as the convicting magistrate, was bound to produce the conviction; but—Held, that as the conviction could probably have been produced if such objection had been raised at the trial, its non-production could not now be allowed to prejudice the defendant. *Arnott* v. *Bradly*, 23 C. P. 1.

IV. Miscellaneous Cases.

Held, that the direction of a search warrant to the constable of Thorold, not naming him, to execute the warrant in the township of Louth, was good. *Jones* v. *Rose*, 3 Q. B. 328.

Quære, 1. Is an attachment of privilege within the 9th clause of 2 Geo. IV. c. 1; and, 2. Would this doubt, or the want of an affidavit being annexed to a bailable process, deprive the defendant, a constable, of the benefit of the 21 Jac. I. on the point of venue. *Brown* v. *Shea*, 5 Q. B. 141.

A constable of any town within the county in which a warrant of attachment against goods from the Division Court is issued under 12 Vict. c. 69, s. 1, has authority to execute such warrant. *Delany* v. *Moore*, 9 Q. B. 294.

Under C. S. U. C. c. 54, s. 402, it is for the city council, not for the commissioners of police, to determine the remuneration to be paid to the police force. Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it. *In re Prince and the Corporation of the City of Toronto*, 25 Q. B. 175.

CONSTITUTIONAL LAW.

I. Imperial Enactments.

1. *Statutes in force*, 698.

(a) *Church of England—See* Churches.

(b) *Bracery, Champerty, and Maintenance—See* Champerty and Maintenance.

II. British North America Act, 1867, 701.

III. Miscellaneous Cases, 704.

[*The Criminal Law of England was established in this Province when forming part of the Province of Quebec, by the Imperial Statute 14 Geo. III., c. 83. By the Provincial Statute, 32 Geo. III., c. 1, the law of England was adopted in all matters of controversy relative to property and civil rights.*]

I. Imperial Enactments.

1. *Statutes in force.*

An indenture of apprenticeship is not void, but voidable, when contrary to 5 Eliz. c. 4; and that statute is not in force in this province. *Fish* v. *Doyle*, Dra. 328; *Dillingham* v. *Wilson*, 6 O. S. 85.

Semble, the statute of 5 Eliz. c. 4, is not in force in Upper Canada, but the 20 Geo. II. c. 19, is in force; and under the third and fourth clauses of the latter statute, jurisdiction is given to two or more justices, and cannot be exercised by one, and the party cannot be arrested on the complaint; he must be summoned. *Shea* v. *Choat*, 2 Q. B. 211.

The Bubble Acts, 6 Geo. I. c. 18, and 14 Geo. II. c. 37, are not in force in this province, and banks chartered by act of the Provincial Parliament could not come within the provisions of those acts. *Bank of Montreal* v. *Bethune*, 4 O. S. 165, 193.

The British statute 24 Geo. II. c. 46, disallowing the sale of spirituous liquors at one time in quantities of less value than 20s. to be consumed out of the shop, is not in force here. *Heartly* v. *Hearns*, 6 O. S. 452; *Leith* v. *Willis*, 5 O. S. 101.

The court refused a mandamus to compel a registrar to register a deed on a declaration of its execution made in England under 5 & 6 Will. IV. c. 62, substituting declarations for oaths, as that act does not apply to such a case. *In re Lyons*, 6 O. S. 627.

The statute of 9 Geo. II. c. 36, relating to charitable uses, is in force in this province. *Doe d. Anderson* v. *Todd*, 2 Q. B. 82; *Hallock*

v. *Wilson*, 7 C. P. 28; *Mercer* v. *Hewston*, 9 C. P. 349; *Davidson* v. *Boomer*, 15 Chy. 1, 218; *Hambly* v. *Fuller*, 22 C. P. 141.

Under the 75th clause of our Bankruptcy Act, the 108th sec. of the British statute 6 Geo. IV. c. 16, is not in force in Upper Canada. *Maulson* v. *Commercial Bank*, 2 Q. B. 338.

The 16 Car. I. c. 10, was intended only to apply to the Court of Star Chamber and other courts therein mentioned, and not to such tribunals as the Recorder's Court for the city of Hamilton. Therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £600 sterling, imposed by the sixth clause of the statute, was held not sustainable; and, at all events, the record being unreversed, would have protected the defendant. *Stark* v. *Ford*, 11 Q. B. 363.

Held, that the Ashburton Treaty contains the whole law of surrender as between Canada and the United States; the statute 3 Will. IV. c. 6, being superseded by the Ashburton Treaty and the Imperial act 6 & 7 Vict. c. 76, and the provincial statute 12 Vict. c. 19; though in relation to other foreign powers, with whom no treaty or conventional arrangement existed, the statute 3 Will. IV. c. 6, is still in force. *Regina* v. *Tubbee*, 1 P. R. 98.—C. L. Chamb.—Macaulay.

Quære, how far the United States, Lower Canada, or England, would respect the statute 3 Will. IV. c. 6, if a fugitive surrendered by Upper Canada to a foreign power were taken through those countries. *Ib.* See now the Imperial Act 33 & 34 Vict c. 32.

Quære, whether the English Marriage Act, 26 Geo. II. c. 33, is in force in this province. *Regina* v. *Seeker*, 14 Q. B. 604.

Semble, that it is not. *Regina* v. *Bell*, 15 Q. B. 287.

26 Geo. II. c. 33, except, perhaps, the 11th clause, is in force in this country. *Hodgins* v. *McNeil*, 9 Chy. 305.

32 Geo. III. c. 1, introduced the law of marriage as it existed in England at that date, except, perhaps, some clauses of 26 Geo. II. c. 33. It introduced 25 Hen. VIII. c. 22, 28 Hen. VIII. c. 7, 28 Hen. VIII. c. 16, and 32 Hen. VIII. c. 38, so far as they remained in force, and so much of the canon law as had been adopted by the law of England. *Ib.*

5 & 6 Will. IV. c. 54, does not extend to this province. *Ib.*

The Imperial statute 26 Geo. III. c. 86, s. 2, enacting that owners of ships should not be liable for any loss or damage which may happen to any goods shipped on any such vessel by reason or means of any fire happening to such ship, is in force in this province. *Torrance* v. *Smith*, 3 C. P. 411; *Hearle* v. *Ross*, 15 Q. B. 259.

The statute 5 & 6 Edw. VI. c. 16, against buying and selling of offices, is in force in this country under the 40 Geo. III. c. 1, as part of the criminal law of England. Any act done in contravention of that statute is indictable though not specially made so. Quære, per Robinson, C. J., whether it is also introduced by the 12 Geo. III. c. 1, which adopts the law of England "in all matters of controversy relative to property and civil rights." The 49 Geo. III. c. 19[illegible] clearly extends the 5 & 6 Edw. VI. to Upper Canada, and to the office of sheriff. *Regina* v. *Mercer*, 17 Q. B. 601; *Regina* v. *Moodie*, 20 Q. B. 389.

The Imperial statute against lotteries, 12 Geo. II. c. 28, is in force in this country. *Cronyn* v. *Widder*, 16 Q. B. 356; *Corby* v. *McDaniel*, 16 Q. B. 378; *Marshall* v. *Platt*, 8 C. P. 156; *Lord* v. *Clark*, 11 C. P. 248; *Cronyn* v. *Griffiths*, 16 Q. B. 396.

Held, that in this country there can be no demurrer to a return to a mandamus, the statute allowing it in England, 6 & 7 Vict. c. 67, not being in force here. *Regina* v. *Wells*, 17 Q. B. 545. But see now 28 Vict. c. 18, s. 7.

The nullum tempus act, 9 Geo. III. c. 16, is in force in this province, but it does not apply to the unsurveyed waste lands of the crown. *Regina* v. *McCormick*, 18 Q. B. 131.

No penalty can now be recovered for selling liquor without a license from the governor or lieutenant-governor, under the Imperial act 14 Geo. III. c. 88, for since the 1 & 2 Will. IV. c. 23, the issue of such licenses has been regulated by the colonial legislature, and now depends upon the municipal act 22 Vict. c. 99. *Andrew* v. *White*, 18 Q. B. 170.

The 22 Geo. III. c. 46, which relates, among other things, to attorneys sharing their business with persons not admitted, though repealed in England, is in force in this country. *Dunne* v. *O'Reilly*, 11 C. P. 404.

1. Will. & M. c. 18, relating to disturbances in church, &c., is in force in this province, and not superseded by C. S. U. C. c. 92. *Reid* v. *Inglis*, 12 C. P. 191.

The Imperial statute 28 Geo. III. c. 49, s. 4, enabling justices of the peace for counties at large to act as such within any city, being a county of itself, situate therein or adjoining such county, is local in its character, and is not in force in this province. *Regina* v. *Row*, 14 C. P. 367.

The Imperial statute 59 Geo. III. c. 69, against procuring and endeavouring to procure enlistments in this country for the army of the United States:—Held, to be in force in this province, and a conviction under it sustained. *Regina* v. *Schram*, *Regina* v. *Anderson*, 14 C. P. 318.

Per J. Wilson, J., the Imperial Mutiny Act does not override C. S. C. c. 100, but the latter act was passed in aid of it, and is therefore in force. *Regina* v. *Sherman*, 17 C. P. 167.

Per A. Wilson, J., the punishment by fine *and* imprisonment imposed by the provincial act stands abolished so long as the Mutiny Act is in force, and the imprisonment can in no case exceed six calendar months, but the power of trial by the court of Oyer and Terminer under the provincial act has not been taken away by the Mutiny Act. *Ib.*

The Imperial statute 11 & 12 Vict. c. 12, for the better security of the crown and government of the united kingdon, does not override 3 Vict. c. 12, of this province, to protect the inhabitants against aggression from foreigners, for the latter is re-enacted by the consolidation of the statutes,

which took place in 1859. *Regina* v. *Slavin*, 17 C. P. 205.

The English statutes, 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape warrants, are not in force in this province. *Hesketh* v. *Ward*, 17 C. P. 667.—A Wilson, diss.

The court is bound to take notice that the Imperial Act 2 Geo. IV. and 1 Will. IV. c. 60, enables lands in this province held in trust by a person of unsound mind, to be conveyed by a committee appointed by the high Court of Chancery in England. *Thompson* v. *Bennett*, 22 C. P. 393.

II. British North America Act, 1867.

Notice of application for discharge in insolvency in the Canada Gazette, and not in the Local Gazette:—Held, sufficient under the Insolvent Act of 1864, the B. N. A. Act, and 31 Vict. c. 6, O. *In re Huffman*, 5 L. J. N. S. 71.—C. C.—Sherwood.

Held, by a majority of the arbitrators, that as the B. N. A. Act, 1867, confers powers on the arbitrators appointed thereunder of a public nature, such powers may be exercised by the majority, and an award by all is therefore unnecessary. *In re Arbitration between the Provinces of Ontario and Quebec*, 6 L. J. N. S. 212.

The jurisdiction of the courts of one of the litigant provinces to interfere to stay the proceedings on the arbitration by writ of prohibition considered, and held that there is none. *Ib.*

Semble, that the right to legislate on returns of convictions and fines for criminal offences belongs to the Dominion, and not Provincial, legislature. *Clemens* q. t. v. *Bemer*, 7 L. J. N. S. 126.—C. C.—Hughes.

Returns of convictions and fines for criminal offences being governed by the Dominion statute 32 & 33 Vict. c. 31, s. 76, and not by the Law Reform Act, 1868, are only required to be made semi-annually to the general sessions of the peace. *Ib.*

The 28 Vict. c. 20, authorizing the governor to appoint police magistrates, continued by 31 Vict. c. 17, O., relates to the administration of justice, and is within the powers of the legislature of Ontario, and is still in force. *Regina* v. *Reno*, 4 P. R. 281.—C. L. Chamb.—Draper.

The legislature of Ontario having passed an act to regulate tavern and shop licenses, 32 Vict. c. 32, under the power given to them by the B. N. A. Act, 1867, s. 92, sub-ss. 9, 16:—Held, that they had power, under sub-s. 15, to enact that any person who, having violated any provisions of the act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, sub-s. 27, by which the criminal law is assigned exclusively to the Dominion parliament. *Regina* v. *Boardman*, 30 Q. B. 553.

A brewer licensed as such by the government of Canada under 31 Vict. c. 8, D., requires no license under the Tavern and Shop License Act of Ontario, 32 Vict. c. 32, s. 1, as amended by 33 Vict. c. 28, for selling ale manufactured at his brewery. Whether the statute, if applicable to licensed brewers, would have been within the power of the provincial legislature, was a question raised, but not decided. *Regina* v. *Scott*, 34 Q. B. 20.

The Dominion authority alone has power to tax and regulate the trade of a brewer, which is a branch of trade and commerce, and having done so, the Ontario legislature has not the power to restrain it, unless in a qualified manner, and for the mere purposes of police. *Regina* v. *Taylor*, Q. B. H. T. 1875. Not yet reported.

The prohibition to keep, have, or sell beer, by a brewer, unless under a license and the payment of a tax for a license, is an excess of power by the Provincial authority, and is a restraint and regulation of trade and commerce, and not the exercise of a police power. *Ib.*

The restriction imposed by the Ontario legislature on brewers not to sell by retail, as defined by the act of 1874, is not ultra vires, because it is a mere repetition and renewal of the legislation which was in force here before and at the time of the confederation. *Ib.*

The right conferred on the Ontario legislature to deal exclusively with shop, saloon, tavern, auctioneer, and other licenses for the purposes of revenue, does not extend to the licenses on brewers and distillers, over which the general government only, and at all times, exercised jurisdiction, and which are of a higher and different class than the licenses of retail dealers which are mentioned; and the "other licenses" have reference to those kind of licenses before stated, such as on billiard tables, livery stables, &c., which are chiefly enumerated in the municipal acts. *Ib.*

The Ontario legislature has a right to license or prohibit the sale of liquors in shops and taverns, and in other places of the like kind, because it has the exclusive power over municipal institutions, and these institutions had before and at the time of confederation the exercise of these powers, and because such powers, read in connection with sec. 92, sub-s. 16 of the Confederation Act is now a matter of "a merely local or private nature in the province." That power is in restraint of trade as well as a matter of police. The general regulation of trade and commerce, which is vested in the Dominion government, must be considered to be modified by the powers which the Ontario legislature, acting in relation to municipal institutions, may properly exercise. *Ib.*

By-laws passed by municipal corporations wholly prohibiting spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses to nine:—Held, valid, as being within the power of the corporation, under the 32 Vict. c. 32, O.; and that it was within the authority of the Provincial legislature to confer such power. *In re Slavin and the Corporation of the Village of Orillia*, Q. B. H. T. 1875. Not yet reported.

Held, that 33 Vict. c. 19, O., amending the law relating to bills of lading, was not beyond the powers of the provincial legislature, as being an interference with "trade and commerce," (B. N. A. Act, s. 91, sub-s. 2.) *Beard* v. *Steele*, 34 Q. B. 43.

Held, that sec. 50 of the Insolvent Act of 1869, was not beyond the power of the Dominion parliament, as being an interference with property and civil rights, but was within their exclusive authority over bankruptcy and insolvency. *Crombie* v. *Jackson*, 34 Q. B. 575.—A. Wilson, J., sitting alone.

To an information of intrusion filed by Her Majesty's attorney general for the Dominion, prosecuting for Her Majesty, the defendant pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada; but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867, and still are the property of the Province of Ontario, in which they are situate. Issue having been joined on this plea, the title at the trial was gone into, and a verdict entered for the crown, with leave to defendant to move to enter it for him:—Held, that the crown was clearly entitled to recover, for, among other reasons, the plea set up no title in defendant, and admitted the crown title by stating the lands to belong to this province; and the fact of the attorney general for Canada prosecuting for the crown could not shew that a Dominion title was necessarily claimed. *Attorney-General* v. *Harris*, 33 Q. B. 94.

The Provincial attorney-general, and not the attorney-general for the Dominion, is the proper party to file an information, when the complaint is not of an injury to property vested in the crown as representing the government of the Dominion, but of a violation of the rights of the public of Ontario. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Chy 34.

The Provincial attorney-general is the proper person to file an information in respect of a nuisance caused by interference with a railway. *Ib.*

By his will a testator gave to his children contingent interests only in his residuary estate, real and personal. The widow and children of the testator, by indenture—after reciting the will, and after other recitals as to payment of annuities and legacies under the will, and that the residuary estate amounted to more than $300,000, and that it was desirable that each of such children of the testator should enter into possession of their shares repectively without waiting for the death of the widow—provided for the allotment to each of the testator's children of his and her respective shares. They also stipulated to apply to the Provincial legislature to confirm the arrangement, and for all necessary and incidental powers. Application was accordingly made to the legislature by petition, setting forth the will at length, and the names of all the parties, infants as well as adults, interested thereunder, for an act to confirm and validate the settlement which had been so made. Thereupon an act (34 Vict. c. 99) was passed, enacting that the said deed should be confirmed and made valid; and the trustees under the will were authorized and required to carry into effect the provisions of the act; and were thereby declared to be saved harmless and indemnified. On appeal it was—Held, that the provincial legislature had power to pass such an act; but that the infant grandchildren of the testator, who were interested under the will, not having been expressly named in the act, their interests remained unaffected thereby. Draper, C. J., and Spragge, C., diss. *In re Goodhue*, 19 Chy. 366.

And per Strong, V. C., that the will having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the province of Ontario could not be affected by any act of the legislature of this province, the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and that, therefore, the contingent interests of the grandchildren was not "property or a civil right" within the province. *Ib.*

III. Miscellaneous Cases.

Can the provincial parliament constitutionally give a right of action against the board of ordnance, a military department of the Imperial government? *Tully et al.* v. *The Principal Officers of H. M. Ordnance*, 5 Q. B. 6.

The legislature of Canada, by an act, set apart a certain quantity of land along the line of a projected railway running through Quebec and Ontario, to be granted to the company on completion of the railway; and a proportionate part of such lands on the completion of 20 miles of the railway. The company having completed a portion of the line of railway in Ontario to an extent of more than 20 miles, applied for a grant of the proportion to which, under the act, they claimed to be entitled, which was refused. The company thereupon presented a petition of right against the province of Ontario. It was alleged that the province of Ontario had not along the line of the road sufficient lands to make the grant desired:—Held, that this formed no ground for the province of Ontario insisting that the province of Quebec should have been made a party to the proceeding. *Canada Central R. W. Co.* v. *Regina*, 20 Chy. 273.

CONTEMPT OF COURT.

I. Attachment for—*See* Attachment of the Person.

II. Power of Justices to Commit for—*See* Justices of the Peace.

III. Sequestration—*See* Sequestration.

While a power resides in any court or judge to commit for contempt, it is the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke and Heermans*, 7 Q. B. 223.

A writ of attachment for contempt in not obeying the original order of a judge to deliver up the custody of children, under C. S. U. C. c. 74, was by order of a judge issued from the Court of Queen's Bench; and the husband moved against it for irregularity. It was objected that while in contempt for not having surrendered himself under it, he could not be heard; but,—Held, that he might nevertheless defend himself by objections to the process if irregular. *In re Allen*, 31 Q. B. 458.

Where an order is made upon a receiver for payment of a sum of money, the court, on de-

fault, will commit for a contempt of such order without requiring any further order to be served. *McIntosh* v. *Elliott*, 2 Chy. 396.

Semble, that it is a contempt of a court of common law to proceed in this court after a reference to arbitration under an order of that court, which orders the parties to perform the award. *Pomeroy* v. *Boswell*, 7 Chy. 163.

It would seem that a plaintiff prosecuting his decree is entitled to do so, notwithstanding he may have been placed in contempt for disobedience to an order of the court for payment of money. In such a case the defendant must obtain an order staying proceedings until the contempt is purged. *Hurd* v. *Robertson*, 1 Chy. Chamb. 3.—Esten.

Where an order limits a time to do an act, the order must be served before the time limited has expired, otherwise the party required to do the act will not be committed for disobedience *Wagner* v. *Mason*, 6 P. R. 187.—Chy. Chamb.—Holmested, *Referee*.

Every court of record has the power to punish for contempt; but if the court is one of inferior jurisdiction, the superior court may intervene and prevent any usurpation of jurisdiction by it. Where, therefore, a barrister during the sittings of the County Court of Carleton used words which might have been and were by the learned judge considered to have been used to insult the court, on being told that unless he offered some apology he would be fined, replied that he had nothing to say; and he was then adjudged guilty of contempt and fined: upon motion for a certiorari to remove the order:—Held, that there was no excess of jurisdiction, and that this court could not interfere. *Ex parte Lees and the Judge of the County Court of the County of Carleton*, 24 C. P. 214.

CONTRACT.

I. Making the Contract.

1. *By Letters or Telegrams*, 708.
2. *Personal Liability*, 712.
   (a) *On Bills or Notes*—*See* Bills of Exchange and Promissory Notes.
   (b) *On behalf of Corporations* — *See* Corporations.
   (c) *Of Agents* — *See* Principal and Agent.
   (d) *Of Executors*—*See* Executors and Administrators.
3. *Collateral Parol Terms*—*See* Evidence.

II. Sufficiency of Consideration, 714.

III. Operation of the Statute of Frauds.

1. *Generally*, 717.
2. *Agreements not to be Performed within a Year*, 717.
2. *Contract in consideration of Marriage*, 718.
4. *Guarantee*—*See* Guarantee and Indemnity.
5. *Sale of Goods*—*See* Sale of Goods.
6. *Sale of Land*—*See* Sale of Land—Timber.
7. *Trusts*—*See* Trusts and Trustees.

IV. Validity as regards Public Policy.

1. *Restraint of Trade*, 719.
2. *Other Cases*, 720.
3. *Compromise of Legal Proceedings*—*See* Compromise.
4. *Fraud* — *See* Fraud and Misrepresentation.
5. *Dealing with Particular Persons.*
   (a) *Infants*—*See* Infants.
   (b) *Persons under Duress*—*See* Duress.
   (c) *Intoxicated Persons* — *See* Fraud and Misrepresentation.
   (d) *Exerting Undue Influence* — *See* Fraud and Misrepresentation.
   (e) *Trustees*—*See* Trusts and Trustees.
   (f) *Lunatics*—*See* Lunatics.
6. *Goodwill*—*See* Goodwill.
7. *Bracery, Champerty, and Maintenance* —*See* Champerty and Maintenance.

V. Validity as regards Statutes.

1. *Office*—*See* Office.
2. *Insolvents*—*See* Bankruptcy and Insolvency.
3. *Public Companies*—*See* Corporations —Municipal Corporations.
4. *Gaming, Lottery, and Horse Racing*—*See* Gaming.
5. *At Elections*—*See* Parliament.
6. *Smuggling*—*See* Revenue.
7. *Usury*—*See* Usury.
8. *Sunday*—*See* Sunday.
9. *Sale of Indian Lands* — *See* Indian Lands.

VI. Construction of Contracts.

1. *Conditions Precedent*, 721.
   (a) *Dependent and Independent Covenants*—*See* Covenant.
   (b) *Pleading*—*See* Pleading at Law.
2. *Implied Contract*, 724.
3. *Vague or Uncertain*, 725.
4. *Other Cases*, 725.
5. *Of Bonds*—*See* Bond.
6. *Of Deeds*—*See* Deed.
7. *Of Covenants*—*See* Covenant.—Covenant for Title.
8. *Of Mortgages*—*See* Bills of Sale and Chattel Mortgages—Mortgage.
9. *Of Leases*—*See* Landlord and Tenant.
10. *Sale of Goods*—*See* Sale of Goods.
11. *Sale of Land*—*See* Sale of Land.

VII. Waiver and Substituted Contract.

1. *Generally*, 730.
2. *Accord and Satisfaction by*—*See* Accord and Satisfaction.

VIII. Rescinding and Determining, 733.

IX. Performance, 735.
1. *Payment*—*See* Payment.
2. *Enforcing*–*See* Specific Performance.
X. Parol Contract.
1. *Agreements to Vary*—*See* Evidence.
2. *Specific Performance of*—*See* Specific Performance.
XI. Actions and Proceedings on Contracts.
1. *Parties.*
(a) *Privity of Contract*, 738.
(b) *Other Cases*, 742.
2. *Pleading.*
(a) *Certainty and Particularity*, 742.
(b) *Other Cases*, 743.
(c) *Common Counts* — *See* Money Counts.
(d) *Amendment of Statement of Contracts*—*See* Amendment at Law.
3. *Damages*—*See* Damages.
4. *Restraining Sale of Goods*—*See* Injunction.
5. *Specific Performance*–*See* Specific Performance.
6. *Evidence*—*See* Evidence.
XII. Penalty—*See* Penalty by Contract.
XIII. Contracts by Particular Persons.
1. *Agents*—*See* Principal and Agent.
2. *Officers of the Army*—*See* Army and Militia—Ordnance.
3. *Commission Merchants* — *See* Commission Merchants.
4. *Corporations*—*See* Corporations.
5. *Executors* — *See* Executors and Administrators.
6. *Infants*—*See* Infants.
7. *Lunatics*—*See* Lunatic.
8. *Married Women* — *See* Husband and Wife.
9. *Partners*—*See* Partnership.
10. *Shipowners*—*See* Ship.
11. *Trustees*—*See* Trusts and Trustees.
XIV. Other Particular Contracts.
1. *Of Apprenticeship*—*See* Apprentice—Attorney.
2. *Building Contract* — *See* Work and Labour.
3. *For Carriage* — *See* Carriers—Railways and Railway Companies—Ship.
4. *Contracts of Marriage*—*See* Husband and Wife.
5. *Of Tenancy*—*See* Landlord and Tenant.
6. *Of Hiring*—*See* Corporations—Master and Servant—Public Schools.
8. *Of Surety* — *See* Bond — Guarantee and Indemnity — Principal and Surety.
9. *Sale of Timber*—*See* Timber.
10. *Guarantee*—*See* Guarantee and Indemnity.
11. *Warranty*—*See* Warranty.
12. *Of Insurance*—*See* Insurance.
13. *Use of Water*—*See* Water and Water Courses.
14. *Work and Labour* — *See* Work and Labour.

I. Making the Contract.

1. *By Letters or Telegrams.*

Plaintiff telegraphed to defendant at Lockport: "A party wants to buy wheat on 'Grace Greenwood;' what is your price?" Defendant answered by telegraph, "I will sell for two dollars per bushel." Plaintiff replied, "I will take wheat on 'Grace Greenwood' at your offer, two dollars per bushel." The wheat was not delivered:—Held, that there was a valid contract. *Bundy* v. *Johnson*, 6 C. P. 221.

Defendant, in June, 1855, agreed to employ plaintiff's vessel in carrying lumber from Bear Creek to Montreal until the close of navigation. After some correspondence between the plaintiff and defendant's agent, she was sent for the last trip to Cleveland, and there took in a load of corn for Montreal, which brought £170 less freight than a cargo of timber from Bear Creek would have done:—Held, that the letters set out in the case contained no agreement on defendant's part to pay such difference, but that the plaintiff's remedy was on the original contract. Burns, J., diss., and holding that by the conduct of the parties the original agreement was put an end to, and that the facts proved, together with the letters, constituted an agreement to substitute a cargo of grain for timber, making a fair compensation for the difference. *McPherson* v. *Cameron*, 15 Q. B. 48.

Held, that the letters set out in the report of this case sufficiently showed a contract by defendant in writing to assume a certain debt due by another as his own. *Clark* v. *Wauldell*, 16 Q. B. 352.

On the 1st of September, the plaintiff, living at Kingston, received a telegram from C., at Oswego: "Will give you eighty cents for rye," and on the next day he took to defendants' office the following reply: "Do accept your offer; ship to-morrow fifteen or twenty hundred." He paid defendants sixty cents, namely, thirty cents for sending the message to Ogdensburg, and thirty cents from thence to Oswego. His answer was not received by C., who swore that if it had been the bargain would have been closed at eighty cents; but that, after waiting for two or three days, the party for whom he was acting would not take it. The price fell on the 5th or 6th, and it appeared the plaintiff might before that time have communicated with C. by letter. In an action for negligence in not transmitting the message:—Held, that no damages could be recovered, for even if it had been received by C., there would have been no complete contract binding him to take the rye. Quære, whether any and what damages could otherwise have been recovered from defendants. *Kinghorne* v. *Montreal Telegraph Co.*, 18 Q. B. 60.

When a contract is attempted to be made out through the telegraph, if that can be done at all,

the messages signed by the parties must be produced, not the transcript taken from the wire. *Ib.*

[But see now 36 Viet. c. 11, O.]

In the construction of a contract arising out of letters and telegraphic communications, the party making the proposal must be considered as renewing his offer every moment, until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer. *Thorne* v. *Barwick et al.*, 16 C. P. 369.

Plaintiff, on the 5th September, 1865, wrote to defendants, asking their price for a certain specified quantity of leather. On the 7th defendants replied through their manager, acknowledging the receipt of plaintiff's letter, and adding, "We are now selling our leather for 22 cents cash, at the tannery. Trusting to receive your order, I remain, &c." On the 13th, plaintiff wrote, "I am in receipt of your favour, offering, &c., at 22 cents cash. In reply, &c., I will take 400 sides No. 1, overweights, though I am paying you one cent more than what I have just purchased at. I will send over Mr. P. to look out what will be most suitable for my trade." On the 15th, one of the defendants telegraphed plaintiff thus: "Wednesday next will be most convenient to attend Mr. P. at tannery:" —Held, that the whole correspondence taken together constituted a binding contract between the parties, and that the plaintiff was therefore entitled to recover against defendants, on their refusal to deliver. *Ib.*

Semble, that the letter and telegram, of the 13th and 15th September, respectively, would of themselves have established a binding contract between plaintiff and defendant. *Ib.*

Quære, whether it is a misdirection to tell the jury that a telegraphic communication is to be taken most strongly against the sender. *Ib.*

Plaintiff telegraphed to defendant, in answer to an enquiry about price and quantity of butter on hand, that he had 100 kegs at 20 cents, and defendant replied he would take it, *if good.* Plaintiff did not state, in reply, that it was good, or offer to guarantee that it was, but two days after he again telegraphed to come and ship the butter or send $1,500, to which defendant answered, that he would try and see him the following week. After the lapse of several days, plaintiff enquired whether defendant intended taking the butter or not. In an action by plaintiff against defendant: Held, that there was no binding contract between the parties, and a nonsuit was therefore directed. *McIntosh* v. *Brill*, 20 C. P. 426.

The plaintiff, on the 14th June, by telegraph, asked defendants their prices for high wines and whiskey. On the 16th, defendants wrote, specifying the prices for quantities not less than a car-load, and requesting an order, which they said should receive prompt attention. On the 17th, the plaintiff telegraphed, "Send three car-loads high-wines." Defendants answered that the price had advanced, and refused to deliver at the price first named. It was admitted that the order was reasonable in point of quantity, and that defendants had the goods on hand:—Held, that there was a complete contract, and that defendants were liable for not delivering. *Harty* v. *Gooderham et al.*, 31 Q. B. 18.

In an action for non-delivery of 15 bales of hops, alleged to have been sold by defendant to plaintiffs, the evidence shewed that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at 20 cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, "Will take 15 to 20 bales good new hops at 20 cents cash." On the 21st defendant replied by telegram, "Your offer accepted. Have booked your order for 15 bales new hops for delivery when picked." On the 16th September defendant telegraphed, "Hops picked ready for delivery. Answer back." On the 21st September plaintiffs telegraphed, "Our man will be there ready to receive hops early next week," and on the 26th of September, "Ship the 15 bales hops to us Galt to-day, and draw at three days' sight;" and on the 27th, "If hops not shipped will send team and money for them tomorrow. Answer quick." On the same day defendant replied, "Cannot have hops." A tender of the price was subsequently made and refused: —Held, that there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August was not a simple acceptance of the plaintiffs' offer of the 17th, but qualified it both as to quality (by leaving out the word *good*) and as to time of delivery; and assuming defendant's telegram of the 16th September to be a renewal of such acceptance, the plaintiffs' subsequent telegrams did not shew an assent to it. *Carter et al.* v. *Bingham*, 32 Q. B. 615.

Held, also, that if there had been a previous binding contract the plaintiffs' delay, while the market was rising, in not answering the telegram of the 16th of September until the 21st, justified the jury in finding, as they did, that the plaintiffs were not ready and willing to accept and pay for the hops within a reasonable time. *Ib.*

L., residing at Montreal, agent of defendants residing in Liverpool, telegraphed and wrote to the plaintiff at Hamilton, soliciting orders for boiler plate, to be filled by defendants, specifying the quality and terms to be delivered f. o. b. at Liverpool. Plaintiff wrote on receipt to L. at Montreal, enclosing an order for a certain quantity, to which L. answered next day that the order would go forward by next mail:—Held, that the letters and telegrams, more fully set out in the case, constituted a contract. Held, also, that such contract was made in Ontario, at Hamilton. *McGiverin* v. *James et al.*, 33 Q. B. 203.

On the 14th Nov., 1872, defendant wrote to the plaintiffs, who were extensive manufacturers of billiard tables, asking what they would require to exchange two second-hand tables of their own manufacture, which defendant had bought from them two years before, for three new tables; to which the plaintiff replied $700. The defendant on the 20th Nov., wrote objecting to the price, and offering "two good second-hand tables, one a four-pocket and one a carom," and $550 cash. The two tables previously purchased from plaintiff were both carom tables, but one of the plaintiffs swore that he was not aware of this. In answer, the plaintiffs wrote explaining about their prices, and added that they had some rosewood tables on hand, "also some the same as your present tables." After a long correspondence, of which the above is the

most material part, the plaintiffs sent the three new tables to the defendant, and received in return two second-hand tables, but not of their own manufacture, which they refused to receive. The learned Judge ruled that defendant was bound to send two tables of the plaintiffs' own manufacture:—Held, that this was a misdirection: that it should have been left to the jury to find, not merely whether the defendant believed the plaintiffs to believe that they were to get two second-hand tables of their own manufacture, but whether he believed the plaintiffs to believe that he, defendant, was contracting to deliver such tables; and that their attention should be directed to the distinction between plaintiffs agreeing to take the tables under the belief that they were their own make, and agreeing to take them under the belief that defendant contracted that they were of such make. And semble, that, under the circumstances, neither party was precluded from denying that he had agreed to the terms of the other, so that there was in fact no contract. *Riley et al.* v. *Spotswood*, 23 C. P. 318.

One of the plaintiffs, W., of New York, and his agent, C., of Ingersoll, saw defendant at his cheese factory at Stratford, and talked of the price of cheese. W., in leaving, said any correspondence would be through C., from whom defendant would probably hear on plaintiffs' behalf, when the cheese was ready for sale. Subsequently, the plaintiffs authorized C. to buy cheese from defendant, and on the 20th August, at 4 p.m., C. telegraphed defendant, "Name lowest price for your cheese, stating the number of boxes," which defendant received on the 21st. On the evening of the 21st, defendant telegraphed C., "Will sell 250 cheeses 10½ cents," which C. received at 9:25 a.m., on the 22nd, and immediately answered by telegraph, "I accept your offer. When will you box? Answer," which was received at the Stratford office at 10 a.m., and by defendant on the same day. On the evening of the 21st, defendant had left a telegram to be sent to C. on receipt at the telegraph office of C.'s answer to defendant's telegram naming the price. It read "I have sold in Stratford, did not get your answer in time." This was sent on the 22nd to C., on the receipt of C.'s telegram accepting, and C. answered at once that the plaintiffs would claim the cheese. The defendant in his evidence stated that he did not understand that C. was plaintiffs' agent when they came to his factory:—Held, that the telegrams shewed a complete contract. Quære, per Wilson, J., whether the words, "when will you box?" after accepting defendants' offer, might not be considered as leaving the bargain still open as to time; but it was inferred from the evidence, the case being tried without a jury, that the parties did not so regard it. Per Morrison, J., it was an enquiry collateral to the contract, and not qualifying the acceptance. *Webb et al.* v. *Sharman*, 34 Q. B. 410.

Held, also, that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to shew that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiffs' agent. *Ib.*

Defendant, living at St. Marys, on the 24th September, 1873, telegraphed to the plaintiff at Forest, "Can you ship three cars Treadwell wheat this month at $1.20. Reply." On the same day plaintiff answered, "Will accept your offer, three cars Treadwell one twenty." On the 26th defendant enclosed a shipping bill to plaintiff, asking him to ship the wheat as soon as possible. This bill was a printed form in use on the Grand Trunk railway, filled up for the three cars, addressing them to the Royal Canadian bank, Montreal. On the next day, hearing that the railway company had been inserting the words "at owner's risk for delay" in their shipping bills, defendant telegraphed on the 26th to the plaintiff that he could not take the wheat if the plaintiff allowed these words to be put in. The agent of the railway, however, insisted on inserting these words in the bill of lading, and the plaintiff sent the wheat forward, and drew upon defendant with the bill of lading attached to the draft, which defendant refused to accept, and the wheat was sold by the bank. The plaintiff thereupon sued for goods bargained and sold:—Held, that the two telegrams of the 24th September did not form a binding contract: that the terms of the shipping note were to be considered as part of the bargain; and that the plaintiff therefore could not recover. *Willing* v. *Currie*, 35 Q. B. Not yet reported.

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2. *Personal Liability.*

Assumpsit does not lie against the commissioners of the St. Lawrence canal, under 3 Will. IV. c. 17, for the work done on the canal on a contract made with them, unless it can be specially shewn that they made themselves personally liable, as they must be considered merely as agents of the government. *Tait* v. *Hamilton*, 6 O. S. 89.

A county superintendent of common schools, signing, together with trustees, a contract with a teacher, will be considered to have signed the same only as approving of the appointment, and in pursuance of the direction of the statute, and not as a party contracting with the teacher. *Campbell* v. *Elliott et al.*, 3 Q. B. 241.

The plaintiff sued the defendant for lumber furnished on the occasion of the provincial agricultural society's meeting at Hamilton. The defence was, that the society, which was an incorporated body, was liable, and not the defendant personally. The learned judge at the trial left it to the jury to find upon the evidence whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable; but the jury were told that if he contracted only as representing or on behalf of the corporation, that then he would not be personally liable:— Held, on motion for a new trial, the verdict being for the plaintiff, that the ruling was correct. *Simpson* v. *Carr*, 5 Q. B. 326.

School trustees acting under the statute of 9 Vict. c. 20 cannot be sued as individuals upon any contract made by them under the statute as trustees. *Sheriff* v. *Patterson et al.*, 5 Q. B. 620.

Assumpsit for work and labour. The plaintiff put in a paper headed "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria

Bridge Co. of, &c., of the first part, and James Johnson, (the plaintiff,) of," &c. It contained an agreement by the plaintiff to do certain work for specified prices, which "the party of the first part hereby agree to pay," &c., and was signed by defendant, describing himself as "Pres. V. B." and by the plaintiff. It appeared that the company had been duly incorporated, and that the plaintiff had received £350 from them on account of this work:—Held, that defendant was not personally liable. *Johnson* v. *Hamilton*, 13 Q. B. 211.

Where four parties described, not by their own names and personal descriptions, but as a collective body not shewn to be corporate, signed and sealed a deed with their own names and seals:—Held, that they were individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

The plaintiff sued five defendants, describing them as the committee of the Presbyterian Church at P., for his salary as minister from January, 1857, to August, 1858. It was proved by verbal evidence of different members of the congregation, that the committee usually consisted of eight persons chosen annually, and that a record of their proceedings was kept; that at a meeting of the congregation in 1856, it was agreed to give the plaintiff a call, and afterwards, at another meeting, that he should receive £100 a year, to be paid to him from the pew rents, which it was customary for the committee to collect half-yearly. It was not shewn who composed the committee in 1856, or that all the defendants were members of it in 1857 or 1858:—Held, that the action could not be maintained. *Stewart* v. *Martin et al.*, 18 Q. B. 477.

Defendants were a committee of the city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee that there should be a ceremony on the occasion of laying the corner stone, and a luncheon given in the St. Lawrence Hall; and one of the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, to be sent to the St. Lawrence Hall, directing him to render his account to the board of gaol inspectors. The plaintiff sent his bill to the chamberlain's office, headed "K. T., chairman board of gaol inspectors, bought of G. Thomas, agent." The council, however, refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given:—Held, that they were personally liable, and that the plaintiff might sue in his own name. One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee:—Held, not sufficient to exempt him from liability with the others. *Thomas* v. *Wilson et al.*, 20 Q. B. 331.

II. Sufficiency of Consideration.

The words, "value received," in a stock note import primâ facie a consideration; and a consideration which cannot legally be enforced may be sufficient to sustain a promise. *Waddel* v. *McCabe*, 4 O. S. 191. See *S. C.*, 3 O. S. 502.

Defendant on the 12th March, 1835, gave his promissory note to the plaintiff for £265 payable in twelve months, and immediately after gave him the following letter:—"Sir,—I have this day received from you the sum of £265, and for which sum I have given my promissory note to you, payable in twelve months from this date, the original sum being £250, and six per cent. interest makes up the amount to £265; and notwithstanding that you have accepted of my promissory note at the above date, it is perfectly understood between us that should you require the money before the expiry of the said period, I shall instantly repay the whole amount:"—Held, that no action would lie on this letter, 1. From the want of consideration; 2. Because the contract was usurious on the face of it. *Stewart* v. *Rennie*, 5 O. S. 151.

While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it postponing the period for performance, and the original consideration will be regarded as imported into such new agreement, and will support it. *Hurlburt* v. *Thomas*, 3 Q. B. 258; *O'Donnell* v. *Hugill*, 11 Q. B. 441.

A special assumpsit to pay in grain, or in any particular manner, or at a *future* time, a *continuing* debt in respect to which the law had raised an implied assumpsit to pay in money on request, is a binding promise supported by a good consideration. Macaulay, J., diss. *Belcher* v. *Cook*, 4 Q. B. 401.

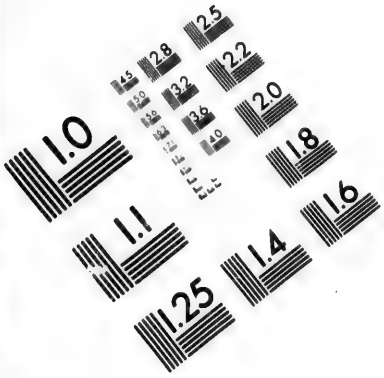
Declaration, that it was amongst other things agreed that in consideration that the plaintiff had leased from the defendant certain lands at 5s. per acre, defendant promised to build a house and barn on the premises, &c.:—Held, bad, as shewing no legal consideration for the agreement, the whole promise being grounded upon a past consideration. *Cunningham* v. *Richardson*, 7 Q. B. 163.

If the plaintiff part with anything that is of value to himself, though it may be of no legal value in defendant's hand, to obtain defendant's promise, that forms a valid consideration for the promise. *Bradford* v. *O'Brien*, 6 Q. B. 417.

To support an action of debt on a simple contract it must appear that the contract has been entered into for a *consideration moving to the debtor himself*, and not, as in assumpsit, for a consideration moving from the plaintiff to a third party. *McLean* v. *Tinsley*, 7 Q. B. 40.

Declaration that in consideration that plaintiff, at defendant's request, had sold to defendant a certain portion of plaintiff's lot, defendant then promised the plaintiff, &c.:—Held, bad on general demurrer, for that the executed consideration, though laid with a request, would not support the promise. *Rees* v. *Howcutt*, 4 C. P. 284.

Declaration, that in consideration that the plaintiff, at defendant's request, had consigned and shipped certain wheat to Messrs. C. & B. at Oswego, defendants promised to advance him a certain sum thereon, and to sell it for him within thirty days, and to pay over the proceeds, less the advance and charges, &c.; that the defen-



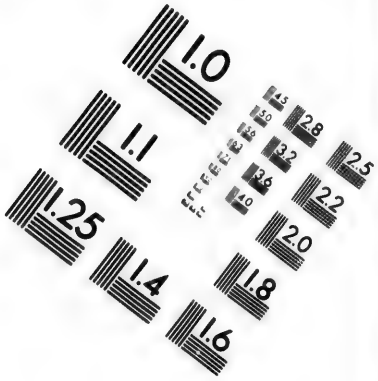
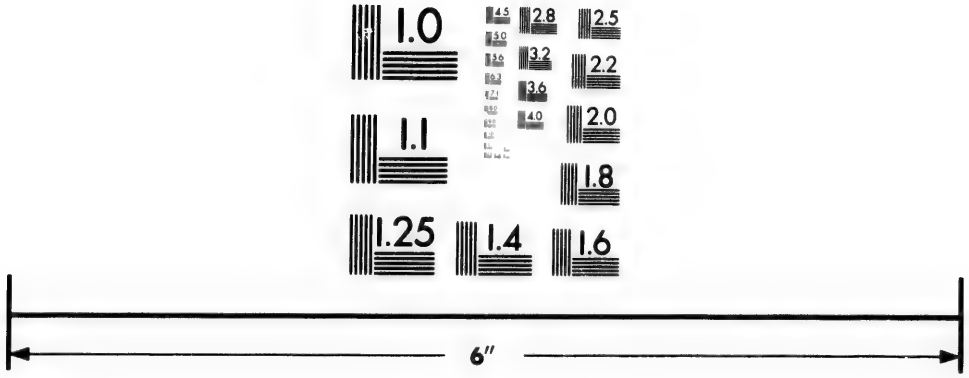
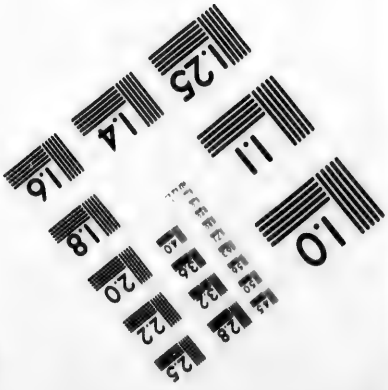


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dants did make the advance, but did not sell the wheat:—Held, bad, as shewing only a past, and therefore not a sufficient, consideration. *Marlatt* v. *Gooderham et al.*, 14 Q. B. 221.

Covenant by lessee against lessor on a covenant to deliver possession of the demised premises to plaintiff on 20th March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff and had deprived him of the use of the land and premises. Defendant pleaded, on equitable grounds, that plaintiff, by an agreement in writing, executed cotemporaneously with the lease, in consideration that defendant had leased to him the premises mentioned in the declaration, which were then in the possession of one J. Y., who had agreed to surrender possession by the said 20th of March, agreed not to bring any claim or damage against defendant if possession could not be obtained on the day, as provided in the deed, averring that on the 20th March Y. was and continued in possession of the premises, and refused to deliver them up to defendant, who consequently could not obtain possession thereof on the said day, and could not by reason thereof deliver possession on 20th March to plaintiff. Plaintiff new assigned that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises on 21st March: —Held, on demurrer to both plea and new assignment, that the plea was bad as a legal and equitable defence for want of a good consideration, alleging as it did a past consideration as that on which the agreement was based. *Wilson* v. *Keys*, 15 C. P. 32.

An antecedent debt in respect of which an insolvent has duly received his discharge under the insolvent acts of 1864 and 1869, is a continuing debt in conscience, and a sufficient consideration for a new promise to pay it. *Austin* v. *Gordon*, 32 Q. B. 621.

Where defendant promised that if plaintiff would sell land to Mrs. A. B., and take a mortgage from her for payment of the purchase money by a certain day, the money should be paid on that day:—Held, that assumpsit would lie against defendant on the non-payment of the mortgage, and that a plea of Mrs. A. B.'s coverture was a bad plea. Semble, however, that such a plea would be a good defence where a promise of the defendant is set up in the declaration, as founded on a consideration of the plaintiff's forbearance to sue a married woman for a debt alleged to be previously due by her. *Nichols* v. *McGill*, 7 Q. B. 233.

Where a married woman procured the plaintiff to endorse for her a bill of exchange, promising to indemnify him, and after her husband's death renewed the promise:—Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use. Lee *v.* Muggeridge, 5 Taunt. 36, held to be in effect overruled. *Dixie* v. *Worthy*, 11 Q. B. 328.

The plaintiff declared on a special agreement, not under seal, that in consideration that the plaintiff, then a bailiff of a Division Court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty:—Held, that sufficient consideration appeared for the promise. *Robertson* v. *Broadfoot*, 11 Q. B. 407.

A deposit of money by the plaintiff with a third party for a limited time, during which defendants would ascertain facts:—Held, a sufficient consideration to support a promise by defendants to delay entering a judgment and issuing execution. *Reed* v. *Carrall et al.*, 7 C. P. 283.

C. had contracted with defendants to carry their lumber from Collingwood to Chicago, and had chartered plaintiff's vessel for that purpose. C. being indebted to plaintiff, gave him two orders on defendants for £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. Plaintiff drew accordingly, but defendants then told him that C. had been overpaid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel:—Held, that the plaintiff was entitled to recover, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendant's promise. Quære, whether plaintiff's forbearing to detain defendants' lumber as he had threatened, would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberly* v. *Baines et al.*, 15 Q. B. 25.

Defendant with others signed the following, his subscription being $100:—"We the undersigned do hereby severally promise and agree to pay to F. W. T., Esq., (the plaintiff,) agent of the Bank of Montreal in Goderich, the sums set opposite our respective names, for the purpose of building an Episcopal Church and rectory in the town of Goderich." The declaration thereon alleged that in consideration that W. and others would promise defendant to pay the plaintiff certain specified sums for the purpose, &c., and that plaintiff would pay $100 for the same purpose, defendant promised to pay plaintiff $100 therefor; that W. and others did promise and pay accordingly, and the plaintiff paid $100, yet defendant had not paid. At the trial the plaintiff's promise to contribute $100 was not proved: Held, that on this ground defendant was entitled to succeed. Held, also, that the instrument was the several promissory note of each subscriber; and as it seemed that the plaintiff was entitled to recover, though not upon these pleadings and evidence, a new trial was ordered on payment of costs. *Thomas* v. *Grace*, 15 C. P. 462.

The plaintiff declared that on the 12th of December, 1857, one T. mortgaged certain lands to defendant for £300, and defendant by a memorandum in writing, signed by said T. and defendant, then agreed with T. to lease said land from him (T.) for two years at £40 a year, which said rent defendant and T. then agreed should be endorsed on and taken in part payment of the

mortgage so soon as the two years should have elapsed: that afterwards, in April, 1858, defendant sold and assigned said mortgage to the plaintiff, and then promised the plaintiff to pay him the said £80 at the end of said two years, but did not pay the same:—Held, on demurrer, that the declaration was insufficient, for the agreement between defendant and plaintiff would be without consideration, as they could not without T.'s privity compromise his right to the rent. *Murdiff* v. *Ware*, 21 Q. B. 68.

Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt, and a mere promise to pay such money in consideration of forbearance to sue would not be binding, though, if in consideration of forbearing to sell or eject, it would be. *Jackson et al.* v. *Yeomans*, 28 Q. B. 307.

Defendant, by deed dated 26th September, 1870, agreed to sell to the plaintiff all the merchantable timber, &c., on defendant's land which the plaintiff could make by the 1st of May, 1871; any timber or logs left, standing or cut, after that date to be the property of defendant. The plaintiff made a large quantity of timber, and drew away some of it. On the 27th March, 1871, defendant verbally gave him leave to let the balance of timber made by him remain on the lot till fall, if the plaintiff would not strip the lot too much; and the plaintiff only cut for a day or too after that. Subsequently, and after the 1st of May, the plaintiff was forbidden to take such made timber off by one K., who said he had bought it, and by defendant who, as one witness said, claimed it as his own; and the plaintiff thereupon brought trover:—Held, that the made timber, which vested in the plaintiff as made, might properly be the subject of a parol contract with defendant, independently of the deed, and that the desistance of the plaintiff from stripping said lot before the 1st of May was a sufficient consideration for the parol agreement. *Hedley* v. *Scissons*, 33 Q. B. 215.

See *Tyke* v. *Cosford*, 14 C. P. 64, p. 727; *Carry* v. *Wallace*, 12 C. P. 372, p. 738; *Tyrill* v. *Annis*, 1 Q. B. 299, p. 740.

See IV. p. 719.

III. Operation of the Statute of Frauds.

1. *Generally.*

The position of a defendant resisting a claim is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the Statute of Frauds. *Lawrence* v. *Errington*, 21 Chy. 261.

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2. *Agreements not to be Performed within a Year.*

Plaintiff contracted to clear 20 acres of defendant's land, receiving for his labour all the wood cut there, and he was to be allowed 14 months to perform his contract:—Held, not within the statute, as it might be performed within the year. *Hamilton* v. *McDonell*, 5 O. S. 720.

Semble, that under the facts of this case the objection that the agreement upon which the plaintiff claimed a right to the use of defendant's cattle was not to be performed within a year, was not tenable. *Scouler* v. *Haley*, 8 Q. B. 255.

An agreement to provide the plaintiff with board and lodging, during the term of his natural life:—Held, not within the Statute, as it would not necessarily endure beyond a year. *Slater* v. *Smith et al.*, 10 Q. B. 630.

Plaintiff contracted with defendant for the sale to defendant of the goodwill of a business. Plaintiff's part of the agreement was to be performed within a year, though the execution of defendant's portion was to extend beyond that limit. In an action for non-payment of the purchase money:—*Held*, that the Statute of Frauds did not apply. *Christie* v. *Clark*, 27 Q. B. 21; *S. C.* 16 C. P. 544.

The plaintiff, on the 29th of July, agreed with defendants verbally to enter their service as book-keeper on the 1st of September following, for a year from that day:—Held, a contract not to be performed within a year from the making thereof. *Dickson* v. *Jacques et al.*, 31 Q. B. 141.

Plaintiff agreed with defendant for the purchase of a piano at a certain price, and upon certain terms of payment, defendant agreeing to guarantee that the instrument was then free from defect, and should so continue for five years; and that in case of its becoming defective within that period defendant would, upon plaintiff's returning it within that time, refund the purchase money:—Held, a contract not to be performed within a year. *Nicholls* v. *Nordheimer*, 22 C. P. 48.

M. being owner of the equity of redemption, verbally assented to an arrangement that "In consideration of the said M. having promised to give his personal covenant for the payment of the said balance of £300 (due on the mortgage), in three years from 10th February last, with interest to be paid half yearly as a collateral security, I will procure him an extension of time, as aforesaid, on receiving said covenant from him," which was embodied in a memorandum signed by the solicitor of the mortgagee, but without his authority. Proceedings were accordingly delayed on the mortgage for three years, on the faith of this promise; and the mortgagee subsequently instituted proceedings in this court to obtain a sale of the premises, and that M. might be ordered to pay any deficiency arising on such sale. Quære, as part of the agreement (that as to giving the covenant) was to be performed within a year, but the mortgagee's part embraced a period of three years, (as did also M.'s in regard to the time for payment), whether the Statute of Frauds would stand in the way of the plaintiff's recovery. Had M. performed his part by delivering his covenant, the mortgagee could have been compelled to execute his. *Christie* v. *Dowker*, 10 Chy. 199.

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3. *Contract in Consideration of Marriage.*

Quære, whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a

settlement by him, would be a sufficient writing signed by the agent of the party to be charged. *Gillespie* v. *Grover*, 3 Chy. 558.

IV. Validity as regards Public Policy.

1. *Restraint of Trade.*

The plaintiff sued defendant on a bond conditioned not to commence business as an hotelkeeper within three years in a certain township. At the assizes the cause and all matters in difference between the parties in connexion with it were referred. A verdict was taken for the penalty, subject to a reference. An award having been made in favour of the plaintiff, defendant moved to arrest judgment, on the ground that the condition was void, being in restraint of trade. The application was refused, on the grounds that the arbitrator might for all that appeared have decided the point now raised, as he had power to do, or the award might have been upon some other matter connected with the contract; but Held, that if the motion had been after verdict, without a reference, defendant must have succeeded, for the contract being in restraint of trade it was necessary to shew a consideration, and none appeared in the declaration. *Dawes* v. *Wilkinson*, 19 Q. B. 604.

On sale of goods upon credit to a trader, the purchaser covenanted by deed with one E. F., a clerk of the vendors, to buy all his goods from them, and that E. F. should be at liberty, at any time while such business was carried on, to enter into the place of business and take possession of the goods and premises, and wind up the affairs. The business was carried on for two years and a half, during which time the vendors delivered goods to a large amount under the agreement: —Held, that the covenant not to purchase elsewhere was not binding on the purchaser (Esten, V. C., doubting); but that as he had received goods under the agreement, there was a sufficient consideration for the covenant, so as entitle them to the remedies given by the deed; and that this was not such an agreement as required to be registered under the chattel mortgage act, to enable the vendors to hold as against subsequent purchasers with notice. *Fisken* v. *Rutherford*, 8 Chy. 9.

The defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London, in this Province, under the name of "Mason's Hotel," or "Western Hotel:"—Held, in appeal, varying the decree below, that a covenant in the agreement that the vendor should pay $4,000 in the event of his carrying on business as an innkeeper within ten years, was void as an undue restraint of trade. *Mossop* v. *Mason*, 18 Chy. 453. See *S. C.* 16 Chy. 302; 17 Chy. 360.

Several incorporated companies and individuals, engaged in the manufacture and sale of salt, entered into an agreement stipulating that the several parties agreed to combine and amalgamate under the name of "The Canadian Salt Association," for the purpose of successfully working the business of salt manufacturing and to develope and extend the same, and which provided that all the parties to it should sell all salt manufactured by them through the trustees of the association, and should sell none except through the trustees:—Held, on demurrer, that this agreement was not void as contrary to public policy, or as tending to a monopoly or being in undue restraint of trade; and that it was not ultra vires of such of the contracting parties as were incorporated companies, but was such in its nature as the court would enforce. *The Ontario Salt Co.* v. *The Merchants' Salt Co.*, 19 Chy. 540.

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2. *Other Cases.*

An agreement to pay money on a party's not bidding at a sheriff's sale, is not void as being contrary to public policy, when the party making the agreement thereby insured the withdrawal of a claim from the land. *Waddel* v. *McCabe*, 4 O. S. 191.

A party suspected of stealing a horse, was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner (the prosecutor), but before doing so took a bond of indemnity:—Held, that such bond was not necessarily void, as contrary to the general policy of the law. *Ballard* v. *Pope*, 3 Q. B. 317.

A bond given to secure a sheriff a certain fixed salary or otherwise, to be paid by his deputy, is void. *Foott* v *Bullock*, 4 Q. B. 480.

Plaintiff declared on a special agreement not under seal, that in consideration that the plaintiff, then a bailiff of a Division Court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty: that he did afterwards sell, and that several persons claimed the goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay, yet that defendant refused to indemnify. A verdict having been found for the plaintiff:—Held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out to be a legal execution of the process, and therefore that the agreement was not illegal. *Robertson* v. *Broadfoot*, 11 Q. B. 407.

The plaintiffs having a judgment against B. & P., agreed with defendant that if such judgment or any portion of it, should be realized from property to be pointed out by him, he, defendant, should have one-third of the amount so realized; "all costs that may be incurred in endeavouring to make the money to be payable by him if unsuccessful, and the amount of such costs to be the first charge on any proceeds; the net balance to be divided." Goods pointed out by defendant having been seized, were found, on an interpleader issue, to be the claimant's. The plaintiffs thereupon sued defendant on the agreement for their costs of defence in the interpleader, &c.: —Held, that if such agreement extended to those costs, it was illegal, as being contrary to public policy, if not within the definition of champerty; and if it did not so extend, the plaintiffs could not recover. *Kerr et al.* v. *Brunton*, 24 Q. B. 390.

The declaration represented the plaintiffs and one C. to have individually associated them-

selves together for the purpose of procuring an act of incorporation as a gas company, which they succeeded in obtaining; that for this and other services rendered they had acquired a claim against the company to a certain amount; that they were individually possessed of certain books, &c., belonging to themselves relating to the company, and that, at the request of the defendant and one H., they agreed to surrender and did surrender to defendant and H: 1. All their said claim against the company; 2. The subscription lists; 3. The books, &c., of the plaintiffs; 4. As far as they lawfully could, their right to the interest in or control over the assets of the company and the charter of incorporation; for all of which defendant and H. jointly and severally bound themselves to pay the plaintiffs $3000:—Held, on demurrer, that the declaration was good, for the sale alleged was not of the franchise and charter of the company, but of the mere claims of the plaintiffs therein, and their personal rights and interests in the concern. Held, also, at the trial, that evidence was admissible to shew that the subject of the sale was not the franchise itself, but a mere claim against or right in the company capable of being legally sold, and that the plaintiffs, on the evidence set out in the report, were entitled to hold their verdict. *Miller et al.* v. *Thompson*, 15 C. P. 186; 16 C. P. 513.

Upon rehearing, the decree pronounced in this cause, declaring that a conveyance made for the purpose of enabling an irresponsible person to justify as special bail was a transaction against good conscience and morality, was affirmed with costs. *Langlois* v. *Baby*, 11 Chy. 21.

A guaranteed to B. (a creditor of C.) certain composition notes, which B. was to endorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee. *Clarke* v. *Ritchey*, 11 Chy. 499.

The plaintiffs, S. and W.—S. being a licensed medical practitioner, and W. an apothecary—purchased the good will of the defendant's practice as a medical man at I., defendant agreeing not to practise within eight miles of that place. In an action on this agreement:—Held, that there was nothing illegal in the plaintiffs entering into partnership: that no intention could be inferred that W. should practise physic contrary to the statute; and that the fact of his not being licensed could therefore form no defence. *Swan and Walker* v. *Scott*, 23 Q. B. 434.

VI. Construction of Contracts.

1. *Conditions Precedent.*

Where an action was brought on notes payable in work:—Held, that the plaintiff could recover without proving a demand and refusal to do some specific work, it being incumbent on the defendant to offer to perform work for the plaintiff. *Teal* v. *Clarkson*, 4 O. S. 372.

Where payment is to be a condition precedent or a concurrent act, and is to be made in a certain manner, the plaintiff must aver a readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everardo*, 3 Q. B. 154.

Where the plaintiff declared in assumpsit on a special agreement for leasing land for ten years, and the agreement, it appeared from the declaration, was to be reduced into writing to make it effectual, and the plaintiff assigned as a breach that the defendant did not execute the agreement although requested, the declaration was held bad on general demurrer, because it did not appear that the agreement was reduced to writing. *Lee* v. *Purdy*, 2 Q. B. 193.

In declaring on a special agreement, Quære, what must be averred in the declaration to have been done; or what may be left to be set up as matter of defence. Semble, that the intention of the parties, to be reasonably collected from the whole instrument, must govern. *Ewart* v. *Bowes*, 5 Q. B. 445.

Declaration, that the plaintiff having an agreement for a lease of a certain mill-privilege from A. B., defendant offered for the plaintiff's right to such privilege certain lands and notes, or the assignment of a mortgage for £500; and "that the plaintiff agreed to accept one of said offers on or before the 18th March, 1851, and to pay the water rent of the said privilege up to the 1st of January, 1851; and that it was further agreed that the lease should be made to defendant from the said A. B.; and that the plaintiff did, "afterwards, on the 18th of March, 1851, accept an assignment of the said mortgage," yet defendant would not assign the mortgage:—Held, that as the onus of procuring a lease was assumed by the plaintiff, the payment of rent up to the 1st of January, 1851, was of no consequence to defendant, and not material, if the plaintiff obtained the lease; and that therefore a traverse of such payment was an immaterial issue. *Benns* v. *Raymond*, 3 C. P. 126.

Quære, the materiality of a plea traversing the allegation of the acceptance of the assignment of mortgage, and the effect of that plea. *Ib.*

Defendant agreed to saw for plaintiff a certain quantity of logs, which plaintiff was to deliver at his mill, at specified rates, which would have amounted in all to £500, and it was stipulated that the money should be paid "in cash, or by a negotiable note, at three months, at the end of each month's work." To an action for not sawing logs so delivered, defendant pleaded that he had sawn some of the logs, but the plaintiff refused to pay him therefor, and that he had recovered judgment for such default, which judgment was still unsatisfied. Semble, a good defence. *Buchanan* v. *Anderson*, 16 Q. B. 331.

The declaration claimed damages for breach of a contract between plaintiff and defendant for sawing timber, containing an agreement by defendant to supply the plaintiff with such a portion of the price as would enable the plaintiff to carry out the contract, but did not aver any demand on or refusal by the defendant to supply such moneys:—Held, bad on demurrer, for the payment was not a condition precedent to plaintiff's performance. *Tullock* v. *Wells*, 7 C. P. 47.

Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part perform-

ance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming full performance, and to the satisfaction, &c., as a condition precedent, the contract being in consideration of performance, and not in consideration of his covenant to perform. *Coatsworth* v. *City of Toronto*, 10 C. P. 73.

Defendants entered into a bond conditioned that one McK. should pay to the plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (the plaintiffs) shall, on default being made by the said McK. in the payment of the said amount monthly, give notice thereof to the said obligors:"—Held, that the proviso for notice was a condition precedent to the plaintiffs' right to call upon the defendants as sureties, and that notice of default not having been given within a reasonable time, the defendants were relieved. *Corporation of Chatham* v. *McCrae at al.*, 12 C. P. 352.

The question of reasonable notice is one for a jury, but the undisputed facts leaving no doubt what the decision of a jury should be, the court ordered a nonsuit to be entered. *Ib.*

Plaintiff agreed to do certain work for defendant, for which he was to be paid half in cash on completion of the work, and half by a bankable note at three months, defendant to pay the bank charges and interest, and the note to be renewed, if required, for two months longer. Plaintiff, on the 30th July, 1862, sued for the work done. The evidence shewed the work was not completed until 2nd of May:—Held, that the action was brought too soon, and that the payment of the bank charges by defendant was not a condition precedent to his right to the credit. *Fee* v. *Whyte*, 13 C. P. 83.

Defendant agreed to sell to plaintiff certain American currency or "greenbacks" in four specific sums, amounting in all to $57,000 of that currency, plaintiff giving him with each transaction his note in Canadian currency, the four notes being payable at different times and for different amounts, and also depositing with each of the first two notes a certain sum of the latter currency, while with the fourth he deposited $400 in American currency, as collateral security. Defendant then delivered to plaintiff four of the usual broker's notes, in this form, "Sold to * * deliverable on payment of his note due * * the sum of * * in American currency." After the maturity of the first note plaintiff asked defendant if it was necessary to renew it, when defendant said not, as it drew interest; but, after the others had fallen due, defendant wrote to plaintiff that his notes being still unpaid, he could not carry the amount of American currency longer, and had therefore converted it at that day's rate of exchange, charging his account with the same. After this, plaintiff applied to defendant and his solicitors for the notes, tendering in payment a certain sum, which was short by some $10 or more, and the cheque of one M.; but the solicitors refused to give up the notes, stating that they had been practically paid (by the conversion of the greenbacks). It further appeared that the plaintiff had drawn out of defendant's hands all his money but the $400 deposit in greenbacks. Plaintiff sued defendant on his agreement to deliver the American currency, alleging his readiness and willingness to pay the notes, but that defendant waived the payment on the days they became due, and that within a reasonable time afterwards, and before action, he tendered their amount to defendant, who refused to accept it:—Held, that the payment of the notes was a condition precedent to delivery of the "Greenbacks:" that in the absence of any justification for the non-payment, plaintiff could not recover; and that there was no evidence of plaintiff's readiness to pay the notes, or of the waiver. *Walsh* v. *Brown*, 18 C. P. 60.

W. entered into a contract for the purchase of property, the price being payable by instalments; and there being a mortgage on the property to the Trust and Loan Company which was not due, the vendor was to give the vendee W. a bond of indemnity in respect of the mortgage. A decree was made at the suit of the vendor for specific performance, on the undertaking of the plaintiff, recited in the decree, to procure a release or discharge of the mortgage; and the over-due instalments were ordered to be paid into the bank subject to the further order of the court. On a question subsequently arising as to the effect of this undertaking, it was:—Held, that the performance of the undertaking was not a condition precedent to the paying in of the money, but was a condition precedent to its being paid out. *Robson* v. *Wride*, 13 Chy. 419.

See *Saxton* v. *Ridley*, 13 Q. B. 522, p. 726.

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2. *Implied Contract.*

Where there is evidence of a loan or debt, a promise to repay it will be implied. *Hall* v. *Morley*, 8 Q. B. 584.

The plaintiff gave to defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300, and interest, on a day named, and it was added, "but if default be made in payment of said £300 in part of the whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue:"—Held, on demurrer, that debt would not lie, the deed not sufficiently importing a promise to pay. *McLaughlin* v. *Brouse*, 11 Q. B. 609.

The specifications for a dwelling house to be built stated the work to be done under different heads, mason, carpenter, &c.; and contained a condition that the building must be completed by the 15th June, under a penalty of $20 per week as liquidated damages:—Held, that there was an implied contract by defendant with each contractor that he should not be wrongfully or unreasonably delayed in carrying out his contract; but that where the brick work was necessarily delayed by reason of the frost, and the plaintiff's work was thereby impeded, defendant was not responsible. *Lee* v. *Bothwell*, 24 C. P. 109.

See *Ross* v. *Tait*, H. T. 7 Will. IV. p. 730.

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3. *Vague or Uncertain.*

Under the award and declaration, as given in the statement of this case, the court held that the

amount of £500 awarded to be paid by quarterly instalments, was stated with sufficient certainty. *Watson* v. *Sutherland*, 1 Q. B. 229.

An agreement that A. shall saw certain logs, and deliver the lumber at his mill to B. as soon as he is able, such sawing to be paid for immediately on delivery, is not void for uncertainty. *O'Donnell* v. *Hugill*, 11 Q. B. 441.

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4. *Other Cases.*

A. contracts with a company to make a highway, and B. becomes his security to them. A. then employs C. to cut out certain timber for him, and while C. is thus engaged A. fails in his contract with the company. B., the surety, tells C. to go on and he will see him paid. Upon completing his work C. sues A. and B. jointly:—Held, that there was no joint contract by A. and B. with C., but that A. was primarily liable on his contract, and B. as a guarantor. *Nicholas* v. *King et al.*, 5 Q. B. 324.

Held, that the following receipt, "Received of B. & C. a note they held against A. L., on which there was a balance due, September 1st, 1842, of $400.33, which is to be paid to them in Michigan treasury warrants; also a balance of accounts of $57.17, which is to be paid in current money if enough is collected; if not, in warrants, (Signed) D. O'B.," could not be considered on the face of it evidence of a promise by O'B. personally to pay these debts. *Bradford et al.* v. *O'Brien*, 7 Q. B. 562.

In trespass for mesne profits, before the verdict was taken, the plaintiff's attorney and the defendant signed a paper, by which it was agreed the costs in the suit should be left to be taxed by, &c., and the value of the mesne profits should be decided by, &c., in case a verdict should be given for the plaintiff:—Held, that the words, "in case a verdict shall be given for the plaintiff," left it open to defendant to contend against a verdict at the trial upon any grounds in law, or upon the merits. *Patterson* v. *Prince*, 7 Q. B. 528.

"For value received I promise to pay J. M., and M., or their order, the sum of £102 15s. cy., to be paid in yearly proportions:—Held to give two years for payment. *McQueen et al.* v. *McQueen*, 9 Q. B. 536.

While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it, postponing the period for performance, and the original consideration will be regarded as imported into such new agreement, and will support it. *Hurlburt* v. *Thomas*, 3 Q. B. 258; *O'Donnell* v. *Hugill*, 11 Q. B. 441.

An indenture of lease was made between three parties: plaintiff of first part, one A. of second part, and defendant of third part. The party of the first part leased to the party of the second part a certain hotel, with certain goods and chattels; and the party of the second part covenanted, among other things, at the expiration or other sooner determination of the lease, to pay the party of the first part the difference between £550 and the value of such goods, which value should be ascertained by, &c. Then it proceeded as follows:—"The said party of the third part (defendant) covenants with the said party of the first part that the said party of the second part (lessee) shall pay the difference between the said sum of £550 and the value of such of said goods and chattels," &c., not containing the words, "to be ascertained as aforesaid:"—Held, that notwithstanding such omission, upon nonperformance by the lessee, plaintiff could recover against defendant. *Hayes* v. *Addy*, 3 C. P. 262.

Declaration upon an agreement, by which defendant undertook to commence certain work, "so soon after the opening of navigation this spring as he can remove a steam dredge and working apparatus to Port Burwell:"—Held, insufficient to allege only that the spring had elapsed; but that it was necessary to aver that since the opening of the navigation defendant could have removed the dredge. *Saxton* v. *Ridley*, 13 Q. B. 522.

The declaration charged that the plaintiff, having recovered judgment against A. & Co., was about to sell their goods under a fi. fa., and in consideration that the plaintiff would withdraw his writ defendants promised to pay the amount. It appeared that A. & Co. made an assignment to the defendants of all their goods, in trust out of the proceeds to pay their landlord's rent and certain executions, of which this was one, according to their legal priority, then to pay the preferential creditors named; and lastly, to divide the surplus money among the other creditors executing the assignment. This assignment was executed by the defendants, but not by the plaintiff. It was put in at the trial by the plaintiff, and it was proved that the defendants had received moneys under it, but no promise was shewn by them except what was in the deed, which recited that defendants had agreed to pay these claims out of the proceeds of the property assigned, if sufficient:—Held, that the plaintiffs could not recover, the only promise made being that contained in the deed, which was to pay out of the proceeds of the goods. *Harris* v. *Buntin et al.*, 16 Q. B. 59.

Declaration by A., B. and C., plaintiffs. First count, that A. and B. agreed to perform certain work on a railway for defendant, and having associated C. with them as a co-partner, commenced the same: that defendant became desirous of discontinuing and suspending said work, and it was then agreed between the plaintiffs and defendant in writing that it should be suspended, and at the option of defendant entirely abandoned, and if abandoned, that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. Breach, that defendant wholly refused to allow the plaintiffs to resume said work, and hindered and prevented them from so doing, and neglected to give the plaintiffs another contract, and took said work into his own hands, and gave it to other persons:—Held, on demurrer to the whole declaration, that the first count was bad, as not shewing a breach of the agreement declared upon, which was only to give a new contract if the first should be abandoned, and it was not abandoned, but gone on with. *Gould et al.* v. *Gzowski*, 17 Q. B. 52.

Articles of agreement made on, &c., between O. of the first part, and S. of the second part,

witnesseth that the said O. hath agreed to sell, and by these presents doth bargain and sell unto said S., all and singular that certain leasehold property and premises, being composed of, &c., for the price of £250, to be paid as follows: £50 down, and the remainder in four equal annual instalments. Then followed a covenant by O. that if S. should duly pay the said sums, and should pay and save harmless said O. from the rent due by the leases under which O. held, then the said O. would assign and convey the aforesaid leasehold, and the appurtenances thereof, by said S.:—Held, an agreement to assign only, not an assignment of O.'s interest. *Taylor* v. *Sutton*, 18 Q. B. 615.

Held, that under the agreement between the city of Kingston Water Works Co., and the corporation of the city, set out in this case, the company were not bound to supply water gratuitously to the city for any purpose at more than twenty hydrants. *The Corporation of the City of Kingston* v. *The City of Kingston Water Works Co.*, 19 Q. B. 499.

Held, that the condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it. *Meagher* v. *The Home Insurance Co.*, 11 C. P. 328; *Meagher* v. *Ætna Insurance Co.*, 20 Q. B. 607.

Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk Railway, and furnish the iron, "same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships:"—Held, that they were bound to pay such difference on all shipments, not merely on those made at a time when sailing vessels could be procured. *Coulson* v. *Gzowski et al.*, 22 Q. B. 33.

In support of an account stated as set out in the declaration, the following memorandum was put in evidence: "$300—Good to T. T. to the amount of $300, to be paid to him or his order at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber at cash price.—Signed, J. C. sen., J. C.:"—Held, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the account stated in the declaration. *Tyke* v. *Cosford*, 14 C. P. 64.

Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company: that the vessel was lost; that by the policy defendants were allowed in certain cases to interpose, recover and repair the vessel: that the vessel sank while towed by plaintiff's tug; that defendants and the other company, being desirous of recovering the vessel, by their respective duly authorized agents in that behalf, entered into an agreement in writing with plaintiff, reciting the loss, and that plaintiff should raise the vessel for $3,000, and the plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators, one to be chosen by the plaintiff, another by the defendants and the other company, and the third by the two so chosen, the question by whom said money and other expenses should be paid, &c.; that the plaintiff raised the vessel; had always been willing to appoint, and did appoint, an arbitrator, and was willing to submit such question, &c., of which the two companies had notice, and although the plaintiff requested them, &c., yet the defendants always since wrongfully refused, either in concert with the other company or otherwise, to appoint an arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf and that of the other company, and by reason of such wrongful refusal, &c., &c.:—Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was by an agent duly authorized, it could not be assumed that the authority was not full and sufficient. Held, also, that the contract disclosed was joint; that defendants could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and that, there being no plea in abatement, the declaration was good against the demurrer. *Calvin* v. *Provincial Insurance Co.*, 20 C. P. 21.

On the 2nd of July, 1869, the plaintiff contracted with one H. as clerk of the joint committee of both houses of parliament, to do the printing, &c., for both houses at scheduled prices. On the 7th of October, 1869, the plaintiff contracted with Her Majesty for all the printing required for the several departments, to be specified in requisitions to be made upon him by the departments respectively, including the postmaster-general's department, at scheduled prices; which were lower than under the first contract, and so tendered for as alleged by plaintiff, because he expected in cases where similar matter was required under both contracts, to use the type set to fulfil one for the other. When the contracts were entered into the custom was for the annual reports of the heads of departments to be printed on the order of and paid for by such departments, and the copies required for parliament were ordered and paid for separately through the clerk of the joint committee on printing; but afterwards, by resolution of the committee, concurred in by the House, it was directed that the annual reports should be printed on the order of the committee, under the first contract, including a sufficient number for the use of the departments, with which the departments should be charged. The reports of the postmaster-general having been thus ordered and printed, the plaintiff claimed to charge for the extra number required for the department under the second contract, and for the composition as though re-set for the department:—Held, that he had no such right. *Taylor* v. *Campbell, Postmaster General*, 33 Q. B. 264.

Declaration on a fire policy for $1,000, a plea on equitable grounds, stated that by the policy whenever the defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants' if requested. Semble, per Wilson, J., that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute. *Reesor* v. *Provincial Insur-*

ance Co., 33 Q. B. 357. See also *Provincial Insurance Co.*, v. *Reesor*, 21 Chy. 296.

Declaration under C. S. U. C. c. 78, by the administrator of A. alleging that A. was lawfully on the platform at a station on defendants' railway, and the defendants so negligently managed and drove an engine and carriages loaded with timber along the line near said station that a piece of timber projecting from said carriages, struck and killed the said A. Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise :—Held, plea good, without alleging that A. was a party to, or aware of the agreement. Quære, if such contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant. *Alexander* v. *Toronto and Nipissing Railway Co.*, 33 Q. B. 474 ; affirmed on appeal, 34 Q. B. 453.

Declaration on a deed set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. Clause 20 provided that the plaintiff would accept during the first five months defendants' notes at three months in payment, defendants agreeing to place at the order of the plaintiff, till the notes were paid by them, defendants' bonds to the value of said notes, such bonds being estimated at 85 per cent. of their face value, and after the first five months defendants agreed to pay cash. Breach, that defendants did not during the first five months "deliver to the plaintiff" them bonds to the value of the notes, &c. :—Held, breach bad, for defendants' covenant was to place said bonds at the order of plaintiff, which was capable of a different meaning. *Shanly* v. *Midland Railway of Canada*, 33 Q. B. 604.

On a contract to put up hoists to be "capable of raising a weight of 2000 lbs. without risk :"—Held, that the contract required the hoists to be capable of working in the ordinary way with a weight of 2000 lbs. *Hamilton* v. *Myles*, 23 C. P. 293. But see *S. C.* in appeal, 24 C. P. Not yet reported.

On a sale of malleable iron works "and all machinery and tools in and about the said works connected therewith :" Quære, whether annealing pots used in the manufacture of iron would pass under the word, "tools ;" but,—Held, that this was a question for the jury. *Filschie* v. *Hogg*, 35 Q. B. 94.

The contract, based upon the separate tenders by the different tradesmen signing it, was as follows : "We the undersigned hereby agree to build, erect, complete, and finish the dwelling house, &c., mentioned in the foregoing specifications, for the respective sums hereinafter specified, by the time mentioned in the condition of said specifications, and according to the following trades." The trades with the contract price for each were then set out, a space being left after each for the respective contractors to sign their names ; and the plaintiff thus contracted for the carpenter and joiner's work :—Held, a several contract between each tradesman and the defendant, not a joint contract with all. *Lee* v. *Bothwell*, 24 C. P. 109.

The plaintiffs and defendant entered into a joint venture to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the mineral right in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under sec. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance ; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. The defendant obtained an act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued the defendant for not forming the joint stock company, or carrying on mining operations, and having obtained a verdict for $400 :—Held, that the verdict must be reduced to nominal damages. *Johns et al.* v. *Beck*, 24 C. P. 219.

Held, also, that the conveyance by the municipality of the mineral rights, under sec. 442, was sufficient, and that sec. 441 for stopping of a road allowance did not apply. *Ib.*

Held, also, that although the conveyance of the mineral rights was to R. B. J., the defendant could not urge that he could not be compelled to convey, owing to the absence of any writing ; and that the plaintiffs having control of the title, were in a position to aver and prove their readiness to perform the agreement. *Ib.*

VII. Waiver and Substituted Contract.

1. *Generally.*

Where an agreement under seal, for the completion of certain work, had been entered into by one of two plaintiffs, and the other, who was not mentioned in it, signed and sealed it also, and afterwards assisted in the work, and was recognized and paid by defendant, for whose benefit the work was done, as a joint contractor with the plaintiff mentioned in the instrument :—Held, that assumpsit was maintainable by both for the value of the work, an implied parol agreement having been substituted for the instrument under seal. *Ross et al.* v. *Tait*, H. T. 7 Will. IV.

While an agreement is open between the parties, and the time for performance has not arrived, a new agreement may be substituted for it postponing the period for performance, and the original consideration will be regarded as imported into such new agreement, and will support it. *Hurlburt* v. *Thomas*, 3 Q. B. 258 ; *O'Donnell* v. *Hugill*, 11 Q. B. 441.

To a declaration upon a sealed agreement to build a vessel for plaintiff, of a certain size and

according to a certain model, by a certain day, &c., defendant pleaded, that he procured materials, and before breach of the agreement he was ordered by plaintiff to build a vessel of larger size; and that in pursuance of plaintiff's directions, and by his order and request, he did erect and build such larger vessel, and was consequently compelled to take a longer time, which is the breach complained of:—Held, no answer to the declaration. *Gaskin* v. *Counter*, 6 C. P. 99.

Declaration on a contract by a testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished and not according to the specifications, &c. The 7th plea stated that after testator's contract and promise, it was agreed between him and plaintiff in his lifetime that he should not perform them, but that instead testator should deliver to plaintiff, who was to accept, a different boiler and engine, larger and more valuable, requiring a longer time for construction; and afterwards, before action, testator in his lifetime, and defendants as executors, did make and deliver to plaintiff, who accepted the same upon such terms, and paid the price thereof:—Held, bad. *Leonard* v. *Northey et al.*, 22 C. P. 11.

Declaration, that defendant agreed to sell and deliver to plaintiff within one week certain wheat, and the plaintiff advanced $600 on account, yet defendant failed to deliver. Plea, that before breach. it was agreed that the plaintiff should, and he did waive the delivery within one week, and extended the time for delivery: Held, plea bad, for no subsequent delivery was alleged, nor that the extended time had not elapsed. *Molson* v. *Bradburn*, 25 Q. B. 457.

Defendant, in June, 1855, agreed to employ plaintiffs' vessel in carrying lumber from Bear Creek to Montreal, until the close of navigation. After some correspondence between plaintiff and defendants' agent, she was sent for the last trip to Cleveland, and there took in a load of corn for Montreal, which brought £170 less freight than a cargo of timber from Bear Creek would have done:—Held, that the letters, set out in the case, contained no agreement on defendant's part to pay such difference; but that the plaintiffs' remedy was on the original contract.—Burns, J., diss., and holding that by the conduct of the parties the original agreement was put an end to, and that the facts proved, together with the letters, constituted an agreement to substitute a cargo of grain for timber, making a fair compensation for the difference. *McPherson et al.* v. *Cameron*, 15 Q. B. 48.

Declaration on a bond conditioned to convey to the plaintiffs within three months a certain steamboat, and for quiet possession of the same from the making of the bond, assigning as breaches, 1. Not conveying within three months; 2. An eviction by one O. S. G. under the power in a mortgage derived from the defendants. Pleas, to the first breach, that said steamboat was mortgaged to J. H. C. at the time of the execution of the bond, for the same amount as plaintiffs had agreed to pay defendants, and that defendants had handed him the notes given by plaintiffs for the price; and the said J. H. C. held the mortgage only as security for due payment thereof, and plaintiffs thereupon discharged defendants from procuring such conveyance. Plea to second breach, after stating a similar agreement, alleged a transfer of the mortgage from J. H. C. to O. S. G., and that the plaintiffs made default in their agreement by nonpayment of one of the notes, whereupon O. S. G. took possession, claiming an equitable interest by virtue of said agreement with defendant and his assignees. Both pleas held bad on demurrer, the plaintiffs engaging to apply their payments towards an encumbrance not amounting to a waiver of their right to a conveyance from the vendors. *Corig et al.* v. *Cotton et al.*, 7 C. P. 209.

G. and S., the managers of certain steamboats running in opposition, S. having only one boat, and G. two, referred to arbitration the terms on which the opposition should cease. The arbitrators awarded that each party should run one boat at different hours, and that S. should pay G. £150. Afterwards G. and some of the owners of the steamer for which S. was agent entered into an agreement respecting the two boats which the award allowed to run, which stated that the parties had agreed to settle the disputes between them as steamboat owners on the following terms, and then specified the hours and days on which the boats were to leave the different ports; but it was expressly declared that this agreement was without prejudice to any demand which G. might have upon S.:—Held, that G.'s right to the £150 awarded was not affected by such agreement. *Gildersleeve* v. *Stewart*, 2 P. R. 114.—P. C.—Burns.

Declaration on a bond to plaintiff, securing payment by L. of the rent of certain premises, and averring that rent was then in arrear. Plea, on equitable grounds, that L. had died, having by will appointed defendant and another his executors, who continued in possession of the premises as tenants to plaintiff under the lease to L. until a certain day, when an agreement (not stated to have been in writing) was entered into between the widow of L., the defendant, and the other executor, as executors, and one S., with plaintiff's consent, that S. should purchase the lease of the premises for the amount of rent then agreed upon as in arrear, and that the widow and executors should surrender the lease and possession of the premises, and S. should become tenant to plaintiffs, and should have additional yard room, &c., and should in consideration thereof give his note payable to plaintiff B., for the said agreed sum, and defendant should for accommodation, and as surety for S., join him as maker of the note: that the tenancy and defendant's liability on the bond and in respect of the rent should cease, and plaintiffs should accept the note and surrender of the lease and possession in satisfaction and discharge of the rent then overdue, and of defendant's liability upon the bond and lease: that an endorsement was made under the hands and seals of the executors and the widow upon the lease, at plaintiffs' request and accepted by them, surrendering to plaintiffs said lease and all the estate and interest of the testator at the time of his death in the premises, as also their own interest therein as his executors, and that the widow consented thereto, and also surrendered to plaintiffs: that the note for the rent was made by S. and defendant payable to plaintiff B., and delivered by S. to plaintiffs, and plaintiffs took possession of

the premises, and accepted the surrender thereof in full satisfaction and discharge. Replication, on equitable grounds, setting up, by way of estoppel to the admissibility of the plea, that in an action in the County Court upon said note against defendant and S., they had pleaded an entirely different agreement from that alleged in the above plea respecting said note, and that the consideration for the note had wholly failed: that the jury had found the issue joined thereon in their favour; and that defendant subsequently, upon motion for a new trial, made and filed an affidavit stating that neither defendant nor S. had ever received any benefit, &c., for said note, or in payment thereof, by reason of which said acts and statements plaintiffs had been prevented from recovering the amount of said note:—Held, on demurrer, plea good, both in substance and in form; in substance, as setting up an entirely new contract and part performance in substitution of the former contract; and in form, as shewing the plaintiffs to have been sufficiently identified with the whole transaction to be bound by it, as they had taken the benefit of it. Held, also, replication bad. *Bradfield et al.* v. *Hopkins*, 16 C. P. 298.

To an action for breach of contract between plaintiffs and defendant, that defendant would build plaintiffs' railway to be completed by a day named, defendant pleaded equitably that the plaintiffs, with consent of defendant, agreed with E. to finish said railway, and defendant, before breach, abandoned said contract, and E. entered upon and took possession of the works on said railway, and continued the same with plaintiffs' consent. Replication, that by the agreement in the last plea mentioned, the plaintiffs' rights against defendant were expressly reserved:—Held, on demurrer, replication good, but plea bad, as not shewing that the alleged substituted contract contained all the essentials requisite to make it a complete discharge and release of the original one. *Port Whitby and Port Perry R. W. Co.* v. *Dumble*, 32 Q. B. 36.

[See the same plaintiffs *v.* Dumble, 22 C. P. 36, where the Court of Common Pleas, in an action against the principal, appear to have taken a different view as to the replication.]

See *Thompson* v. *Smith*, 21 C. P. 1, p. 734.

VIII. Rescinding and Determining.

A. agrees to pay B. for a lot of land upon receiving a deed. B. offers a deed, when A. declares his inability to pay, and proposes new terms, which were accepted:—Held, that B. was thereby relieved from the necessity of tendering a deed to entitle him to sue A. or rescind the contract: that B. was at liberty to rescind the contract, and might do so by parol; and that an agreement in writing, under the Statute of Frauds, might be waived, discharged, and determined by a subsequent verbal agreement. Quære, whether before or after the breach of the agreement. *Mulgrew* v. *Pringle*, Dra. 269.

The defendant alleged that the plaintiff agreed with defendant's wife, that defendant, with whom he had left some notes for collection, should keep the proceeds for himself and maintain the plaintiff free of charge for the remainder of his life. Quære, whether the plaintiff could rescind such agreement, and sue for the money collected, defendant not being bound. *Bush* v. *Abel*, 7 C. P. 499.

Quære, as to the sufficiency of a plea to a written contract, that before breach it was rescinded, and a new contract substituted, not alleging the rescission to have been in writing. Such a plea was allowed to be pleaded, but leave given to plaintiff to reply, take issue and demur; the demurrer, if any, to be first determined. *Wingate* v. *The Enniskillen Oil Co.*, 10 L. J. 216.

Defendant agreed with his son that if he would remain and work with him, so as to assist in paying for a lot of land which he had purchased, he should be paid for his services by the property being divided with him. The son remained, worked upon the land for several years, and died. After his death, defendant stated that he "had a conversation in his family, and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons:—Held, that neither this conversation, nor a subsequent offer on defendant's part to pay plaintiff, as administratrix of the son, $800 in satisfaction of the action, amounted to a repudiation or rescission of the only bargain between the father and son, which was to divide the land; and that, therefore, indebitatus assumpsit for the son's work and labour would not lie. *McClarty* v. *McClarty*, 19 C. P. 311.

Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided; and in case of failure of the plaintiff to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines, or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final. To an action by the plaintiff for wrongful dismissal, defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified:—Held, that defendant was bound to establish the ground mentioned in his notice for terminating his agreement. *Griggs* v. *Billington*, 27 Q. B. 520.

Defendant bought from plaintiff a quantity of oil at four months' credit. Plaintiff delivered the oil, but defendant refused to accept a four months' draft for the price, alleging that it was not according to sample. Plaintiff assented, and requested defendant to return the oil, which defendant promised, but failed to do within a reasonable time. Before the four months had expired plaintiff sued for goods sold and delivered:—Held, that the original contract had been rescinded, and that the plaintiff might sue upon a new contract arising out of the retention of the oil by defendant. *Thompson* v. *Smith*, 21 C. P. 1.

Declaration, for work and materials in construction of a house for defendants. Plea, that by deed dated 31st July, 1871, plaintiff covenanted to finish the works before 31st October, 1871, under a forfeiture of $20 for every week the work was left unfinished after that day; that

the plaintiff did not complete the works till 20 weeks after said date, and thereby $400 became due from plaintiff to defendant, which defendants are willing to set off. Replication, on equitable grounds, that after the breach in the plea alleged, the defendants for good and sufficient consideration by parol discharged the plaintiff from the performance of the covenant and damages for the breach thereof:—Held, good. *Simpson* v. *Kerr et al.*, 33 Q. B. 345.

An injunction restraining a corporation from permitting certain buildings to be completed under a contract, was dissolved, it appearing that the contract which had been entered into between the corporation and the contractor had been cancelled. On production of the contract in court, it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made; VanKoughnet, C., dubitante as to any necessity therefor. *The Edinburgh Life Assurance Co.* v. *The Municipality of the Town of St. Catharines*, 10 Chy. 379.

The owner of land by a memorandum in writing sold the timber thereon, and when the time verbally agreed upon for its removal was nearly expired, the vendor told his vendee that he might have another year within which to complete the cutting and removal of the timber:—Held, that the vendor was not at liberty afterwards to revoke such extension of time. *Lawrence* v. *Errington*, 21 Chy. 261.

IX. Performance.

Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request should be averred. *Daily* v. *Stevenson*, 5 O. S. 737.

Where defendant had agreed to return a steamer chartered on a certain day in good repair, dangers of the lake accepted, a plea "that before the day arrived the plaintiff took the boat from defendant without his consent, and kept her," was held sufficient, though not in express terms confessing and avoiding the fact of not returning the boat. *Larned* v. *McRae*, 1 Q. B. 99.

Declaration charging the defendant with the non-performance of a certain contract. Plea, that the said contract was not duly performed by the said parties, to wit, the plaintiff and defendant, in manner, &c.:—Held, bad, in leaving it uncertain by which of the said parties and in what particular it had not been performed. *Jones* v. *Hamilton*, 3 Q. B. 170.

Defendants were taken by the plaintiff to a quantity of timber already made upon the ground, and having seen it they contracted to draw it out and deliver it to the plaintiff on the bank of a river:—Held, that the timber cut in two by defendants to suit their convenience, without plaintiff's permission, and drawn out to the river in that altered state, was not a delivery within the contract. *Reynolds* v. *Shuter et al.*, 3 Q. B. 377.

Semble, that it is no defence to an action against the commander of a steamboat for not towing, &c., that he could not perform his contract by reason of his tow-boat being unavoidably frozen in the ice. *Dorland* v. *Bouter*, 5 Q. B. 583.

To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed: Held, on demurrer, no defence. *Wade* v. *The Corporation of the town of Brantford*, 19 Q. B. 207.

Declaration upon the common counts. The defendant, after setting out an agreement, by which he was to build a mill for plaintiff, averred that he had built and finished the mill as he had contracted to do, and that the plaintiff was indebted to him in the price agreed upon to be paid. In reply, the plaintiff merely traversed that the defendant had so built and finished the mill without shewing in what respect he had not performed the contract, and the replication was held bad. *Brown* v. *Taggart*, 10 Q. B. 183.

In consideration that the plaintiff would deliver to the defendant 2,000 bushels of wheat, the defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour.—Held, that the word "therefrom" must be construed to mean thereafter, and not that the flour was to be made from the identical wheat delivered. This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill, containing the wheat, was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted. *Tilt* v. *Silverthorne*, 11 Q. B. 619.

A promise to deliver a conveyance includes a promise to execute it. *Whittier* v. *McLennan*, 13 Q. B. 638.

By deed of the 18th of June, 1847, defendant agreed to sell to plaintiff the net profits for two years from the date of the agreement out of certain shares in mining company for £375. On the 25th of November, 1847, the company sold and assigned to the Montreal Mining Company certain tracts of land therein described, and all tools, engines, &c., for £33,250, to which sale defendant assented:—Held, that the defendant having disposed of his stock, which represented his interest in the mines, before the time at which he was to sell the profits to the plaintiff, he had placed it out of his power to fulfil his agreement, and so broke his contract; and the plaintiff became immediately entitled to sue for the breach thereof, upon the ground that the contract was at an end, and that the consideration had failed. *Sanders* v. *Baby*, 5 C. P. 441.

The first count alleged that the defendant agreed under seal with the plaintiff to edit a magazine owned by her, on certain terms specified, but that he refused to continue as such editor, whereby she was forced to discontinue the publication. Defendant pleaded that before

any breach of his agreement the plaintiff, finding the magazine did not pay, ceased to publish it, whereby he was prevented from acting as editor, although he was ready to do so:—Held, clearly a good defence. *Elmore* v. *Hind*, 24 Q. B. 130.

Where a party, before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue. *Dallea* v. *Taylor*, 34 Q. B. 12.

Declaration, that the plaintiff agreed to sell and defendant to buy certain land in Oshawa, adjoining the lands of the plaintiff, which would be thereby enhanced in value to the plaintiff, for $325, upon the following terms; the money to be paid and the conveyances executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware; and that in case he should not do this he would at the expiration of said eighteen months reconvey the land and receive back the purchase money; and all things happened and all times elapsed, &c., and plaintiff was ready to convey, yet defendant did not pay the plaintiff, nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c. Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement; and before any demand by the plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to the plaintiff and that they would not require said land, and that the plaintiff was released; and defendant did not otherwise abandon said agreement:—Held, following Hochster *v.* De La Tour, 2 E. & B. 678, that the declaration was good, and the plea no answer to it. *Ib.*

Declaration on a contract by testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished, and not according to the specifications, &c. Defendants pleaded, 3rdly, that testator, and defendants since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of plaintiff and his agent:—Held, bad, among other reasons, because leave and license cannot be pleaded to a breach of contract. Fifth plea, as to so much of the declaration referring to alleged imperfections of material and workmanship, that after the occurrence thereof, and before suit, said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable to damages in respect of the causes of action to which the plea was pleaded:—Held, good. *Leonard* v. *Northey et al.*, 22 C. P. 11.

XI. Actions and Proceedings on Contracts.

I. *Parties.*

(a) *Privity of Contract.*

A. contracted with defendants to perform work, and B. executed a bond as his surety. It appeared that B. was in fact the principal, and did the work, and that A. had tendered and taken the contract for him, and had in writing assigned to him all his interest in the proceeds: Held, that B. could have no right of action against defendants. *Ferris* v. *The Municipality of the Township of Kingston*, 12 Q. B. 436.

A contractor with a corporation to supply hydrants at certain points with water for public use, in the event of fires, is not liable for damages occasioned to the property of an individual rate-payer of the city by fire, owing to there not being a sufficient supply of water: there being no sufficient privity between such ratepayer and the contractor. *Cunningham* v. *Furniss*, 4 C. P. 514.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period, B. with D., a stranger to A., make advances to C.:—Held, that B., individually, could not recover from A. the amount of the advances so made. *Stevenson* v. *McLean*, 11 C. P. 208

One T. contracted with defendants, a corporation, to construct certain work for them, and on the same day the plaintiff agreed with T. to do a portion of it for $900, subject to the same conditions which bound T. in his contract with defendants. T. on the same day by letter authorized defendants to pay the plaintiff for his work to the amount of T.'s contract with him, and defendants in answer agreed to this. Defendants paid the plaintiff all but 20 per cent. as the work progressed, but their manager refused to certify as the contract required, complaining that it was improperly performed. He, however, had verbally agreed to pay the plaintiff's men $100 if they would discharge the company:—Held, that the plaintiff had no right of action against defendants, for there was no contract between them. *Standing* v. *London Gas Co.*, 21 Q. B. 209.

Plaintiff sued defendants, as churchwardens, for his stipend as the incumbent or minister of a church. It appeared that several resolutions were adopted in vestry as to the salary of the clergyman, but only one subsequent to defendant's acceptance of office, which related to an old balance:—Held, that as plaintiff's claim rested on a voluntary undertaking of the vestry, not founded upon a consideration moving from plaintiff or upon any executed consideration of services rendered, and the evidence shewed no contract between plaintiff and defendants founded upon a consideration between them, defendants were entitled to judgment. *Carry* v. *Wallace et al.*, 12 C. P. 372.

Plaintiff brought ejectment against D., and hearing that D. was about to remove a barn upon the lot in dispute to other land which he had leased from defendant, he went to defendant and told him that it was his. D. afterwards took the barn there, though defendant forbade him; and the plaintiff then sued defendant for

it as for goods sold and delivered :—Held, that even assuming the barn to be a chattel, he could not recover, for there was no contract or privity between them. *Best* v. *Boice*, 22 Q. B. 439.

Defendant had contracted to supply the Buffalo and Lake Huron R. W. Co. with wood. In 1858, by instrument under seal between them, in consideration of $2,000, defendant released the company from the contract, and the company covenanted to indemnify defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land; one in South Easthope, which had been leased by plaintiffs to defendant, the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the company stating that the plaintiffs had claimed from him rent in arrear on these two lots amounting to $2,000, and offering, if the company would pay him that sum, and re-convey the leases, to assume them for the future. The company assented, paid him the $2,000, transfered to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant after receiving this money paid the rent on the South Easthope lot. The plaintiffs having recovered from defendants as for money received to their use :—Held, that the verdict was wrong, for though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiffs' money, but as the price of the railway company's discharge, and there was no privity between plaintiffs and defendant. *The Canada Company* v. *McDonald*, 25 Q. B. 384.

Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made :—Held, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Dawson*, 28 Q. B. 323.

S. having mortgaged certain land to F. agreed to sell it to the plaintiff, and went to the office of defendant, who acted as agent for F., where S. executed a bond to convey to the plaintiff on payment of £200 down and the balance by instalments, and at the request of S. the plaintiff paid this £200 to defendant for F. on account of the mortgage. Afterwards, at their joint request, defendant returned £50 to the plaintiff, and S. having released to F. his equity of redemption, the plaintiff sued defendant to recover back the £150 remaining, as money paid to his use. Some evidence was given at the trial to shew that the title was defective :—Held, that the plaintiff clearly could not recover, for the money was not paid to defendant on any contract between him and the plaintiff, but was a payment by S. of his debt due to F. Semble, that the evidence, set out in the case, was not sufficient to shew a failure of title, but that if it had been, F., under the circumstances, could at most have been liable only, on receiving payment of his mortgage, to convey to the plaintiff such title as he had derived from S. *Branigan* v. *Cartwright*, 23 Q. B. 264.

Held, that where there was an express agreement between the owner of certain logs and the plaintiff, that he would sell the logs subject to plaintiff's charges thereon for rafting, which agreement was communicated to defendants, the purchasers, who promised the plaintiff, before the delivery by him to them of the whole of the logs, to pay said charges, the plaintiff was entitled to maintain an action against defendants for non-payment of the same. *Jackson* v. *Evans et al.*, 21 C. P. 33.

The owner of several steamers, carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburgh at any time thereafter: and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburgh. Upon a bill filed for that purpose, the court held the owners bound by the covenant entered into by the original proprietors, and granted an injunction restraining them from navigating the river below Ogdensburgh with those vessels. *Holcomb* v. *Nixon*, 5 Chy. 278, 373.

(b) *Other Cases.*

A. being indebted to B., and C. to A., B. and C., without the assent or knowledge of A., agree that C. shall pay to B. the debt due to him by A., on condition that B. shall discharge A. from his debt :—Held, that such agreement is binding on C., and that B. may sue him for its non-performance. *Tyrill* v. *Annis*, 1 Q. B. 299.

A. contracts by deed with B. to sell him certain timber off his lot, to be paid for by B. at certain fixed times. B. being in default, A., supposing C. to have a joint interest in the timber with B., sues B. and C. on an implied assumpsit :—Held, that though A. might sue B. alone on an implied assumpsit, yet that, being concluded by the deed as to the parties liable on the contract, he could not sue B. and C. jointly. *Armstrong* v. *Anderson et al.*, 4 Q. B. 113.

Debt does not lie by the grantee of a rent-charge to issue out of lands, where there is no express covenant to pay. *Dougall* v. *Turnbull*, 10 Q. B. 121.

The plaintiff having sued one of two joint contractors, the other being out of the jurisdiction, and having recovered judgment against him, cannot afterwards sue the other. *Harris et al.* v. *Dunn*, 18 Q. B. 352.

Declaration by A., B., and C., plaintiffs. First count, that A. and B. agreed to perform certain work on a railway for defendant, and having associated C. with them as a co-partner commenced the same: that defendant became desirous of discontinuing and suspending said work, and it was then agreed between plaintiffs and defendant in writing that it should be suspended,

and at the option of defendant entirely abandoned, and if abandoned that the plaintiffs should receive from defendant another contract on a substituted line equally advantageous to them, and if the work should be resumed the plaintiffs should repay defendant a specified sum. The second count alleged an agreement with all the plaintiffs to do the work, and charged that defendant refused to allow them to go on with it:—Held, that the second count was good, and that there was clearly no misjoinder, both being on agreements with all the plaintiffs. *Gould et al. v. Gzowski*, 17 Q. B. 52.

The second count of the declaration alleged that the plaintiff was seised for his life of certain land, and one R. owned the reversion; and that by an agreement between them and the Buffalo, Brantford, and Goderich Railway Co., they granted to the said company the two first ridges of gravel next the lake; and the company thereby agreed to leave the ground two and a half feet in depth above the level of the lake, and the surface even and level; that afterwards, and after the passing of the act 19 Vict. c. 21, the said company, under that act, delivered over their railway to defendants, and defendants completed the same under the agreement set forth in the statute; that defendants chose to enforce the said agreement with the plaintiffs, and removed the gravel, but dug pits below the stipulated depth, thereby injuring the land. R. brought a separate action as reversioner for the same injury. The agreement, when produced, appeared to be with both plaintiffs jointly:—Held, that the plaintiff could not recover, for defendants were not bound by the agreement; and, besides, it being entered into with the plaintiffs jointly, they could not maintain separate actions. *Pew* v. *Buffalo & L. Huron R. W. Co.*, 17 Q. B. 282.

In an action for work and labour against the executors of Z., it appeared that the work was done under two sealed contracts, entered into originally by Z. with one R. who had sublet one of these contracts to the plaintiff and D. The plaintiff had, by subsequent agreement with M. and D., respectively, acquired the sole interest in each of these contracts; but after he had done so, on each contract between B. and his sub-contractors an agreement under seal was endorsed, by which B. assigned all his interest in these contracts respectively to Z.; and the sub-contractors (the plaintiff and M. in the one case, and the plaintiff and D. in the other) agreed to accept Z. in place of B., and Z. agreed to assume the contracts, as if originally made by him with the sub-contractors. The agreement endorsed on the contract between B. and the plaintiff and D. was not executed by D.:—Held, that the plaintiff could not recover alone, the liability being to himself jointly with A. and D. respectively on the respective contracts. *Zimmerman* v. *Woodruff et al.*, 17 Q. B. 584.

Two of the plaintiffs contracted under seal to do certain work, which was done by them, but not according to the agreement. The three having sued were nonsuited on production of the contract. The nonsuit was upheld, and an amendment by striking out the name of the third plaintiff, in order to save the Statute of Limitations, was refused. *Bricker et al.* v. *Ancell*, 23 Q. B. 481. See also *Ross et al.* v. *Tait*, H. 7 Will. IV.

2. *Pleading.*

(a) *Certainty and Particularity.*

In an action for the non-delivery of wood according to contract, the declaration was held bad on special demurrer, for not stating the price to be paid, nor that the wood was to be paid for either on delivery or on a certain day, nor that the plaintiff was ready and willing to pay for it. *Maddock* v. *Stock*, 4 Q. B. 118.

Where defendant is sued upon a promise to continue a former agreement then about expiring, the declaration should state the precise terms of the former agreement, and aver that such terms composed the whole of it. *Barnes* v. *McKay*, 5 Q. B. 246.

The plaintiff charged defendants upon a special agreement stated to have been made by them as trustees, to furnish with fuel when required the plaintiff, a school teacher, under the Act 9, Vict. c. 29. Declaration held bad, because no request with time and place had been alleged to furnish fuel. *Anderson* v. *Vansittart et al.*, 5 Q. B. 335.

Upon an agreement to deliver wheat *for* the plaintiff at the mill of a third party, naming him, the plaintiff averred "that he was always willing to accept the wheat at the place aforesaid, whereof defendant had notice:"—Held, on motion in arrest of judgment, declaration good. *Wright* v. *Weed*, 6 Q. B. 140.

An uncertainty in the statement of a part of the consideration for the defendant's promise, with respect to a part only of the plaintiff's demand, does not make the declaration bad on general demurrer. *Bradford et al.* v. *O'Brien*, 6 Q. B. 417.

In debt for goods found and provided for one M. at defendant's request, not alleging by plaintiff:—Held, declaration sufficient, on motion to arrest judgment. *Kendrick* v. *Maxwell*, 7 Q. B. 94.

An averment that in consideration that the plaintiff, at the defendant's request, "would agree" not to put the said A. B. to costs in respect of his debt, the defendant promised, &c., is a sufficient allegation of plaintiff's promise. *Noad* v. *Brown*, 8 Q. B. 154.

Special assumpsit for not accepting a schooner, the consideration being that the plaintiff would sell defendant the schooner, "together with all and singular the apparel, tackle and furniture, boats, oars and appurtenances to the said schooner belonging or appertaining, and convey and assure the same to the defendant by a good and sufficient deed of conveyance or bill of sale, free from all encumbrances." Upon special demurrer the declaration was—Held bad, for not alleging that the conveyance tendered embraced the "apparel, tackle and furniture," and because it was not inconsistent with all the averments that the "apparel, tackle and furniture" might not be free from incumbrances. *Phillips* v. *Merritt*, 2 C. P. 299.

Quære, whether when a contract is to pay at a particular place named in a declaration, the general averment that the defendant did not pay is not sufficient, and any statement as to the plaintiff not being at the place named to receive the money, or that the defendant was there ready to pay it, must not arise by way of defence. *Becher et al.* v. *Corporation of the Town of Amherstburgh*, 23 C. P. 602.

(b) *Other Cases.*

Where no time is limited for the doing of an act, it must be done in a reasonable time, and a special request must be averred, but the statement of a general request will be sufficient after verdict. *Daily* v. *Stevenson et al.*, 5 O. S. 737.

Assumpsit against a miller for not delivering flour ground by him from wheat sent to him by plaintiff, on an agreement that he would grind and deliver the flour at one of two prices named, depending upon whether the barrels were furnished by him or the plaintiff:—Held, 1. That it was unnecessary to aver that there was any mark to distinguish the plaintiff's wheat, as required by 31 Geo. III. c. 7, s. 3; 2. That readiness to pay either one price or the other, and notice to the defendant or a tender of payment must be averred, but that the former was sufficient. The agreement as set out in the third count, was to grind 10,000 bushels of wheat, alleged to have been delivered by the plaintiff. In the 4th count, it was averred that under the said agreement set out in the third count, the plaintiff delivered 10,000 other bushels:—Held, bad. *Counter* v. *Jones*, 6 O. S. 37.

The plaintiff declared in assumpsit on an agreement with defendant to make 100,000 bricks, and then averred that he had made 68,000 of them, and prepared in part 30,000 more, but that defendant would not allow him to complete them, but absolutely discharged, hindered and prevented him from doing so. Defendant pleaded, 1. That the plaintiff entered upon defendant's close to complete the work there, and that defendant prevented him, as he lawfully might, which was the same hindering and preventing; and, 2. That the plaintiff was making the said bricks upon plaintiff's close, and had made 68,000 of them in so bad and unskilful a manner that they were wholly useless, and was proceeding to make the rest in the same way, and that therefore defendant did then forbid and prevent him from making the residue.:—Held, that both pleas were bad, because pleaded to the whole declaration and not answering the discharge, and that a replication of leave and license to the first plea was good. *Toleman* v. *Crew*, 2 Q. B. 186.

Assumpsit on a contract to make and furnish a steam-engine and boiler. Breach, that the boiler furnished was not made of good and sufficient materials, and was not reasonably fit and proper for the said engine. Plea, that the said boiler was made of good and sufficient materials:—Held, bad, as not answering the whole breach. *Abel* v. *Leonard*, 12 Q. B. 192.

CONTRACTOR.

I. Disqualification of as Member of Municipal Councils—*See* Municipal Corporations.

II. Liability of Railway Companies for acts of—*See* Railways and Railway Companies.

III. Right of Remuneration—*See* Work and Labour.

A railway company is not responsible for damages occasioned by the negligence of sub-contractors in making the road, where such damage was occasioned by said sub-contractors doing acts which they were not required by their contract to do. *Woodhill* v. *The Great Western R. W. Co.*, 4 C. P. 449.

Defendant having been employed by a road company to furnish them with stones by placing them on the road, accidentally caused the death of the plaintiff's servant and horse. On an application for a nonsuit it was held that the defendant was personally liable for the damage done, under 16 Vict. c. 190, s. 49, *Lennox* v. *Harrison*, 7 C. P. 496.

To sustain an action against the employer for damages occasioned in the performance of a contract it must be shewn that the contractor is the authorized agent of the parties sought to be charged, or at all events that they subsequently ratified or adopted the work as their own. In this case the defendants were held not liable for damage done by fire in clearing up an allowance for road. *Carroll* v. *The Corporation of Plympton*, 9 C. P. 345.

One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:—Held, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment and subject to his directions; and that defendant was responsible. Quære, per Wilson, J., whether if M. had been such contractor the defendant would have been liable. *Johnston* v. *Hastie*, 30 Q. B. 232.

The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing and clearing the track of trees, &c., to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage —Held, that the contractors, not the defendants were primâ facie responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out in the report, did not shew such an interference by the engineer as would make defendants liable. *Gillson* v. *North Grey R. W. Co.*, 33 Q. B. 128, affirmed in appeal, Blake, C., diss., 34 Q. B. 475.

The plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains, and was thus taking two crow bars from Port Hope to a point on the line where his men were at work. As the train passed the spot C. dropped one bar out, and the baggage master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggage man having nothing to do with him, nor any right to meddle with his tools, nor did he ask him to put the bar out:—Held, that defendants were not responsible for the injury, for the baggage man was not acting as their servant or in pursuance of his employment. *Cunningham* v. *The Grand Trunk R. W. Co.*, 31 Q. B. 350.

The defendants agreed, with a contractor for the construction of their railway, to furnish a construction train to be used in carrying materials for ballasting and laying the track of a portion of their road, then under process of construction; the defendants to provide the conductor, engineer, and fireman; the contractor furnishing the brakesmen. On the 31st of October, 1872, after work was over for the day, and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen lived, the plaintiff, with the permission of the conductor, but without the authority of the defendants, got on the train. Through the negligence of the person in charge of the train, an accident happened, and the plaintiff was injured:—Held, that the defendants were not liable, for their contract was to carry materials only, not passengers, and the conductor in permitting the plaintiff to get upon the train, was not acting as defendants' agent. *Graham* v. *Toronto, Grey & Bruce R. W. Co.*, 23 C. P. 541. See, also, *Sheerman* v. *Toronto, Grey & Bruce R. W. Co.*, 34 Q. B. 451.

CONTRIBUTION.

I. By Sureties—*See* Bills of Exchange and Promissory Notes — Principal and Surety.

One of several defendants in assumpsit who has paid the whole amount of the damages under an execution, is entitled to recover contribution from the other defendants; and in an action for such contribution, the regularity of the judgment in the original action cannot be questioned; and it is not necessary to shew any notice of execution, nor demand of the money, before action brought. *Woodruff* v. *Glassford*, 4 O. S. 155.

When an award directs two parties to pay each a certain sum of money to a builder, and one is obliged to pay the whole from a refusal by the other to pay his share, the party so paying can compel contribution by suing the other in covenant for non-performance of the award. *Allen* v. *Coy*, 7 Q. B. 419.

In 1849 G., being the owner of whiteacre and blackacre, contracted to sell half of the former to B. by a bond, which was never registered. In 1852 G. executed a mortgage covering both lots to C., which was immediately registered, but the Christian name of the grantor's wife (who executed to bar dower) did not appear in the memorial. In 1853, G. gave a mortgage of blackacre to P., who immediately registered his conveyance. In 1855 G. sold the remaining half of whiteacre to M., and in the following year B. conveyed his interest in the other half to S. In 1861 C. sold blackacre under a power of sale in his mortgage, and the sale realized fully what was due thereon. In 1862 P. filed his bill against M. and S. in order that he might be subrogated to the rights of C. as against whiteacre for the amount due him on his security. S. and H. had previously paid all their purchase money:—Held, that P. was not entitled to any relief against S., but that if C.'s mortgage was duly registered, P. was entitled to contribution against M. *Boucher* v. *Smith*, 9 Chy. 347.

Where costs were incurred by a tenant in common suing on behalf of himself and his cotenants in restraining the committing of waste on the joint property by a stranger, it was—Held, that on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense in proportion to the advantage they had derived from the suit. *Gage* v. *Mulholland*, 16 Chy. 145.

CONTRIBUTORY NEGLIGENCE.

See Negligence.

CONTROVERTED ELECTIONS.

I. Municipal Elections — *See* Municipal Corporations.

II. Parliamentary Elections—*See* Parliament.

CONVERSION.

I. Of Realty—*See* Conversion of Realty by Statute.

II. Of Goods—*See* Trover.

CONVERSION OF REALTY BY STATUTE.

One of several heirs of an intestate being lunatic, an act was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and it was Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Chy. 254.

The principle of sec. 56 of C. S. U. C., c. 12, relating to the conversion of infant's estates sold under that act, is also applicable to all cases where it is necessary for collateral purposes to effect the conversion of an infant's estate from realty into personalty; the rule of the court in

all such cases being that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134.—Chy. Chamb.—Holmested, *Referee*.

CONVEYANCE.

See DEED.

CONVICTION.

I. OF FELONS—*See* ATTAINDER—CRIMINAL LAW.

II. BY MAGISTRATES—*See* JUSTICES OF THE PEACE.

III. APPEAL TO GENERAL OR QUARTER SESSIONS—*See* SESSIONS.

IV. REMOVAL OF—*See* CERTIORARI.

V. ACTIONS AGAINST MAGISTRATES FOR NOT RETURNING—*See* JUSTICES OF THE PEACE.

VI. UNDER MASTERS' AND SERVANTS' ACT—*See* MASTER AND SERVANT.

VII. FOR SELLING LIQUOR WITHOUT LICENSE—*See* TAVERNS AND SHOPS.

VIII. FOR NON-PAYMENT OF TOLLS—*See* WAY.

Commissioners appointed under 2 Vict. c. 15, for the protection of the lands of the crown in this province from trespass and injury, to receive informations and inquire into complaints that may be made to them against any person for illegally possessing himself of the lands, must shew upon the face of a conviction by them under that act, that the lands of which illegal possession had been taken had been actually occupied and claimed by some tribe or tribes of Indians, and for the cession of which no agreement had been made with the government. A conviction alleging that the party convicted had unlawfully possessed himself of *crown lands* is bad, as they have no general jurisdiction over such lands. *Little et al.* v. *Keating*, 6 O. S. 265.

Semble, that the recital in a warrant by the commissioners under the act to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *S. C. Ib.* 270.

Form of conviction under the Temperance Act of 1864. *In re McCall*, 2 L. J. N. S. 16.

A conviction, though void, must be quashed, under C. S. U. C., c. 126, s. 3, before an action will lie against the magistrate for any thing done under it. *Graham* v. *McArthur*, 25 Q. B. 478.

On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned though it has not been quashed. Sec. 205 applies only to actions brought for acts done under an illegal by-law. Such a conviction must shew by what municipality the by-law was passed:—Quære, whether it is essential to state the title or date of the by-law. *Regina* v. *Osler*, 32 Q. B. 324.

On a motion to set aside a conviction and warrant of commitment on the grounds: 1, that the conviction was not in the magistrate's office, but in that of the clerk of the peace; 2, that the conviction did not contain a clause of distress; and, 3, that the conviction only warranted the imprisonment without hard labour, whereas the prisoner had been committed with hard labour:—Held, that the prisoner must be discharged, but on the last ground only. *Regina* v. *Yeomans*, 6 P. R. 66.—C. L. Chamb.—Morrison.

CO-OPERATIVE ASSOCIATION.

The plaintiffs supplied goods to a co-operative association, formed under 29 Vict. c. 22, on the order of their manager. The terms of purchase were said to be cash, but it appeared that according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued:—Held, not a cash transaction, within the 14th section of the act, and that the plaintiffs could not recover. Semble, that the defence should have been specially pleaded, and the plea was allowed to be added. *Fitzgerald et al.* v. *The London Co-operative Association, (Limited,)* 27 Q. B. 605.

CO-PARCENERS.

See ESTATE.

COPIES.

I. OF AFFIDAVITS—*See* AFFIDAVITS.

II. OF DOCUMENTS IN EVIDENCE—*See* EVIDENCE.

III. OF PLEADINGS—*See* PLEADING IN EQUITY.

An affidavit verifying the copy of a paper "that it is a true copy as the deponent is informed and verily believes," is insufficient. *Chafe* v. *Parr*, 2 Q. B. 98.

CORONER.

I. POWERS AND LIABILITY OF, 748.

II. INQUEST, 749.

III. FEES OF CORONERS AND WITNESSES, 750.

I. POWERS AND LIABILITY OF.

Our act 48 Geo. III. c. 13, s. 5, gives no authority to the coroner to summon a special jury. Where the sheriff is interested some indifferent person appointed by the court must strike the jury. *Clandinan* v. *Dickson*, 8 Q. B. 281.

A barrister cannot insist upon being present at a coroner's inquest, and upon examining and cross-examining the witnesses, &c., and can maintain no action against the coroner for excluding him from the room. Defendant in such an action having justified as coroner it was—Held, on the authority of Garnett *v.* Ferrand, 6 B. & C. 611, that the plea was good, for, 1. The coroner was not liable to a civil action for anything done in his judicial capacity; and, 2. He was authorized in what he did. In a second count the plaintiff set out the facts, stating that as a barrister and attorney-at-law he had been employed by certain clients to attend on their behalf at an inquest held by the defendant as coroner on the body of one W., in the issue of which they were interested, and that the defendant unlawfully and maliciously, and without reasonable or probable cause, refused to allow him to act, and forcibly compelled him to desist:—Held, bad, for the same reasons that the plea was sustained. *Agnew* v. *Stewart*, 21 Q. B. 396.

Plaintiff sued defendant in trespass, stating that acting as coroner he assaulted the plaintiff, &c. The second count stated that defendant was acting as coroner, &c., and that a jury being duly sworn he held an inquisition on the body of one N. F., then lying dead, setting forth the finding of the jury, which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff, and through culpable negligence on his part in not having given sufficiently explicit directions, and charging that defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c. At the trial, on its being objected that defendant, as a coroner, was a judge of a court of record, and that no action would lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted maliciously, and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and super visum corporis, or that he had issued his warrant on the finding of the jury. On this the plaintiff was nonsuited:—Held, that as defendant was acting judicially, trespass would not lie against him; and that though the nonsuit did not appear so erroneous as to warrant its being set aside, still, that if the plaintiff desired to present facts to the jury not suggested to them at the trial, he should be allowed to do so, on payment of costs. *Garner* v. *Coleman*, 19 C. P. 106.

A coroner is a magistrate who may give a certificate of loss under an insurance policy. *Kerr* v. *The British America Assurance Co.*, 32 Q. B. 569.

II. Inquest.

At an inquest held upon the body of a boy who had committed suicide, the verdict, after finding the cause of death, stated that from evidence submitted the jury judged that the boy's master, a medical man, had not done justice to him according to his agreement made with the boy's father in Scotland, in regard to his clothing and the labour he had to perform:—Held, that the latter part of the verdict was relevant and within the province of the jury; and although the evidence seemed to preponderate the other way, the court could not on that account alter the finding. *In re Miller et al.*, 15 Q. B. 244.

Held, that the inquisition set out in this case was bad, for the principal was not sufficiently charged either with manslaughter or murder; and it was uncertain which crime it was intended to charge the others as aiding in, although they were said to have been present at the "murder aforesaid." *Regina* v. *Breden et al.*, 16 Q. B. 487.

Held, that a coroner's warrant to arrest J. C., reciting a coroner's inquisition, and stating the offence as follows: that J. C. "stands charged with having inflicted blows on the body of the said D. F.," and not shewing the place where the blows, if any, were inflicted, or the offence, if any, was committed, was bad. *In re Carmichael*, 10 L. J. 325.—C. L. Chamb.—Morrison.

A coroner's jury found the cause of a death into which they were inquiring to have been disease, adding that it was accelerated by an over dose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F. as a cholera preventative; and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing. This inquisition having been brought up by certiorari, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indictable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference. Quære, whether the affidavits were properly entitled The Queen, plaintiff, *v.* Robert Farley, defendant. *Regina* v. *Farley*, 24 Q. B. 384.

A coroner's inquest held on Sunday is invalid. *In re Cooper et al.*, 5 P. R. 256.—C. L. Chamb.—Galt.

III. Fees of Coroners and Witnesses.

A coroner is not entitled to poundage on an attachment against a sheriff. *In re Duggan*, 2 Q. B. 118.

A medical witness attended during two inquests held on fifty-two persons, and occupying several days; no post mortem examinations were made:—Held, entitled, under 13 & 14 Vict. c. 56, only to 25s. for each day's attendance, (not for each body), together with his mileage in travelling. *In re Askin and Charteris*, 13 Q. B. 498.

Under the 20 Vict. c. 36, the coroner is made the judge of the necessity for investigation into the cause of a fire; and therefore, to an application for a mandamus to the treasurer to pay him his fees, it was held no answer to shew that in the opinion of the reeve and others the enquiry was not called for:—Held, also, that the want of funds in the treasurer's hands was no answer, the payment not having been refused on that ground. *In re Fergus and Cooley*, 18 Q. B. 341.

Where a coroner, under C. S. U. C. c. 125, summoned a second medical practitioner as a

witness at an inquest, and to perform a post mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by s. 9, a mandamus to the coroner, to make his order on the county treasurer for the fees of such witness, under s. 10, was refused. Semble, that on an application for such mandamus, the county treasurer as well as the coroner must be called upon. *In re Harbottle and Wilson*, 30 Q. B. 314.

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CORPORATIONS.

I. Corporate Name and Existence, 752.
1. *Building Societies—See* Building Societies.
2. *Municipal Corporations—See* Municipal Corporations.

II. Stock.
1. *Subscription for*, 754.
2. *Making Calls*, 755.
3. *Transfer.*
(a) *Generally*, 757.
(b) *Sale and Transfer under Execution*, 759.
4. *Forfeiture*, 760.
5. *Liability of Shareholders to Creditors*, 760.
6. *Of Railway Companies—See* Railways and Railway Companies.

III. Directors, Officers, and Agents.
1. *Election of Directors*, 762.
2. *Personal Liability of*, 763.
(a) *Parties to Bills or Notes—See* Bills of Exchange and Promissory Notes.
3. *Powers of*, 765.

IV. Liability of Members, 766.

V. Powers of, 767.

VI. Contracts by and with Corporations.
1. *Liability on Contracts not under Seal.*
(a) *For Work and Labour*, 771.
(b) *Of Hiring*, 774.
(c) *Leases*, 775.
(d) *Other Contracts*, 776.
(e) *In respect of Bills and Notes—See* Bills of Exchange and Promissory Notes.

VII. Actions by, 779.

VIII. Actions and Proceedings against.
1. *Proof of Seal*, 779.
2. *By Members*, 780.
3. *Procedure*, 781.
(a) *Service of Writ—See* Practice at Law.
4. *Other Cases*, 782.
5. *Mandamus to—See* Mandamus.
6. *Quo Warranto—See* Quo Warranto.

IX. Amalgamation of Companies, 782.
1. *Of Railways—See* Railways and Railway Companies.

X. Dissolution, 783.

XI. Foreign Corporations, 783.

XII. Miscellaneous Cases, 784.

XIII. Gifts and Bequests to—*See* Mortmain—Will.

XIV. Chartered and other Corporations.
1. *Banking—See* Banks.
2. *Building—See* Building Societies.
3. *Canals—See* Canal.
4. *Colleges—See* Colleges.
5. *Ecclesiastical—See* Churches.
6. *Gas—See* Gas Companies.
7. *Harbour—See* Harbour Companies.
8. *Insurance—See* Insurance.
9. *Municipal—See* Municipal Corporations.
10. *Railway—See* Railways and Railway Companies.
11. *Road—See* Way.
12. *School—See* Public Schools.
13. *Street Railway—See* Street Railway.
14. *Telegraph—See* Telegraph.
15. *Temperance Society—See* Temperance Societies.
16. *Other Corporations—See* Their Several Titles.

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I. Corporate Name and Existence.

Held, that no action will lie on a demise in the name of the trustees of the Presbyterian church at Galt, as in a corporate capacity. *Doe d. The Trustees of the Presbyterian Church in Galt, in connexion with the Church of Scotland and of Dickson* v. *Bain*, 3 Q. B. 198.

Where defendant pleads over, and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of B. N. A.* v. *Sherwood*, 6 Q. B. 213.

The plaintiffs declared on a bond to "The Beverley Municipal Council," there being no such corporation in existence. Defendants did not deny the making of the bond, but pleaded over. On demurrer,—Held, that by not pleading non est factum, defendants were debarred from taking the objection to the form of the bond as pleaded. *The Corporation of the Township of Beverley* v. *Barlow et al.*, 10 C. P. 178.

Held, that the act abolishing districts did not take away from defendants the name given to them by their charter. *Hughes* v. *The Mutual Fire Insurance Co. of the District of Newcastle*, 9 Q. B. 387.

Where, in styling the lessors of the plaintiff,—"The Chancellor, President and Scholars of King's College at York, in the Province of Upper Canada" in the consent rule, appearance and plea in ejectment,—the words "in the Province of Upper Canada," were omitted, the omission was held not material, or, at all events, not a nullity,

and might be cured by laches. *Doe* d. *Chancellor, &c., of King's College* v. *Roe*, 1 C. L. Chamb. 111.—Macaulay.

A bond sued upon in the name of "The Trent and Frankford Road Company" was in the name of the president and directors of the Trent and Frankford Road Company:—Held, no objection. *The Trent and Frankford Road Co.* v. *Marshall*, 10 C. P. 329.

Held, that the commissioners for the town of Peterborough, appointed by 24 Vict. c. 61, are not a corporation, and cannot be sued as such. Upon this objection to the declaration, the action was held, not sustainable, this court being of opinion that they should be sued by name, adding their statutory designation. *The Commissioners of the Peterborough Town Trust* v. *Cochrane*, 13 C. P. 111.

The name of the defendant as a sole corporation by the statute, was "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada." The instruments declared on were in the name of the "Roman Catholic Bishop of Sandwich:"—Held, that the variance was immaterial. *Ruitz* v. *The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 C. P. 269.

The trustees for the time being, under the Religious Institutions Act, C. S. U. C. c. 69, may bring ejectment in their individual names, describing themselves as trustees, &c., or in their quasi corporate name alone, without their individual names. *Humphreys et al.* v. *Hunter*, 20 C. P. 456.

Where the plaintiffs sued in their individual names, describing themselves as trustees of the Wesleyan Methodist Church of Brussels, an amendment was allowed at the trial, by striking out the names and allowing them to sue as a corporation incorporated under C. S. U. C. c. 69:—Held, that the amendment was authorized. *The Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Brewer*, 23 C. P. 553. See now 36 Vict. c. 135, O.

Defendants, a company, were styled in the bill "The Ontario Wood Pavement Co." Certain other defendants alleged to be Directors of this Co., when brought up to be examined for discovery, denied all connection with it, and refused to answer any questions relating to "The Ontario Wood Pavement Company of Toronto." This latter name the plaintiff's solicitor stated to be the true corporate name of the company, intended to be described by the bill; but there being no further evidence of this fact, an application to compel the defendants to answer the questions put to them was refused. *Dickey* v. *Ontario Wood Pavement Co.*, 6 P. R. 93.—Chy. Chamb.—Holmested, *Referee*.

The 22 Vict. c. 122, incorporating the North-west Transit Co., enacted that it should not be lawful for the company to proceed with their operations under the act until £50,000 of the capital stock should have been subscribed, and ten per cent. paid thereon. Subsequently, and before such subscription or payment, a proposition was made by one C. to certain stockholders that C. should sell his steam vessel to the company for £5,000, and should become a subscriber to the amount of £50,000, and that the steamer should be taken as a payment of ten per cent on the £50,000. This was acceded to and carried out in compliance with a resolution of the company:—Held, an evasion of the statute, and the company were restrained from proceeding with their operations. *Howland* v. *McNab*, 8 Chy. 47.

See *Goodwin* v. *The Ottawa and Prescott R. W. Co.*, 13 C. P. 254, p. 759.

II. Stock.

1. *Subscription for.*

Action for calls under 1 Will. IV. c. 12, incorporating the plaintiffs against the defendant as one of the stockholders:—Held, that the said act was not obsolete for nonuser: that the clauses of the said act requiring the books of subscription to be opened within two months was only directory: that the subscription books subsequently opened might be considered as in connexion with those previously opened, and that all the proceedings from the beginning might be taken together: that the omission in the new books of the name of H., one of the original petitioners for the act, (he being dead) did not render the proceedings of the company invalid, nor was it fatal to the plaintiffs: that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation was sufficient: that the names of the petitioners in the said act named need not necessarily be signed to the new subscription books; and that defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29.

Sufficiency of declaration for calls under the statute 1 Will. IV. c. 12, incorporating the plaintiffs. *The Marmora Foundry Co.* v. *Murney*, 1 C. P. 1; *The Marmora Foundry Co.* v. *Boswell*, *Ib.* 175; *The Marmora Foundry Co.* v. *Dougall*, *Ib.* 194.

Defendant had taken shares in a road company, for which he subscribed his name, and the secretary called to solicit a further subscription. Defendant told him he would take another £100, and the secretary afterwards, in defendant's absence, put down his name for these shares:—Held, not sufficient to charge defendant. *Ingersoll and Thamesford Gravel Road Co.* v. *McCarthy*, 16 Q. B. 162.

The authority to take shares should be in writing; but, Semble, that a verbal authority would be binding. *Ib.*

A plea that defendant became holder of the shares by subscription, and was induced to become so by the fraud of the company, and that he has received no benefit from, and has repudiated the shares:—Held, good, on demurrer. *Provincial Ins. Co.* v. *Brown et al.*, *Provincial Ins. Co.* v. *Denroche*, 9 C. P. 286.

Defendant subscribed for shares in plaintiffs' company, incorporated under 27 & 28 Vict. c. 23, and bound himself to pay as required by the board. Somewhat over half the capital stock

was thus subscribed :—Held, no answer to plaintiffs' call on defendant, that there had been no allotment of shares, and defendant was not therefore a shareholder. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

The statute provided for the issue of letters patent on half the capital being subscribed, though no express provision was made as to when the company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was, in fact, elected and acted as a director, and never resigned his position as such :—Held, that he could not set up as a defence that all the stock must be subscribed before calls could be made; and that the directors were warranted by the act in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor. *Ib.*

A bonâ fide subscription for stock in a corporate company by one person in his own name, but really as trustee and agent for another who had requested such stock to be subscribed for, is valid. *Davidson* v. *Grange*, 4 Chy. 377.

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2. *Making Calls.*

The gas company of Toronto sued stockholders in separate actions of debt, founded upon 11 Vict. c. 14. The plaintiffs' charter authorizes actions for calls made by the directors of the company, "under and by virtue of the power and directions of that act." It was proved that the secretary, acting under a resolution merely of the directors, passed *before* the 11 Vict. c. 14, came into force, notified the stockholders that a call of ten per cent. would be made on the first of May, June, July, and August :—Held, that the action would not lie. *Gas Company* v. *Russell et al.*, 6 Q. B. 567.

Semble, that it is not a resolution of the directors to make a call upon the stockholders, which constitutes the call, but the notice of advertisement of the call itself. *Ib.*

Semble, that where an act says, "that no instalment shall be called for except after the lapse of one calendar month from the time when the last instalment was called for," calls made for 1st of May, June, July, and August, would be illegally made. Quære, also, whether the four calls could regularly be made at one time. *Ib.*

An instrument under 12 Vict. c. 84, was signed by defendant and others for the formation of a road company, defendant agreeing to take three shares. The directors named met on the 27th of May, 1850, and called in four instalments, each of ten per cent. on each share. The six per cent. required by the statute was at the same meeting paid by the promissory note of the directors to the treasurer, who then signed a receipt for the money, and afterwards registered the instrument. By the 20th of November, 1850, the treasurer had received, by means of the call, a sum equal to the six per cent., and he then destroyed the note. On the 13th of January, 1854, another call was made, payable by six instalments; and this action was brought for the four instalments of the first call, and the first three instalments due on the second :—Held, that the first call could not be recovered, for when it was made the six per cent. had not been in fact paid, but that the plaintiffs might recover the second call, for on the 13th of January the six per cent. had been actually paid; and the company having proceeded bonâ fide in the construction of this road, the irregularity in registering the instrument of incorporation before such payment was cured by 16 Vict. c. 190, s. 55. *Nelson and Nassagaweya Road Co.* v. *Bates*, 12 Q. B. 586.; confirming, as to the first point, *Niagara Falls Road Co.* v. *Benson*, 8 Q. B. 307. See, however, *Nelson and Nassagaweya Road Co.* v. *Bates*, 4 C. P. 507.

A gas company incorporated under 16 Vict. c. 173, by resolution of the directors made certain calls to be paid on particular days named, but by the notice published they were made payable on different days. Defendant had written to the company, enclosing his note for four of the calls, saying that for the balance he would send his note soon, and requesting them to accept this offer, as he had been absent in Europe, and had no knowledge of any of the calls. The company, however, declined :—Held, that the calls were illegal, being unauthorized by the resolution, and that defendant was not estopped from disputing them. *London Gas Company* v. *Campbell*, 14 Q. B. 143.

A call of four per cent. on the first instalment of five per cent. on the capital stock, made by a quorum only, and not by a majority of the directors,—Held, a good call, under sec. 9 of 12 Vict. c. 166, plaintiffs' act of incorporation. *Ontario Marine Insurance* v. *Ireland*, 5 C. P. 139.

When the directors of a railway company at *one meeting* made several calls payable at intervals of two months from each other :—Held, bad, for the calls cannot be made at less intervals than two months. *Moore et al.* v. *McLaren*, 11 C. P. 534.

The plaintiffs' charter provided that stockholders should pay up their shares "by such instalments and at such times and places as the directors of the said corporation shall appoint." It provided also for the appointment of a managing director, "to whom shall be delegated the special management of the business of the society." The directors passed a resolution, ordering a call, payable in two payments on days specified, and directing the secretary to notify the stockholders according to the act. A notice signed by the managing director "by order," was published, and a circular signed by him sent to each shareholder, in which the place of payment was mentioned; but there was no meeting of directors between the passing of the resolution and the day named for payment. In an action for this call :—Held, a fatal objection that the directors had appointed no place of payment, the advertisement and circular being the act of the managing director only. *Provident Life Assurance and Investment Co.* v. *Wilson*, 25 Q. B. 33.

Held, that the Lake Superior Navigation Company, incorporated under 27 & 28 Vict. c. 23, were entitled to call in all the unpaid stock at one time, as the act did not prevent their so doing. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

To an action for calls, alleged to be due by defendant to the Canada Car and Manufacturing Co., defendant pleaded, on equitable grounds, that he subscribed for the shares and became a shareholder in a company, called the Canada Car Co., incorporated by letters patent, for cer-

tain specified purposes, and not otherwise: that afterwards, and without the assent and against the will of defendant, that company applied to the Dominion legislature and obtained an act constituting the shareholders therein a body corporate, under the name of the Canada Car and Manufacturing Co., the now plaintiffs: that by the said act greater powers were conferred upon plaintiffs than were possessed by the Canada Car Co., and the nature of the business was varied and extended, and the undertaking rendered more hazardous than was contemplated by the Canada Car Co. or the defendant when he became a shareholder thereof; and that defendant never agreed to become a shareholder of or invest his money in a company possessing the powers of the plaintiffs; whereby defendant is relieved from liability:—Held, plea clearly bad; for the act was binding on all the shareholders, whether assenting or not to the application for it; and this court had no jurisdiction to relieve defendant from a liability which the statute expressly declared that he should continue to be subject to. *Canada Car and Manufacturing Co.* v. *Harris*, 24 C. P. 380.

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3. *Transfer.*

(a) *Generally.*

A witness who was a stockholder in and also the president of a banking institution, stated, in an action brought by the bank, that he had released his stock for a nominal consideration to the directors, but that he had no doubt it would be restored to him:—Held, that the transfer was merely colourable, and that his testimony was not admissible. *Bank of Michigan* v. *Gray*, 1 Q. B. 422.

Defendant, as sheriff, by his deputy, levied under a fi. fa. on twenty-five shares of the stock of the Bond Head Harbour Co., in the books of the said company appearing to be the property of W. H. B. Having written to the plaintiff in this suit to say that he had done so, he afterwards returned the writ nulla bona:—Held, that the shares not having been transferred in the books of the company, were at the time of the levy at the order and disposition of said W. H. B., and liable to execution as being his property, and did not pass to his trustees under a deed of assignment to them. *Brock* v. *Ruttan*, 1 C. P. 218.

Assumpsit for calls on shares. Plea, that defendant was not, when action brought, nor is the holder of said shares:—Held, bad, for by the 10 & 11 Vict. c. 68, s. 13, incorporating defendants, a person ceasing to be stockholder after the call was made would still be liable. *Montreal Mining Company* v. *Cuthbertson*, 9 Q. B. 78.

Certain stock in the British America Assurance Co. was transferred by A., and the transfer entered in the stock ledger, so that the shares stood in the name of the transferree, but before any acceptance had been signed the shares were seized under an execution against the transferror:—Held, that the transfer was complete and the seizure illegal. *Woodruff* v. *Harris*, 11 Q. B. 490.

Held, that an assignment of stock in this company, duly executed by assignor and assignee, for a good consideration, with proper notice to the company, is valid without further registration, provided the assignor is not indebted to the company and owes no calls. *Crawford* v. *Provincial Insurance Co.*, 8 C. P. 263.

In an action against a harbour company, for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, that although S., being president of the company, might perhaps have registered the assignment himself, yet that the refusal of the secretary to do so formed a good ground for an action against the company. *McMurrich et al.* v. *Bond Head Harbour Co.*, 9 Q. Q. 333.

Held also, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground refuse to register the assignment. *Ib.*

Held, also, as to four shares, of which there appeared only an entry of credit to S. in a ledger, but which were not standing in his name in the stock-book, that the plaintiffs were not entitled to recover in respect of such shares. *Ib.*

Held, also, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *Ib.*

Held, that registration in the books of the company is necessary in order to complete the transfer. *Ib.*

To an action brought for two calls, one made on the 9th of December, 1858, and the other on the 17th of June, 1859, defendant paid into court the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th of February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for, by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced, in which the stock appeared in M.'s name since the 5th of February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney:—Held, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer, as agent for both parties, and recognized in their books: that it was unnecessary to produce the bond given by defendant; and that defendant was not estopped by having paid the call made in December, 1858, from denying that he had transferred the stock before the call was made. *Provincial Insurance Co. of Canada* v. *Shaw*, 19 Q. B. 533.

Where the directors of a railway company at one meeting made several calls, payable at intervals of two months from each other:—Held, bad, for the calls cannot be made at less intervals than two months; and that a stockholder who had paid the first call thus made, and then transferred his shares, was not responsible for the subsequent calls thus illegally made. *Moore et al* v. *McLaren*, 11 C. P. 534.

Held, also, that the insolvency of the assignee was no objection to the transfer, the only condition for a valid transfer being the payment of all calls. *Ib.*

Held, that a company incorporated under 27 & 28 Vict. c. 23, has not power to refuse to allow a transfer of shares of its stock without assigning a sufficient reason therefor. *In re Smith* v. *Canada Car Co.*, 6 P. R. 107.—C. L. Chamb.—Richards.

See *McKenzie* v. *Kittridge*, 24 C. P. 1 p. 761.

(b) *Sale and Transfer under Execution.*

Held, that Bond Head Harbour Co. stock was personal property of the debtor, and liable to be seized and sold under an execution against him. *Brock* v. *Ruttan*, 1 C. P. 218.

Held, that stock in a building society may be taken in execution under 12 Vict. c. 23; but, Held, also, that under the circumstances of this case set out in the report, the stock in question was not property belonging to the execution debtor, Banks, which the sheriff was bound to seize. *Robinson* v. *Grange*, 18 Q. B. 260.

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff as a shareholder:—Held, that the C. S. C. c. 70, as well as C. L. P. Act, ss. 255, 256, must be obeyed; and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin* v. *Ottawa and Prescott Railway Co.*, 22 Q. B. 186.

Upon an application to compel a railway company by mandamus to register a transfer of stock, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen and commonalty of the city of Ottawa," and by C. S. U. C. c. 54, the name of the corporation was changed to "the corporation of the city of Ottawa:"—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given:—Held, also, that a demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company was sufficient, the court being of opinion that service and demand upon the president was not indispensable. *In re Goodwin and the Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Several demands to transfer the stock having been made, and delays and evasive answers given without in direct terms refusing:—Held, that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer. *Ib.*

Held, also, that a mandamus may be directed to the company, without naming the officers. *Ib.*

On application for such a mandamus:—Held, that a demand and refusal after service of the attested copy of execution was essential, under C. S. C. c. 70. The execution debtor was the president of the company, and on shewing cause, he asserted payment of the execution before the sale, &c.:—Held, that this could not justify the company in refusing to transfer, for they had no concern with the transactions between the execution plaintiff and defendant, or between defendant and the sheriff. Quære, as to the effect of a delay in serving the attested copy beyond the ten days after the sale, prescribed by the act. *In re Guillot and the Sandwich and Windsor Gravel Road Co.*, 26 Q. B. 246.

Held, that the stock of an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff, under C. S. C. c. 70, ss. 3, 4, and not from the time of the delivery of the writ to the sheriff. *Hatch* v. *Rowland*, 5 P. R. 223.—C. L. Chamb.—Dalton, *C. C. & P.*

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4. *Forfeiture.*

Held, in accordance with the court of Common Pleas, that the company were not restricted to the remedy by forfeiture, but might maintain an action against a shareholder upon calls of stock subscribed. Draper, J., diss. *Marmora Foundry Co.* v. *Jackson*, 9 Q. B. 509. See *Marmora Foundry Co.* v. *Murney*, 1 C. P. 1, 29; *Marmora Foundry Co.* v. *Boswell*, 1 C. P. 175.

To a declaration for calls under section 10 of plaintiff's charter, 12 Vict. c. 166, defendant pleaded, that by nonpayment of said calls the shares became forfeited in pursuance of the statute, and that defendant acquiesced in such forfeiture, of which plaintiffs had notice:—Held, bad, for defendant could not thus forfeit the shares. *Ontario Marine Ins. Co.* v. *Ireland*, 5 C. P. 135.

Where a trading company, incorporated by statute, became insolvent:—Held, that one of the partners, being also a judgment creditor of the company, was entitled to a decree compelling the directors to make calls upon the stock of subscribers, notwithstanding a clause in the statute declaring the shares of defaulters should be forfeited, the forfeiture being cumulative to all other remedies to which a creditor was entitled. *Harris* v. *The Dry Dock Co.*, 7 Chy. 450.

In January, 1864, a non-borrowing member of a building society died intestate. No one administered until June, 1867. In that interval his shares in the building society ran into arrear, and in consequence the society, in November, 1865, declared them forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up or was supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:—Held, 1. That the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; 2. That the plaintiff (the administrator) was entitled to relief, and that the lapse of time between the attempted forfeiture and the procuring letters of administration was no answer to the claim. Draper, C. J., Hagarty, C. J., Wilson, J., and Gwynne, J., diss. *Glass* v. *Hope*, (in appeal,) 16 Chy. 420; *S. C.* in the court below, 14 Chy. 484.

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5. *Liability of Shareholders to Creditors.*

The plaintiff, a creditor of a company incorporated by letters patent, sued defendant, a shareholder, who pleaded that there was nothing due upon his stock. It appeared that there were

nine shareholders, two of whom held a patent right under which the company were to work. The defendant held $5,000 stock, on which he had paid in cash $1,000. It was arranged between the patentees and the other shareholders, that the latter should pay an additional ten per cent. on their stock, making twenty per cent., in consideration of which the patentees, who were said to have a large cash claim against the company for their patent right, were to pay up the balance of the unpaid stock of the seven shareholders, equal to $28,000, out of this claim. In pursuance of this arrangement, each of the seven gave his check to the secretary for the balance of his unpaid stock, which the secretary passed on to the patentees, who accepted them and gave receipts to the company for the amount. The patentees then handed back the checks and receipts to the secretary, who returned the checks to the shareholders by whom they were given; it having been agreed beforehand that they were to be so returned, and not used:—Held, that this transaction was not a payment in full of the stock, and that defendant was liable. *Scales* v. *Irwin*, 34 Q. B. 545.

In an action against defendants as stockholders of a joint stock company incorporated under C. S. C. c. 63, for debts incurred by the company to plaintiffs, the declaration averred that the whole amount of the capital stock had not been paid in, nor a certificate to that effect, signed and sworn to by a majority of the trustees of the company, registered in the registry office of the county, nor had the defendants paid up the full amount of their shares, nor made nor registered a certificate to that effect as required by the act:—Held, good, for it was unnecessary to negative the registration of a certificate, under s. 46, of the payment in full of the capital stock, and the requirements of s. 35, which were negatived, could not be dispensed with in the case as stated in the declaration. *McKenzie et al.* v. *Kittridge et al.*, 24 C. P. 1.

Quære, as to the application and meaning of s. 46. *Ib.*

The defendants' first plea alleged that they were not, at the respective times when the debts were made or contracted, or at any time from thence until the commencement of this suit, stockholders in the company:—Held, good, not being open to objection as tendering an immaterial issue, whether defendants were stockholders at the commencement of this suit, for the averment as to that could not prejudice or embarrass the plaintiff. *Ib.*

The replication to the first plea alleged, that although the defendants did transfer their shares to other parties, the balance due thereon had not been paid in, as required by the act:—Held, bad, for under ss. 29 and 30, if all previous calls had been paid, the defendants might transfer; and without such payment they could not transfer, and would remain stockholders. *Ib.*

The second plea alleged that within five years after incorporation defendants paid up their full shares, and thereafter and before suit, namely, 1st October, 1873, a certificate to that effect was signed and sworn to by a majority of the trustees, including the president, before the registrar, and was on the same day duly registered, as prescribed by the act:—Held, good, without alleging that it was filed within thirty days, for that the limit, prescribed by s. 35, applies to the general payment in full of the stock, not to payment by one individual shareholder; and that it was unnecessary to shew that defendants paid up within the time mentioned in the declaration of incorporation, or that the certificate was filed before the contracting of the debts sued for. *Ib.*

Under s. 33, as soon as a shareholder, has paid up his full shares, and registered the certificate prescribed, his liability ceases, except in the cases specified in the act; and this notwithstanding s. 34, which, owing to the manner in which the previous statutes have been consolidated, is apparently inconsistent. *Ib.*

Under the C. L. P. Act, s. 97, to make a plea a good plea to the further maintenance of the action, it is sufficient if it disclose on its face matter which arose after the commencement of the action; no formal commencement is necessary. Therefore in an action by creditors against shareholders of a company, a plea setting up the payment of their shares in full by defendants, not saying before the suit, and that a certificate to that effect was drawn up, sworn, and registered after the commencement of the suit, was—Held a good plea of a defence arising after suit, the defence being incomplete without the registry. *S. C. Ib.* 145.

Sec. 68 of the Imperial Statute, 7 & 8 Vict. c. 110, provides a summary proceeding whereby a creditor who has obtained a judgment or decree against any company incorporated thereunder, may call on any shareholder, by motion or otherwise, according to the practice of the various courts, to pay his claim. Upon such an application against shareholders resident in this country by a creditor who had obtained a decree:—Held, per VanKoughnet, C., that the statute did not apply to proceedings in our courts.—Spragge, V. C., dubitante. *Penley* v. *The Beacon Assurance Co.*, 10 Chy. 422.

III. Directors, Officers, and Agents.

1. *Election of Directors.*

Where in a prior statute the two directors having the smallest number of votes of the five chosen in a former election were declared to be ineligible at any subsequent election, and by a subsequent statute the number of directors was fixed at seven, and the persons named who were to constitute the board until the next election—the court held that two of the board having vacated their seats by non-residence, rendered it unnecessary for two of the remaining five to vacate their seats. *Rex* v. *Welland Canal Co.*, Tay. 300.

Where an election of directors in a joint stock company was clearly illegal—the voters having been each allowed only one vote, whereas each share should have given a vote—but the parties chosen had for more than eight months discharged the duties, the court refused to interfere by mandamus for a new election. Quære, whether mandamus or quo warranto would be the proper remedy. *In re Moore and The Port Bruce Harbour Co.*, 14 Q. B. 365.

The Court of Chancery has jurisdiction to set aside an election of directors by persons who are

subscribers nominally and not bonâ fide. *Davidson* v. *Grange*, 4 Chy. 377.

A suit to set aside an election of directors of a corporation on the alleged grounds of fraud, may be brought by some of the shareholders on behalf of all, and need not be in name of the corporation itself. *Ib.*

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2. *Personal Liability of.*

The plaintiff sued the defendant for lumber furnished on the occasion of the provincial agricultural society's meeting at Hamilton. The defence was, that the society, which was an incorporated body, was liable, and not the defendant personally. The learned judge at the trial left it to the jury to find upon the evidence whether the defendant had contracted with the plaintiff personally, or as one of a committee of gentlemen who undertook to superintend, in either of which events he held him to be personally liable; but the jury were told, that if he contracted as only representing or on behalf of the corporation, he would then not be personally liable:—Held, that the ruling was correct. *Simpson* v. *Carr*, 5 Q. B. 326.

Assumpsit for work and labour. The plaintiff put in a paper headed, "Memoranda of an agreement made and entered into this 23rd of March, 1854, between the directors of the Victoria Bridge Company of, &c., of the first part, and J. J. (the plaintiff) of," &c. It contained an agreement by the plaintiff to do certain work for specified prices, which "the party of the first part hereby agree to pay," &c., and was signed by defendant, describing himself as "Pres. V. B.," and by the plaintiff. It appeared that the company had been duly incorporated, and that the plaintiff had received £350 from them on account of this work:—Held, that defendant was not personally liable. *Johnson* v. *Hamilton*, 13 Q. B. 211.

In consequence of arrangements for uniting the Grand Trunk Telegraph Co. with the British North American Association, the superintendent of the former company, on the 19th December, 1854, wrote to its president and directors, expressing his readiness (in order not to embarrass the company in its operations) to cease his connection with it on the 31st December, 1854, on the company guaranteeing to him his salary for six months from the 1st January, 1855. The president replied, "We are in receipt of your favour of this date, upon the subject of your retiring from the office you now hold under us. We will be happy to meet you in the way set forth; and we hereby pledge ourselves to carry out the provisions mentioned in your behalf. (Signed), "G. H. Cheney, president, on behalf of myself and the directors of the G. T. T. Co.:" —Held, that the president's reply amounted to a personal guarantee. Richards, J., diss. *Boyd* v. *Cheney*, 5 C. P. 494.

Plaintiffs sued defendants for breach of an agreement by which defendants bound themselves to carry lumber for the plaintiffs from Peterborough to Port Hope at a stipulated price. The agreement set out, which was dated in November, 1865, recited that defendants were engaged in running the Port Hope, Lindsay and Beaverton railway, and the Millbrook branch thereof. One of the defendants was president and the other managing director. The jury were asked to find whether the agreement was made by defendants acting as agents for and directors of the company, of which plaintiffs had notice, and having found in the negative and assessed damages in favour of plaintiffs, the court refused to interfere with their verdict, as contrary to law and evidence. *McDougall et al.* v. *Covert et al.*, 18 C. P. 119.

Held, that a member of a committee is not responsible for the salary of a person employed by the committee (under a joint stock banking charter,) before he became a stockholder in the bank and such member. *Mingaye* v. *Burton*, 16 C. P. 60.

Certain persons, seven in number, defendant being one, were incorporated as the Amherstburgh and St. Thomas Railway Co., with power, among other things, to obtain a certain amount of stock. As soon as it was obtained, a meeting of the stockholders was to be called to organize the company. These seven acting as provisional directors, passed a resolution authorizing one M. R. to retain counsel to prosecute a suit in Chancery on their behalf, and on the same day the board of directors, which had been previously chosen by the stock holders, passed a resolution to the same effect. The plaintiffs were thereupon retained, and proceedings in Chancery instituted for the costs of which this action was brought: Held, that the resolution being an illegal act, and the responsibility arising therefrom not being removed by the resolution of the general board of direction, the defendant as well as the others who authorized retaining the plaintiff, was liable personally. *McDonald et al.* v. *Macbeth*, 11 C. P. 224.

L. arranged with the Canada Agency Association, an English company investing money in Canada, and having defendant R. as their manager, and defendant H. as one of their local directors, for a loan of money. After paying off a prior mortgage on the lands of L., and the expenses, &c., the manager sent to his order a cheque for the balance of $889.95, signed by R. & H. the defendants. L. having made a claim for a larger amount, brought an action against R. & H. to recover the amount he claimed to be due him:—Held, that defendants were not liable, as they never received any money to the use of the plaintiff, having no control over the money except as manager and director of the Canada Agency Association and were in no wise acting as individuals on their own behalf, but solely as officers of the company; that the evidence did not establish any privity between the plaintiff and the defendants in respect of the money claimed, and without such privity the action would not lie. *Heward* v. *Logan*, 14 C. P. 592.

The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over estimating the assets and under estimating the liabilities, thereby inducing defendant to believe it sound and to purchase stock:—Held, upon the evidence set out in the case, 1, That there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent

intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed; 2. That the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by defendant. 3, That if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information. *Parker* v. *McQuesten*, 32 Q. B. 273.

Where the directors of an incorporated company misappropriate the funds of the corporation, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stock-holders on behalf of all except the directors; the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. *Hamilton* v *Desjardins Canal Co.*, 1 Chy. 1.

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3. *Powers of.*

Case for overflowing land of the Canada Company. The defendant produced a letter to one S., under whom he claimed, from the plaintiffs' agent, saying that the land would be sold to him for the purpose of erecting a saw mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, and that he should furnish the company, or their settlers, with lumber at a reasonable rate:—Held, that this letter could not be construed as a license to the defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam was known to and contemplated by the parties at the time:—Held, also, that the plaintiffs, as a corporation, could not be bound with respect to such an injury as was shewn in this case, by any thing done by their ordinary agents without special authority. *Canada Company* v. *Pettis*, 9 Q.B. 669.

Held, Richards, C. J., hesitante, that the president or other principal officer of a corporation taking a mortgage for and in the name of the corporation does not act as its agent, but as principal in the exercise of its corporate powers; and may, therefore, make the affidavit of bona fides under C. S. U. C. c. 45, without authority in writing. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

The defendants wishing to introduce an ore, called "blue ore," into Pennsylvania, corresponded with the plaintiff at Pittsburg. Through the plaintiff's intervention an agreement was made between O. & Co. and defendants for the sale of 15,000 tons, to be delivered before the 1st of August, 1872, with an option to O. & Co. to order any number of tons, from 10,000 to 30,000, during the five years from the 1st of February, 1873, and a formal contract was subsequently executed. On the above sale being effected, C., defendants' managing director, wrote plaintiff that a commission of 15 cents per ton would be paid him on the sale, and that he would make him the following offer for the future: "I will give you a commission of 10 cents per ton for all ore introduced to any furnace, that is, for the first sale made to any furnace; and a commission of 5 cents per ton for all blue ore for the years 1873, 4, 5, 6, 7, that is, for five years from the 1st of January, 1873; and I make you the sole agent for the sale of blue ore for Western Pennsylvania:"—Held, that proof merely that C. was defendants' managing director was not sufficient evidence under 16 Vict. c. 253, ss. 10, 20, of C.'s authority to enter into the contract with plaintiff; but it should have been shewn that his act was in accordance with the powers conferred on him:—Held, also that the plaintiff was not an agent within sec. 17, so as to require his appointment by by-law. *Taylor* v. *The Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 24 C. P. 200.

A bank having executions against a railway company in the hands of the sheriff, the secretary of the company, in order to avert a seizure of a quantity of railway iron, signed a letter agreeing that the bank, out of moneys coming to their hands from certain garnishee proceedings taken by the bank against debtors of the company, might retain "a sufficient amount fully to cover all your solicitor's costs, charges, and expenses against you or against you and us, as between attorney and client or otherwise; as well as the costs, charges, and expenses of your bank, of what nature or kind soever, and after the payment of such, in the second place, to hold the surplus, if any, to apply on your executions against us." This letter was signed without any authority from the board of directors of the company, although two members of the board were aware of it, and one of them, the vice-president of the company, authorized it:—Held, that this was not such an act as the officers of the company were authorized in the discharge of their duties to perform; and that, although the bank granted the time asked for, they could not enforce payment of the amounts stipulated for. *The Hamilton and Port Dover R. W. Co.* v. *The Gore Bank*, 20 Chy. 190.

A railway company being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due the company, the costs of which as between attorney and client the railway company was to pay:—Held, that the officers of the company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. *Ib.*

Where a vote of the shareholders of an incorporated company had authorized the directors to raise money on the security of the company's lands, and one of the directors afterwards, by arrangement with the other directors, advanced money for the use of the company, and took a mortgage on their lands, it was held that a third party, who subsequently became the purchaser of the mortgaged estate, could not resist the claim of the mortgagee, on the ground that a mortgage to a director was invalid. *Greenstreet* v. *Paris Hydraulic Co.*, 21 Chy. 229.

IV. Liability of Members.

In an action against a member of a joint stock company, his admissions that he was a partner

are sufficient to prove his liability, without producing the partnership deed; and when a company is formed for purposes which do not render the drawing and accepting of bills and notes necessary, it will be sufficient to establish the liability of a partner, on bills or notes drawn or accepted in the name of the company by their secretary that while he was a partner the secretary was in the habit of so drawing and accepting bills, which were afterwards paid with his concurrence and admission of liability. *Lee* v. *McDonald*, 6 O. S. 130.

On sci. fa. to render the individual members of a company formed under the general act 16 Vict. c. 191, liable for its debts:—Held, that in the absence of any express provision in such act, they were not so liable, and even if they were, Quære, whether they would not have been exempted by the operation of 12 Vict. c. 10, s. 5, sub-s. 24. *Emerson* v. *Flint*, 7 C. P. 161.

See III. 2, p. 763.

V. Powers of.

Quære, whether manufacturing new steam engines for steamboats was within the purposes for which defendants were incorporated. *Hamilton* v. *Niagara Harbour and Dock Co.*, 6 O. S. 381.

Where a corporation is empowered by statute to enact by-laws and impose a penalty for their infraction, not exceeding a certain amount, a by-law is bad which annexes a penalty to an offence but does not declare its amount. *Peters* v. *The President and Board of Police of London*, 2 Q. B. 543.

Under 1 Vict. c. 30, and 7 Vict. c. 16, the Kingston Marine Railway Co., may give and receive promissory notes in the course of transacting their legitimate business. *Kingston Marine R. W. Co.* v. *Gunn*, 3 Q. B. 368.

In declaring upon such notes, the plaintiffs need not aver the consideration upon which they were received. *Ib.*

The omission of the words "value received" in a note, or the fact that a note is made payable at a certain time after date, affords no inference that such notes were taken in violation of the clause of the charter prohibiting the company from banking operations. *Ib.*

Held, that the plaintiff was not precluded from recovering money advanced to B. for the liquidation of liabilities by B. to the Niagara Harbour and Dock Co., or from enforcing any security for its repayment, because that company, in such transactions, exceeded the power conferred on it by its charter. *Cayley* v. *McDonnell*, 8 Q. B. 454.

The defendants being unable to finish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies, and resolutions passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the work done: Held, that they could not recover, for constructing defendants' road was a matter without the scope of their charter. *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.*, 17 Q. B. 477.

The exception in the last clause of 22 Vict. c. 85, which prevents corporations, &c., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it. *The Edinburgh Life Assurance Co.* v. *Graham*, 19 Q. B. 581.

The defendants, a life insurance company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of the loan. Semble, that even if the exception above mentioned had applied to them, this would not constitute usury. *Ib.* See, also, *Reed* v. *Whitehead*, 10 Chy. 446. *The Corporation of North Gwillimbury* v. *Moore*, 15 C. P. 445.

The Great Western Railway shareholders resolved in 1857, to advance £150,000 stg., to the Detroit and Milwaukee Railway company, and again, in 1858, a further sum of £100,000 stg. The first loan was expressly sanctioned by parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway Company, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee company to be deposited with the plaintiffs, and exchange on the Great Western Railway's London board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee railway account, Great Western Railway," and kept distinct from the Great Western Railway account proper. Large advances were made, and exchange drawn; the business was carried on for two years, and moneys advanced by the G. W. R. to the D. & M. Co., beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. It was proved that of the two loans only about $700,000 was paid to the plaintiffs by exchange or traffic receipts. Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co., or to the individual directors negotiating the arrangement, and the plaintiffs sued for the balance overdrawn, amounting to about $1,000,000. At the trial many objections were taken:—that credit was not given to defendants; that they could not be bound except under seal; and that all advances to the foreign company were ultra vires, as the plaintiffs well knew. Leave was reserved to move for a nonsuit, and it was left to the jury to say (among other things) to whom credit was given, who reaped the benefit of the expenditure of this money, and whether the plaintiffs had any notice of the loans being exceeded. The jury found all these points in favour of the plaintiffs:—Held, that the plaintiffs as bankers could under the special circumstances recover, although there was no evidence of a debt under seal; that the objection of the advances being ultra vires

could not prevail under the peculiar facts of the case; that it was a question of fact for the jury whose credit was actually pledged and to whom credit was given; and that there was evidence to support the finding for the plaintiffs. *Commercial Bank* v. *Great Western R. W. Co.*, 22 Q. B. 233; *Great Western R. W. Co.* v. *Commercial Bank*, 2 E. & A. 287; affirmed on appeal to the Privy Council, 3 Moore P. C. C. N. S. 295.

By their act of incorporation, 26 Vict. c. 31, Huron College is authorized to take, hold, and convey lands sold, given or granted to it, provided that such land so held shall be only such as may be required for the purposes of college buildings, &c.; and provided, also, that it may acquire any other real estate, by gift, devise or bequest, and hold the same for seven years, to revert to the person from whom it was acquired if not disposed of within that time. The plaintiff in ejectment claimed as assignee of a mortgage executed to the college in 1864, and assigned by them to him in the same year; and it was objected that they had no power either to take or assign such mortgage:—Held, that under the first part of the clause the college could not take the land; and if prevented from holding it by the first proviso, that the crown only could take advantage of their disability, and they could convey their defeasible title. *Becher* v. *Woods*, 16 C. P. 29.

Quære, whether they could not also acquire this land under the second proviso, the word "gift" being often confounded with "grant." If they could, they had assigned to the plaintiff within seven years; and in either view, therefore, he was entitled to recover. *Ib.*

Defendant being employed by plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labour:—Held, that defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs under their charter could not sue on such a cause of action. *Northern R. W. Co.* v. *Lister*, 27 Q. B. 57.

The plaintiffs supplied goods to a co-operative association, formed under 29 Vict. c. 22, on the order of their manager. The terms of purchase were said to be cash, but it appeared that according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct, the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued:—Held, not a cash transaction within the 14th section of the act, and that the plaintiffs could not recover. Semble, that the defence should have been specially pleaded, and the plea was allowed to be added. *Fitzgerald et al.* v. *The London Co-operative Association Limited*, 27 Q. B. 605.

Held, that the Roman Catholic bishop of S., incorporated by 8 Vict. c. 82, as "The Roman Catholic Episcopal Corporation of the Diocese of Sandwich in Canada, had no power to borrow so as to bind his successor; and therefore that the plaintiff, having lent money to such bishop, which was used in the construction of the episcopal residence, and for the purposes of the church, and taken security for repayment under the corporate seal, was not entitled to recover against the corporation. *Ruitz* v. *The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 Q. B. 269.

Held, on demurrer to a plea setting up the absence of the corporate seal, that a parol agreement entered into by "the duly authorized agents" of an incorporated insurance company, to refer to arbitration the question of the legal liability of said company to bear any portion of the expenses of raising and repairing a vessel insured by them and subsequently lost, was not binding upon the company, as not being a contract relating to the purposes for which the company was incorporated. *Calvin* v. *The Provincial Insurance Co.*, 20 C. P. 267.

An insurance company was by its charter authorized to hold real estate for the immediate accommodation of the company, "or such as shall have been bonâ fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts;" and having sold and conveyed a vessel, took from their vendee mortgages on real estate to secure the purchase money:—Held, a transaction within the act of incorporation, the price of the vessel being a debt existing previously to the execution of the mortgages; and, Semble, that under these words of the act it was not, as with banking institutions, necessary to the validity of such a mortgage that any previous indebtedness should exist. *Western Assurance Co.* v. *Taylor*, 9 Chy. 474.

An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a company's incorporation act, and as was conclusive to the attainment of those objects, having been duly carried out:—Held, that the arrangement could not afterwards be declared to have been beyond the powers of the company or its directors, so as to entitle the company to keep for their own use, without compensation to the plaintiff, the whole benefit which the arrangement had afforded the company. *Ib.*

M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region as entitled to it. He made known this location to an incorporated mining company, under an agreement that he should be compensated for the communication, but the mode of compensation was not determined. The communication having proved valuable to the company, it was held that M. was entitled to compensation in the manner usual in such cases. The usual mode was proved to be by receiving a share or partnership interest in the mine when the patent is procured:—Held, that this mode was not ultra vires of the company or the directors. *McDonald* v. *The Upper Canada Mining Co.*, 15 Chy. 179.

A railway or canal company cannot lease the concern or delegate its powers for a specified term without the sanction of the legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its act of incorporation. *Hinckley* v. *Gildersleeve*, 19 Chy. 212.

By acts of the Legislature of Canada and the State of New York respectively, a company was incorporated in either country for the purpose of constructing a suspension bridge across the river Niagara, for railroad and other purposes, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of their charters, to a railway company, to be for their exclusive use, and the use of such other railway companies as the lessees might arrange with:—Held, that such assignment was ultra vires and void. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Chy. 34.

The Erie and Niagara Railway Company had, by statute, authority to arrange for the passage over such bridge from Canada into the United States; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon an information by the attorney-general of Ontario, at the relation of The Erie and Niagara Company, and a bill by that company, was filed against the two bridge companies and their lessees, complaining of such refusal; and praying a declaration, 1, that the lease of the bridge was ultra vires; 2, that the Erie and Niagara Company were entitled to the use of the bridge on paying reasonable tolls; and for an injunction restraining the defendants from preventing The Erie and Niagara Company using the bridge. The evidence shewed that The Erie and Niagara Company had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to The Erie and Niagara Company was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognize their right to use the bridge, the court, at the hearing, dismissed their bill as against all the defendants, and also dismissed the information as against the American Bridge Company with costs; declared the lease of the bridge, as regarded the Canadian Bridge Company void, and restrained them from further acting thereunder. And, Semble, that even if The Erie and Niagara Company had established a complete title to relief as against the Canadian Bridge Company, still, as this court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of The Erie and Niagara Company to cross as far as the Canadian Bridge Company's charter extended, i.e., to the centre of the bridge, and was thus unable to afford any effectual assistance, the court on this ground also would have refused to interfere. *S. C. Ib.*

VI. Contracts by and with Corporations.

1. *Liability on Contracts not under Seal.*

(a) *For Work and Labour.*

Where a corporation had contracted under seal with the plaintiff for certain work, which was afterwards departed from by their orders, with the plaintiff's consent:—Held, that assumpsit would lie for the value of the work done under the substituted contract. *Davis* v. *Grand River Navigation Co.*, 6 O. S. 59.

Assumpsit held not maintainable against defendants for the non-performance of a parol agreement to build an engine for a steamboat. *Hamilton* v. *The Niagara Harbour and Dock Co.*, 6 O. S. 381.

The trustees of a school section, being a corporation under 13 & 14 Vict. c. 58, were—Held, not liable to pay for a school house erected for and accepted by them, not having contracted for the erection of same under seal.—Macaulay, C. J., diss. *Marshall* v. *School Trustees of School Section No. 11, Township of Kitley*, 4 C. P. 373.

Where work done for a corporation is such as was evidently contemplated by their charter and they have accepted and availed themselves of it, they cannot refuse to pay on the ground that there was no contract under seal:—Held, therefore, that the Hamilton and Gore Mechanics' Institute were liable to the plaintiff for services rendered by him as an architect upon a verbal agreement, in preparing plans and superintending the erection of a hall for their accommodation.—Draper, J., diss. *Clark* v. *Hamilton and Gore Mechanics' Institute*, 12 Q. B. 178.

Defendants having called for tenders for making plank side-walks in December, 1854, the plaintiff sent in an offer, which the then council passed a resolution to accept; and several of the members pressed the plaintiff to proceed. He went on, but in January, the new council refused to sanction the contract, and he then desisted, and sued the corporation:—Held, that he could recover the value of the work, but not the damages sustained from not being allowed to finish the job. *Bartlett* v. *The Municipality of Amherstburg*, 14 Q. B. 152.

The plaintiff sued for work done upon a road in the township of Russell. In June, 1851, a resolution of the municipality was passed, that the road surveyor should be associated with J. S., one of the councilors for Russell, to receive tenders and approve of contracts for opening the road from the boundary line of Cambridge and Russell to Louck's mill in Russell. The plaintiff's tender was accepted in pursuance of the resolution of June, 1851, and the work was performed, examined, and approved of by the surveyor and S., the councillor named in that resolution:—Held, that a contract under seal was unnecessary. *Fetterly* v. *The Municipality of Russell and Cambridge*, 14 Q. B. 433.

The municipal council for 1856 passed a resolution that certain work should be done, for which a verbal tender was made by the plaintiff to the street and side walks committee, and accepted in writing by a majority of the committee after the last meeting of the council in 1856, and without the tender having been submitted to the council, or any written contract executed. In April, 1857, some time after the plaintiff had commenced the work, the council notified him not to proceed, but he went on and completed it, and in this action brought for the price, a verdict was taken for the plaintiff, with leave reserved to enter a verdict for defendants, unless the whole amount claimed could be recovered:—

Held, that the plaintiff could not recover. *Mclean* v. *Town Council of Brantford*, 16 Q. B. 347.

The defendants being unable to finish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies, and resolutions passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed defendants' line, and ran it for some time at a loss. They then sued defendants for the money expended above the receipts:—Held, not recoverable, for the agreement relied upon, being special in its terms, was invalid for want of a corporate seal. *Great Western R. W. Co.* v. *Preston and Berlin R. W. Co.*, 17 Q. B. 477.

Semble, that defendants, under the circumstances, should have been held to have accepted the work done, if there were not the other objection to the plaintiffs' recovery. *Ib.*

Semble, also, that a valid agreement in the terms of the resolution would not have created a partnership between the parties. *Ib.*

Where the plaintiff performed certain public work under contract, not made with the municipality, or with any of its known officers, but merely with persons in their individual capacity assuming to act as a duly appointed committee: Held, that no action would lie against the corporation. *Stoneburgh* v. *Municipality of Brighton*, 1 C. P. 155.

Held, on appeal, reversing the judgment below, that an action may be sustained against a corporation for work and labour done for and accepted by them, without being supported by a contract under the seal of the company. *Pim* v. *Municipal Council of Ontario*, 9 C. P. 304; *S. C.* 3. 302.

A committee of the corporation was appointed June, 1860, with power, among other things, to treat with and recommend to the council an engineer to make the requisite surveys, &c., for applying the city with water, and making application to the government for a site for the reservoir. The chairman of this committee employed the plaintiff to make plans which the commissioner of public works required to see, and one of the aldermen being in Quebec wrote to the plaintiff to come down and assist in pressing their application for a site, which he did, the chairman having also told him to go. The report of their proceedings there was adopted by the council:—Held, that the plaintiff was entitled to recover for his work, and the journey to Quebec, though there was no contract under seal and no by law relating to the matters out of which his claim arose. *Perry* v. *The Corporation of Ottawa*, 23 Q. B. 391.

Defendants being a joint stock road company under C. S. U. C. c. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there on three other miles of the road. This mode of payment was not authorized by the act, (sec. 9) but the plaintiff built the road, the defendants accepted it, and levied tolls upon it, and after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done:—Held, that they were liable upon the common counts. *Thornton* v. *Sandwich Street Plank Road Co.*, 25 Q. B. 591.

Defendants wished to dredge their harbour, and the plaintiff had a dredge, then in the State of New York, which, after negotiations with the chairman of the committee on harbour and town property, he offered to lend to the corporation on certain terms, one of which was that the corporation should pay the cost of its transport to Belleville. The committee reported and recommended this offer to the council, and it was adopted, and the chairman then told the plaintiff to bring the dredge to Belleville, which he did, at a cost of $373. The committee afterwards decided to let out the dredging by contract to another person:—Held, that the corporation were liable to the plaintiff for the cost of bringing the dredge, although there was no contract under seal. *Brown* v. *The Corporation of the Town of Belleville*, 30 Q. B. 373.

The managing director of a railway company entered into a contract in his own name, adding, "acting on behalf of the company," with a person for the construction of the road, and for keeping it in repair. Under this the contractor completed the greater portion, when the company stopped the works, alleging that they had not been aware of the terms of the contract, and which they asserted were most extravagant in respect of the prices agreed to be paid. On a bill filed to enforce this contract:—Held, per cur., Spragge, V. C., diss., that the contract did not require the common seal to render it binding: that the company must be presumed to have had notice of the terms and stipulations of the contract: that the intricacy of the accounts was such as to render this a proper case to be disposed of by this court; and the company was bound to pay for the work at the prices agreed upon. And an enquiry was directed as to the damage sustained by the contractor by reason of the stopping of the works, and the loss of the contract. *Whitehead* v. *Buffalo and Lake Huron R. W. Co.*, 7 Chy. 351.

On appeal, the decree made in accordance with the above judgment was varied so far as it allowed damages to the contractor for not being allowed to complete the contract. Per Robinson, C. J., the contractor was entitled to be paid a reasonable sum for damages sustained on account of the stoppages. Spragge, V. C., diss., and thought the only relief to which the party was entitled was to be paid for what had been done, as upon a quantum meruit. *S. C.* 8 Chy. 167.

See Wood v. *Ontario and Quebec R. W. Co.*, 24 C. P. 334, p. 775.

(b) *Of Hiring.*

The plaintiff had been appointed many years ago, by the corporation of Toronto, weigh-master and clerk of the fish-market. He had been voted each year a sum for his services during the then current year. The municipal year began on the 23rd January. For 1847, the plaintiff had been voted £90 for his salary. On the 30th June, 1848, the corporation having determined to farm

out the plaintiff's office, he was dismissed without notice, and without any allowance for his services between January and June of 1848. The plaintiff brought assumpsit to recover a year's salary at the same rate as the previous year. It was objected, among other things, that there was no contract under the corporate seal, but:—Held, that assumpsit would well lie; and that though the plaintiff, holding his office during pleasure, by the act of incorporation, could not recover the whole year's salary for 1848, still he was entitled to his salary for 1848 to the time of his dismissal, at the rate of salary voted to him for 1847; and that no previous demand upon the corporation to vote an allowance need be proved. *Dempsey* v. *City of Toronto*, 6 Q. B. 1.

Semble, that a municipal corporation may be liable on a parol contract to hire a clerk or servant to render services in their ordinary business. *Raines* v. *The Credit Harbour Co.*, 1 Q. B. 174; remarked on in *Quin* v. *The School Trustees*, 7 Q. B. 130.

In an action of assumpsit brought by a teacher against the school trustees appointed by the Act 9 Vict. c. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year, from, &c., at a certain salary, &c.; and also in a special action on the case, founded upon a parol agreement, brought by the teacher under the same statute, for wrongfully, and without cause, turning the plaintiff away, and preventing him thereby from earning his salary, it was—Held, per cur, that the declaration in both cases was bad, in not averring the agreement to have been made with the defendants by their corporate seal. *Quin* v. *The School Trustees*, 7 Q. B. 130.

Held, under 34 Vict. c. 48, the Act incorporating the Ontario and Quebec R. W. Co., and the Railway Act of 1868, that the defendants were empowered to appoint an agent to negotiate for and obtain municipal aid, and that for that purpose a resolution of the board of directors, or an entry or minute in their record of proceedings would have been sufficient, without the formality of a by-law or the seal of the company. The plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which the defendants' railroad was to pass, and the only evidence of his appointment was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrangements with the plaintiff to work up the bonuses, and requesting him to proceed forthwith. It was shown also that the President had recognized and adopted his services, and partially paid therefor:—Held, that this was not sufficient proof of the plaintiff's engagement, or of the acceptance of his services by the company; but a new trial was granted without costs, to enable him to supply proper evidence if possible. *Wood* v. *Ontario and Quebec R. W. Co.*, 24 C. P. 334.

(c) *Leases.*

A declaration in covenant stated that by indenture made between the plaintiffs and defendants, the plaintiffs demised to defendants the tolls authorized by law to be received upon a certain turnpike road, for one year: that defendants covenanted to pay a certain rent therefor: and that by virtue of the said demise the defendants entered and were possessed for the term so to them granted. Breach, nonpayment of the rent:—Held, on demurrer, that the defendants were estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise. *Municipal Council of Frontenac, Lennox and Addington* v. *Chestnut et al.*, 9 Q. B. 365.

Held, also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorized in writing, was bad. *Ib.*

In an action against church-wardens for the use and occupation of a house rented by the previous church-wardens for the rector:—Held, no objection that there was no contract under the corporate seal of the church-wardens. *Maynard* v. *Gamble et al.*, 13 C. P. 56.

Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enters and holds thereunder he will be liable for all rents reserved thereby during the time he so holds; and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied, but, before the expiration of the term demised the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment:—Held, that they were liable for the rent during the residue of the term which had since expired. *Finlayson* v. *Elliott*, 21 Chy. 325.

In such a case the property had been conveyed by the owner to the bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings, and the bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The court, under the circumstances, made a decree for payment of the amount in favour of the party beneficially entitled. *Ib.*

(d) *Other Contracts.*

The Grafton Road Company, under 10 & 11 Vict. c. 93, s. 35, may make contracts by parol. *Turley* v. *Grafton Road Co.*, 8 Q. B. 579.

Assumpsit held maintainable against defendants for the non-performance of a special parol agreement with plaintiff for the supply of water to the Toronto baths.—Robinson, C. J., dis. *Blue* v. *Gas and Water Co.*, 6 Q. B. 174.

A special contract for continuing to supply gas will not be binding on the company unless in writing, under the corporate seal. *Smith* v. *The London Gas Co.*, 7 Chy. 112.

The plaintiff declared in assumpsit, setting out that he had brought two actions against defendants, the first for not giving him a crossing with cattle-guards over their road as agreed, and the second, for an alleged injury occasioned by them; that while both actions were pending the plaintiff and defendants, by their said attorney, then duly authorized in such behalf, made an agreement in writing, setting it out, of which

the terms were, that the plaintiff was to receive £175 for all claims against the company—the company to pay costs, and to make the cattle-pass and complete the crossing by the 16th of July then next; the suits to be withdrawn; the agreement to be carried out by the Messrs. M. (plaintiff's attorneys) on plaintiff's account, and M. R. on behalf of the company, as soon as the court was over (this was signed by M. R. for the company): that in consideration of the premises, and that the plaintiff at defendants' request would perform said agreement on his part, defendants promised to perform on their parts: that confiding in such promise, he withdrew the actions, and did all that was to be done on his part, but that, although defendants in part performance paid £75 and costs, yet they did not make the cattle-pass nor complete the crossing: Held, on demurrer to the declaration, that it must be assumed from the averments that M. R. had been authorized under the defendants' corporate seal to make the agreement; but that no promise of the corporation, such as was declared upon, could be implied therefrom: that the proper construction of the agreement was, that it required a proper legal covenant by the company to bind them to the terms which they had authorized him to accept, and that they could not be charged as liable through him on a parol agreement to do that which they could only have bound themselves under seal to perform. *Doran* v. *Great Western R. W. Co.* 14 Q. B. 403.

A trading company entered into a written contract, but not under its corporate seal, for the purchase of a quantity of barrels:—Held, the contract being executory, that defendants, though a trading corporation, were not liable for refusing to accept barrels not then manufactured, nor for refusing to allow the plaintiff to continue to manufacture barrels according to the agreement. *Wingate* v. *Enniskillen Oil Refining Co.*, 14 C. P. 379.

The magistrates in Quarter Sessions have no power to order furniture for the court house, and the county council are not liable for furniture so supplied. The fact that the court house was also used as a shire hall for the sittings of the council, and the furniture made use of by them, could make no difference. *Coombs* v. *Municipal Council of Middlesex*, 15 Q. B. 367.

Declaration, that a certain vessel insured in the Provincial Insurance Company was sunk, and that defendant who was the agent of the company in effecting settlements on account of vessels lost or damaged, in consideration that the plaintiffs would contract with defendant as and assuming to be the agent of the company, to raise the vessel for $3,100, the question of the liability to pay said sum to be referred to arbitration, defendant promised the plaintiffs that he was authorized by the company to enter into said contract as their agent, as follows, (the contract was then set out, made between the plaintiffs and the company, and signed by the defendant for the company): that the plaintiffs entered into such contract with defendant as and assuming to be the agent of the company, and raised the vessel; yet defendant was not authorized by the company to make such contract, and refused to pay the plaintiffs the $3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the contract against the company, and were put to expense, &c. Plea—that the plaintiffs were unable to enforce the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the company:—Held, on demurrer. 1. That there was no assertion in the declaration of defendant being the agent inconsistent with the allegation of his want of authority. 2. That the plea shewed no defence, for if defendant had been authorized as he represented, the company could have been compelled in equity to affix their seal to the contract. *Calvin et al.* v. *Davidson*, 31 Q. B. 396.

Declaration by a county against a city corporation for compensation for the care and maintenance by the plaintiffs in the county gaol of prisoners, under s. 403 and following sections of the Municipal Act of 1866, alleging an agreement made on the 6th June, 1867, by which, after deducting the amount paid from the administration of justice fund, the balance of the expenses were to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870 inclusive, amounted to $5,429; and though defendants had paid part of it and their half of the other expenses, as agreed on, yet they had not paid the residue, &c.:—Held, that the agreement was one which defendants might enter into without deed. *The Corporation of the County of Wentworth* v. *The Corporation of the City of Hamilton*, 34 Q. B. 585.—A. Wilson, sitting alone.

The objection that a corporation cannot be bound unless under the corporate seal, is applicable only to actions at law. *Brewster* v. *The Canada Co.*, 4 Chy. 443.

It is not necessary that the seal of a building society should be affixed to an authority to its agent to sell; the entry in the books of the society is sufficient for that purpose. *Osborne* v. *The Farmers' and Mechanics' Building Society*, 5 Chy. 326.

Where a municipal corporation contracted for the purchase of land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken:—Held, that the contract could not be enforced by the vendor against the corporation. *Houck* v. *The Town of Whitby*, 14 Chy. 671.

M., being aware of a valuable mining location, made it known to defendants, under an agreement that he should be compensated. The mode of compensation was not determined, but the usual mode was found to be by receiving a share or partnership interest in the mine. The agreement was not under the corporate seal. The company received $5,500 for their claim to the property by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors to obtain secretly a grant of the property to himself personally:—Held, that the plaintiff was entitled to share this sum, and that the want of a seal was no defence. *McDonald* v. *The Upper Canada Mining Co.*, 15 Chy. 179.; affirmed on rehearing.

A railway company being indebted to a bank, the officers of the company arranged that the bank should proceed to garnish certain debts due to the company, the costs of which as between attorney and client the railway company was to pay :—Held, that the officers of the company had authority, without a resolution of the board of directors, to enter into such an agreement, and that the same need not be under the corporate seal. *Hamilton and Port Dover R. W. Co,* v. *Gore Bank*, 20 Chy. 190.

The corporation of a town appointed a committee, consisting of the reeve and two others, to purchase 1,500 feet of hose for the use of the water works. They called for tenders, and the two plaintiffs, of whom the reeve was one, submitted a sample of hose, on which the other two members of the committee gave the plaintiffs the order. The hose was tested when it arrived, and was the same as the sample, but it was useless for the purpose required :—Held, that the corporation, on the evidence, more fully set out in the case, had not accepted the hose absolutely, but conditionally only, to keep it if they found it to answer : that they were not liable for it as being bound by the conduct of the committee, for want of an agreement under the corporate seal ; and that such contract, being executed, might also be avoided because one of the plaintiffs was a member of the committee. *Brown et al.* v. *The Corporation of the Town of Lindsay*, 35 Q. B. 509.

VII. Actions by.

The declaration, at the suit of a corporation, named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only :—Held, a non pros. might be signed and execution issue against them in their private capacities. *Markland* v. *Dalton*, Tay. 125.

A corporation may maintain assumpsit on an executory as well as on an executed consideration, where the contract is in the usual course of business. *Kingston Marine R. W. Co.* v. *Phillips*, M. T. 3 Vict.

A suit brought by an incorporated company will be removed, if it be shewn that difficult questions of law will arise as to the powers conferred by their act of incorporation. *Cataraqui Cemetery Co.* v. *Burrowes*, 3 L. J. 47.—C. L. Chamb.—McLean.

Sufficiency of declaration for calls under the statute 1 Will. IV. c. 12, incorporating the plaintiffs. *The Marmora Foundry Co.* v. *Murney*, 1 C. P. 1 ; *The Marmora Foundry Co.* v. *Boswell, Ib.* 175 ; *The Marmora Foundry Co.* v. *Dougall, Ib.* 194.

VIII. Actions and Proceedings Against.

1. *Proof of Seal.*

Where a witness stated that he had good opportunities, which he described, of observing and knowing the seal of a corporation, and that he believed the seal to be their seal, both from the impression itself and from the signature of the party attached to it, with which he was acquainted :—Held, sufficient to go to a jury to authenticate the seal. *Doe* d. *King's College*, v. *Kennedy*, 5 Q. B. 577.

Held, that the production of a document within the powers of the corporation, with the seal attached, is sufficient primâ facie evidence of its proper execution. *Woodhill* v. *Sullivan*, 14 C. P. 265 ; *Fell* v. *South*, 24 Q. B. 196.

Some of the parties executing a deed were corporate bodies, and the witnessing clause was expressed, "In witness whereof, the said parties hereto have hereunto set their hands and seals," &c., and the seals were all simple wafer seals :—Held, sufficient, in the absence of evidence shewing these not to be the proper corporate seals. *The Ontario Salt Co.* v. *The Merchant's Salt Co.*, 18 Chy. 551. See, also, *Hamilton* v. *Dennis*, 12 Chy. 325.

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2. *By Members.*

A stock-holder is not entitled, as a matter of right, to inspect the stock-book or other books of a bank. *In re Bank of U. C.* v. *Baldwin*, Dra. 55.

The court will not, although they have the power, grant a mandamus for the inspection of the stock-book or other books of a bank, unless some special grounds be disclosed to warrant it. *Ib.*

Where the directors of an incorporated company misappropriated the funds of the corporation, a bill against them and the company, in respect of such misappropriation, cannot be sustained by some of the stockholders on behalf of all except the directors ; the company must be made plaintiffs whether the acts of the directors are void or only voidable, and the stockholders have a right to make use of the name of the company as plaintiffs in such proceedings. *Hamilton* v. *Desjardins Canal Co.*, 1 Chy. 1.

Where by the act of incorporation the government is authorized to purchase the corporate estate on payment of its full value, the attorney-general is not a necessary party to a bill by the stockholders against the directors complaining of improper conduct on the part of the latter in dealing with the corporate funds. In such case the defendants having answered, admitting certain moneys to have been received by the directors, a motion to pay the amount into court was refused, but the costs of the motion were reserved. *Ib.*

A decree was obtained in a suit by a shareholder of a building society, suing on behalf of himself and all other shareholders, for the administration of the assets of the society, and charging the directors with losses which had been sustained :—Held, that persons who had ceased to be directors before the suit was commenced could not be made parties in the master's office. *Rolph* v. *The Upper Canada Building Society*, 11 Chy. 275.

A suit will lie by an individual corporator complaining of an illegal diversion of the funds which the corporation holds as trustee, though the plaintiff may himself have no pecuniary interest in the funds so alleged to have been diverted; but he must sue on behalf of himself and all other corporators. *Armstrong* v. *The Church Society of the Diocese of Toronto*, 13 Chy. 552.

A bill was held to lie by a corporator of the Church Society of the Diocese of Toronto, on behalf of himself and all other members of the society, to correct and prevent alleged breaches of trust by the corporation. To such a bill the attorney-general is not a necessary party. *Boulton* v. *The Church Society of the Diocese of Toronto*, 14 Chy. 123; 15 Chy. 450.

3. *Procedure.*

A writ of distringas is not the proper process by which an action against a corporation aggregate should be commenced in this province. *Cooper* v. *The Canada Co.*, Dra. 189.

A corporation aggregate is not bound to appear at the trial as witnesses under a notice served on their attorney under 16 Vict. c. 19, s. 2. *The Trustees of School Section No. 2 of the Township of Dunwich* v. *McBeath*, 4 C. P. 228.

Held, that a debt due by a corporation having its head office in England cannot be attached by service of the attaching order upon an agent of the corporation in Upper Canada. *Bank of B. N. A.* v. *Laughrey*, 2 L. J. N. S. 44.—C. L. Chamb.—Morrison.

No. 13 of the general orders, authorizing the registrar to draw up an order to take the bill pro confesso at the expiration of one month from the service of the bill, does not apply to corporations. *Counter* v. *Commercial Bank*, 4 Chy. 230.

The order permitting the service of the bill upon the agent of a corporation aggregate applies only to foreign corporations having agencies within Upper Canada. *Campbell* v. *Taylor*, 1 Chy. Chamb. 2.—Spragge.

Held., Spragge, V. C., dubitante, that in proceeding against a corporation to enforce obedience to a decree or order, it is not necessary to sue out a writ of distringas; the proper mode of proceeding is by orders nisi and absolute for a sequestration. *Attorney-General* v. *Brantford*, 1 Chy. Chamb. 26.—Chy.

Where a company is virtually defunct before bill filed, the proper course to effect service is to apply to the court for an order therefor, otherwise an order pro confesso cannot be obtained. *Furness* v. *Metropolitan Water Co.*, 1 Chy. Chamb. 369.—Spragge.

A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did not name the person:—Held, that the company must be presumed to know who this person was: that there was no presumption that the plaintiff knew him; and that, the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside* v. *The Toronto Street Railway Co.*, 14 Chy. 409.

A plaintiff cannot obtain an order pro confesso against a corporation ex parte, under the orders of 1857, relating to orders pro confesso against corporations, unless the bill was served upon some of the officers of the company specified in the order, even although the Act incorporating such corporation makes it competent to the plaintiff to serve process upon a director. *Cameron* v. *Upper Canada Navigation Co.*, 4 L. J. N. S. 77.—Chy. Chamb.—Taylor, *Secretary*.

A corporation cannot file an answer without seal, except by consent. *Gildersleeve* v. *Wolfe Island R. W. and Canal Co.*, 3 Chy. Chamb. 358.

Where a stay of proceedings was asked to enable defendants to apply at law for a mandamus to compel the head of the corporation to affix the corporate seal, but it was not shewn that the majority of the shareholders approved of the answer, the application was refused with costs. *Ib.*

The trustees of the Bank of Upper Canada were held necessary parties to a bill by creditors to enforce the double liability of shareholders. *Brooke* v. *The Bank of U. C.*, 17 Chy. 301.

Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill to which the attorney-general was defendant, to have the lease declared void. *Hinckley* v. *Gildersleeve*, 19 Chy. 212.

4. *Other Cases.*

Where a corporation having a debt to pay, which it was to their advantage to discharge immediately, raised money upon an accommodation note of an individual, and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. *Burnham* v. *Peterborough*, 8 Chy. 366.

A company incorporated for the purpose of improving the navigation of a river, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors. The court will reluctantly interfere with a company's discretion where amongst engineers there may be a difference of opinion; but as it appeared that the damage complained of by the plaintiff might be avoided by certain alterations of the company's works, suggested by an eminent engineer to whom the matter was referred by the court, which alterations the company said they would have made if suggested before suit, the court decreed the making thereof. *Moore* v. *The Grand River Navigation Co.*, 13 Chy. 560.

IX. Amalgamation of Companies.

A statute gave the bond-holders of the Cobourg and Peterborough Railway Company an option to convert their bonds into stock, and enacted that this "converted bonded stock," and any new subscribed stock, should be preferential to the ordinary stock, and be entitled to dividends of eight per cent. per annum in priority to any dividend to the ordinary shareholders. By a subsequent act the company was authorized to unite with another company, and it was declared, that the two companies, and those who should become shareholders in the new company under the acts relating to the Cobourg and Peterborough

Railway Company and under the deed of union, should constitute the new company :—Held, that the union did not extinguish the right of the bond-holders to elect. *Cayley* v. *Cobourg, Peterborough, and Marmora Railway and Mining Co.*, 14 Chy. 571.

The Act authorizing the union of two incorporated companies declared, that any deed the companies executed under the act should be valid to "all intents and purposes in the same manner as if incorporated in the act :"—Held, that this provision enabled the companies to bargain together in respect of the rights which each had, and to make such arrangements as their union rendered necessary ; but did not give them legislative authority over the rights of other persons. *Ib.*

A statute authorized two companies to unite into one company by either a complete or partial union ; and either of joint or separate, or absolute or limited liabilities to third parties. The companies agreed to an absolute union, and made no provision for limiting the liability of the new company in respect of past transactions of the old companies :—Held, that the new company thereby assumed all the liabilities of the old company to third persons. *Ib.*

X. Dissolution.

Process was served upon A. as president of a bank, he having been elected in June, 1866, for one year. No election of president or directors had taken place since then, and A. in fact never resigned his office. In September, 1866, the bank suspended specie payments, and before sixty days thereafter assigned their property to trustees, and ceased to do business as a bank. It was provided by the charter that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeiture of the charter, &c. :—Held, that the total annihilation of the bank was not contemplated by these provisions, and it did not follow from the loss of the charter that there must be a dissolution for all purposes : that some formal process was still necessary finally to determine and put an end to all the functions of the corporation : that the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts, and that A. must still be looked upon as president ; and an application to set aside the service upon him was discharged with costs. *Brooke* v. *Bank of U. C.*, 4 P. R. 162.—C. L. Chamb.—A. Wilson.

XI. Foreign Corporations.

A foreign corporation, such as a bank, cannot sue upon notes received and discounted by them in the course of banking business here, although they may maintain money had and received against the person for whom such notes were discounted and to whom money was advanced on them. *Bank of Montreal* v. *Bethune*. 4 O. S. 341. See *Bank of B. N. A.* v. *Sherwood*, 6 Q. B. 213.

The plaintiffs were a company chartered by the state of New York to carry on mutual insurance in the county of Genesee. Their charter gave them a lien by way of mortgage on the property insured, and upon the title of the insured to the land on which such property stood :—Held, that the company, from the very nature and object of its charter, was incapable of carrying on its business in this province. *Genesee Mutual Ins. Co.* v. *Westman*, 8 Q. B. 487.

Quære, whether any foreign corporation can under its foreign charter assume to carry on business here. *Ib.*

A foreign corporation may sue here on a bond taken to secure the payment to them of premiums received by their agent in conducting an insurance business in this province. *Washington County Mutual Ins. Co.* v. *Henderson*, 6 C. P. 146.

Action by a foreign corporation, incorporated in the United States, against residents of this province, on the common counts. Plea, that defendants are subjects of this province, and the plaintiffs are a foreign corporation, and cannot sue in this province. On demurrer :—Held, that although the plaintiffs might not sue for goods bargained and sold on a contract made wholly in Upper Canada, they could for goods sold and delivered ; and as in this case the plea must be taken to apply distributively to each cause of action stated in the count, that the account stated in Canada must be taken to have been of and concerning dealings which took place in a foreign country, where the right of the corporation to be a party to such proceedings could not be denied. *The Union India Rubber Co.* v. *Hibbard*, 6 C. P. 77.

Held, that a debt due by a foreign corporation to a resident of Upper Canada cannot be attached by service of the order to attach upon the agent of the corporation of this province. *Lundy* v. *Dickson*, 6 L. J. 92.—C. L. Chamb.—Robinson.

A foreign corporation may sue in this country on a promissory note given to them here for goods furnished by them to the maker. *Howe Machine Co.* v. *Walker*, 35 Q. B. 37.

Review of authorities as to the right of a foreign corporation to contract and carry on business here. *Ib.*

Semble, that they may also, under certain circumstances, maintain an action for breach of an executory contract entered into here in the ordinary course of their business. *Ib.*

Held, that the general agents in Canada of a foreign company must be regarded in the same light as the general agents at the head office in the foreign country. *Campbell* v. *The National Life Ins. Co.*, 24 C. P. 133.

XII. Miscellaneous Cases.

A member of a joint stock company, not incorporated, lending with the assent of the company out of the joint fund to another member, and taking from him a promissory note payable to himself individually for repayment, can recover on the note. *Comer* v. *Thompson*, 4 O. S. 256.

A partner in a joint stock company, the notes of which are suppressed by 7 Will. IV. c. 13, having retired their notes which were in circulation after the suppression, cannot put them into

circulation again so as to bind the partnership. *Hall* v. *Buck*, T. T. 2 & 3 Vict.

A party contributing to a mining joint stock adventure, which does not go into effect, may recover back his money as money had and received; but the court must see that the circumstances gave him a just right:—Held, that in this case no such right was shewn. *Gilpin* v. *Greene*, 7 Q. B. 586.

Where four parties described, not by their own names and personal description, but as a collective body not shewn to be corporate, signed and sealed a deed in their own names and seals they were held to be individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

Semble, that under the Interpretation Act, 31 Vict. c. 1, s. 7, sub-s. 9, O, the defendants, though a corporation, would be "persons signing" the bill of lading, if signed by their authorized agent. *Royal Canadian Bank* v. *Grand Trunk R. W. Co.*, 23 C. P. 225.

A writ of fi. fa. against a railway company, which was directed to a sheriff, before he became a director in the company, was held properly returnable by him, and that his becoming a director before the return of the writ, did not invalidate it. *Smith* v. *Spencer*, 12 C. P. 277.

The declaration represented the plaintiffs and one C. to have individually associated themselves together to procure a charter as a gas company, which they obtained, for which and other services they had acquired a claim against the company; that they individually owned books, &c., relating to the company, and that they agreed to and did surrender to defendant and one H., at their request, 1, their said claim; 2, the subscription list; 3, the books; 4, as far as they lawfully could their right, title, interest in, or control over, the assets of the company, and the charter, for all of which defendant and H. agreed to pay the plaintiffs $3,000:—Held, declaration good; for the sale alleged was not of the franchise and charter of the company, but of the mere claims of the plaintiffs thereon, and their personal rights and interests in the concern. *Miller et al.*, v. *Thompson*, 15 C. P. 186.

Held, that a railway company does not "live and carry on business" within the meaning of 32 Vict. c. 23, s. 7, O., at any other place than its head office, at which its business is managed. *Aherns* v *McGilligat*, 23 C. P. 171.

COSTS.

I. By and against Particular Persons.
1. *By and against the Crown*, 788.
2. *Executors and Administrators*—*See* Executors and Administrators.
3. *Justices of the Peace*—*See* Justices of the Peace.
4. *Paupers*—*See* Pauper.
5. *Trustees*—*See* Trusts and Trustees.

II. Security for Costs.
1. *Who may be Security*, 788.
2. *When Ordered.*
(a) *Residents abroad and Foreigners in this Country*, 789.
(b) *Suits by Next Friend*, 791.
(c) *Costs of former Suit unpaid*, 793.
(d) *Bankruptcy and Insolvency*, 794.
(e) *Other Cases*, 794.
3. *Practice in Moving for.*
(a) *Time for Applying*, 795.
(b) *Affidavits and Papers*, 796.
(c) *Other Cases*, 797.
4. *Discharging Application*, 797.
5. *Putting in Security.*
(a) *Form and Amount of*, 798.
(b) *Other Matters*, 799.
6. *In Appeal.*
(a) *From County Court*—*See* County Court.
(b) *From Superior Courts*—*See* Error and Appeal.

III. Costs of the Day.
1. *Neglecting to Proceed to Trial or Hearing.*
(a) *Rule for*, 800.
(b) *When Given or Refused*, 800.
2. *Other Cases*, 803.

IV. Application for County Court Costs. 803.

V. Application for Full Costs.
1. *Time for Applying*, 804.
2. *Parties Resident in Different Localities*, 805.
3. *Reduction by Payments*, 806.
4. *Title to Land in Question*, 806.
5. *Decisions under 31 Vict. c. 24, O.*, 808.
6. *Other Cases.* 808.
7. *When there has been a Reference*—*See* Arbitration and Award.
8. *In Libel and Slander*—*See* Defamation.

VI. Application to Deprive Plaintiff of Costs under 43 Eliz. c. 6, 812.

VII. Several Issues.
1. *Issues in Law and in Fact*, 813.
2. *Several Issues in Fact*, 814.

VIII. Set-off of Costs.
1. *Generally*, 815.
2. *By Attorney or Solicitor*—*See* Attorney and Solicitor.

IX. Taxation of Costs.
1. *Notice of Taxation*, 819.
2. *Costs Allowed.*
(a) *Counsel Fee and Brief*, 820.
(b) *Term Fee*, 821.
(c) *Witness Fees and Subpœnas*, 821.
(d) *Commission to Examine Witnesses*—*See* Evidence.
(e) *Costs in the Cause*, 822.
(f) *Pleadings and Affidavits*, 824.
(g) *Other Matters*, 824.
3. *Revision of Taxation*, 826.

4. *Costs of Taxation and Revision*, 828.
5. *Other Cases*, 828.
6. *Between Attorney and Client*—*See* ATTORNEY AND SOLICITOR.

X. UNNECESSARY OR VEXATIOUS PROCEEDINGS, 829.

XI. MEANS OF RECOVERING COSTS.
1. *By Order or Execution*, 830.
2. *By Staying Proceedings in Second Action or Suit.*
(a) *In what Cases*, 832.
(b) *In Ejectment*—*See* EJECTMENT.
3. *By Attachment*—*See* ATTACHMENT OF THE PERSON.
4. *Attorney's or Solicitor's Bill*—*See* ATTORNEY AND SOLICITOR.

XII. MISCELLANEOUS CASES, 833.

XIII. IN PARTICULAR PROCEEDINGS.
1. *In Arbitration*—*See* ARBITRATION AND AWARD.
2. *Amendment of Bills*—*See* AMENDMENT IN EQUITY.
3. *Of Appeal.*
(a) *From County Court*—*See* COUNTY COURT.
(b) *From Superior Courts*—*See* ERROR AND APPEAL.
(c) *From Master*—*See* PRACTICE IN EQUITY.
(d) *From Convictions*—*See* SESSIONS.
4. *When Defendant held to Special Bail is entitled to Costs*—*See* ARREST.
5. *Garnishment*—*See* ATTACHMENT OF DEBTS.
6. *Rectifying, Varying or Setting Aside Deeds*—*See* DEED.
7. *Of Distress*—*See* DISTRESS.
8. *Setting aside Fraudulent Conveyances*—*See* FRAUDULENT CONVEYANCES.
9. *Of Injunction*—*See* INJUNCTION.
10. *Of Interpleader*—*See* INTERPLEADER.
11. *Mandamus*—*See* MANDAMUS.
12. *Quashing By-Laws*—*See* MUNICIPAL CORPORATIONS.
13. *Controverted Elections.*
(a) *Municipal*—*See* MUNICIPAL CORPORATIONS.
(b) *Parliamentary*—*See* PARLIAMENT.
14. *Of Partition*—*See* PARTITION.
15. *In Pleading*—*See* PLEADING AT LAW—PLEADING IN EQUITY.
16. *In Master's Office*—*See* PRACTICE IN EQUITY.
17. *Motions, Rules, Orders and Summonses*—*See* PRACTICE AT LAW—PRACTICE IN EQUITY.
18. *Setting aside Proceedings for Nonpayment of Costs.*
(a) *Attachments*—*See* ATTACHMENT OF THE PERSON.
(b) *Rule for New Trial*—*See* NEW TRIAL.
19. *Quieting Titles*—*See* QUIETING TITLE.
20. *Of Inquests*—*See* CORONER.

XIV. IN PARTICULAR ACTIONS OR SUITS.
1. *Administration Suits*—*See* ADMINISTRATION SUITS.
2. *Alimony*—*See* HUSBAND AND WIFE.
3. *On Bills or Notes*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
4. *Slander or Libel*—*See* DEFAMATION.
5. *Dower*—*See* DOWER.
6. *Ejectment*—*See* EJECTMENT.
7. *Foreclosure*—*See* MORTGAGE.
8. *Redemption and Bills to Redeem*—*See* MORTGAGE.
9. *Replevin*—*See* REPLEVIN.
10. *Specific Performance*—*See* SPECIFIC PERFORMANCE.

XV. LIEN OF ATTORNEY FOR COSTS—*See* ATTORNEY AND SOLICITOR.

XVI. COSTS AS DAMAGES—*See* COVENANT FOR TITLE.

XVII. COSTS IN CRIMINAL CASES—*See* CRIMINAL LAW.

XVIII. ON REMOVAL BY CERTIORARI—*See* CERTIORARI.

I. BY AND AGAINST PARTICULAR PERSONS.

1. *By and against the Crown.*

In an action in the nature of an information filed by the attorney-general, costs will not be allowed to the defendant against the crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

The attorney-general is never made to pay costs, even upon interlocutory proceedings. *Gibson* v. *Clench*, 1 Chy. Chamb. 69.—VanKoughnet.

The rule that the crown neither claims nor pays costs is favoured by the court as most consistent with the dignity of the crown and the practice of the court; and where the crown is made a party in consequence of the discharge of an international duty, and out of courtesy or for form's sake, having no substantial interest in the question at issue, and no interests have suffered, and no loss accrued by the crown disclaiming or not appearing, the court will certainly not order costs to be paid to the attorney-general. *The United States* v. *Denison*, 2 Chy. Chamb. 263.—VanKoughnet.

II. SECURITY FOR COSTS.

1. *Who may be Security.*

The attorney for the plaintiff or his partner cannot become security for costs. *Myers* v. *Hutchinson*, 2 P. R. 380.—C. L. Chamb.—Richards.

Held, that a practising attorney may be a surety in an election petition. *Re Hamilton*, 10 L. J. N. S. 170.—E. C.—Dalton, *C. C. & P.*

It is irregular for a solicitor to become security for his client. *Beckitt* v. *Wragg*, 1 Chy. Chamb. 5.—Spragge.

2. *When Ordered.*

(a) *Residents Abroad and Foreigners in this Country.*

A military officer on duty out of Canada and suing as plaintiff, must give security. *Tripp* v. *Frazer*, 1 Q. B. 253.

So must a plaintiff from England, coming here merely to attend to the suit, and intending to return when it is over. *Gill* v. *Hodgson*, 1 P. R. 381.—C. L. Chamb.—Robinson. But see the next four cases.

Held, that if the plaintiff be actually a resident of the province at the time of the application, and intend so to remain until trial or judgment in the cause, security for costs ought not to be ordered. *Hawkins* v. *Paterson et al.*, 3 P. R. 253.—C. L. Chamb.—A. Wilson.

Semble, if a resident in the province were to declare his intention of leaving for abroad at once, and had sold off his property, and made other preparations for his immediate departure, with the intention of residing abroad, that upon these facts being shewn the party might be called upon to give security, according to the general practice. *Ib.*

Semble, that security will not be ordered when the plaintiff intends to reside here during the suit. *Wilder* v. *Hopkins*, 4 P. R. 350.—C. L. Chamb.—Gwynne.

Where a plaintiff came here shortly before commencing an action, but shewed an intention of residing here permanently, security was refused. *Ib.*

Where, after an order made for security, plaintiff came within the jurisdiction, made affidavit "that he is now residing in Toronto; that when he left Canada he intended to return, his absence from Canada being merely temporary; and that he now intends to remain in Toronto until after judgment has been obtained in this suit by or against him;" and undertook not to leave the jurisdiction without leave of the court or a judge, or of defendant, until a reasonable time after defendant might properly enter judgment against him, an order was made discharging the order for security for costs. *Watson* v. *Yorston*, 1 L. J. N. S. 97.—C. L. Chamb.—A. Wilson.

Quære, as to relief in such a case if security for costs were actually given, and not merely an order staying proceedings till security given. *Ib.*

The plaintiff, a British subject, having resided in the United States for several years, but never taken any oath of naturalization, or exercised the rights of citizenship, returned to this province, and some months afterwards filed a bill in this court. A motion for security for costs was refused, although several persons swore that his intention was to leave immediately on the decision of the case, which the plaintiff denied. *O'Grady* v. *Munro*, 7 Chy. 106.

Held, that the mere fact of a client, who has applied to have an attorney's bill taxed, is out of the jurisdiction, is not a sufficient ground for an order for security, but upon special circumstances being shewn it may be. *In re A. B., an Attorney*, 6 P. R. 210.—C. L. Chamb.—Dalton, C. C. & P.

Held, following Rann *v.* Lawless, 1 Chy. Chamb. 333, that the fact of a co-plaintiff, resident within the jurisdiction, being on the record would not prevent an order for security for costs being granted. *Van Winkle* v. *Chaplin*, 3 L. J. N. S. 44.—Chy. Chamb.—Taylor, *Secretary*.

Held, that by the provincial statute, 16 Vict. c. 152, the whole province having been set off into territorial divisions, the court is bound to take notice of such subdivisions of the country as that act makes, and that therefore the security for costs should be given, where the plaintiff is stated in the bill to be resident in Rigaud, county of Vaudreuil. *McDonald* v. *Dicaire*, 1 Chy. Chamb. 34.—Blake.

On a motion by plaintiff to set aside a consent to the dismissal of a bill, it appeared that the plaintiff resided out of the jurisdiction. The judges' secretary ordered that security to $100 should be given before the plaintiff could proceed with his motion. *Bolster* v. *Cochrane*, 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary*.

Where a suit is brought in this court to restrain proceedings at law, the plaintiff will not be ordered to give security, though resident out of the jurisdiction; and that, too, notwithstanding the bill may ask for relief other than the injunction. *Manly* v. *Williams*, 1 Chy. Chamb. 48.—Esten.

The recent act, 22 Vict. c. 33, has effected a material change in the practice of this court as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the province will not be sufficient to warrant an order for that purpose where it is shewn that he has property within the jurisdiction. *White* v. *White*, 1 Chy. Chamb. 48.—Esten.

A plaintiff who is resident out of the jurisdiction will not be ordered to give security for costs, if he is possessed of unincumbered real estate of sufficient value situate within the jurisdiction. *Gault* v. *Spencer*, 2 Chy. Chamb. 92; 3 L. J. N. S. 70.—Taylor, *Secretary*.

The mere fact of a plaintiff being in the service of the crown and absent from the jurisdiction, is not sufficient to exempt him from giving security; it must be shewn that he is absent from his domicile in the service of the crown. *Dickenson* v. *Duffill*, 1 Chy. Chamb. 108.—Spragge.

An infant out of the jurisdiction petitioning for relief will be required to give security for costs. *Stinson* v. *Martin*, 2 Chy. Chamb. 86.—Spragge.

Where it appears that the residence of the plaintiff is not known, and that there is reason to believe he has left the country, security will be ordered, although it does not appear by the bill that the plaintiff is resident out of the jurisdiction, and it is not shewn positively where he is resident. *Somerville* v. *Kerr*, 2 Chy. Chamb. 168.—VanKoughnet.

Where, on petition against a solicitor for an account, it was alleged, and not denied, that he had large sums of the client's money in his hands, the petitioner, though resident in a foreign country, was relieved from giving security. *Re Carroll*, 2 Chy. Chamb. 305.—Mowat.

The rule requiring security will be relaxed by the court in their discretion, when the circumstances require. *Ib.*

Where a defendant had by answering waived his right to security, and the plaintiff assigned

his interest in the mortgage, the subject of the suit, to a party resident out of the jurisdiction, it was held that the defendant was entitled to security against the new plaintiff. *Thompson* v. *Callagan*, 3 Chy. Chamb. 15.—Taylor, *Secretary*.

The fact that the suit was a foreclosure suit, was held not to disentitle the defendant to the order for security against the plaintiff, although a mortgagor, he disputing that any thing was due, and the master being directed to inquire "what, if any thing, was due." *Ib.*

The claimant under an interpleader issue, if out of the jurisdiction, is bound to give security. *Walker* v. *Niles*, 3 Chy. Chamb. 108.—Strong.

A plaintiff out of the jurisdiction, with no certain place of abode, and having no property in this province, though stating on affidavit that she was only temporarily absent, and intended to return, was ordered to give security for costs, there being no circumstances from which the court could reasonably infer that the intention to return would certainly be carried out. *Grant* v. *Winchester*, 6 P. R. 44.—Chy. Chamb.—Holmested, *Referee*.

The court will order a plaintiff to give security for costs if he misdescribe himself in his bill through an improper motive, or with the intention of misleading the defendant, even though on the application for security the plaintiff should furnish his true address. *Waldron* v. *McWalter*, 6 P. R. 145.—Chy. Chamb.—Blake.

An order for security for costs can only be obtained upon præcipe when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. *Wilson* v. *Wilson*, 6 P. R. 152.—Chy. Chamb.—Strong, on appeal from the Referee.

Where a bill described the plaintiff as "of the city of Toronto," but afterwards contained the following statement, "by the advice of a physician the plaintiff has sought change of air, and is now temporarily resident at Rochester": —Held, that it must be concluded that the residence was only temporary, and no order for security should be granted. *Ib.*

(b) *Suits by Next Friend.*

Married Women.]—Where a plaintiff sues with her brother-in-law, with whom she lives, as next friend, he will not be ordered to give security, even though there is a doubt as to his solvency. *Gardiner* v. *Graham*, 5 P. R. 463.—C. L. Chamb. —Dalton.—*C. C. & P.*

When one of several co-plaintiffs is a married woman, she must sue by next friend, who must be a solvent person capable of answering costs. *Rann* v. *Lawless*, 1 Chy. Chamb. 333.—Van-Koughnet.

Where, upon a bill filed by a married woman by her next friend, it appears that after due enquiries the next friend is not known in the locality of which he is described to be a resident, and not in possession of any property there, an order will be made for security. *Van Winkle* v. *Chaplin*, 3 L. J. N. S. 44.—Chy. Chamb.—Taylor, *Secretary*.

When a bill is filed by a next friend, if he be not a person of substance, the plaintiff will be required to give security. *Leishman* v. *Eastwood*, 2 Chy. Chamb. 88.—Spragge.

The next friend of a married woman who is co-plaintiff with her husband, will be required to give security if it appear that he is a person of no known means, and his residence not known —though it appear that the husband has a substantial interest and is not a mere formal party to the suit. *Van Winkle* v. *Chaplin*, 2 Chy. Chamb. 98.—Taylor, *Secretary*.

A feme covert plaintiff has a right to change her next friend without notice to the former next friend, and without giving him security for the costs already incurred. But notice to the opposite party is necessary, because the order for security is only given on condition of the antecedent costs of the opposite party being secured, if such a condition is desired by him. *Harvey* v. *Boomer*, 3 Chy. Chamb. 11.—Mowat.

Held, qualifying McBean *v.* Lilley, 2 Chy. Chamb. 247, as the decision in that case is stated in the head note: that the affidavit of a next friend, that he is worth $400 over and above all his debts, is only primâ facie proof of his sufficiency as a next friend, and that evidence as to his circumstances may be given. *Walker* v. *Walker*, 3 Chy. Chamb. 273.—Taylor, *Referee*.

Where evidence contradictory to the affidavit was adduced, which in the opinion of the Court outweighed this statement, security or a new next friend was ordered. *Ib.*

The test of the solvency of a next friend is, whether he is worth £100 over and above what will pay his just debts. If the allegation to such effect is uncontradicted, or the fact established by evidence, it is sufficient. *Stovel* v. *Coles*, 3 Chy. Chamb. 421.—Taylor, *Referee*.

When on a motion to change a next friend on the grounds of insolvency, the next friend's own cross-examination shewed him worth the necessary amount, and no evidence to the contrary was adduced, the motion was refused with costs. *Ib.*

Infants.]—When the Court has appointed the natural guardian of an infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the Court in making such appointment, such next friend will not be removed nor will he be ordered to give security, although in destitute circumstances. *Morris* v. *Leslie*, 5 P. R. 141.—C. L. Chamb.—Galt.

In the case of an infant plaintiff, the court will not require security for costs, or remove a next friend because he is not a person of substance. *Re McConnell*, 3 Chy. Chamb. 423.—Taylor, *Referee*.

Idiots.]—The next friend of an idiot stands in the same position as the next friend of an infant, and is not required to establish his solvency or give security. Where, however, in the bill the description and residence of the next friend were not given, the Secretary ordered an amendment to be made within a week giving the residence and description, or the defendant to be entitled to security. *Sharp* v. *Sharp*, 2 Chy. Chamb. 244. —Taylor, *Secretary*.

Other Cases.]—Where the next friend of a plaintiff has become insolvent and left the jurisdiction, the proper order to be made is, that proceedings be stayed until a solvent next friend be appointed, or until security be given. *McGoay* v. *Maladay*, 2 Chy. Chamb. 437.—Taylor, *Secretary*.

A next friend is liable for costs incurred while acting as such next friend, and not for other or past costs. *Poole* v. *Poole*, 2 Chy. Chamb. 459.—Taylor, *Secretary*.

Where a next friend had been appointed who proved to be an infant, and a new next friend was consequently appointed, an application to make the new next friend liable for the costs incurred before his appointment was refused. *Ib.*

(c) *Costs of former Suit unpaid.*

The plaintiff was nonsuited in an action against the sureties of A. Whilst this suit was pending the same plaintiff sued A., who then asked for security for costs under 29 & 30 Vict. c. 42, s. 1:—Held, that he was entitled to security. *Elliott* v. *Pinkerton*, 4 P. R. 86.—C. L. Chamb.—J. Wilson.

Held, that the mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security, if the costs of the first action have been paid, and the second action brought in good faith. *Armstrong* v. *Montgomery*, 5 P. R. 461.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, on an application for security for costs under C. S. U. C. c. 27, s. 76, that the fact of the costs of the former unsuccessful actions having been paid, is not a ground for refusing to make an order. *Chambers* v. *Unger*, 6 P. R. 101.—C. L. Chamb.—Dalton, *C. C. & P.*

To bring a case within the 29 & 30 Vict. c. 42, requiring security for costs to be given where another action for the same cause is pending, it must be clearly shewn the causes of action are identically the same, and not merely growing out of the same transaction. *Dean* v. *Lamprey*, 2 Chy. Chamb. 202.—Taylor, *Secretary*.

Quære, does the act apply at all to this court, or to a case where one action is at law and the other in this court. *Ib.*

The plaintiff (the vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a fi. fa. goods to recover the costs, which was returned nulla bona. Afterwards the vendor filed his bill in equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given. *Follis* v. *Todd*, 1 Chy. Chamb. 288.—Spragge.

A former suit, brought by a married woman in her own name for redemption of lands in which she claimed an estate for life, under a lease made in 1866, in which the bill had been dismissed with costs, to be paid by the next friend of the plaintiff, was considered substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of the second suit. A stay of proceedings until the costs of the former suit were paid, was refused, there being a distinction in this respect between suits by married women and suits by persons sui juris. *Redman* v. *Brownscombe*, 9 L. J. N. S. 192.—Chy. Chamb.—Holmested, *Referee*.

(d) *Bankruptcy and Insolvency.*

When the plaintiff has assigned all his property for the benefit of his creditors, and sues on their account, defendant may demand security *Reid* v. *Cleal*, 1 C. L. Chamb. 128.—Robinson.

An official assignee in insolvency cannot be compelled to give security. *Monck* v. *Northwood*, 2 L. J. N. S. 268.—C. L. Chamb.—Draper.

Where a bill was filed by an assignee in insolvency against B. for the indemnification of the estate in respect of a claim by C., which it was alleged B. should pay, and it appeared that the plaintiff was himself an insolvent: that there were no assets whatever of the estate he represented; and that the suit was brought at his instigation, risk, and expense, and for his benefit:—Held, that the plaintiff must give security for costs. *Mason* v. *Jeffrey*, 1 Chy. Chamb. 379.—Mowat.

The plaintiff will be ordered to give security where it is shewn that he is insolvent, and is carrying on the suit for the benefit of another party, who seeks to escape the risk of costs. *Mason* v. *Jeffrey*, 2 Chy. Chamb. 15.—Mowat.

(e) *Other Cases.*

Where defendant applied for security, and one of the plaintiffs deposed in an affidavit that he was resident at Kingston, where in fact he was in gaol, the court ordered security. *Bastable* v. *Mowatt*, Tay. 492.

Security for costs may be obtained in an action for dower. *Nolan* v. *Reid*, 1 P. R. 264.—C. L. Chamb.—Burns.

The real plaintiff need not shew upon the trial that security for costs has been given, as required by the Division Courts Act, C. S. U. C. c. 19, s. 154. If not given, defendant may move to stay proceedings, or perhaps may plead it in bar of the action. Quære, as to the meaning of that clause in the statute. *McDonald* v. *McDonald*, 21 Q. B. 52.

An execution creditor made defendant in an interpleader issue, may be ordered to give security. *Lovell* v. *Wardroper*, 4 P. R. 265.

Held, that the mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security, if the costs of the first action have been paid, and the second action brought in good faith. *Armstrong* v. *Montgomery*, 5 P. R. 461.—C. L. Chamb.—Dalton, *C. C. & P.*

Where an assignment had been made by the plaintiff of his interest in a suit to secure a claim, such claim not equalling what the plaintiff claimed in his suit, the surplus to go to the plaintiff after the claim was paid, it was held that the plaintiff had such a beneficial interest

in the suit as that no order for security could be made. *Carroll* v. *Eccles*, 2 Chy. Chamb. 493.—Taylor, *Secretary*.

On an application for security for costs, it appeared that the plaintiff, though a resident of Canada, was in such circumstances as not to be good for the costs of the suit, should it go against him; that other persons were greatly interested in the subject matter thereof; that the plaintiff's success would materially benefit them; and that the defendant had already succeeded in an ejectment suit at law in respect of the same right on one of the grounds relied on by the bill; but there being no evidence that the plaintiff was actually put forward by the other persons interested to try the right, or that the suit was not brought entirely at his own instance, security for costs was refused. *Little* v. *Wright*, 16 Chy. 576.

Security will not be ordered to be given where a defendant has obtained further time to answer. *Arthur* v. *Brown*, 3 Chy. Chamb. 396.—Taylor, *Secretary*.

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3. *Practice in moving for.*

(a) *Time for Applying.*

[By Rule of T. T. 1856, No. 23, the application must, in ordinary cases, be made before issue joined.]

Security granted, in an action proceeded with by the plaintiff's attorney, in the name of the plaintiff, for costs, before issue joined, and delay accounted for. *O'Bierne* v. *Gowin*, 1 C. L. Chamb. 16.—Macaulay.

Security refused where defendant had pleaded, and applied after notice of trial, without accounting for his delay. *McDade* d. *O'Connors* v. *Dafoe*, 1 C. L. Chamb. 18.—Macaulay.

The defendant may, under certain circumstances, demand security, with a stay of proceedings, even after plea. Generally, he must apply as soon as he reasonably can after knowledge of the fact of the plaintiff's residence abroad. *Wood* v. *Bellisle*, 1 C. L. Chamb. 130. —Macaulay.

An application made on the 23rd of January, after issue joined, and on an affidavit sworn on the 4th, was refused. *Morgan* v. *Hellems*, 1 P. R. 363.—C. L. Chamb.—Robinson.

In ejectment, security for costs cannot be obtained before appearance, as in other actions; and the appearance does not put the cause at issue, so as to prevent the application. *Crowe* v. *McGuire*, 3 L. J. 205.—C. L. Chamb.—Draper.

Held, that the defendant in ejectment not having appeared could not move for security. *O'Reilly* v. *VanEvery*, 2 P. R. 184.—C. L. Chamb. —Richards.

In ejectment, commenced 26th February, 1861, appearance entered 18th March following, defendant, on 19th of same month, demanded security for costs, because plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when the plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial:—Held, that an application by defendant for security after service of the notice of trial was too late. *Fopp* v. *Pypher*, 3 P. R. 309.—C. L. Chamb.—J. Wilson.

An appearance was entered on 13th September, 1862, declaration filed on 29th, order for security for costs obtained on 7th October, 1862, on the ground that plaintiff had left Canada, and order rescinded on 11th March, 1863, on the ground of his return. Plaintiff again left Canada in October, 1863. An application was again made in March, 1864, for security:—Held, not too late: there being nothing to shew when defendant first had notice of plaintiff leaving in October, 1863, or that defendant had taken any steps in the cause, between that date and his application. *Somers* v. *Carter*, 3 P. R. 328.—C. L. Chamb.—Draper.

A delay in applying for security from the 2nd July, when the interpleader issue was delivered, until the 11th August, was held fatal. *Lovell* v. *Wardroper*, 4 P. R. 265.—C. L. Chamb.—Draper.

An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security given, must be made promptly after declaration served, according to the rule in ordinary cases. *Morris* v. *Leslie*, 5 P. R. 141.—C. L. Chamb.—Galt.

Security must be applied for before the time for answering has expired. *Smith* v. *Day*, 2 Chy. Chamb. 456.—Taylor, *Secretary*.

The filing of an answer is a waiver of any claim for security. *Ib.*

The application may be made after the expiry of the time for answering. *Ganson* v. *Finch*, 3 Chy. Chamb. 296.—Taylor, *Referee*.

(b) *Affidavits and Papers.*

Where the plaintiff has left the province, the affidavit should state that he has become a stationary resident abroad. *Micklejohn* v. *Holmes*, Tay. 39.

The affidavit must state with certainty that the plaintiff is not resident within the jurisdiction. *Redden* v. *McNab*, 4 O. S. 136.

Semble, per Robinson, C. J., that, on the authority of Dowling *v.* Harman, 6 M. & W. 431, an affidavit that deponent is informed and believes that plaintiff resides abroad, is sufficient. *Morgan* v. *Hellems*, 1 P. R. 363.

But held not, by Richards, J., on the authority of Joynes *v.* Collinson, 2 D. & L. 449. *Noad* v. *Provincial Insurance Co.*, 2 P. R. 331.

On making this application it must be shewn at what stage the proceedings are. *Torrance* v. *Gross*, 2 P. R. 55.—C. L. Chamb.—Burns. But see *Maneilly* v. *Hays*, 1 C. L. Chamb. 222. —Burns.

The state of the cause should be shewn on affidavit; but, to supply a defect in this respect, a judge may in his discretion look at the records of the court. *Hall* v. *Brigham*, 5 P. R. 464.—C. L. Chamb.—Dalton, *C. C. & P.*

An order for security can only be obtained on præcipe when the plaintiff admits on the face of

the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. *Wilson* v. *Wilson*, 10 L. J. N. S. 173.—Chy. Chamb.—Strong, on appeal from the Referee.

Where a bill described the plaintiff as of the city of Toronto, but stated that by the advice of a physician he had sought change of air, and was then temporarily resident at Rochester, it was held that an order for security could not properly be granted on præcipe. *Ib.*

A certificate of the state of the cause is only necessary where the application for security is made before answer filed. *Grant* v. *Winchester*, 6 P. R. 44.—Chy. Chamb.—Holmested, *Referee*.

(c) *Other Cases.*

Defendant's attorney entering common bail, is a good appearance to sustain a motion for security. *Grace* v. *Meighan*, Dra. 187.

Where a defendant obtains an order for security it is not necessary to file affidavits shewing that the order has been complied with before the bill is noted pro confesso. *Bolster* v. *Cochrane*, 2 Chy. Chamb. 327.—Mowat, on appeal from the Secretary.

Where defendants took separate orders for security, and the plaintiff obtained an ex parte order giving him liberty to pay $400 into court, instead of filing security by bond, the money so paid in was held to be security for all defendants, though the order recited one only of the orders for security. *Ib.*

When security is ordered to be perfected within a certain time, or the bill be dismissed, an order to dismiss may be granted ex parte on a certificate that no bond for security has been filed. *McCarrol* v. *McCarrol*, 2 Chy. Chamb. 380.—Taylor, *Secretary*.

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4. *Discharging Application.*

The subsequent acquisition of property is no ground for rescinding an order for security. *Reaume* v. *Leavitt*, *Reaume* v. *Trowbridge*, 6 P. R. 70.—C. L. Chamb.—Dalton, *C. C. & P.*

Where a plaintiff, who, when bill filed, was out of the jurisdiction, and had been ordered to give security, afterwards returned, but it appeared that he had no business and no intention of entering into any, no fixed place of abode, no house and no family or ties to bind him to the province; and the court was of opinion that the return of the plaintiff was merely to get rid of the order for security, the court declined to rescind it. *Marsh* v. *Beard*, 1 Chy. Chamb. 390.—VanKoughnet.

Where a plaintiff, who has been ordered to give security, returns within the jurisdiction to reside permanently, the order will be discharged. *Harvey* v. *Smith*, 1 Chy. Chamb. 392.—VanKoughnet.

The papers and affidavits used on a motion to set aside a bond for security for costs of appeal from the Court of Chancery, should be entitled in that court. *Denison* v. *Denison*, 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary*.

Where plaintiffs who reside out of the jurisdiction paid a certain sum into court in lieu of security, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated. *Luther* v. *Ward*, 2 Chy. Chamb. 175.—Taylor, *Secretary*.

The fact that defendant's solicitor knew that the plaintiffs had lands in the province when he took out the order for security, was held a good ground of objection to the order. *Ganson* v. *Finch*, 3 Chy. Chamb. 296.—Taylor, *Referee*.

An objection that the copy-order served was not endorsed with the name and place of business of the solicitor serving it was overruled, it not being shewn to have been the first proceeding taken by him. *Ib.*

On the plaintiff shewing he had lands in the province worth $4000, an order for security obtained on præcipe was set aside, and the order being also irregular in form, it was set aside with costs. *Ib.*

A plaintiff who had been for several years and was at the time of the filing of the bill, resident in the United States, described herself in her bill as of the township of Bertie, in the province of Ontario. Under these circumstances the court refused to discharge an order for security, although the plaintiff had returned to the jurisdiction and stated that it was her intention to reside there for the rest of her life. *Waldron* v. *McWalter*, 3 P. R. 145.—Chy. Chamb.—Blake.

A plaintiff resident abroad will not be released from giving security for costs, unless he shew that he has property to the value of $400 within the jurisdiction of the court and available in execution. Leasehold property may be sufficient. *Higgins* v. *Manning*, 6 P. R. 147.—Chy. Chamb.—Strong, on appeal from the Referee.

The plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth $2,666) in lands subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. The lease was for twenty-one years, and gave the defendants an option to purchase; under its terms no rent or taxes were to be paid until the title had been quieted under the Act for Quieting Titles, or a certificate was refused; in the latter event the defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending. The plaintiff's interest in this property was held insufficient to entitle him to the discharge of an order for security. *Ib.*

Nature of the property within the jurisdiction necessary to discharge an order considered. *Wilson* v. *Wilson*, 6 P. R. 152.—Chy. Chamb.—Strong, on appeal from the Referee.

See *Watson* v. *Yorston*, 1 L. J. N. S. 97, p. 789.

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5. *Putting in Security.*

(a) *Form and Amount of.*

A defendant, after plea, obtained an order to stay proceedings until security given for costs was given by him, and the plaintiff delivered him a bond for such security, and at the same time gave notice of trial, and defendant signed an agreement to admit documents at the trial, but afterwards returned the bond, and gave

notice that he would move to set aside plaintiff's proceedings if he went to trial. The plaintiff, however, tried his cause :—Held, that defendant had waived any irregularity or insufficiency in the bond. *Doe* d. *Leonard* v. *Myers*, 2 Q. B. 382. —P. C.—Macaulay.

Held, that it is for the plaintiff's convenience to submit the name of the proposed surety to the opposite party before filing the bond, as he may risk the surety not being successfully objected to by the defendant, and it is not necessary that the surety should be first approved by defendant's solicitor or the registrar, nor is a plaintiff bound to give more than one surety unless he alone is insufficient. *Beaton* v. *Boomer*, 1 L. J. N. S. 108.—Chy. Chamb.—VanKoughnet.

Held, also, that that the bond should contain the condition, to the effect, that upon the surety (and not the plaintiff) paying the costs, the obligation should be void. *Ib.*

The order for security should name the sum for which the bond for security is to be given. *Ganson* v. *Finch*, 3 Chy. Chamb. 296.—Taylor, *Referee.*

A party opposing the allowance of a surety's bond for security for the costs of an appeal, may read affidavits in opposition to the surety's affidavit of justification. *Campbell* v. *Royal Canadian Bank*, 9 L. J. N. S. 160.—Chy. Chamb.—Holmested, *Referee.*

An application for leave to pay into court $400 as security for costs of an appeal from a certificate of title under the Quieting Titles Act having been granted by the referee ex parte, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife and the other by the husband alone; it was held that the order was bad, as these facts should have been made known to the referee and the order under such circumstances made upon notice. *Re Howland*, 4 Chy. Chamb. 6.—Strong.

It is no objection to the bond that there is no affidavit of execution annexed. *Donelly* v. *Jones*, 4 Chy. Chamb. 48.—Taylor, *Referee.*

Neither is an affidavit of justification necessary until the solvency of the surety is questioned. *Ib.*

In the case of bonds for carrying a case to the Court of Appeal, an affidavit of justification is necessary under the order of Court of Error and Appeal, No. 8. *Ib.*

A bond for security for costs need not be by two sureties unless the defendant, before the bond is prepared, gives notice that he requires two. *Ib.*

(b) *Other Matters.*

A defendant, having applied for security for costs, does not waive his application by pleading in abatement before the rule is returnable. *Hastings* v. *Champion et al*, 6 O. S. 29.

Held, that where a summons for security for costs, with a stay of proceedings, was obtained, followed by an order, also containing a stay of proceedings, the defendant has the same number of days after security given in which to plead that he had at the time the proceedings were stayed by the summons. *Ryley* v. *Parmenter*, 2 L. J. N. S. 268.—C. L. Chamb.—Draper.

On an application for liberty to sue upon the bond given to secure the costs of an appeal against a decree of this court :—Held, that the party moving must shew a demand from, and refusal of the costs by, the sureties named in the bond. *Stokes* v. *Crysler*, 1 Chy. Chamb. R. —Esten.

On an application by defendant for leave to sue on the bond given in this case for security for costs, the plaintiff being resident out of the jurisdiction :—Held, that the decree must be produced, to shew that the defendants were ordered to receive their costs. *Roaf* v. *Topping*, 1 Chy. Chamb. 14.—Spragge.

When plaintiffs, who were residents out of the jurisdiction, had paid a certain sum into court in lieu of security for costs, an application to have this money paid out to them was refused, although a decree for specific performance had been made in their favour, the suit not being finally terminated. *Luther* v. *Ward*, 2 Chy. Chamb. 175.—Taylor, *Secretary.*

On an application to limit the time for putting in security for costs, a plaintiff was allowed the same length of time as she would have had for answering the bill, if she had been a defendant, such time to date from the application to limit the time. *Grant* v. *Winchester*, 6 P. R. 73; *S.* 9 L. J. N. S. 193.—Chy. Chamb —Holmested, *Referee.*

III. Costs of the Day.

1. *Neglecting to Proceed to Trial or Hearing.*

(a) *Rule for.*

The rule for costs of the day for not proceeding to trial, is absolute in the first instance. *Chisholm* v. *Simpson*, Dra. 2.

Held—1. Under sec. 225, C. L. P. Act, C. S. U. C., c. 22, that the rule should be drawn up in the principal office at Toronto; 2. That deputy clerks of the crown have no power, under the 120th rule of practice, to issue rules for costs of the day. *White* v. *Shire*, 7 L. J. 206.—C. L. Chamb.—Burns.

Per McLean, C. J., and Wilson, J., under rule of court No. 120, such rule may issue in vacation, at any time after the assizes for which notice was given. Per Hagarty, J., semble, that the rule of court was not intended to allow such a rule to be obtained sooner than by the previous practice, but to give it either in the term following the assizes or in any subsequent vacation. *Adshead* v. *Upton et al*,, 22 Q. B. 429.

(b) *When given or refused.*

Costs allowed for not proceeding to assessment of damages pursuant to notice. *Cross* v. *Cronther*, Tay. 186; *King's College* v. *Mayle*, 2 Q. B. 94.—P. C.—Jones.

The court refused to order a plaintiff to pay to defendant's executors the costs of not going to trial pursuant to notice. *Morris* v. *Randall*, Tay. 299.

Costs were allowed to a defendant who had accepted short notice, and the plaintiff did not proceed to trial pursuant thereto. *Harris* v. *Hawkins*, 3 O. S. 142.

Where the plaintiff having given notice of trial, did not enter his record in time, but defendant, notwithstanding, agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial, he was refused the costs of the day. *Doe* d. *Crawford* v. *Coppledike*, 4 O. S. 6.

Where a cause was put to the foot of the docket with defendants' consent, and was not tried, costs of the day were refused. *Bank of U. C.* v. *Covert et al.*, 4 O. S. 324.

Where the plaintiff's attorney sent notice of countermand to his agent in town, but too late for service, and the defendant's witnesses attended for the trial:—Held, that their expenses were rightly allowed in the costs of the day. *Spafford* v *Buchanan*, 4 O. S. 325.

Defendant is entitled to costs where the plaintiff does not enter his cause on the commission day, although he offers to enter it subsequently, which the defendant refuses to allow. *O'Neil* v. *Barnhart*, 5 O. S. 453.

Costs were refused, where after notice of trial defendant pleaded de novo, and the plaintiff did not proceed to trial, the court considering a new notice necessary. *McMillan* v. *Fergusson*, M. T. 2 Vict.

Where no notice of trial had been given, but the cause was entered after the commission day by consent, and the plaintiff did not afterwards proceed to trial:—Held, that the defendant was entitled to costs of the day. *Tenbroeck* v. *Cole*, 1 Q. B. 401.—P. C.—McLean.

In ejectment, where the jury having been sworn were discharged on defendant objecting that the jurata was defective, the defendant was not allowed costs of the day. *Doe* d. *Crooks et ux.* v. *Cummings*, 2 Q. B. 380.—P. C.—Macaulay.

Where a cause in the absence of plaintiff's counsel was struck out, and afterwards on his application reinstated, and then leave obtained to add pleas, and the cause at the close of the assizes not tried, a rule by defendant for costs of the day was set aside. *Scott* v. *Crosthwaite*, 6 [illegible] 89.—C. L. Chamb.—Richards.

Where a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant states he is ready, and the cause is struck out of the docket, defendant is entitled to his costs of the day. *White et al* v. *Shire*, 7 L. J. 206.—C. L. Chamb.—Burns.

After the jury had been sworn, it appeared that the notice to examine defendant had been served too late, and the plaintiff having no evidence, was unable to go on. The judge dismissed the jury, telling the plaintiff's attorney that they might be called together when convenient, at any time during the assizes, and the case taken. The plaintiff was afterwards ready to go on, but defendant's attorney refused to allow the case to be taken out of its order, and it was not tried:—Held, that defendant could not move for judgment as in case of nonsuit; but as the plaintiff's laches had rendered it necessary to dismiss the jury, the rule was discharged without costs. *Taylor* v. *Smith*, 2 P. R. 213.—P. C.—Richards.

No costs of the day for not proceeding to trial pursuant to notice in an interpleader suit will be allowed until the termination of the proceedings. *Salter* v. *McLeod*, 10 L. J. 299.—C. L. Chamb. —Richards.

In ejectment against U. and H., after notice of trial given a summons was obtained to allow U. to defend as landlord in lieu of H., and an order to that effect was made on the commission day of the assizes, 13th of April. The plaintiff, in consequence, did not enter his record, and on the 27th, during the assizes, defendant's attorney (who had made no amendment as allowed by his order) took out a rule for costs of the day on the ordinary affidavit, that the plaintiff had not proceeded to trial pursuant to notice nor countermanded it:—Held, that such rule must be set aside with costs, for the plaintiff under the circumstances was not bound to go to trial in pursuance of his notice. Per McLean, C. J.—Such rule was irregular, for as the judge at nisi prius might have allowed the record to be entered at any time during the assizes, there could be no default until they were over. *Adshead* v. *Upton et al*, 22 Q. B. 429.

Where, upon a cause being called on for trial, counsel for plaintiff states he is not ready, and counsel for defendant, though present in court, does not insist upon having the cause struck out or a nonsuit entered, in consequence whereof the cause is passed over, defendant is not entitled to costs of the day. *Vanluvan* v. *Tolan*, 8 L. J. 276.—C. L. Chamb.—Morrison, Burns.

Where defendant's counsel was ready at the assizes, and the plaintiff's counsel not being prepared, the cause was struck out:—Held, that defendants were not entitled to costs for not proceeding to trial pursuant to notice, but their proper course was to have insisted upon a nonsuit. *Crofts* v. *McMaster*, 3 P. R. 121.—C. L. Chamb.—Wilson.

Defendant obtained a judge's order: "That the trial of this cause be put off to the next spring assizes for York, and that the record now entered for trial be withdrawn, and that said trial be so put off on payment of costs." The costs were taxed, but defendant refused to pay them. The record was not withdrawn:—Held, that as the record was not withdrawn, and was a remanet, the order should be treated as conditional, and that defendant could not be compelled to pay the costs; but a summons to rescind the order was made absolute. *Brega* v. *Hodgson*, 4 P. R. 47.—C. L. Chamb.—A. Wilson.

Held, that a "reasonable time" need not be given in which to pay the costs of the day, &c., after taxation, but that the order, &c., may be made a rule of court, &c., the day after taxation. *Smith* v. *Cronk*, 9 L. J. N. S. 237.—P. C. —A. Wilson.

Where plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day: his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into

evidence unless by leave of the court. *Wallace* v. *McKay*, 1 Chy. Chamb. 67.—VanKoughnet.

A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed:—Held, overruling Wallace *v.* McKay, 1 Chy. Chamb. 67, that the defendant was entitled to have the case struck out of the paper, with the costs of the day. *Cobourg and Peterborough Railway* v. *Covert*, 7 Chy 411.

An application for costs of not proceeding to hearing according to notice will not be granted ex parte. The practice discussed, Armour *v.* Noble, 3 Chy. Chamb. 90, considered. *Jardine* v. *Hope*, 3 Chy. Chamb. 197.—Taylor, *Referee.*

The master will proceed upon his warrant, though the order of reference be obtained ex parte and be not served, so long as the warrant is not moved against. *Re McDonnell*, 4 Chy. Chamb. 69.—Boyd, *Master.*

As to when costs of the day will be granted. *Ib.*

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2. *Other Cases.*

The costs of a special jury are costs in the cause, and not costs of the day. *Whitehead* v. *Brown*, 2 O. S. 245.

The plaintiff had a verdict on all the issues, subject to a demurrer; the demurrer was decided in favour of the defendant; the plaintiff had leave to amend on payment of costs:—Held, not entitled to the costs of the day at nisi prius, not having succeeded on any of the issues. *Bank of B. N. A.* v. *Ainley*, 1 C. L. Chamb. 187.—Macaulay.

Held, that 29 & 30 Vict. c. 42, s. 1, does not refer to costs of the day in the same suit, and consequently proceedings cannot be stayed in a suit in which costs of the day have not been paid. Held, nevertheless, that this can be done on the ground of abuse of the process of the court, where the proceedings are vexatious. *Nicholson* v. *Coulson*, 6 P. R. 65.—C. L. Chamb.—Dalton, *C. C. & P.*—Galt.

Held, that a judgment purchased by defendant from a third party cannot be set off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien. *Bennett* v. *Tregent*, 6 P. R. 171.—C. L. Chamb.—Gwynne.

Held, that the costs of a chamber application to stay proceedings until term in a superior court case tried at the county court under the Law Reform Act 1868, are taxable under a rule for a new trial upon payment of costs, the county court judge having refused to stay the proceedings. *Merchants Bank* v. *Ross*, 6 P. R. 214.—Dalton, *C. C. & P.*

IV. Application for County Court Costs.

Under 13 & 14 Vict. c. 53, s. 78, in a case brought in this court, and a verdict rendered within the Division Court jurisdiction, the judge had no power to order County Court costs. *Cameron* v. *Campbell*, 11 Q. B. 159.

Where plaintiff in good faith sues in a County Court, and had reasonable grounds for supposing that he would recover more than he could recover in the Division Court, the judge may properly certify for County Court costs. *Donnelly* v. *Fletcher*, 8 L. J. 109.—C. C.—Mackenzie.

If one of the judges of the Superior Courts would grant a certiorari by reason of difficult questions of law, to remove the cause if commenced in a Division Court, it is proper for the judge of the County Court to certify for County Court costs. *Patterson* v. *Snook*, 8 L. J. 109.—C. C.—Mackenzie.

Where the verdict exceeds $60, and a certificate for full costs is refused, the master has still power to enquire whether a Division Court had jurisdiction, and to tax County Court costs. In this case the action was for use and occupation, the plaintiff recovered $100, and the master taxed County Court costs. The learned judge who tried the case would have certified for such costs if he had had authority to do so, and he therefore refused to interfere. *Harold* v. *Stewart*, 2 L. J. N. S. 245.—C. L. Chamb.—Draper.

The proceedings here with regard to writs of error to County Courts, must be governed by the old practice in England. The plaintiff, in the County Court, recovered $5 on a declaration containing counts on the warranty of a horse for deceit, and the common counts. No certificate was granted, and judgment was entered for defendant for his costs of defence as between attorney and client, less the $5 damages. The plaintiff removed the judgment by writ of error, contending that under the Statute of Ontario, 31 Vic. c. 24 s. 2, sub-s. 4, he was entitled to Division Court costs. The defendant obtained a rule calling upon the plaintiff to assign errors; Held, not his proper course; but that he should have sued out a scire facias quare executionem non. Held, also, that this writ could not be said to have been sued out merely for delay, in which case the court will not stay execution, for there was fair ground for contending that the plaintiff was entitled to Division Court costs, and that the defendant should have deducted his own costs in such court from his own County Court costs. *Pope* v. *Reilly*, 29 Q. B. 478.

V. Application for Full Costs.

1. *Time for Applying.*

The plaintiff recovered a verdict within the jurisdiction of the District Court, and as soon as the verdict was recorded, the court adjourned. A motion for a certificate, made at the opening of the court on the following morning:—Held, too late. *Falls* v. *Lewis*, Dra. 500.

A certificate under 58 Geo. III., c. 4, if not moved for after other causes have been tried, though upon the same day, will not be granted. *McKee* v. *Irwine*, 1 Q. B. 160.

When ordered at the trial but not completed from inadvertence, it may be completed afterwards at any time. *Linfoot* v. *O'Neill*, 5 O. S. 343.

Where there are issues in law and in fact, and a venire to try the issues and assess the damages, a certificate must be applied for at the trial, and an order cannot be made by a judge as in cases of assessment, after judgment by default. *Mahoney* v. *Zwick*, 4 O. S. 99.

Where a verdict was found for the plaintiff in a defended cause, and the judge at nisi prius did not certify, but the plaintiff afterwards obtained an order for costs in chambers from another judge, as if the damages had been assessed after judgment by default—the court set the order aside. *McNab* v. *Reeves*, H. T. 6 Vict.—P. C.—McLean.

After the jury had rendered their verdict, but before any other business, the judge examined a witness to prove only that the cause was commenced before the late District Court Act, and therefore proper to be tried in the Queen's Bench, and thereupon granted a certificate:—Held, properly granted. *Handcock* v. *Bethune*, 2 Q. B. 386.

A certificate either under the Division Court or District Court Act, must be moved for immediately after the verdict is rendered, and no discretion remains with the court or with the judge who tried the cause to grant it afterwards. *Malloch* v. *Johnston*, 4 Q. B. 352.

Semble, that where in a personal action the sum recovered is within the Division Court, a certificate must be moved for at the trial, or costs cannot afterwards be given. *Hamilton* v. *Clarke*, 2 P. R. 189.—C. L. Chamb.—Richards.

In trespass, the verdict was for 45s., and a certificate was applied for at the trial. The judge took time to consider, and before judgment entered, but after the first four days of next term, certified that the trespass was wilful and malicious, and that it was a proper case to be tried in the Superior Court:—Held, that the delay was no objection. *Wise* v. *Hewson*, 1 P. R. 232.—C. L. Chamb.—Burns.

A certificate having been granted, on application first made three months after verdict, and costs taxed thereon, the order was rescinded and costs revised: the defendant was at the same time allowed to set-off the excess of his costs of defence between attorney and client over County Court costs against the plaintiff's costs of the cause. *Bonter* v. *Pretty*, 9 C. P. 273.

See *Major* v. *McKenzie*, 23 C. P. 261, p. 808.

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2. *Parties Resident in Different Localities.*

Where an action was brought upon a promissory note, the consideration for which had arisen in the district of A., and the plaintiff brought his action and recovered a verdict under £15, in the district of B., the court refused to set aside a certificate for costs, under the District Court Act. *Secord* v. *Hornor*, Tay. 215.

Where plaintiff and defendant and the plaintiff's witnesses resided in different districts, full costs were allowed on a cause of action within the jurisdiction of the District Courts. *Hugill* v. *Driscoll*, Dra. 234.

Full costs were refused on a note under £40 where the plaintiff resided in the United States. *Sawyer* v. *McDonell*, T. T. 7 Will. IV.

Full costs will not be allowed on a cause of action within the jurisdiction of the District Courts, unless the cause of action arose in the district in which the plaintiff resides, or defendant removed from the district in which the action accrued before action brought. *Ketchum* v. *Cryder*, H. T. 7 Will. IV.

Full costs allowed on a note for £10, defendant having left the district in which it was made, and residing in another. *Perrin et al.* v. *Carson*, T. T. 2 & 3 Vict.

Full costs allowed in a cause within the jurisdiction of the District Courts, where there were several defendants residing in different districts. *Jones* v. *O'Sullivan*, H. T. 3 Vict.

So in a joint action against maker and indorser of a note, for less than £40. *Bank of B. N. A.* v. *Dennison*, 1 Q. B. 414.—P. C.—Macaulay.

Action against maker and endorser of a note for £25, made and endorsed at Perth, in the Bathurst district, but was discounted at Brockville, in the Johnstown district, by the agent of the plaintiffs, the endorsees, laying the venue in the Johnstown district. Judgment by default, and an order to compute was obtained:—Held, plaintiffs entitled to Queen's Bench costs. *Commercial Bank* v. *Kerr*, 5 Q. B. 320.

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3. *Reduction by Payments.*

Where a note originally beyond the jurisdiction had been reduced within it by payments after action, the plaintiff was allowed full costs. *Kilborn* v. *Wallace*, 3 O. S. 17.

Where, after action in the Superior Court, defendant paid $152 in full of the suit, which the plaintiff accepted, less costs, to be paid when taxed or agreed on, it was held that the plaintiff was entitled to full costs, as if the money had been paid into court. *Leslie* v. *Forsyth*, 1 L. J. N. S. 188.—C. L. Chamb.—Richards.

Where a note was reduced by payments before action, full costs were refused. *Donnelly* v. *Gibson*, 5 O. S. 704.

Where an account originally beyond the jurisdiction of the District Courts, was reduced within the jurisdiction of the Court of Requests by payments before action, a suggestion to deprive the plaintiff of full costs under the Court of Requests Act, was refused. *Scott* v. *Ferguson*, *Scott* v. *Rooke*, M. T. 3 Vict.

The plaintiff is entitled to full costs, when he sues for the balance of an account originally beyond the jurisdiction of the District Courts, but reduced by payments never specially applied to any items in the account. *Mearns* v. *Gilbertson*, 6 O. S. 573.

In an action for goods sold and delivered, the plaintiff claimed $453.50, but the verdict decided that his proper claim was at first only $324.77; of this $155 was paid before action, leaving $169.77, of which defendant paid into court $119.77, and the verdict was $58. A certificate for full costs was refused. *Brown* v. *McAdam*, 4 P. R. 54.—C. L. Chamb.—Hagarty.

Except in very special cases certificates will be refused when the claim is reduced by payment within the jurisdiction of an inferior court. *Ib.*

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4. *Title to Land in Question.*

Trespass q. c. f. Plea, "that the close was not the close of the plaintiff." Verdict for 1s. damages:—Held, that the plaintiff, under 22 Car. I. c. 9, without a certificate that the title

came in question, was entitled to full costs. *Lake* v. *Briley*, 5 Q. B. 307.

Trespass q. c. f. with a count for taking goods: Plea, not guilty by statute. Verdict for £1 and no certificate:—Held, plaintiff not entitled to full costs. *Hawkes* v. *Richardson*, 9 Q. B. 229.

Trespass q. c. f. Plea, general issue only. Verdict for 20s. A certificate under 22 & 23 Car. II., was refused at the trial:—Held, confirming Hawkes *v.* Richardson, 9 Q. B. 229, that the plaintiff was entitled at least to County Court costs. *Davis* v. *Barnet*, 10 Q. B. 501.

In trespass, defendant pleaded not possessed, which was held bad on demurrer, and plaintiff obtained a verdict with 1s. damages. A certificate under 43 Eliz. was obtained by defendant after judgment entered and costs taxed, that damages were under 40s. On motion for revision of taxation:—Held, that the plaintiff was entitled to costs, because the judge could have had no opportunity of certifying that the title was in question under the plea, after its being held bad on demurrer; and that the certificate under 43 Eliz. was too late. *Kain* v. *McGill*, 2 C. P. 151.

In an action against a road company for obstructing a flow of water from plaintiff's lands, the plea of not guilty by statute, was held not to bring the title to the land in question, so as to entitle the plaintiff to full costs without a certificate. *Overholt* v. *Paris and Dundas Road Co.*, 7 C. P. 293.

Where in trespass the title to land was not in question upon the pleadings, and the plaintiff obtained only £5 damages, and no certificate:—Held, that he was entitled only to Division Court costs. *Hamilton* v. *Clarke*, 2 P. R. 189.—C. L. Chamb.—Richards.

Under the 16 Vict. c. 177, s. 1, it is for the plaintiff claiming full costs to shew that the title did really and bonâ fide come in question, not merely that by the pleadings it might have been put in issue. *Ib.*

Plaintiff sued for trespass to land, and obtained a verdict for 1s., the pleas being not guilty, not possessed, and liberum tenementum; and the judge certified that the action was really brought to try a right, besides the right to recover damages for the trespass complained of:—Held, that this certificate alone, taken with the pleadings, was equivalent to an assertion by the judge that the title to the land was in question, and entitled the plaintiff to full costs. *Spiers* v. *Carrique*, 23 Q. B. 585.

In trespass q. c. f. defendant pleaded that the land was not the plaintiff's, and the plaintiff obtained a verdict for £10:—Semble, that he would have been entitled to full costs without a certificate, though title were not brought in question at the trial (as in this case it was held to be). *Humberstone* v. *Henderson*, 3 P. R. 40.—Q. B.

In trespass q. c. f. and for taking goods, defendant pleaded not guilty: that the goods were not the plaintiff's, and justification under a fi. fa. Title to land was not brought in question:—Held, that the plaintiff on a verdict for $175 was clearly not entitled to full costs without a certificate. *Stewart* v. *Jarvis et al*, 27 Q. B. 467.

The plaintiff filed a bill for the protection of the timber on certain land which he claimed to own. At the hearing the court retained the bill with liberty to the plaintiff to bring an action. The plaintiff brought the action and recovered a verdict for $20. It appearing that the question in issue was the plaintiff's title to the land, he was held entitled to a decree with costs, notwithstanding the small amount of damage which had been actually done by the defendant. *McAlpine* v. *Eckfrid*, 16 Chy. 595.

See, also, COUNTY COURTS, III. 5, p. 842.

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5. *Decisions under 31 Vict. c. 24, O.*

Under this statute, section 1, a judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act. *Orok* v. *Garvin*, 5 P. R. 169.—C. L. Chamb.—Richards.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff with 1s. damages:—Held, that (there being important rights at stake, and it being such a case as would properly be removable from an inferior court by certiorari), the plaintiff was entitled to a certificate for full costs. *Ib.*

In an action for breach of promise of marriage, a certificate for full costs under 31 Vict. c. 24, s. 1, was moved for at the trial, and refused; but some seven weeks afterwards the plaintiff applied for and obtained a certificate under the same section, to prevent the defendant from setting off costs. The certificate was set aside, for, 1. Sec. 1, which only authorizes such a certificate in actions of trespass or trespass on the case, does not extend to actions of contract, like the present; and, 2. As the certificate granted was not applied for at the trial, nor the consideration thereof postponed, it was granted too late. *Major* v. *McKenzie*, 23 C. P. 261.

A certificate under 31 Vict. c. 24, ss. 1, 2, was granted after a verdict for $118 "to entitle the plaintiff to county court costs":—Held, that there could not be a set-off of costs on such certificate. *Moore* v. *Price et al*, 5 P. R. 9.—C. L. Chamb.—J. Wilson.

In an action for slander the plaintiff is entitled under a certificate for full costs pursuant to 31 Vict. c. 24, O., to tax full costs of suit; but, per Gwynne, J., he is not so entitled without a certificate, upon the ground that some of the words mentioned in the declaration are not actionable without special damage laid. *Stewart* v. *Moffatt*, 20 C. P. 89.

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6. *Other Cases.*

The master is not to refuse to tax Queen's Bench costs, merely because the verdict is within the District Court jurisdiction, although the judge has not certified. *Murray* v. *Orr*, Dra. 3.

Full costs not allowed where in covenant only £2 was recovered, and the judge did not certify. *Gardner* v. *Stoddard*, Dra. 94.

Effect of the word "withdrawn" in a certificate. *Ib.*

One of the plaintiffs being judge of the District Court in which the defendant resided, full

costs were allowed, although the cause of action was within the District Court jurisdiction. *Jones* v. *Wing*, 3 O. S. 36.

Where in an investigation of a charge under the Petty Trespass Act, 4 Will. IV. c. 4, before magistrates, the plaintiff was guilty of a contempt, for which the magistrates convicted him, but without warrant, and plaintiff brought an action for false imprisonment against them and recovered:—Held, that the action did not arise in consequence of anything done by the magistrates under the Petty Trespass Act, and that therefore it was not necessary for the judge, under the 21st sec. of that Act, to certify his approval of the verdict to entitle the plaintiff to his costs. *Armour* v. *Boswell*, 6 O. S. 450.

Full costs were allowed in a bailable action, there being no judge in the district where the cause of action arose when the action was brought. *Jennings* v. *Dingman*, T. T. 4 & 5 Vict.—P. C. —Macaulay.

So, also, under similar circumstances in a non-bailable action. *Willis* v. *Merriton*, T. T. 4 & 5 Vict.—P. C.—Macaulay.

The plaintiff sued in the Queen's Bench, and applied for Queen's Bench costs, on the ground that on the day he commenced his suit, no judge of the County Court had been appointed by the government to fill up the vacancy that had occurred; but, Held, that under the circumstances Queen's Bench costs could not be allowed. *Sutherland* v. *Tisdale*, 1 C. L. Chamb. 213.—Burns.

The plaintiffs having recovered only £5 against a corporation, were allowed Queen's Bench costs, as the right to sue a corporation in a District Court was doubtful. *Fisher* v. *The City of Kingston*, 4 Q. B. 213.

The court ordered full costs on an assessment of damages upon a cause of action exceeding £30, but under £40, it being a case in which the court would have granted a certificate if there had been a trial. In another case, it was refused. *Ferrie* v. *Young and McGill* v. *Stull*, 3 O. S. 140.

It is no ground for a certificate that defendant's set-off could not be tried in the District Court. *Gooderham* v. *Chilver*, 5 O. S. 496.

Plaintiff, residing in the London district, sold goods to defendant residing in the Western district, who gave his note for the amount:—Held, that on the mere surmise that the consideration of the note might be disputed, the plaintiff was not justified in suing in the Queen's Bench, and could not therefore get full costs. *Cronyn* v. *Probat*, 6 O. S. 192.

Declaration on a special count and common counts—General verdict for a sum within the District Courts, and no certificate:—Held, plaintiff entitled only to District Court costs. *Washburn* v. *Longley*, 6 O. S. 217.

Declaration in covenant, assigning two breaches, one for liquidated, and the other for unliquidated demands. Verdict under £40:—Held, plaintiff not entitled to Queen's Bench costs without a certificate. *Beattie* v. *Cook*, 6 O. S. 217.

Where plaintiff, an attorney, brought assumpsit and recovered 3s., the Court held him entitled to full costs, as he proved a cause of action to the amount of £20 and upwards, although the jury decided against him on those items of his claim on hearing the whole evidence. *King, one, &c.*, v. *Such*, 5 O. S. 81.

Attorneys, suing for costs by an attorney, and not by attachment of privilege, were refused full costs. *Strachan et al.* v. *Bullock*, 2 Q. B. 382.—P. C.—Macaulay.

Trespass for assault and battery. Defendant pleaded that the plaintiff was wrongfully in defendant's close, and molliter manus imposuit to turn him out, and the plaintiff replied excess, and obtained a verdict for 1s.:—Held, that he was entitled to full costs. *Caniff* v. *Corwin*, T. T. 5 & 6 Vict—P. C.—Macaulay.

In an action for assault and battery, where a battery has been proved, the judge nevertheless has a discretion to withhold a certificate for full costs under the 22 & 23 Car. II. c. 9. *Carr* v. *Trotter*, 8 Q. B. 324.

An action for assault and battery was brought before 16 Vict. c. 175, s. 26, and damages were afterwards assessed at 1s. After the passing of the C. L. P. Act, sec. 312, the plaintiff applied for an order to tax full costs:—Held, that the 16 Vict. c. 175, being in force till the C. L. P. Act came into operation, the plaintiff might have moved under it; and the application was refused. *Savage* v. *Robertson*, 2 P. R. 307.—Q. B.

After the jury had rendered their verdict, but before any other business, the judge examined a witness to prove only that the cause was commenced before the late District Court Act, and therefore proper to be tried in the Queen's Bench, and thereupon granted a certificate:—Held, properly granted. *Handcock* v. *Bethune*, 2 Q. B. 386.

Held, that a party who gave instructions for an action, without specifying the court, (the attorney not stating that he would expect him to pay the difference should the verdict be within the County Court jurisdiction, and commencing the action in the superior court), was only liable for County Court costs between attorney and client, the sum recovered being within the jurisdiction of the County Court, and no higher costs being taxable between party and party. *Scanlan* v. *McDonough*, 10 C. P. 104.

An action in which it would be necessary to issue a commission for the examination of witnesses may be brought in one of the superior courts, although the amount sued for may be within the jurisdiction of an inferior court. *Comstock* v. *Leaney*, 3 L. J. 13—C. L. Chamb.—Burns.

An order for a certiorari to bring up a case into a superior court entitles the defendant to the full costs of that court if he succeed, without any certificate. *Corley* v. *Roblin*, 5 L. J. 225.—C. L. Chamb.—Richards.

The fact that a plaintiff prays an injunction is not sufficient to entitle him to full costs without a certificate. The action itself and the equitable relief sought must be such as to justify the judge in certifying it to be a proper action to be tried in the Superior Court. There is nothing in the Patent Act, C. S. C. cap. 34, to justify the judge in refusing to certify for costs,

merely because defendant might have defeated the plaintiff entirely by proper pleading, but had not done so. Under the peculiar circumstances of these cases:—Held, that the first was a case proper for a certificate, but the second case not so. *Emery* v. *Iredale*, *Emery* v. *Hodge*, 7 L. J. 181.—C. L. Chamb.—Richards.

In an action on a lease alleged to contain a covenant sued on, where it was a difficult question of law to determine whether or not the lease contained such a covenant, although the jury found $140 damages only, the judge certified that the cause was a fit one to be tried in the Court of Common Pleas. *Thompson* v. *Crawford*, 9 L. J. 262.—C. L. Chamb.—Richards.

The amount of the verdict primâ facie settles the jurisdiction, and if under any circumstances the inferior court could have tried the action for that amount, a certificate is necessary. *Bonter* v. *Pretty*, 9 C. P. 273.

The mere fact that the damages have been laid at a sum beyond the jurisdiction of the County Court, does not entitle the plaintiff, without a certificate, to superior court costs. In the absence of this certificate the master on taxation must be governed by the verdict recovered. *Miller* v. *The Beaver Mutual Fire Insurance Co.*, 15 C. P. 75.

The verdict of the jury must determine for all purposes of costs the amount of the plaintiff's claim. *Brown* v. *McAdam*, 4 P. R. 54.—C. L. Chamb.— Hagarty.

Where an action was brought on an open account, and a verdict entered by consent for the amount claimed, which was within the County Court:—Held (dissenting from Bonter *v.* Pretty, 9 C. P. 273,) that it was a case in which, under rule of court No. 155, a judge in Chambers could make an order for full costs. *Cumberland* v. *Ridout*, 3 P. R. 14.—C. L. Chamb.—Robinson.

A certificate is necessary to obtain full costs in replevin as in other actions, though the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts. *Ashton* v. *McMillan*, 3 P. R. 10.—Q B.

At the trial in replevin in the County Court a verdict was entered for defendant, with leave reserved to move to enter it for the plaintiff, and no certificate was applied for. On appeal a verdict was directed for the plaintiff for 15s., and the clerk of the County Court taxed only Division Court costs. The judge refused a revision, and this court would not interfere. *In re Coleman* v. *Kerr*, 28 Q.B. 297.

The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not shew that the action could not have been brought in the District Court. The plaintiff, to entitle himself to Queen's Bench costs, must prove at the trial that the goods are really of greater value. —Macaulay, J., diss. *Wheeler* v. *Sime et al.* 3 Q. B. 265.

An action of seduction may, under some circumstances, be brought "to try a right," or the grievance complained of, may be "wilful and malicious;" and therefore, on a verdict under $8, without a certificate, the plaintiff was held not entitled under C. L. P. Act, s. 324, to any costs whatever, but as the statute is confined to a verdict or assessment he was entitled to full costs of demurrer. *Townsend* v. *Sterling*, 4 P. R. 125. —C. L. Chamb.—A. Wilson.

The 554th general order as to the filing a certificate of the applicability of the lower scale tariff is directory, and the omission of it does not entitle a defendant in case of the dismissal of the bill to the higher scale costs, except for fees of court actually paid. *Ferguson* v. *Rutledge*, 18 Chy. 511.

The costs of a suit by a judgment creditor, to whom less than $200 is due, to obtain payment of his own debt alone out of property alleged to have been conveyed away to defeat the plaintiff's claim, are taxable according to the lower scale, no matter what the value of the property may be. *Forrest* v. *Laycock*, 18 Chy. 611.

When a plaintiff files a bill in this court to foreclose a mortgage for a sum within the jurisdiction of the County Court no costs will be allowed him. The fact that defendant is resident in a county other than where the land is situate will not vary this rule. *Connell* v. *Curran*, 1 Chy. Chamb. 11.—Spragge.

Primâ facie the sum realized on a sale under a power contained in a mortgage is the subject matter of the suit. A mortgagee exercised the power of sale contained in his security, and realized $350. On a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $130. The plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350. *McGillicuddy* v. *Griffin*, 20 Chy. 81.

VI. Application to Deprive Plaintiff of Costs under 43 Eliz., c. 6.

It is not compulsory upon a judge to certify under 43 Eliz. *McGuire* v. *Donaldson*, Tay. 247.

In an action for a libel wherein the plaintiff recovered only 20s., the judge refused to certify. *Cameron et ux.* v. *McLean*, Tay. 381.

Where the jury gave only 1s., a certificate under 43 Eliz. to deprive plaintiff of costs was refused. *Jeffrey* v. *Lawrence*, 5 O. S. 317.

Where there are counts in trespass q. c. f. and de bonis asportatis, and a general verdict under 40s., the judge may certify, to deprive the plaintiff of costs. *Harper* v. *Ward*, M. T. 4 Vict.

In trespass q. c. f., to which the general issue is pleaded, (not by statute,) the judge may certify under 43 Eliz., to deprive the plaintiff of costs, when the damages are under 40s. *Goodall* v. *Glen*, 6 Q. B. 14.

Declaration for trespass and false imprisonment, that the defendant assaulted the plaintiff. Defendant pleaded: 1. Not guilty; and 2, 3, and 4, as to the assaulting the plaintiff, and keeping and detaining him in prison, of justification under writs of ca. sa. and ca. re. Verdict for 12s. 6d.:—Held, that a battery was not admitted on the pleadings, and therefore a certificate

might be granted under 43 Eliz. c. 6, to deprive the plaintiff of costs. *Jones* v. *Marshall*, 11 Q. B. 204.

VII. Several Issues.

1. *Issues in Law and in Fact.*

Where the issues in fact and one issue in law are in favour of the plaintiff, and an issue in law in bar of the action in favour of defendant, the plaintiff is entitled to the costs of the trial and of the pleading determined in his favour, and defendant to the general costs of the cause. *Davis* v. *Davis*, 5 O. S. 453.

When the plaintiff succeeds on a demurrer to a plea in abatement, he cannot recover the costs of the demurrer under 7 Will. IV. c. 3, until the termination of the suit. *Richmond et al.* v. *Campbell*, H. T. 2 Vict.

Defendant took issue upon some counts and demurred to the rest, and judgment was against the demurrer, but the issues found for him :—Held, that he was entitled to the costs of those issues. *Sheldon* v. *Hamilton*, M. T. 3 Vict.

In trespass against two, they pleaded the general issue and separate justifications, to which the plaintiff demurred, and he obtained a verdict on the general issue, assessing contingent damages on the demurrer, on which judgment was afterwards given for one defendant, and against the other :—Held, that under 7 Will. IV. c. 3, ss. 24 and 26, the defendant who succeeded on demurrer was entitled to enter judgment for his costs. *Clarke* v. *Durham et al.*, T. T. 4 & 5 Vict. —P. C.—Macaulay.

Defendant demurred to one count, and took issue on the others ; the plaintiff went to trial and assessed contingent damages on the demurrer; the plaintiff succeeded on the demurrer, and defendant on all the issues :—Held, that defendant was entitled to his costs of the issues in fact, and might have judgment and execution for them. *Taylor* v. *Carr*, 4 Q. B. 149.

When upon a demurrer and issues in fact, judgment is given for defendant on the demurrer, and the issues are found for plaintiff, the defendant cannot call upon the plaintiff to pay him the costs of the issues on which he failed as a condition of his (the plaintiff's) being allowed to amend on the demurrer. *Bank of B. N. A.* v. *Ainley*, 7 Q. B. 521.

The plaintiff had a verdict on all the issues, subject to a demurrer; the demurrer was decided in favour of the defendant; the plaintiff had leave to amend on payment of costs :—Held, not entitled to the costs of the day at nisi prius, not having succeeded on any of the issues. *Bank of B. N. A.* v. *Ainley*, 1 C. L. Chamb. 187.—Macaulay.

Plaintiff declared against defendant as a stockholder in a railway company, to which defendant pleaded and demurred. The issues in fact were tried first, and resulted in a verdict for plaintiff, with leave to move for a nonsuit, which rule was taken out the same term in which demurrer was set down, and upon the latter being called on for argument the plaintiff obtained leave to amend on payment of costs. An amended declaration was after[illegible]rds served, and defendant's costs taxed upon the amendment, when the costs of the issues of fact and the rule nisi were disallowed. Upon motion for revision in Chambers, referred to full court :—Held, that defendant was entitled to all the costs of the demurrer and application to amend, and (the question being a new one) the costs in Chambers and of this application. *Fraser* v. *Hickman*, 12 C. P. 213.

In an action on the case, the plaintiff had judgment on demurrer to some of the pleas. He afterwards obtained a verdict for 1s. damages on the issues in fact, and a certificate for costs was refused :—Held. that under C. L. P. Act, s. 316, he was entitled to his full costs of the demurrer, and that sec. 328 did not apply. *Kinloch* v. *Hall*, 26 Q. B. 134.

A declaration contained one count for seduction of plaintiff's daughter, and another for necessaries supplied for the child. Plea not guilty to first count ; demurrer to second. The issue in fact was first tried and verdict for the plaintiff for 5s. Judgment was afterwards given for plaintiff on the demurrer, whereupon the plaintiff remitted on the roll all damages, without excepting costs, under the second count, and signed judgment for the 5s. and full costs taxed. On a summons for revision :—Held, that the plaintiff was entitled to the costs of demurrer to the second count, although it would have been more correct to have excepted the costs in the remittitur. *Townsend* v. *Sterling*, 4 P. R. 125.—C. L. Chamb.—A. Wilson.

The plaintiff appealed from the report of the master, stating eleven objections thereto. On the argument he abandoned one, two were found in his favour, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the court, instead of giving one set of costs to the plaintiff and another to the defendant, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff. *Ferguson* v. *Frontenac*, 21 Chy. 188.

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2. *Several Issues in Fact.*

Replevin for 900,000 feet of sawn lumber. Pleas : 1. Non cepit ; 2. Goods not plaintiff's ; 3. Goods defendant's. The jury found in favour of the plaintiff for 350,000 feet of lumber, and for defendant as to the remaining 550,000 :—Held, 1. That the plaintiff was entitled to the general costs of the cause ; 2. that defendant was entitled to the proportion of costs occasioned by that part with respect to which he had succeeded, and to deduct them from the plaintiff's bill. *Caniff* v. *Bogart*, 6 L. J. 59.—C. L. Chamb. —Burns.

A judge will not certify under 4 Anne c. 16, s. 5, to protect a defendant against the costs of a plea which he knows is not true, but which he pleads for a collateral purpose. *McLeod* v. *Torrance*, 3 Q. B. 174.

Action against administrators on several counts. Pleas : 1. Plene administraverunt præter, a Division Court judgment for £20, and that goods of intestate in defendant's hands were insufficient to pay ; 2. Payment of £55, before action brought, in satisfaction of so much ; 3. Set-off. Plaintiffs

took issue on each plea, and to the first also replied lands. Defendants rejoined, admitting that intestate died seised of lands, but denying that they had any power to deal with them, and praying judgment de bonis propriis; to which replication the plaintiff's demurred. Afterwards, defendants further pleaded the recovery of five judgments against them as administrators, and remaining unsatisfied and no effects sufficient. Plaintiffs replied that one judgment was obtained by fraud, and took issue as to the others. The court decided for defendants on the demurrer. A verdict was rendered for plaintiffs on the issues subject to reference, costs, &c., to abide the event of the award. The award found the issue on the plea of plene administraverunt, and the pleas of payment in favour of defendant: that on the plea of set-off, defendants were entitled to £5, leaving balance in plaintiffs' favour of £220 1s. 1d., which sum was awarded to plaintiffs. The remaining issues were awarded to defendants:—Held, that defendants were only entitled to judgment on the issues determined in their favour with their costs of cause relating to such issues, while the plaintiffs were entitled to judgment as against the estate of intestate for the amount found due on the plea of set-off with the general costs of the cause, except as to issue found against him, and for the costs of the issue on the plea of set-off against the defendants de bonis propriis. *Mein et al.* v. *Short et al.* 11 C. P. 430. See *Holton* v. *McDonald*, 12 C. P. 246.

Trespass in one count q. c. f., and taking away goods. Defendant justifies the breaking and entering in one plea, and in another, denies the goods to be the plaintiff's. Defendant has a verdict upon the first plea, and plaintiff upon the second for 30s.:—Held, plaintiff entitled to judgment in the action and the costs of the cause. *Evans* v. *Kingsmill*, 4 Q. B. 132.

Where defendants had set up several grounds of defence on which much evidence was gone into, and the court without going into these defences, dismissed the plaintiff's bill on a ground not argued, and which might have been taken by demurrer to the bill: Held, Esten, V. C. diss.) that the defendants were notwithstanding, upon the authorities, entitled to the whole costs of their defence. *Simpson* v. *Grant*, 5 Chy. 267.

In answer to a bill for the redemption of a mortgage alleging usury in the original transaction, the mortgagee set up several defences which were decided against him. The court, in decreeing redemption, ordered the plaintiff to pay the costs as of a common redemption suit, and defendant the costs of the issues found against him. *Isherwood* v. *Dixon*, 5 Chy. 314.

VIII. Set-off of Costs.

1. *Generally.*

Where a defendant put off a trial on payment of costs, and never having paid them afterwards, obtained a verdict:—Held, that those costs could not be set off against defendant's general costs, there being no affidavit of his insolvency. *Potts* v. *Doyle*, 5 O. S. 97.

If plaintiffs on a verdict are allowed only District Court costs, and defendant neglect to take out a rule to be present at the taxation, the court will not direct a revision that defendant's costs may be deducted. *McCall et al.* v. *Cameron*, 1 Q. B. 414.—P. C.—Macaulay.

If the plaintiff refuse to enter his judgment in a case where defendant is entitled to set off his costs against plaintiff's verdict and costs, a judge in Chambers will limit a time within which plaintiff must enter his judgment, and in default, allow defendant to enter it for him. *Sinclair* v. *Barrow*, 3 L. J. 49—C. L. Chamb. Richards.

Held, that a defendant who conceives he has a right to costs against a plaintiff, in consequence of plaintiff having recovered in a superior court an amount within the jurisdiction of an inferior court, is entitled to call upon plaintiff, either himself to proceed to the entry of judgment, or to bring in the record, in order that judgment may be entered by defendant. *Cross* v. *Waterhouse*, 3 P. R. 287.—C. L. Chamb.—Morrison.

Held, also, that a judge in Chambers has power to entertain the application and make the order. *Ib.*

A plaintiff having taken out a rule for the payment of costs, &c., erroneously entitled, gave defendant's attorney notice of a waiver of the rule, and proceedings under this rule were stayed by a judge's order until the fourth day of next term. The plaintiff after that day issued the rule properly entitled, and having obtained an order for an attachment, arranged with defendant's attorney to allow certain costs to be set off against the costs for the non-payment of which the attachment was ordered, and that the attachment should only be proceeded with for the balance. The defendants, on the 21st of November, obtained a rule to set aside the rule or the attachment thereon issued, on the ground that the plaintiff's attorney had issued the rule properly entitled without authority, and during the time the proceedings were stayed by the judge's order. Against this rule it was shewn that on the 18th of November the plaintiff's attorney served a notice on defendants' attorney, abandoning the second rule and the attachment issued thereon:—Held, per Draper, J., that the judge's order only stayed proceedings upon the rule erroneously entitled, not in the cause; and that the arrangement made by defendants' attorney with plaintiff's attorney as to setting off costs after the attachment had been ordered, precluded defendant from going back to object to proceedings antecedent to the granting of the attachment; and as, in addition to this, notice of abandonment of the attachment had been served before defendant's attorney took out this rule, that such rule should be discharged with costs. *Doe Murphy* v *McGuire*, 1 P. R. 33.—P. C.

The 13 & 14 Vict. c. 53, s. 78, enacts, that in any suit which might have been brought in a Division Court, unless the judge shall certify as therein mentioned, so much of defendant's costs as shall exceed the costs which would have been incurred by him in the Division Court shall be set off by the master in entering judgment against the plaintiff's costs, and defendant shall be entitled to execution against the plaintiff when the costs to set off shall exceed the plaintiff's verdict and Division Court costs:—Held, that under this the defendant might set off the excess of his cost of defence above his own and the

plaintiff's verdict.—Draper, J., diss. *Cameron* v. *Campbell*, 12 Q. B. 159; *S. C.* 1. P. R. 170.—C. L. Chamb.—Burns.

Held, also, that the plaintiff's attorney, having advanced to the plaintiff the amount of the verdict, could have no lien so as to deprive the defendant of the benefit of the statute. *Ib.*

Two actions commenced in December were tried in May; the plaintiff had a verdict in one and defendant in the other. In March the plaintiff assigned all his effects to his attorney for the benefit of creditors:—Held, that notwithstanding the assignment defendant was entitled to set off his costs against the plaintiff's verdict and costs, saving the attorney's lien for his costs, if it could be shewn that the property assigned to him was insufficient to pay them. *Tippett* v. *Haacke*, 1 P. R. 365.—C. L. Chamb.—Robinson.

Trover for a deed. Verdict for £24 16s. A new trial was ordered unless plaintiff would accept nominal damages, to which he consented. The court refused to compel plaintiff to enter judgment and tax his costs, or allow defendant to do so for him, in order to set-off the costs of defence, and recover the excess over the plaintiff's verdict and taxable costs—first, because it is not clear that an action of this nature is within the jurisdiction of the Division Court; and secondly, because the verdict was not reduced until after the trial, and the plaintiff therefore had no opportunity to apply for a certificate, which perhaps he might otherwise have obtained. *Ginn* v. *Scott*, 11 Q. B. 542.

A certificate having been granted, on application first made three months after verdict, and costs taxed thereon, the order was rescinded and costs revised. The defendant was at the same time allowed to set-off the excess of his costs of defence between attorney and client over County Court costs against the plaintiff's costs of the cause. *Bonter* v. *Pretty*, 9 C. P. 273.

Where in an action for false imprisonment the plaintiff obtained a verdict for 1s., and no certificate:—Held, that as he was entitled to no costs, defendant could not, under sec. 328 of the C. L. P. Act set off or recover his costs, against him. *Cross* v. *Waterhouse*, 23 Q. B. 590.

Held, that where plaintiff, without a trial, recovers in a superior court an amount within the pecuniary jurisdiction of an inferior tribunal, defendant is not entitled to set off as against the costs of plaintiff so much of defendant's costs taxed, as between attorney and client, as exceed the taxable costs of defence, which would have been incurred in the inferior tribunal, had the action been brought in that tribunal—sec. 328 of C. L. P. Act not being applicable. *Johnson* v. *Morley*, 3 P. R. 217.—C. L. Chamb.—A. Wilson.

[See now 31 Vict. c. 24, O., which repeals secs. 324 and 328 of C. L. P. Act, and substitutes other provisions.]

Held, that a judgment purchased by defendant from a third party cannot be set-off against the costs of the day, given to the plaintiff upon an application to postpone the trial, secured by the personal undertaking of the defendant's attorney to pay these costs, and upon which the plaintiff's attorney has a lien. *Bennett* v. *Tregent*, 6 P. R. 171.—C. L. Chamb.—Gwynne.

The plaintiff, in the County Court, recovered $5 on a declaration containing counts on the warranty of a horse for deceit, and the common counts. No certificate was granted, and judgment was entered for defendant for his costs of defence as between attorney and client, less the $5 damages. The plaintiff removed the judgment by writ of error, contending that under the Statute of Ontario, 31 Vict. c. 24, s. 2, sub-s. 4, he was entitled to Division Court costs. The defendant obtained a rule calling upon the plaintiff to assign errors:—Held, not his proper course; but that he should have sued out a scire facias quare executionem non. Held, also, that this writ could not be said to have been sued out merely for delay, in which case the court will not stay execution, for there was fair ground for contending that the plaintiff was entitled to Division Court costs, and that the defendant should have deducted his own costs in such court from his own County Court costs. *Pope* v. *Reilly*, 29 Q. B. 478.

Defendant pleaded several pleas on which issue was joined, and afterwards pleaded a defence arising since suit commenced, to which the plaintiff replied, confessing its truth, and praying judgment for costs. It was ordered that all the pleas and issues thereon, except the plea confessed, should be struck out, the costs of such pleas to be set off against plaintiff's general costs of the cause. *Gordon* v. *Robinson*, 1 L. J. N. S. 326.—C. L. Chamb.—A. Wilson.

A certificate under 31 Vict. c. 24, ss. 1, 2. was granted after a verdict for $118, "to entitle the plaintiff to County Court costs":—Held, that there could not be a set-off of costs on such certificate. *Moore* v. *Price et al.*, 5 P. R. 9.—C. L. Chamb.—J. Wilson.

Where the plaintiff's bill sought to enforce two judgments, one of which the court held him not entitled to enforce, no costs were given to either party up to the hearing. The rule seems to be, that where costs are to be set off against other costs, the court will not give costs to either party. *Cameron* v. *Bradbury*, 9 Chy. 67.

A decree had been made in a cause giving the plaintiffs relief, and ordering defendants to pay the costs, which however, were not paid. The plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal was dismissed with costs, to be paid to one of the respondents; thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly. *Bank of Upper Canada* v. *Thomas*, 10 Chy. 356.

On the dismissal of a bill, costs were taxed to the defendants, and execution issued against the plaintiff, which was returned nulla bona. Two of the defendants, as administrators, held moneys part of which would, on distribution, belong to the plaintiff, and which they now applied for leave to set off against the taxed costs. Under the circumstances the motion was refused. *Black* v. *Black*, 11 Chy. 270.

The practice at common law with respect to the set-off of one defendant's costs against those of another, for the benefit of the plaintiff, does not prevail here. Nor can a plaintiff set off costs payable by one defendant against that de-

fendant's share of the joint costs of defence in the same suit, all defendants being represented by the same solicitor. *Commercial Bank* v. *Atwood*, 1 Chy. Chamb. 219.—VanKoughnet.

In a partnership suit, the partnership was found indebted to the defendant; and, on the other hand, the defendant was liable to certain costs. The defendant having become insolvent, it was held that the plaintiff was entitled, notwithstanding the insolvency, to set off the costs against the debt. *Brigham* v. *Smith*, 17 Chy. 512.

To entitle a party to set off one debt against another, it must be shewn that the debts are due from and to the same parties respectively. Where, therefore, a debt was due from A. to B., and an amount of costs was due from B. and his solicitor to A., the court refused an application made by B. and his solicitor to set off the one amount against the other, although the effect of such a set-off would have been that B. would have paid a debt for which he was only jointly liable with another. *Wilson* v. *Switzer*, 1 Chy. Chamb. 160.—Spragge.

A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff successfully defended before any injunction could be obtained, he proceeded no further with his suit in equity, and the bill was dismissed with costs. It was claimed that the costs at law should be set off as against these costs, but the referee considered that costs at law could not be set off against costs in equity, that being the rule in England. Strong, V. C., affirmed the order of the referee as to the first point, and without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, affirmed the order of the referee in this point also, on the ground that the lien of the attorney attached, and was paramount to any right to set-off. *Webb* v. *McArthur*, 4 Chy. Chamb. 63.—Taylor, *Referee*.

A defendant in an ejectment suit entitled to relief in equity on the ground of mistake, defended the action, in which he was unsuccessful, instead of coming at once to this court for relief. Subsequently he filed a bill and obtained a decree with costs, but the plaintiff at law was held entitled to set off against such costs his costs of the ejectment subsequent to the writ. *Haynes* v. *Gillen*, 21 Chy. 15.

IX. Taxation of Costs.

1. *Notice of Taxation.*

Where a party does not appear on notice of taxation, he cannot, perhaps, object to the amount of items taxable in the discretion of the of the master, but he is not precluded as to items in toto, upon the allowance of which the master has no discretion. *Conger* v. *McKechnie*, 1 C. L. Chamb. 209.—Burns.

The judgment having been entered without notice of taxation, the court set it aside as irregular, in order to give defendant the advantage of a certificate under 43 Eliz. c. 6, which had been obtained after judgment, and therefore too late. *Davis* v. *Barnet*. 10 Q. B. 501.

Want of notice of taxation is not in all cases a sufficient reason for setting aside judgment. *Black et al.* v. *Hall and Patterson* v. *Hall*, 11 Q. B. 356.

Semble, that it is no ground. *Felton* v. *Conley*, 1 P. R. 319.—C. L. Chamb.—Robinson.

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2. *Costs allowed.*

(a) *Counsel Fee and Brief.*

The counsel's fee should be exclusively as to fee with brief at the trial. *Doe.* d. *Boulton* v. *Switzer*, 1 C. L. Chamb. 83.—P. C.—Macaulay.

An attorney is entitled to recover against his client fees paid to counsel conducting the case at the trial. *Brock* v. *Bond*, 3 Q. B. 349.

With respect to brief and counsel fee held under the circumstances of this case that the master should allow no disbursement to counsel with brief, nor any charge with brief either not actually incurred or unnecessarily incurred. *Pegg* v. *Pegg*, 7 Q. B. 220.

Where separate actions were brought against the maker and endorsers of a note, and upon a demurrer to the replication judgment was given for defendant, and the plaintiffs made one application to amend in the three cases:—Held, that defendant was entitled only to the costs as for one case, in attending to oppose it. Held, also, that as to the ordinary fee disbursed to counsel to argue the demurrer in the three cases, and the ordinary taxable costs occasioned to defendant by the demurrer in each case, that they might be allowed to defendant. *Bank of B. N. A.* v. *Ainley*, 7 Q. B. 521.

An application for an increased counsel fee must be to the judge who tried the case. *Merrick* v. *Monarch Ins. Co.*, 3 L. J. 30. C. L. Chamb.—Burns.

The rule that a person cannot tax a counsel fee in his own case does not extend to his partner. *Henderson* v. *Comer*, 3 L. J. 29.—C. L. Chamb.—Burns.

A counsel fee will be taxed between party and party, even though the counsel did not attend the trial. *Ib.*

Where in a country cause the record was entered and afterwards settled before the commission day, the master, upon consulting the chief justice of the Common Pleas, refused to allow the costs of entering the record or counsel fee. *Hingston* v. *Whelan*, 8 L. J. 72.—C. L. Chamb.—Burns.

Where, before the commission day, an order had been obtained to postpone the trial on payment of costs, and plaintiff afterwards, on taxation of costs, claimed a counsel fee as paid to the partner of plaintiff's attorney, without shewing when or how paid; and it appeared that the record had not been entered for trial, the master refused to tax the counsel fee; and a summons for a revision of his taxation was discharged. *Manary* v. *Dash*, 9 L. J. 327.—C. L. Chamb.—Morrison.

On motion by plaintiffs to revise taxation:—Held, that under rule of court of H. T. 22 Vict. 18 Q. B. 58, no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the master allow more as between party and party. If brief for second

counsel was actually prepared, his accidental absence at the trial should make no difference. *Ham et ux.* v. *Lasher et al.*, 24 Q. B. 357.

Held, that a counsel fee may be taxed for the trial, although the case is referred to arbitration without being entered upon. *Wood* v. *Foster*, 6 P. R. 175—C. L. Chamb.—Galt.

The parties to an alimony suit consented to a decree, whereby defendant was ordered forthwith to "pay the plaintiff the sum of $75, and all disbursements in the suit as between solicitor and client, including sheriff's fees on executions; such disbursements to be taxed and allowed by the master of this court:—Held, that in proceeding under this decree the master had properly allowed to the plaintiff a sum of $50 paid by the plaintiff to her solicitors, they being also counsel, for counsel fees on the examination and hearing of the cause. *Bucke* v. *Bucke*, 21 Chy. 77. See *Leslie* v. *Ball*, 22 Q. B. 512.

A counsel fee on hearing is not taxable until the cause has been set down for hearing, and notice of hearing given. *Dewar* v. *Orr*, 3 Chy. Chamb. 141.—Strong.

(b) *Term Fee.*

No term fee is allowed after judgment. *Wilt* v. *Lai*, 1 C. L. Chamb. 216.—Burns.

Nor unless there has been some proceeding during the term. *Ham et ux.* v. *Lasher et al.* 24 Q. B. 357.

(c) *Witness Fees and Subpœnas.*

The master may examine into the truth of an affidavit of disbursements for witnesses' expenses, &c., or counsel's receipt for fees. *Doe* d. *Boulton* v. *Switzer*, 1 C. L. Chamb. 83.—P. C.—Macaulay.

A misnomer of a witness, David instead of Daniel, would be immaterial. *Ham et ux. Lasher et al.*, 24 Q. B. 357.

As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vict., and the master having authority to make all such inquires as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries. *Ib.*

All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay. *Ib.*

Held, that service of subpœnas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion. *Ib.*

Semble, that subpœnas being mesne process, under sec. 277 of C. L. P. Act, no fees can be allowed for mileage or service, if not made by the sheriff. *McLean* v. *Evans*, 3 P. R. 154.—C. L. Chamb.—A. Wilson.

Where witnesses are subpœnaed and paid by both parties to a suit, the successful party is entitled to the costs of such witnesses from the other. *Ib.*

Where witnesses are subpœnaed but not called, the master should decide whether they were necessary or not, and allow or refuse their expenses accordingly. *Ib.*

In trials under the Controverted Election Act of 1871, the costs and witness fees, and the materiality of evidence, are in the discretion of the master, subject to the court, as in other trials. *Re Prescott Election*, 32 Q. B. 303.

The master will generally be sole judge as to how many witnesses shall be allowed for as to one issue. *Ib.*

Where the master allowed fees to seventy witnesses subpœnaed, but not called, on charges of bribery by the petitioner, the election having been avoided on the evidence of other witnesses:—Held, that the master exercised a proper discretion, even though respondent's attorney swore he believed the witnesses would have disproved the charges they were called to prove; the facts that each witness was subpœnaed to prove appearing on the petitioner's brief put in before the master, and it appearing also by affidavit that the witnesses were subpœnaed bonâ fide, and were material. *Ib.*

There is no presumption in a trial under the Controverted Elections Act of 1871 arising from the number of witnesses subpœnaed that they are unnecessarily called. The presumption is to the contrary. *Ib.*

Costs of evidence to disprove the merits of the defence set up must not be incurred without consideration, and will not be allowed as of course. *Redford* v. *Todd*, 6 P. R. 154.—Chy. Chamb.—Strong, on appeal from Holmested, *Referee.*

Fee on subpœna by direction of the court to be allowed on taxations under the tariff of costs where the amount itself is properly taxable. *Stephen* v. *Simpson*, 3 L. J. N. S. 102.—M. O.—Taylor, *Secretary*

A public officer in charge of documents for which he is responsible, and attending as a witness in his public capacity and in relation to matters connected with his office, will be allowed professional witness fees of $4 a day. *In re Nelson*, 2 Chy. Chamb. 252.—VanKoughnet.

Where the parties to a cause had produced and examined their witnesses at Toronto, all of whom resided at a distance therefrom, and in close proximity to one of the circuit towns, the court, while awarding the general costs of the cause to defendant, refused him the costs of the attendance of his witnesses. *Ledyard* v. *McLean*, 10 Chy. 139.

(e) *Costs in the Cause.*

The costs of a special jury are costs in the cause, not costs of the day. *Whitehead* v. *Brown*, 2 O. S. 345.

Costs of applying to rescind a judge's order to allow County Court costs, were held not to be costs in the cause. *Cameron* v. *Campbell*, 1 P. R. 170.—C. L. Chamb.—Burns.

The phrase "costs in the cause," generally means the costs only of the party who is successful in the cause. But where the phrase was used in an award as follows: "We also order

and award that the plaintiff and defendants shall each pay half the costs of the cause, and that the defendants shall pay all the costs of the reference and award, our costs of which reference and award as arbitrators we assess at the sum of $201.50 :"—Held, that the words "costs in the cause," meant the whole costs of the plaintiff and defendants. *Scott* v. *The Grand Trunk R. W. Co.*, 3 P. R. 276.—C. L. Chamb.—Richards.

The costs of an application under sec. 82, of the Surrogate Court Act, C. S. U. C. c. 18, for an assignment of a probate bond, in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on default. *Closson* v. *Post et al.*, 6 L. J. 141.—C. L. Chamb.—Draper.

The costs of shewing cause against a rule for setting aside an award, are costs in the cause, and the successful party is entitled thereto, although no mention of them is made in the rule. *The Corporation of Essex* v. *Parke*, 12 C. P. 159.

After issue joined on demurrer, but a month before term, plaintiff prepared demurrer books. The case was subsequently referred to arbitration. Costs of the pleadings, &c., to be costs in the cause :—Held, that the preparation by the plaintiff of the demurrer books was reasonable, and that he must be allowed costs of the same on taxation as part of the necessary proceedings in the cause before the reference. *Elliott* v. *Northern Assurance Co.*, 6 P. R. 111.—C. L. Chamb.—A. Wilson.

The costs of a commission to take evidence in a foreign country, form part of the costs of the cause. *Colborne* v *Thomas.* 4 Chy. 169.

Where a cause is withdrawn on account of the absence of a necessary witness for the plaintiff, and he shews that he has made dilligent efforts to secure the attendance of such witness who is residing within the jurisdiction, but fails to secure it, the costs of putting off the examination will, as a general rule, be costs in the cause. In all other cases, the costs will be disposed of according to circumstances and in the discretion of the judge. *Pattison* v. *McNab*, 12 Chy. 483.

Where defendant serves a notice of motion, but before the return thereof the plaintiff takes out on præcipe and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs therefor, under the order to dismiss, as costs in the cause. *Purdy* v. *Ferris*, 1 Chy. Chamb. 303.—Mowat.

The plaintiff had obtained a decree with costs against defendant. Afterwards, by consent, a supplemental order varying the decree was made, which was silent as to costs :—Held, that the costs of such order and proceedings thereunder were not costs in the cause, and could not be taxed against the defendant. *Attorney-General* v. *Taylor*, 1 Chy. Chamb. 362.—Spragge.

A motion was granted for postponing the hearing and examination of a cause, on the grounds of the absence of a material witness after notice of hearing had been given, although the cause had been at issue for some months previous. The costs of such a motion are costs in the cause. *Graham* v. *Machell*, 2 Chy. Chamb. 376.—Taylor, *Secretary.*

It is the practice to make the costs of postponing the hearing of a cause, where sufficient grounds are shown for such postponement, costs in the cause. *Rees* v. *Attorney-General*, 2 Chy. Chamb. 386.—Taylor, *Secretary.*

Where after notice of motion to stay proceedings until the costs of a former suit for the same cause of action should be paid, such costs are paid, the costs of the motion to stay proceedings will be made costs in the cause. *Little* v. *Hawkins*, 3 Chy. Chamb. 78.—Taylor, *Secretary.*

The decree in a cause gave the plaintiff the general costs thereof :—Held, that this did not carry the costs of rehearing an interlocutory order made refusing an injunction, and which order was reversed on rehearing ; the practice requiring that, where costs of rehearing are intended to be given they must be expressly mentioned in the decree or order giving the costs of the cause. *Mossop* v. *Mason*, 20 Chy. 406.

(f) *Pleadings and Affidavits.*

The master disallowed a great portion of the pleadings, which he considered unnecessary, and the court discharged with costs a rule nisi to revise the taxation. *Malloch* v. *Grier*, 2 Q. B. 113.

After issue joined on demurrer, but a month before term, plaintiff prepared demurrer books. The case was subsequently referred to arbitration, costs of the pleadings, &c., to be costs in the cause :—Held, that the preparation by the plaintiff of the demurrer books was reasonable, and that he must be allowed costs of the same on taxation as part of the necessary proceedings in the cause before the reference. *Elliott* v. *Northern Assurance Co.*, 6 P. R. 111.—C. L. Chamb.—A. Wilson.

Unnecessary lengthy pleadings ordered to be reduced by the master at the party's expense.—*Canada Permanent Building and Savings Society* v. *Harris*, 16 C. P. 54.

Where plaintiff filed many useless affidavits and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the master that they should not be allowed to the plaintiff on taxation, though he discharged defendant's summons with costs. *Hooper* v. *Burley*, 1 L. J. N. S. 273.—C. L. Chamb.—Draper.

Costs for superfluous or irrelevant matter introduced into affidavits will not be allowed, and in extreme cases the judge will disallow costs for the whole affidavit. *Corley* v. *Robbin*, L. J. 225—Chy. Chamb.—Richards.

(g) *Other Matters.*

Where separate actions were brought against maker and endorsers of a note, and upon a demurrer to the replication judgment was given for defendant, and the plaintiffs made one application to amend in the three cases :—Held, that defendant was only entitled to the costs as for one case, in attending to oppose it. Held, also, that as to the ordinary fee disbursed to counsel, to argue the demurrer in the three cases, and the ordinary taxable costs occasioned to defendant by the demurrer in each case, that they might be allowed to defendant. *Bank of B. N. A.* v. *Ainley*, 7 Q. B. 521.

Before a party can tax the costs of obtaining an exemplification of judgment, he must serve the other side with notice to admit, under rule 28 E. T. 1842; but the master may allow the costs of procuring a copy of the roll. *Conger* v. *McKechnie*, 1 C. L. Chamb. 220.—Burns.

One of several defendants who, in an action of tort, joins his co-defendants in plea of not guilty, upon which a verdict is rendered in his favour against plaintiff, though plaintiff recovers against his co-defendants, is entitled to a proportion of the taxed costs of defence. *Huntingdon* v. *Latz et al.*, 10 L. J. 46.—C. L. Chamb.—Morrison.

Attendance to hear judgment should only be taxed once, that is, attendance when judgment is delivered. *Ham et ux.* v. *Lasher et al.*, 24 Q. B. 357.

Defendants could not tax the costs of enlarging plaintiffs' rule for their own convenience. *Ib.*

Plaintiff having attended under defendants' notice, without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs. *Ib.*

Taxing officers should not allow any items for which there are not proper vouchers, and these vouchers, (except briefs, &c.) should be filed. *Wilson* v. *Moulds*, 1 P. R. 101.—C. L. Chamb.—Morrison.

On revision of a taxation by deputy clerks of the crown, the master is not to allow any items which are not verified by vouchers which have been filed on the original taxation. *Ib.*

Held, that the costs of a Chamber application to stay proceedings until term, in a superior court case tried at the County Court under the Law Reform Act, 1868, are taxable under a rule for a new trial upon payment of costs, the County Court judge having refused to stay proceedings.—*Merchants Bank* v. *Ross*, 6 P. R. 215.—M. O.—Dalton, *C. C. & P.*

Where there were two suits by a solicitor for the same object, the master refused in one of the two, without a special order, to tax as between party and party, more than part of the costs, and it appearing that, as between solicitor and client, no part of that bill could have been recovered, the court refused to interfere with the taxation. *Spence* v. *Clemow*, 15 Chy. 584.

The costs payable out of an estate to persons not trustees thereof, were directed to be taxed between party and party only. *Gray* v. *Hatch*, 18 Chy. 72.

If a cause irregularly set down for hearing by the plaintiff is struck out upon defendant's motion in Chambers with costs, this entitles the defendant to tax costs of the application only, and not the costs of preparing for hearing. *Frietsch* v. *Winkler*, 3 Chy. Chamb. 141.—Boyd, *Master.*

The first part of General Order 315 applies to cases where several persons are acting in the same interest, and where costs are to be apportioned among them. It does not empower the master to deprive any one of his entire costs where the decree gives costs generally. A surviving trustee, and the representatives of a deceased trustee, are not within the rule which prevents trustees severing in their defence at the risk of having but one set of costs between them. *Reid* v. *Stephens*, 3 Chy. Chamb. 372.—Boyd, *Master.*

Married women joined with their husbands in an application for taxation of costs:—Held, that notwithstanding the late act (35 Vict. c. 16,) the married women must in such cases have a next friend. *In re Spencer et al.*, 19 Chy. 467.

Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of the defendant, against whom an injunction had been ordered, the court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing. *The Fire Extinguisher Co.* v. *The North Western (Babcock) Fire Extinguisher Co.*, 20 Chy. 625.

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3. *Revision of Taxation.*

If plaintiffs on verdict are allowed only District Court costs, and defendant neglect to take out a rule to be present at the taxation, the court will not direct a revision that defendant's costs may be deducted. *McCall et al.* v. *Cameron*, 1 Q. B. 414.—P. C.—Macaulay.

A judge in Chambers can order a revision of taxation. *Doe* d. *Boulton* v. *Switzer*, 1 C. L. Chamb. 83.—Macaulay.

A revision was granted, as defendant's attorney was not present at the taxation, and some of the items were questionable. *Halfpenny* v. *Kelly*, 1 C. L. Chamb. 174.—Macaulay.

Defendant's costs not having been taxed with sufficient liberality, as between attorney and client, a revision was ordered on that ground. *Cameron* v. *Campbell*, 1 P. R. 170.—C. L. Chamb.—Burns.

A revision of taxation was ordered on contradictory affidavits as to the payments sworn to in the affidavit of disbursements. *Smith* v. *McKay*, 1 P. R. 178.—C. L. Chamb.—Robinson.

Where, on the 27th June, the master, to whom certain bills had been referred, certified that there was £30 10s. due by the attorneys to their clients, which sum the clients on 7th July received from the attorneys under and pursuant to the allocatur, a summons obtained on 26th August for a revision, upon the ground that certain retainers had been improperly allowed, was discharged. *In re Smith & Henderson, two., &c.*, 9 L. J. 265.—C. L. Chamb.—Robinson.

Quære, whether under C. L. P. Act, 1856, sec. 12, a judge's order is not necessary to have taxation revised by the principal clerk. *Cochrane* v. *Scott and Cochrane* v. *Ross*, 3 P. R. 32.—C. L. Chamb.—Burns.

Judgment was entered in an outer county, and full costs taxed. On the 20th of July, 1860, the taxation was revised in Toronto, under C. L. P. Act, sec. 331, and £2 15s. 7d. struck off. On the 2nd of August the judge who tried the cause gave a certificate or memorandum, stating, among other things, that he declined to certify that it was a proper case to be withdrawn from the inferior court, and on this the taxing officer, without any notice to or consent of the plaintiff, on the 3rd of August, 1860, reduced the costs to Division Court costs, and gave a certificate that

he had done so, which was served on the plaintiff's attorney. In October, 1862, defendant sued the plaintiff for enforcing the execution for too much, which was the first notice plaintiff had of the reduction, and some time after that the master made an entry on the roll of this last revision, and the reduction thereby of the costs to £11 3s. 9d., adding "therefore let the said plaintiff have execution therefor," &c. :—Held, that the proceeding on the 3rd of August, which was not shewn to have been a continuation or adjournment of the revision of the 20th of July, and the subsequent entry on the roll was wholly unauthorized, and must be set aside. *Spiers* v. *Carrique*, 23 Q. B. 585.

Where the taxation is not objected to before the master, the court is slow to interfere, but—Held, that the circumstances shewn in this case sufficiently explained the omission. *Stewart* v. *Jarvis*, 27 Q. B. 467 ; 2 L. J. N. S. 330.

The bill of costs in this cause having been taxed by the local master, the plaintiff paid the amount taxed without protest :—Held, that he still was entitled to a revision before the master at Toronto. *Kormann* v. *Tookey*, 6 P. R. 112 ; *Elliott* v. *Northern Assurance Co.*, 10 L. J. N. S. 16.—M. O.—Dalton, *C. C. & P.*

An appeal from a master's certificate of costs should be to the court, not to a judge in Chambers. *Grahame* v. *Anderson*, 2 Chy. Chamb. 303. —VanKoughnet.

The proper mode of appealing from the master's certificate of taxation is by motion, and not by petition. *In re Ponton*, 15 Chy. 355.

Although the courts will interfere and order a retaxation of costs, even after a judgment has been obtained for them, when the overcharges are gross and excessive, yet a client must come promptly, more especially when the relationship of solicitor or client has ceased to exist, to obtain such relief, and it will not be granted if the amount overpaid is small. *Re Scott—Scott* v. *Burnham*, 3 Chy. Chamb. 467. — Taylor, *Referee.*

Where the alleged excess overpaid was only $15, making about one-twelfth of the whole bill, and the application was not made until after great delay, the referee refused an order for retaxation, and his decision was upheld on appeal. *Ib.*

The proper style of proceedings in such a matter is in the matter of the solicitor only, without the style of any cause. *Ib.*

The claim for which a suit had been brought having been compromised, the question by whom the costs of the suit should be borne, was determined by the referee in Chambers, on a summary application by consent of the parties. Upon appeal Strong, V. C., refused to interfere with the discretion exercised by the referee as to costs. *Garforth* v. *Cairns*, 9 L. J. N. S. 212.—Chy. Chamb.—Holmested, *Referee.*

An order to retax a bill of costs, on the ground that, through inadvertence, no person attended on behalf of the plaintiff, was refused, no improper items being pointed out in the bill as taxed. *Eastman* v. *Eastman*, 4 L. J. N. S. 322. —Chy. Chamb.—Taylor, *Secretary.*

The taxing officer on revision of bills of costs taxed by a local master, has power under general orders 311 and 312, not only to strike out items improperly allowed, but also to restore items improperly struck out, and generally to review the taxation. *Keam* v. *Yeagley*, 6 P. R. 60.—M. O.—Taylor, *Master.*

Evidence cannot be received by a taxing officer to make costs payable otherwise than they appear to be by the order awarding them when explained by the ordinary rules of construction. *Ib.*

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4. *Costs of Taxation and Revision.*

Semble, that if defendant does not rule the plaintiff, or attend taxation, he will only be allowed a revision on payment of costs of it and of revision. *Halfpenny* v. *Kelly*, 1 C. L. Chamb. 174—Macaulay.

Where defendant asks the plaintiff for the amount of costs in order to settle, and the plaintiff merely gives the amount, and refuses a bill in detail, defendant will not be allowed the costs of an application for taxation. Semble, it might be otherwise if the defendant paid the amount of costs into court. But the plaintiff may be compelled to refer his bill for taxation, and will not be allowed costs for attending such order. *Sutherland* v. *Rutheste*, 1 C. L. Chamb. 178.—Macaulay.

An order had been obtained by the solicitor for the taxation of his bill against a client. The client did not attend upon the taxation, and in consequence the master refused to allow the solicitor the costs of the taxation :—Held, right *In re Kerr*, 2 Chy. Chamb. 47 ; 2 L. J. N. S. 302. —Chy. Chamb.—Taylor, *Secretary.*

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5. *Other Cases.*

Arbitrator's fees may be referred to the master for taxation. *Scott* v. *The Grand Trunk R. W. Co.*, 10 L. J. 72.—C. L. Chamb.—Richards.

Where the master is directed by a decree to tax the costs of the suit, he has no jurisdiction to decline taxing them, even if he find that the amount due does not exceed $200, and that the suit might have been brought in the County Court. *McLeod* v. *Millar*, 12 Chy. 194.

An application for leave to add a counsel fee paid and omitted was granted, on payment of costs, such costs being set off against the taxed costs ; but the adding of such item was not to affect the question of the costs of taxation. See Re Whalley, 2 Beav. 576. *In re Crawford* v. *Crombie*, 2 Chy. Chamb. 13.—Taylor, *Secretary.*

When the registrar is directed to fix the amount of interlocutory costs and to aid him in doing so, a bill of costs is prepared and taxed, the bill of costs should be filed. *Saunders* v. *Furnivall*, 2 Chy. Chamb. 55.—VanKoughnet.

The defendant is not entitled to the delivery of any bill he is not entitled to have taxed ; and where a bill has been taxed it will not again be referred, even with other or subsequent costs, except on proof of special circumstances. *Bell* v. *Wright*, 2 Chy. Chamb. 96.—Mowat.

An application to tax costs should be on petition and not by motion. *Ib.*

Where an order was applied for for the taxation of costs incurred in suits in the Common Pleas, the County Court and Division Court, according to the terms of an alleged agreement as to the rate of remuneration, an order was granted with a direction to the master to ascertain whether any valid agreement existed between the parties. *Re Wetenhall*, 4 Chy. Chamb. 82.—Taylor, *Referee*.

Where the amount in dispute is under $200, but the defendant is out of the jurisdiction, the plaintiff is entitled to costs on the higher scale. *Skelly* v. *Skelly*, 18 Chy. 495.

X. Unnecessary or Vexatious Proceedings.

When the plaintiff made charges of improper conduct against the administratrix, which were not sustained in evidence, he was ordered to pay all costs other than of an ordinary administration suit. *Hodgins* v. *McNeil*, 9 Chy. 305.

When a plaintiff, without proper enquiry into facts, and with undue haste, filed a bill in this court to enforce a judgment at law, in which he made charges of fraudulent practices against the defendant, the court, while granting him the relief to which he was strictly entitled, refused him his costs of the suit, and ordered him to pay the costs of the defendant. *Neale* v. *Winter*, 9 Chy. 261.

Where an answer improperly impugned the motives of the solicitor who filed the bill, the court, although it dismissed the bill with costs, directed the costs of the answer to be disallowed to the defendant. *McKenzie* v. *Yielding*, 11 Chy. 406.

Where a party moves in court for what should properly be moved for in Chambers, the court will not allow him any costs of the application even if the motion be granted. *Murney* v. *Courtney*, 10 Chy. 52.

The court, although unable upon the evidence to grant the relief asked, refused defendants their costs up to the original hearing, in consequence of the untruthfulness of their answers. *Finlayson* v. *Mullard*, 10 Chy. 130.

Where a cause was set down to be heard on further directions, for the purpose of having remedied a defect in the master's report, the court, although it made the order asked, refused the plaintiff costs other than those of a motion in Chambers; the order being such as might have been obtained on motion there. *King* v. *Connor*, 10 Chy. 364.

Where, instead of demurring to the bill, the defendant put in an answer, and went to an examination and hearing, the court, on dismissing the bill, gave the defendant costs only as upon a demurrer. *Brouse* v. *Cram*, 14 Chy. 677.

Where an executor obtained the usual order for the administration for his testator's estate, and, upon the hearing on further directions, no reason was shewn for invoking the aid of the court, and the guardian of the infants did not object in any way to the course taken by the executor, the court refused both parties their costs. *Springer* v. *Clarke*, 15 Chy. 664.

The plaintiff having failed in that part of a suit which rendered a bill necessary, and as the other objects of the suit could have been attained by less expensive proceedings, and it being considered that in case the latter course had been adopted the costs to the insolvent estate would have been about equal to the costs incurred by it in defending the suit, no costs were given to either party. *Darling* v. *Wilson*, 16 Chy. 255.

In the case of small estates, an administration suit can only be justified where every possible means of avoiding the suit has been exhausted before suit brought. *McAndrew* v. *LaFlamme*, 19 Chy. 193.

Where a next friend filed a bill for a minor, without having observed this rule, and the suit did not appear to have been necessary in the interests of the minor, the next friend was charged with all the costs. *Ib.*

Where a bill had been filed on a mortgage on which only a small sum for interest had become due two days previously, and the defendant's solicitor had called at the plaintiff's solicitor's office and left word that he was ready to pay the money, the court refused the plaintiff his costs, and held, that the bill was unnecessarily and improperly filed. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

Where the object of a suit has been attained, the proper course is for the plaintiff, if he seek costs, to apply to the defendant to have the question of costs disposed of on motion; unless he does so, he will not be given the extra costs occasioned by going on to a hearing. *Webb* v. *McArthur*, 3 Chy. Chamb. 364.—Taylor, *Referee*.

Quære, will such a motion be entertained at all, except by consent. *Ib.*

Semble, if the defendant refuse consent to the costs being disposed of on motion, the plaintiff will get his extra costs of going to hearing. *Ib.*

See *Gore District Mutual Fire Insurance Co.* v. *Webster*, 10 L. J. 190, p. 831.

XI. Means of Recovering Costs.

1. *By Order or Execution.*

On the 1st March, an order was made setting aside a judgment on payment of costs within a week. On the 8th March, the costs were tendered, and through error refused. On the same day the defendant, treating the judgment as set aside, filed and served his pleas, together with a demand of replication. Plaintiffs afterwards demanded the costs, and on non-payment issued execution:—Held, 1. That the tender of costs was in sufficient time; 2. That the tender was a compliance with the order setting aside the judgment on terms; 4. That where the conduct of the defendant's attorney was vexatious, this was a ground for refusing costs of the application. Plaintiffs afterwards, to avoid judgment of non pros, took issue on the pleas, and then executed a power of attorney, authorizing a party to demand payment of costs, payment of which was refused on the ground that the power of attorney was not countersigned by the president of the company:—Held, 1. That the duty to pay costs continued, notwithstanding the refusal to receive them when tendered; 2. That the filing of the replication was not, under the cir-

cumstances, a waiver of plaintiff's right to costs; 3. That the plaintiffs were entitled to a substantial order directing the payment of the costs, and the costs of the application. Quære, as to plaintiffs' right, under the circumstances, to costs, between attorney and client, to be paid by the attorney for the defendant, as a punishment for his vexatious conduct. *Gore District Mutual Fire Insurance Co.* v. *Webster*, 10 L. J. 190.—C. L. Chamb.—Draper.

Where an order for payment of costs is sought which may, under C. S. U. C. c. 24, s. 19, be followed by execution, as in this instance, for payment of costs of a prosecution for libel under C. S. U. C. c. 103, the service of the summons must in general be personal. The court may, under special circumstances, dispense with personal service. Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that defendant is keeping out of the way to evade service; and even in this case, it is by no means clear that personal service will be dispensed with. Service on the attorney, on the record, and on the wife of the defendant, it not being shown that he was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada, and gone to reside in the United States. *Regina* v. *Simpson*, 10 L. J. 220.—C. L. Chamb.—A. Wilson.

Held, that a "reasonable time" need not be given in which to pay the costs of the day, &c., after taxation, but that the order, &c., may be made a rule of court, &c., the day after taxation. *Smith* v. *Cronk*, 9 L. J. N. S. 237.—P. C.—A. Wilson.

A party who has to pay debt and costs on a final judgment on verdict, nonsuit, demurrer, or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them; nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment. *Coolidge* v. *The Bank of Montreal*, 6 P. R. 73.—P. C.—A. Wilson.

The plaintiff taxed costs on an order on 10th May. These costs were revised in Toronto on 22nd May, and on the same afternoon were demanded of defendant's attorney in Toronto, the defendant himself living in Belleville. On 23rd May, the order for costs was made a rule of court:—Held, that the rule was regular. *Smith* v. *Cronk*, 6 P. R. 80.—P. C.—A. Wilson.

It is irregular to take out a fi. fa. the instant costs have been taxed without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Chy. Chamb. 94.—Mowat.

A solicitor whose costs have been taxed on the application of the client and not paid, a fi. fa. having been returned nulla bona, is entitled to an order for the examination of his client touching his estate and effects. *Re Blain*, 1 Chy. Chamb. 345.—Mowat.

By sec. 7 of order 46, (orders of 1853,) subpœnas for costs are abolished. The effect of this order upon orders giving costs issued previously to the time it took effect is, that an order must be obtained, fixing a day for payment of the costs when taxed. *Saul* v. *Cooper*, 4 Chy. 61.

An order had been obtained directing a defendant, Mrs. G., to pay to the plaintiff certain costs:—Held, that the order was a judgment and the defendant a judgment debtor, within the meaning of the C. S. U. C. c. 24, s. 41, as extended by 27 & 28 Vict. c. 25, and an examination of the defendant touching her ability to pay the costs was allowed. *Lovell* v. *Gibson*, 6 P. R. 132, Chy. Chamb.—Spragge, on appeal from Holmested, *Referee*.

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2. *By Staying Proceedings in Second Action or Suit.*

(a) *In what Cases.*

The court refused to stay proceedings until payment of costs in two other suits pending for the same cause. *Richmond* v. *Campbell*, E. T. 2 Vict.

When the second action appears to be vexatious, the court will stay the proceedings till the costs of the first action be paid. *Bays* v. *Ruttan*, 1 C. L. Chamb. 20.—Macaulay.

Non-payment of costs of the day, is not a sufficient ground for staying proceedings until such costs are paid, except perhaps in an extreme case. *Becket* v. *Durand*, 6 L. J. 15.—C. L. Chamb.—Draper.

In an action of trespass de bonis, in the County Court, the judge stayed proceedings, on it appearing that defendants had been sued for the same causes in the County Court of another county, in which action the proceedings against them were held to be corum non-judice, and whereof the costs, though taxed, had not been paid. A mandamus to compel the judge to proceed to try this case, was refused on the ground that the defendants being primarily interested, had a right to be before the court and heard. Semble, that the proceedings should not have been stayed. *In re the Judge of the County Court of Perth in suit of Dollery* v. *Whaley*, 12 C. P. 552.

The plaintiff, having sued in the County Court, proved a claim beyond the jurisdiction, whereupon the jury were discharged. He then brought his action in this court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the County Court action and pay the costs of it. The order was rescinded, for, 1. The County Court having no jurisdiction, the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2. This suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed. *Hodgson* v. *Graham*, 26 Q. B. 127.

An action was prosecuted to trial in the name of a plaintiff, who was dead before the commencement of the suit, but of this the attorney was ignorant. The death of plaintiff being shewn at trial, the record was struck out by the judge. An action was subsequently brought for the same cause by the parties properly entitled to sue:—Held, that this action was not vexatiously brought, so as to entitle defendant to stay proceedings in it until the costs of the first were paid. *Davis* v. *Weller*, 5 P. R. 150.—C. L. Chamb.—Hagarty.

Held, that 29 & 30 Vict. c. 42, s. 1, does not refer to costs of the day in same suit, and consequently proceedings cannot be stayed in a suit in which costs of the day have not been paid. Held, nevertheless, that this can be done on the ground of abuse of the process of the court, where the proceedings are vexatious. *Nicholson* v. *Coulson*, 6 P. R. 65—C. L. Chamb.—Dalton, *C. C. & P.*—Galt.

Where a plaintiff files a bill for relief, and both parties dying after answer, a new bill setting forth substantially the same facts is filed by the plaintiff's heir against defendant's heir, praying no relief but a discovery, and to perpetuate the testimony of witnesses, proceedings in the second suit will not be stayed till the costs of the first are paid. Semble, that if both suits were instituted by the same individual, and if he were liable to pay the costs of the first, he would not be prevented from prosecuting the second until he had paid those costs. *Street* v. *Ryckman*, 1 Chy. 215.

In prosecuting a claim to land before the referee of titles, a contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant. *Shepherd* v. *Hayball*, 13 Chy. 681.

Non-payment of the untaxed costs of an unsuccessful application in a former suit is no bar to a motion for a like purpose in another suit between the same parties. *The Erie and Niagara R. W. Co.* v. *Galt*, 15 Chy. 567.

A plaintiff suing in formâ pauperis is not liable to have his suit stayed until he has paid the costs at law, or of a former suit in this court, touching the same subject matter, unless it can be shewn that the proceedings are vexatious. *Casey* v. *McColl*, 3 Chy. Chamb. 24.—Taylor, *Secretary.*

Where therefore a plaintiff had been ordered to give security for prior costs at law, and by another order the time for giving security had been limited, and in default the bill ordered to be dismissed, and the plaintiff was afterwards admitted to sue in formâ pauperis, the two orders for giving security were set aside. *Ib.*

Where costs are given to a plaintiff suing in formâ pauperis, they are in general, and unless otherwise ordered, dives costs. *Ib.*

XII. Miscellaneous Cases.

An application for a judge's certificate, that a cause is a proper cause for a special jury, must be made immediately after the trial on the same day the cause is tried. *Binkley* v. *Desjardine*, Tay. 177.

After issue joined, plaintiff and defendant settled the action on condition of defendant paying the costs incurred, which were stated at a certain sum by plaintiff's attorney, and defendant gave his note therefor payable before the assizes. On the first day of the assizes, defendant's agent tendered the amount, reserving to himself the right of taxation; and the plaintiff's attorney refused to receive it, except unconditionally. The agent afterwards tendered it unconditionally, but it was then refused, because additional costs had been incurred; and the plaintiff's attorney took a verdict for nominal damages. The court set the verdict aside on payment of the sum originally agreed upon, and made the plaintiff's attorney pay the costs of the application. *Ruttan* v. *Robertson*, 2 Q. B. 37.

Where a plaintiff in an action against a magistrate for acting maliciously and without reasonable or probable cause, being guilty of the offence of which he was convicted, was, under the operation of C. S. U. C. c. 126, s. 17, restricted to the recovery of only three cents damages, he was held not to be entitled to any costs whatever. *Haacke* v. *Adamson*, 10 L. J. 270.—C. L. Chamb.—Draper.

Held, that the 18th and 19th secs. of C. S. U. C. c. 126, taken together must be limited "to any such action" not provided for in section 17 of the same act. *Ib.*

Held, that no one can have costs taxed to him who did not incur costs. *Ib.*

A judge in Chambers may make an order on a deputy clerk of the crown to refund costs improperly received. *McIntosh* v. *Pollock*, 2 C. L. Chamb. 209.—Burns.

Upon an application for a rule to tax the costs of proceedings on an indictment for nuisance under 5 & 6 Will. & Mary, c. 33, and that they should be allowed to a particular person, the court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina* v. *Gordon and Regina* v. *Robson*, 8 C. P. 58.

Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the insolvent acts; the conditions of the agreement having been so far performed:—Held, 1. That the writs were not in the sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the sheriff took priority; 2. That the seizing creditors had no lien for their costs under ss. 3, 12, 13, of the act of 1865, the lien there given applying to the law of Quebec. *In re Ross*, 3 P. R. 394.—C. L. Chamb.—J. Wilson.

Held, overruling the above case, that under 29 Vict. c. 18, sec. 13, a judgment creditor who had an execution in the sheriff's hands at the making of the assignment, was entitled to rank for his costs of the judgment as a privileged creditor against the insolvent. *In re Hayden, an Insolvent*, 29 Q. B. 262.

Held, that the jury in an action for slander had no right to give costs by their verdict. *Campbell* v. *Linton*, 27 Q. B. 563.

In this case the verdict, though irregularly obtained, was set aside without costs, as defendant's attorney had not raised the objection upon which the verdict was set aside until after it had been obtained, and his conduct was wanting in candour in not drawing attention to such objections to the procedure as he intended to insist upon until the day before the trial, although he might have done so some two months before. *Cushman et al.* v. *Reid*, 20 C. P. 147.

Held, that the clerk of the Division Court is not bound, under sec. 63, sub. 3 of the Assessment Act, to receive an appeal unless the sum of $2 be deposited with him as security for the costs of the appeal. If so disposed he may give credit for the amount, and if he do so, the appeal is properly entered and ought to be heard by the county judge. *In Re Paine* v. *Town of Brantford*, 9 L. J. N. S. 261—C. C.—Jones.

Where the only defence set up failed, and the ground on which the court decided against the plaintiff was not taken, or even pointed to in any manner by the answer, the court, though it dismissed the bill, refused defendant his costs of the suit. *McAnnany* v. *Turnbull*, 10 Chy. 298.

Where a motion stands over, and afterwards the party moving gives notice of abandoning the application, the costs which are given against him are not those of an abandoned motion, but of a motion refused. *Dennison* v. *Devlin*, 11 Chy. 84.

The court being dissatisfied with the mode in which the argument was conducted, and the brief of the pleadings had been prepared, though it allowed a demurrer to the bill, liquidated the costs at $10 only. *McFadyen* v. *Stewart*, 11 Chy. 272.

A., an execution creditor of B., was made a defendant to a suit as claiming an interest in certain chattels which the plaintiff claimed as prior mortgagee. A. filed an answer and disclaimer, but it appeared that his solicitor had given instructions to the sheriff to seize the interest of the debtor therein, if any:—Held, that before answering the bill he should have notified the plaintiff that he made no claim to the chattels, and that, not having done so, he was not entitled to the costs of the suit. *Lymburner* v. *Clarke*, 12 Chy. 130.

Where defendants set up a defence to a bill, which if tenable would have formed sufficient grounds for their having taken steps to set aside the transaction, which it was now sought to enforce, but had not done so, although twelve years had elapsed since the act was done which they questioned, and which it was shewn they had all the while been aware of, the court, under the circumstances, ordered them to pay the costs of the suit. *Miller* v. *Ostrander*, 12 Chy. 349.

The beneficial owner of land omitted to have the paper title thereto in his own name, and thus enabled his son, who held such title, to mislead parties into accepting a mortgage thereon from the son. The court, though unable to refuse him relief, in a suit brought to set aside such mortgage, under the circumstances, refused him his costs. *Gray* v. *Coucher*, 15 Chy. 419.

Where an application has been refused with costs, and a motion is made for leave to make a new application of the same nature, on further evidence, the new evidence must be produced, and the costs of the previous application paid. *Anon*, 1 Chy. Chamb. 196.—VanKoughnet.

On motion for leave to answer notwithstanding an order pro confesso, where the proposed answer was not properly sworn:—Held, that it could only be granted on the terms of paying the costs of the application and of the order pro confesso; but, if the answer had been properly sworn, the application would have been allowed without costs. *Merrill* v. *Evans*, 1 Chy. Chamb. 303.—VanKoughnet.

Under a sequestration against the defendant, property on his land had been seized, to which a third party laid claim, and which the bailiff released to the claimant upon his own undertaking. Upon inquiry by the plaintiff into the circumstances, he released the property, but not until after notice given by the claimant of a motion in the nature of one for an examination pro interesse suo:—Held, that the claimant, by leaving his property in the custody of defendant, had brought the difficulty on himself, and was therefore not entitled to the costs of the application. *Harvey* v. *Taylor*, 1 Chy. Chamb. 353.—VanKoughnet.

The rule of this court, that when the subject matter of a suit is settled by defendant before decree, the question of costs cannot be disposed of on a summary application by plaintiff, unless the defendant consents, applies to mortgage suits. A defendant in such a case may insist on the suit going to hearing, as there may be grounds on which he may be relieved from costs. Where under such circumstances the referee refused an application by plaintiff for the payment by defendant of the costs of the suit, an appeal from such order was dismissed with costs. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

The plaintiff appealed from the report of the master, stating eleven objections thereto. On the argument he abandoned one, two were found in his favour, and the remaining eight were decided against him, but they embraced only four distinct questions. Under the circumstances, the court, instead of giving one set of costs to the plaintiff and another to the defendant, directed the costs of the appeal generally to be taxed to the defendants, deducting therefrom one-fourth in respect of the partial success of the plaintiff *Ferguson* v. *Frontenac*, 21 Chy. 188.

COUNCIL.

See MUNICIPAL CORPORATIONS.

COUNSEL.

See BARRISTER-AT-LAW.

COUNTY ATTORNEY.

See CLERK OF THE PEACE.

In 1858 the plaintiff was appointed county attorney for Wentworth. In May, 1862, the person who had for many years been clerk of the peace for that county died, and in August following defendant was appointed to succeed him in such office. C. S. U. C. c. 106, s. 7, enacts that any clerk of the peace appointed after that act "shall be ex officio county attorney for the county of which he is clerk of the peace:"—Held, that defendant upon his appointment as clerk of the peace became also county attorney, although

the plaintiff's commission had not been otherwise revoked, and he had received no notice of any change in his position. *Robertson* v. *Freeman*, 22 Q. B. 298.

A county attorney practising law only so far as required by that office, need not take out a certificate. *Re Coleman*, 33 Q. B. 51.

A county attorney and clerk of the peace may maintain an action against the corporation of the county for breach of duty in not providing necessary and proper accommodation for him as such officer, as required by 29 & 30 Vict. c. 51, s. 419, and may recover, by way of damages in such action, rent paid by him to procure such accommodation. *Lees* v. *The Corporation of the County of Carlton*, 33 Q. B. 409.

The court house in which plaintiff previously had his office was burned, and the county council informally offered him certain rooms in another building leased by them. The plaintiff considering them insufficient, as in fact they were, hired others at $11 per month; and having sent in his bill to the council for seventeen months, they passed a resolution to pay him $93.50 (being one-half) in full of his claim, which sum he afterwards received, and signed the receipt and the check therefor, which purported to be in accordance with the resolution:—Held, that he was bound by such settlement, and could not recover more in respect of the seventeen months' rent; but that he might recover the full rent paid by him subsequent to the resolution. *Ib.*

COUNTY COURTS.

I. JUDGE.

1. *Actions and Proceedings Against*, 838.
2. *Other Cases*, 839.
3. *In Insolvency — See* BANKRUPTCY AND INSOLVENCY.
4. *Of Division Court — See* DIVISION COURTS.
5. *Of Surrogate Court — See* SURROGATE COURT.
6. *Mandamus to — See* MANDAMUS.
7. *Prohibition to — See* PROHIBITION.
8. *Appeal to from the Court of Revision — See* ASSESSMENT AND TAXES.

II. CLERK, 839.

III. JURISDICTION.

1. *Actions of Contract*, 839.
2. *Actions of Tort*, 840.
3. *Replevin*, 841.
4. *Penal Actions*, 841.
5. *Title to Land in Question*, 842.
   (a) *Application for Full Costs — See* COSTS.
6. *Equitable Jurisdiction*, 843.
7. *Other Cases*, 844.

IV. PRACTICE AND PROCEDURE.

1. *Writs of Trial and Enquiry*, 846.
2. *Other Cases*, 846.

V. ERROR AND APPEAL FROM.

1. *Error*, 847.
2. *When Appeal lies*, 848.
3. *Bond and Subsequent Proceedings*, 850.
4. *Setting down Case for Argument*, 852.
5. *Costs*, 852.
6. *Other Cases*, 853.

VI. MISCELLANEOUS CASES, 854.

VII. CERTIORARI TO REMOVE CAUSES FROM — *See* CERTIORARI.

VIII. APPLICATION FOR COUNTY COURT COSTS — *See* COSTS.

IX. REFERRING CAUSES FROM SUPERIOR COURTS TO COUNTY COURTS, AND VICE VERSA — *See* TRIAL.

I. JUDGE.

1. *Actions and Proceedings Against.*

The court will not order an attachment against a judge of a District Court for not obeying a certiorari, unless it be shewn clearly that he acted contumaciously. *In re Judge of the District Court of the District of Niagara*, 3 O. S. 437.

A judge of a County Court cannot be arrested upon mesne or final process. *Adams* v. *Ackland*, 7 Q. B. 211.

Impeachment of—Proceedings and finding of the court of impeachment. See *In re Hughes*, 8 L. J. 203.

A county judge being served with a subpœna duces tecum to produce a deed did not attend; and, on motion for an attachment, excused his absence on the ground of important private business, urging also that he obtained the deed and became possessed of his information as an attorney, that he had a lien on the deed, and that he was entitled to witness fees as an attorney:—Held, that he was not so entitled, and should have attended, and the rule was made absolute. *Deadman* v. *Ewen*, 27 Q. B. 176.

C. S. U. C. c. 15, s. 5, as amended by 29 Vict. c. 30, enacts, that no County Court judge shall directly or indirectly practice in the profession of the law as counsel, attorney, solicitor, or notary public, or as a conveyancer, or do any manner of conveyancing, or prepare any papers or documents to be used in any court of this Province, under the penalty of forfeiture of office and $400. The declaration alleged that defendant, being such judge, did in certain proceedings in the Surrogate Court prepare certain papers and documents to be used in said court, to wit, the petition of one G., &c. (describing the papers). Defendant pleaded that he did not practise in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said Surrogate Court. The evidence shewed that defendant prepared gratuitously for G., who was a widow in poor circumstances, the petition, bond, and affidavits required to enable her to obtain administration to her late husband:—Held, that the plea was proved, and a verdict was therefore entered for defendant on the leave reserved. Per Draper, C. J. of Appeal, and Morrison, J., the evidence did not bring defendant within the

spirit of the act or the mischief against which it was directed, which was the doing the acts prohibited for profit. *Allen* q. t. v. *Jarvis*, 3 2 Q. B. 56.

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2. *Other Cases.*

A deputy judge of the County Court declined, on the ground that he was the partner of the plaintiff's attorney, to entertain an application by the defendant for a supersedeas because he had not been charged in execution within the term next after judgment:—Held, that the defendant was entitled to be discharged from custody under a writ of habeas corpus. *Reid* v. *Drake*, 4 P. R. 141.—C. L. Chamb.—A. Wilson.

Held, that the fact of a defendant being a county judge, where the plaintiff might otherwise have proceeded under the Overholding Tenants Act of 1865, and thereby have obtained a more summary remedy, is a sufficient reason to change the place of trial in an action of ejectment. *Anonymous*, 4 P. R. 310.—C. L. Chamb.—Draper.

Quære, whether the circumstance of defendant being a county judge is not in itself sufficient to give plaintiff the right to have the place of trial changed on grounds of public policy. *Ib.*

Held, that when a reference is made from Nisi Prius to a judge of a County Court by name, adding his description, judge of a County Court, and not to him as judge of the County Court, he is entitled to his fees as such arbitrator. *Wood* v. *Foster*, 6 P. R. 175.—C. L. Chamb.—Galt.

See *Smith* v. *Rooney*, 12 Q. B. 661, p. 847; *Leslie* v. *Emmons*, 25 Q. B. 243, p. 847.

II. Clerk.

A clerk of the County Court, being also ex officio deputy clerk of the crown and clerk of assize, is privileged from arrest only while engaged in his official duties, or while going to and returning from his office, and this court therefore discharged a rule to prohibit the County Court judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodson*, 27 Q. B. 263.

III. Jurisdiction.

1. *Actions of Contract.*

The inferior courts can entertain a suit for the balance remaining due upon a written undertaking to pay a larger sum. *Longworth* v. *McKay et al.*, 6 O. S. 149.

Where there are open running accounts between the plaintiff and the defendant, made up of divisible items, not exceeding in each £25, the defendant can only recover by way of set-off the difference between £25 and the amount due to the plaintiff. If the defendant, however, desire to recover more than will balance the plaintiff's demand, he must give notice of or plead a set-off to the £25, and claim in his plea or notice to have the amount between the plaintiff's demand and the £25 allowed to him. McLean, J., diss., being of opinion that a defendant might recover a balance to any amount beyond the £25, the jurisdiction not being limited as to a defendant's set-off. *Russell* v. *Conway*, 5 Q. B. 256.

Under 8 Vict. c. 13, s. 5, the District Courts have jurisdiction in actions on covenant to pay a sum certain to £50. *Billings* v. *Nicolls*, 5 Q. B. 622.

The declaration contained three counts, claiming each £50, but the damages were laid only at £50, and the particulars were, for account rendered £55 15s., less by cash £22 10s.—£33 5s. At the trial the plaintiff relied on the count on account stated, and produced a draft by himself on defendant for £55 15s. 1d., "being the balance in full of your account;" and proved that when presented defendant acknowledged the amount to be correct, but refused to accept it, as he was afraid he would be sued. A verdict having been found for £34 3s. 3d., Held that the claim was within the jurisdiction; and, semble, that the evidence of an account stated was sufficient. *McMurtry* v. *Munro*, 14 Q. B. 166.

The plaintiff, by special endorsement on his summons, claimed for cash lent and interest, and for a lathe sold, £93 13s. 8d., and in his particulars £91 1s. 4d. On the trial he produced a paper signed by the defendant, specifying that he was to pay plaintiff for the lathe the invoice price, and "the charges of freight, duties, &c.":—Held, clearly an amount liquidated by the act of the parties, and therefore within the jurisdiction. *Wallbridge* v. *Brown*, 18 Q. B. 158.

Upon the evidence in the County Court it appeared that the plaintiff, under the common counts, was claiming an amount of $771, reduced to $304 by credit given, but not by payment or by set-off agreed to be taken as payment: Held, that the $304 was not an amount liquidated or ascertained by the act of the parties, and that the claim therefore was beyond the jurisdiction. A plaintiff cannot by giving credit for a set-off compel defendant to set it up, or give the County Court jurisdiction *Furnival* v. *Saunders*, 26 Q. B. 119. See, however, *Furnival* v. *Saunders*, 2 L. J. N. S. 245.—C. L. Chamb.—J. Wilson.

The plaintiff in a County Court suit gave credit on a claim of $300 (for board, &c.) for $170, being the value of an article received by him from defendant. Held, that although the agreement as to setting off the one against the other be made before the debt for which the action is brought is contracted, yet, if the amount to be allowed to defendant for the article can be treated as a payment of a portion of plaintiff's claim, and not merely an unliquidated set-off against it, or the transaction can be viewed as a sale first of the article upon an agreement that payment of it was to be made in board, &c., to be furnished by plaintiff to defendant—the court has jurisdiction. *Fleming* v. *Livingstone*, 6 P. R. 63.—C. L. Chamb.—Gwynne.

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2. *Actions of Tort.*

The District Courts have no jurisdiction in an action for a false return. *Bell* v. *Jarvis*, 6 Q. B. 423.

Where in matters of tort relating to personal chattels, title to land is brought in question,

though incidentally the court has no jurisdiction. *Trainor* v. *Holcombe*, 7 Q. B. 548.

The declaration stated that the plaintiff had delivered certain cattle to defendant to be pastured, &c., and to be re-delivered on request—with a breach, that through the negligence, &c., of the defendant, the cattle were lost. The plaintiff had a verdict for £9, and no certificate:—Held, that the action might have been brought in the County Court. *Hinds* v. *Denison*, 1 C. L. Chamb. 194.—Burns.

An action on the case, founded on the statute of Merton for distraining beasts of the plough, may be maintained in the County Court. *McGregor* v. *Batson*, 2 C. L. Chamb. 206.—Burns.

In trespass for entering plaintiff's close and taking his goods defendant pleaded not guilty, that the goods were not the plaintiff's, and justification under a fi. fa. Title to land was not brought in question:—Held, that the plaintiff on a verdict for $175 was clearly not entitled to full costs without a certificate. *Stewart* v. *Jarvis*, 27 Q. B. 467.

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3. *Replevin.*

The mere fact of the plaintiff in his declaration in replevin stating the value of the goods distrained at a higher sum than £15, does not shew that the action could not have been brought in a District Court. The plaintiff, to entitle himself to Queen's Bench costs, must prove at the trial that the goods are really of greater value. Macaulay, J., diss. *Wheeler* v. *Sime*, 3 Q. B. 265.

The Replevin Act, 4 Will. IV. c. 7, gives jurisdiction to the District Courts only in cases of seizure for distress. *Foster* v. *Miller*, 5 Q. B. 509.

To an action against a sheriff for taking an insufficient replevin bond, he pleaded that the goods replevied were worth more than £15, and that so the writ of replevin, being sued out of the District Court, was void:—Held, plea bad. *Kirkendall* v. *Thomas*, 7 Q. B. 30.

In replevin defendants avowed under a distress for rent, to which the plaintiff pleaded that he did not hold the land as tenant, &c., as in the avowry alleged:—Held, that the title upon this plea did not necessarily come in question, and that the record therefore did not shew a cause of action beyond the jurisdiction. *O'Brien* v. *Welsh et al.*, 28 Q. B. 394.

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4. *Penal Actions.*

The County Courts have no jurisdiction in penal actions, unless expressly given them by statute; and for this purpose they were held not to be included in the words "any court of record in Canada West," used in 4 & 5 Vict. c. 12. *O'Reilly* q. t. v. *Allan*, 11 Q. B. 526. See *Stinson* q. t. v. *Guess*, 1 L. J. N. S. 19.—C. L. Chamb.—A. Wilson.

But they were held to have jurisdiction in an action for the penalty imposed by sec. 81 of C. S. U. C. c. 6, for selling spirituous or fermented liquors on polling days. *In re Judge of the County Court of the County of Elgin, in a cause of Metcalfe* v. *Widdifield*, 12 C. P. 411.

And, under C. S. U. C. c. 124, s. 2, to try an action for a penalty against a justice of the peace, where the penalty claimed does not exceed $80. *Brash* q. t. v. *Taggart*, 16 C. P. 415.

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5. *Title to Land in Question.*

Where in matters of tort relating to personal chattels, title to land is brought in question, though incidentally, the court has no jurisdiction. *Trainor* v. *Holcombe*, 7 Q. B. 548.

In trespass, defendant pleaded pleas bringing the title to land in question, accompanying them with the affidavit required by 8 Vict. c. 13, s. 13. A nonsuit having been ordered:—Held, upon appeal, that the effect of the pleas was to oust the jurisdiction altogether: that the judge should therefore have refused to entertain the case; and that the judgment of nonsuit must be reversed. *Powley* v. *Whitehead*, 16 Q. B. 589.

One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to the plaintiff. The defendant proceeded to take off the timber:—Held, that the title to land was not in question, and that an action for trespass to the land would lie in the County Court. *Bailey* v. *Bleecker*, 5 L. J. N. S. 99.—C. C.—Sherwood.

A plea was pleaded bringing title to land in question, and after a verdict for the plaintiff a new trial was granted, on the ground that the court had no jurisdiction. On appeal, the judgment was reversed, as the court having no jurisdiction could not grant a new trial. The absence of the affidavit required by the statute with such plea will not warrant the court in proceeding, but would be ground for setting aside the plea. *Campbell* v. *Davidson*, 19 Q. B. 222.

Declaration for converting the plaintiff's dwelling house, with the doors and windows, &c. Plea, that the goods were not the plaintiff's. At the trial in the County Court, it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was whether the house was part of the freehold. A verdict having been rendered for the plaintiff, was afterwards set aside, on the ground that the title to the land came in question, and that the case should have been stopped upon the plaintiff's evidence:—Held, that this was right, and the judgment below was affirmed. *Portman* v. *Patterson*, 21 Q. B. 237.

Title to land does not, on mere suggestion, necessarily come in question under a plea of Not Guilty by statute. The general rule is, that it must not only be pleaded, but be verified by affidavit. In this case, which was an appeal from the County Court:—Held, that though defendant might have shewn, upon the plea of Not Guilty, that for want of title the plaintiff could not maintain the action for injury to his premises, yet that in the absence of such proof, or a bonâ fide tender thereof, the mere suggestion of it did not preclude the County Court from trying the real cause of action, which was within its jurisdiction. *Ball* v. *The Grand Trunk R. W. Co.* 16 C. P. 252.

In ejectment in the County Court, under 23 Vict. c. 43, it appeared that the defendant held the land under a verbal lease for a year, from

7th June, from one B., with the arrangement that if B. sold defendant would give up possession at the end of the year. B., in January, sold to the plaintiff, of which defendant had notice, and promised to give up possession, and the plaintiff gave defendant a notice to quit on the 8th June, his term having expired. At the trial the deed from B. to the plaintiff and the notice to quit were proved:—Held, a case within the statute; that defendant's term was put an end to on the 7th June, and that there was no dispute as to title to exclude the jurisdiction, which was clearly not ousted by the mere proof of the plaintiff's paper title. *Neads* v. *McMillan*, 29 Q. B. 415.

A County Court judge, at the trial of a case, upon the application of plaintiff's counsel, struck out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction, by bringing title to land in question:—Held, that he had the power to do so. *Fitzsimmons* v. *McIntyre*, 5 P. R. 119.—C. L. Chamb.—Gwynne.

Where a County Court cause is entered for trial at the assizes, under 32 Vict. c. 6, s. 17, sub-s. 2 (The Law Reform Act, 1868), the jurisdiction is the same only as if it had been tried in the County Court. Where in such a case, therefore, the title to land came in question, and a verdict was entered for defendant:—Held, that the proceedings were coram non judice, and the verdict was set aside. *Wetherall* v. *Garlow*, 30 Q. B. 1.

Declaration, that one A. devised the N. ½ of lot 15 to his son W. in fee, and the S. ½ to his wife J. for life, and after her death to W. in fee: that during W.'s life, he and his mother, J., leased to defendant the whole lot for five years at an annual rent, and that W. died soon after, having devised his land to the plaintiffs in fee. And the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J. after notice. Equitable plea, that W. by his will devised all his lands to the plaintiff in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent:—Held, that upon these pleadings the title to land was brought in question, and the jurisdiction ousted. *Fair et al.* v. *McCrow*, 31 Q. B. 599.

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6. *Equitable Jurisdiction.*

The act giving to County Courts equitable jurisdiction, in relation to mortgages, when the sum does not exceed £50, does not apply when defendant is resident out of the jurisdiction. *Lawrason* v. *Fitzgerald*, 9 Chy. 371.

A County Court has no equitable jurisdiction where all the defendants do not reside in the county. *McLeod* v. *Millar*, 12 Chy. 194.

Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appear that there is an incumbrance beyond that sum. *Hyman* v. *Roots*, 11 Chy. 202.

Where a plaintiff files a bill in the Court of Chancery to foreclose a mortgage for a sum within the jurisdiction of the County Court, no costs will be allowed him. The fact that the defendant is resident in a county other than where the land is situate, will not vary this rule. *Connell* v. *Curran*, 1 Chy. Chamb. 11.—Spragge.

A suit in the County Court is only removable into this court, under the 57th section of the County Courts' Act (C. S. U. C. c. 15), where the County Court has jurisdiction in the matter, but the "nature of the claim renders it a proper case to be withdrawn from the jurisdiction of the County Court, and disposed of in the Court of Chancery." *Martin* v. *Mitchell*, 1 Chy. Chamb. 384.—Mowat.

Where creditors whose claims in the aggregate were under $200, obtained the usual administration order, and it was shewn that the value of the estate including lands, was under $800, and although the real estate, which it was necessary to sell to satisfy such claims, was encumbered by mortgage to an amount which together with these claims exceeded $200, it was held that the plaintiffs could not reckon the mortgage debt for the purposes of this suit, and therefore that the case was within the jurisdiction of the County Court; and the plaintiffs were refused their costs. *In re Scott—Hetherington* v. *Stevens*, 15 Chy. 683.

An administration suit by a person interested to an amount less than $200 in an estate, which considerably exceeded $800, and against which a debt proved (and the only debt proved) exceeded that sum, was held not to be within the equity jurisdiction of the County Court. *Goldsmith* v. *Goldsmith*, 17 Chy. 213.

Where the plaintiff's claim on the premises, together with the amount of a subsequent mortgage, exceeded $200, it was held to be beyond the jurisdiction of the County Court. Semble, The necessity for an order for substitutional service would appear to be sufficient reason for filing a bill in this court which might otherwise have been filed in the County Court. *Seath* v. *McIlroy*, 2 Chy. Chamb. 93.—Taylor, *Secretary.*

A mortgagee exercised the power of sale contained in his security and realized $350. On a bill filed by the mortgagor for an account, it appeared that after deducting the amount due on the mortgage at the time of sale, together with the costs of the sale and of an action of ejectment, as also a payment made to the plaintiff before suit, the balance coming to the plaintiff was reduced to $139. The plaintiff was still held entitled to his full costs, "the subject matter involved" being the $350. *McGillicuddy* v. *Griffin*, 20 Chy. 81.

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7. *Other Cases.*

The jury in a District Court cannot try, as an issue of fact, whether the Division Court gave judgment on insufficient evidence, nor whether the plaintiff abandoned the residue of a large demand, so as to give the court jurisdiction. *Hynes* v. *Burrowes*, 5 Q. B. 253.

A County Court judge cannot grant a quo warranto during term time in the superior courts. *Regina ex rel. Gleeson* v. *Horsman*, 13 Q. B. 140.

Under 16 Vict. c. 175, a County Court judge can certify for immediate execution in cases sent down to him by writ of trial, as well as in other cases, the 53rd clause of 8 Vict. c. 13, being in effect overruled. *Riach et al.* v. *Hall; Peter-*

son v. *Hall*, 11 Q. B. 356; *McKay* v. *Hall*, *Johnson* v. *Hall*, 4 C. P. 145.

Held, that in a case depending in one of the superior courts, and taken down for trial to the County Court, under 23 Vict. c. 42, s. 4, the judge of the court below can order immediate execution. *Gildersleeve* v. *Hamilton*, 11 C. P. 298.

Where an action for not repairing the road, in which the venue is local, had been brought in the County Court of a county different from that in which the road was situate, and a verdict for the plaintiff confirmed in term, this court allowed the appeal from such judgment, but made no order, as the court below, having no jurisdiction, could not be ordered to do anything in the case. *Ferguson* v. *Corporation of Howick*, 25 Q. B. 547.

Held, 1. That the citing of a trustee to appear before the judge of the county court, under section 130 et seq. of the School Act, C. S. U. C. ch. 64, is not necessarily a bar to proceeding by arbitration under the 29th section; 2. That under sec. 130 the judge of the county court has no jurisdiction, except when a secretary-treasurer "has in his possession, books, moneys, &c., which came into his possession as secretary-treasurer, and which he wrongfully holds and refuses to deliver up," &c., and such secretary-treasurer must be guilty of misdemeanour, contemplated by the 130th clause, before the judge can interfere. *Ferris* v. *Chesterfield* 10 C. P. 272.

Held, that the judge of the County Court has power to allow pleas to be added in cases sent down from the superior courts to be tried by him, as well as in actions commenced in his own court. *King* v. *Glassford*, 11 C. P. 490.

On error from the County Court, it appeared by the record that after issue joined a ven. fac. was awarded, and then the postea stated an agreement by the parties to leave the case to the judge, the decision to be looked upon as the verdict of a jury. Afterwards it was entered that "the said judge has determined, and the court is of opinion and has ordered," that the defendant should pay to the plaintiff a sum named. Then followed an entry of judgment for that sum and costs:—Held, that the judgment was erroneous, for no verdict was directed or entered to support it. Quære, whether the judge had power to direct a verdict. *Jones* v. *Smith*, 23 Q. B. 485.

Held, affirming the judgment of the County Court, and following McPherson *v.* Forrester, 11 Q. B. 362—that an action would not lie in a County Court upon a Division Court judgment. *Donnelly* v. *Stewart*, 25 Q. B. 398.

The Overholding Tenancy Act, 31 Vict. c. 26, O., gives jurisdiction to the county judge in cases where the tenancy has been determined by forfeiture for breach of contract. *Nash* v. *Sharp*, 5 L. J. N. S. 73.—C. C.—Logie.

Per Hagarty, C. J., the intention of the Act 31 Vict. c. 26, O., was not to empower the judge of the County Court to determine the question of right between landlord and tenant on its merits; but, on its appearing that the tenant is holding under a bonâ fide belief of right, which the evidence in this case shewed, he should dismiss the case, and leave the right to be tried in ejectment. *Gilbert* v. *Doyle*, 24 C. P. 60.

Every court of record has the power to punish for contempt; but if the court is one of inferior jurisdiction, the superior court may intervene and prevent any usurpation of jurisdiction by it. *Ex parte Lees and the Judge of the County Court of the County of Carlton*, 24 C. P. 214.

IV. Practice and Procedure.

1. *Writs of Trial and Enquiry.*

Where the declaration claimes £75 for work and labour, but the bill of particulars only £19, the case is within the limits of the 8 Vict. c. 13, and a writ of trial may be ordered. *Martin* v. *Gwynne*, 5 Q. B. 245.

It is not necessary to obtain a rule of court, or a judge's order to warrant the issue of a writ of inquiry to the District Court. A plaintiff enters his record at the assizes to assess damages; the cause does not come on in its order, and is made a remanet; the plaintiff subsequently sues out a writ of inquiry to the District Court; the defendant moves to set this writ aside, and all subsequent proceedings, for irregularity, the cause having been made a remanet at nisi prius; but Held, per cur, writ of inquiry regular. *Northcote* v. *Hodder*, 5 Q. B. 635.—P. C.—Draper.

Under the 8 Vict. c. 13, a writ of enquiry may issue from the Queen's Bench to the District Court, not only to try the issues to the country, but also to assess contingent damages upon demurrer. *King's College* v. *Gamble et al.*, 1 C. L. Chamb. 54.—Macaulay.

Notice of trial of a Queen's Bench cause in the County Court, cannot be given by anticipation before the writ of trial has been obtained. *Riach et al.* v. *Hall*, *Patterson* v. *Hall*, 11 Q. B. 356.

The filing of the writ of trial with the verdict endorsed on it, signed by the judge of the County Court, is a sufficient compliance with the statute. *Ib.*

The want of a postea according to the form given in the rule of court of H. T. 10 Vict. was held no objection, and if indispensable the court would have allowed such postea to be afterwards filed. *Ib.*

Held, 1. that a defendant complaining of an insufficient service of notice of trial in a cause pending in a superior court, but sent to a County Court for trial under 23 Vict. c. 42, s. 4, may, without waiving the irregularity, apply within four days after the trial to the county judge for a stay of proceedings till the fifth day of the following term of the superior court of law. *Fisher* v. *Green*, 2 L. J. N. S. 14.—C. L. Chamb.—J. Wilson.

Held, also, that he may, within the like period, make a similar application to a judge of one of the superior courts of law sitting in Chambers. *Ib.*

Quære, if he delay for seven days after the verdict without making an application of any kind, has he not thereby waived the irregularity? *Ib.*

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2. *Other Cases.*

Semble, that a recognizance taken in a District Court may be sued on in the Queen's Bench. *Cockrane* v. *Eyre*, 6 Q. B. 289.

Where a recognizance has been taken in open court, and it is so averred:—Held, that under the 8 Vict. c. 13, ss. 20, 23, & 50, the filing of the recognizance in the office of the clerk is not necessary to perfect it. *Ib.*

A County Court judge cannot, by arrangement with the bar of his county, transact term business in vacation. *Smith* v. *Rooney*, 12 Q. B. 661.

When the Courts of Queen's Bench and Common Pleas are at issue on the construction of an act of parliament, the duty of a county judge is to decide according to his own view of the law. *McInnes* v. *Benedict*, 8 L. J. 22.—C. C.—Hughes.

The vacation succeeding a term, is not to be considered for the purpose of charging a defendant in execution as part of the preceding term. The same rule governs in this respect in County Courts as in the superior courts. *Reid* v. *Drake*, 4 P. R. 141.—C. L. Chamb.—A. Wilson.

A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before that term began, and no successor was appointed till after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment:—Held, that he was right. *Leslie* v. *Emmons*, 25 Q. B. 243.

The plaintiff, having sued in the County Court, proved a claim beyond the jurisdiction, whereupon the jury were discharged. He then brought his action in this court, and upon defendant's application an order was made staying proceedings until the plaintiff should discontinue the County Court action and pay the costs of it. The order was rescinded, for, 1. the County Court having no jurisdiction the plaintiff could not discontinue the suit there, which would be a proceeding in the cause; and, 2. this suit being for a debt, and not brought oppressively or vexatiously, should not have been stayed. *Hodgson* v. *Graham*, 26 Q. B. 127.

Defendant in the County Court obtained a rule nisi to enter a nonsuit, with stay of proceedings; it was not signed by the clerk, but had at the side the words, "Rule nisi granted: W. Salmon, judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff:—Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed. *Brown* v. *Cline*, 27 Q. B. 87.

Held, that under s. 18 of the Law Reform Act, judges of the County Courts can try cases brought down from superior courts without the intervention of a jury. *Cushman* v. *Reid*, 5 P. R. 121.—C. L. Chamb.—Galt.

V. Error and Appeal From.

1. *Error.*

Where either party can appeal from a District Court under sec. 57 of 8 Vict. c. 13, the appellant must take that course and not by writ of error. *Thomas* v. *Hilmer*, 4 Q. B. 527.

The plaintiff having commenced an action in the County Court, at the trial a bill of exceptions was tendered, and it was then agreed that the pleadings and evidence should be stated as a special case for the Queen's Bench, on which the court might order a verdict for plaintiff or defendants, or, at the election of the plaintiff, a nonsuit or new trial, the court to draw inferences as a jury. This was argued as a special case in the Queen's Bench, and judgment given for the plaintiff, whereupon the defendants brought error. In the copy of the judgment roll transmitted immediately after the pleadings and venire the evidence was set out, and then a statement of the contention on either side, and a formal entry of judgment for the plaintiff. The Court of Appeal refused to entertain the case, holding that if it was to be looked upon as an informal appeal from the County Court to the Queen's Bench, it was not a special case within secs. 150 or 157 of the Common Law Procedure Act, upon which error could be brought; that if it was to be treated as a cause in the Queen's Bench, then the agreement of the parties to the special case, and a judge's order allowing it, should have appeared on the roll, the facts and not the evidence only should have been stated, and the agreement of the parties should have been absolute, not giving the plaintiff an option to take a nonsuit or new trial instead of being bound by the judgment. *Holmes* v. *Grand Trunk R. W. Co.*, 29 Q. B. 294.

The proceedings here with regard to writs of error to County Courts, must be governed by the old practice in England. The plaintiff, in the County Court, recovered $5 on a declaration containing counts on the warranty of a horse for deceit, and the common counts. No certificate was granted, and judgment was entered for defendant for his costs of defence as between attorney and client, less the $5 damages. The plaintiff removed the judgment by writ of error, contending that under the Statute of Ontario, 31 Vict. c. 24, s. 2, sub-s. 4, he was entitled to Division Court costs. The defendant obtained a rule calling upon the plaintiff to assign errors: Held, not his proper course; but that he should have sued out a scire facias quare executionem non. Held, also, that this writ could not be said to have been sued out merely for delay, in which case the court will not stay execution, for there was fair ground for contending that the plaintiff was entitled to Division Court costs, and that the defendant should have deducted his own costs in such court from his own County Court costs. *Pope* v. *Reilly*, 29 Q. B. 478.

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2. *When Appeal li*

The court will not ent[er] [in] appeal from a County Court, where [the] [ju]dgment turns wholly upon the evidence, a[nd] [pr]esents no point of law. *Fowler* v. *McDonal[d]* Q. B. 385; *Bradley* v. *Crane*, 4 Q. B. 122; *[Ha]rdisty* v. *Ashall*, 23 Q. B. 302; *Clark* v. *Hurlburt*, [6] C. P. 438; *McKastry* v. *Furby*, 24 Q. B. 176; *Harris* v. *Robinson*, 25 Q. B. 247; See, also, *Regina ex rel. McKeon* v. *Hogg*, 15 Q. B. 140; *Regina* v. *McLean*, 22 Q. B. 443.

There must always be great reluctance to set aside the order of a county judge directing bailable process, when there are reasonable grounds from which he might draw the conclusion that

defendant was about to leave. *Swift* v. *Jones*, 6 L. J. 63.—C. L. Chamb.—Richards.

Where the County Court judge had exercised his discretion in such a case, a Superior Court judge refused to interfere. *Molloy* v. *Shaw*, 5 P. R. 250.—C. L. Chamb.—Richards. *Clark* v. *Hurlburt*, 6 C. P. 438.

Semble, effect must be given to a valid legal objection on appeal, though justice has been done.—Robinson, C. J., dubitante. *Kelly* v. *Baldwin*, 4 Q. B. 143.

Semble, that upon appeals on points of special demurrer, effect need not be given to all objections which would prevail in this court. *Outwater* v. *Dafoe*, 6 Q. B. 256.

Where only costs are involved, a decision will not be reversed on a mere point of special demurrer. *Kerby* v. *Elliott*, 13 Q. B. 367.

A County Court judge cannot by arrangement with the bar of his county transact term business in vacation, and an appeal from a decision under such an arrangement was allowed with costs. *Smith* v. *Rooney*, 12 Q. B. 661.

The court will not entertain an appeal from the court below upon the question whether plaintiff or defendant was entitled first to address the jury. *Hastings* v. *Earnest*, 7 Q. B. 520.

The judge of the County Court granted a new trial on the ground that he was wrong in allowing the plaintiff to begin, and that it had prejudiced the defendant, as the verdict for the plaintiff was against the weight of evidence. This court held that though the verdict was wrong on the evidence, the ruling at the trial as to the right to begin was right, and an appeal was therefore dismissed without costs. *Neville* v. *Fox*, 28 Q. B. 231.

The order of a judge upon an application to amend, is not appealable. *Branigan* v. *Stinson*, 10 Q. B. 403.

The decision on a case settled by consent in the County Court without pleadings, is not appealable. *Harding* v. *Knowlson*, 17 Q. B. 564.

Quære, whether the refusal of a re-pleader is an appealable matter. *Anglin* v. *Municipality of Kingston*, 16 Q. B. 121.

Where a verdict is taken for plaintiff, with leave to move to enter a verdict for defendants, an appeal will lie from the decision on such motion. *Haworth* v. *Fletcher*, 20 Q. B. 278; *McLean* v. *The Town Council of Brantford*, 16 Q. B. 347.

An appeal will lie upon an interpleader. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

Where a county judge has jurisdiction in the premises, a superior court judge will not in general, if at all, exercise a power of appeal by habeas corpus, which was never intended as a means of appealing from the discretion of a county judge. *Runciman* v. *Armstrong*, 2 L. J. N. S. 163.—C. L. Chamb.—A. Wilson. See, also, *In re Mann*, 25 C. P. B. 24.

Defendant in the County Court obtained a rule nisi to enter a nonsuit, with stay of proceedings; it was not signed by the clerk, but had at the side the words, "Rule nisi granted: W. Salmon, judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff:—Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed. *Brown* v. *Cline*, 27 Q. B. 87.

An appellant, having obtained the usual stay, omitted to give the bonds, and the opposite party, at the expiration of the four days, entered judgment. A mandamus to certify the proceedings in appeal upon a bond subsequently entered into was refused, upon the ground that no appeal would lie after judgment entered. *Murphy* v. *The Northern R. W. Co.*, 13 C. P. 32. See also *Duffil* v. *Dickenson*, 14 C. P. 142; *Wood* v. *Grand Trunk R. W. Co.* 16 C. P. 275.

Where defendants moved for a nonsuit on leave reserved, or for a new trial, and the rule was made absolute for a new trial, on payment of costs:—Held, that they might appeal from this decision as refusing the nonsuit, and need not first take out the rule absolute as granted. *Penton* v. *Grand Trunk R. W. Co.*, 28 Q. B. 367.

An appeal will lie under the Partition Act, 32 Vict. c. 33, O., from the judgment of a County Court judge on a special case stated. *In re Shaver and Hart*, 31 Q. B. 603.

An appeal will not lie from the granting of a rule nisi in the County Court, before it has been made absolute or discharged. *Robinson* v. *Richardson*, 32 Q. B. 344.

In a County Court case, tried at the assizes, after verdict for defendant in that suit, the parties agreed upon a special case in the action in that court, and not upon a case originating in a superior court; the clerk, with the approval of the court, refused to receive it, on the ground that the only mode of bringing such a case before the superior court was the ordinary statutory one, by way of appeal. *Pattypiece* v. *Mayville*, 21 C. P. 316.

Where, in a case of collision, the judge reported that he thought he had not sufficiently directed the jury to the rule laid down in Tuff *v.* Warman, 5 C. B. N. S. 573, as to the effect of negligence on the plaintiff's part, and that he had therefore granted a new trial, this court on appeal refused to interfere. *Somers* v. *Livingston*, 24 Q. B. 64.

After the evidence had been taken, a verdict was entered by consent for plaintiff, subject to the opinion of the court upon the whole case, with power to reduce the verdict:—Held, that there was no right of appeal. *McColl* v. *Waddell*, 19 C. P. 213.

The decision of a county judge on an application by an insolvent for his discharge from imprisonment is applicable. *Hood* v. *Dodds*, 19 Chy. 639.

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3. *Bond and Subsequent Proceedings.*

On the 18th of January proceedings were stayed for four days to allow defendants to give a bond for appeal, which was to be taken for $600. On the 18th the bond was filed, the proper penalty being inserted in the obligation, but in the recital of the judge's order this sum was left blank. The judge pointed out the omission to

defendant's attorney, who inserted the sum; but the judge afterwards required him to get the bond re-acknowledged, and he procured it from the clerk of the court for that purpose. The plaintiff's attorney finding it gone gave notice of taxation; but it was returned before judgment, which was nevertheless entered, and upheld on the ground that the bond when first filed was defective, and that it had not been refiled with an affidavit of execution after being corrected. The judge afterwards refused to transmit the papers for appeal, and to a mandamus nisi returned the above facts:—Held, that the bond was sufficient when first filed, the omission being immaterial: that the sum might have been inserted without re-execution, and that it was therefore unnecessary to file any new affidavit. *Regina* v. *Wells*, 17 Q. B. 545.

A County Court judge having refused to certify the papers for appeal, because the bond was not conditioned to abide by the decision of the court above, as the statute requires, this court refused to interfere. *In re Keenahan* v. *Preston*, 21 Q. B. 461.

As to the effect of the 27 Vict. c. 14, regarding the form of bond, see *Tozer* q. t. v. *Preston*, 23 Q. B. 310: *Pentland* v. *Heath*, 24 Q. B. 464; *Darling* v. *Sherwood*, 2 L. J. N. S. 130.

[See now 33 Vict. c. 7, s. 13.]

This court will not refuse to hear an appeal properly entered, because the necessary bond was not given in time. *Haworth* v. *Fletcher*, 20 Q. B. 278.

The condition of the bond not being in accordance with the statutes, the appeal entered for argument was struck out of the paper. *Pentland* v. *Heath*, 24 Q. B. 464.

The right to appeal must be exercised before the entry of judgment in the cause. A bond having been allowed, and the appeal books set down for argument, after judgment entered, the case was struck out upon motion. *Duffil* v. *Dickenson*, 14 C. P. 142.

Semble, that until the bond has been filed with the clerk, he cannot refuse to enter the judgment. In this case the bond had been allowed and the opposite party notified thereof, but it was not deposited with the clerk until after the entry of judgment and issue of execution, though on the same day:—Held, 1. that such judgment was not a nullity; 2. that if irregular it should have been moved against in the court below. The proceedings in the cause having been improperly certified to this court, after the entry of such judgment the appeal was ordered to be struck out of the paper. *Wood* v. *The Grand Trunk R. W. Co.*, 16 C. P. 275. But see the next two cases.

Where the bond allowed was for less than the verdict:—Held, insufficient; but this court will not go behind the certificate of the county judge to enquire into the regularity of the prior proceedings.—Pentland *v.* Heath, 24 Q. B. 464, referred to. *McLellan* v. *McClellan*, 2 L. J. N. S. 297.—P. C.—A. Wilson.

This court will not entertain objections to the hearing of County Court appeals unless such objections appear or should properly appear upon the proceedings certified. They refused therefore to strike out an appeal entered, for objections to the form and amount of the bond, and to the sufficiency of the sureties and the affidavits of justification. *Penton* v. *The Grand Trunk R. W. Co.*, 28 Q. B. 367.

R., the plaintiff below, appealed, giving a bond to the defendant, W., to abide by the decision of this court of the cause, "and to pay all such sums of money and costs, as well as of the said suit as of the said appeal, as should be awarded and taxed to said W." The appeal having been dismissed, W. recovered judgment in the court below:—Held, that the bond compelled R. to pay W.'s costs of defence taxed there, not merely the costs of appeal. *Waddell* v. *Robertson*, 26 Q. B. 376.

Where the decision of the court appealed to in effect sustains a judgment of the County Court, which disposes of the cause in the respondent's favour, or directs a proceeding or judgment which has that effect, the bond is a security for any debt or damages awarded, and for the costs of the cause as well as of the appeal. *Ib.*

Declaration on a bond conditioned to abide by the decision of the Common Pleas in a County Court suit of W. *v.* M., appealed to that court, and to pay all moneys and costs, as well of the suit as of the appeal. Breach, nonpayment of all sums of money and costs awarded and taxed to W. in the suit: that he recovered judgment in the County Court against M. for $220 damages and $72 costs, which defendant had not paid. Plea, that no decision of the said cause was ever made by the Common Pleas, nor any money or costs awarded or taxed by that court to the plaintiff:—Held, plea good, for the condition was only to abide by the decision of the Common Pleas, and if the appeal was not heard and the refusal to entertain it was a decision of that court, it should have been so alleged. The plaintiff replied, that the sums of $270 and $72 were within the true intent and meaning of the condition awarded and taxed to the plaintiff as and for his moneys and costs which M., within such intent and meaning, was liable to pay:—Held, bad, as tendering an issue on matter of law. *Waddell* v. *McColl*, 30 Q. B. 260.

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4. *Setting down Case for Argument.*

As to the time within which appeals must formerly have been set down for argument. See *Ruttan* v. *Vandusen*, 10 Q. B. 620; *Simpson* v. *The Great Western R. W. Co.*, 17 Q. B. 57; *Smith* v. *Foster*, 11 C. P. 161.

[This is now regulated by rule of court. T. T. 26 Vict. 22 Q. B. 166.]

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5. *Costs.*

As the defendant might be said to have appealed in compliance with the wish of the learned judge, costs were not given on dismissing the appeal. *Harris* v. *Robinson*, 25 Q. B. 247.

Appeal allowed with costs, contrary to the previous practice. *Eddy* v. *The Ottawa City Passenger R. W. Co.*, 31 Q. B. 569, 576, note *a*; *In re Shaver and Harty*, *Ib.* 609, note *a*. See, also, *Smith* v. *Rooney*, 12 Q. B. 661.

Where a party filed a bill on the equity side of the County Court, which on the hearing was dismissed with costs, and the plaintiff appealed to this court, when the ruling of the judge was reversed, the court gave to the plaintiff the costs of the appeal, as well as of the court below. *Farquhar v. The City of Toronto*, 12 Chy. 186.

The defendant, in a suit on the equity side of the County Court, had, before being served with an injunction restraining the removal of a building, removed the same by direction of the city inspector as being a nuisance, having been erected partly on the public street; notwithstanding this, an order was made by the judge of the County Court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this court. In allowing the appeal, and directing defendant's discharge, the court did not give him the costs of the application. *Murphy* v. *Morrison*, 14 Chy. 203.

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6. *Other Cases.*

Where either party can appeal from a District Court under sec. 57, of 8 Vict. c. 13, the appellant must take that course, and not by writ of error. *Thomas* v. *Hilmer*, 4 Q. B. 527.

Where a nonsuit was granted in the County Court, which this court thought could not be sustained, but the right of the plaintiff upon the evidence seemed very doubtful, the court on appeal ordered a new trial. *O'Rourke* v. *Lee*, 18 Q. B. 609.

The court refused to receive an affidavit, made by one of the witnesses examined at the trial, and put in after the argument of the appeal. *Bank of Upper Canada* v. *Tarrant*, 19 Q. B. 423.

The grounds of appeal must be stated in the appeal books, independently of the objections set out in the rule nisi below. *Severn* v. *Street Railway Co.*, *Corbett* v. *Taylor*, 23 Q. B. 254.

Appeals will not be heard unless such grounds are entered on the appeal books when delivered. *Eddy* v. *Ottawa City Passenger Railway Co.*, 31 Q. B. 569.

Semble, that on an appeal the judge should certify the original pleadings, &c., filed in the cause. *Murphy* v. *Northern Railway Co.*, 13 C. P. 32.

Where exhibits used in the court below are not produced before the appellate court, the appeal will not be heard, if the attention of the court be called to the fact. *Morse* v. *Thompson*, 19 C. P. 94.

The unnecessary length of the appeal books remarked upon in this case. *Phillips* v. *Findlay*, 27 Q. B. 32.

The manner in which the appeal books were written remarked upon. *Cloy* v. *Jacques*, 27 Q. B. 88.

Observations on the manner of sending up cases from the County Courts on appeal to the superior courts, and the insufficient materials furnished. *Arthur* v. *Monk*, 21 C. P. 76.

It is the duty of a County Court judge to certify to the court above on an appeal the grounds of his decision. The statute is not complied with by certifying the decision simply. *Hayward* v. *Grand Trunk R. W. Co.*, 32 Q. B. 392.

The general rule in matters of appeal is, that unless the appellate court can say that the judgment of the court appealed against is clearly wrong, that judgment stands. *Keena* v. *O'Hara*, 16 C. P. 435.

Semble, that no time is now limited for appealing from the County Courts. *In re Tozer* q. t. v. *Preston*, 23 Q. B. 310.

In pleading the general issue by statute, any statute relied upon for the defence must be referred to in the margin as well as that by which such plea is allowed. But where such a statute had been omitted in the County Court, this court on appeal directed the court below to amend by inserting it. *VanNatter* v. *The Buffalo and Lake Huron R. W. Co.*, 27 Q. B. 581.

There was a demurrer to the replication, and a verdict had been directed for defendant on the issue in fact on the opening address of plaintiff's counsel, from which the plaintiff appealed. Remarks as to the inconvenience of an appeal under such circumstances. *Sheriff* v. *McCoy*, 27 Q. B. 597.

In appeals against the orders of the County Court, this court will assume those orders to be correct until the contrary is shewn; and care must be taken to point out the defects on the pleadings and proceedings brought into this court. *Murphy* v. *Morrison*, 14 Chy. 203.

A petition of appeal from the decision of a County Court judge, acting in insolvency, need not set out all the evidence, documents, and materials used before the judge. What is needed is, that either the petition, or the notice accompanying it, should shew to the opposite party the objection which is taken to the proceeding appealed from, and the materials to be used on the argument of the appeal. *Hood* v. *Dodds*, 19 Chy. 639.

An order in insolvency was made on the 24th day of December, and the fifth day thereafter fell on a Sunday:—Held, that service of notice of appeal on the Monday following, was in time. *Ib.*

It is not necessary that the security to be given on an appeal in insolvency should be executed in presence of a judge. *Ib.*

VI. Miscellaneous Cases.

The judgment of a District Court could not bind lands under 5 Geo. II. c. 7, for want of a docket. *Doe* d. *McIntosh* v. *McDonell*, 4 O. S. 195.

The new tariff established by the Courts of Queen's Bench and Common Pleas does not extend to the County Courts. *Card* v. *Lount*, 2 P. R. 72.—C. L. Chamb.—Burns.

Per Macaulay and Jones, JJ.—Attorneys, not being barristers, cannot, as of right, be heard as advocates in the District Courts. Robinson, C. J., diss. *In re Lapenotiere*, 4 Q. B. 492.

Held, that County Court judges cannot allow attorneys who are not barristers to practice before them as advocates in County Courts. *In re Brooke*, 10 L. J. 49.—C. C.—Jones.

The vacation succeeding a term is not to be considered, for the purpose of charging a defendant in execution, as a part of the preceding term. The same rule governs in this respect in County Courts as in the superior courts. *Reid* v. *Drake*, 4 P. R. 141.—C. L. Chamb.—A. Wilson.

Held, that under secs. 59 and 64 of the Administration of Justice Act, 1873, there should be no County Court sitting in May of that year. *Dain* v. *Gossage*, 6 P. R. 103.—C. L. Chamb.—Dalton, *C. C. & P.*, Richards.

Held, under the Law Reform Act, 1868, s. 17, sub-ss. 4 and 5, as amended by the 33 Vict. c. 71, O., that in a County Court cause tried at the Assizes the motion to arrest judgment was properly made in this court. *Edmunds* q. t. v. *Hoey*, 35 Q. B. 495.

COUPON.

See DEBENTURE.

COURT HOUSE.

[*See 36 Vict. c. 48, ss. 348-366, O.*]

The justices of the peace cannot apply the district funds to building a new gaol and court house without an act of parliament specially conferring that authority. *Rex* v. *Justices of Newcastle*, Dra. 204.

The court refused a rule nisi for a mandamus, at the instance of the justices of the Huron district, to compel the Huron district council to build a court house. *Justices of the District of Huron* v. *Huron District Council*, 5 Q. B. 574. See, also, *Regina* v. *The Municipal Council of Bruce*, 11 C. P. 575.

Under 10 & 11 Vict. c. 6, a district council cannot be made liable in damages for an injury, resulting in death, occasioned to an individual in walking up the court house steps, which had been allowed to fall into an unsafe and dangerous condition. The council was charged in this declaration as having the court house under their control, and as bound by law to keep it in repair, and judgment was arrested on this averment, as the act 4 & 5 Vict. c. 10, s. 46, throws the responsibility on the district surveyor, upon whose report, in the first instance, as to the necessity of the repair and the expense, the council have to pass a by-law. *Hawkeshaw* v. *The District Council of the District of Dalhousie*, 7 Q. B. 590.

Quære, would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted. *Ib.*

Upon ejectment brought to try the question whether the sheriff or the municipal council were entitled to the control of the court house, and the appointment of a custodian of it:—Held, that the title of the plaintiffs by virtue of a deed from the town council of Goderich being admitted, the defence must fail, the question in dispute not being decided. *Municipal Council of Huron and Bruce* v. *Macdonald*, 7 C. P. 278.

The plaintiff brought an action for the use and occupation of a room in his hotel as a court room, and proved that the sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges:—Held, not recoverable. *Dark* v. *Municipal Council of Huron and Bruce*, 7 C. P. 378.

The magistrates in Quarter Sessions have no power to order furniture for the court house, and the county council are not liable for furniture so supplied. The fact that the court house was also used as a shire hall for the sittings of the council, and the furniture made use of by them, could make no difference. *Coombs* v. *Municipal Council of Middlesex*, 15 Q. B. 367.

In consequence of the separation of the city of Toronto from the county of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to the use of the gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act, which came into force in February, 1869, the city was re-united to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of the use of the gaol, stating that as to the court house the action of the legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half-year's rent which would have become due on 21st March following. *The Corporation of the County of York* v. *The Corporation of the City of Toronto*, 21 C. P. 95.

Held, that since the passing of the Law Reform Act, 32 Vict. c. 6, s. 22, O., re-uniting the city of Toronto to the county of York for judicial purposes, the city is not liable to pay the county any compensation for the use of the court house. *The Corporation of the County of York* v. *The Corporation of the City of Toronto*, 22 C. P. 514.

COURT OF CHANCERY.

I. JURISDICTION.
1. *Generally*, 857.
2. *County Court—Equitable Jurisdiction of —See* COUNTY COURTS.
3. *Alimony Suits — See* HUSBAND AND WIFE.
4. *Setting aside Patents or Grants—See* CROWN LANDS.
5. *Setting aside Sale of Land by Sheriff—See* EXECUTION.

II. REGISTRAR, 859.

III. MISCELLANEOUS CASES, 859.

IV. APPEAL FROM—*See* ERROR AND APPEAL.

V. PLEADING IN—*See* PLEADING IN EQUITY.

VI. PRACTICE IN—*See* PRACTICE IN EQUITY.

VII. MASTER—*See* PRACTICE IN EQUITY.

VIII. INJUNCTION—*See* INJUNCTION.

IX. SPECIFIC PERFORMANCE — *See* SPECIFIC PERFORMANCE.

X. SALE OF LAND BY ORDER OF THE COURT —*See* SALE OF LAND BY ORDER OF THE COURT.

I. JURISDICTION.

1. *Generally.*

A bill having been filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand river, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands:—Held, that as the whole estate, both legal and equitable, was in the crown, it was not a case in which the court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to have been dismissed with costs. *Brown* v. *West*, 1 O. S. 287.

The Court of Chancery cannot enforce against the crown specific performance of an order in council. *Simpson* v. *Grant*, 5 Chy. 267.

Nor has it jurisdiction to grant relief to a subject where the rights of the crown are in question. *Miller* v. *The Attorney-General*, 9 Chy. 558.

Held, following the last case, that the equitable jurisdiction in matters of revenue in this province, at the suit of a subject, resides in the superior courts of common law, if at all, and not in this court. *Norwich* v. *The Attorney-General*, 9 Chy. 563. But see *S. C.* in appeal, 2 E. & A. 541.

This court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the crown before the issuing of letters patent, but a bill for the purpose must shew why it is necessary to come to this court. *Bull* v. *Frank*, 12 Chy. 80.

Where a bill was filed by devisees against the executors of their testator's will, alleging the inability of the executors to attend to the trust of the will on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead, the court dismissed the bill, on the ground that the jurisdiction to interfere in such a case belongs to the Probate and Surrogate Courts, and not to the court of Chancery; and inasmuch as the executors had been brought before the courts without any fault on their part, the bill was dismissed with costs. *Corrigal* v. *Henry*, 2 Chy. 310.

This court will, upon the petition of the guardian duly appointed by the Court of Probate or Surrogate, interfere summarily, and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending in court respecting the infant's estate. *Re Gillrie*, 3 Chy. 279.

This court has jurisdiction to set aside the election of directors of a corporate body by persons who are subscribers nominally and not bonâ fide. *Davidson* v. *Grange*, 4 Chy. 377.

Where an insurance had been effected, and a fire occurred before the policy issued:—Held, that this court had jurisdiction to compel the issue of a policy or the payment of the insurance. *Penley* v. *Beacon Assurance Co.*, 5 L. J. 213.—Chy.

Where property was devised by a testator to his widow for the maintenance and raising of his family until the coming of age of the youngest child, and then to R., one of the sons, charged with certain payments at intervals to the widow and other children, with a provision for the substitution of another son in the event of R. dying under age or without issue:—Held, that the court had no jurisdiction to order a sale or mortgage of such property, the court having no power under 12 Vict. c. 72, to dispose of the real estate of infants against the provisions of any last will by which such estate was devised to such infants; 2. That such property was not the real estate of the infants within the meaning of the act. *In re Callicott*, 1 Chy. Chamb. 182. —Spragge.

On an application by a client for taxation of costs in a suit in this court, and in another suit in a County Court, his affidavit admitted a retainer in the County Court suit, but denied one in the suit in this court. The solicitor making no claim for costs in the suit in this court:—Held, that this court had no jurisdiction to order taxation between the client and solicitor. *In re Cameron, a Solicitor*, 1 Chy. Chamb. 354.—Spragge.

A bill had been dismissed with costs to be paid to the plaintiff. Two of the defendants were administrators, and as such had funds in their hands to which the plaintiff was entitled as one of the heirs and next of kin of the intestate. The defendants had been unable to obtain the costs by fi. fa. and filed a petition asking to be allowed to retain the funds in the hands of the administrators:—Held, that the court had no control over the funds, and the petition was dismissed with costs. *Black* v. *Black*, 1 Chy. Chamb. 360.—Spragge.

Where a person falsely representing himself to be the agent for the owner of certain land, entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not obtain a specific performance of the contract:—Held, that his remedy against the agent for the return of the deposit was at law, and that a bill for that purpose would not lie. *Graham* v. *Powell*, 15 Chy. 327.

This court has jurisdiction in a suit, as well as on a petition, under C. S. U. C. c. 86, s. 31, to decree a sale of an inchoate right of dower. *Cassey* v. *Cassey*, 15 Chy. 399.

This court has jurisdiction to carry out the terms of an award which directs the payment of money, although the reference contained no submission to pay, where the reference has been made an order of the court, and will in such a case order a reference to the master, and not oblige the party to sue at law. *Armstrong* v. *Cayley*, 2 Chy. Chamb. 163.—VanKoughnet.

A defendant confined in close custody under a writ of arrest, may apply to this court for his discharge under C. S. U. C. c. 26, s. 7. *Lawson* v. *Crookshank*, 2 Chy. Chamb. 413. — Taylor, *Secretary.*

The jurisdiction of equity in the case of lost bonds exists also in the case of bonds which have been destroyed. *County of Frontenac* v. *Breden*, 17 Chy. 645.

This court has no jurisdiction to give relief to sureties on a recognizance in a criminal proceeding. *Rastall* v. *The Attorney-General*, 18 Chy. 138; reversing *S. C.* 17 Chy. 1.

Where a plaintiff filed a bill for an injunction and payment of damages, and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced:—Held, that the court had not jurisdiction to make a decree for the damages. *Brockington* v. *Palmer*, 18 Chy. 488.

In a suit in this court brought against an insurance company to recover for loss sustained, on the ground that the policy was not a perfected one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were, that the policy had been duly signed by the president and secretary, and countersigned by the agent at I., (the place where the insurance was effected), and was ready to be delivered to the plaintiff:—Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed. *McFarlane* v. *The Andes Ins. Co.*, 20 Chy. 486.

A bill was filed in this court for the purpose of administering an estate in the province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties to the suit, other than the debtor who resided in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as manager for the trustees, and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of want of jurisdiction. The court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings. *Grant* v. *Eddy*, 21 Chy. 45, 568.

II. Registrar.

Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in this court, although they may not actually share in the emolument of suits. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

III. Miscellaneous Cases.

The remedies pointed out by statute for the purpose of settling the claims of land-owners to compensation for lands taken by a railway company becoming ineffectual, the court in such a case will direct a reference to the master for that purpose. *Mulloch* v. *Grand Trunk R. W. Co.*, 6 Chy. 348.

Semble, that it is a contempt of a court of common law to proceed in this court after a reference to arbitration under an order of that court, which orders the parties to perform the award. *Pomeroy* v. *Boswell*, 7 Chy. 163.

The court will not refer it to the surrogate judge to settle the amount of compensation or commission to be allowed to an administrator or executor, but having possession of the subject matter of litigation will finally dispose of the rights of all parties. *McLennan* v. *Howard*, 3 Chy. 279.

A judgment recovered at law by the fraudulent acquiescence of the defendant in the action will be enquired into in this court at the instance of a subsequent judgment creditor; although the rule at law is, that only the party to the action can move against the judgment there. *McDonald* v. *Boice*, 12 Chy. 48.

Where a rule for setting aside a fi. fa. against lands was discharged at law under a material error as to the facts:—Held, no bar to relief in equity at the suit of the debtor's grantee of the lands. *Paton* v. *The Ontario Bank*, 13 Chy. 107.

The court will reluctantly interfere with a company's discretion where amongst engineers there may be a difference of opinion; but as it appeared in this case that the damage complained of by the plaintiff might be avoided by certain alterations of the company's works, suggested by an eminent engineer to whom the matter was referred by the court, and it being stated on behalf of the company that these alterations would have been made by the company if suggested before suit, the court decreed the making thereof agreeably to the engineer's report. *Moore* v. *The Grand River Navigation Co.*, 13 Chy. 360.

Where a will related to both real and personal estate, and the personal property was worth at least £2,000, and it was sworn that the questions to be tried and determined were of such importance and difficulty that they could be more effectually tried and disposed of in this court than in the Surrogate Court, which statement was uncontradicted, the court ordered the removal of the matter into this court. *Re Eccles*, 1 Chy. Chamb. 376.—Mowat.

The rule and policy of the court is to discourage suits for trifling amounts, or brought vexatiously; where, therefore, a bill was filed in respect of a sum not exceeding $10, including interest, the court at the hearing, without reference to the merits of the demand, dismissed the bill, but without costs, as the defendant ought, under the circumstances, either to have demurred or moved to take the bill off the files. *Westbrook* v. *Browett*, 17 Chy. 339.

The Court of Chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10. Where, therefore, after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused. *Shaw* v. *Freedy*, 8 L. J. N. S. 136.—Chy. Chamb.—Taylor, *Secretary*. See, also, *Gilbert* v. *Braithwaite*, 3 Chy. Chamb. 413.

The Court of Chancery discountenances unnecessary or useless suits against trustees. *Liddell* v. *Deacon*, 20 Chy. 70.

The fact that a submission or award relative to personalty is made out of the jurisdiction of the court is no objection to its being made an order of the court. *Re Coombe et al.*, 6 P. R. 158.—Chy. Chamb.—Holmested, *Referee*.

COURTS.

I. Decisions.
1. *Generally*, 861.
2. *Conflicting Decisions.*
(a) *Practice*, 862.
II. Miscellaneous Cases, 862.
III. Rules of—*See* Rules of Court.
IV. Appeal from—*See* Appeal.
V. Referring Causes from one Court to another—*See* Trial.
VI. Prohibition—*See* Prohibition.
VII. Admiralty—*See* Admiralty.
VIII. Assize—*See* Trial.
IX. Chancery—*See* Court of Chancery.
X. County Court—*See* County Courts.
XI. Error and Appeal—*See* Error and Appeal.
XII. Oyer and Terminer—*See* Criminal Law.
XIII. District Court—*See* County Courts.
XIV. Division Court—*See* Division Courts.
XV. Heir and Devisee Commission—*See* Heir and Devisee Commission.
XVI. Impeachment—*See* Impeachment.
XVII. Judge in Chambers—*See* Practice at Law—Practice in Equity.
XVIII. King's Bench—*See* Queen's Bench.
XIX. Nisi Prius—*See* Trial.
XX. Police Court—*See* Police Court.
XXI. Practice Court—*See* Practice Court.
XXII. Queen's Bench—*See* Queen's Bench.
XXIII. Quieting Titles—*See* Quieting Titles.
XXIV. Recorder's Court—*See* Recorder's Court.
XXV. Court of Requests—*See* Division Court.
XXVI. Court of Revision—*See* Assessment and Taxes.
XXVII. Sessions—*See* Justices of the Peace—Sessions.
XXVIII. Surrogate—*See* Surrogate Court.

I. Decisions.

1. *Generally.*

A. Wilson, J., though having an opinion at variance with a decision in Chambers, refused to hold contrary thereto until the practice was settled by the court. *Clark* v. *Galbraith*, 10 L. J. 296.—C. L. Chamb.

The Court of Chancery in this country having frequently held constructive notice of an unregistered interest to be insufficient, where such unregistered interest was founded on an instrument capable of registration, and the want of actual notice was not wilful or fraudulent, this rule will continue to be acted on until the different doctrine lately held by V. C. Stuart in England, and Mr. justice Lynch in Ireland, is adopted in Appeal, either in England or here. *Moore* v. *The Bank of B. N. A.*, 15 Chy. 308.

If there be a series of decisions in this country leading one way, they should be followed in preference to a single decision of an English court, especially where in it there was a difference of opinion. *Scott* v. *Reikie*, 15 C. P. 200.

2. *Conflicting Decisions.*

(a) *Practice.*

Where the construction of a will had been determined by the Common Pleas, this court held it to be settled by their decision, and conformed to it, without expressing any opinion on the question raised. *Scouler* v. *Scouler*, 19 Q. B. 106.

Where the Court of Common Pleas exercises an appellate jurisdiction, it will decide according to its own view of the law, notwithstanding an adverse decision in the Queen's Bench. *McInnes* v. *Haight*, 8 L. J. 20.—C. P.

When the Queen's Bench and Common Pleas are at issue on the construction of an act of parliament, the duty of a county judge is to decide according to his own view of the law. *McInnes* v. *Benedict*, 8 L. J. 22.—C. C.—Hughes.

Remarks on the anomalous state of the law regulating appeals from County Courts, so far as the questions involved in this case are concerned. *Ib.*

Where the Courts of Queen's Bench and Common Pleas had given opposing judgments on the same question, this court, on affirming one of those judgments, dismissed the appeal without costs. *Sexton* v. *Paxton*, 2 E. & A. 217.

We are not to adopt as a rule the decisions of the Queen's Bench in matters of practice, more than those of the Exchequer or Common Pleas, but should adopt whichever will be most convenient and suitable for ourselves. *Hawkins* v. *Paterson*, 3 P. R. 254.—C. L. Chamb.—A. Wilson.

Where defendant, besides denying plaintiff's title, claimed title under a deed from the plaintiff to M. and under M.:—Held, that such notice did not relieve the plaintiff from proof of title. A contrary opinion had prevailed in this court, in opposition to the view taken by the Common Pleas, but each of the judges now composing the Queen's Bench had, while sitting in the other court, concurred in their decisions:—Held, therefore, that the difference of opinion should no longer continue; and the cases in this court—Brandon *v.* Cawthorne, 19 Q. B. 368, and Cartwright *v.* McPherson, 20 Q. B. 251—were overruled. *McGee* v. *McLaughlin*, 23 Q. B. 90.

Held, that whatever might be the individual opinion of the present members of the court, and however inclined to take the opposite view, they were bound by the judgment previously pronounced, as to the meaning of the contract sued upon, until its reversal. *Thomson* v. *Leach*, 20 C. P. 241.

II. Miscellaneous Cases.

The court delayed pronouncing judgment in order to enable parliament, if they should think proper, to legalize certain orders of Sessions on

which large expenditure has been incurred. *Rex* v. *Justices of Newcastle*, Dra. 294. See, also, *Forester and the Corporation of the Township of Ross*, 24 Q. B. 588.

Quære, as to the propriety of asking the court to pronounce an opinion as to the construction of a contract for parliamentary printing, and whether an action would lie thereon against the postmaster-general. *Taylor* v. *Campbell*, 33 Q. B. 264.

The court should not be asked, upon a case stated without pleadings, to answer questions which could not be raised upon proper pleadings. *Ib.*

Three of the judges in appeal being members of the church society, they held themselves disqualified to sit as judges, except ex necessitate, though no objection to their sitting was taken at the bar; but there not being a quorum without them, they heard the case with the other judges, in order that a judgment, legal in point of form, might be given by the court. *Boulton* v. *The Church Society*, 15 Chy. 450.

COVENANT.

I. What Constitutes a Covenant, 863.

II. Construction of.

1. *Dependent or Independent*, 865.
2. *Other Cases*, 869.
3. *Validity—See* Contract.
4. *Parol Explanation—See* Evidence.

III. Actions on.

1. *Who may Sue*, 870.
2. *Pleading*, 871.
3. *Evidence*, 874.
4. *Damages*, 874.
5. *Other Cases*, 875.
6. *Of Division Court Bailiff and his Sureties—See* Division Court.
7. *Of Sheriff and his Sureties — See* Sheriff.

IV. Discharge of and Excuse for Performance, 876.

V. Particular Covenants.

1. *Apprenticeship—See* Apprentice.
2. *In Leases — See* Landlord and Tenant.
3. *In Mortgages—See* Mortgage.
4. *In Policies—See* Insurance.
5. *For Title—See* Covenants for Title.

I. What Constitutes a Covenant.

Covenant cannot be sustained on the proviso in a mortgage deed, to pay the mortgage money. *Martin* v. *Woods*, T. T. 3 & 3 Vict.

A lessee covenanted to build on the demised premises during the term, "provided always, and it is the true intent and meaning of these presents, and the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," &c.:—Held, a covenant to pay. *McFattridge* v. *Talbert*, 2 Q. B. 156.

A covenant must be express and distinct, and not gathered as arising consequentially or morally by reason of something else in the deed. *Liddell* v. *Monro*, 4 Q. B. 474.

The plaintiffs were sureties to defendant for the performance by C. of an agreement whereby C. covenanted for himself, his executors, administrators and assigns, to build certain cottages for £1,800, which defendant covenanted to pay to C., his executors, administrators and assigns, as follows: £800 to be advanced during the work, and the remaining £1,000 to be paid on the completion of the agreement, by the conveyance to C. of certain specified premises. C. failed to perform his contract, and assigned it to the plaintiffs, having received £800 on account. It was not shewn that defendant was any party to the assignment. The plaintiffs and defendant then entered into an agreement (to which C. was no party,) reciting C.'s previous contract; the plaintiffs' liability as sureties for him; his nonperformance and assignment to the plaintiffs; that the defendant, at the plaintiffs' request, had agreed to give further time for the completion of the contract; and that in consideration of the premises the plaintiffs covenanted to finish the work according to the first agreement; and the parties mutually bound themselves in £1,000 for the performance of this last agreement:—Held, that there was no covenant, either express or implied, on the part of the defendant to convey to the plaintiffs, or to pay them £1,000. Robinson, C. J., diss. *Hall et al.* v. *Gilmour*, 9 Q. B. 492.

Upon a contract to do certain work within a specified time, with a penalty of £4 per week in case of default, as rent of the premises:—Held, that the condition to pay the £4 per week, although not incorporated in the specifications, formed a covenant on the part of the defendant to pay that sum for so long as his contract should remain unperformed after the day limited. Richards, J., diss. *Gaskin* v. *Wales*, 9 C. P. 314.

Plaintiff gave defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay to the plaintiff £300, and interest, on a day named; and it was added, "but if default be made in payment of said £300 in part of the whole, contrary to the manner and form aforesaid, then it" (the bill of sale) "shall remain and be in full force and virtue:"—Held, on demurrer, that the deed did not import a promise to pay, and debt would not lie. *McLaughlin* v. *Brouse*, 11 Q. B. 609.

The plaintiff demised to defendant certain premises at a yearly rent, which defendant covenanted to pay; and by the same instrument it was further witnessed, that "in consideration of £300, of which £50 was paid down at the ensealing hereof, the receipt whereof is hereby acknowledged, and the other moiety is to be paid on the 30th December, 1862, with interest in the meantime payable yearly, half yearly, or quarterly," the plaintiff sold to defendant the house on the land:—Held, that defendant was liable as on a covenant to pay the unpaid moiety of the purchase money. *Joseph* v. *Todd*, 23 Q. B. 80.

Held, that the mere words, in the proviso of a mortgage "in three equal payments to be respectively made," did not create a covenant to pay the amounts specified. *Jackson* v. *Yeomans*, 19 C. P. 394.

An indenture between plaintiff and defendant recited that defendant was the owner and occupier of certain timber limits, and had agreed to sell to the plaintiff all the square timber growing there of a specified length for $1,000, the receipt of which was acknowledged, and witnessed that the plaintiff "had a right to cut, make, and draw off the said timber until the 15th of April next, and not longer:"—Held, Hagarty, J., doubting, that taken altogether the instrument contained a covenant by defendant that he owned the limits, and had power to sell and give the plaintiff a right to remove the timber. *Link* v. *Hunter*, 27 Q. B. 187.

Plaintiff and defendant entered into an agreement under seal, by which the plaintiff agreed to convey to defendant certain land "for $300," payable in the manner specified:—Held, to amount to a covenant by defendant to pay the money. *Berry* v. *Garrard*, 32 Q. B. 173.

II. Construction of.

1. *Dependent or Independent.*

Where the plaintiff covenanted that his son should serve defendant for seven years, in consideration whereof defendant covenanted at the expiration of the time, to convey 200 acres of land to the son, his heirs and assigns:—Held, that the service for seven years was a condition precedent to the right to the conveyance. *Goodall* v. *Elmsley*, 1 Q. B. 457.

The plaintiff sued in assumpsit for work and labour, and at the trial put in a sealed agreement under which he had agreed to perform the work, by which it appeared that defendant was bound to pay for the work at stated periods. The work was not done according to the contract, and the plaintiff consequently sued in assumpsit, but was nonsuited at the trial, on the ground that the covenants in the sealed instrument were independent, and that he could have sued on the agreement for the money although the work was not performed:—Held, that the nonsuit was wrong. *Barton* v. *Fisher*, 3 Q. B. 75.

Where payment is to be a condition precedent or a concurrent act, and is to be made in a certain manner, the plaintiff must aver readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everardo et al.*, 3 Q. B. 154

A. by deed, in consideration of the rents, &c., on the part of B., to be paid and performed, agreed with B. that he would on or before the 1st day of October, upon request to him in writing by B., grant unto him a lease to be prepared or approved by B.'s counsel of certain premises, to hold for five years at a rent named; the said lease to contain certain covenants; and said A. thereby agreed to deliver to said B. on the 1st of October, 200,000 staves at the above premises, at a price specified, for which B. agreed to pay said A. on certain days; and it was thereby agreed that said lease should contain a covenant by said A. that he would deliver to the said B. in each of the two succeeding years staves, &c.: and further, that B. should furnish securities for the due performance of the above agreement on or before the 20th day of July:—Held, that a request by B. for, or the granting by A. of such lease, was not a condition precedent to the right of B. to have the staves delivered, the covenants to grant the lease and to deliver the staves being independent. *Leonard* v. *Wall*, 5 C. P. 9.

Upon a contract extending over several years for work and labour to be paid for by instalments, the defendants admitted part performance of the contract upon which the action was brought, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that thorough and complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming full performance, and to the satisfaction of their officer, as a condition precedent, the contract being in consideration of performance, and not in consideration of plaintiff's covenant to perform. *Coatsworth* v. *City of Toronto*, 10 C. P. 73.

Defendant leased to the plaintiff certain premises for three years from the 1st of May; and the plaintiff covenanted that, on or before said 1st of May, he would give to defendant two good and sufficient securities for the performance of plaintiff's covenants in the lease:—Held, that the giving such security, was a condition precedent to the plaintiff's right of possession under the lease. *Murphy* v. *Scarth*, 16 Q. B. 48.

Declaration, that the plaintiffs agreed to complete the ballasting of a certain portion of defendants' railway, and to construct stone culverts and bridge abutments at certain points, and to do the grading necessary, &c., all to be completed before the 1st of January, 1859, provided the company should furnish cash to meet the monthly estimates of the engineer; and that the plaintiffs commenced and were ready to complete the work, but defendants wrongfully prevented and discharged them. Plea, that by the same agreement it was provided, that whereas the plaintiffs had leased said railway from defendants by lease bearing even date with the agreement, in which it was provided that £30,000 should be expended by defendants on the completion of the road before the rents should be payable, and whereas defendants were unable to raise the £30,000, it was therefore agreed that the plaintiffs should work the road free of any charge for the use of it, and should expend the surplus earnings on the completion thereof, the amount so expended to be taken as part of the £30,000: that the lease so made was for the express purpose of enabling the plaintiffs to work the road, and raising thereby enough to enable defendants to pay them for the work contracted to be done by them: that the plaintiffs, although they had the free use of the road, refused to work and abandoned the same, whereby they forfeited the contract, and the defendants therefore prevented them from proceeding with the work, as they lawfully might:—Held, on demurrer, plea bad, the agreements being independent. *Tate et al.* v. *The Port Hope, Lindsay, and Beaverton R. W. Co.*, 17 Q. B. 354.

The declaration recited that the Desjardins canal company were indebted to plaintiffs in £13,000, which they had agreed to pay before the 1st of January, 1854: that by 16 Vict. c. 54,

defendants were authorized to become security to the plaintiffs on account of said company, for certain improvements on their canal to the extent of £15,000; and that after such statute defendants duly covenanted with the plaintiffs that the said company should pay them the said sum of £13,000 and interest, on or before the 1st of January, 1854, and that in default thereof defendants would pay the same. Defendants pleaded, on equitable grounds: 3. That the plaintiffs had agreed to build for said canal company a certain bridge over a channel to be cut by the plaintiffs to their canal, in consideration whereof the company covenanted to pay them £13,000 on the completion of said work, which said sum and the said channel and bridge are the sum and the improvements mentioned in the declaration: that defendants in pursuance of said statute entered into the covenant declared upon as security for the payment by the canal company of said sum: that the said agreement of the plaintiffs is subject to a condition precedent, that the work should be approved of by the engineers of the plaintiffs and the canal company, &c., who should report when the same were executed, and that no such report was made before this suit. 4. On equitable grounds, that the said channel and bridge were not completed before this suit. The plaintiffs replied, setting out the agreement in full, by which it appeared that the agreement of the canal company was to give security for the repayment of the money advanced by the plaintiffs "at the time and in manner as is stated in such securities:"—Held, on demurrer, both pleas bad, as shewing no equitable defence; for the covenant by defendants was absolute, that the canal company should pay on a certain day; and by the agreement the money was to be paid at the time mentioned in the security, not to be dependent on the completion of the work. *Great Western R. W. Co.* v. *The Corporation of the Town of Dundas*, 20 Q. B. 523.

Upon a covenant to pay, in consideration of certain work to be performed, the first payment to be made before the time fixed for the completion of the contract:—Held, that the performance of the work was not a condition precedent to payment. *Cullen* v. *Nickerson*, 10 C. P. 549.

Held, that under the agreement for the sale of land set out in this case, the covenants by defendant to pay, and by plaintiff to convey a good title, on receiving payment, were independent of each other, and that defendant was responsible on his covenant, notwithstanding the plaintiff's inability to perform his. *Tisdale* v. *Dallas*, 11 C. P. 238.

Defendants entered into a bond, conditioned that one McK. should pay to the plaintiffs certain rent in equal monthly payments, with a proviso "that the said municipality (the plaintiffs) shall, on default being made by the said McK. in the payment of the said amount monthly, give notice thereof to the said obligors:"—Held, that the proviso for notice was a condition precedent to the plaintiff's right to call upon the defendants as sureties, and that notice of default not having been given within a reasonable time, the defendants were relieved. *Corporation of Chatham* v. *McCrea et al.*, 12 C. P. 352.

The question of reasonable notice is one for a jury, but the undisputed facts leaving no doubt what the decision of a jury should be, the court ordered a nonsuit to be entered. *Ib.*

Declaration on a deed, by which, in consideration of $1, defendant assigned to the plaintiff one-fourth share in an invention, for which he was applying for a patent in the United States, and covenanted to assign to him the same share in such letters patent to be issued; in consideration whereof the defendant covenanted to use his best endeavours to bring said patent into general use in the United States. Breach, that after the patent had been obtained, the defendant would not assign to the plaintiff, but wrongfully sold his whole interest to others. Plea, on equitable grounds, that the real consideration, as the plaintiff well knew, was not the $1, but the plaintiff's covenant to endeavour to bring the patent into use in the United States: that the plaintiff wholly neglected to do this, but spoke against and by his conduct prejudiced the invention. And so the defendant said that before any breach on defendant's part, or any sale by him, the plaintiff withdrew from and broke his agreement, whereby the consideration for the defendant's agreement wholly failed:—Held, on demurrer, no defence; for the two covenants were independent, the plaintiff was entitled to a transfer as soon as the patent issued, and the non-performance by him of something to be done afterwards could not defeat his right of action. *Stovin* v. *Dean*, 26 Q. B. 600.

Declaration upon defendant's bond, conditioned for the performance by one D. of his agreement, under seal, to construct a railway for the plaintiffs, to be completed by the 15th February, 1871, or within such further time as might be allowed. First breach, failure to complete by the 15th February. Second breach, failure to complete within the extension of time allowed. Plea to the first breach, that by the agreement the plaintiffs promised to pay D. for the works $290,000, of which $100,000 was to be paid in mortgage bonds of the plaintiffs, and the rest as specified, but ten per cent. was to be retained out of each payment of bonds until the completion of the work, and then to be paid with the last payment; and that, although the plaintiffs made certain payments according to the contract, they failed to make the residue, whereby D. was and is prevented from completing the work:—Held, plea bad, for the covenants were independent, and non-performance by the plaintiffs was no defence. *Port Whitby and Port Perry R. W. Co.* v. *Dumble*, 32 Q. B. 96; 22 C. P. 39.

Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto, in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel, was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September, inst., a lease containing the usual covenants to be prepared and executed by both parties; and that for the due peformance of the agreement, the

parties became bound to each other in $1,000, to be paid by the party in default, as liquidated damages. Fifth plea: that the valuation of the furniture, &c., was not finished on or before the 29th September, nor yet finished. Plaintiff replied that the valuation was prevented and not finished on or before, &c., solely by the acts and misconduct of the defendant:—Held, good, as the valuation was a condition precedent to the granting of the lease. *Walker* v. *Kelly*, 24 C. P. 174.

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2. *Other Cases.*

Where executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, &c., in the deed, for good title:—Held, that they were personally liable on that covenant, and that the grant by them as executors could not control their express contract. *McDonald* v. *McDonell et al.*, 6 O. S. 109.

Defendant covenanted to pay £100 to plaintiff in three months after a certain day, or as soon as the defendant returned from the United States after having taken possession of certain land (which had been sold by the plaintiff to the defendant,) or disposed of any part thereof. The plaintiff assigned as a breach, that although the three months had elapsed, defendant had not paid the money, without averring that the defendant had returned from the United States, having taken possession, &c.:—Held, sufficient. *Hardy* v. *Johnston*, 2 Q. B. 160.

Covenant to indemnify "generally and without exception" against a charter party, which defendants had assumed:—Held, under the circumstances of the case, to mean rather without exception as to the description of claim, than as to time; and that the defendants would be liable only for moneys accruing due under it during their copartnership, and thence to the expiration of the charter. *Jones* v. *Walker et al.*, 9 Q. B. 136.

Plaintiff demised certain premises to defendant by lease, dated the 1st of November, 1849, which lease contained a covenant to the effect that it should be "competent" for the defendant to remove the then front window sashes, &c., and to put the best plate glass windows in the room of those removed, &c., within one year from the date of the lease:—Held, that notwithstanding the introduction of the word "competent," the defendant covenanted to do the work specified. *McDonald* v. *Cochrane*, 6 C. P. 134.

Held, that a covenant not to sue, entered into by the creditor with the principal debtor without the surety's consent, but with a reservation of remedies against other parties, does not discharge such surety. *Hall* v. *Thompson*, 9 C. P. 257.

Defendants covenanted to pay the plaintiff $961, and by the same agreement it was made a condition that the plaintiff should allow his name to be used in prosecuting a claim in which defendants were interested, against an insurance company: that he would personally present his particulars of loss, with the usual affidavits and certificate required by the company, whenever requested in writing so to do by any of the parties to the agreement; and that if the claim should be defeated by any gross negligence of the plaintiff, then this agreement should be void. In an action upon defendant's covenant:—Held, that it was not necessary that the plaintiff should present the necessary papers in person to the company, or on the precise day named by defendants; and that he must be held to have performed the condition upon the evidence set out in the case, which shewed that the papers furnished by him were not objected to, and that the claim was not defeated owing to their insufficiency. *Rice* v. *Wells et al.*, 20 Q. B. 404.

The plaintiffs being indebted to the defendant in the sum of $80,000, and to other parties (whether partnership or individual debts) in an amount not exceeding $2,160, by deed dated October, 1859, in consideration of a release of the debt of $80,000, and of $4,000 paid, assigned to defendant all their stock in trade, book debts, and assets (except household furniture) with a covenant on defendant's part, that he would indemnify and save harmless the plaintiffs from all debts and demands not exceeding the amount of $2,160, and a further covenant by both plaintiffs and defendant for $4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed. Upon an action brought upon the covenant to indemnify, and reference to arbitration, it appeared that the defendant had paid plaintiffs' liabilities to the amount of $1,857, and claimed the sum of $356, he having settled that sum by setting off the same with the creditors of the plaintiffs to whom said debts were due, sums of money due from those creditors to the plaintiffs, being partnership debts due to plaintiffs and assigned to defendant by the deed above stated:—Held, that the sum so set off ($356) was not properly defendant's property, and that the plaintiffs were entitled to a verdict for that amount. Held, also, that the sum of $4,000 so claimed was not a debt due as liquidated damages upon each breach of the covenant. *Rutherford et al.* v. *Stovel*, 12 C. P. 9.

Declaration on a covenant made by the defendant to the plaintiff, whereby he covenanted to pay the plaintiff £37 10s. and interest. The defendant pleaded that the covenant was contained in a chattel mortgage made by him at the plaintiff's request, and to hinder, defeat, and defraud his creditors, and without consideration. Upon demurrer,—Held, that a covenant executed as above is only void as against third parties, and not between the parties to it; and that the plaintiff, therefore, was entitled to judgment. *Scoble* v. *Henson*, 12 C. P. 65.

III. Actions on.

1. *Who may Sue.*

Held, that an heir could not sue on a covenant with the ancestor to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's life-time. *Goodall* v. *Elmsley*, 1 Q. B. 457.

Under a fi. fa. lands, against the plaintiff in this suit, in favour of A., the sheriff sold to A. a rent charge, which defendant in this suit had granted by deed to the plaintiff for her life. The deed contained a personal covenant of the defendant to the plaintiff to pay the rent charge:

—Held, per Burns, J., that A. was not entitled to sue on the covenant in the name of the plaintiff. *Smith* v. *Turnbull*, 1 P. R. 38.—P. C.—Burns.

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2. *Pleading.*

In covenant, plaintiffs agreed to deliver 200 toise of stone for building a wall, defendants to pay 6s. 9d. per toise, i.e., for every 216 feet cubic measure, when the wall was erected. Plaintiffs averred delivery of 195 toises laid in the wall, but omitted to aver how many toises, at the rate of 216 cubic feet to a toise, had been laid in the wall and measured there:—Held, bad on general demurrer. Macaulay, J., diss. *Howe et al.* v. *Newman et al.*, Dra. 90.

In an action of covenant for not making a lease of premises, it is no ground for arresting the judgment that the premises are not particularly set forth, if the breach be as definitive as the terms of the covenant require. *Rowand* v. *Tyler*, 4 O. S. 257.

Where the declaration set out that the money was to be paid according to the condition of a certain bond, the balance due on which was alleged to be ascertained, and the breach assigned was, that the money was not paid according to the covenant, but did not state the balance due, the judgment was arrested. *Martin* v. *Woods*, T. T. 3 & 4. Vict.

Declaration on a covenant by defendant to transfer to plaintiff certain land to which defendant was entitled as the son of an U. E. Loyalist, provided the plaintiff should locate the land, perform settlement duties, and procure the patent thereof, at his own costs, defendant in his covenant agreeing to furnish the plaintiff with full power to do so. The breach was held bad, for not averring a demand of authority to locate, perform settlement duties, &c., with time and place. *Detlor* v. *Keogh*, 1 Q. B. 226.

Declaration for payment of money by instalments, alleging that a sum became due on one day for two instalments:—Held, good on special demurrer. *Thompson* v. *Chambers*, 2 Q. B. 191. See, also, *Courtney* v. *Sinclair*, 5 Q. B. 311.

Where a payment is to be a condition precedent, or a concurrent act, and is to be made in a certain manner, the plaintiff must aver readiness to pay in the precise manner stipulated. *Tanner* v. *D'Everado et al.*, 3 Q. B. 154.

To an action of covenant, the fraud of the plaintiff may be pleaded in general terms. *Lacey* v. *Spencer*, 3 Q. B. 169.

Declaration on a covenant to pay money. Plea, that the defendant had not broken his covenant:—Held, bad on special demurrer. *Mitchell* v. *Linton*, 5 Q. B. 331.

Construction of conveyance, as to the necessity of averring affirmatively, in declaring thereon, that the plaintiff had sold lands, or why he had not sold them, before he could entitle himself to sue upon the covenant for the non-payment of a sum of money. *Kay et al.* v. *Gamble et al.*, 6 Q. B. 267.

Quære, whether the first count of the declaration, set out in the case, was in covenant or in tort. *Warren* v. *Monroe et al.*, 15 Q. B. 557.

In covenant upon articles of agreement, to recover payment for certain works therein specified, the defendants pleaded in general terms denying the doing of the work and the performance of the covenants mentioned in the articles:—Held, good, without specifying what works the plaintiffs had not performed, or wherein they had not performed the covenants. *Dunn et al.* v. *Zimmerman et al.*, 6 C. P. 346.

The declaration stated that one W. G. mortgaged to the plaintiff and two others, as trustees of S., his unexpired term in certain lands, to secure £400 and interest, which he thereby covenanted to pay them at certain times specified; that W. G. also mortgaged said term to the plaintiff, to secure £226 7s. 6d.: that under a power of sale in said last mentioned mortgage, the plaintiff duly sold the mortgaged premises to defendant at the following price—that is to say, that defendant should pay the mortgage to said trustees, and £150 to the plaintiff: that the plaintiff thereupon assigned said premises to defendant, and defendant, by the assignment, covenanted with the plaintiff to perform the covenants in the mortgage to said trustees; and the plaintiff alleged that defendant had not paid the price so to be paid by him for his purchase, and had not paid the last instalment of the mortgage money payable to the trustees. Defendant pleaded, 1. As to so much of the declaration as relates to the price or sum of money to be paid by defendant to plaintiff, that he did not promise as alleged; 4. As to said price, a set-off for moneys due by plaintiff to defendant; 5. As to the plaintiff's claim in respect of the mortgage from W. G. to the trustees, a similar set-off:—Held, on demurrer, pleas bad, for the first was not a denial of the covenant sued upon, but an attempt to put in issue its legal effect: the fourth and fifth were pleaded to a cause of action not advanced, as the declaration was for the non-payment of money to the trustees, not to the plaintiff; and as to the fifth plea, the claim under the covenant to pay the trustees was not one to which a set-off could be pleaded, the debts not being mutual. *Martin* v. *Clark*, 20 Q. B. 419.

A plea of leave and license:—Held, bad, as no answer to an action of covenant. *McDonald* v. *Great Western R. W. Co.*, 21 Q. B. 223. See, also, *Gwynne* v. *Brock*, 6 O. S. 271.

Declaration that plaintiffs covenanted with defendants to do certain works within a limited period, with power to defendant by six days' notice to take the works out of plaintiffs' hands in default of sufficient progress to ensure completion of the said works within the time; but, omitting to set out the words, "It is also understood that the work is to be carried on unceasingly night and day with sufficient force to ensure its completion within the limited time." Averment, that though plaintiffs fulfilled the conditions precedent, defendants did take the works out of the plaintiffs' hands without notice or just cause, &c., whereby, &c.:—Held, on motion for nonsuit to be no variance, as by sec. 106 of C. L. P. Act, 1856, the averment of performance by plaintiff of conditions precedent, not denied by defendants, is sufficient. *Hennessey et al.* v. *Weir*, 11 C. P. 179.

Declaration, by executor of S., on a covenant made by defendant on the 10th of January, 1835, to pay S. £240, with interest, by instalments. The second and third pleas set up payment of £210 under a previous agreement to secure the

fulfilment of which the deed declared on was given, and these pleas were:—Held, bad, for it was not alleged that the £210 formed any part of the £240 for which the covenant sued on was made, or that there was no other consideration for such covenant than to secure the £210. *Robison* v. *Flanigan*, 22 Q. B. 417.

Fifth plea, that before breach of the covenant declared on, S. accepted from defendant £210 in goods in full satisfaction of said sum of £240, and of the cause of action declared on, and by deed released defendant therefrom. On demurrer to this plea, except as to the allegation of release:—Held, that the rest might be rejected as surplusage, and that it shewed a good defence. *Ib.*

The plea was that A. S. did not at the request of defendant sign and seal, and as his act and deed deliver to the insurance company the covenant mentioned in the first count:—Held, that by this plea the question of A. S. having entered into the covenant at the *request* of the defendant was put in issue, and there being no evidence to support the issue, a new trial was ordered without costs. *Stewart* v. *Clark*, 13 C. P. 203.

Declaration on a covenant to pay $1,400 on a day named, if defendant did not make a deed in fee simple, clear of all encumbrances, of certain land specified, to the plaintiff, his heirs and assigns. Breach, that defendant did not make a deed in fee simple, clear of all incumbrances, of the said land to the plaintiff, his heirs and assigns, nor did he pay the $1,400. Demurrer, that the breach is uncertain, as it might mean either that defendant made no deed, or not one free from encumbrances, in which case the encumbrances should be stated:—Held, that the breach was sufficient. *Cully* v. *Winter*, 25 Q. B. 34.

Declaration, that the defendant, by deed, covenanted (not saying with the plaintiff) to pay to the plaintiff, &c.:—Held, good on demurrer. *Hennessy* v. *Hennessy*, 30 Q. B. 38.

Declaration, that the plaintiff and defendant and one D. entered into an agreement under seal, set out, which was in substance as follows: D. has sold to defendant his interest in certain land and mills (described) for £1,350, which was held in trust by said D. for the plaintiff, and has conveyed it to defendant to be held in trust for the plaintiff, as it was held by D. The lien therefore which defendant has on said property is said sum of £1,350 paid by him to D. Plaintiff agrees to pay defendant said £1,350, with interest, as follows (setting out the times of payment). And further, D. delivers to defendant all the chattels on the premises, to be held in defendant's name, but for the plaintiff's benefit, and the business to be done in defendant's name, but the profits to go to the plaintiff. It was then alleged that the said agreement being in full force, the defendant, in breach thereof, distrained upon the plaintiff's goods, as his tenant, in the house he then dwelt in on the said premises, for £306, being, as the warrant of distress falsely alleged, the amount of rent due to defendant for the same on the 1st October then last, whereby the plaintiff, in order to obtain possession of his goods, was obliged to replevy them, and was put to great loss and expense, &c.:—Held, that the declaration was bad, as not shewing a breach of any covenant contained in the agreement set out; for it was not alleged that the goods distrained were those mentioned in the deed, nor that the plaintiff was not defendant's tenant, nor that no rent was due, nor what proceedings were had in the replevin suit. *Scott* v. *McCabe*, 31 Q. B. 220.

To a declaration on a covenant in a lease alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow thereon, and charging as a breach, that defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it according to the true intent and meaning of the added part:—Held, on demurrer, plea bad. *Shier* v. *Shier*, 22 C. P. 147.

To an action of covenant in a lease, defendant pleaded in substance, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, Gwynne, J., diss., plea bad. *Ib.*

To an action in covenant defendant pleaded never indebted:—Held, not a nullity, but merely an irregularity. *Abell* v. *Glen*, 6 P. R. 64.—C. L. Chamb.—Dalton, *C. C. & P.*, Richards, Galt, Gwynne.

Treating a pleading as a nullity does not prevent it afterwards being attacked as an irregularity. *Ib.*

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3. *Evidence.*

Plaintiff declared that defendant, by his deed, covenanted not to commit waste, not stating with whom:—Held, that the plaintiff could not shew that he was suing as assignee of the reversion, but must prove a covenant with himself; and an amendment was refused at nisi prius. *Brennan* v. *Whitley*, 15 Q. B. 277.

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4. *Damages.*

In an action upon defendant's covenant to pay off a mortgage executed by the plaintiff to one G., upon land sold by the plaintiff to defendant, it appeared that G. had sold under the mortgage in Chancery, in a suit against defendant, the costs of which amounted to £43, and that for the mortgage money remaining, after deducting the proceeds of sale and these costs, he had obtained a judgment against the plaintiff. The defendant had paid £20 to G. before the Chancery suit was begun, but had not obtained credit for it:—Held, (by Adam Wilson, J., his judgment being accepted by consent as that of the court,) that this sum of £20 should not go to reduce the plaintiff's claim, for it was the defendant's duty to have obtained credit for it in taking the accounts; and that the plaintiff could recover for the Chancery costs, as G. had properly deducted them, and the plaintiff, being liable to pay G

the deficiency then remaining on the mortgage, was entitled to be paid it by defendant. *Stephens* v. *Boulton*, 23 Q. B. 16.

Where A. is liable to pay B. a certain sum on a particular day, and C. covenants with A. to pay it, A. on default may recover the whole sum from C., although he has paid nothing. *Leith* v. *Freeland*, 24 Q. B. 132.

A debtor, whose business was the manufacture of reaping machines, conveyed his personal property to trustees; and having afterwards compounded with them and his other creditors, the trustees entered into a covenant to re-assign to him the property on certain terms and conditions. The debtor filed a bill, alleging, amongst other things, a breach of the covenant, and claiming damages:—Held, that he might be entitled to damages for the detention of the machinery necessary for carrying on his business; and it was referred to the master to inquire into the nature of the personal property withheld, and, if it was machinery or chattels of a like nature, to inquire and report as to damages. *Scott* v. *Wilson*, 16 Chy. 182.

Upon a foreclosure suit upon a mortgage for £350, and on which only £250 had been in fact advanced, the court disallowed the additional £100, and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Bitner*, 11 C. P. 102.

5. *Other Cases.*

Where the plaintiffs, who had built mills on a stream, by indenture granted a license to the defendant to make a raceway over their lands for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby, nor any injury or damage occasioned to the plaintiffs' mills, and after the defendant's mill had been erected, by an accumulation of ice on the by-wash, the water was forced back on the plaintiffs' mill:—Held, that the plaintiffs might maintain an action for such injury, and that case, and not covenant on the indenture, was the proper form of remedy. *Eastwood et al.* v. *Hellivell*, 4 O. S. 38.

Where the plaintiff has been awarded a certain sum in accordance with the terms of an instrument under seal, for the non-payment of such an award the plaintiff should sue in covenant: he cannot sue in assumpsit unless some new consideration, apart from the written instrument, can be proved. *Tait* v. *Atkinson*, 3 Q. B. 152.

The defendants gave a bond to the plaintiff in the sum of £45, conditioned to pay him £45 a year so long as he should continue the minister of a certain congregation. They paid him without suit for the first two years. For the next four years the plaintiff sued them, declaring upon the bond as a covenant, and obtained judgments, which were satisfied without any question being raised. He then sued for the sixth year, and the question of defendants' liability was left to the court without pleadings:—Held, that covenant clearly would not lie; but that to a declaration on the bond the former payments, not having been paid or received in satisfaction of the penalty, could form no defence; and that the defendants, therefore, were entitled only to have satisfaction entered on payment of the penalty and costs. *Niven* v. *Jardine et al.*, 23 Q. B. 476.

The owner of several steamers, carrying on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburg at any time thereafter; and also, that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of navigating the St. Lawrence below Ogdensburg. Afterwards the proprietor transferred his business as forwarder, and sold the two other steamers to persons having full knowledge of this covenant, who notwithstanding commenced running the vessels on the St. Lawrence below Ogdensburg. Upon a bill filed for that purpose, the court held the owners bound by the covenant entered into by the original proprietors, and granted an injunction restraining them from navigating the river below Ogdensburg with those vessels. *Holcomb* v. *Nixon*, 5 Chy. 278, 373.

IV. Discharge and Excuse for Performance.

The plaintiff declared in covenant on defendant's agreement for the hire of a steamboat, for which certain sums were to be paid by instalments, and it was provided that the defendant should employ an experienced and competent captain, officers and men, and that if from any other cause than carelessness or bad management on the part of the master or hands on board she should be lost during the term, then the instalments should not further be paid; and the plaintiff assigned a breach in the non-payment of £1,250, the instalment due on 1st December, 1842. Defendant pleaded that before that sum became payable, the steamboat from a certain cause other than such carelessness or bad management, to wit, because she was run into by a schooner called the Canada, was sunk and wholly lost, of which the plaintiff had notice, and the defendant was thereby discharged:—Held, plea bad, because the accident was not so described as to except the master and hands on board from being the occasion of the loss. *Counter* v. *Hamilton*, 6 O. S. 612.

Semble, that it is no defence to an action against the commander of a steamboat for not towing, &c., that he could not perform his contract by reason of his towboat being unavoidably frozen in the ice. *Dorland* v. *Bonter*, 5 Q. B. 583.

Held, that a covenant not to sue entered into by the creditor with the principal debtor without the surety's consent, but with a reservation of remedies against other parties, does not discharge such surety. *Hall* v. *Thompson*, 9 C. P. 257.

Under a fi. fa. lands against the plaintiff in this suit, in favour of A., the sheriff sold to A. a rent charge which defendant in this suit had granted by deed to the plaintiff for her life. The deed contained a personal covenant of the defendant to the plaintiff to pay the rent charge. Quære, whether the sale to A. would not have the effect of discharging the defendant from his covenant. *Smith* v. *Turnbull*, 1 P. R. 38.—P. C.—Burns.

To an action against a municipal corporation for not renewing a lease pursuant to their covenant contained in it, defendants pleaded that

they had no authority to make the lease, as defendant who was an inhabitant of the town, well knew when he took it: and that before the term expired, a decree was obtained against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *The Corporation of the Town of Brantford*, 19 Q. B. 207.

By letters patent, bearing date in 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one A., the patent containing a condition for the erection of an esplanade according to a certain plan, within three years. A., by indenture, demised the said lands to M., of whom plaintiff was assignee, with full covenants against all the world, and M. covenanted to perform the condition in the patent. The 16 Vict. c. 219, enacted that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it, and impose a special rate to defray the expense thereof; and by 20 Vict. c. 80, further powers were granted to the corporation. The corporation entered upon the premises, and by filling up the space between the water's edge and the esplanade, prevented the working of the plaintiff's mill. For this the plaintiff brought an action on the covenant against defendants, the assignees of the lessor:—Held, that as the act of the corporation was done under superior authority, (the legislature,) although the statute did not exist at the time of the execution of the lease, and as the breach of covenant did not arise from the neglect, fraud, or procurement of the lessor, but from the non-fulfilment by the lessee of his own covenants, defendants were entitled to succeed. *Snarr* v. *Baldwin et al.*, 11 C. P. 353.

Declaration for work and materials in construction of a house for defendants. Sixth plea: that by deed, dated 31st July, 1871, plaintiff covenanted to finish the works before the 31st of October, 1871, under a forfeiture of $20 per week for every week the work was left unfinished after that day: that the plaintiff did not complete the works till twenty weeks after said date, and thereby $100 became due from plaintiff to defendants, which defendants are willing to set-off. Fourth replication, on equitable grounds, that by the said deed the work was to be done to the satisfaction of S. & G., architects, and if any dispute arose between the parties touching the works or the meaning of the contract, &c., it should be referred to S. & G., whose award should be final: that by the said deed defendants agreed to pay the plaintiff $3,037 on the certificate of S. & G. eighty per cent. on the work and materials, as done and provided, and the balance one month after the whole had been completed, subject to any detraction for the nonfulfilment of the terms of the deed: that the plaintiff completed said works to the satisfaction of S. & G., without objection as to the time within which it was to be done, either from the architects or the defendants: that the architects certified from time to time, as provided in said deed, and on completion certified that the whole had been completed, and that the plaintiff was entitled to be paid for the same: that more than a month had elapsed after the last certificate was given: that no complaint was made by defendants after or before that certificate, or before suit, that the work had not been completed in time, and no detraction was sought to be made for nonfulfilment of the contract: that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and on completion of the work promised to pay the plaintiff notwithstanding anything in the said indenture to the contrary contained. And that upon the faith of said promise the plaintiff delivered possession of the premises to defendants, who accepted the same. Fifth replication, on equitable grounds, that after the breach in the plea alleged, the defendants, for good and sufficient consideration, by parol, discharged the plaintiff from the performance of the covenant and damages for the breach thereof:—Held, on demurrer, 1. Fourth replication bad, for it disclosed no equity, and was multifarious, inconsistent, and embarrassing: that the architects could only certify subject to defendants' right of deduction: that the omission to complain was immaterial: that the parol waiver, after breach and without consideration, could not avail: that the promise to pay, as alleged, might mean subject to the deduction; and that the delivering possession to the plaintiffs of their own building, as stated, could form no satisfaction; 2. That the fifth replication was good. *Simpson* v. *Kerr et al.*, 33 Q. B. 345.

The plaintiff sued C., a Division Court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a fi. fa. on such judgment returned nulla bona as to part, and claiming to recover the balance:—Held, affirming the judgment of the County Court, that the declaration was bad, for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause of action. *Sloan* v. *Creasor*, 22 Q. B. 127. See *McArthur* v. *Cool*, 19 Q. B. 476.

The declaration set out that the plaintiff was assignee of a mortgage made by one A. to R., containing a power of sale, under which he sold to defendant for less than the mortgage money, and defendant covenanted that "in case any Chancery or other law proceedings arising out of said sale payable by the plaintiff, he, the defendant, would pay that sum," to wit, any costs or charges incurred by said plaintiff by reason of such Chancery or law proceedings: that afterwards R. filed a bill, to which the plaintiff and defendant were made parties, whereupon the sale was set aside, plaintiff being ordered to pay his own costs of defence, &c.; and these costs the plaintiff claimed to recover. Defendant, in a plea on equitable grounds, set out two agreements between himself and defendant, of the same date, which he alleged formed part of one transaction and constituted the sale. By the first the plaintiff agreed to sell the land to defendant for £400, £50 to be paid down, and forfeited on non-payment of the balance within a month; a deed to be given on payment in full. By the second it was agreed that if the plaintiff should fail to make the balance of his mortgage money from A., defendant would pay it, and all

costs to be incurred in suing on the covenant, "and in case any Chancery or other law proceedings arise out of the sale payable by E.," (the plaintiff,) defendant covenanted to pay "that sum" to the plaintiff. The plea then stated the bill in Chancery, and the setting aside the sale: that afterwards R. paid the money and interest to the plaintiff, who gave up to him all his interest in the land; and that in the Chancery suit each party was ordered to pay his own costs: that the plaintiff never completed the sale, or gave defendant any title; and that the consideration for defendant's covenant failed, and his agreement was done away with by the decree:—Held, on demurrer, that the plea shewed no ground for absolving defendant from his express covenant, which was independent of the plaintiff's covenant to give the deed, and that he was liable to pay the plaintiff's costs incurred to his own solicitor, not merely costs given against him in favour of other parties. *Evans* v. *Turley*, 23 Q. B. 282.

In 1846 the Law Society of Upper Canada entered into a covenant with the crown, in conformity with 9 Vict. c. 33, to provide at their own cost, and without further charge to the province, for all time to come, fit and proper accommodation for the superior courts of law and equity for Upper Canada, as then existing or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the crown to repair, &c., and the outlay to become a charge on the society's land. On the execution of this covenant, the sum of £6,000 was paid over to the society by the government, and proper accommodation was provided by the former for the then existing courts. Subsequently the Court of Common Pleas was established, and it became necessary to enlarge the buildings in which the courts were held at greatly enhanced outlay. 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, were passed for raising funds for the purpose; and the moneys authorized thereby were expended in the erection of Osgoode Hall, for the accommodation of the courts. In 1865, at the request of the society, a certain sum was supplied by the government for necessary repairs to the building, and by subsequent arrangement with the Ontario government, the latter agreed to pay the society annually the sum of $3,000 for the purposes of heat and light:—Held, per Hagarty, C. J., that notwithstanding the greatly increased expense, since the passage of the above acts, of repairing and maintaining the buildings, the society was nevertheless bound by its covenant to repair and maintain them, and was not impliedly, much less expressly, released therefrom in consequence of the legislation that had taken place in relation thereto. *Regina* v. *The Law Society*, 20 C. P. 490.

Per Galt, J., that the effect of 33 Vict. c. 9, O., was to entitle the Law Society to have the government account to them annually for the sum of $29,000, and that this sum must be considered as a provision to enable them to perform their covenant, and that consequently the same was in full force. *Ib.*

Per Gwynne, J., that the effect of subsequent legislation had been to discharge the society from their covenant. *Ib.*

Held, affirming the judgment of the Court of Common Pleas, 20 C. P. 490, Gwynne, J., diss., that the Law Society were not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall," for the accommodation of the superior courts of common law and equity; and that no estoppel arose in favour of the society, against the crown, in consequence of the several acts of the legislature that had been passed in relation thereto. *S. C.* 21 C. P. 529.

In consequence of the separation of the city of Toronto from the county of York for judicial purposes, a deed was executed between the respective corporations, in which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to use of gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act which came into force in February, 1869, the city was reunited to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of use of gaol, stating that as to the court house the action of the legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half year's rent which would have become due on 21st March following. *The Corporation of the County of York* v. *The Corporation of the City of Toronto*, 21 C. P. 95.

Where the lessee of goods covenanted to restore them to the lessor "at the expiration of the term, in as good order as they then were, reasonable wear and tear only excepted," and the goods during the term were destroyed by fire without the lessee's default:—Held, that the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, and that the lessee was not liable on the covenant for not restoring them at the end of the term. *Chamberlen* v. *Trenouth*, 23 C. P. 497.

Held, also, that the exception "reasonable wear and tear excepted," referred to the order and condition of the goods, so as to exclude bad repair, breakages, &c., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods. *Ib.*

On the sale of a woollen factory and machinery, it was stipulated that until the purchase money should be fully paid the vendees were not to remove the machinery. The vendors afterwards executed a conveyance to the purchasers, and the latter, to secure the unpaid purchase money, executed a mortgage which purported to be of the factory only, and did not mention the machinery:—Held, that the covenant against removing the machinery remained in force. *Crawford* v. *Findlay*, 18 Chy. 51.

A stipulation not to sue one of two judgment debtors is no discharge of the other, though there should be no express reservation of rights as against such other. *Dewar* v. *Sparling*, 18 Chy. 633.

An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent renunciation of the parties, or by the wife's leaving the husband without cause. *Walker* v. *Walker*, 19 Chy. 37.

COVENANTS FOR TITLE.

I. Usual Covenants, 881.

II. Qualified or Absolute, 881.

III. Matters Constituting a Breach.

1. *Claims for Dower*, 882.
2. *Claims for Taxes*, 883.
3. *Mortgages*, 884.
4. *Proceedings in Chancery*, 885.
5. *Other Matters*, 886.

IV. Covenants Running with the Land, 888.

V. Actions on.

1. *Pleading*, 892.
2. *Evidence.*
   (a) *Onus Probandi*, 894.
3. *Damages.*
   (a) *Costs Incurred*, 894.
   (b) *Other Cases*, 896.

VI. In Leases—*See* Landlord and Tenant.

I. Usual Covenants.

"Usual covenants" in a conveyance to a purchaser extend only to the acts of the vendor, if himself a purchaser for value; if he take by descent, to the acts of himself and his ancestors; and if by devise, to the acts of himself and his devisor. *Gamble* v. *McKay*, 7 C. P. 319.

The Canada Company, by their charter, are not exempted from giving to purchasers of the lands granted to them by the crown the usual covenants against their own acts; and as to lands purchased from private individuals, the company will be required to give the same covenants as another vendor. *Scarlett* v. *Canada Company*, 1 Chy. Chamb. 90.—Esten.

In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed and the vendee to execute a mortgage:—Semble, that it would be improper to insert a power of sale in such mortgage, and, Quære, if the deed merely contains qualified covenants, whether the mortgage should contain any others. *McKay* v. *Reed*, 1 Chy. Chamb. 208.—Sprague.

II. Qualified or Absolute.

Defendant conveyed his equity of redemption in certain land to the plaintiff, subject to two mortgages, one made by himself, the other by a stranger, covenanting that notwithstanding anything done by him he was entitled to such equity, and had good right to grant the same to plaintiff; that the lands were not subject to any incumbrance but the mortgages mentioned, and that he had done or suffered nothing whereby such equity could be affected; and further, that the plaintiff might quietly enjoy the land after the 1st of November next, without interruption from the defendant or any other person, and that free from all arrears of taxes, and from all former conveyances, mortgages (except the mortgages referred to), judgments, especially any and all undischarged judgments registered against the lands of the defendant, and of and from all manner of other charges and incumbrances whatsoever:—Held, that the last covenant was not restricted to judgments against the defendant, but extended to judgments against his grantor. *Austin* v. *Ferguson*, 25 Q. B. 270.

Held, following the last case, that the full covenant for quiet enjoyment and freedom from incumbrances, contained in a deed for the conveyance of land, was not controlled by the restrictive words preceding the earlier covenants. *Wallbridge* v. *Everitt*, 22 C. P. 28.

A covenant in a deed, purporting to be made in pursuance of the act respecting short forms of conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words, "notwithstanding any act of the covenantor," contained in column one of schedule 2 of the Act:—Held, not a covenant within the statute; but to mean that the covenantor had the right to convey as he had conveyed, i. e., in fee simple. Held, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that the defendant had done no act to encumber, by making them absolute covenants, these covenants being in accordance with the form in column one. *Brown* v. *O'Dwyer*, 35 Q. B. 354.

See *Shire* v. *Gates et al.*, 21 Q. B. 419, p. 885.

III. Matters Constituting a Breach.

1. *Claims for Dower.*

It is no breach of the covenant for seisin free from encumbrances that the covenantor's wife is alive and has not barred her dower; nor is it any breach of a covenant for further assurance that a deed of release of his wife's dower was tendered to the covenantor to be executed, and refused. *Bower* v. *Brass*, E. T. 5 Vict.; *Hoyt* v. *Widderfield*, 5 Q. B. 180; *Duck* v. *Currie*, 12 Q. B. 334; *Wilson* v. *Biggar*, 26 Q. B. 85.

Semble, per Macaulay, J., that if the woman survive her husband, an action on the covenant for further assurance will only lie upon tender of an *effectual* conveyance to pass her estate. *Hoyt* v. *Widderfield*, 5 Q. B. 180.

The plaintiff declared on the covenants for seisin and quiet enjoyment, alleging as a breach the prospective claim for dower of defendant's wife. The defendant by his plea set up a special agreement with defendant, by which the claim for dower was excluded from the operation of the covenants, and provided for by a certain bond. The bond having been set out on oyer, the plea was held bad, for not describing the bond correctly as regards the recital, or setting it out according to its legal effect; but the court gave judgment for defendant, on the ground that a prospective claim to dower is no breach either of the covenant for seisin or quiet enjoyment. Quære, however, whether the intention of the parties did not sufficiently appear from the bond to enable the court to stay proceedings in this action as being against good faith, unless the plaintiff would swear that the agreement was not such as alleged by defendant. Quære, also, whether, taking the bond and award together as one instrument, the covenant might not be read as containing an exception of the claim for dower. *Thornhill* v. *Jones*, 12 Q. B. 231.

One T. S. conveys lands to one R. with full covenants. R. conveys by a similar deed to plaintiff. T. S. dies leaving a wife, who recovers

judgment for her dower. R. pays her a certain sum in accord and satisfaction :—Held, that the recovery was a breach of the covenant for quiet enjoyment, which is prospective in its operation; and this though the plaintiff was never evicted, and no dower assigned. *Cuthbert* v. *Street*, 9 C. P. 115.

Declaration on a covenant for quiet enjoyment. Breach, that one F. G., as the widow of J. G., claimed dower to which she was entitled against plaintiff, and threatened to evict him from one-third of the land; and plaintiff, to protect himself from eviction, was compelled to pay $150, and other large sums, to settle said claim, and to procure a release from F. G. :—Held, on demurrer, declaration good; for that the plaintiff was not obliged to delay settling the claim until a judgment in dower had been obtained, much less until eviction. *McClure* v. *Grafton et al.*, 19 C. P. 149.

See *Hodgins* v. *Hodgins*, 13 C. P. 146, p. 895; *Hunter* v. *Johnson*, 14 C. P. 123, p. 896.

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2. *Claims for Taxes.*

Taxes due upon land at the time of sale, are an incumbrance within the covenant for quiet enjoyment; but the plaintiff can recover only the arrears due at the date of the conveyance. *Haynes* v. *Smith*, 11 Q. B. 57.

A sewerage rate imposed by by-law is not a tax upon the land, but a personal charge upon the owner. Where, therefore, the plaintiff purchased certain land from defendants, in respect of which this rate was for three years overdue, which the plaintiff paid, and also commuted for the entire rate as allowed by the by-law :—Held, that he had no right of action for either of these sums, under the covenants in his deed for seizin and quiet enjoyment, free "from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands." Semble, that even if the rate in arrear were an incumbrance on the land, the payment by way of commutation, being wholly optional, would not be recoverable under the covenant. *Moore* v. *Hynes*, 22 Q. B. 107.

The declaration alleged that by indenture the defendant did (in pursuance of the act respecting short forms of conveyances) grant to the plaintiff, in fee, certain land subject to the reservations, &c., in the original grant from the crown; and covenanted with the plaintiff for right to convey, notwithstanding any act of the defendant; and for quiet enjoyment, free from incumbrances. Averment, that the defendant at the time of executing the indenture, was $71.32 in arrear for taxes, which the plaintiff was obliged to pay, and was put to great trouble and expense in defending an action brought by one S. under a covenant for quiet enjoyment in a deed given by plaintiff to her :—Held, that the declaration was bad, because it did not aver that the taxes had accrued during the time the defendant held the land; because the covenants in defendant's deed to plaintiff, and plaintiff's deed to S., were not shewn to be the same, and therefore a recovery upon one might not give a like claim upon the other; and because the plaintiff had assigned his interest in the covenant before the commencement of this action. *Harry* v. *Anderson*, 13 C. P. 476.

Defendant conveyed land on the 13th of April, 1863, covenanting for quiet enjoyment free from arrears of taxes. The property was assessed in February, and the by-law fixing the rate passed in July :—Held, (reversing the judgment of the County Court), that the taxes for the year could not be considered as in arrear at the date of the deed, for the amount had not then been ascertained, no rate having been fixed, and they therefore could not be paid. "Arrears" means something behind in payment; it implies a duty and a default. Sec. 16 of the Assessment Act C. S. U. C. c. 55, is intended only to fix the fiscal year as regards taxes, and to provide that no matter when the by-law imposing the rate is passed, they shall be considered as imposed for the year; it gives no retrospective existence to the tax. *Corbett* v. *Taylor*, 23 Q. B. 454.

See *McCollum* v. *Davis*, 8 Q. B. 150, p. 896.

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3. *Mortgages.*

Defendant conveyed to plaintiff certain land which had been previously mortgaged, covenanting for enjoyment free from encumbrances and for further assurance. Plaintiff sued upon these covenants; and it appeared that before action the mortgage had been satisfied, though no discharge was recorded, and that he had sold the land to a third party, who had not been disturbed in his possession, but who had refused to pay part of the purchase money, for want of such discharge :—Held, that the action could not be maintained. *Kennedy* v. *Solomon*, 14 Q. B. 623.

Held, that a party giving an absolute covenant in a conveyance of real estate, and a bond conditioned that it should be void upon payment of a certain mortgage for £75 upon the land conveyed, is liable thereon, although no legal proceedings may have been taken upon the mortgage by which the party is damnified. *Carlisle* v. *Orde*, 7 C. P. 456.

P. conveyed certain lands to defendant, "subject to a mortgage," and with a covenant for quiet enjoyment free from all incumbrances. Defendant then demised the same land to P. and wife for the term of their respective natural lives, and P. granted and assigned to plaintiff all his right, title, and interest therein, to hold during the life of P. The mortgagees or their assignee brought ejectment against both plaintiff and P. when the plaintiff paid the amount due under the mortgage, and then brought an action against defendant for money paid to his use :—Held, that he could not recover in this form of action; but, Semble, his remedy would be on the implied covenant for quiet enjoyment contained in the life lease to P. *Snyder* v. *Snyder*, 22 C. P. 361.

On the sale of land, subject to a prior mortgage by the vendor, not then due, the vendor covenanted with the purchaser, B., that he had not encumbered the property, and B. executed a mortgage for his unpaid purchase money. The intention was, that the vendor should pay the prior mortgage, but he failed to do so. After it became due, he sold and assigned B.'s mortgage to the plaintiff, who had notice of all the facts; the plaintiff afterwards obtained an assignment of the prior mortgage, and B. paid off the same :—Held, Strong, V. C., diss., that B. was entitled

to apply on his mortgage the money so paid by him to the plaintiff. *Henderson* v. *Brown*, 18 Chy. 79.

4. *Proceedings in Chancery.*

Plaintiff declared against executors, on a qualified covenant by their testator, that he had the right to convey certain land, and, for quiet possession, assigning as a breach of the first covenant that the testator at the time of making the deed was only a trustee of the land for one D., in whom the right to convey the same in fee as beneficial owner was vested, and by whom it had been conveyed to testator in pursuance of a conspiracy between the testator and D. to defraud one W., a creditor of D., who had then a writ in the hands of the sheriff against D.'s lands. The plaintiff then alleged that W., having purchased the land at sheriff's sale on the execution, filed a bill in Chancery against defendants and the plaintiff, and was declared to have a lien on the land for the amount of his claim; and that although the defendants had paid the sum due to W., they had not paid the plaintiff's costs of defending the suit in Chancery:—Held, that the declaration was bad, for the covenant for right to convey was qualified, and the writ being in the sheriff's hands before the deed to the testator, the sale and subsequent proceedings did not arise from any act of his in accepting that deed for the purpose alleged, but might equally have taken place without it; nor could they support a recovery on the other covenant, also qualified, if they had been assigned as a breach of it. *Shire* v. *Gates et al.*, 21 Q. B. 419.

The declaration alleged that W., defendants' testator, by indenture made under the act, conveyed certain land to the plaintiff, in fee, covenanting for right to convey, and that he had done no act to encumber; and assigned as a breach, that before the execution of said deed the title was vested in the Bank of Upper Canada, who conveyed to W., being then a director and vice-president of, and as such a trustee for, the said bank; by reason whereof the said W. had not good right to convey, and the said lands were impeached in title and estate, and afterwards many persons to whom the plaintiff had agreed to sell parts of said land, refused in consequence thereof to perform their contracts; and the Court of Chancery, in a suit duly instituted, thereupon decreed the plaintiff's title to be defective for this cause, whereby the plaintiff was unable to enforce said agreements, or to sell the land, &c.:—Held, on demurrer, that the declaration shewed no cause of action, for, among other reasons, the legal estate passed to the plaintiff, the defect alleged being an equitable one only; no eviction or disturbance was shewn; and the alleged proceedings in Chancery would not compel a court of law to hold the title bad. *Brunskill* v. *Wilson et al.*, 25 Q. B. 248.

Declaration, that defendant by deed conveyed land to one T. in fee, covenanting that he should quietly enjoy, without the let, suit, &c., of defendants or any person: that T. conveyed to the plaintiffs, who entered into possession; and afterwards a bill in Chancery was filed against plaintiffs and defendants, and it was decreed in the suit that defendants had no right to convey, being trustees only; and the plaintiffs were ordered to convey the land and give up possession thereof, and of their deeds, to two trustees named, whereby the plaintiffs had lost the land, and been compelled to pay costs of the suit, &c.:—Held, that a good cause of action was shewn: that it was unnecessary to allege an eviction; and that the proceedings in Chancery constituted a breach of the covenant. *The Trust and Loan Co. of Upper Canada* v. *Covert et al.* 30 Q. B. 239.

One defendant pleaded that since action the plaintiffs had conveyed the land to C. and M.; and the other, that the plaintiffs had so conveyed in pursuance of the decree, C. and M. being the trustees appointed thereby:—Held, clearly no defence. *Ib.*

5. *Other Matters.*

No action will lie on the covenant for title when the grantor had a good title at the time of conveying, although the plaintiff experienced delay and expense in getting into possession. *Carr* v. *Dunn*, 9 Q. B. 246.

Semble, a public highway is not an incumbrance within the covenant for quiet enjoyment. *Moore* v. *Boulton*, 10 Q. B. 140.

The declaration set out that in 1837, one W. conveyed land to E., giving absolute covenants for title and quiet enjoyment; that E. entered and died seized, having made his will in 1840, devising "all his messuages, lands, and real estate" to B. in trust; that B. entered, and in 1843 conveyed to the plaintiff without covenants; and that the plaintiff soon afterwards conveyed to D. with the usual covenant for quiet enjoyment. The deed from W., and the plaintiff's deed to D., both contained the usual reservation of the rights of the crown as expressed in the original grant. The declaration then averred that when W. conveyed to E. he was not seized according to his covenant, but that part of the land was the property of the crown, and was granted in 1846 to one J.; that J. afterwards conveyed to R., who brought ejectment against D. and recovered; that the plaintiff, in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges, and these damages he claimed from defendant in this action as surviving executor of W.:—Held, that under the facts alleged, the action was not maintainable. *Bown* v. *Hart*, 10 Q. B. 228.

Plaintiffs, administrators of R., sued defendants, executors of M., on their covenants for seisin in their own right contained in a conveyance of land by them to R. It appeared that defendants' only claim to the land was as executors, under a power to sell for payment of debts, contained in M.'s will:—Held, that there would be a breach of the covenant, defendants not being seized, for which, however, only nominal damages would be recoverable. *Macdougall et al.* v. *Macdonell et al.*, 5 C. P. 355.

Defendant conveyed land to the plaintiff by deed, made under the act to facilitate the conveyance of real property, containing covenants for right to convey, for quite possession, and that he had done no act to incumber, and on the same day took back a mortgage in fee to secure the purchase money, in which it was provided that the plaintiff should retain possession until

default. Before making the deed, defendant had leased land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession:—Held, that this sum could not be recovered as money paid, and that the plaintiff could not sue upon the covenants in the deed while the mortgage continued in force. *Proctor* v. *Gamble*, 16 Q. B. 110.

Plaintiff purchased from defendant two lots of land, taking the following receipt:—Received, Goderich, 16th June, 1857, from A. C., in promissory notes and otherwise, the sum of £200 cy., for transfer of lots 11 & 12, in the 8th concession of the township of Turnberry, to be procurred from the original locatee on or before one month from this date, and peaceable possession to be had of the land, or the consideration of transfer to be returned." R. had purchased from the crown in 1854. He assigned to defendant, and defendant to plaintiff, who went into possession, but one F. immediately claimed one of the lots, and forbade him from working on it, whereupon the plaintiff desisted. The plaintiff soon afterwards, with defendant's consent, arranged verbally with one M. to assume his bargain, and M. went into possession in January, 1858, and remained until October, 1859, paying three instalments to the crown in plaintiff's name. It was shewn that in November, 1854, two months after the date of R.'s purchase, a receipt was given by the crown to H. for this lot, treating him as the purchaser; and it appeared at the trial, but by verbal evidence only, that in April, 1859, the commissioner of crown lands decided in favour of H., and that he should pay M. for his improvements, which he had done. M. in consequence gave up possession, and the plaintiff then sued defendant as for a breach of the agreement for quiet possession:—Held, that he could not recover, for, 1. The contract was not a continuing one, but was satisfied when the plaintiff obtained peaceable possession; 2. When H. warned off the plaintiff, he had himself no right; and, 3. There was no sufficient evidence that the sale to R. had been effectually avoided. *Cochrane* v. *McDonald*, 11 C. P. 202.

Action on covenants for seisin and right to convey, contained in a deed by the defendants to one F., who had conveyed to the plaintiffs. Plea, on equitable grounds, that the conveyance to F. was voluntary, and he knew when the defendants executed it that they were not seized, and had not the right to convey; and the plaintiffs were aware of these facts when F. conveyed to them:—Held, on demurrer, no defence, for such covenants are not in equity confined to defects unknown to the vendee. The plaintiff replied equitably, that F.'s deed to the plaintiff was a mortgage, to secure money then lent to him by them, and defendants conveyed to F. for the express purpose of enabling him to execute such mortgage and obtain the loan, and the plaintiffs were induced to lend by their reliance on defendants' covenants, as the defendants well knew. Semble, that if the plea had been good, the replication would have been an answer to it. *Trust and Loan Co. of Upper Canada* v. *Covert et al.*, 27 Q. B. 120.

To a declaration on a covenant for quiet enjoyment, in a mortgage to the plaintiffs executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from the defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, the deed first. It appeared that there were two mortgages from T. to the plaintiffs, on another lot, when this mortgage was made, and instead of which it was given. After executing this mortgage T. found that a deed from defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August:—Held, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover. Held, also, that if the mortgage had been delivered before the deed, defendants could not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants. *Trust and Loan Co.* v. *Covert et al.*, 32 Q. B. 222.

The plaintiff, on the 4th of April, 1861, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st of March, 1864, which was the plaintiff's only title to the land: that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction: that the plaintiff by the mortgage covenanted that he was seised in fee and had good right to convey; and that the eviction complained of was an action of ejectment brought by the heirs of L., on the ground that L. was of unsound mind when he executed the deed on the 31st of March, 1864, which was proved at the trial, and the jury thereupon found for the heirs.—Held, that the plea was bad: for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage: nor did the estoppel applicable to the deed extend to the mortgage: that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 Q. B. 635.

After a conveyance incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts and the acts of those claiming under him:—Held, that the vendor was not bound to pay off the incumbrances; and therefore that the purchaser was not entitled to set off against them a balance of his purchase money remaining unpaid and secured by mortgage. *Re Buck, Peck* v. *Buck*, 6 P. R. 98. Chy. Chamb.—Spragge, in appeal from Holmested, *Referee*.

IV. Covenants Running with the Land.

Where a purchaser mortgages the same lands to his vendor in fee, to secure payment of the purchase money, he cannot sue the vendor for breach of covenant for good title, while the

mortgage continues in force. *Huyck* v. *McDonald*, 3 O. S. 292; *Rees* v. *Strachan*, 14 Q. B. 53; *Proctor* v. *Gamble*, 16 Q. B. 110.

A conveys to B., covenanting that "at the time of making the conveyance he was lawfully seized of a perfect and absolute estate of inheritance in fee simple." B. afterwards conveys to C., reciting that he was then possessed in his own right of the land in question:—Held, in an action brought by C., the assignee of B., against A. upon his covenant; that C. was not estopped by B.'s recital. *Gamble* v. *Rees*, 6 Q. B. 396.

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is that he has not the interest he supposed he was acquiring, and which he would have had if the title of the covenantor, who executed the first deed, had been good. *Ib.*

In covenant for good title brought by the assignee against the original covenantor, it is no objection to the declaration that it does not shew that the covenantor or assignee may not have been seized of a good estate, in the land *at the time of action brought*. *Ib.*

The usual covenant for good title runs with the land, and it is no objection therefore to an action by the assignee of the covenantee, that because according to the statement in the declaration, "the grantor was not seized in fee when he gave his covenant," the covenant was broken as soon as made, and could not enure to the benefit of the assignee. *Ib.* upheld in *Scott* v. *Fralick*, 6 Q. B. 511.

Quære, what would the effect be, if when the covenant was given a third party had been in adverse possession, or if the covenantee had been evicted before he made the deed to the assignee. *Gamble* v. *Rees*, 6 Q. B. 396.

In the covenant for good title, it is only the assignee of the fee who can represent the covenantee; the devisee of a life estate cannot sue on the covenant. *Clark* v. *Robertson*, 8 Q. B. 370.

An action will not lie on a covenant for title against the devisees of the covenantor. *Sickles* v. *Snyder*, 10 Q. B. 209.

The declaration set out that in 1837 one W. conveyed land to E., giving absolute covenants for title and quiet enjoyment: that E. entered and died seised, having made his will in 1840, devising "all his messuages, lands, and real estate" to B., in trust: that B. entered, and in 1845 conveyed to the plaintiff, without covenants: that the plaintiff soon after conveyed to D., with the usual covenant for quiet enjoyment. The deed from W., and the plaintiff's deed to D., both contained the usual reservation of the rights of the crown as expressed in the original grant. The declaration then averred that when W. conveyed to E. he was not seised according to his covenant, but that part of the land was the property of the crown, and was granted in 1846 to one J.: that J. afterwards conveyed to R., who brought ejectment against D., and recovered: that the plaintiff, in order to prevent D. from being dispossessed, paid to R. a large sum of money as the price of the land, besides costs and charges, and these damages he claimed from the defendant in this action as surviving executor of W. Quære, as E. devised to R. only all his real estate, and this land, not being owned by him, was not therefore in words devised, whether B. could be treated as holding the covenant of W. as assignee, and as a covenant running with the land. *Bown* v. *Hart*, 10 Q. B. 228.

Plaintiffs, administrators of R., sued defendants, executors of M., on their covenants for seisin in their own right contained in a conveyance of land by them to R. It appeared that defendants' only claim to the land was as executors, under a power to sell for payment of debts, contained in M.'s will:—Held, 1. That if the power was well exercised the estate passed to R.'s heir, who must sue on the covenant, not the plaintiffs; 2. That there would be a breach of the covenant, defendants not being seised, for which, however, only nominal damages would be recoverable. A new trial was granted, to enable defendants to prove the existence of debts, in order to warrant the sale. *Macdougall et al.* v. *Macdonell et al.*, 5 C. P. 355.

Plaintiff conveyed land to M., with the privilege of drawing off from the mill race on the adjoining land of the plaintiff a certain quantity of water for purposes specified, leaving always sufficient to supply the mill on the plaintiff's land. And by the same indenture M. covenanted for himself, his heirs, executors, administrators and assigns, to restrict themselves to the use of the water for the purpose mentioned, and not to take such water unless there should be enough without it to supply the plaintiff's mill:—Held, a covenant running with the land, on which the plaintiff might sue M.'s assignees. *Warren* v. *Munroe et al.*, 15 Q. B. 557.

In a lease for years of premises made to G., and assigned by G. as to the residue of the term to defendants, was contained, after the usual covenant to yield up the same in good repair, a proviso that nothing therein contained should be taken in any way to compel the said G. to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they now are, "but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to be done and performed by the said G. at his own proper costs and charge:" Held, that these words constituted a covenant running with the land, and bound the assignees of the lease, though assignees were not expressly mentioned. *Perry et ux.* v. *The Bank of U. C.*, 16 C. P. 404.

An action on covenants running with the land, can only be maintained by the party between whom and the covenantor there is privity of estate at the time of the breach. *Rowe* v. *Street*, 8 C. P. 217.

Defendant conveyed with absolute covenants to plaintiff, who before action conveyed to one D.:—Held, that the covenants ran with the land, and the plaintiff could not sue, though they were broken as soon as made. *Scrivener* v. *Myers*, 9 C. P. 255.

Held, that a mortgage in fee made subsequently to a breach of a covenant for quiet enjoyment, and to an action for substantial damages therefor, does not estop the mortgagor from suing the vendor of the party from whom he purchased, on the covenant contained in the

vendor's deed for the property. *Cuthbert* v. *Street*, 9 C. P. 386.

Quære, whether a purchaser at sheriff's sale acquires a right to sue on covenants running with the land. *Campbell* v. *Burley*, 19 Q. B. 204.

Plaintiff sued defendant on a covenant for seizin and right to convey, and defendant pleaded only that he was seized and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one M., so that he was not the proper person to sue, if the action had been properly resisted; but he recovered a verdict, and on motion for a new trial it appeared on affidavit that he was in fact suing for the benefit of the person entitled. The court, under these circumstances, refused to interfere, the verdict being just. *Ib.*

An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee may sue upon the covenant and recover damages in proportion to his interest. *Keyes* v. *O'Brien*, 20 Q. B. 12.

Declaration stated that defendant, by indenture, conveyed lands to C. in fee, who on the same day re-conveyed same to defendant by way of mortgage; and defendant afterwards conveyed to one A. in fee, subject to the equity of redemption then existing, and covenanting in the assignment that he had done no act whereby said premises had been encumbered: that A. assigned to W., who assigned in fee to the plaintiff, whereby plaintiff is assignee of the premises, and entitled to sue on defendant's covenant. Breach, that defendant before conveying to C. had mortgaged to one J., who foreclosed, and plaintiff was thereby deprived of his security, &c. Demurrer, because the deed to C. conveyed only the equity of redemption, which alone passed to C., and defendant's covenant applies only to that estate:—Held, declaration good, as there was nothing to shew any intention of the mortgagor to limit his covenant to the equitable estate. Plea, that title in J., the first mortgagee, became absolute before the assignment to plaintiff and breach of the covenant, and all damage accrued before the assignment to plaintiff:—Held, no defence, for the covenant for title in the original mortgage, by which the premises passed to plaintiff, was a covenant running with the land conveyed to plaintiff, and plaintiff was entitled to all the incidents thereto, and therefore to bring this action for breach of the said covenant. *Meredith* v. *McCutcheon*, 13 C. P. 209.

A covenant against incumbrances in a deed purporting to convey the legal fee simple, runs with the land, although the grantor was in fact seized only of an equity of redemption. *The Empire Gold Mining Co.* v. *Jones*, 19 C. P. 245.

Declaration—1st count, on the covenant for right to convey in a deed of three lots of land by defendant to plaintiffs, alleging that at the time of making the conveyance defendant had granted one of the lots to S.; 2nd. On the covenant for quiet possession in the same deed. Breach, that before making it defendant had mortgaged one of the lots to S. in fee, and afterwards S. proceeded against the plaintiffs in Chancery and foreclosed his mortgage, by which the plaintiffs lost this lot; 3rd. That defendant, being possessed of a lot of land, mortgaged it to one S. for £250 in fee, and afterwards conveyed his equity of redemption in this and other lots to the plaintiffs in fee for $22,400, before then advanced by plaintiffs to defendant, and in this conveyance covenanted to pay off the mortgage to S., and indemnify plaintiffs against it; but that he neglected to do so, and S. obtained a decree of foreclosure against the plaintiffs, whereby they lost their security and the land, and were put to costs, &c.; 5th plea, to the first three counts: that before the alleged breaches, the plaintiffs by deed conveyed all their estate in the land in those counts mentioned to one D. and they have not and had not at the commencement of this suit got back or become seized of their former or any estate in said land, whereby the causes of action in those counts could not and did not accrue to the plaintiffs. On demurrer, Held, plea good, as to the first, but bad as to the second and third counts; for the plaintiffs, as those counts shewed, had only an equity of redemption, and the right to sue on the covenants would not pass with it to their assignee. *Burrowes* v. *DeBlaquiere*, 34 Q. B. 498.

See *Harry* v. *Anderson*, 13 C. P. 476, p. 883.

V. Actions on.

1. *Pleading.*

In an action on covenant for quiet enjoyment, it is sufficient to state that one B. was seized before conveyance to the plaintiff, and that the plaintiff was obliged to pay him a named sum to obtain possession, without stating eviction by B. *Bleecker* v. *Myers*, Tay. 285.

A plea that the plaintiff enjoyed the estate without eviction, was held no answer. *Sherwood* v. *Johns*, Tay. 232.

In an action on a covenant that plaintiff was the lawful owner, and had a good title, a plea that defendant was the right owner, &c., and that the plaintiff has had possession since the conveyance, and never has been evicted:—Held, bad. *Vanderburgh* v. *Vanalstine*, 5 O. S. 454.

Where in an action on a covenant for quiet enjoyment without the hindrance, &c., of defendant, (the grantor) or any one claiming under her, the plaintiff declared that A. and others, who had title from the defendant at the execution of the covenant, to the plaintiff to the lands conveyed, expelled the plaintiff under such title; and that the defendant pleaded that A. and the others had not such title to the lands and woods at the time of the conveyance to the plaintiff: Held, on special demurrer, that the allegation of title in A. and the others at the time of the conveyance was immaterial; and that the plea was bad in denying the title of A. *and* the others to the lands *and* woods, conjunctively, and not disjunctively. *Gwynne* v. *Brock*, 6 O. S. 271.

Where in covenant for quiet enjoyment free from incumbrances, the breach assigned was, that £15 was due upon the land for arrears of taxes, without stating of what nature: Held, bad, on special demurrer. *Wilson* v. *York*, 2 Q. B. 437.

In an action upon the covenant for further assurance the covenantee must aver in his declaration that the conveyance which he required was devised by himself or his counsel, and tendered to the party to be executed. Macaulay, J., dubitante. *Hoyt* v. *Widderfield*, 5 Q. B. 180.

The devisee of a grantee suing upon the grantor's covenant, that "the land was free from incumbrances," must aver that the incumbrance was unsatisfied when the devisee took the estate. *Managan* v. *Fraser*, 8 Q. B. 11.

The plaintiff sued on the usual covenant for quiet enjoyment, alleging as a breach a highway over a portion of the land conveyed:—Held, bad; for the exception in the covenant for title of any limitation, proviso, or condition contained in the original grant from the crown, extends equally to the covenant for quiet enjoyment, and it was not averred that no highway was reserved in the original grant. *Moore* v. *Boulton*, 10 Q. B. 140.

A plea to an action on the covenants for title and right to convey:—Held, bad, as being only an argumentative assertion of the defendant's title; and because defendant should have averred directly that he himself was seized, and need not have set out a derivative title. *Shanahan* v. *Sheerin*, 10 Q. B. 600.

Action on covenants for seisin and right to convey, a mortgage to C. being specially excepted. Breach, that defendants were not seised, with the exception of said mortgage, and had not good right to convey; but that one G. H. was seised of a portion of said lands, and one J. B. and T. B. of another. Pleas, 2. That said mortgage was a mortgage in fee, and that by the indenture declared on, defendants covenanted for seisin, except said mortgage, which is still unpaid; 3. Same defence, applied to the covenant for right to convey; 4. That defendants were seised, in accordance with their covenants: 5. That they had good right to convey as covenanted for; 6. That before the execution of the indenture declared on, defendants agreed with the plaintiff for the sale of lands to him at a specified sum, of which part was to be paid down, and the residue secured by mortgage, and that the plaintiff then mortgaged the same lands in fee to the defendants, to secure such residue, which is still unpaid; 7. That said G. H. was not seised as alleged; 8. That said J. B. and T. B. were not, nor was either of them seised: Held, on demurrer—2nd, 3rd, 4th, 5th, 7th, and 8th pleas bad; 6th plea good. *Rees* v. *Strachan et al.*, 14 Q. B. 53.

Declaration on a covenant contained in a mortgage to plaintiffs, to which the defendant pleaded equitably that the plaintiffs gave their bond, binding themselves to execute a good and sufficient bond to defendant of the premises comprised in said mortgage, and alleging that plaintiffs had not done so, &c., and averring that the plaintiffs had not at the time of giving their bond, nor at any time since, a good title to the said land, &c.:—Held, plea bad, as it did not shew what defect there was in the plaintiffs' title, nor that the plaintiffs' bond would not fully indemnify defendant against loss, nor that there was any fraud or misrepresentation; and as this court could not do ample justice between the parties, they would not interfere. *Dauphin et al.* v. *Lesperance*, 14 C. P. 133.

The breach assigned of a covenant to convey free from encumbrance was that the land was at the date of the covenant subject to a claim for a dower in favour of one R., the wife of one J., a former owner of said land:—Held, bad, for it could not be assumed that J. was dead at the date of the covenant. *Wilson* v. *Biggar*, 26 Q. B. 85.

Part of the land included in a conveyance was inserted by mistake, the vendor not being or pretending to be the owner of it. To an action on the covenants for title defendant pleaded these facts as an equitable defence:—Held, that the plea was good as pleaded. *Belgea* v. *Muir et al.*, 5 P. R. 273.—C. L. Chamb.—Dalton, *C. C. & P.*

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2. *Evidence.*

(a) *Onus probandi.*

In covenant for title, the breaches assigned were, want of seizin in fee, and an eviction by a stranger, to which the defendant pleaded a seizin in fee in himself:—Held, that on the plaintiff proving an eviction by a stranger, without shewing his title it was incumbent on defendant to give evidence of a seizin in fee in himself. *Varey* v. *Mulcheal*, Dra. 486.

Where to a declaration in covenant for title generally, and a breach that defendant had no title, the defendant pleaded a seizin in fee:—Held, that the issue lay upon him, and that he must shew such seizin by proof of actual possession at some time as primâ facie evidence of his estate in fee, although the plaintiff offered no evidence. But the rule is otherwise when the covenant is only against the party's own acts. *McKinnon* v. *Burrows*, 3 O. S. 114.

In an action on a covenant for title, where defendant pleads that he was seized in the terms of the covenant, the onus of proof lies upon him, and the plaintiff need not first prove a breach to entitle himself to a verdict. *Lemesurier* v. *Willard*, 3 Q. B. 285.

Where the plaintiff sues upon a covenant for right to convey land, alleging as a breach that defendant had no such right, and defendant pleads that he had, the proof of title lies upon defendant. *Mills* v. *Wigle*, 22 Q. B. 168; *McCollum* v. *Davis*, 8 Q. B. 150.

Upon an action of covenant for title by an assignee of the covenantee, it is not essential that he should shew that a legal interest passed to him under the deed; his cause of action is, that he has not the interest he supposed he was acquiring, and which he would have had if the title of the covenantor, who executed the first deed, had been good. *Gamble et al.* v. *Rees*, 6 Q. B. 396.

Where a party binds himself to make a good and effectual conveyance of land, he must prove that he has the legal title, and that the land did actually pass by his deed. *Toland* v. *Bruce*, 8 Q. B. 14.

3. *Damages.*

(a) *Costs Incurred.*

Covenant for title: breach, that defendant had no title and no right to convey, charging eviction, and claiming damages for costs incurred by the plaintiff in his defence against a person having paramount title:—Held, that the plaintiff was entitled to recover the costs paid in defending himself in the suit of ejectment under which he had been dispossessed. *Brennan* v. *Servis*, 8 Q. B. 191.

A purchaser, who has been ejected, suing upon his covenant for a good title, may recover as damages the costs of defending an ejectment brought against him, even though he has not actually paid them, in addition to the purchase money and interest. *Stubbs* v. *Martindale*, 7 C. P. 52.

A. purchases from B. a lot of land (to which B. had no title) and conveys it to C., taking back a mortgage for the balance of the purchase money. C. ascertains that he has no title, and claims a deduction in the mortgage money on that account. They arbitrate and a deduction is made by the arbitrators. The costs of the arbitration, &c., amounting to £51 4s. 9d., A. has to pay. He then sues B. for the purchase money of the lot, and these costs:—Held, that such costs were the consequence of his own act, inasmuch as if he had not sold the property they would not have been occasioned, and were not recoverable. *Forsyth et al* v. *McIntosh*, 9 C. P. 492.

In an action on a covenant for quiet enjoyment, the breach alleged was the recovery of a judgment for dower, and eviction of defendant from one-third of the land. Defendant allowed judgment to go by default:—Held, that the plaintiff was entitled, in assessing damages, to recover the costs of the dower suit, and to the whole value of the dower estate, not merely damages to the bringing of this action. *Stuart* v. *Mathieson*, 23 Q. B. 135.

Upon a foreclosure suit upon a mortgage for £350, and on which only £250 had been in fact advanced, the court disallowed the additional £100 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Bitner*, 11 C. P. 102.

A. having mortgaged land to B., sold it to C., giving covenants against his own acts. B. foreclosed, making C. a party to the suit, who employed a solicitor and incurred £10 costs, which he claimed in an action against A. for breach of his covenant:—Held, that the costs were incurred by the voluntary act of C., and were not a necessary consequence arising from a breach of the covenant, and were not recoverable against A. *Parker* v. *McDonald*, 11 C. P. 478.

The plaintiff's father by indenture of bargain and sale conveyed to him certain land, (the dower of the grantor's wife not being barred), covenanting for quiet enjoyment in consideration, among other things, of 5s. Upon his death his widow recovered judgment in dower against plaintiff, and the plaintiff sued his executors for breach of the covenant for quiet enjoyment. Upon a special case:—Held, that the measure of damages on a covenant for quiet enjoyment was not to be governed by the consideration money in the conveyance; and that the plaintiff was entitled to the value of the crops which he had lost by the eviction. Richards, J., diss. The court being of opinion that the plaintiff should have satisfied the demand for dower upon receiving notice, the costs of her action of dower were disallowed him. *Hodgins* v. *Hodgins*, 13 C. P. 146.

In an action brought against the executors of a grantor on a full covenant deed, to recover damages sustained by the plaintiff, by reason of the payment of a sum of money in an action for dower, defendant pleaded that the deed was not the deed of the grantor in his lifetime, and plene administravit. To the first plea the plaintiff joined issue, and to the second replied lands. It appeared on the trial that an action had been brought against one G. S. B. for the recovery of this dower, and a release obtained for $120; but not until after a defence and some £20 of costs were incurred, and that the only amount paid by plaintiff was $50:—Held, that the jury should have been directed that the defence of the dower suit was not justifiable, the deed containing the release of dower executed in May, 1835, not being signed by the wife, although certified to by two magistrates, and the costs thereof should have been disallowed; and that the plaintiff was only entitled to recover the amount paid for the release of dower and interest. *Hunter* v. *Johnson*, 14 C. P. 123.

The plaintiff having been ejected by the heirs of H. L., sued under the covenant for quiet enjoyment in a deed from H. L., and under a covenant in a mortgage subsequently made by the plaintiff to H. L. by which the plaintiff was to be undisturbed until default in the mortgage, and a verdict was rendered for the plaintiff with 1s. damages on the second count:—Held, that plaintiff was not entitled to increase these damages by the costs of the ejectment suit, for it appeared that the mortgage was not set up by the plaintiff in that suit, and if it had been he might have been successful in it. *Eccles* v. *Lowry*, 34 Q. B. 75.

(b) *Other Cases.*

Semble, that where heavy damages are given in an action of covenant for good title, and it appear that the plaintiff knew the state of the defendant's title, the court will grant a new trial, and will intend that in that case excessive damages have been given contrary to evidence. *Emery* v. *Miller*, Tay. 336.

Where A. purchased a lease from B., and B. covenanted to re-purchase it in three years for more than he paid, and after the three years A. tendered an assignment of the lease, which B. refused:—Held, that in an action on the covenant A. was entitled to recover as the amount of damages the price agreed upon by B. for the re-purchase. *Gibson* v. *Cubitt*, E. T. 2 Vict.

A party is liable only for such damages as are the natural consequences of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes accrued during his vendor's time, and neglected to redeem it within the year:—Held, on a covenant for a right to convey, and freedom from encumbrances, that he could not as of right recover the value of the land so allowed to be sold. *McCollum* v. *Davis*, 8 Q. B. 150.

In an action for breach of covenant of good title the measure of damages is the purchase money paid, with interest. No allowance is to be made for the improvements or increased value. *McKinnon* v. *Burrows*, 3 O. S. 590; *Clark* v. *Robertson*, 8 Q. B. 370.

The right to such damages is not lessened by the fact that the plaintiffs have never been disturbed in their possession, if an incumbrance

really do exist. *Gibson* v. *Boulton*, *Hackett* v. *Boulton*, 3 C. P. 407.

Defendant agreed to sell land to P. for £150, and gave him a bond for a deed: P. sold to O., who sold to plaintiff; and at his request defendant executed a deed in fee to plaintiff, the consideration expressed being £425, with covenants in fee. Plaintiff being dispossessed:—Held, entitled to recover the full consideration in the deed. *Graham* v. *Leslie*, 4 C. P. 176.

In an action on the covenants for seizin and right to convey the plaintiff is not entitled to substantial damages without shewing an eviction or ouster from the premises in question, or some other facts which would entitle him to more than nominal damages. *Snider* v. *Snider*, 13 C. P. 157; *Graham* v. *Baker*, 10 C. P. 426; *Bannon* v. *Frank*, 14 C. P. 295.

In an action for breach of an absolute covenant for title to land,—Held, that the plaintiff (the vendee) was entitled only to nominal damages where defendant (the vendor) had, after action brought, acquired the outstanding title; for by estoppel in Doe Irvine *v.* Webster, 2 Q. B. 224, a perfect title to the land passed to the plaintiff through the defendant's former conveyance to him immediately upon the outstanding title becoming vested in defendant. *Boulter* v. *Hamilton*, 15 C. P. 125.

A covenant against encumbrances in a deed purporting to convey the legal fee simple, runs with the land, although the grantor was in fact seised only of an equity of redemption, and can be sued upon by the assignee of the covenantee, who will be entitled to substantial damages, represented by the amount for which the mortgage stands as security, though it may not be yet due. *The Empire Gold Mining Co.* v. *Jones*, 19 C. P. 245.

W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land was subsequently claimed by one R., who brought ejectment, and D. sued B. under the covenant. W. then gave B. a mortgage to indemnify him against all damages, costs, and charges in respect of the action of covenant. B. subsequently compromised with R.:—Held, that W.'s estate was only liable for the value of the piece of land so claimed, and not the amount paid by his vendee on the compromise. *Hart* v. *Boen*, 7 Chy. 97.

In an action on a covenant that the defendant had done no act to encumber contained in a conveyance of land by the defendant to the plaintiff, for a consideration of £150:—Held, that the plaintiff was entitled to recover the whole amount due upon an outstanding mortgage, although it exceeded the purchase money and interest, and the mortgage included other lands sufficient in value to satisfy it. *Connell* v. *Boulton*, 25 Q. B. 444.

Where the evidence shewed that when the grantor conveyed, there was a mortgage on the land by a prior owner, unpaid; but the grantee, the plaintiff, had taken possession and left after a month, not having been evicted, and no one else had been in possession since; and it did not appear that he been unable to sell, nor that defendant, the covenantor, had been guilty of any fraud. Semble, that only nominal damages could be recovered, the covenant being in effect the same as a covenant for seisin, and a continuing one. *Brown* v. *O'Dwyer*, 35 Q. B. 354.

See *Macdougall* v. *Macdonell*, 5 C. P. 355, p. 890; *Hodgins* v. *Hodgins*, 13 C. P. 146, p. 895.

CREDITORS' SUIT.

See ADMINISTRATION SUIT.

A large body of creditors may be represented by one or more of the number, but the bill must disclose a sufficient reason for this course. Where a bill stated that the creditors of the said L. entitled to the benefit of the said indenture are too numerous to make it practicable to prosecute this suit if they were all made parties:—Held, that such statement was too general. Quere, whether necessary to furnish proof of such statement, and whether in a creditor's suit any decree can be made without previous proof of his debt. *Michie* v. *Charles et al.*, 1 Chy. 125.

In a creditor's bill against the devisees of a debtor, it is not indispensable that the heir-at-law should be a party. *Fenny* v. *Priestman*, 1 Chy. 133.

The personal representative may file a bill *as a creditor simply* upon the testator's estate against a devisee of lands under the will after the personal estate is exhausted and obtain a decree as an ordinary creditor. *Tiffany* v. *Tiffany*, 9 Chy. 158.

The other creditors need not be made parties to such a bill, but the heirs at law must. *Ib.*

Where a bill was filed by one of several creditors of a debtor, who had assigned his estate for the benefit of his creditors against the debtor and the trustees, seeking an account of the estate and payment, without making any other creditor a party, the court overruled an objection for want of parties, on the ground of the absence of any such creditor. *Wood* v. *Brett*, 9 Chy. 78.

Upon a creditor's bill a receiver of the rents and profits of the testator's real estate will not be granted where the plaintiff does not allege in his bill and clearly prove the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application of the realty or the rents and profits thereof, to that object. *Sanders* v. *Christie*, 1 Chy. 137.

Where in a creditor's suit to administer the estate of a deceased debtor to whose estate administration ad litem had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them pro confesso, and did not appear at the hearing, the court made the usual decree, without requiring a general administration to be first obtained. *Dey* v. *Dey*, 2 Chy. 149.

An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage settled certain lands (the subject of the suit) in trust to the use of the wife for life, with power of sale to the trustee, to be exercised with the husband's consent. The legal estate

was in one R., who had a primary charge on the premises. Under these circumstances it was decreed that the plaintiff was entitled to redeem R. : that the wife's estate was exempt from every charge other than that of R. : that of this charge she must either keep down the interest or pay a proportionate share of the principal : that she was entitled to a provision out of her life estate : that subject to her interest, the property, on R. being paid, should be sold ; and an enquiry was directed as to other judgments, in order to a proper application of the proceeds. *Pemberton* v. *O'Neil*, 2 Chy. 263.

A sale of real estate had taken place in pursuance of the decree made in a creditor's suit. It appeared that the legal estate remained in the debtor's vendors, to whom there was still owing a part of the purchase money. The court ordered the vendors, upon payment of this amount, to convey to the purchaser under the decree. *Heal* v. *Harper*, 2 Chy. 695.

Where the plaintiff unreasonably delays in carrying on a creditor's suit, the court will give the carriage of the decree to another creditor upon his indemnifying the plaintiff against future costs. *Patterson* v. *Scott*, 4 Chy. 145.

The provisions of the statute 13 & 14 Vict. c. 63, apply only to judgment creditors whose judgments have been entered up since the 1st of January, 1851 ; where, therefore, a creditor whose judgment was entered up in the year 1836, and registered in 1854, filed a bill in 1856, to set aside a deed executed by their debtor to his son in the year 1835, as having been done to defraud creditors, or as being voluntary and therefore void as against purchasers for value, the court refused this relief, but gave the plaintiff liberty to amend by making the bill a bill on behalf of all the creditors, and praying for an administration of the debtor's estate. *Gillespie* v. *VanEgmondt*, 9 Chy. 533.

In a creditors' suit, the plaintiff having the carriage of the decree must see that the master's report states the priorities of the creditors. Creditors who have proved debts in the master's office, but are not parties to the cause, should not be served with notice of the hearing on further directions. *Larin* v. *O'Neill*, 13 Chy. 179.

In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase : the assignment was made absolute in form so as to deceive and defraud other creditors ; but the purpose as between the parties was merely to secure the debt due to the assignees. Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendors in respect of the contract, obtained an award of $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600 :—Held, that the plaintiff was entitled to such payment : that in view of the fraud and trust, the lapse of time was no defence, and that a bill against the assignees by the creditor, instead of by the administrator, was proper. *Gillies* v. *How*, 19 Chy. 32.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority ; nor does a creditor who has a sequestration in the hands of the sequestrator lose the advantage of it. Creditors who had filed bills to enforce their claims having, by order made under an administration decree, been restrained from proceeding with their own suits, and directed to prove under the administration decree ; it was held that they were entitled to six years' arrears of interest computed back from the commencement of their own suits. *Meyers* v. *Meyers*, 19 Chy. 185.

Incumbrancers, a company, duly notified in a creditor's suit to come in and prove their claim in the master's office under the decree, neglected to do so, relying upon a supposed remedy at law. They were accordingly foreclosed by the decree upon further directions, and subsequently an assignee of their claim, the legal remedy having proved illusory, applied to be allowed to prove the claim notwithstanding the foreclosure and the lapse of more than two years. The application was granted, as it appeared that no other rights had intervened, that no other incumbrancers would be prejudiced, and that the only opposition to the motion was on the part of the debtor. The application, under the circumstances, was held to be properly made in chambers ; but that if the claim had been adjudicated upon, on the merits, the motion should have been made in court. *Cameron* v. *Wolfe Island Co.*, 6 P. R. 91.—Chy. Chamb.—Holmested, *Referee*.

CRIMINAL CONVERSATION.

I. Action for—*See* Husband and Wife.

II. Forfeiture of Dower—*See* Dower.

CRIMINAL INFORMATION.

I. Against Judges and Magistrates, 900

II. Miscellaneous Cases, 901.

III. For Intrusion—*See* Intrusion.

IV. For Libel—*See* Defamation.

V. By Attorney-General—*See* Attorney and Solicitor-General.

I. Against Judges and Magistrates.

To support a motion for leave to file a criminal information against a justice of the peace, the affidavits should not be intituled as in a suit pending. *Bustard* v. *Schofield*, 4 O. S. 11.

Notice must be given of complainant's intention to apply. *Ib.*

The motion should be made without unnecessary delay, and sufficiently early in term to admit of notice of it being given. *Ib.*

Application for leave to file an information against a judge of a Recorder's Court, upon the grounds that he had falsified the records of the court and maliciously condemned the applicant as guilty of a felony upon the verdict of his peers, when, as alleged, no verdict whatever was found by the jury. The facts were that the jury came into court and the foreman pronounced a verdict of guilty. The counsel of the accused then

questioned (not through the court) some of the jury as to the grounds of their verdict, when one stated that he did not concur in it. The attention of the court was not drawn to this dissent, nor did it appear they were aware of it. A verdict of guilty was recorded by the presiding judge; and when formally read to the jury by the clerk, no objection was made. The court refused the information. *The Queen ex rel. Stark* v. *Ford*, 3 C. P. 209.

On application for leave to file a criminal information against a Division Court judge, for his conduct in imposing a fine for contempt upon a barrister employed to conduct a case before him: Held, that such leave should never be granted unless the court see plainly that dishonest, oppressive, vindictive, or corrupt motives influenced the mind, and prompted the act complained of, which in this case was clearly not shewn. *In re The Recorder and Judge of the Division Court of the City of Toronto*, 23 Q. B. 376.

Quære, whether such information is proper in the case of a judge of an inferior court of civil jurisdiction, in relation to a matter over which he has exclusive jurisdiction. *Ib.*

II. Miscellaneous Cases.

A criminal information must be signed by the master of the crown office. *Regina* v. *Crooks*, 5 O. S. 733.

On putting off the trial of an information for penalties, on the application of the defendant, costs will be imposed as in civil cases. *Rex* v. *Ives*, E. T. 1 Will. IV.

It is not necessary that there should be fifteen days between the teste and return of a subpœna on a criminal information, where the venue is laid in the Home District. *Regina* v. *Crooks*, E. T. 3 Vict.

An information to restrain a nuisance caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them had put up such a fence:"—Held, bad, on demurrer, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Chy. 402.

CRIMINAL LAW.

I. Arson, 904.

II. Assault.
1. *Generally*, 905.
2. *Summary Convictions for*, 906.
3. *With Intent to Ravish*—*See* Rape, 932.
4. *With Intent to Murder*—*See* Murder, 925.

III. Attempts to Commit Crimes, 906.

IV. Bigamy, 907.

V. Bribery, 908.

VI. Burglary, 908.

VII. Coin, (Offences relating to,) 908.

VIII. Conspiracy, 908.

IX. Desertion, (Assisting Sailors or Soldiers to Desert,) 909.

X. Elections, (Offences connected with,) 909.

XI. Embezzlement and Frauds by Trustees, Agents, and Others, 910.

XII. Escape, 912.

XIII. Extortion, 913.

XIV. False Pretences.
1. *The Offence*, 913.
2. *Indictment*, 915.

XV. Forcible Entry, 915.

XVI. Foreign Aggressions, 916.

XVII. Foreign Enlistment, 917.

XVIII. Forgery, 918.

XIX. Fraudulent Assignment, 920.

XX. Frontier, (Outrages upon,) 921.

XXI. Kidnapping, 921.

XXII. Larceny, 922.

XXIII. Libel—*See* Defamation.

XXIV. Maliciously Destroying Records, 925.

XXV. Menaces and Threats.
1. *The Offence*, 925.
2. *Commitment to keep the Peace*—*See* Justice of the Peace.

XXVI. Murder and Manslaughter.
1. *The Offences*, 925.
2. *Dying Declarations*, 928.

XXVII. Obtaining Money with intent to Defraud, 929.

XXVIII. Perjury, 929.

XXIX. Rape.
1. *The Offence*, 932.
2. *Effect of Evidence of in Actions of Seduction*—*See* Action and Suit.

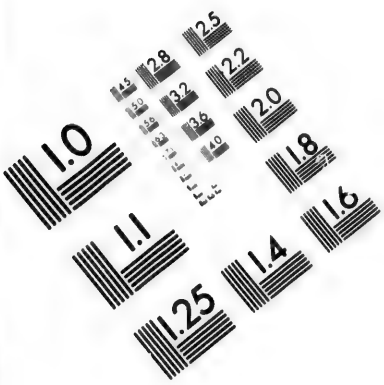
XXX. Riot, 932.

XXXI. Sacrilege, 933.

XXXII. Treason, 933.
1. *Attainder for*—*See* Attainder.

XXXIII. Other Offences, 933.

XXXIV. Procedure and Practice.
1. *Indictment.*
(a) *Venue*, 934.
(b) *Joinder of Counts and Defendants*, 934.
(c) *Statement of Ownership of Property*, 935.
(d) *Copy of*, 935.
(e) *Amendment of*, 935.
(f) *Other Cases*, 936.
(g) *Removal of*—*See* Certiorari.
2. *Plea of Autrefois Acquit*, 937.
3. *Summary Trial before County Judge*, 937.
4. *Other Cases*, 938.
5. *Convictions*—*See* Justices of the Peace.



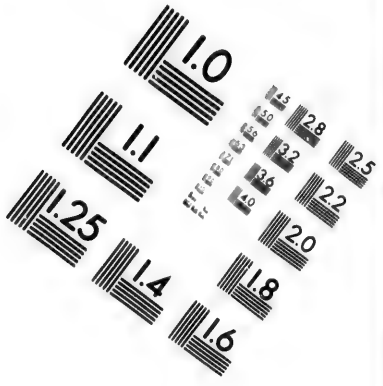
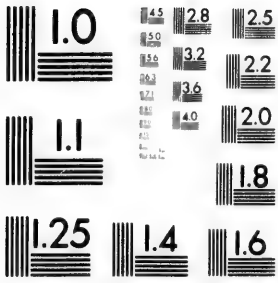
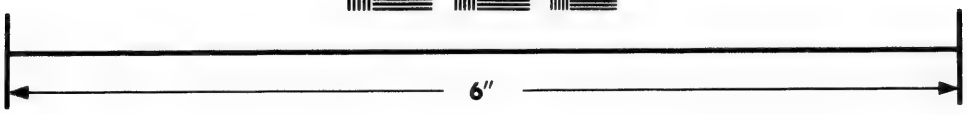
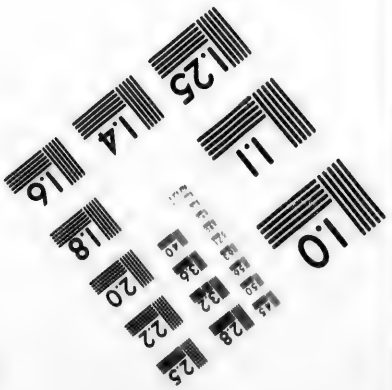


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XXXV. JURY.

1. *Summoning*, 940.
2. *Challenges*, 940.

XXXVI. EVIDENCE.

1. *Confessions and Admissions*, 941.
2. *Depositions*, 943.
3. *Competency of Witnesses*, 943.
4. *Accomplices*, 943.
5. *Other Cases*, 944.
6. *In Extradition Proceedings* — *See* EXTRADITION.

XXXVII. NEW TRIAL, 946.

XXXVIII. VERDICT, JUDGMENT, AND SENTENCE, 947.

XXXIX. ERROR AND APPEAL, 949.

XL. COSTS, 949.

XLI. BAIL, 949.

XLII. MISCELLANEOUS CASES, 951.

XLIII. PARTICULAR OFFENCES.

1. *Compounding Prosecutions* — *See* COMPROMISING.
2. *Prostitution*—*See* BAWDY HOUSE—PROSTITUTE.
3. *Obtaining Lands from Indians*—*See* INDIAN LANDS.
4. *Nuisances*—*See* NUISANCE.
5. *Sale of Public Offices*—*See* OFFICE.
6. *Relating to Customs and Excise*—*See* REVENUE.
7. *Smuggling*—*See* REVENUE.
8. *Sunday*—*See* SUNDAY.
9. *Illegal Sale of Liquors* — *See* TAVERNS AND SHOPS.
10. *Highways*—*See* WAY.

XLIV. APPREHENSION AND ARREST OF OFFENDERS.

1. *Arrest.*
   (a) *By Private Individuals*—*See* ARREST.
   (b) *By Constable*–*See* CONSTABLE.
2. *Warrant of Commitment* — *See* JUSTICES OF THE PEACE.

XLV. SUMMARY CONVICTIONS — *See* JUSTICES OF THE PEACE.

XLVI. EXTRADITION OF CRIMINALS — *See* EXTRADITION.

XLVII. HABEAS CORPUS—*See* HABEAS CORPUS.

XLVIII. SUSPENSION OF ACTIONS IN CASES OF FELONY–*See* ACTION AND SUIT.

XLIX. CRIMINAL INFORMATION–*See* CRIMINAL INFORMATION.

L. RECOGNIZANCES OF CRIMINALS AND WITNESSES—*See* RECOGNIZANCE.

LI. ACTIONS FOR MALICIOUS PROSECUTION — *See* MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

I. ARSON.

A building used by a carpenter, who was putting up a house near it, as a place of deposit for his tools and window frames which he had made, but in which no work was carried on by him:—Held, not "a building used in carrying on the trade of a carpenter," within 4 & 5 Vict. c. 28, s. 3. *Regina* v. *Smith*, 14 Q. B. 546.

The remains of a wooden dwelling house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floors so as to render it untentable, and which was being repaired:—Held, not a building within sec. 7 of 32 & 33 Vict. c. 22, so as to be the subject of arson. *Regina* v. *Labadie*, 32 Q. B. 499.

Upon an indictment for arson, the prisoner was proved to have requested or procured one S. to set fire to the house, telling S. that he had his house insured, and asked if he would not set fire to it. He also stated that "his insurance would run out next day, and that he, S., must set the house on fire that night." The evidence also shewed that a sum had been awarded the prisoner for his insurance, in payment of which he was seen to have a bill of exchange on London in his possession:—Held, that under C. S. C. c. 93, s. 4, it is necessary, where the setting fire is to a man's own house, to prove an intent to injure and defraud, although the words "with intent thereby to injure or defraud any person," introduced into the Imperial Act, are omitted in ours. The indictment alleged that the prisoner did incite, &c., one F. S., the said felony in form aforesaid to do and commit, with intent then and there to injure and defraud a certain insurance company called, &c.:—Held, necessary to prove that the premises were insured, but Draper, C. J., was of opinion that the indictment would have been sufficient if it had ended with the words "to injure and defraud," the insurance being a matter of proof, and that the prisoner's statement or admission was evidence sufficient to support the indictment. Hagarty, J., diss. *Regina* v. *Bryans*, 12 C. P. 161.

In an indictment for arson, it is unnecessary to charge any intent, as our statute (differing from the English Act) does not make the intent part of the crime. This omission, however, if a defect, would not be ground for a new trial, under C. S. U. C. c. 113. *Regina* v. *Greenwood*, 23 Q. B. 250.

But though the indictment is sufficient without alleging any intent, an intent to injure or defraud must be shewn on the trial. *Regina* v. *Cronin*, Q. B. H. T. 1875. Not yet reported.

The prisoner being indicted for unlawfully and maliciously attempting to burn his own house by setting fire to a bed in it, it appeared in evidence that the dead body of a woman was in the bed at the time: that her death had been caused by violence: that she had been recently delivered of a child, whose body had been found in the kitchen; and that she had lived in the house since it had been rented by the prisoner, who frequently went there at night. It was also shewn that the prisoner had been indicted for the murder of this woman and acquitted, and the record of his acquittal was put in. This evidence was objected to as tending to prejudice the prisoner's

case; but, Held, admissible, for the house being the prisoner's, it was necessary to shew that his attempt to set fire to it was unlawful and malicious, and these facts might satisfy the jury that the murder being committed by another, the prisoner's act was intended to conceal it. *Regina* v. *Greenwood*, 23 Q. B. 250.

On an indictment for attempt to commit arson, the evidence shewed that one W., under the direction of the prisoner, after so arranging a blanket saturated with oil, that if the flame were communicated to it the building would have caught fire, lighted a match, held it till it was burning well, and then put it down to within an inch or two of the blanket, when the match went out, the flame not having touched the blanket:—Held, that the prisoner was properly convicted under 32 & 33 Vict. c. 22, s. 12. *Regina* v. *Goodman*, 22 C. P. 338.

See *Regina* v. *Hambly*, 16 Q. B. 617, p. 943; *Regina* v. *Cronin*, Q. B. H. T. 1875, p. 936.

II. Assault.

1. *Generally.*

Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace. *Forrester* v. *Clarke*, 3 Q. B. 151.

Defendant was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged:—Held, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed, although the defendant might have been guilty of riot or joining in an unlawful assembly. *Regina* v. *Kelly*, 6 C. P. 372.

Under C. S. C. c. 99, s. 66, there can be no conviction for an assault unless the indictment charges an assault in terms, or a felony necessarily including it, which manslaughter is not. Where, therefore, the indictment was for manslaughter, in the form allowed by that act, charging that defendants "did feloniously kill and slay" one D.:—Held, that a conviction for assault could not be sustained. *Regina* v. *Dingman & Corwin*, 22 Q. B. 283.

Held, following Regina *v.* Bird, 2 Den. C. C. 94, and Regina *v.* Phelps, 2 Moo. C. C. 240, that on an indictment for murder the prisoner cannot be convicted of an assault under 32 & 33 Vict. c. 29, s. 51. *Regina* v. *Ganes*, 22 C. P. 185.

On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. c. 29, s. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault. *Regina* v. *Smith*, 34 Q. B. 552.

Per Wilson, J.—In this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death. *Ib.*

Upon an indictment for shooting with a felonious intent, the prisoner, if acquitted of the felony, may be convicted of common assault. *Regina* v. *Cronan*, 24 C. P. 106.

To discharge a pistol loaded with powder and wadding at a person within such a distance that he might have been hit, is an assault. It was Held, here, that there was sufficient evidence of the prisoner having done this, and a conviction for assault was upheld. *Ib.*

Sci. fa. upon a recognizance to keep the peace and be of good behaviour towards Her Majesty and all her liege subjects, and especially towards H. M., charging an assault and breach of the peace. For the crown a judgment of the Court of Quarter Sessions was proved, affirming a conviction of defendant before magistrates on a charge of assaulting H. M. "by using insulting and abusive language to him in his own office, and on the public street, and by using his fist in a threatening and menacing manner to the face and head of said H. M.":—Held, sufficient proof of a breach of the peace. Held, also, that defendant was properly convicted, for the offence charged amounted to an assault. *Regina* v. *Harmer*, 17 Q. B. 555.

C. S. C. c. 91, probably applies only to common assaults, &c. A charge of assaulting and beating is not a charge of aggravated assault, and a complaint of the former will not sustain a conviction of the latter, though when the party is before the magistrate, the charge of aggravated assault may be made in writing and followed by a conviction therefor. *In re McKinnon*, 2 L. J. N. S. 324.—C. L. Chamb.—A. Wilson.

The Court of Quarter Sessions has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in case of default. *Orens* v. *Taylor*, 19 C. P. 49.

See *Regina* v. *McEvoy*, 20 Q. B. 344, p. 926; *Regina* v. *Connolly*, 26 Q. B. 317, p. 932.

2. *Summary Convictions for.*

On motion to quash a conviction by two justices of the county of Norfolk for an assault:—Held, 1. That stating the offence to have been committed at defendant's place in the township of Townsend was sufficient, for C. S. U. C. c. 3, s. 1, sub-s. 37, shews that township to be within the county; 2. That it was unnecessary to shew on the face of the conviction that complainant prayed the magistrates to proceed summarily, for the form allowed by C. S. C. c. 103, s. 50, was followed, and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit; 3. That it was clearly no objection that the assault was not alleged to be unlawful. *Regina* v. *Shaw*, 23 Q. B. 616.

It had been previously held that the prayer for summary jurisdiction should appear on the face of the conviction, even if not necessary on the face of the information. *In re Switzer and McKee*, 9 L. J. 266.—Q. S.—Harrison.

III. Attempts to Commit Crimes.

Held, that a prisoner indicted for a misdemeanour (in this case it was for false pretences) may on such indictment be convicted of an attempt to commit the offence which is a misdemeanour. *Regina* v. *Goff*, 9 C. P. 438.

The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to

Cooksville, and examined J. G.'s store with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself:—Held, that as those actually engaged were guilty of the attempt to steal, the prisoner, under 27 & 28 Vict. c. 19, s. 9, was properly convicted. *Regina* v. *Esmonde*, 26 Q. B. 152.

Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. *Regina* v. *Clement*, 26 Q. B. 297.

On an indictment for attempting to have connection with a girl under ten, consent is immaterial; but in such a case there can be no conviction for assault if there was consent. *Regina* v. *Connolly*, 26 Q. B. 317.

The prisoners being indicted for an attempt to commit burglary, it appeared that they had agreed to commit the offence on a certain night, together with one C., but C. was kept away by his father, who had discovered their design. The two were seen about twelve that night to come within about thirteen feet of the house, towards a picket fence in front, in which there was a gate; but without entering this gate they went, as was supposed, to the rear of the house, and were not seen afterwards. Afterwards, about two o'clock, some persons came to the front door and turned the knob, but went off on being alarmed, and were not identified:—Held, that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution; and that a conviction, therefore, could not be sustained. *Regina* v. *McCann et al.*, 28 Q. B. 514.

Attempt to commit arson. See *Regina* v. *Goodman*, 22 C. P. 338, p. 905.

IV. Bigamy.

The witness called to prove the first marriage swore that it was solemnized by a J. P. in the state of New York, who had power to marry, but this witness was not a lawyer nor inhabitant of the United States, and did not state how the authority of the justice was derived:—Held, insufficient. *Regina* v. *Smith*, 14 Q. B. 565.

Where the prisoner relies upon the first wife's lengthened absence, and his ignorance of her being alive, he must shew enquiries made and that he had reason to believe her dead, more especially when he has deserted her; and this, notwithstanding that the first wife may have married again. *Ib.*

The first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid. *Regina* v. *Madden*, 14 Q. B. 588.

The evidence of the first wife is not admissible, nor is that of the second until the first marriage is proved. *Regina* v. *Tubbee*, 1 P. R. 98.—C. L. Chamb.—Macaulay.

It is not necessary that marriages shall be solemnized in a church. Where banns have been published, and no dissent then expressed by parents or guardians, the husband being under age is no objection even by the English Marriage Act; but, quære, whether that act is in force here. *Regina* v. *Secker*, 14 Q. B. 604.

V. Bribery.

Where a statute relating to municipal elections made no provisions to repress bribery: Per Robinson, C. J., it would no doubt be an indictable offence. *Regina ex rel. McKeon* v. *Hope*, 15 Q. B. 140.

VI. Burglary.

Burglary is not an offence within the Ashburton treaty, or the Statutes of Canada passed to give effect to it. *In re Beebe*, 3 P. R. 273.—C. L. Chamb.—Morrison.

Attempt to commit burglary. See *Regina* v. *McCann*, 28 Q. B. 514, p. 907.

VII. Coin (Offences relating to).

Section 18 of C. S. C. c. 90, makes it an offence to have possession of any coin counterfeited to resemble, or any dies for the purpose of imitating, any foreign gold or silver coin described in the 16th section of the act. The gold or silver coin there described are any coin of coarse gold or silver resembling any coin made by the authority of any foreign state and then actually current there, though not current by law in this province. An indictment under this section alleged, that there was a certain silver coin known as half-a-dollar struck by and current in the United States, though not current by law in this province, and that the defendants had in their possession counterfeited coin, each piece resembling a piece of the current coin of the United States of the value of fifty cents, and called therein half-a-dollar, and also dies used to counterfeit the current silver coin of the United States called half-a-dollar, &c.:—Held, on demurrer, that the indictment was bad, for not alleging that the counterfeit coin which the defendants had resembled some gold or silver coin of the United States; but that the allegation as to the dies was sufficient, without alleging that the silver coin was not current in this province. *Regina* v. *Tierney*, 29 Q. B. 181.

VIII. Conspiracy.

Indictment charging that defendants, H., C., and D. were township councillors of East Nissouri, and F. treasurer; and that defendants intending to defraud the council of £300 of the money of said council, falsely, fraudulently, and unlawfully did combine and conspire, unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer as aforesaid:—Held, bad, on writ of error. *Horseman* v. *Regina*, 16 Q. B. 543.

Upon an indictment for conspiracy to procure by fraud the return of one F. as a member of the legislative assembly:—Held, that it was clearly unnecessary to prove that all the defendants, or

any two of them, actually met together and concerted the proceeding carried out; it was sufficient if the jury was satisfied from their conduct and from all the circumstances, that they were acting in concert. *Regina* v. *Fellowes*, 19 Q. B. 48.

IX. Desertion, (Assisting Sailors or Soldiers to Desert.)

The Naval Discipline Act 29 & 30 Vict. c. 109, s. 25, authorizes a summary conviction before magistrates for this offence, but the 101st sec. expressly preserves the power of any court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the act punishable by common or statute law:—Held, therefore, that defendant could be indicted under the C. S. U. C. c. 100, s. 2. *Regina* v. *Patterson*, 27 Q. B. 142.

Held, per J. Wilson, J., that the Imperial Mutiny Act does not override the C. S. C. c. 100, but that the latter was passed in aid of it, and is therefore in force. *Regina* v. *Sherman*, 17 C. P. 166.

Held, per A. Wilson, J., that the punishment by fine *and* imprisonment imposed by the provincial act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the Court of Oyer and Terminer, under the provincial act has not been taken away by the Mutiny Act, and therefore that the defendant in this case could not complain, as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and that though a fine of 10s. had also been imposed, for this was merely nominal, in compliance with the provincial statute, and would not entitle him to be discharged, as the court had power to pass the proper judgment if an improper one had been given. *Ib.*

X. Elections (Offences connected with).

An indictment against a deputy returning officer at an election, for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters, was Held bad on demurrer, for omitting the name of the agent. *Regina* v. *Bennett*, 21 C. P. 235.

In the same indictment another count charged defendant with entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath prescribed by law:—Held, not an indictable offence, being a creature of the statute, which also prescribed the penalty and the mode of enforcing it. Remarks upon the otherwise objectionable character of the indictment, in setting out in the inducement a copy of the poll book containing a number of names, while none were mentioned in the indictment itself, a reference being merely made to the "said list." *Ib.*

Demurrer to an indictment. The first count charged that the defendant, after having made the alphabetical list of persons entitled to vote, &c., made out a duplicate original of the said list, and certified by affirmation to its correctness, and delivered the same to the clerk of the peace and that in making out the certified list so delivered to the clerk of the peace of persons entitled to vote, &c., the defendant did feloniously omit from said list the names, &c., which names or any or either of them ought not to have been omitted. The second count was nearly the same as the first, the word "insert" being used where the word "omit" was used in the first:—Held, that the omission charged having been from the certified list delivered to the clerk of the peace or "duplicate original," the words "said list," referring to the words "the certified list so delivered to the clerk of the peace," was a sufficient description to identify the list intended. *Regina* v. *Switzer*, 14 C. P. 470.

As to the objection that it did not appear that the persons whose names were charged to have been omitted, &c., were persons entitled to vote, &c.:—Held, that the words in the indictment were not a direct and specific allegation that those persons were entitled to vote. *Ib.*

As to the objection that it was not alleged that the list was made up from the last revised assessment roll:—Held, that by the indictment it appeared that the assessment roll referred to was the assessment roll for 1863, and that it was sufficiently stated that the alphabetical list was made up for that year, and that the crown would be bound to prove such a list. *Ib.*

Held, further, that both counts in the indictment were bad, as they should have shewn explicitly how and in what respects these names should or should not have been on the list, by setting out that they were upon or were not upon the assessment roll, (as the case might be) or at any rate, were or were not upon the alphabetical list. *Ib.*

Falsely personating a voter at a municipal election is not an indictable offence. Remarks as to the form of indictment in such a case. *Regina* v. *Hogg*, 25 Q. B. 66.

See *Thomas* v. *Platt*, 1 Q. B. 217, p. 929; *Regina* v. *Fellowes*, 19 Q. B. 48, pp. 909, 940; *Regina* v. *Cowan*, 24 Q. B. 606, p. 930.

XI. Embezzlement and Frauds by Trustees, Agents, and Others.

The prisoner was convicted upon an indictment under 4 & 5 Vict. c. 25, s. 41, charging that one W. entrusted to him for a special purpose, viz., for the purpose of exhibiting to B. and obtaining another note made by prisoner to and endorsed by B.,—the said prisoner then being the agent of W.,—a promissory note made by prisoner payable to and endorsed by B., being a valuable security, without any authority to sell, transfer, &c., or convert the same to his own use; and that he unlawfully kept and converted it to his own use. It appeared that the prisoner gave an endorsed note, payable at Kingston, in payment of goods purchased, with an agreement that in case the payee should be unable to get it discounted at Kingston, he would procure for him a new note, with the same endorsers, payable at Belleville. The payee being unable to get it discounted at Kingston, sent the note to W. at Belleville, with instructions to get a new note from the prisoner as agreed on; W. entrusted

the prisoner with the note, on his promise that he would take it to the endorsers, and either return it or bring back a new note at once. The prisoner, however, kept the note, and neither returned it nor procured another, though often requested to do so both by the payee and W. :—Held, that the prisoner was not an agent within the meaning of the statute, and that the conviction must be quashed. *Regina* v. *Hynes*, 13 Q. B. 194.

Semble, also, that it could not be said that the prisoner was intrusted with the note without any authority to transfer or pledge the same; or that his retaining it was proof of converting it to his own use. *Ib.*

The indictment charged that one M. entrusted to defendant, then being an agent, a promissory note of one R., for $200, for the special purpose of receiving £6 thereon from A., and that defendant, contrary to the purpose for which said note was entrusted to him, did unlawfully negotiate and convert the same to his own use. It appeared that R. had made the note for A.'s accommodation, and A. being indebted to one C. in £6, it was agreed that he should deposit this note with M. to secure the payment. Defendant, by C.'s order, got the note from M. on condition that he should give it up to A. on the £6 being paid. A. afterwards paid this sum to defendant, but defendant kept the note and sued R. upon it, alleging that he was entitled to do so by some arrangement with R., which the jury found was not the case, and they convicted defendant :—Held, that the conviction could not be sustained, for defendant was not an agent within the meaning of the act, which refers only to general agents of the descriptions specified; and—Semble, that upon the evidence he was not M.'s agent, or guilty of any breach of trust towards him. *Regina* v. *Armstrong*, 20 Q. B. 245.

The prisoner being a clerk in the Bank of U. C., was placed in an office apart from the bank, and entrusted with funds for the purpose of paying persons having claims upon the government, which payments were made upon the checks of the receiver-general, whose office was in the same building. While so employed a deficiency was discovered in his accounts, which he at first ascribed to a robbery, but he afterwards confessed that he had lent the moneys entrusted to him to various friends. It also appeared that on a certain day he had received a check from the receiver-general for £1439 15s. for coupons on government debentures held by the bank, and had credited himself in account with that sum as if paid out by him on the check, making no entry of the coupons, thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the check in cash, when in fact he had paid nothing. The indictment contained two counts; the first charging that on, &c., the prisoner, being a clerk, then employed in that capacity by the bank, did then and there in virtue thereof receive a certain sum, to wit, £1439 15s., for and on account of the said bank, and the said money feloniously did embezzle. The second, that he as such clerk received a certain valuable security, to wit, an order for the payment of money, to wit, £1439 15s. for and on account of the said bank, and the said valuable security feloniously did embezzle. On this indictment he was convicted of embezzlement :—Held, that the prisoner had been guilty of embezzlement within the 19 Vict. c. 121, s. 40; and the conviction was affirmed. *Regina* v. *Cummings*, 16 Q. B. 15.

Held, also, that the indictment was sufficient in form, the omission of the conclusion, contra formam statuti, being no objection. *Ib.*

On an indictment against a treasurer of a county for embezzling £9 14s. 10d., received for taxes, it appeared that defendant received the money in October, 1858, and resigned in February, 1859, when his books were taken from him by the warden, although the usual time for making up his account with the county, 31st of March, had not arrived. This sum was not entered in his books as received, nor was there any entry of other moneys received for taxes at a later date; but after his books had been taken he sent in a list of moneys received, including this, although before he did so it had been stated in a newspaper that this and other payments were not accounted for. There was no proof that he was indebted to the county on the whole of his accounts, and it was shewn that he claimed that they were in his debt; and that the question was pending before arbitrators, to whom several civil suits between himself and the council had been referred. The jury found defendant guilty :—Held, that the evidence did not warrant the conviction, and a new trial was granted. Held, also, that the money was not improperly charged to be the money of the county, though it was received for the township of Maidstone, and was to be accounted for to it by the county. *Regina* v. *Bullock*, 19 Q. B. 513.

A school trustee having money in his hands not as secretary and treasurer of a board, or in any official capacity, cannot embezzle such money, his duty as trustee not requiring or authorizing him to receive it. *Ferris* v. *Irwin*, 10 C. P. 116.

One D., being postmaster at Berlin, transmitted to defendant at Toronto several post-office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant having been convicted upon an indictment which charged him with unlawfully, fraudulently, and knowingly obtaining from our lady the Queen these sums, of the moneys and property of our said lady the Queen, with intent to defraud :—Held, that the indictment was good; that the 56th section of the Post Office Act, C. S. C., c. 31, was not applicable to the case; that the money was properly charged to be the money of the Queen, not of the postmaster; and that it was unnecessary to allege an intent to defraud any particular person. Remarks as to the extensive nature of the provision on which the indictment was framed, C. S. C. c. 92, s. 73. Semble, that defendant might also have been properly convicted under another count of the indictment, charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 Q. B. 231.

XII. Escape.

One W. was brought before magistrates in the custody of defendant, a constable, to answer a

charge of misdemeanour, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail and send the case to the assizes. He said he could get bail if he had time to send for them, and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted:—Held, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper. *Regina* v. *Shuttleworth*, 22 Q. B. 372.

XIII. Extortion.

Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting:—Held, that they might be jointly convicted. Held, also, not indispensable that the indictment should charge them with having acted corruptly. *Regina* v. *Tisdale et a'.*, 20 Q. B. 272.

XIV. False Pretences.

1. *The Offence.*

Where a person tenders to another a promissory note of a third party in exchange for goods, though he says nothing, yet he should be taken to affirm that the note has not to his knowledge been paid, either wholly or to such an extent as almost to destroy its value:—Held, that on the evidence in this case it was properly left to the jury to say whether the note for $100, which defendant gave to the prosecutor for the full amount, had or had not been paid except the value of half a barrel of flour; and that the conviction was warranted. *Regina* v. *Davis*, 18 Q. B. 180.

The prisoner represented to the prosecutor that a lot of land, on which he wished to borrow money, had a brick house upon it, and thus procured a loan, when in fact the land was vacant:—Held that he was properly convicted. *Regina* v. *Huppel*, 21 Q. B. 281.

One D. being postmaster at Berlin, transmitted to defendant at T. several post office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant was held properly convicted of having obtained these sums with intent to defraud. And, semble, that defendant might also have been properly convicted under another count of the indictment, charging him with having obtained the money by false pretences. *Regina* v. *Dessauer*, 21 Q. B. 231.

A defendant indicted for misdemeanour in obtaining money under false pretences cannot, under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorizes a conviction for the misdemeanour, though the facts proved amount to larceny. Where a defendant on such an indictment had been found guilty of larceny:—Held, that the court had no power, under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Regina* v. *Ewing*, 21 Q. B. 523.

The prisoner, with one D., whose note he held, came to the store of H. & F., where an agreement was entered into between the parties, that D. would pay for all the goods furnished by H. & F. to the prisoner, on the amount being endorsed on his (D.'s) note, held by the prisoner. The prisoner several times called at H. & F.'s with the note mentioned, obtained goods, and had the amount endorsed on the note. Afterwards he called without the note and got goods, on his promising to bring the note within a day or two to have the amount endorsed thereon. Prisoner saw D. the day after, and directed him not to pay anything more than the amounts endorsed on the note, and he never after presented the note to have the amount endorsed thereon:—Held, that there was no false representation or pretence of an existing fact, but a mere promise of defendant, which he failed to perform. *Regina* v. *Bertles*, 13 C. P. 607.

Held, that defendant (who was indicted for false pretences) could not on the indictment and evidence in this case be convicted of larceny under C. S. C. c. 99, s. 62. Quære, as to the meaning of that clause. *Ib.*

The prisoner sold a mare to B., taking his notes for purchase money, one of which was for $25, and a chattel mortgage on a mare as collateral security. After this note had matured he threatened to sue, and B. got one R. to pay the money, the prisoner promising to get the notes from a lawyer's office, where he said they were, and give them up next morning. This note, however, had been sold by the prisoner some time before to another person, who afterward sued B. upon it, and obtained judgment:—Held, that the prisoner was properly convicted of obtaining the $25 by false pretences. *Regina* v. *Lee*, 23 Q. B. 340.

The indictment charged one B. with obtaining by false pretences, from one J. T., two horses, with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanour aforesaid to commit:—Held, good, defendant being charged as a principal in the second degree. Held, also, that the evidence set out in this case was not sufficient to sustain the charge. *Regina* v. *Connor*, 14 C. P. 529.

The term "valuable security," used in C. S. C. c. 92, s. 72, means a valuable security to the person who parts with it on the false pretence; and the inducing a person to execute a mortgage on his property is therefore not obtaining from him a valuable security within the act. *Regina* v. *Brady*, 26 Q. B. 13.

An indictment for obtaining from A. $1200 by false pretences, is not supported by proof of obtaining A.'s promissory note for that sum, which A. afterwards paid before maturity. *Ib.*

G., the prisoner, and another, were in a boat on the bay, and they agreed to take M., the prosecutor, to meet the steamer, G. saying the charge would be 75 cents at the steamer. The prosecutor, according to his own account, took

out a $2 bill at the steamer, saying he would get it changed. Prisoner said "I'll change it," upon which the prosecutor handed it to him, and he shoved off with it. Other witnesses represented the prisoner's statement to be that he had change. The prosecutor did not say what induced him to part with the money :—Held, that a conviction could not be sustained. *Regina* v. *Gemmell*, 26 Q. B. 312.

See *Regina* v. *Campbell*, 18 Q. B. 413, infra.

2. *Indictment.*

Held, that a prisoner indicted for a misdemeanour (in this case it was for false pretences) may on such indictment be convicted of an attempt to commit the offence which is a misdemeanour. *Regina* v. *Goff*, 9 C. P. 438.

Held, that the indictment for false pretences in this case was clearly sufficient, as it followed exactly the form sanctioned by 18 Vict. c. 92. *Regina* v. *Davis*, 18 Q. B. 180.

A municipality having provided some wheat for the poor, the defendant obtained an order for 15 bushels, described as "three of golden drop, three of Fife, nine of milling wheat." Some days after he went back, and represented that this order had been accidentally destroyed, when another was given to him. He then struck out of the first order, the words "three of golden drop, three of Fife," and presenting both orders, obtained in all 24 bushels. The indictment charged that defendant unlawfully, fraudulently and knowingly, by false pretences did obtain an order from A., one of the municipality of B., requiring the delivery of certain wheat by and from one C., and by presenting the said order to C., did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, to wit, nine bushels of wheat, from the said C., of the goods and chattels of the said municipality, with intent to defraud :—Held, sufficient in substance, not being uncertain or double, but in effect charging that defendant obtained the order and by presenting it obtained the wheat by false pretences. Held, also, that the evidence, set out in the case, was sufficient to sustain the conviction. *Regina* v. *Campbell*, 18 Q. B. 413.

An indictment that defendant by false pretences did obtain board of the goods and chattels of the prosecutor :—Held, bad, the term "board" being too general. *Regina* v. *McQuarrie*, 22 Q. B. 600.

XV. Forcible Entry.

The court refused a writ of restitution after a conviction of forcible entry and detainer, where the premises were a crown reserve, the lease of which had expired. *Rex* v. *Jackson*, Dra. 50.

An inquisition for a forcible entry, taken under 6 Hen. VIII. c. 9, must shew what estate the party expelled had in the premises, or the inquisition will be quashed and restitution awarded. The inquisition is also bad if it appear to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of 40s., or that the party complaining was sworn as a witness. *Mitchel* v. *Thompson*, *Rex* v. *McKreavy*, 5 O. S. 620, 625.

On an indictment for forcible entry and detainer of land, evidence of title in defendant is not admissible. *Regina* v. *Cokely*, 13 Q. B. 521.

The defendants applied for delay in order to give evidence of title, but on the prosecutor consenting to waive restitution in the event of conviction, they were compelled to go to trial, and were convicted. A writ of restitution was afterwards refused; though, Semble, that it would in any case have been improper to delay the trial for the reason urged. *Regina* v. *Connor*, 2 P. R. 139.—C. L. Chamb.—Robinson.

Semble, also, that where the prosecutor has been examined as a witness, restitution should not be granted. *Ib.*

The defendant having been convicted at the Quarter Sessions on an indictment for forcible entry, was fined, but that court refused to order a writ of restitution, and the case was removed here by certiorari :—Held, that it was in the discretion of this court either to grant or refuse the writ; and under the circumstances it was refused. *Regina* v. *Wightman*, 29 Q. B. 211.

XVI. Foreign Aggressions.

The prisoner was convicted upon an indictment under C. S. U. C. c. 98, containing three counts, each charging him as a citizen of the United States. The first count alleged that he entered Upper Canada with intent to levy war against Her Majesty; the second that he was in arms within Upper Canada, with the same intent; the third, that he committed an act of hostility therein, by assaulting certain of Her Majesty's subjects, with the same intent. The prisoner's own statement, on which the crown rested, was that he was born in Ireland, and was a citizen of the United States. It was objected that the duty of allegiance attaching from his birth continued, and he therefore was not shewn to be a citizen of the United States—but, Held, that though his duty as a subject remained, he might become liable as a citizen of the United States by being naturalized, of which his own declaration was evidence. Held, also, upon the testimony set out in the case, that there was evidence against the prisoner of the acts charged. Held, also, that even if he carried no arms, on which the evidence was not uniform, yet being joined with and part of an armed body which had entered Upper Canada from the United States and attacked the Canadian volunteers, he would be guilty of their acts of hostility and of their intent; and that if he was there to sanction with his presence as a clergyman what the rest were doing, he was in arms as much as those who were actually armed. *Regina* v. *McMahon*, 26 Q. B. 195.

In this case, the charge being the same as in the last, it was shewn that the prisoner had declared himself to be an American citizen since his arrest, but a witness was called on his behalf who proved that he was born within the Queen's allegiance :—Held, that the crown might waive the right of allegiance, and try him as an American citizen, which he claimed to be. The fact of the invaders coming from the United States, would be prima facie evidence of their being citizens or subjects thereof. The prisoner asserted that he came over with the invaders as reporter only; but Held, that this clearly could

form no defence, for the presence of any one encouraging the unlawful design in any character, would make him a sharer in the guilt. *Regina* v. *Lynch*, 26 Q. B. 208.

The prisoner being indicted under C. S. U. C. c. 98, and charged as a citizen of the U. S., was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit:—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner, being insufficient as against a subject; and the prisoner, therefore, was not in legal peril on the first indictment. *Regina* v. *Magrath*, 26 Q. B. 385.

The prisoner, having been indicted under C. S. U. C. c. 98, (3 Vict. c. 12,) as a citizen of the United States, was convicted of having as such joined himself to divers other evil disposed persons, and having been unlawfully and feloniously in arms against the Queen within Upper Canada, with intent to levy war against Her Majesty. It was sworn that the prisoner had said he was an American citizen, and had been in the American army, and there was no evidence offered to contradict this:—Held, evidence against the prisoner, as his own admissions and declarations, of the country to which he belonged. Held, also, that the evidence, set out in the report, was sufficient to prove the offence charged. The Imperial Statute 11 & 12 Vict. c. 12, does not override 3 Vict. c. 12, of this Province, for the latter is re-enacted by the consolidation of the statutes, which took place in 1859. *Regina* v. *Slavin*, 17 C. P. 205.

XVII. Foreign Enlistment.

The imperial statute, 59 Geo. III. c. 69, for procuring and endeavouring to procure enlistments in this country for the army of the U. S.:—Held, to be in force in this province, and a conviction under it sustained. *Regina* v. *Schram*, *Regina* v. *Anderson*, 14 C. P. 318.

A warrant of commitment under the Foreign Enlistment Act, 59 Geo. III. c. 69, s. 4, reciting that T. K. C. "was this day charged (not saying upon oath) before us," and without shewing any examination by the magistrates, upon oath or otherwise, into the nature of the offence, and commanding the constables or peace officers of the county of Welland to take the said T. K. C. into custody:—Held, sufficient. *In re Clarke*, 10 L. J. 331.—C. L. Chamb.—J. Wilson.

A warrant of commitment under the statute, committing the prisoner until "discharged by due course of law," sufficiently complies with the statute, which provides for a committal until delivered by due course of law. *Ib.*

A commitment under 28 Vict. c. 2, s. 1, stating the offence "for that he on, &c., at, &c., did attempt to procure A. B. to serve in a warlike or military operation in the service of the government of the United States of America," omitting the words, "as an officer, soldier, or sailor," &c.:—Held, bad. *In re Bright*, 1 L. J. N. S. 240.—C. L. Chamb.—Draper.

Held, that a judgment for too little is as bad as a judgment for too much, and so a condemnation to pay $100 and costs, when the statute creating the offence imposes a penalty of $200 and costs, is bad. *Ib.*

Held, that a commitment on a judgment for a penalty and costs, not stating in the body of the commitment or a recital in it the amount of costs, is bad. *Ib.*

Quære, is the jurisdiction of the officers named in 28 Vict. c. 2, a general or a local one. *Ib.*

Held, 1. That a warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under the 28 Vict. c. 2, averring that on a day named, "at the town of Chatham, in said county, he the said A. S. did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeding: "And whereas the said A. S. was duly convicted of the said offence before me the said police magistrate, and condemned," &c., sufficiently shewed jurisdiction. *In re Smith*, 1 L. J. N. S. 241.—C. L. Chamb.—Hagarty.

2. That the direction to take the prisoner "to the common gaol at Chatham," the warrant being addressed "to the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," was sufficient. *Ib.*

3. That the warrant as above set out sufficiently contained an adjudication as to the offence, though by way of recital. *Ib.*

4. That the words "to enlist to serve" do not shew a double offence, so as to make a warrant of commitment bad on that ground. *Ib.*

5. That the offence created by the statute was sufficiently described in the warrant as above set out. *Ib.*

6. That the warrant was not bad as to duration or nature of imprisonment. *Ib.*

7. That the amount of costs was sufficiently fixed in the warrant of commitment. *Ib.*

8. That there is power to commit for non-payment costs. *Ib.*

9. That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either. *Ib.*

A warrant of commitment reciting that F. M. was charged on the oath of J. W., "for that he F. M. was this day charged with enlisting men for the United States army, offering them $350 each as bounty," without charging any offence with certainty, and without stating that the men enlisted were subjects of her Majesty, and without shewing that J. W. was unauthorized by license of her Majesty to enlist:—Held, bad. *In re Martin*, 3 P. R. 298.—C. L. Chamb.—J. Wilson.

XVIII. Forgery.

"Mr. W., please let the bearer, W. T., have the amount of £10, and you will oblige me. B. B. Mitchell:"—Held, on an indictment for forgery, to be an order for the payment of money, not a mere request. *Regina* v. *Tuke*, 17 Q. B. 296.

"Mr. McK., Sir,—Would you be good enough as for to let me have the loan of $10 for one week or so, and send it by the bearer immediately, and much oblige your most humble servant. (Signed) I. Almiras, P. P.:"—Held, not an order for the payment of money, but a mere request. *Regina* v. *Roepelle*, 20 Q. B. 260.

"$3.50. Carick, April 10th, 1863. "J. McL., tailor,—Please give Mr. A. S. to the amount of $3.50, and by doing so you will oblige me:" Held, an order for the payment of money, and not a mere request. *Regina* v. *Steel*, 13 C. P. 619.

A writing not addressed to any one may be an order for the payment of money, if it be shewn by evidence for whom it was intended. In this case the order was for $15, in favour of "bearer or R. R.," and purported to be signed by one B. The prisoner in person presented it to M., representing himself to be the payee, and a creditor of B.:—Held, that it might fairly be inferred to have been intended for M.; and a conviction for forgery was sustained. *Regina* v. *Parker*, 15 C. P. 15.

Indictment for offering, &c., the following instrument knowing it to be forged:—"I, J. H., do agree to W. C., of W., the full rite and privilege of all the white oke and elm and hickory lying and standing on lot 26, south part, on the 3rd concession Plymp, for the sum of $30, now paid to H. by C., the receipt whereof is hear by me acknowledged." The jury having convicted the prisoner,—Held, upon a case reserved, 1. That the instrument forged being set out in hæc verba in the indictment, the description of its legal character would be surplusage, and was unnecessary; 2. That under sec. 29 C. S. C. c. 99, it is not necessary to allege an intent to defraud in an indictment for forgery; 3. That the averment of the offence being contra formam statuti was immaterial, (the objection being that there was nothing in the indictment, which contained this averment, to shew that the offence was against any statute); 4. That the instrument might be construed as an agreement or contract to sell the timber, or a receipt for the payment of money, and in either case came within the 22 Vict. c. 94, and the conviction was sustained. *Regina* v. *Carson*, 14 C. P. 309.

A forged paper purporting to be a bank note, is a promissory note within the 10 & 11 Vict. c. 9, even though there is no such bank as that named. *Regina* v. *McDonald*, 12 Q. B. 543.

A promissory note had been drawn by the prisoner, payable two months after date to the order of one S., and afterwards endorsed by said S., and the prisoner then altered the note from two to three months, and discounted it at a bank. It was objected that the forgery or uttering, if any, was a forgery of or the uttering of a forged endorsement, (the note having been made by himself,) and that there was no legal evidence of an intent to defraud:—Held, that the altering the note while in his own possession after it was endorsed was a forgery of a note, and not of an endorsement; and that the passing of the note to the third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. *Regina* v. *Craig*, 7 C. P. 239.

Defendant was convicted at the Quarter Sessions on an indictment for uttering a promissory note purporting to be made by one F., for £4 10s., with intent to defraud, knowing it to be forged. It appeared that some boys had been amusing themselves with writing promissory notes and imitating persons' signatures, and among them was one with F.'s name. The papers were put into the fire, but this note was carried up the chimney by the draft, and fell into the street, where it was picked up by defendant. A person who was with him at the time, said that he thought it was not genuine, and advised him to destroy it; but defendant kept it, and afterwards passed it off, telling the person who took it that it was good:—Held, that defendant was guilty of a felonious uttering; but the conviction was quashed, for the indictment was defective in not stating expressly that the note was forged, or that defendant uttered it as true; and the case should not have been tried at the Quarter Sessions. *Regina* v. *Dunlop*, 15 Q. B. 116.

The Quarter Sessions has no jurisdiction to try the offence of forgery. *Regina* v. *McDonald*, 31 Q. B. 337.

Semble, that on the evidence, stated in the report, the testimony of the prosecutor, whose name had been forged to a note, was sufficiently corroborated. *Ib.*

Prisoner was indicted for forging an order for the delivery of goods. The only witnesses examined were the person whose name was forged, and the person to whom the order was addressed, and who delivered the goods thereon; and there was no corroborative testimony:—Held, (under 10 & 11 Vict. c. 9, s. 21) not sufficient evidence. *Regina* v. *Giles*, 6 C. P. 84.

An indictment will not lie for forging or altering the assessment roll for a township deposited with the clerk. *Regina* v. *Preston*, 21 Q. B. 86.

A prisoner was arrested in Upper Canada for having committed in the United States "the crime of forgery by forging, coining, &c., spurious silver coin," &c.:—Held, 1. That the offence as above charged did not constitute the crime of "forgery" within the meaning of the Extradition Treaty or Act; 2. That it certainly is not the crime of forgery under our law, and therefore the prisoner could not be extradited. *In re Smith*, 4 P. R. 215.—C. L. Chamb.—A. Wilson.

Definition of the term forgery considered. *Ib.*

Held, that a person convicted of forgery or uttering forged paper in the United States, who escaped to Canada after verdict but before judgment, was liable to be delivered up under the Ashburton treaty and the Provincial statute passed to give effect to that treaty. *In re Warner*, 1 L. J. N. S. 16.—C. L. Chamb.—Hagarty.

Semble, that the execution of a deed by prisoner in the name of and representing himself to be another, may be forgery, if done with intent to defraud, even though he had a power of attorney from such person, if he fraudulently conceal the fact of his being only such attorney, and assume to be the principal. *In re Regina* v. *Gould*, 20 C. P. 154.

XIX. Fraudulent Assignment.

Upon an indictment under 22 Vict. c. 96, for making an assignment of personal property to defraud creditors:—Held, that a money bond

for the conveyance of land is personalty seizable on an execution under 13 & 14 Vict. c. 53, and 20 Vict. c. 57; and, further, that a transfer made to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the assignor less liable under this indictment. Richards, J., diss. *Regina* v. *Potter*, 10 C. P. 39.

XX. Frontier, (Outrages upon.)

Under sec. 11 of 28 Vict. c. 1, for preventing outrages on the frontier, the court can only order restoration of property seized when it appears that the seizure was not authorized by the act; and in this case, on the facts stated, they refused to interfere. *In re Propeller "Georgian,"* 25 Q. B. 319.

XXI. Kidnapping.

The plaintiff in error having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one Bratton without authority, with intent to transport him out of Canada against his will, was, on the 24th of June, 1872, brought before the county judge, by whom he consented to be tried under the 32 & 33 Vict. c. 35. In the record drawn up under that statute, it was charged that he did feloniously and without authority, forcibly seize and confine one B. within Canada, &c., (without alleging any intent), and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The judge fixed the 3rd of July for the trial, and on that day the prisoner said he was ready, but upon the request of counsel for the crown the trial was postponed till the 15th of July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the judge, changing the name of Rufus Bratton to James Rufus Bratton. In the notice required from the sheriff to the judge, by 32 & 33 Vict. c. 35, s. 2, only the charge contained in the second count of the indictment was referred to. On error being assigned,—Held, that the sessions had jurisdiction over the offence, and so the county judge had power to try it. Held, also, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence showed it should have been; and that the judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment. Held, also, that the judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment. By 32 & 33 Vict. c. 20, s. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada against his will, or to be sold or captured as a slave, is guilty of felony:—Held, Wilson, J., diss., that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count therefore was defective in not stating any intent. Upon this ground, the judgment was reversed, and under C. S. U. C. c. 113, s. 17, the record was remitted to the judge to pronounce the proper judgment, which would be upon the second count only. Held, also, that the amendment was authorized, under 32 & 33 Vict. c. 29, ss. 1 and 71, D. Held, also, that the court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error. Held, also, no objection that the jurisdiction conferred by 32 & 33 Vict. c. 35, was not shewn, for the record and judgment were in the form prescribed by that act. Held, also, that the sheriff's notice was sufficient, as 32 & 33 Vict. c. 35, s. 2, requires it only to state the "nature of the charge" preferred against the prisoner. The prisoner having been sent to the penitentiary, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 Q. B. 106.

XXII. Larceny.

A party cannot be prosecuted under 4 & 5 Vict. c. 25, for stealing fruit "growing in a garden," unless the bough of the tree upon which the fruit is hanging be within the garden; it is not sufficient that the root of the tree be within the garden. *McDonald* v. *Cameron*, 4 Q. B. 1.

In an indictment charging the prisoner with stealing bank bills, the words "of the moneys, goods, and chattels" may be rejected as surplusage. *Regina* v. *Saunders*, 10 Q. B. 544.

An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishioners of the said church:"—Held, bad. They must be averred to belong to some person or persons individually. Such a defect is not within the 18 Vict., c. 92, ss. 25, 26. *Regina* v. *O'Brien*, 13 Q. B. 436.

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection taken, the indictment was amended, by stating the goods to be the property of the mother, and no further evidence of her administrative character was given, the County Court judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury:—On a case reserved, Held, 1. That there was ample evidence of possession in R. M. to support the indictment without amendment. 2. That the judge had power to amend, under C. S. C. c. 99, s. 78. 3. That the conviction on the amended indictment could not be sustained, there being no evidence of the mother's representative character, nor any question of ownership by her, apart from such character, left to the jury. *Regina* v. *Jackson*, 19 C. P. 280.

A defendant indicted for misdemeanour in obtaining money under false pretences cannot, under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorizes a conviction for the misdemeanour, though the facts proved amount to larceny. Where a defendant on such an indictment had been found guilty of larceny:—Held, that the court had no power

under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Regina* v. *Ewing*, 21 Q. B. 523.

Held, that defendant, who was indicted for false pretences, could not, on the indictment and evidence in this case, be convicted of larceny, under C. S. C. c. 99, s. 62. Quere, as to the meaning of that clause. *Regina* v. *Bertles*, 13 C. P. 607.

Defendant held the title of certain land belonging to one A., who lived in the United States. A. exchanged it with H. (the prosecutor) for other land, and gave an order on defendant to convey to H. When H. presented this order defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and defendant that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, where the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance, $1,150. Defendant, instead of returning the money and notes, ran away with them: Semble, that upon these facts an indictment for larceny might have been sustained, if the jury found that defendant when he obtained possession of the property intended to steal it. *Regina* v. *Ewing*, 21 Q. B. 523.

The public interest being concerned, the principle of estoppel would not apply, so as to prevent H. from asserting that the payment which he professed to make in good faith was in fact only a pretence. *Ib.*

In an action against a carrier for non-delivery of a package of money, defendant pleaded not guilty. The plaintiffs' witness, their agent, proved that within a week after his delivering the parcel to defendant he found that he had absconded: that he then sued out an attachment against him as an absconding debtor; and that, as he believed, defendant was at the time of the trial in gaol, charged with stealing the money:—Held, that this evidence sufficiently shewed a felony, as defendant upon it might, as a bailee, be properly convicted of larceny, under C. S. C. c. 92, s. 55; and a nonsuit was ordered. —Hagarty, J., diss. *Livingstone et al.* v. *Massey*, 23 Q. B. 156.

Upon an indictment for stealing money, the property of certain persons (composing the firm of the American Express Co.), it appeared that the agent of the company in St. Mary's delivered two parcels containing $888, which had been sent by one K., addressed to E. & S. at St. Mary's, to the prisoner to deliver, and that he appropriated them to his own use. On the trial in the Quarter Sessions the counsel for the crown asked the agent of the company when their (the company's) liability ceased, which was objected to by the prisoner's counsel:—Held, 1. That the enquiry aimed at was material to shew how far the company had undertaken to deliver, and therefore when their duty as carriers ceased, but that the question as put was objectionable. 2. That it was a question for the jury to say whether the contract of the company was to deliver to E. and S., and the property in the money therefore was properly laid in the indictment. 3. That if the undertaking was to deliver the money to E. & S. the prisoner was the agent of the company for that purpose. 4. That money is property, of which a person can be a bailee so as to make him guilty of felony, if he appropriates it to his own use. The case not having been properly submitted to the jury on these points, a new trial was ordered in the court below. *Regina* v. *Massey*, 13 C. P. 484.

Defendant hired a pair of horses from a livery stable to go to a particular place, and afterwards absconded with them. The jury found that at first he did not intend to steal, but having accomplished the object of hiring, he then made up his mind to convert them to his own use. Held, that he was a bailee, within C. S. C., c. 92, s. 55, and properly convicted on an indictment for larceny in the ordinary form. *Regina* v. *Tweedy*, 23 Q. B. 120.

The prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone out with one A. to Cooksville, and examined J. G.'s store with a view of robbing it, and that afterwards A. and three others, having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed after one had got into the store through a panel taken out by them. Prisoner saw them off from Toronto, but did not go himself:—Held, that as those actually engaged were guilty of the attempt to steal, the prisoner, under 27 & 28 Vict. c. 19, s. 9, was properly convicted. *Regina* v. *Edmonds*, 26 Q. B. 152.

Held, that the police court of the city of Toronto is a court of justice, within 32 & 33 Vict. c. 21, s. 18, and that the prisoner was properly convicted of stealing an information laid in that court. *Regina* v. *Mason*, 22 C. P. 246.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanours, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent Assize, when the count for larceny only is read to the jury:—Held, no error, as the prisoner was only given in charge on the larceny count. *Ib.*

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer, or motion to quash the indictment, under 32 & 33 Vict. c. 29, s. 32; and where there has been a demurrer to such allegations, as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the Court of Error will not reopen the matter on the suggestion that there is misjoinder of counts. *Ib.*

An indictment describing an offence within 32 & 33 Vict. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict. *Ib.*

The conviction stated that "Joseph Caswell had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to Thomas Fulton, which said Thomas states was taken and

stolen from him, and which said Joseph could not satisfactorily account for its possession:"—Held, that the conviction was bad, because 32 & 33 Vict. c. 21, s. 25, under which it was made, applies to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree" within the statute. *Regina* v. *Caswell*, 33 Q. B. 303.

Semble, that the conviction was also bad, for not alleging that the property taken was of the value of twenty-five cents at the least; the direction in the conviction, that the defendant should pay seventy five cents for said wood, not being a finding that it was of that value. *Ib.*

Semble, that the conviction sufficiently stated that defendant was in possession of the wood. *Ib.*

The prisoner, being the agent of the American Express Company, in the State of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry in their books of its receipt, as it was his duty to do, and afterwards absconded with it to this province, where he was arrested:—Held, that he was guilty of larceny, and was properly convicted here under 32 & 33 Vict. c. 31, s. 112, D. *Regina* v. *Hennessy*, 35 Q. B. 603.

XXIV. Maliciously Destroying Records.

Held, that maliciously destroying an information or record of the police court is a felony within 32 & 33 Vict. c. 21, s. 18. *Regina* v. *Mason*, 22 C. P. 246.

XXV. Menaces and Threats.

1. *The Offence.*

Demanding with menaces money actually due, is not a demand with intent to steal, under 4 & 5 Vict. c. 25, s. 11. *Regina* v. *Johnson*, 14 Q. B. 569.

The 32 & 33 Vict. c. 21, s. 43, D., makes it a felony to send "any letter demanding of any person with menaces, and without any reasonable or probable cause," any money, &c.:—Held, that the words, "without reasonable or probable cause," apply to the money demanded, and not to the accusation threatened to be made. *Regina* v. *Mason*, 24 C. P. 58.

XXVI. Murder and Manslaughter.

1. *The Offences.*

Murder committed in the United States by a slave to prevent capture—Extradition. *In re Anderson*, 20 Q. B. 124.

Held, that a warrant of commitment issued by a magistrate under the Ashburton treaty and our statute, which used the words, "did wilfully, maliciously, and feloniously stab and kill," and omitted the words "murder," and "with malice aforethought," and concluded by instructing the gaoler to "there safely keep him, the prisoner, until he shall be thence delivered by due course of law," did not come within the provisions of the treaty or statute, and was consequently defective. *In re Anderson*, 11 C. P. 9.

At the Quarter Sessions the prisoner was found guilty on an indictment charging that she, on, &c., in and upon one B., in the peace of God and of our lady the Queen then being, unlawfully did make an assault, and him, the said B., did beat and illtreat, with intent him, the said B., feloniously, wilfully, and of her malice aforethought, to kill and murder, and other wrongs to the said B. then did, to the great damage of the said B., against the form of the statute in such case made and provided, and against the peace, &c. A count was added for common assault. The evidence shewed an attempt to murder, but it was moved in arrest of judgment that the court had not jurisdiction, for that it was a capital crime, under C. S. C. c. 91, s. 5:—Held, that the indictment did not charge a capital offence under that section, nor an offence against any statute, but that the conviction might be sustained as for an assault at common law. *Regina* v. *McEvoy*, 20 Q. B. 344.

Prisoner being indicted for the murder of one H., the principal witness for the crown stated that the crime was committed on the 1st of December, 1859, on a bridge over the river Don, and that the prisoner and one S. (who had been previously tried and acquitted) threw H. over the parapet of the bridge into the river. The counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the learned judge rejected the evidence, saying that S. might be called, and if contradicted might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted D. was not examined:—Held, that the presence of S. was a fact material to the enquiry, and that D. therefore should have been admitted when tendered; and, the prisoner having been found guilty, a new trial was ordered. *Regina* v. *Brown*, 21 Q. B. 350.

A warrant charging that the prisoners "did feloniously shoot at, &c., with intent, &c., to kill and murder," sufficiently charged an "assault with intent to commit murder," the words used in the Ashburton treaty and statute. *Regina* v. *Reno et al.*, 4 P. R. 281.—C. L. Chamb.—Draper.

The prisoner, having been indicted with two others acquitted, was convicted of the murder of one H., whose body was found in a field adjoining the railway, on Monday, the 10th April, apparently about three days after death, which, had clearly been caused by violence. One M., the chief witness for the crown, swore that on the Friday night previously, he heard cries in this field, a quarter of a mile from his house, and that he saw three persons walk quickly past his house from that direction, whom he recognized as the prisoner and two of his sons. He also stated that on the following morning he saw the prisoner walking along the railway and stopping near where the body was afterwards found, his manner being strange and excited. At the coroner's inquest, held six months before, this witness had declared himself unable to identify the persons seen by him, and had not mentioned seeing the prisoner on Saturday. On motion for a new trial, on the ground, among others, of surprise at these discrepancies, the court refused to interfere. *Regina* v. *Hamilton et al.*, 16 C. P. 340. See *Regina* v. *Slavin*, 17 C. P. 205.

P. (the prisoner) and D. (deceased) being brothers, were in the house of the latter, both a little intoxicated. D. struck his wife, and on P. interfering a scuffle began. While it was going on D. asked for the axe, and, when they let go, P. went out for it and gave it to him, asking what he wanted with it. D. raised it as if to strike P., and they again closed, when the wife hid the axe. While the scuffle was going on D. struck P. twice. On getting up, P. kicked him on the side and arm, and then ran across the garden, got over a brush fence into the road, and dared D. three times to come on, saying the last time that he would not go back the same way as he came. D. seized a stick from near the stove, which had been used to poke the fire with, and ran towards P. In trying to cross the fence he fell to his knees, and P. came forward and took the stick out of his hand. He got up, and as he went over the fence P. struck him on the head with it. The wife entreated him to spare her husband, but he struck him a second time, when he fell, and again while on the ground, from which he never rose. P., in answer to the wife, said D. was not killed, and refused to take him in, saying, "Let him lie there till he comes to himself:"—Held, that the evidence was sufficient to go to the jury to establish a charge of murder; that if the death had been caused by the kicks received before leaving the house, the circumstances would have repelled the conclusion of malice; but that whether what took place at the fence was under a continuance of the heat and passion created by the previous quarrel, was, under the circumstances, a question for the jury. A conviction for murder was therefore upheld, and a new trial refused. *Regina* v. *McDowell*, 25 Q. B. 108.

The prisoner, C., was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. and his wife on the river bank at Amherstburg, standing near a pile of wood. She saw M. standing behind the pile, who on deceased going up to him struck deceased with a stick, of which he died; deceased ran, when two other men sprang out and followed him, but in a few seconds two of them returned and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw the blow struck and identified M.; and one witness, B., swore that about six on that evening deceased left his office with R. and his wife, and that about twenty minutes after he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that the three were together before the affray, and in a saloon together about nine o'clock afterwards:—Held, that there was not sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, and no evidence whatever that he and the others were together with any common unlawful purpose; and the words spoken were in themselves unimportant. *Regina* v. *Curtley*, 27 Q. B. 613.

On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32 & 33 Vict. c. 29, s. 51, cannot be convicted of an assault; and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault. *Regina* v. *Smith*, 34 Q. B. 552. See, also, *Regina* v. *Dingman and Corrin*, 22 Q. B. 283; *Regina* v. *Ganes*, 22 C. P. 185.

Per A. Wilson, J.—In this case there could have been no conviction for the assault, because the evidence upon the trial for murder shewed that it did not conduce to the death. *Regina* v. *Smith*, 34 Q. B. 552.

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2. *Dying Declarations.*

On an indictment for manslaughter, it appeared that deceased died about midnight, December 16th, from the effect of severe bruises alleged to have been caused by the prisoner, her husband, striking her with a lighted coal oil lamp. Immediately after receiving the injuries, which was between eight and nine in the evening of the 15th December, she said to the prisoner and to a female relative that she was dying. Four physicians, who saw her almost at once, declared that there was no hope of recovery. One of them who had remained with her till three, a. m., on the 17th, returned in the forenoon of that day. He then told her that she would die, and asked her if she was afraid to die; she said "No," and asked him if she was dying then; he answered, "Yes, you are," and she replied, "God help me." He said from the manner of her answering he believed she thought she was dying. She then made the statement which was put in evidence. The doctor asked her how she had caught fire; she said, "Arthur" (the prisoner) "knocked me down with the lamp." He then asked if the prisoner had threatened her before he did it, and she said "Yes." She died about twelve hours after this, from the effect of her injuries. The parish clergyman, who was with her from six to nine o'clock on the morning of the 17th, said he addressed her as a woman whom he thought was dying, and that she understood it in that way: that he recommended her to trust in Christ as her only hope, and she said "Yes, I look to him:"—Held, that this statement was admissible as a dying declaration; and that it made no difference that the second answer was given to a leading question. *Regina* v. *Smith*, 23 C. P. 312

The prisoners were charged with the murder of one B., caused by attempting, by the use of an instrument, to procure abortion. The deceased died on the 28th December, 1874. On the 24th she made a statement commencing: "I am very ill. I have no hope whatever of recovery. I expect to die." She then narrated the facts, and added: "If I die in this sickness I believe it will have been caused by the operations performed on me by Dr. Sparham, at the instigation of William Greaves. * * I make these statements in all truth, with the fear of God before my eyes, for I firmly believe that I am dying." On the 26th she was again examined, and the previous statement read to her. She confirmed its truth in every respect, and added that she then felt she was in the presence of God, and had no hope of recovery of any kind at the time; and her attention being called to the expression "If I die," she said, "I had no doubt whatever that I was dying, and I felt that I was dying, and did not by the form of the expression mean to doubt in any way that I was dying," &c.:—Held, that both statements were

admissible: that the mere use of the words, "If I die" would not alone defeat the emphatic declaration of abandonment of all hope made on the same occasion; and that the second declaration was receivable in order to explain the first. *Regina* v. *Sparham and Greaves*, C. P. E. T. 1875. Not yet reported.

XXVII. Obtaining Money with Intent to Defraud.

One D., being post-master at Berlin, transmitted to defendant at Toronto several post-office orders payable there, which defendant presented and got cashed, but it appeared afterwards that the moneys thus obtained had never been received by D. for defendant, and that frauds to a large extent had been thus committed. Defendant having been convicted upon an indictment for obtaining from the Queen these sums, of the moneys and property of the Queen, with intent to defraud:—Held, that the indictment was good: that the 56th section of the Post Office Act, C. S. C., c. 31, was not applicable to the case: that the money was properly charged to be the money of the Queen, not of the post-master; and that it was unnecessary to allege an intent to defraud any particular person. *Regina* v. *Dessauer*, 21 Q. B. 231.

Remarks as to the extensive nature of the provision on which the indictment was framed, C. S. C. c. 93, s. 73. *Ib.*

XXVIII. Perjury.

The swearing falsely by a voter, at an election of aldermen or common councilmen for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification to a declaration on the case for imputing perjury to plaintiff, on the ground of such false swearing, is bad on demurrer. *Thomas* v. *Platt*, 1 Q. B. 217.

The clerk of a Division Court, acting under 13 & 14 Vict. c. 53, s. 102, issued an interpleader summons of his own authority, without the bailiff's request. Both parties attended before a barrister appointed by the judge of the court, who was ill, and an order was made. The judge afterwards ordered a new trial, which took place. The defendant was convicted for perjury committed upon that occasion:—Held, that both parties having appeared, the proceedings in the first instance could not be considered void for want of a previous application by the bailiff; but, Held, also, that it was not competent for the judge to order such new trial, the first order being made final by the statute; and that the conviction was therefore illegal. *Regina* v. *Doty*, 13 Q. B. 398.

Where it appears on the face of the indictment that the statement complained of was made before a justice of the peace in preferring a charge of larceny committed within his jurisdiction, it is unnecessary to allege expressly that he had authority to administer the oath. *Regina* v *Callaghan*, 19 Q. B. 364.

The court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that in the indictment, provided the indictment sets forth the substantial charge contained in the information. *Regina* v. *Broad*, 14 C. P. 168.

The prisoner being indicted for perjury in giving evidence upon a charge of felony against one E. G., it appeared that the felony was committed in the county of Middlesex, if at all. The justices before whom the examination took place entertained the charge and examined the witnesses within the city of London. Defendant's counsel objected at the trial that the justices, being justices of the county of Middlesex, had no jurisdiction, sitting in London, to examine into an offence committed outside the city limits:—Held, that the conviction was illegal. *Regina* v. *Row*, 14 C. P. 307.

A joint affidavit made by the defendant and one D., stated * * * "Each for himself maketh oath and saith that, &c.; and that he, this deponent, is not aware of any adverse claim to or occupation of said lot." The defendant having been convicted of perjury on this latter allegation:—Held, that there was neither ambiguity nor doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. *Regina* v. *Atkinson*, 17 C. P. 295.

To sustain a conviction for perjury in an affidavit, it is not necessary that the jurat should contain the place at which the affidavit is sworn, for the perjury is committed by the taking of the oath, and the jurat, so far as that is concerned, is not material. *Ib.*

There was no statement in the affidavit as to where it had been sworn, either in the jurat or elsewhere, except the marginal venue, "Canada, County of Grey, to wit:" but the contents showed that it related to lands in that county, and it was proved that defendant subscribed the affidavit: that the party before whom it purported to have been sworn was a justice of the peace for that county, and had resided there for some years: that the affidavit had been received through the post-office, by the agent of the crown lands there, by whom it was forwarded to the commissioner of crown lands; and that subsequently a patent issued to the party on whose behalf the affidavit had been made:—Held, evidence from which the jury might infer that the affidavit was sworn in the County of Grey. *Ib.*

Held, also, that if the affidavit was sworn in the county of Grey, the proof of the swearing by the justice of the peace, and the taking of the oath by the defendant, were made out by proving their signatures. *Ib.*

An election under the municipal act is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded. Where, therefore, in an indictment for perjury, defendant was alleged to have sworn that no notice of the disqualification of a candidate for township councillor had been given previous to or at the time of holding the election, the perjury assigned being that such notice had been given previous to the election; and the notice appeared to have been given on the nomination of the candidate objected to:—Held, that the assignment was not proved. *Regina* v. *Cowan*, 24 Q. B. 606.

An indictment for perjury charged that it was committed on the trial of an indictment against A. B., at the Court of Quarter Sessions, for the county of B., on the 11th of June, 1867, on a charge of larceny:—Held, sufficient. *Regina* v. *Macdonald*, 17 C. P. 635.

Upon an indictment for perjury committed upon the hearing of a complaint before a magistrate, the information having been proved:—Held, upon a case reserved, that it was unnecessary to prove any summons issued, or any step taken to bring the person complained of before the magistrate; for so long as he was present, the manner of his getting there was immaterial. *Regina* v. *Mason*, 29 Q. B. 431.

The indictment was defective for not shewing the jurisdiction over the offence, by alleging where the liquor was sold, the sale of which without license was the complaint; but as judgment had been pronounced, this could be taken advantage of only by writ of error. Quære, whether it was not defective also, for not shewing that the person complained against was present, or that a summons issued, and that the magistrate was authorized to proceed ex parte. *Ib.*

Attempting to bargain with or procure a woman falsely to make the affidavit provided for by C. S. U. C. c. 77, s. 6, that A. is the father of her illegitimate child, is an indictable offence. The attempt proved consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting, but not proved, to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried at York. Semble, per Draper, C. J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there. Quære, whether, if the woman had committed the offence, it should have been charged as a misdemeanour only, or as the statutory offence of perjury. *Regina* v. *Clement*, 26 Q. B. 297.

C. S. U. C. c. 52, s. 73, empowers any justice of the peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a mutual insurance company is interested, and to administer to him the requisite oath. Upon an indictment for perjury assigned upon an affidavit made in compliance with one of the conditions of a policy:—Held, that the policy must be produced, although the defendant's affidavit referred to the policy in such a way that its existence might be fairly inferred. *Regina* v. *Gagan*, 17 C. P. 530.

32 & 33 Vict. c. 23, s. 8, D., applies to all cases of perjury, not merely to "Perjuries in Insurance Cases," which is the heading under which ss. 4 to 12 are placed in the Act. *Regina* v. *Currie*, 31 Q. B. 582.

Held, therefore, that a magistrate in the county of Halton had jurisdiction to take an information, and to apprehend and bind over a person charged with perjury committed in the county of Wellington. *Ib.*

Held, also, that a recognizance to appear for trial on such charge at the Sessions was wrong, as that court has no jurisdiction in perjury, but a certiorari to remove it was refused, as the time for the appearance of the party had gone by. *Ib.*

The practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending, disapproved of. *Chadd* v. *Meagher*, 24 C. P. 54.

XXIX. Rape.

1. *The Offence.*

Having connexion with a woman under circumstances which induce her to believe that it is her husband, does not amount to a rape. *Regina* v. *Francis*, 13 Q. B. 116.

In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, e. g. that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape. *Regina* v. *Connolly*, 26 Q. B. 317.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral perception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented:—Held, that the conviction could not be sustained. *Ib.*

On an indictment for attempting to have connection with a girl under ten, consent is immaterial, but in such a case there can be no conviction for assault if there was consent. *Ib.*

The meaning of the words that the prisoner "violently and against her will feloniously did ravish," is, that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made the ravisher see and know that she really was resisting to the utmost, and in this case the evidence was Held sufficient to warrant a conviction. The facts, as they appeared in evidence, were left to the jury, who were also told that they must be satisfied before convicting that the prisoner had had connection with the prosecutrix "with force and violence and against her will;" and further, that "some resistance should be made on the part of the woman, to shew that she really was not a consenting party:"—Held, a proper and full direction. *Regina* v. *Fick*, 16 C. P. 379.

XXX. Riot.

Defendant was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault:—Held, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of riot or joining in an unlawful assembly. *Regina* v. *Kelly*, 6 C. P. 372.

XXXI. Sacrilege.

An indictment for breaking into a church and stealing vestments, &c., there, describing the goods stolen as the property of "the parishoners of the said church:"—Held, bad. *Regina* v. *O'Brien*, 13 Q. B. 436.

They must be averred to belong to some person or persons individually. Such a defect is not within the 18 Vict. c. 92, ss. 25, 26. *Ib.*

XXXII. Treason.

The estate of a traitor concerned in the rebellion of 1837, and who accepted the benefit of the 1 Vict. c. 10, is at once vested in the crown under the 33 Hen. VIII. c. 20, s. 2, without office found. *Doe* d. *Gillespie* v. *Wixon*, 5 Q. B. 132.

XXXIII. Other Offences.

Semble, that the treasurer of a municipality may be indicted for an appropriation of the funds clearly contrary to law, even though sanctioned by a resolution of the council. *Municipality of East Nissouri* v. *Horseman*, 16 Q. B. 576.

Semble, that the treasurer of a municipality might be indicted for paying a member of the council for his attendance. *Ib.* See, also, *Daniels* v. *The Municipal Council of the Township of Burford*, 10 Q. B. 478.

The statute 5 & 6 Edw. VI. c. 16, against buying and selling of offices, is in force in this country under the 40 Geo. III. c. 1, as part of the criminal law of England. Any act done in contravention of that statute is indictable, though not specially made so. Quære, per Robinson, C. J., whether it is also introduced by the 32 Geo. III. c. 1, which adopts the law of England "in all matters of controversy relative to property and civil rights." The 49 Geo. III. c. 126, clearly extends the 5 & 6 Edw. VI. to Upper Canada, and to the office of sheriff. Foott v. Bullock, 4 Q. B. 480, confirmed. *Regina* v. *Mercer*, 17 Q. B. 602; *Regina* v. *Moodie*, 20 Q. B. 389.

The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500 and an annuity of £300 a year if he would resign; R. accordingly placed his resignation in defendant's hands. The £500 was paid and certain lands conveyed to secure the annuity; and it was further agreed that in the event of the resignation being returned, and R. continuing to hold the office, the money should be repaid and the land reconveyed; but R. did not undertake in any way to assist in procuring the appointment for defendant. The defendant having been appointed by the government in ignorance of this agreement, an information was filed against him and sci. fa. brought to cancel his patent:—Held, an illegal transaction within 5 & 6 Edw. VI., and that an information might be sustained under that act without reference to the 49 Geo. III., which clearly prohibited and made it a misdemeanour. *Regina* v. *Mercer*, 17 Q. B. 602.

Semble, that the agreement would also have been an offence at common law. The ignorance of the government, which was averred in the information, as to the illegal agreement, was immaterial. *Ib.*

XXXIV. Procedure and Practice.

1. *Indictment.*

[See, also, the different crimes.]

(a) *Venue.*

The attempt to procure a woman to make a false affidavit, consisted of a letter written by defendant, dated at Bradford, in the county of Simcoe, purporting, but not proved, to bear the Bradford post mark, and addressed to the woman at Toronto, where she received it:—Held, that the case could be tried at York. Semble, per Draper, C. J., if the post mark had been proved, and the letter thus shewn to have passed out of defendant's hands in Simcoe, intended for the woman, the offence would have been complete in that county, and the indictment only triable there. Per Hagarty, J., the defendant in that case would still have caused the letter to be received in York, and might be tried there. *Regina* v. *Clement*, 16 Q. B. 297.

Held, that 32 & 33 Vict. c. 29, s. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure. *Regina* v. *McLeod*, 5 P. R. 181.—C. L. Chamb.—Galt.

Held, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this province has authority to enquire into offences committed on said lakes although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.—C. L. Chamb.—A. Wilson.

See *Regina* v. *Hennessy*, 35 Q. B. 603, p. 925.

(b) *Joinder of Counts and Defendants.*

An indictment charging a misdemeanor against a registrar and his deputy jointly is good if the facts establish a joint offence. A deputy is liable to be indicted while the principal legally holds the office, and even after the deputy himself has been dismissed. *Regina* v *Benjamin*, 4 C. P. 179.

Where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting:—Held, that they might be jointly convicted. *Regina* v. *Tisdale et al.*, 20 Q. B. 272.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour, as counts, to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32 & 33 Vict. c. 29, s. 32; and where there has been a demurrer to such allegations as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, the Court of Error will not reopen the matter on the suggestion that there is misjoinder of counts. *Regina* v. *Mason*, 22 C. P. 246.

The prisoner in this case was indicted on two sets of counts, one charging him as a citizen of the United States, the other as a subject of her Majesty. The learned judge at the trial refused to put the crown to an election between the two

sets of counts, and the court upheld his ruling. *Regina* v. *School*, 26 Q. B. 212.

Where an indictment contains one count for larceny, and allegations in the nature of counts for previous convictions for misdemeanors, and the prisoner, being arraigned on the whole indictment, pleads "not guilty," and is tried at a subsequent Assize, when the count for larceny only is read to the jury:—Held, no error, as the prisoner was only given in charge on the larceny count. *Regina* v. *Mason*, 22 C. P. 246.

(c) *Statement of Ownership of Property.*

Where an indictment charged defendant with procuring certain persons to cut trees, the property of A., B., and C., growing on certain land belonging to them, and the evidence shewed that the land belonged to them and to another as tenants in common:—Held, that a conviction could not be supported. *Regina* v. *Quinn*, 29 Q. B. 158.

See *Regina* v. *Bullock*, 19 Q. B. 513, p. 912; *Regina* v. *Maxsey*, 13 C. P. 484, p. 924; *Regina* v. *Dessauer*, 21 Q. B. 231, p. 912; *Regina* v. *O'Brien*, 13 Q. B. 436, p. 922; *Regina* v. *Jackson*, infra.

(d) *Copy of.*

[See 32 & 33 c. 29, s. 47, D.]

A copy of an indictment for high treason may be had by the consent of the attorney-general. *Rex* v. *McDonel*, Tay. 299.

Semble, that a person tried for felony and acquitted, can only obtain a copy of the indictment and record of acquittal, to be used in an action for malicious prosecution, on the fiat of the attorney-general; and the granting or refusing such application cannot be reviewed by this court. The application here was for a rule calling on the attorney-general to shew cause why judgment of acquittal should not be entered on the indictment:—Held, that the indictment not being a record of this court, or brought into it by certiorari, the court had no jurisdiction. *Regina* v. *Ivy*, 24 C. P. 78.

(e) *Amendment of.*

The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age: that his father was dead, and the goods were bought with the proceeds of his father's estate: that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection taken the indictment was amended, by stating the goods to be the property of the mother, and no further evidence of her administrative character was given, the County Court judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury. On a case reserved:—Held, 1. That there was ample evidence of possession in R. M. to support the indictment without amendment; 2. That the judge had power to amend under C. S. C. c. 99, s. 78; 3. That the conviction on the amended indictment could not be sustained, there being no evidence of the mother's representative character; nor any question of ownership by her, apart from such character, left to the jury. *Regina* v. *Jackson*, 19 C. P. 280.

Defendant was charged with having set fire to a building, the property of one J. H., "with intent to defraud." The case opened by the crown was that the prisoner intended to defraud several insurance companies, but the legal proof of the policies was wanting, and an amendment was allowed by striking out the words with "intent to defraud." The evidence shewed that different persons were interested as mortgagees of the building, a large hotel, and J. H. as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested. They found a verdict of guilty:—Held, that the amendment was authorized and proper, and the conviction was warranted by the evidence. *Regina* v. *Cronin*, Q. B. H. T. 1875. Not yet reported.

The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shewn on the trial. *Ib.*

"The merits of the case," with reference to amendments, under 32 & 33 Vict. c. 29 s. 71, means the justice of the case as regards the guilt or innocence of the prisoner; and "his defence on such merits" means a substantial and not a formal or technical defence. *Ib.*

See *Cornwall* v. *Regina*, 33 Q. B. 106, p. 938.

(f) *Other Cases.*

In an indictment charging the prisoner with stealing bank bills, the words, "of the moneys goods, and chattels," may be rejected as surplusage. *Regina* v. *Saunders*, 10 Q. B. 544.

As to the averment, "contra formam statuti," see *Regina* v. *Deane*, 10 Q. B. 464; *Regina* v. *Walker*, 10 Q. B. 465; *Regina* v. *Cummings*, 16 Q. B. 15; *Regina* v. *Carson*, 14 C. P. 309.

[By 32 & 33 Vict. c. 29, s. 23, no indictment shall be held insufficient for the omission of these words.]

An indictment alleged a nuisance to be near lot 16, and the evidence shewed it to be on it:—Held, a fatal variance. *Regina* v. *Meyers*, 3 C. P. 305.

Held, that the indictment for false pretences, in this case, was clearly sufficient, as it followed exactly the form sanctioned by 18 Vict. c. 92. *Regina* v. *Davis*, 18 Q. B. 180.

The production of the original indictment is insufficient to prove an indictment for felony; but a record must be made up, with a proper caption. *Henry* v. *Little*, 11 Q. B. 296.

Variance between indictment and proof in description of land. *Regina* v. *Baby*, 12 Q. B. 346.

The indictment charged one B. with obtaining by false pretences, from one J. T., two horses, with intent to defraud, and that the defendant was present aiding and abetting the said B. the misdemeanor aforesaid to commit:—Held, good, defendant being charged as a principal in the second degree:—Held, also, that the evidence, set out in the case, was not sufficient to sustain the charge. *Regina* v. *Connor*, 14 C. P. 529.

The indictment charged that the defendant "did receive, conceal, *or* assist" one W., a deserter from the navy. Semble, not sufficiently certain and precise. *Regina* v. *Patterson*, 27 Q. B. 142.

The court will not arrest judgment after verdict, or reverse judgment in error, for any defect patent on the face of the indictment, as by 32 & 33 Vict. c. 29, s. 32, objection to such defect must be taken by demurrer or by motion to quash the indictment. *Regina* v. *Mason*, 22 C. P. 246.

An indictment describing an offence within 32 & 33 Vict. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict. *Ib.*

2. *Plea of Autrefois Acquit.*

The prisoner being indicted under C. S. U. C. c. 98, and charged as a citizen of the U. S., was acquitted on proving himself to be a British subject. He was then indicted as a subject of Her Majesty, and pleaded autrefois acquit:—Held, that the plea was not proved, for that by the statute the offence in the case of a foreigner and a subject is substantially different, the evidence, irrespective of national status, which would convict a foreigner, being insufficient as against a subject; and the prisoner therefore was not in legal peril on the first indictment. *Regina* v. *Magrath*, 26 Q. B. 385.

See *Regina* v. *Smith*, 34 Q. B. 552. p. 905.

3. *Summary Trial before County Judge.*

The plaintiff in error, having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one B. without authority, with intent to transport him out of Canada against his will, was, on the 24th June, 1872, brought before the county judge, by whom he consented to be tried under the 32 & 33 Vict. c. 35. In the record drawn up under that statute, it was charged that he did feloniously and without authority, forcibly seize and confine one B. within Canada, &c., (without alleging any intent,) and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The judge fixed the 3rd of July for the trial, and on that day the prisoner said he was ready, but upon the request of counsel for the crown the trial was postponed till the 15th of July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the judge, changing the name of R. B. to J. R. B. In the notice required from the sheriff to the judge by 32 & 33 Vict. c. 35, s. 2, only the charge contained in the second count of the indictment was referred to. On errors being assigned,—Held, that the Sessions had jurisdiction over the offence, and so the county judge had power to try it. Held, also, that the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed it should have been; and that the judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment. Held, also, that the judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment. By 32 & 33 Vict. c. 20, s. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent" to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada against his will, or to be sold or captured as a slave, is guilty of felony:—Held, Wilson, J., diss., that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping; and that the first count, therefore, was defective in not stating any intent. Upon this ground the judgment was reversed, and under C. S. U. C. c. 113, s. 17, the record was remitted to the judge to pronounce the proper judgment, which would be upon the second count only. Held, also, that the amendment was authorized, under 32 & 33 Vict. c. 29, ss. 1 and 71, D. Held, also, that the court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error. Held, also, no objection that the jurisdiction conferred by 32 & 33 Vict. c. 35, was not shewn, for the record and judgment were in the form prescribed by that act. Held, also, that the sheriff's notice was sufficient, as 32 & 33 Vict. c. 35, s. 2, requires it only to state the "nature of the charge" preferred against the prisoner. The prisoner having been sent to the penitentiary, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 Q. B. 106.

4. *Other Cases.*

A writ of exigi facias will be awarded by the Court of Queen's Bench upon the application of a prosecutor without its being applied for by the attorney-general. *Rex* v. *Elrod*, Tay. 120.

Where, in an action on the case for a malicious prosecution, it was alleged in the declaration that the trial of the indictment took place before a Court of Oyer and Terminer, and the indictment was at general gaol delivery:—Held, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Prowdfoot*, E. T. 3 Vict.

On an indictment for nuisance in obstructing a highway, judgment had been arrested, and a second trial had, in order to take the opinion of the jury on a particular question which the court thought material. The jury upon the second trial found a general verdict of acquittal, without answering such question, which was submitted to them by the judge. The indictment had not been removed by certiorari, and Held, therefore, that this court could not interfere by staying the entry of judgment until a new indictment could be preferred. Semble, that the jury had a right to find generally as they did. *Regina* v. *Spence*, 12 Q. B. 519.

Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case. *Regina* v. *Hambly*, 16 Q. B. 617.

An indictment having been held bad upon demurrer, the judgment was that the indictment be quashed, so that another indictment might be

preferred, not that defendants be discharged. *Regina* v. *Tierney et al.*, 29 Q. B. 181.

The plaintiff in error having been committed to gaol for trial on a charge of unlawfully and forcibly kidnapping and taking one B. without authority, with intent to transport him out of Canada against his will, was, on the 24th of June, 1872, brought before the county judge, by whom he consented to be tried under the 32 & 33 Vict. c. 35. In the record drawn up under that statute, it was charged that he did feloniously, and without authority, forcibly seize and confine one B. within Canada, &c., (without alleging any intent; and that he did afterwards feloniously kidnap one B. with intent to cause the said B. to be unlawfully transported out of Canada against his will, &c. The judge fixed the 3rd of July for the trial, and on that day the prisoner said he was ready, but upon request of counsel for the crown the trial was postponed until the 15th of July, when the prisoner was found guilty on both counts. An amendment of the indictment was allowed by the judge, changing the name of Rufus Bratton to James Rufus Bratton. In the notice required from the sheriff to the judge, by 32 & 33 Vict. c. 35, s. 2, only the charge contained in the second count of the indictment was referred to. On errors being assigned:—Held, 1. that the sessions had jurisdiction over the offence, and so the county judge had power to try it; 2. that the record was properly framed, in stating the offence charged in such form as the depositions or evidence shewed it should have been; and that the judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment; 3. that the judge had power to postpone the trial, and the record was not defective in not stating the cause of the adjournment. *Cornwall* v. *Regina*, 33 Q. B. 106.

By 32 & 33 Vict. c. 20, s. 69, under which the charge was made, "Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent to cause such person to be secretly confined or imprisoned in Canada, or to be unlawfully sent or transported out of Canada, against his will, or to be sold or captured as a slave, is guilty of felony:—Held, Wilson, J., diss., that the intent required applied to the seizure and confinement in Canada, as well as to kidnapping, and that the first count, therefore, was defective in not stating any intent. Upon this ground the judgment was reversed, and under C. S. U. C. c. 113, s. 17, the record was remitted to the judge to pronounce the proper judgment, which would be upon the second count only:—Held, 1. that the amendment was authorized, under 32 & 33 Vict. c. 29, secs. 1 and 71, D.; 2. that the court would not presume that the two counts referred to the same offence, and if it were so, duplicity would not be a ground of error; 3. no objection that the jurisdiction conferred by 32 & 33 Vict. c. 35, was not shewn, for the record and judgment were in the form prescribed by that Act; 4. that the sheriff's notice was sufficient, as 32 & 33 Vict. c. 35, s. 2, requires it only to state the "nature of the charge" preferred against the prisoner. The prisoner having been sent to the penitentiary, a habeas corpus was ordered to bring him up to receive the proper judgment. *Ib.*

XXXV. Jury.

1. *Summoning.*

By proclamation published on the 15th December, 1866, the county of Peel was separated from York from and after the 1st of January, 1867. On the 23rd of November preceding, the usual precept had been sent to the sheriff of the united counties for the winter Assizes for York, to be held on the 10th January, 1867, and the sheriff returned his panel to that precept, containing fifty-four jurors from York and thirty from Peel. Only those from York, however, attended, and the prisoner was tried by a jury de medietate, including six of these jurors, upon an indictment found and pleaded to at the previous Assizes in October. On motion for a new trial, or venire de novo, because the precept and panel should have been for York only, not for the united counties:—Held, per Draper, C. J., that the objection, if available at all, must be taken by writ of error. Per Hagarty, J., no objection would lie. *Regina* v. *Kennedy*, 26 Q. B. 326.

It was objected, on error, to the record of judgment on a conviction for murder, that the only authority shewn being that of Oyer and Terminer, the award "therefore let a jury thereupon immediately come," was unauthorized, and a special award of venire facias was requisite but—Held, assuming, but not admitting, that in England there is a difference in this respect between the power of justices of Oyer and Terminer and of Gaol Delivery, and that the record shewed no authority to deliver the gaol—that in this country, by the jury act, C. S. U. C. c. 31, both have the same powers, the general precept to summon a jury being issued by both before the Assizes. *Whelan* v. *Regina*, 28 Q. B. 2.

2. *Challenges.*

Upon the trial of a party indicted for misdemeanor, the crown has a right to cause jurors to stand aside until the whole panel is gone through. *Regina* v. *Benjamin*, 4 C. P. 179.

Upon an indictment for conspiracy to procure by fraud the return of one F. as a member for the legislative assembly:—Held, that the crown was entitled to challenge any of the jurors peremptorily, without assigning a cause, until the panel had been exhausted. *Regina* v. *Fellowes*, 19 Q. B. 48.

Upon a trial for murder, after the usual notice of right of challenge, two jurymen were sworn without challenge. J. H. was then called, and a person came forward and was sworn. Others were called and challenged; and after another was called and sworn without challenge, the prisoner's counsel objected to J. H., as he was a witness in the case. Upon enquiry he was found not to be the person intended to be called on the jury, being not only a witness, but not a resident in the counties, and therefore not qualified as a juryman. Upon consent of counsel for the crown and prisoner, he was allowed to retire, and others were called and sworn, the prisoner exercising the right to challenge, till the jury was chosen. After conviction, upon motion for a new trial,—Held, 1. That J. H. (improperly sworn) was legally discharged from the jury; 2. That the right of challenge as to those previously

sworn was not thereby reopened, their reswearing not being rendered necessary ; 3. That the prisoner was properly tried by the twelve, although thirteen were sworn to try him. *Regina* v. *Coulter*, 13 C. P. 299.

On a trial for murder the prisoner desired to challenge one S., one of the jurors called, for favour, alleging sufficient cause. The judge ruled that he must first exhaust his peremptory challenges, and this point was raised by plea and demurrer, and formally decided. The entry on the record then was, that in deference to the judgment the challenge was taken and treated by the prisoner, and by the attorney-general, as a peremptory challenge for and on behalf of the prisoner. Afterwards, having exhausted his twenty challenges, including S., he claimed to challenge peremptorily one H., contending that by the erroneous ruling he had been compelled to challenge S. peremptorily, and should not be obliged to count him as one of the twenty. This was also entered of record and decided against him :—Held, 1. That the prisoner was entitled to challenge for cause before exhausting his peremptory challenges ; that error would lie for the refusal of this right ; and that had S. been sworn there must have been a venire de novo ; but, Held, also, 2. Morrison, J., diss., that by the peremptory challenge of S., which excluded him from the jury, the first ground of error was removed ; and that error on the second challenge could not be supported, for the prisoner had in fact had twenty peremptory challenges, and the peremptory challenge of S. being in deference to the ruling of the judge did not make it the less a peremptory challenge. *Whelan* v. *Regina*, 28 Q. B. 2.

The above judgment, on error, affirmed.—Van Koughnet, C., Hagarty, C. J. C. P., Spragge, V. C., and Morrison, J., diss. *Whelan* v. *Regina*, 28 Q. B. 108.

The 37 Vict. c. 38, s. 11, enacts that the right of the crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel :"—Held, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels ; and that the fact of the prosecution being conducted by a counsel appointed by and representing the attorney-general would make no difference. *Regina* v. *Patteson*, Q. B. M. T. 1874. Not yet reported.

The judge, at the trial, allowed the crown counsel in such a case to direct jurors to stand aside, but, after the verdict, entertaining doubts, he reserved a case for the opinion of this court as to the propriety of his having permitted it :—Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute. *Ib.*

XXXVI. Evidence.

[See, also, the different headings.]

1. *Confessions and Admissions.*

Held, that statements made by a prisoner to the parties who arrested him, he having been previously told on what charge he was arrested, were evidence. *Regina* **v.** *Tufford*, **8 C. P. 81.**

The prisoner was convicted of arson. His admission or confession was received in evidence on the testimony of the constable, who said that after the prisoner had been in a second time before the coroner, he stated there was something more he could tell, whereupon the constable cautioned him not to say what was untrue. He then confessed the charge. The constable did not recollect any inducement being held out to him. There was also evidence that on the third day of his incarceration he expressed a wish to the coroner to confess, on which the latter gave him the ordinary caution, that anything he said might be used against him, and not to say anything unless he wished. He then made a second statement, and after an absence of a few minutes returned and made a full confession :—Held, that on these facts appearing, the statement made to the constable was primâ facie receivable, and that the judge was well warranted in receiving as voluntary the confession made to the coroner after due warning by him. *Regina* v. *Finkle*, 15 C. P. 453.

Semble, however, that the more reasonable rule to adopt in such cases is, that notwithstanding the caution of the magistrate, it is necessary in the case of a second confession, not merely to caution the prisoner not to say anything to injure himself, but to inform him that the first statement cannot be used against him. But in this case, it having afterwards appeared that the prosecutor had offered direct inducements to the prisoner to confess :—Held, that if the judge was satisfied that the promise of favour thus held out had induced the confessions, and continued to act upon the prisoner's mind, notwithstanding the warning of the coroner, he was right in directing the jury to reject them. *Ib.*

Held, also, that if the judge suspected the confessions had been obtained by undue influence, such suspicion should have been removed before he received the evidence. It is a question for the judge whether or not the prisoner has been induced by undue influence to confess. *Ib.*

Semble, that when the names of other prisoners are mentioned in the confession, the proper course is to read the names in full, but to direct the jury not to pay any attention to them. *Ib.*

The prisoner, after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused, the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appear to have been voluntarily made, uninfluenced by either hope or threat ; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case :—**Held, following Regina** *v.* **Finkle, 15 C. P. 453, that both the information and deposition were properly received in evidence, as being statements voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that too, though made under oath.** *Regina* **v.** *Field*, **16 C. P. 98.**

The rule of law excluding the sworn statements of a prisoner under examination apply only to his examination on a charge against himself, and not when the charge was against another; for in the latter case, a prisoner is not obliged to say anything against himself, but if he volunteer such a statement, it will be admissible in evidence against him. Explanation of the principle on which the statement of a prisoner under oath is excluded. *Ib.*

Remarks as to evidence of confessions, and an objection that the whole statement was not given. *Regina* v. *Jones*, 28 Q. B. 416.

See *Regina* v. *Slavin*, 17 C. P. 205, p. 917.

2. *Depositions.*

At a trial for murder the prisoner's counsel proposed to prove by witness his own deposition at the inquest, and to shew by other witnesses that it contained a true statement of his evidence, although the witness alleged it to be incorrect. The learned judge ruled that the coroner must be called to prove the depositions. He was afterwards called to prove them, and the evidence before offered was not again tendered: Semble, that the ruling as to proof of the depositions was right, they having been taken before a coroner; but—Held, that the point became immaterial when they were afterwards proved in accordance with it; and that it must be assumed that it was not intended to adduce the other evidence. *Regina* v. *Hamilton*, 16 C. P. 340.

The object of taking depositions is not to afford information to the prisoner, but to secure the testimony. *Ib.*

3. *Competency of Witnesses.*

The defendant on his trial upon an indictment cannot give evidence for himself, nor can his wife be admitted as a witness. *Regina* v. *Humphreys*, 9 Q. B. 337.

Where no evidence appears against one of several prisoners, he ought to be acquitted at the close of the prosecutor's case. Quære, whether without such formal acquittal he may be called as a witness for his co-prisoner. Semble, not, unless it appear that he has been joined in order to exclude his testimony. It is in the discretion of the judge at the close of the prosecution to submit such prisoner's case separately to the jury; but he is not bound to do so, and whether he has rightly exercised his discretion or not, cannot be reserved as a point of law:—Held, that in this case (being an indictment for arson) it could not be said that there was no evidence against E. H., one of the prisoners; and Semble, that under the circumstances he could not be called as a witness for the other. *Regina* v. *Hambly et al.*, 16 Q. B. 617.

Four prisoners being indicted together for robbery, one severed in his challenges from the other three, who were first tried;—Held, that he was a competent witness on their behalf. *Regina* v. *Jerrett et al.*, 22 Q. B. 499.

4. *Accomplices.*

A conviction of a prisoner for horse-stealing, upon the uncorroborated evidence of an accomplice, was held legal, although the judge did not caution the jury as to the weight to be attached to the evidence. *Regina* v. *Beckwith*, 8 C. P. 274.

Semble, that a conviction on an indictment for conspiracy to procure by fraud the return of one F. to the Legislative Assembly upon the evidence of an accomplice not corroborated by other testimony, is not illegal; but, Held, that in this case such evidence was clearly confirmed, and that the verdict against all the defendants was warranted. *Regina* v. *Fellowes et al.*, 19 Q. B. 48.

When the jury have been cautioned as to acting upon the unconfirmed testimony of accomplices, no fault can be found with the admission of their evidence. *Regina* v. *Seddons*, 16 C. P. 389.

In this case being an indictment for soliciting P. and S. to steal money of the Gore Bank, the jury were told that the testimony of the accomplices was not sufficiently corroborated to warrant a conviction, whereupon they came into court stating that they thought the prisoner guilty, but that he ought not to be convicted on the evidence. They were then told that they ought to acquit; but after a short interval they returned a verdict of guilty. Before recording their finding, the presiding judge recommended them not to convict on the evidence, saying, however, that they could do so if they thought proper; they nevertheless adhered to their verdict:—Held, no ground for a new trial. *Ib.*

5. *Other Cases.*

An indictment alleged a nuisance to be near lot 16, and the evidence shewed it to be on it:—Held, a fatal variance. *Regina* v. *Meyers*, 3 C. P. 305.

A witness for the crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel. He admitted such statement when shewn to him, but said it was all untrue, and made to save himself. Per Wilson, J.—The prosecutor's counsel was properly admitted to disprove the witness's assertion as to how the statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution and was therefore not a collateral matter, but relevant. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. *Regina* v. *Jerrett et al.*, 22 Q. B. 499.

A writ of habeas corpus ad testificandum may be issued to the warden of the provincial penitentiary to bring a convict for life before a Court of Oyer and Terminer and General Gaol Delivery, to give testimony on behalf of the crown in a case of murder. *Regina* v. *Townsend*, 3 L. J. 184.—C. L. Chamb.—Burns.

Whenever a joint participation in an enterprise is shewn, any act done in furtherance of the common design is evidence against all who were at any time concerned in it. In this case, the prisoner being charged with being in arms in Upper Canada with intent to levy war against the Queen, evidence was admitted against the

prisoner of an engagment between the body of men with whom he had been and the Canadian volunteers, although the same took place several hours after his arrest :—Held, that the evidence had been properly received, as shewing to some extent that the engagement in question had been contemplated by the parties while the prisoner was with them before his arrest. *Regina* v. *Slavin*, 17 C. P. 205.

On a trial for murder, the crown having made out a prima facie case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter :—Held, that the learned judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them ; and if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge. *Regina* v. *Jones*, 28 Q. B. 416.

C. S. U. C. c. 52, s. 73, empowers any justice of the peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a mutual insurance company is interested, and to administer to him the requisite oath. Upon an indictment for perjury assigned upon an affidavit made in compliance with one of the conditions of a policy,—Held, that the policy must be produced, although the defendant's affidavit referred to the policy in such a way that its existence might be fairly inferred. *Regina* v. *Gagan*, 17 C. P. 530.

As to certain threats alleged to have been uttered by the prisoner :—Held, that they were clearly admissible, and if undue prominence was given to them in the charge, the attention of the learned judge should have been called to it by the prisoner's counsel. *Ib.*

Remarks as to alleged misdirection, in not directing that the jury must be satisfied not only that the circumstances were consistent with the prisoner's guilt, but that some one circumstance was inconsistent with his innocence. *Ib.*

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions,—Held, that a medical witness, previously examined for the crown, was properly allowed to be recalled to state that, in his opinion, the injuries found on the body could not have been so occasioned. *Ib.*

Remarks as to the effect in criminal cases of a belief by the jury that false evidence has been fabricated for the prisoner, or false answers to questions. *Ib.*

Where an indictment charged defendant with procuring certain persons to cut trees, the property of A., B., and C., growing on certain land belonging to them, and the evidence shewed that the land belonged to them and to another as tenants in common :—Held, that a conviction could not be supported. *Regina* v. *Quinn*, 29 Q. B. 158.

The theory of the defence, on an indictment for murder, was that the death was caused by the communication of small pox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject :—Held, that he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. *Regina* v. *Sparham and Greaves*, C. P. E. T. 1875. Not yet reported.

XXXVII. New Trial.

[By 20 Vict. c. 61 (C. S. U. C. c. 113), a person convicted of any treason, felony, or misdemeanor, might apply for a new trial upon any point of law or a question of fact in as ample a manner as in a civil action. By 32 & 33 Vict. c. 29, s. 80, this act, so far as it authorizes any court to grant a new trial in any criminal case, is repealed. The decisions under the act while in force, are given here so far as they seem likely to be of value, and the others are referred to.]

The court has no power to order a new trial in a criminal case reserved under 14 & 15 Vict., c. 13; but only to decide upon any legal exceptions raised, and whether there was legal evidence to sustain the indictment, taking it in as strong a sense against the defendant as it will bear, and supposing the jury to have given credit to it to its full extent. *Regina* v. *Baby*, 12 Q. B. 346.

Quære, whether it is proper to grant a new trial, where an individual or a corporation has been once acquitted on an indictment, even in cases of misdemeanor. *Regina* v. *Grand Trunk R. W. Co.*, 15 Q. B. 121.

Where, after conviction for a capital offence, the proceedings were discovered to have been illegal, there having been no associate judge sitting in court during the trial, on motion on behalf of the crown (the prisoner not moving in any way), the indictment and conviction, with the prisoner, were brought up on certiorari and habeas corpus, and an order made setting aside all such proceedings, and remanding the prisoner to custody, with a view to a new trial. *Regina* v. *Sullivan*, 15 Q. B. 198.

Remarks, and review of authorities, as to granting new trials upon the evidence ; *Regina* v. *Chubbs*, 14 C. P. 32 ; *Regina* v. *McElroy*, 15 C. P. 116 ; *Regina* v. *Fick*, 16 C. P. 379 ; *Regina* v. *Hamilton*, 16 C. P. 340 ; *Regina* v. *Seddons*, 16 C. P. 389 ; *Regina* v. *Slavin*, 17 C. P. 205.

The court declined to receive affidavits as ground for such applications. See *Regina* v. *Crozier*, 17 Q. B. 275; *Regina* v. *Beckwith*, 8 C. P. 274 ; *Regina* v. *Fitzgerald*, 20 Q. B. 546 ; *Regina* v. *Chubbs*, 14 C. P. 32 ; *Regina* v. *Hamilton*, 16 C. P. 340.

It was held, affirming the judgment of the Common Pleas, that under the 20 Vict. c. 61, the court was not empowered to grant a new trial in criminal cases on any ground apart from what was done by either the court or the jury at the trial, such as the alleged discovery of new evidence, or a disappointment in obtaining witnesses. *Regina* v. *Gray*, 1 A. & E. 501.

The court was not authorized to grant a new trial on the discovery of new evidence, or for the misconduct of the jury. *Regina* v. *Oxentine*, 17 Q. B. 295.

Upon motion for a new trial upon an information for conspiracy tried at Nisi Prius upon a record from the Queen's Bench:—Held, that affidavits made by some of the jurors that the jury were not unanimous, but believed that the verdict of the majority was sufficient, could not be received as ground for new trial. *Regina* v. *Fellowes*, 19 Q. B. 48.

Where several defendants have been convicted, a new trial, if granted, must be to all. *Ib.*

Where points of law were reserved under the act, and the prisoner, besides relying upon them, moved for a new trial, the court refused to grant it, though the evidence was slight. *Regina* v. *Hambly*, 16 Q. B. 617.

On motion for a new trial by a prisoner convicted of murder on circumstantial evidence only, Morrison, J., who tried the case, expressed himself as not dissatisfied with the verdict, and Draper, C. J., having reviewed the evidence at length, came to the conclusion that there was enough to go to the jury, and that their finding upon it could not be declared wrong. Hagarty, J., held that under the statute a judge is called upon only to say whether there was evidence to go to the jury, not to express any opinion as to their verdict founded upon it. A new trial was therefore refused; and the court declined to grant leave to appeal. *Regina* v. *Greenwood*, 23 Q. B. 255.

Held, that the withholding from the court confessions made before the coroner, for fear that they would prejudice the prisoner, would render the application for a new trial irregular. *Regina* v. *Finkle*, 15 C. P. 453.

The court on the return of the rule refused to receive new affidavits, stating that the deceased had been seen alive after the date of the alleged murder, and thus setting up an entirely new case. *Regina* v. *Hamilton*, 16 C. P. 340.

One of the prisoner's counsel at the trial, whilst he was addressing the jury at the close of case, was suddenly seized with a fit and incapacitated from proceeding any further. No adjournment, however, was applied for, but the other, who was the senior counsel, continued the address to the jury on the prisoner's behalf, without raising any objection that he was placed at a disadvantage by reason of his colleague's disability; it did not, moreover, appear that the prisoner had been prejudiced by the absence of the counsel alluded to:—Held, no ground for a new trial. *Regina* v. *Fick*, 16 C. P. 379.

The rule is the same in criminal as in civil cases, at any rate where the prisoner is defended by counsel, that any objection to the charge of the presiding judge, either for non-direction or for misdirection, must be taken at the trial, and if not then taken, it cannot be afterwards raised, especially where the evidence fully sustains the verdict. *Ib.*

XXXVIII. Verdict, Judgment, and Sentence.

A criminal convicted at a Court of Oyer and Terminer of a capital felony, may be brought up to the Court of Queen's Bench for sentence. *Rex* v *Kenrey*, 5 O. S. 317.

A defendant indicted for a misdemeanour for obtaining money under false pretences, cannot under C. S. C. c. 99, s. 62, be found guilty of larceny. That clause only authorizes a conviction for the misdemeanour though the facts proved amount to larceny. *Regina* v. *Ewing*, 21 Q. B. 523.

Where a defendant on such an indictment had been found guilty of larceny:—Held, that the court had no power under C. S. U. C. c. 112, s. 3, to direct the verdict to be entered as one of "guilty," without the additional words. *Ib.*

On error brought, it was—Held, that on the record of a conviction for murder the authority of the justice sufficiently appeared, without any statement whether a commission had issued or been dispensed with by order of the governor; for such courts are now held, not under commission, but by virtue of the C. S. U. C. c. 11, as amended by 29 & 30 Vict. c. 40; and as the record sufficiently shewed the absence of any commission, it must be presumed that it seemed best to the governor not to issue one. Semble, that if the court had been held by a Queen's counsel or County Court judge, it might have been necessary to shew whether a commission had issued or not, as he would derive his authority from a different source in each of the two cases. Semble, also, that if the caption had been defective it might have been rejected altogether, under C. S. U. C. c. 99, s. 52. *Whelan* v. *Regina*, 28 Q. B. 2.

The crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *Desjardins Canal Co.*, 29 Q. B. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the crown not being bound by the 43 Geo. III. c. 1. *Ib.*

This court or a judge may at any time interfere, as exercising the powers of the Court of Exchequer, to restrain undue harshness or haste in the execution of such writ, although what is complained of may be strictly authorized. *Ib.*

Held, per J. Wilson, J., that the Imperial Mutiny Act does not override the C. S. C. c. 100, but that the latter was passed in aid of it, and is therefore in force. Per A. Wilson, J., that the punishment by fine *and* imprisonment, imposed by the provincial act, stands abolished as long as the Mutiny Act is in force, and that the imprisonment can in no case exceed six calendar months; but that the power of trial by the Court of Oyer and Terminer, under the provincial act, has not been taken away by the Mutiny Act; and therefore that the defendant in this case could not complain, as he had been tried by a tribunal of this kind, and sentenced to no longer imprisonment than the last mentioned period; and that though a fine of 10s. had also been imposed, for this was merely nominal, in compliance with the provincial statute, and would not entitle him to be discharged, as the court had power to pass the proper judgment, if an improper one had been given. *Regina* v. *Sherman*, 17 C. P. 166.

See *In re Bright*, 1 L. J. N. S. 240, p. 917; *Regina* v. *Tierney*, 29 Q. B. 181, p. 939; *Cornwall* v. *Regina*, 33 Q. B. 106, p. 939.

XXXIX. Error and Appeal.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 Q. B. 215.

The attorney-general refused his fiat for a writ of error in this case, upon objections taken to the indictment. *Regina* v. *Greenwood*, 23 Q. B. 256, note *a*.

Error, as distinguished from appeal, will lie in a criminal case from the Court of Error and Appeal to the Queen's Bench, and the writ of error may be as nearly as possibly in the form of a writ of appeal given by the orders of the court published in 1850. *Regina* v. *Whelan*, 28 Q. B. 108. See *S. C.* 28 Q. B. 2.

Appeals, under C. S. U. C. c. 13, s. 29, as distinguished from error, are in criminal cases confined to such as arise under the act respecting new trials in criminal cases, 20 Vict. c. 61, now C. S. U. C. c. 113. *Ib.*

The court will not arrest judgment after verdict, or reverse it in error, for any defect patent on the face of the indictment, as by 32 & 33 Vict c. 29, s. 32, such defect must be objected to by demurrer, or by motion to quash the indictment. *Regina* v. *Mason*, 22 C. P. 246.

Whether the Police Court is a court of justice within 32 & 33 Vict. c. 21, s. 18, or not, is a question of law which may be reserved by the judge at the trial, under C. S. U. C., c. 112, s. 1, and where it does not appear by the record in error that the judge refused to reserve such question it cannot be considered upon a writ of error. *Ib.*

29 & 30 Vict. c. 45 had in view and recognizes the right of every man committed on a criminal charge to have the opinion of the judge of the superior court upon the cause of his commitment by an inferior jurisdiction. *Regina* v. *Mosier*, 4 P. R. 64.—C. L. Chamb.—J. Wilson.

See *Regina* v. *Coulter*, 13 C. P. 299, p. 941; *Regina* v. *Kennedy*, 26 Q B. 326, p. 940; *Regina* v. *Mason*, 29 Q. B. 431, p. 931.

XL. Costs.

Upon an application for a rule to tax the costs of proceedings on an indictment for nuisance in obstructing a highway, under 5 & 6 Will. & Mary, c. 33, and that they should be allowed to a particular person, the court refused the rule. A wide bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina* v. *Gordon and Regina* v. *Robson*, 8 C. P. 58.

XLI. Bail.

The court refused to discharge a prisoner on a habeas corpus, charged with having murdered his wife in Ireland, communication having been made by the provincial to the home government on the subject, and no answer received, and the prisoner having been in custody less than a year; and bail in such a case will not be allowed until a year from the time of the first imprisonment, although no proceedings have been taken by the crown. *Rex* v. *Fitzgerald*, 3 O. S. 300.

A prisoner in custody for grand larceny may be admitted to bail. *Rex* v. *Jones*, 4 O. S. 18.

A prisoner charged with murder may in some cases be admitted to bail; and on such an application the court may look into the information, and if they find good ground for a charge of felony, may remedy a defect in a commitment, by charging a felony in it. *Rex* v. *Higgins*, 4 O. S. 83.

Although a statute may require the presence of three justices to convict of an offence, yet one has power to bail the offender; and a second arrest for the same charge, by the same complainant, before the time appointed for the hearing, is illegal. *King* v. *Orr*, 5 O. S. 724.

Held, (before the passing of 16 Vict. c. 179), that magistrates were not liable for refusing to admit to bail on a charge of misdemeanor in the absence of any proof of malice. *Conroy* v. *McKenney*, 11 Q. B. 439. See *McKinley* v. *Munsie*, 15 C. P. 230.

Where the prisoners were convicted at the sessions of felony, and a case reserved for the Queen's Bench, which had not been argued, the judge in chambers refused to bail except with the consent of the attorney-general. *Regina* v. *Sage*, 2 C. P. 138.—C. L. Chamb.—Robinson.

The guilt or innocence of a prisoner is not the question to decide on application for bail on a criminal charge. The seriousness of the charge, the nature of the punishment and evidence, and probability of the prisoner appearing to take his trial, are the important questions to be considered:—Held, where it was shewn that the prisoner attempted to bribe the constable to allow him to escape, that the probability of his appearing to take his trial was too slight for the judge to order bail. *Regina* v. *Byrnes*, 8 L. J. 76.—C. C. —Hughes.

Bail refused, although it was some months before a criminal court competent to try the case would sit. *Ib.*

On an application by prisoner in custody on a charge of murder, under a coroner's warrant, to be admitted to bail, it is proper to consider the probability of their forfeiting their bail if they know themselves to be guilty. Where in such case there is such a presumption of the guilt of the prisoners as to warrant a grand jury in finding a true bill, they should not be bailed. The fact of one assize having passed over since the committal of the prisoners, without an indictment having been preferred, is in itself no ground for bail. The application is one of discretion and not of right, the prisoners not having brought themselves within 31 Car. II. c. 2, s. 7, by applying on the first day of the assize to be brought to trial. *Regina* v. *Mullady et al.*, 4 P. R. 314.—C. L. Chamb.—Draper.

Where a prisoner applies to a judge in chambers to be admitted to bail for an indictable offence, under C. S. C. c. 102, s. 63, the copies of information, examination, &c., may be received, though certified by the county crown attorney, and not by the committing justice. *Regina* v. *Chamberlain*, 1 L. J. N. S. 157.—C. L. Chamb. —A. Wilson.

The evidence in this case warranted the magistrates in requiring bail. *Regina* v. *Mosier*. 4 P. R. 64.—C. L. Chamb.—J. Wilson.

Where a prisoner charged with felony had been admitted to bail upon an order of a judge, and an application was subsequently made to rescind such order, and to recommit the prisoner, on the grounds that he had not been committed for trial at the time such order was granted, and that the bail put in was fictitious:—Held, that a judge had power to make the order asked for; but the order in this case was conditional upon the failure of the prisoner to find new sureties within a specified time. *Regina* v. *Mason*, 5 P. R. 125.—C. L. Chamb.—Morrison.

XLII. Miscellaneous Cases.

A writ of exigi facias will be ordered by this court upon the application of the prosecutor, without its being applied for by the attorney-general. *Rex* v. *Elrod*, Tay. 120.

A bench warrant issued at the Quarter Sessions, tested in open sessions, and signed by the clerk of the peace:—Held, not invalid for want of a seal. *Fraser* v. *Dickson*, 5 Q. B. 231.

A proceeding by sci. fa. on a recognizance to keep the peace is a civil, not a criminal, proceeding. *Regina* v. *Shipman*, 6 L. J. 19.—C. L. Chamb.—Robinson.

The offence of possessing distilling apparatus without having made a return thereof, contrary to the Inland Revenue Act, 31 Vict. c. 8, s. 130, is a "crime." *Re Lucas and McGlashan*, 29 Q. B. 81.

The legislature of Ontario having passed an act to regulate tavern and shop licenses, 32 Vict. c. 32, under the power given to them by the B. N. A. Act, 1867, s. 92, sub-ss. 9, 16:—Held, that they had power under sub-s. 15 to enact that any person who, having violated any of the provisions of the act, should compromise the offence, and any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, sub-s. 27, by which the criminal law is assigned exclusively to the Dominion parliament. *Regina* v. *Boardman*, 30 Q. B. 553.

Lawful acts of war against a belligerent cannot be either commenced or concluded in neutral territory. *In re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.—Richards.

The schedule appended to C. S. U. C. c. 120, was not intended to embrace all the expenses of criminal justice chargeable against the government, but only to remove all doubt as to those specified. *The Corporation of the County of Lambton* v. *Poussett*, 21 Q. B. 472.

A coroner's jury found the cause of a death into which they were enquiring, to have been disease, adding that it was accelerated by an overdose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F. as a cholera preventative; and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing. This inquisition having been brought up by certiorari, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indictable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference. Quære, whether the affidavits were properly entitled The Queen, plaintiff, v. Robert Farley, defendant. *Regina* v. *Farley*, 24 Q. B. 384.

Held, that the great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this province has authority to enquire into offences committed on said lakes, although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.—C. L. Chamb.—A. Wilson.

Returns of convictions and fines for criminal offences being governed by the Dominion statute 32 & 33 Vict. c. 31, s. 76, and not by the Law Reform Act of 1868, are only required to be made semi-annually to the General Sessions of the peace. *Clemens* q. t. v. *Bemer*, 7 L. J. N. S. 126.—C. C.—Hughes.

Semble, that the right to legislate upon this subject, belongs to the Dominion parliament, and is not conferred upon the provincial legislature by the B. N. A. Act, 1867. *Ib.*

The owner of the shop is criminally liable for any unlawful act done therein, in his absence, by clerk or assistant; as, for instance, in this case, for the sale of liquor without license by a female attendant. Secus, semble, if it appeared that the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business. *Regina* v. *King*, 20 C. P. 246.

CROPS.

I. Rights of Tenants—*See* Landlord and Tenant.

A party purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field. *Haydon* v. *Crawford*, 3 O. S. 583.

Liberum tenementum to a declaration in trespass q. c. f., and for carrying away the plaintiff's hay and corn, is bad on demurrer. *Wilcox* v. *Montgomery*, 5 O. S. 312.

Where the owner of a lot of land encroached upon an adjoining lot belonging to the crown, and took three successive crops off it without any permission from the crown, and another person who had taken possession of the same land also without license about ten years before, and paid taxes and made clearings on it, warned off the owner of the other lot after he had taken the third crop, and then cropped the land himself:—Held, that the owner of the adjoining lot had no property nor possession to maintain trespass against him for that crop. *Killichan* v. *Robertson*, 6 O. S. 468.

Where a devise was made to the plaintiff of half the fruit which might grow on a certain farm devised to another party, and the latter gathered the whole of the fruit and disposed of it for his own use:—Held, that an action of trover could be maintained. *Taylor* v. *Nugent*, 6 O. S. 549.

Where the plaintiff and defendant being each possessed of a farm agreed to work them together and divide the profits arising from them at the end of the season, and before the harvest defendant was dispossessed of his farm by ejectment, and the plaintiff thereupon gave him notice that he would not divide his crops with him, notwithstanding which the defendant entered the plaintiff's farm and took away his share of the crop:—Held, that the plaintiff could not maintain trespass against him. *Wemp* v. *Mormon*, 2 Q. B. 146.

Where a mortgagor in possession, after default made in payment of the mortgage money, received a letter from the mortgagee, who was in a foreign country, directing him to put a spring crop into the land, unless he came into the country in time for the mortgagor to remove in the spring, and he did not come until the summer:—Held, that notwithstanding the relation between the parties of mortgagor and mortgagee, the defendant could not be turned out of possession of the land while crops were growing, nor without a demand of possession. *Doe* d. *Patterson* v. *Brown*, H. T. 6 Vict.

In trover for wheat reaped and claimed by the defendants as of right belonging to them, as an away-going crop after the expiration of a lease for seven years, the plaintiff's witnesses proved a new lease in writing of the premises to a third party, from the expiration of the defendants' lease, but the new tenant swore that he had no right to the crop:—Held, that it was not necessary for the plaintiff to produce the new lease. *Burrowes* v. *Cairns et al.*, 2 Q. B. 288.

Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to customary right of the away-going crops is excluded. *Ib.*

Semble, that there is no custom of the country as to the away-going crops in Upper Canada. *Ib.*

Plaintiff and defendant owned adjoining lots with a fence between them supposed to be on the division line. A correct line was, however, run, and defendant was found to be encroaching some acres on the plaintiff. The plaintiff took possession of the disputed piece under a protest from the defendant, and cultivated it. When the crop was fit to cut, the defendant entered and took it away:—Held, that the plaintiff had such a possession as would enable him to maintain trespass. *Gallagher* v. *Brown*, 3 Q. B. 350.

A., living abroad, sends to an agent in this province to purchase a lot of land for B., who was living in the province, and to take the conveyance to himself, A. This is done, and B. is put in possession of the land, who from thenceforth uses and cultivates for his own benefit. At the time of purchase a crop of wheat was in the ground:—Held, that B., and not A., should sue in trespass for cutting and carrying away the wheat. *Campbell* v. *Cushman*, 4 Q. B. 9.

Quere, did the property in the wheat belong to A. or B. *Ib.*

Trespass to the south parts of lots 14 & 15, and taking and converting wheat and straw of the plaintiff. Plea, leave and license generally. In support of this plea, defendants proved a deed made by plaintiff, 20th February, 1846, whereby, in consideration of £28 received from defendant T., he bargained and sold to him, among other things specified, twenty acres of wheat then growing on the south part of lot 14, and in the plaintiff's possession. The plaintiff bargained and sold all the said twenty acres of wheat, with the right of ingress and egress into and from lot 14, to harvest and remove the said twenty acres of wheat. Then followed a proviso, that if plaintiff should pay to T. £28, with interest, on a day named the deed should be void. Plaintiff covenanted to pay the money, and it was stipulated that until default plaintiff might retain in his possession and use the goods and premises mortgaged, unless he should before the day of payment be sued by any other person, in which case T. might take and enjoy the said goods as his own:—Held, that defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15. *Lunn* v. *Turner*, 4 Q. B. 282.

Semble, that if the license to enter on lot 14 gave a right to enter on lot 15 as being necessary to the privilege granted with respect to lot 14, they should have in a special plea set forth the necessity. *Ib.*

Held, that defendants must fail, also, as the license was not to enter and take the plaintiff's wheat, but to enter for the purpose of taking the defendant's wheat. *Ib.*

Semble, also, plea bad, as the license proved was conditional and not absolute. There should have been a special plea shewing default in payment by plaintiff on day named. *Ib.*

Semble, that the only right the deed gave the defendants, was to cut and carry away the wheat of the plaintiff; the defendants had no right to enter on the plaintiff's land and take the wheat away by force after it had been cut and stacked by plaintiff. *Ib.*

Growing crops on the land of a testator may or may not be assets according to the contents of the will, which was not in evidence. Under ordinary circumstances they go to the executor, and not to the heir, but if the land on which the crops were growing was devised by the will, that would in general make the crops go with the land. *Fisher* v. *Trueman*, 10 Q. B. 617.

By deed of conveyance of all and singular that certain parcel of land, &c., together with the houses and easements, profits, privileges, hereditaments, &c., to said parcel of land belonging or in anywise appertaining, and all the rents, issues and profits thereof, &c., growing crops in the ground at the time of the execution of the deed will pass to the grantee. *Wood* v. *Lang*, 5 C. P. 204.

A person having become purchaser of land under a sale in Chancery, and having received possession on condition that he allowed the wheat and straw there to be removed, does not acquire any legal right to the straw as emblements under such purchase. *O'Dell* v. *Coyne*, 4 C. P. 452.

In trespass to land, where the action was brought on the 7th of May:—Held, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the accomplained of, as ascertained at the time of harvest. *Throop* v. *Fowler*, 15 Q. B. 365.

Where a sheriff, acting in good faith for all concerned, agrees to pay for having grain thrashed for the purpose of its better sale, the expenses of such thrashing should be allowed him. *Galbraith* v. *Fortune*, 10 C. P. 109.

S. A. before the marriage to C. R. her present husband, (on the 1st of April, 1857,) leased certain lands to the defendant by the year, one-third of the yearly crop to be paid as rental. To a declaration claiming the non-delivery of the crop as agreed, defendant pleaded, thirdly, that on 17th April, 1860, the lands in question were sold under Chancery sale to one D., who paid his deposit and signed a memorandum, and thereby became entitled and entered into possession, and took and converted one-third of the crop to his own use, whereby he, the defendant, was prevented from furnishing the same:—Held, that D. being only an inchoate purchaser, he was not entitled to the crops, and therefore that defendant was liable on his contract. *Richardson et ux.* v. *Trinder*, 11 C. P. 130.

A. and B. contracted with C. to put in the crops on a certain farm, and to do all the necessary farm work thereon for the whole season, and for which they were to have one-half of the crops for that year. Under the contract A. and B. sowed a quantity of wheat, and B. having absconded, his interest in the wheat while growing was sold under an execution issued on a judgment obtained in the Division Court against B. at the suit of D., who became the purchaser thereof. A. subsequently sold all his interest and that of B. in the wheat to C., who harvested it. D. having brought an action of trover to recover the one-quarter of the quantity of the wheat, claiming to have become the owner of that portion of it by purchase at sale on the writ of execution from the Division Court:—Held, that as between A. and B. the contract was joint, and that trover by D. for the one-quarter sold to him under the execution against B. was not maintainable. *Park* v. *Humphrey*, 14 C. P. 209.

H. by agreement with defendant planted sixteen and a half acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work, and defendant to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder. Subsequently, H. being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own, and harvested it:—Held, that H. and defendant were tenants in common of the crop of Indian corn: that one tenant in common cannot maintain trespass or trover against his co-tenant for merely reaping and harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it; and that under the circumstances of the case the court might assume after the verdict, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion. *Brady* v. *Arnold*, 19 C. P. 42. See, also, *Culver* v. *Macklem*, 11 Q. B. 513.

Held, that on the finding of the jury in this case the plaintiff must be taken to have paid the full price of the crop at the time of the bargain for its purchase, and the delivery being as complete as the circumstances would admit of, H.'s interest passed at that time to the plaintiff, and could not be divested by the subsequent sale to defendant. *Brady* v. *Arnold*, 19 C. P. 42.

D., in November, 1862, took land from defendant's agent on a written agreement to clear so much a year, getting certain crops, and all the timber, excepting pine of a specified size. In July, 1863, D. wrote to the plaintiff that if he would complete the clearing under this arrangement, and deliver to D. $40 worth of cordwood, he should have all the benefit arising from it. Under this the plaintiff claimed a crop of wheat sown in the fall of 1863, and seized by the sheriff in July, 1864, under an execution against D. On an interpleader issue the jury found for the plaintiff, negativing any fraud as between him and D.:—Held, that the plaintiff could have no title to the land, for the agreement with D. and assignment to the plaintiff, not being by deed, were both void, under C. S. U. C. c. 90, s. 4; but that having been let into possession by D., and having cultivated the land for his own benefit, and at his own expense, it could not be held that the wheat, which was an independent chattel, not within the statute, was defendant's property; and that the verdict, therefore, must stand. *Hogan* v. *Berry*, 24 Q. B. 346.

Though a sale of land may be fraudulent as against creditors, still where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labour and means had been contributed by the vendee alone:—Semble, J. Wilson, J., diss., that the crops were the sole property of the vendee as against the execution creditor. *Kilbride* v. *Cameron*, 17 C. P. 373.

Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was verbally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent verbal agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by the 4th sec. of the Statute of Frauds might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. *McGinness* v. *Kennedy*, 29 Q. B. 93.

Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *Ib.*

The owner of property sold and took a mortgage to secure payment of the purchase money by instalments. Default having been made in payment of the first instalment, an action was brought and judgment recovered upon the covenant; whereupon the purchaser filed a bill setting up that a tenant of the vendor had by virtue of a lease previously made by the vendor, carried away the crops from off the premises, and praying to redeem upon payment of the amount of the judgment, after deducting therefrom the value of the crops so taken away. The court, by consent of parties, directed a reference to the master to enquire as to the amount of damages sustained by reason of the removal of the crops, but refused to interfere with the judgment already recovered, the remaining instalments of purchase money being more than sufficient to cover any sum to which the purchaser could be entitled in respect of such damages. *Moore* v. *Merritt*, 6 Chy. 550.

The growing crops on land are part of and go with the freehold when sold. Where, therefore, a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money, and the same order was made to extend to taxes due on the land and unpaid. *Stewart* v. *Hunter*, 2 Chy. Chamb. 335.—Taylor, *Secretary*.

Although the general rule is, that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property, still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had obtained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such previous years the mother might have been accountable to her infant children as trustee for them. *Bates* v. *Martin*, 12 Chy. 490.

B. was a registered judgment creditor of M., after whose death T. obtained a decree for a debt due by M. T. issued a sequestration for this debt. Under the sequestration lands were seized and let under the authority of the court to tenants:—Held, that B.'s charge having the priority over T.'s, B. was entitled to set aside the leases on paying the tenants for their labour in putting in fall crops and preparing the land for fall and spring crops, and to have the land sold free from the leases. *Meyers* v. *Meyers*, 19 Chy. 541.

A testator had sown a quantity of grain which was in the ground after his decease. One of the next of kin sought to charge the executors with the value thereof, but the land on which it was, having been devised to the widow for life, it was—Held, on appeal, that she, not the executors, were entitled to the emblements. *Cudney* v. *Cudney*, 21 Chy. 153.

CROWN.

I. Actions and Proceedings by and against.

1. *Generally*, 958.
2. *Executions*, 959.
   (a) *Extent*—*See* Extent.
   (b) *Sci. Fa.*—*See* Scire Facias.
3. *Costs*—*See* Costs.
4. *Attorney and Solicitor-General*—*See* Attorney and Solicitor-General.
5. *Information for Intrusion*—*See* Intrusion.
6. *Inquisition*—*See* Inquisition.

II. Bonds—*See* Crown Bonds.

III. Petitioning—*See* Petition of Right.

IV. Agents—*See* Crown Lands.

V. Officers—*See* Attorney and Solicitor-General—County Attorney—Crown Office — Office — Public Officers.

VI. Office—*See* Crown Office.

VII. Ministers of—*See* Attorney and Solicitor-General—Parliament.

VIII. Charters—*See* Corporations.

IX. Lands.

1. *Belonging to*—*See* Crown Lands—Indian Lands—Ordnance Lands.
2. *Forfeiture of, to Crown*—*See* Attainder—Inquisition.

X. Timber—*See* Crown Lands.

XI. Patent—*See* Crown Lands.

XII. Excise and Customs—*See* Revenue.

XIII. Rights on Water—*See* Ferry—Fishery—Water and Water Courses.

XIV. Rights in Highways—*See* Way.

I. Actions and Proceedings by and against.

1. *Generally.*

In case of debts due to the crown, which would be cognizable in the Court of Exchequer in England, this court may give relief when it appears that in law, reason, or good conscience, the debtor ought not to be charged. *Regina* v. *Bonter*, 6 O. S. 551.

The sureties of a clerk of the Division Court having entered into the bond authorized by the acts 4 & 5 Vict. c. 3, and 8 Vict. c. 37, are liable upon such bond to the crown for moneys collected by the clerk for suitors in the court not paid over. *Regina* v. *Patton*, *Regina* v. *McCullough*, *Regina* v. *Moran*, 7 Q. B. 83.

Semble, that on the trial of any such action the crown would be entitled to a verdict for the penalty of the bond, and not only for the sum received for the suitor and not paid over. *Ib.*

The crown cannot be a claimant within the meaning of the statute authorizing the settlement of claims of goods taken under execution by interpleader. *McGee* v. *Baines*, 3 L. J. 151.—C. L. Chamb.—Robinson.

The garnishee clauses of the C. L. P. Act do not extend to the Queen. The crown cannot, therefore, proceed under them to attach a debt. *Regina* v. *Benson*, 2 P. R. 350.—Q. B.

The statute 23 Vict. c. 25, exempting certain articles from seizure, does not bind the crown. *Regina* v. *Davidson*, 21 Q. B. 41.

The crown has the right in a civil action to lay the venue in any county. *Regina* v. *Shipman*, 6 L. J. 19.—C. L. Chamb.—Robinson.

Where the recognizance is removed into one of the superior courts at Toronto, the united counties of York and Peel are the proper counties in which to lay the venue, and in such a proceeding the venue cannot be changed without the consent of the attorney-general. *Ib.*

Held, that the Queen may take a chattel mortgage from any of her subjects (under our acts) through and in the name of the head of the department to which the debt is due, to secure such debt. *McGee* v. *Smith*, 9 C. P. 89.

Held, that the crown could not be prejudiced in its right to recover back taxes on land leased to a commissariat officer by mistake of the officer in charge in paying them. *The Principal Secretary of State for War* v. *The Corporation of the City of London*, 23 Q. B. 476.

Semble, that the court may direct crown cases to stand in the new trial paper for argument with ordinary suit between party and party. *Regina* v. *Sinnott*, 27 Q. B. 539.

The rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded does not apply where the crown and not a private person is the plaintiff. *Regina* v. *Reifenstein*, 5 P. R. 175—C. L. Chamb.—Galt.

The Court of Chancery cannot enforce against the crown specific performance of an order in council. *Simpson* v. *Grant*, 5 Chy. 267.

Where the crown holds the equity of redemption of mortgaged premises no absolute order of foreclosure can be pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession. *Dunn* v. *Attorney-General*, 10 Chy. 482.

A plea of purchase for value without notice cannot be set up against the crown. *Attorney-General* v. *McNulty*, 11 Chy. 281.

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2. *Executions.*

The testator at or before his death was deputy superintendent general of Indian affairs, and trustee of the Six Nation Indians, and as such superintendent was an accountant to the crown, and at the time of his death he was indebted as trustee :—Held, that the testator was not a public accountant within the meaning of 13 Eliz. c. 4, and that the crown could have no authority to sell his land under that statute. *Doe* d. *Dickson et ux* v. *Gross*, 9 Q. B. 580.

The crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed ; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *The Desjardins Canal Co.*, 29 Q. B. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the crown not being bound by the 43 Geo. III. c. 1. *Ib.*

CROWN BONDS.

I. For Fidelity and Honesty of Persons —*See* Principal and Surety.

II. Recognizances—*See* Recognizance.

III. Enforcing—*See* Sciri Facias—Principal and Surety.

A. and B. enter as co-sureties into separate bonds to the crown for C. ; C. becomes a defaulter ; the crown proceeds by sci. fa. on each bond, and obtains a separate judgment against each surety. A. satisfies to the crown the judgment against himself. B. moves the court to be allowed, on paying the judgment against himself in full, to stand in the place of the crown, and to have the benefit of the crown process against his co-surety for a moiety for the judgment :—Held, that the court could not thus relieve B. from the effect of the judgment against himself ; all that they could have done would have been to allow him to proceed in the name of the crown to enforce the judgment which had been obtained on a sci. fa. against A., and this they could not now do, as it appeared the crown had already enforced that judgment. *Regina* v. *Land*, 3 Q. B. 277.

The testator held certain lands as a trustee to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to J. M. (whom he also appointed one of his executors) and his heirs absolutely. The testator had joined in certain crown bonds which remained undischarged : Held, that they formed a charge upon the lands, which the purchaser was entitled to have removed. *Re Charles*, 4 Chy. Chamb. 19.—Boyd, *Master*.

CROWN LANDS.

I. Patent.

1. *Generally*, 961.
2. *Description of Land in Patents*—*See* Deed.
3. *Evidence of*—*See* Evidence.

II. Rights before Issue of Patent.

1. *To Maintain Ejectment*, 962.
2. *To Maintain Trespass or Case*, 963.

III. Estoppel by Deed before Issue of Patent—*See* Estoppel.

IV. Rights of Grantees, 965.

V. Setting Aside Patent or Grant.

1. *Jurisdiction of Court of Chancery*, 966.
2. *For Error or Mistake in Issuing*, 967.

3. *For Fraud in Procuring.*
(a) *Practice and Pleading*, 970.
(b) *Other Cases*, 971.

VI. Crown Timber.

1. *Crown Agents*, 972.
2. *Rights of Licensees*, 973.
3. *Other Cases*, 974.

VII. Miscellaneous Cases, 975.

VIII. Indian Lands—*See* Indian Lands.

IX. Ordnance Lands—*See* Ordnance Lands.

X. Roads—*See* Way.

XI. Survey—*See* Survey.

XII. Inquisition—*See* Inquisition.

XIII. Intrusion—*See* Intrusion.

XIV. Possession of—*See* Limitation of Actions and Suits.

XV. Exemption from Taxation—*See* Assessment and Taxes.

XVI. Prosecuting Claim before Heir and Devisee Commission—*See* Heir and Devisee Commission.

XVII. Registration of Instruments before issue of Patent—*See* Registry Laws.

I. Patent.

1. *Generally.*

In actions in which the King is a party, in the construction of grants from the crown, where there is an ambiguity in respect of the premises—as, for instance, what is to be considered the bank of a river—other grants from the crown are admissible in evidence to assist the construction. *Clark* v. *Bonnycastle*, 3 O. S. 528.

Grants from the crown, either for a valuable consideration or of special favour, are to be construed in the same manner as deeds from subject to subject. *Ib.*

A grant from the crown must be by matter of record, and under the great seal. *Doe* d. *Jackson* v. *Wilkes*, 4 O. S. 142.

An exemplification under the great seal of a grant invalid in its inception will not make such grant valid by relation from its commencement. *Ib.*

So long as there is no other person in possession, claiming adversely to the grantee's title, the grant and title given under it carry the possession by construction of law to the owner of the fee. A visible actual possession by the owner, or by those claiming through him, need not be proved. *Doe* d. *Maclem* v. *Turnbull*, 5 Q. B. 129. See *Weaver* v. *Burgess*, 22 C. P. 104.

The crown granted land by letters patent to J. S., in trust for his son I. S., a lunatic, his heirs and assigns for ever, to have and to hold the same land to him, the said J. S., his heirs and assigns for ever:—Held, per Draper, J., and Burns, J., (Robinson, C. J., diss.,) that this patent coming, as any other mode of assurance, under the operation of the Statute of Uses, 27 Hen. VIII. c. 10, if it did not, from particular considerations applying to the lunatic only, vest the real estate in him, yet that it nevertheless created a use which, on the death of the lunatic, was executed in his heir, and that therefore a deed, made by the heir after his death, would be valid as against a deed executed by the grantee of the crown. *Doe* d. *Snyder* v. *Masters*, 8 Q. B. 55.

A grant of lands in 1784 by the then governor of Quebec, and under his seal at arms, to the Mohawk Indians and others, conveyed no legal estate: 1. As not being by letters patent; 2. For want of a grantee or grantees capable of holding. *Doe* d. *Sheldon* v. *Ramsay et al.*, 9 Q. B. 105.

The land in question was granted by letters patent to A. G., her heirs and assigns for ever, "to have and to hold the said parcel or tract of land thereby given and granted to her the said A. G., in trust for herself and her children, M. G. and F. G.:—Held, that A. took the fee, and that no legal estate passed to the children. *Goldie* v. *Taylor*, 13 Q. B. 603.

The patent in this case granted a certain public toll-bridge, with a planked and macadamized toll-road, together with all toll-gates on said road or bridge, "and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained," &c.:—Held, that the patent was not ultra vires, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof. *Regina* v. *Mills et al.*, 17 C. P. 654.

The patent to A. C. contained the clause then usual, (1796) saving and reserving to the crown all white pine trees:—Held, that notwithstanding this reservation the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 Q. B. 333.

Held, also, that the evidence of possession being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action. *Ib.*

See IV. p. 965.

II. Rights before Issue of Patent.

1. *To Maintain Ejectment.*

A person holding land under a license of occupation from the crown is entitled to a demand of possession before ejectment brought by a grantee of the crown in fee. *Doe* d. *Creen* v. *Friesman*, 5 O. S. 661.

Held, on appeal from the Queen's Bench, that the purchaser from the government of a clergy reserve, upon which he had paid an instalment, and obtained the usual receipt from the department, has a right to obtain possession against any one in the occupation, even although the occupant may have subsequently obtained the receipt of the commissioner of crown lands; the crown, under such circumstances, being bound by the contract made by the department with the first purchaser. Blake, C., Esten and Spragge, V.CC., diss. *Doe Henderson* v. *Westover*, 1 E. & A. 465.

Plaintiff in 1846 purchased some clergy reserve land from a government agent, and obtained receipts for partial payment. Defendants were then living on the land, and had been living there since 1840, having made valuable improvements. On the 2nd of August, 1849, an order of council was made, that on the defendants making the required payments, the plaintiff's money should be returned to him, and the sale to him cancelled. When the present action was brought, an order of the executive council was made on the 6th of August, 1850, recommending that the attorney-general be authorized to defend the suit :—Held, that when the plaintiff received his first receipt, defendants being mere intruders, he acquired a right to eject them under 12 Vict. c. 31, s. 2; and that the crown could not at its pleasure divest him of that right, nor change a wrongful occupant into a rightful occupant, to the prejudice of their own vendee. *Doe* d. *Henderson* v. *Seymour*, 9 Q. B. 47.

The plaintiff in ejectment produced two receipts for certificates of deposits to the credit of the receiver-general, on a purchase of certain lands. In both the money was expressed to have been received from the plaintiff. In the first a blank was left for the name of the vendee, the words "sold to" being inserted. In the second no mention was made of the purchaser :—Held, that the receipts primâ facie imported a sale to the plaintiff. *Young* v. *Scobie*, 10 Q. B. 372.

The plaintiff brings ejectment on a patent to himself for the south-west half of lot No. 12 in the 6th concession of Trafalgar, dated 22nd September, 1852; defendant puts in a receipt for the payment of the first instalment on the said lot from the commissioner of crown lands, dated 19th July, 1852. Pending this suit the 16 Vict. c. 169, was passed :—Held, that this statute, although passed while the suit was pending, had the effect of repealing all former acts which gave any effect beyond the common law to the receipt. *Armstrong* v. *Campbell*, 4 C. P. 15.

In ejectment the plaintiffs produced and proved a receipt in the following form :—"Bank of Upper Canada, agency at Goderich, Feby. 20th, 1861. Original for the depositor. $60.20. Received from W. G. W. and A. M. the sum of sixty dollars twenty cents for account of the crown land department, which amount will appear at the credit of the account with this bank on the mill reserve in the town plot of Fordwich, in the township of Howick. Signed in duplicate, &c. :—Held, that this receipt was not a sufficient authority under 23 Vict. c. 2, to maintain ejectment: that a license of occupation under the hand and seal of the commissioner of crown lands or a patent was necessary; and that the 17th sec. of 23 Vict. c. 2, is only retrospective in its operation. *Walker et al.* v. *Rogers*, 12 C. P. 327.

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2. *To Maintain Trespass or Case.*

The plaintiff obtained a lease under the great seal for a lot of land, and finding plaintiff in possession as an intruder, gave him notice of the lease, and requested him to leave the lot. Defendant afterwards cut off some valuable timber, for which act plaintiff brought trespass :—Held, that plaintiff could recover without further proof of entry. *St. Leger* v. *Manahan*, 5 O. S. 89.

A locatee before patent may maintain an action on the case against a stranger for an injury done by him to his land by flooding; but where an order in council had been made that no deeds should issue from government for lands in a particular part of the township, without a special reservation to the defendant of a right to flood certain portions of that land :—Held, that a locatee could not maintain an action for the flooding of a portion of those lands by the defendant, as he would in such a case be in a better position before grant from the crown than afterwards. *Miller* v. *Purdy*, H. T. 6 Vict.

Held, that a receipt for the purchase money of land from the crown under 4 & 5 Vict. c. 100, entitled the purchaser to maintain trespass, or replevy any property taken therefrom. *Deedes* v. *Wallace*, 8 C. P. 385.

A purchaser holding a receipt for an instalment, and having actual possession, may maintain trespass against all strangers, though not against the crown. *Glover* v. *Walker et al.*, 5 C. P. 478; affirmed in *Alexander* v. *Bird*, 8 C. P. 539.

But actual possession is necessary, for the receipt confers no constructive possession. *Henderson* v. *McLean*, 8 C. P. 42.

The plaintiff entered into an agreement for purchase of land from the crown. He had the lots surveyed, and paid persons to look after them for him, who had frequently entered and examined them, but the plaintiff had not entered upon the land himself, nor cultivated any portion. Defendant went upon the land and cut trees, for which he offered to settle with the plaintiff's agent, but he afterwards went to the local crown land agent, who was ignorant of the plaintiff's purchase, and got him to accept a sum of money and give a receipt for it, as for timber cut on the same land :—Held, that the plaintiff's possession was sufficient to maintain trespass against defendant, and that the payment to the crown land agent formed no excuse. Quære, whether as vendee he could recover substantial damages for the trees cut. *Henderson* v. *McLean*, 16 Q. B. 630.

Held, that the 16 Vict. c. 159, by repealing the former acts, does not confine the right of action against wrong-doers to those who have obtained the license of occupation mentioned in the sixth clause; but leaves to other purchasers whatever rights they may have at common law. Henderson *v.* McLean, 8 C. P. 42, in part dissented from. *Ib.*

Trespass q. c. f. The plaintiff in proof of his title put in at the trial a receipt from the bank of Upper Canada at Kingston, which stated that the amount therein mentioned would appear at the credit of the crown land department in the said bank on lots Nos. 24 and 25 in the 9th concession of Hinchinbrooke, being the premises in question. On this receipt was endorsed a certificate of the sale and terms thereof, signed by the crown land agent :—Held, sufficient, under 23 Vict. c. 2, to entitle the plaintiff to maintain trespass for cutting trees after the date of the certificate, but before the statute. *Whiting* v. *Kernahan*, 12 C. P. 57.

The plaintiff held possession as purchaser under a receipt from the crown land agent, and before defendant entered he had paid up in full, and was entitled to his patent, which however

did not issue until some time after :—Held, that he was entitled to recover for trespass committed before as well as after the patent. *Nicholson* v. *Page*, 27 Q. B. 505.

The plaintiff obtained from a county crown land agent a ticket stating the amount to be paid into the Bank of Montreal as the first instalment on a lot which he said he would probably buy. Nearly a month afterwards he paid this sum to the bank, taking their receipt, which stated that it would appear at the credit of the crown land department, from which he subsequently received a letter acknowledging the receipt of the money on this lot, and saying that his communication would receive attention. The agent said this was not a sale, and this lot was not in the monthly return of lots sold sent to him from the department. Defendant held a timber license for this and other lots, but land previously sold was expressly excluded from it :—Held, that the plaintiff was not a purchaser from the crown, so as to entitle him to recover against defendant for cutting timber on the lot. *Wells* v. *Cumming*, 27 Q. B. 470.

IV. Rights of Grantees

A person holding land under a license of occupation from the crown is entitled to a demand of possession before ejectment brought by a grantee of the crown in fee. *Doe* d. *Creen* v. *Friesman*, 5 O. S. 661.

A. and B. having received grants from the crown for adjoining lots, A. inadvertently occupied, fenced, and improved a portion of B.'s lot, according to the mode of running side lines prescribed by 58 Geo. III. c. 14, believing it to be a portion of his own lot. Some years after, B.'s lot was confiscated under the Alien Act, 54 Geo. III. c. 9, and sold under 58 Geo. III. c. 12. A. and those claiming under him, had held the disputed tract for upwards of twenty years at the time of action brought, but not at the time B.'s estate was confiscated, and the crown became seized by inquest of office :—Held, that A.'s occupation did not work a disseisin of B., and that B. continued seized so as to entitle the crown to that portion of his lot in A.'s possession, and that the bargainee of the crown commissioners could maintain ejectment against the occupiers thereof. *Doe* d. *Howard* v. *McDonnell*, Dra. 374.

The grantee of the crown has the same right as the crown has to treat the possessor without title as a trespasser : he is not disseised by the continuance of a possession that has been held wrongfully as against the crown. *Doe* d. *Charles* v. *Colton*, 8 Q. B. 313.

The effect of the exception in 4 Will. IV. c. 1, s. 17, in favour of a grantee of the crown who has never gone into possession, is, that while ignorant of the fact of his land being in the actual possession of some other person, he is not to be regarded as disseised, and consequently is in a condition to devise. *Doe* d. *McGillis* v. *McGillivray*, 9 Q. B. 9.

Where a married woman claims under letters patent from the crown, her husband need not have entered upon the land in order to entitle him to tenancy by the courtesy, the letters patent suo vigore constituting seisin in fact. *Weaver* v. *Burgess*, 22 C. P. 104.

The patentee of the crown of land may maintain trespass without entry against a person in actual possession before and at the time of the issuing of the patent, for the letters patent operate by way of feoffment with livery of seizin to the patentee, and defendant's possession must be regarded as an entry subsequent thereto. *Greenlaw* v. *Fraser*, 24 C. P. 230.

The plaintiff, having no title, assigned the land in question first to one C., and afterwards to one M., to secure certain advances. The crown having issued the patent to C., the plaintiff sought to get in the legal estate outstanding in C., but without paying M. :—Held, under the maxim "He that comes into equity must do equity," that he was first bound to pay the advances made by M. *Wiggins* v. *Meldrum*, 15 Chy. 377.

See I. p. 961.

V. Setting aside Patent or Grant.

1. *Jurisdiction of Court of Chancery.*

The Court of Chancery has jurisdiction, under 4 & 5 Vict. c. 100, s. 29, to rescind a patent, though the grant may be voidable, or even void at law. *Martin* v. *Kennedy*, 2 Chy. 80.

But not to set aside a grant made upon a deliberate view of all the circumstances, and in the absence of fraud or mistake. *Simpson* v. *Grant*, 5 Chy. 267.

Where the executive government have considered the claims of opposing parties to lands leased from the crown, with a claim of pre-emption, and have ultimately granted to one, the court cannot, where no fraud appears in obtaining the grant, afterwards declare the grantee a trustee of any portion of such lands for the opposing party, on the ground that he had previously acquired an equitable interest therein. *Boulton* v. *Jeffrey*, 1 E. & A. 111, followed in *Barnes* v. *Boomer*, 10 Chy. 532.

Quære, even if there had been fraud, whether the court could interfere at the instance of the party who had opposed the grant. *Ib.*

This court has jurisdiction in a proper case to give relief against a fraudulent assignment by a locatee of the crown, before the issuing of the letters patent, but a bill for the purpose must shew why it is necessary to come to this court. *Bull* v. *Frank*, 12 Chy. 80.

Where the crown lands department has considered opposing claims, and a patent is directed to issue to one claimant, this court cannot review the decision of the commissioner, although it might have taken a different view of the case in the first instance. *Kennedy* v. *Lawlor*, 14 Chy. 224.

This court will, at the instance of a judgment creditor of a locatee, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold, and order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the crown lands department for a patent, as vendee or assignee of the locatee. *Yale* v. *Tollerton*, 13 Chy. 302.

The interest of a debtor in land bought from the crown, but for which at the time of his death he had not fully paid, and had not obtained

the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Chy. 309.

The right which a squatter acquires by being in possession of lands of the crown is not such an interest therein as this court will order a partition of amongst his heirs; in such a case the only remedy is by application to the executive government of this province. *Jenkins* v. *Martin*, 20 Chy. 613.

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3. *For Error or Mistake in Issuing.*

Quære, whether any grant improvidently made of lands set apart for the Rideau canal, before the 7 Vict. c. 11, would not be void at common law if injurious to the canal, without proceeding by sci. fa. to repeal it. *Doe* d. *Malloch* v. *The Principal Officers of Her Majesty's Ordnance*, 3 Q. B. 387.

Held, that lands granted before the 7 Vict. c. 11, but afterwards marked out and reserved by the ordnance department as unnecessary for the canal, became again revested in the crown. *Ib.*

Where a party had, according to the custom of the clergy corporation, paid the patent fee for a lease, gone into possession and made large improvements, the custom being that such party was considered as having a lease for twenty-one years, with a right of renewal and preemption, (not materially varied by the subsequent orders in council regulating the sale of clergy reserves) and the crown, in ignorance of the facts, granted the lands as a glebe of the rector of D., such patent was rescinded as issued in error and mistake. *Martyn* v. *Kennedy*, 4 Chy. 61.

Where the government had appropriated and patented as a glebe a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned to him by the government, the patent was set aside as issued in error and mistake. *Attorney-General* v. *Hill*, 8 Chy. 532.

Although the crown may shew mistake in law or fact in respect of its grant when the individual could not, still the evidence must be conclusive. *Attorney-General* v. *Garbutt*, 5 Chy. 181.

In 1797 an order in council was made in favour of M. P., as daughter of S. De. F., a U. E. loyalist, under which a lot was located, and a description therefor regularly made out in her name; but in 1801 a patent for the lot so described issued to one M. F., the sister of the husband of the locatee, but during her life she never claimed any interest under such patent. No authority was shewn for the change of the name in the grant from M. P. to M. F. The court decreed the patent to be cancelled. Esten, V.C., diss. *S. C. Ib.* 383.

In laying off the town plot of S., a reservation was made by the surveyor of a block for a market square, and marked upon the plan returned by him to the office of the commissioner of crown lands, a copy of which was furnished to the local agent at S., by which he was to sell, and several sales were accordingly effected by him, some of them of lots fronting on this square. On the plans finally adopted by the crown lands office, the market reservation was marked "Reserve" simply. Subsequently the government, under the impression that this block was at their disposal, granted part of it to the church society for a church:—Held, on a bill filed to set aside the patent on the ground of error or inadvertence, that it must be presumed that had the crown lands department been aware of what had been done, the grant to the society would never have been made: that therefore, upon a bill properly framed, the letters patent should be repealed; and that the suit ought to have been instituted by the attorney-general on behalf of the public. *Municipality of Saugeen* v. *The Church Society*, 6 Chy. 538.

The commissioners under the Heir and Devisee Act, in deciding upon claims, are not bound by the strict rules of courts at law. A purchaser from the crown devised the land to his wife for life, with a power of appointment amongst his descendants in tail; and she devised the estate to one of such descendants in fee, on whose application the commission recommended a grant in tail to the person named as devisee. The crown thereupon issued a patent in favour of such devisee. A bill was afterwards filed to set aside the patent, as having been issued in error; but a demurrer to the bill for want of equity was allowed. *Scane* v. *Hartrick*, 7 Chy. 161.

The heir and devisee commission having reported that the heirs-at-law of A. were entitled to a patent, the governor in council afterwards, upon a report of the solicitor-general in favour of B., a brother of A., issued a patent to B. The heirs of A. thereupon filed a bill to have the patent set aside as issued in error, and a new patent issued to themselves. The court having found there was no error of fact:—Held, that the patent was properly issued to B. notwithstanding the finding of the commissioners. *McDiarmid* v. *McDiarmid*, 9 Chy. 144.

Semble, this court may, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission. *Ib.*

A locatee of the waste lands of the crown having settled thereon, in preparing it for cultivation cleared part of the adjoining land. According to the usage of the crown lands department any person, even without settling upon lands of the crown, effecting a clearing thereon, was allowed to purchase the lot at the price fixed by the agent of the goverment. Subsequently the government employed an agent to inspect the lands in the neighbourhood, who reported the property on which the clearing had been made as vacant and unimproved, and valued it at 12s. 6d. per acre. This agent afterwards applied for and obtained a patent for this lot at 8s. an acre, and almost immediately after sold it to a person who had full knowledge of the clearing. Upon a bill filed by the person who had made the improvement, the court ordered the patent to be revoked, as issued in error and mistake, without costs. But Semble, that had the agent been joined as a party, he would have been ordered to pay costs. *Proctor* v. *Grant*, 9 Chy. 26.

The court, while affirming the general doctrine on which the decree was pronounced above, reversed the same, on the ground of want of

notice of the improper conduct of the grantee of the crown in obtaining the patent. Spragge, V. C., dubitante. *S. C. Ib.* 224.

The lessee of the crown conveyed his interest to others. The right to one portion, after going through several hands, became vested in one F., who died, leaving a widow and several children. The widow joined with her second husband in assigning the portion bought by F. to one C., who subsequently agreed to sell to S. A conveyancer employed to prepare the necessary writings recommended a transfer direct from the lessee of the crown to S., to simplify the title, which was accordingly done, and thereupon S. applied to the crown lands department to purchase, producing his transfer, a certificate of a surveyor, and an affidavit by himself that there was not any adverse claim, no mention being made of the previous transfers, or the possession of the intermediate transferees, or of the fact that the uncle of F.'s heir-at-law had intimated to S. that the heir did claim it. Upon this application S. was allowed to purchase, and a patent was issued to him in January, 1853. In 1863 a bill was filed by the heir-at-law of F., seeking to set aside this patent, as having been obtained through the fraudulent concealment of the facts by S. when applying for the grant. It appeared that the plaintiff before attaining his majority went to reside in California, and immediately on his return instituted proceedings. The court, under the circumstances, although acquitting defendant of all actual or intentional fraud, declared the patent void, in order that the crown, with a full knowledge of all the facts, might deal with the case as should be deemed right, and ordered S. to pay the costs of the suit; the delay which had occurred in commencing the suit being accounted for by the inability of the plaintiff, arising from his poverty and his absence. *Fricht* v. *Scheck*, 10 Chy. 254.

In March, 1862, S. purchased land from the crown, and with his family went to reside on it, but by mistake settled on the adjoining land, and made improvements. In June following C. applied to the crown lands department to know whether the land so purchased by S. was for sale; the patent had not issued to S., and through an error in the department C. was informed that the land was for sale, and immediately purchased and received a patent. He did not, however, take possession until December, 1863, when he brought ejectment against S., and engaged the defendant, B., to take the timber off the lot. At the hearing the plaintiff failed to prove notice to C. of his claim and improvements, but the error on the part of the office being proved, and the attorney-general being a defendant, and submitting to the direction of the court, the patent to C. was rescinded, an injunction granted, and C. required to account for the timber cut. *Stevens* v. *Cook*, 10 Chy. 410.

Although parties dealing with the crown will be held to the strictest good faith, yet where it is shewn that the patentee of land was ignorant of a fact which might have been material to bring under the notice of the officers of the crown, and the plaintiff had the opportunity, but failed to do so, and subsequently filed a bill impeaching the patent, as issued in error and improvidence, the court refused the relief prayed, and dismissed the bill with costs. *Mahon* v. *McLean*, 13 Chy. 361.

Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative. *McIntyre* v. *The Attorney-General*, 14 Chy. 86.

Where it appeared that the commissioner of crown lands, in deciding between rival claimants to a lot to which neither had any right, was under a false impression as to a matter of fact, and the fact had not been untruly stated by the party in whose favour he decided, and was not shewn to be material, the court held, that the error was not a sufficient ground for setting aside the patent at the suit of the disappointed claimant. *Ib.*

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3. *For Fraud in Procuring.*

(a) *Practice and Pleading.*

Several persons being in possession of separate portions of crown land, filed a bill, claiming to have, by the invariable usage of the government, a preemptive right each to the portion he was in possession of, alleging that a patent had been obtained for all the lands by a defendant through fraud, and praying that the patent might be rescinded. A demurrer to the bill for misjoinder was allowed. *Westbrooke* v. *The Attorney-General*, 11 Chy. 264.

A bill by a private individual impeaching a patent for fraud or error, must shew that the plaintiff's interest arose before the patent was issued. *Mutchmore* v. *Davis*, 14 Chy. 346.

This rule applies whether the plaintiff's interest is under another patent for the same land, or under a contract of purchase. *Ib.*

A bill by a squatter to set aside a patent for fraud or error, must allege the custom of the crown in favour of squatters, and such other facts as may shew his interest. *Cosgrove* v. *Corbett*, 14 Chy. 617.

Possession of crown lands by a person who entered under an agreement with an another to clear and improve for the latter, on stipulated terms, is not such a possession as entitles the occupant to maintain a bill to set aside a patent to the latter, on grounds of fraud or error unconnected with his own interest. *Cosgrove* v. *Corbell*, 14 Chy. 617.

A bill which shews ground for repealing a patent is not demurrable for not shewing that the plaintiff was entitled to have a patent issued to him. *Rees* v. *The Attorney-General*, 16 Chy. 467.

A bill alleged that the patentees obtained their patent by false representations to the government, and shewed a case in which the patentees would not be entitled to compensation if the patent were set aside and the land given to another:—Held, that to such a bill the attorney-general was not a necessary party. *Ib.*

A bill was filed impeaching a patent as having been obtained wrongfully; the defendants were the patentee and his vendee, who had not paid all his purchase money. The patentee answered denying the equity claimed; his vendee allowed the bill to be noted pro confesso:—Held, that the plaintiff failing to establish his case against the patentee, the bill should be dismissed against both defendants. *McDermott* v. *McDermott*, 3 Chy. Chamb. 38.—Mowat.

(b) *Other Cases.*

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand river, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands:—Held, that as the whole estate both legal and equitable was in the crown, it was not a case in which the court would interfere even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs. *Bown* v. *West*, 1 O. S. 287.

The plaintiff having purchased at sheriff's sale all the interest of a bargainee of the crown, placed defendant in possession. Afterwards the crown land department advertised these lands, amongst others, for sale, at a stipulated price. The rule of the department in all such cases was, that the occupant of lands was entitled to a right of preemption, and the defendant, concealing the nature of his holding, applied for and became the purchaser, and obtained a patent, after notice to the government of the plaintiff's claim. The court declared the defendant a trustee of the lands, and ordered him to pay the costs of the suit. *Dougall* v. *Lang*, 5 Chy. 292.

Patents issued upon a right of preemption obtained by fraudulent concealment of other existing claims to such right, are void. *The Attorney-General* v. *McNulty*, 8 Chy. 324.

If a party knowing that another claims an adverse right to preemption, or that there are circumstances which may give him such right, applies for the lands, and does not state these circumstances, such suppression will be considered fraudulent, even if the circumstances were already known to the government; and a patent issued upon such application will be declared void. *Ib.*

Parties dealing with the crown lands department must be fair and candid in all statements. Where, therefore, a bill was filed to set aside a patent, on the ground that the same had been so issued in ignorance of the opposing claim of the plaintiff, upon the fraudulent misrepresentations of the patentee, and the concealment of the facts by him from the crown lands department, the court, although unable to afford the relief sought, dismissed the bill without costs as against the defendant who had thus dealt with the department. *Lawrence* v. *Pomeroy*, 9 Chy. 474.

A patent was issued to A. in consideration of improvements on the land, but the benefit of these improvements had, on an arbitration between A. and B., been adjudged to B., and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the crown to issue patents in such cases to those entitled to the improvements:—Held, that though the award was known to the officers of the government, the patent should be set aside at the suit of the attorney-general, as having been issued through fraud, and in error and improvidence. *Attorney-General* v. *McNulty*, 11 Chy. 281; affirmed on rehearing, *Ib.* 581.

A bill was filed alleging that by statute the Grand River Navigation Company could take such land as might be necessary for the purposes of the act, subject to payment; and in case of dispute arbitrators were named to determine the amount; and the compensation was in the same manner to be made for any Indian lands required for the undertaking. The bill alleged that the company having claimed about ninety-one acres forming part of the village of Cayuga, which was then occupied and improved by several parties, an arbitration was had in respect thereof on the 30th of October, 1847, when an award was made directing the payment of £159 5s. for the right of the Indians therein, but that no notice was given to the occupiers of the land, nor was anything further done in the matter until January, 1864, when the assignees of the company applied to the government for the absolute purchase of the land, untruly representing, as the bill alleged, that the company had gone into possession under the award and were then in peaceable possession; that the only improvements made on the land were so made by squatters with knowledge of the company's right; and the applicants were thereupon allowed to purchase for the sum awarded, and interest, although in reality the land, by the improvements of the occupiers, was then worth ten times the amount. The bill prayed to set aside the patent as having been issued through fraud, error, improvidence, and mistake. A demurrer by the patentees for want of equity was overruled. *Westbrooke* v. *The Attorney-General*, 11 Chy. 330.

Quære, whether, although a person may have been entitled to a grant, yet if on applying therefor, he knowingly makes grossly false representations to the government, the patent may not be set aside. *Ib.*

VI. Crown Timber.

1. *Crown Agents.*

Held, that under 12 Vict. c. 30, a crown land agent is not authorized to seize boards made from crown timber cut wrongfully. Robinson, C. J., diss., who held that such timber might be seized in the shape of boards, and not merely while unmanufactured; and that even if this were otherwise, the plaintiff, on the facts stated, could not maintain trespass against the agent as a wrongdoer, and recover from him the value of the boards. *Miller* v. *Clark*, 10 Q. B. 9.

Held, that crown timber agents have no legal right to dispose of the timber upon lands sold by the crown lands agents, and that they can in no way affect the rights of such purchaser as against trespassers: Glover *v.* Walker, 5 C. P. 478, affirmed. *Alexander* v. *Bird*, 8 C. P. 539.

C. S. C. c. 23, s. 1, enacts that the commissioner of crown lands, or any agent under him authorized to that effect, may grant licenses to cut timber:—Held, that a person appointed the agent for crown timber for the western division of Upper Canada had not, as such, any power to grant these licenses. *Farquharson* v. *Knight*, 25 Q. B. 413.

In trover for timber by a licensee,—Held, that the licenses were sufficiently proved by the evidence of the person who issued them that he was the crown timber agent, and had acted as such, and issued these licenses in the discharge of his duty. *Boyd* v. *Link*, 29 Q. B. 365.

2. *Rights of Licensees.*

A party obtaining from the crown agent a license to enter upon certain land, and to cut such a quantity of timber of particular dimensions as he might require, not having by such license the exclusive possession of the land, cannot maintain trespass. *McLaren* v. *Rice*, 5 Q. B. 151.

A license to cut was granted to the plaintiffs on the 22nd of November, 1865. On the 6th of December defendant purchased the land, taking a receipt in full from the bank agent at Chatham. On the 14th he obtained a receipt from the commissioner of crown lands, and on the 6th of February, 1866, a patent issued to him:—Held, that if the license had been duly authorized, it would not have been revoked by the defendant's purchase, until the issuing of the patent. *Farquharson* v. *Knight*, 25 Q. B. 413.

A license to cut timber under C. S. C. c. 23, has by the statute the effect of a grant of the timber cut, and though not under seal it is not revoked by the issuing of a patent for the land. *McMullen* v. *Macdonell*, 27 Q. B. 36.

Quære, whether, as was assumed in this case, the holder of a license which has expired may sue for trees cut during its currency. *White* v. *Dunlop*, 27 Q. B. 237.

Licensees of the crown of timber limits, covering allowances for roads, are not liable for cutting timber on such allowances, under the authority of the crown, when no steps have been taken by the municipality to pass a by-law dealing with such timber. *The Corporation of the Township of Burleigh* v. *Campbell*, 18 C. P. 457.

But after the passage of such by-laws the 29 & 30 Vict. c. 51, for the preservation of the municipality may sue the licensees for cutting such timber, even though the licenses were granted before the by-laws, the licensees at the time of cutting having had notice of the by-law. *The Corporation of the Township of Barrie* v. *Gillies et al.*, 20 C. P. 369.

Quære, whether such licenses confer the right to cut timber on the road allowances. Semble, not. *Ib.*

The last case affirmed in appeal, and—Held, that the licenses did not authorize defendants to cut and carry away the timber from the road allowances. *S. C.* 21 C. P. 213.

Where the plaintiff entered on lands of the crown in the summer months, without any right of occupation, and, no one hindering him, cut and cured hay, but was prevented from removing it by defendant, who subsequently took possession under colour of a timber license, which, however, was only in force during the winter months:—Held, that the plaintiff had no right of action against the defendant for the value of the hay so cut, the former shewing no better title than the latter. *Graham* v. *Heenan*, 20 C. P. 340.

Quære, as to the rights of licensees during the intervals between successive licenses. *Ib.*

A bill was filed in respect of certain timber limits by two of the devisees and legatee of the original licensee thereof:—Held, that the suit ought to be by the personal representative, such licenses being personal estate. *Bennet* v. *O'Meara*, 15 Chy. 396.

The plaintiffs were in possession of certain timber limits under a license from the crown, which expired in April, 1872, but it was the practice of the crown lands department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-3, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th of April, 1873, but it was stated to cover the period from the 20th of June previous. During this period certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit, for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam, and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiffs then went to where the logs were, and selected the logs in question, being of the same size and description as his own logs, and marked them:—Held, that the plaintiffs might maintain replevin: that there was sufficient evidence of identity; and that at all events, as the defendant's own wrongful act was the cause of any difficulty, he could not object on this ground. The plaintiffs being in possession, though they might have no title as against the crown, could maintain replevin against a wrongdoer. *Gilmour et al.* v. *Buck*, 24 C. P. 187.

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3. *Other Cases.*

Plaintiff got out a quantity of timber, and placed it in a creek communicating with the intervening rivers for transport during the spring freshets to Quebec. Defendant, who was the lessee of the crown of certain timber limits within which the creek was, obstructed the latter with fallen trees, &c., and thereby caused a large outlay to plaintiff in the removal of the obstructions, and prevented his getting his timber to the Quebec market. Defendant put in a sworn and examined copy of the original map from the crown lands department of recent date, and containing defendant's name as entitled to the timber limits, to prove that the creek was within such limits:—Held, that this coupled with the fact that he had been for many years in possession of the timber limits, culling timber thereon, and improving the same, was some evidence to go to the jury that he was not a mere intruder on the rights of the crown. *Whelan* v. *McLachlan*, 16 C. P. 102.

The patent contained the clause then usual, (1796), saving and reserving to the crown all white pine trees:—Held, that notwithstanding this reservation, the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 Q. B. 333.

Held, also, that the evidence of possession, being such as an owner could be expected to have of wild land, would alone have been sufficient to entitle the plaintiff to maintain the action. *Ib.*

Where timber unlawfully taken from the crown property was subsequently taken by force out of the possession of the first taker, who recovered a judgment against the trespassers, which included the value of the timber:—Held, that the crown was entitled to claim so much of their payment as represented the value of the timber, exclusive of the labour and money expended upon it. *The Attorney-General* v. *Price*, 15 Chy. 304.

The defendant was ordered on argument to pay the costs of the relators. *S. C.* 18 Chy. 7.

The locatee of crown lands located under authority of the act of 1868, has no power to sell or dispose of the pine timber growing thereon. *Hughson* v. *Cook*, 20 Chy. 238.

One S. was the locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The agent of the plaintiff swore that some pine timber had been taken off these lots in 1870-1 by some persons getting out square timber, and further, that the defendant was the only person getting out square timber that season. After two years the court considered this evidence too indefinite as to the locality of cutting and as to quantity cut; and the act too old in date to warrant the court in granting an injunction to restrain further cutting. *Ib.*

See *Edsall* v. *Hamell*, 16 C. P. 93, p. 977.

VI. Miscellaneous Cases.

The lease of a crown reserve having expired, the court refused a writ of restitution after a conviction of forcible entry and detainer. *Rex* v. *Jackson*, Dra. 50.

A. having a claim upon the government for certain wild lands, gave a bond to B. to procure the patent for the same in B.'s name, on conditions that B. should pay him a certain stipulated sum on a fixed day. He did so obtain the patent, and informing B. of it, requested payment. B., without refusing, put it off, and afterwards an action of assumpsit was instituted to recover this money, in which the plaintiff declared, among other things, for the value of lands sold, and for services rendered in procuring letters patent to B., granting him certain lands in fee simple:—Held, that A. could recover. *Kilborn* v. *Forester*, Dra. 332.

Government contracts for sale of lands. Time of the essence of the contract. *Ewing* v. *Good and the Attorney-General*, 1 O. S. 65.

Where the owner of a lot of land encroached upon an adjoining lot belonging to the crown, and took three successive crops off it without any permission from the crown, and another person who had taken possession of the same land also without license about ten years before, and paid taxes and made clearings on it, warned off the owner of the other lot after he had taken the third crop, and then cropped the land himself:—Held, that the owner of the adjoining lot had no property or possession to maintain trespass against him for that crop. *Killichan* v. *Robertson*, 6 O. S. 468.

Evidence will not be received to shew that a grant from the crown was improperly issued, so as to enable a subsequent grantee to recover in ejectment. *Doe* d. *McKay* v. *Rykert*, T. T. 3 & 4 Vict.

The agent for the disposing of the Indian lands on the Grand river does not come under the designation of a district agent of the commissioner of crown lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the Land Sale Acts. *Young* v. *Scobie*, 10 Q. B. 372.

A., being the nominee of the crown, transferred his certificate to B. in 1796, who soon after by writing, not under seal, contracted to sell to C. It was not shewn whether C. had made the payments specified by his agreement, but he went into possession, and he and his descendants had held uninterruptedly for more than fifty years. The defendant claimed under them. In 1837 a patent first issued to A., whose heir brought ejectment. It was left to the jury to presume a grant made by A. before the patent, but they found for the plaintiff, and the court refused to set aside the verdict. *McDonald* v. *Prentiss*, 14 Q. B. 79. See also *Eccles et al.* v. *Maxwell*, 17 Q. B. 173.

Semble, per Draper, C. J., the crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions; and the grantee will be entitled to hold it although a subsequent survey made by authority of the crown makes it by name a different lot, or places it in a different concession from that named in the patent, or the surveyor lying it out projects a road through it. *Horne* v. *Munro*, 7 C. P. 433.

A., a crown lands agent, being asked by the plaintiff whether there were any lands for sale by government in the township of M., told him that there were not, but that B. had certain lots there, to which he would sell his right, and the plaintiff being introduced by A. to B., paid the latter £50 for his good will, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence, or as money had and received. *McMaster* v. *Geddes et al.*, 19 Q. B. 216.

One W., as agent for J., sold to defendant two lots of land for $1000, receiving $100 down and defendant's notes for the balance. This land had been purchased from the crown in 1854, by one Wake, who had assigned his right to Colvin, and Colvin to J. The instalments had all been paid to government, and W. told defendant that when he did the settlement duties he could get the patent. He also handed to defendant the assignments and receipts, with an assignment from J. to defendant. The lots were then vacant, and defendant soon after went into possession and performed the settlement duties, but when he applied for his patent he was informed that the original sale to Wake had been cancelled, as having been obtained in fraud of their regulations; and to avoid losing the

land, he again purchased it from the government for $550. In an action brought by J.'s agent upon the notes, W. swore that he believed what he told defendant to be true, and had no doubt J. also believed it, and there was no proof to the contrary:—Held, that there was no evidence to sustain a defence on the ground of fraud; that there was not a total failure of consideration; and that the plaintiff therefore was entitled to recover. *Walker* v. *Douglass*, 23 Q. B. 9.

Declaration, that defendant intending, &c., falsely and fraudulently represented to plaintiffs that the land and timber were defendant's, and that he had the right to grant to plaintiffs the privilege of cutting the timber thereon, and that all crown dues in respect of such timber and the cutting thereof had been paid by him; whereas the land and timber were not defendant's property, nor had defendant any right to grant to plaintiffs the privilege of cutting the timber, nor had the said dues been paid by defendant, as defendant well knew; by reason whereof the plaintiffs were induced to contract with defendant to purchase said timber, and paid him $88 for the same and for the privilege of cutting it, and not to investigate the title to the land and timber; and relying on the same they cut and conveyed to Quebec the said timber to be sold on their behalf; and that by reason of the premises, and before sale, the timber was seized on behalf of the crown for non-payment of the said dues, and plaintiffs had to pay the same and damages for the illegal cutting thereof, and were deprived thereof for a long time, and prevented during that time from selling same, and the same became greatly depreciated in value:—Held, on demurrer, declaration good; for it sufficiently disclosed a cause of action against defendant for assuming fraudulently to sell the privilege of cutting the timber discharged from crown dues, when it was not discharged from them; and that it did not profess to set out a case of either defendant or plaintiffs being mere wrong-doers, without license of any kind from the crown. Quære, as to an action on the case lying, where the cause of action arises from matter of contract. *Edsecall et al.* v. *Hamell*, 16 C. P. 93.

Held, that the evidence set out in this case was insufficient to prove that a sale of land to B. from the crown had been effectually avoided. *Cochrane* v. *McDonald*, 11 C. P. 202.

The provision of 23 Vict. c. 2, s. 28, the Crown Lands Act, that all affidavits required thereunder may be taken before "any justice of the peace," only empowers a justice to administer the oath in a place where he can act as such justice. *Regina* v. *Atkinson*, 17 C. P. 295.

The same interpretation of this act applies to commissioners for taking affidavits mentioned therein. *Ib.*

Held, that sec. 13, C. S. C. c. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease, or settle on any crown land. *Street* v. *The Corporation of the County of Kent*, 11 C. P. 255.

An order in council was made after the 7 Will. IV. c. 118, and before 4 & 5 Vict. c. 100, appropriating land to certain religious purposes:—Held, that under the 27th sec. of the latter statute, the governor in council had power to revoke such appropriation. *Simpson* v. *Grant*, 5 Chy. 267.

The third section of 4 & 5 Vict. c. 100, giving authority to the governor in council to adjudge upon claims to free grants of land under any order in council then in force:—Held, to apply to located lands on which improvements have been made as well as other lands. *Simpson* v. *Grant*, 5 Chy. 267.

A widow is entitled to dower in lands purchased from the crown by her deceased husband, and whereof he died possessed, although no patent issued therefor, and the purchase money had not been all paid. *Craig* v. *Templeton*, 8 Chy. 483.

She is also entitled to one-third of the rents and profits for six years before the commencement of suit. *Ib.*

A patent was issued in favor of a person, who had died six months previously:—Held, that her heir could not file a bill to set aside a conveyance executed under a power of attorney from her, alleged to have been forged. *Brouse* v. *Cram*, 14 Chy. 677.

It is no part of the functions of this court to take evidence or find facts, upon which the officers of the crown may act in the disposition of the rights of claimants to grants of crown lands. *Ib.*

The plaintiff, having no title, assigned the land in question first to one C. and afterwards to one M., to secure certain advances. The crown having issued the patent to C., the plaintiff sought to get in the legal estate outstanding in C., but without paying M.:—Held, under the maxim "He that comes into equity must do equity," that he was first bound to pay the advances made by M. *Wiggins* v. *Meldrum*, 15 Chy. 377.

J. W. B., a widower, was locatee of the crown, and agreed with his son, J. B., to assign his interest in the land on condition of his son making certain payments and performing certain services for the father, which were all duly made and performed, and afterwards the patent was issued in the name of J. B., by which name the father was known to the officers of the land-granting department. Meanwhile, before the issuing of the patent, the father married again. The son during all the father's life continued to occupy the premises, making valuable improvements, without any claim by the father, except for his support under the agreement made between the father and son. After the father's death, the widow filed a bill for dower in the premises, but the court—Held, that even admitting that the grant of the land was to, and was by the government meant to be to, the father, that he could be treated only as a trustee for the son, dismissed the bill with costs. *Burns* v. *Burns*, 21 Chy. 7.

CROWN OFFICE.

It is not irregular to sign interlocutory judgment in the office of a deputy clerk of the crown in the country, at an hour when by rule of court the principal office in town is not open. *Hall* v. *Hunter*, 5 O. S. 705.

Where the defendant's attorney is present at the opening of the office in the morning to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the defendant's attorney is entitled to precedence. *Fralick* v. *Huffman*, 1 C. L. Chamb. 80.—Macaulay.

A person is entitled to search at the crown office for judgments against any number of persons named, and the clerk should allow him to make such search, if a long one, at whatever time is most convenient with respect to the other business of the office. He is not entitled to search the judgments entered during a particular period, without reference to any named parties. *In re Canada Trade Association*, 17 Q. B. 542.

The crown offices should not be opened for business on Easter Monday, and a judgment entered on that day was set aside, for irregularity, with costs. *Trust and Loan Co.* v. *Dickson*, 2 L. J. N. S. 166.—C. L. Chamb.—Draper.

An attachment was granted against a deputy clerk of the crown for having issued serviceable process without authority; and afterwards, on his appearance in term to answer interrogatories, the court ordered him to be dismissed from his office, and to pay the costs of the proceedings. *Rex* v. *Fraser*, 3 O. S. 247.

A deputy clerk of the crown should not file papers at his private residence, apart from his office, and out of office hours. *Fralick* v. *Huffman*, 1 C. L. Chamb. 80.—Macaulay.

The delivery of a paper to him in the street is not filing or entering it. *Ib.*

The court refused a rule to set aside a fi. fa. because issued by the officer at his own house before office hours. *Rolker* v. *Fuller*, 10 Q. B. 477.

The deputy clerks of the crown have no power, under the 120th rule of practice, to issue rules for costs of the day. *White et al.* v. *Shire*, 7 L. J. 206.—C. L. Chamb.—Burns.

Where an appearance was duly filed with the deputy clerk of the crown, but entered by him under the wrong letter, and judgment was in consequence signed, such judgment was set aside with costs. *Great Western R. W. Co.* v. *Buffalo, Brantford and Goderich R. W. Co.*, 2 P. R. 133. —P. C.—McLean.

Putting an appearance under the door of the office of a deputy clerk of the crown during office hours, or handing it to him in the street, is not a due entry of the appearance. Such a practice is not to be encouraged under any circumstances. *Grey* v. *Stacey et al.*, 10 L. J. 245.—C. L. Chamb. —Draper.

When an appearance properly entitled was filed in the office of the deputy clerk of the crown, but was incorrectly entered in the appearance book by defendant's attorney, and plaintiff's attorney not taking the precaution of searching the files, was led to believe that no appearance had in fact been entered, the judgment was set aside, but without costs, as both parties had contributed to the mistake. *Moore* v. *Simons*, 1 L. J. N. S. 183.—C. L. Chamb.— J. Wilson.

Remarks as to the irregularity and impropriety of attorneys making entries which should be made by the proper officer. *Ib.*

Quære, as to the liability of such officer for damages arising from neglect in his duties in this respect. *Ib.*

Where an appearance to a writ in the Common Pleas was filed in the office of the deputy clerk of the crown, who was also clerk of the County Court, but by mistake was put with the County Court papers, and the stamps necessary for an appearance in a superior court was not affixed, the plaintiff signed judgment as in default of appearance:—Held, that the appearance was a nullity, and was absolutely void under the Stamp Act, and leave was refused to have the stamps affixed as of the day of filing, or to take it off the County Court files. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.—C. L. Chamb.—Draper.

A clerk of the County Court, being also ex officio deputy clerk of the crown and clerk of assize, is privileged from arrest only while engaged in his official duties, or while going to or returning from his office; and this court therefore discharged a rule to prohibit the County Court judge from issuing an order of commitment against such officer. *In re Mackay* v. *Goodson*, 27 Q. B. 263.

A certificate of a deputy clerk of the crown in the shape of a postal card is no evidence. *Johnson* v. *Loney*, 6 P. R. 70.—C. L. Chamb.—Dalton, *C. C. & P.*

CRUELTY.

I. ALIMONY FOR—*See* HUSBAND AND WIFE.

CUMBERLAND (TOWNSHIP OF.)

The 23 Vict. c. 101, declares the mode in which the side lines of the first concession of Cumberland shall be run, and provides a method by which those injured by the change from the original plan of survey may obtain compensation: —Held, that the general statute, 20 Vict. c. 78, was thereby excluded, and that the defendant was confined to this method. *Smith* v. *Sparrow*, 21 Q. B. 323.

As to the survey of this township, See *Holmes* v. *McKechin*, 23 Q. B. 52, 321.

CURRENCY.

See MONEY.

CURTESY.

See ESTATE.

CUSTODY OF CHILDREN.

I. BORN IN WEDLOCK—*See* INFANT.

II. ILLEGITIMATE—*See* BASTARD.

CUSTOM AND USAGE.

Where it is the usage of the trade to carry a deck cargo in inland navigation, and such usage

is known to the shipper, he cannot hold the master or owner responsible for a part of the deck cargo swept off in a storm, the bill of lading excepting the dangers of navigation. *Stephens* v. *McDonell*, M. T. 6 Vict.

Whether in case of loss of cargo loaded on deck the ship-owner will be liable, depends on the usage which prevails in respect to deck loading in the particular navigation. *Paterson* v. *Black*, 5 Q. B. 481.

Case against defendant as a common carrier for loss of goods. Plea, not guilty; 2. That it is a custom in navigating lake Ontario to carry cargo on deck: that the plaintiff's goods were laden and stowed on deck: and that a storm arising they were of necessity thrown overboard for the preservation of the vessel and cargo. Replication de injuria generally, not expressly admitting nor expressly traversing the custom: —Held, per cur., that under these pleadings, the custom of trade, as well as all questions tending to shew negligence, either in the method of loading, or in the management of the vessel, or in the throwing overboard the goods without adequate reason, were put in issue. *Ib.*

Action for money earned by plaintiffs as forwarders and carriers. Plea, that according to the custom and usage of forwarders and carriers existing at Toronto, consignees are authorized to pay wharfingers the amount due from them to such forwarders and carriers for the forwarding or carrying of their goods, and that defendant so paid this money:—Held, that assuming the alleged custom to be valid, notice thereof to the plaintiff, if not acquiescence therein, should be alleged. *Torrance et al.* v. *Hayes*, 2 C. P. 338.

Assumpsit on the common counts for work and labour, &c., by plaintiffs, who were common carriers by water. Plea, setting forth a delivery of the goods carried by plaintiff to a wharfinger at T., to whom defendants, *according to the custom and usage of forwarders and carriers at T.*, paid the plaintiffs' claim:—Held, plea bad, for not averring *notice* of the custom to the plaintiffs. *S. C.* 3 C. P. 274.

Plaintiffs bought from defendant certain coal, shipped to defendant at Toronto from a foreign port, and then lying on board the vessel in the Welland Canal. A sale note was given, stating only the quantity and price, and the time by which it was to be taken out of the vessel:—Held, that defendant was not obliged to pay the import duties. Held, also, that evidence was rightly admitted to shew the usage of the trade as sales made under such circumstances. *Brown et al.* v. *Browne*, 9 Q. B. 312.

The plaintiff effected an insurance with defendants on certain wheat to be carried in a schooner from Port Darlington to Kingston, and from thence to Montreal by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, about three miles below Kingston; the wheat was there transferred to a barge, which returned to Kingston to complete her cargo, and while so returning the barge was stranded and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only shewed that certain forwarders having warehouses at Port Sidney had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised:—Held, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage. *Fisher* v. *The Western Assurance Co.*, 11 Q. B. 255.

Plaintiff shipped 90 barrels of flour at Port Credit, in a vessel of defendant's, to be carried to Quebec, such vessel being capable of carrying 4,500. She proceeded to Toronto, where she took in 400 barrels more, and thence to Oswego, where 2,450 were shipped for Quebec also. She was wrecked near Oswego. Defendant was held liable therefor, such deviation being beyond the established usages of trade. *Wright* v. *Holcombe*, 6 C. P. 531.

Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to a customary right of the away-going crop is excluded; and Semble, that there is no custom of the country as to the away-going crops in Upper Canada. *Burrowes* v. *Cairns*, 2 Q. B. 288.

The plaintiffs, a bank at Milwaukee, sent to defendants, a bank at Toronto, for collection, a bill drawn by A. at Milwaukee on B. at Toronto, payable forty-five days after date, together with a bill of lading indorsed by A. for certain wheat consigned by A. to B.:—Held, that in the absence of any instructions to the contrary defendants were not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance. Evidence having been given as to the custom of merchants in such cases, both in the United States and in Canada:—Held, that the latter only could be material. *Wisconsin Marine and Fire Ins. Co. Bank* v. *Bank of B. N. A.*, 21 Q. B. 284.

Plaintiff bought from R. a number of sheep, paying him part of the purchase money at the time, and the balance within a few days. Upon the first payment being made plaintiff marked the sheep with red paint as his property, and they were then placed apart from the rest of R.'s sheep in a separate field on the latter's farm, where they were to remain until required by plaintiff. Plaintiff was a butcher, and it appeared to be the custom among butchers to leave with farmers stock purchased from them until convenient to remove it. This had also been the course of dealing between plaintiff and R. on previous occasions. The sheep thus remained on R.'s premises until seized under an attachment against R., as an absconding debtor: —Held, that the mere marking of the sheep, or the removal of them from one field of the seller to another, did not constitute a sufficient delivery or change of possession under C. S. U. C. c. 45, s. 4:—Held, also, that there was no evidence of a sufficiently established custom or mode of dealing among farmers of treating as their own, property really belonging to others, to put third parties upon enquiry as to the actual ownership. Quære, whether such enquiry would be admissible in a case arising under the statute in question *Doyle* v. *Lasher*, 16 C. P. 263.

At the trial of an action for advances made by a commission merchant on goods consigned to him for sale, defendant tendered evidence to shew the meaning of cash advances so made, and the usual practice as to commission merchants

reimbursing themselves for such advances:—Held, that such evidence was properly rejected. *Cowie* v. *Apps*, 22 C. P. 589.

A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him at Q. for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, the plaintiff, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st of December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff:—Held, that interest could not be charged. Mowat, V. C., diss. *De Hertel* v. *Supple*, 13 Chy. 648, 14 Chy. 421.

CUSTOMS.

See REVENUE.

DAMAGE FEASANT.

See DISTRESS.

DAMAGES.

I. PRINCIPLES.
1. *General*, 985.
2. *Too Remote*, 988.
3. *Joint Wrongdoers*, 989.
4. *Nominal*, 989.
5. *Exemplary*, 990.
6. *Matters in Mitigation or Reduction*, 990.
7. *In Avoidance of Circuity of Action*—*See* ACTION AND SUIT.

II. IN ACTIONS FOR PERSONAL INJURIES
1. *In General*, 991.
2. *Libel and Slander*—*See* DEFAMATION.
3. *By Negligence*—*See* NEGLIGENCE.

III. IN ACTIONS FOR INJURIES TO PROPERTY.
1. *Detaining Property*—*See* DETINUE.
2. *Distress*—*See* DISTRESS.
3. *Mesne Profits*—*See* EJECTMENT.
4. *Replevin*—*See* REPLEVIN.
5. *Against Railway Companies*—*See* RAILWAYS AND RAILWAY COMPANIES.
6. *Trespass*—*See* TRESPASS.
7. *Trover*—*See* TROVER.
8. *By Collision at Sea*—*See* SHIP.

IV. IN ACTIONS ON CONTRACTS.
1. *Principles*, 992.
2. *For Non-delivery of Goods or Chattels*, 993.
3. *Other Cases*, 993.
4. *Bond*.
   (a) *Generally*—*See* BOND.
   (b) *Bail to the Limits*—*See* BAIL.
   (c) *Penalty*—*See* PENALTY BY CONTRACT.
   (d) *Replevin*—*See* REPLEVIN.
5. *On Foreign Bills*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
6. *Against Railway Companies*—*See* RAILWAYS AND RAILWAY COMPANIES.
7. *Against Ships*—*See* SHIPS.
8. *Sale of Goods*—*See* SALE OF GOODS.
9. *Sale of Lands*—*See* SALE OF LANDS.
10. *Transmitting Messages by Telegraph*—*See* TELEGRAPH.

V. IN ACTIONS ON COVENANTS.
1. *Generally*—*See* COVENANT.
2. *For Title*—*See* COVENANTS FOR TITLE.
3. *In Leases*—*See* LANDLORD AND TENANT.

VI. IN ACTIONS FOR DOWER—*See* DOWER.

VII. BY REVERSIONERS, 994.

VIII. COSTS, WHEN RECOVERABLE AS DAMAGES.
1. *Generally*, 994.
2. *In actions on Covenants for Title*—*See* COVENANT FOR TITLE.

IX. DOUBLE OR TREBLE DAMAGES, 996.

X. AVERMENT OF, IN PLEADING, 996.

XI. ASSESSMENT OF DAMAGES.
1. *By Jury*, 996.
2. *By Master*.
   (a) *In Chancery*—*See* PRACTICE IN EQUITY.
   (b) *Computation of Amount due on Judgment*—*See* JUDGMENT.

XII. MISCELLANEOUS CASES, 998.

XIII. IN ACTIONS AGAINST SHERIFF—*See* SHERIFF.

XIV. DAMAGE OCCASIONED BY NON-REPAIR OF HIGHWAY—*See* WAY.

XV. DAMAGE OCCASIONED BY CONSTRUCTION OF RAILWAY—*See* RAILWAYS AND RAILWAY COMPANIES.

XVI. DAMAGE OCCASIONED BY WATER—*See* WATER AND WATER COURSES.

XVII. DAMAGE FEASANT—*See* DISTRESS.

XVIII. EXCESSIVE DAMAGES—*See* NEW TRIAL.

XIX. SMALLNESS OF DAMAGES—*See* NEW TRIAL.

XX. LIQUIDATED OR PENAL—*See* PENALTY BY CONTRACT.

XXI. COMPENSATION ON APPLICATION FOR SPECIFIC PERFORMANCE OF CONTRACT—*See* SPECIFIC PERFORMANCE.

I. Principles.

1. *General.*

A person who takes upon himself to abate a nuisance—for instance, a mill dam—may be called upon to pay damage for any injury done to the plaintiff's property beyond what is necessary for removing the public inconvenience. *Truesdale* v. *McDonald*, Tay. 121.

A lessor, who had the title to the premises at the time of action brought, but not at the time of trial, is entitled to damages, although he cannot recover his term. *Doe* d. *Meyers* v. *Blakier*, E. T. 2 Vict.

In an action on the case, a declaration would be open to special demurrer in claiming damages for an injury stated to have been committed, or at least continued, after action. *Watson* v. *The City of Toronto Gas-light and Water Co.*, 4 Q. B. 158.

In this province, (though not in England) the heir is only liable, on descent of lands, for the debts of his ancestor. He is not liable for unliquidated damages, as, for instance, upon his ancestor's covenant for good title. *Vankoughnet* v. *Ross*, 7 Q. B. 248.

In trespass for taking timber, the court refused to disturb the verdict, on the ground that the damages were beyond the value of the logs taken. *Flint* v. *Bird et al.*, 11 Q. B. 444.

In trespass to land, where the action was brought on the 7th of May:—Held, that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest. *Throop* v. *Fowler*, 15 Q. B. 365.

Under the 14 & 15 Vict. c. 51, where a railway company's line severs a farm, it is primâ facie their duty to construct a farm crossing, and the fact of their having commenced the construction of such a crossing at a particular place and afterwards desisted at the request of the owner, does not prevent the owner from recovering damages as for a continuing breach. *Ward* v. *Grand Trunk Railway Co.*, 6 C. P. 421.

Held, that the value of goods sold under a judgment recovered upon a mortgage made by the plaintiffs, against which they held a bond of indemnity from defendants, did not form the measure of damages, but they were entitled to recover the amount of such judgment. *Raymond et al.* v. *Cooper et al.*, 8 C. P. 388.

Where a policy of insurance on a steamboat against fire, provided that in the event of loss the damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen":—Held, that in estimating loss the defendants were not entitled to have taken into account a depression in the value of steamers generally, caused by circumstances which might be temporary only. *McCraig* v. *The Quaker City Insurance Co.*, 18 Q. B. 130.

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $6,000, prior to that which the plaintiff purchased, supposing it, from the certificate, to be the first incumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than what would satisfy the two mortgages, but he soon afterwards sold at a considerable advance, so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages:—Held, that the damages were moderate, the plaintiff having in fact sustained loss by defendant's mistake to the full amount of the first mortgage. *Harrison* v. *Brega*, 20 Q. B. 324.

A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution. In estimating the damages against the defendant for such fraudulent removal, it was held that the return of the sheriff as to the amount made on the writ should be presumed to be correct, and if the defendant contended that the sheriff should have applied the proceeds of the sale of other goods to satisfy the plaintiff's execution, or that the sheriff should have seized and sold other goods, and so applied the proceeds, he must prove such a case. *Turner* v. *Patterson*, 13 C. P. 412.

In detinue for a deed:—Quære, whether plaintiff can recover damages for having been prevented by the want of it from obtaining horses to cultivate his farm. *Wood* v. *Bowden*, 23 Q. B. 466.

Trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the judge in the County Court directed that the plaintiff was not entitled to maintain the action because the pamphlet was a scoffing and indecent attack on christianity, and ordered a nonsuit. On appeal:—Held, that the plaintiff held property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefor: that the judge should have directed the jury as to the nature of works which the law protects and what it prohibits: that if the pamphlets were not illegal, they should give damages for their value as a literary production; and if illegal, they should give damages to the value of the paper, &c., irrespective of the words upon it. *Boucher* v. *Sherran*, 14 C. P. 419.

An action will lie for injury to a right, though no appreciable damage has been sustained. *Mitchell* v. *Barry*, 26 Q. B. 416; *Plumb* v. *McGannon*, 32 Q. B. 8; *Warren* v. *Deslippes*, 33 Q. B. 59.

The defendant G. and two others, having executions against W. & K., directed the seizure of certain goods. The plaintiff, to whom the goods belonged, demanded them of the bailiff, who refused to give them up. G. afterwards directed the bailiff not to sell or do anything more on his execution, but it did not appear that he told the plaintiff of this, or ordered the goods to be returned to him. The plaintiff then brought trover against the bailiff and G., and the bailiff afterwards sold the goods under the other executions, paying over no portion of the proceeds to G.:—Held, that G. was liable for the full value of the goods, for the plaintiff's right of action accrued on the demand and refusal, and was not defeated by what took place afterwards. *Macklem* v. *Durrant et al.*, 32 Q. B. 98.

Held, following Howland *v.* Jennings, 11 C. P. 272, and Montgomery *v.* Boucher, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. *Young* v. *Fluke*, 15 C. P. 360.

Where a trustee is authorized to invest in either of two specified modes, and by mistake invests in neither, the measure of his liability is the loss arising from his not having invested in the less beneficial of the authorized modes. *Paterson* v. *Lailey*, 18 Chy. 13.

Two years before the passing of the act relaxing the usury laws (22 Vict. c. 85,) a trustee, who was authorized to invest on mortgage or government securities, made an investment in Upper Canada Bank stock, under the impression that such an investment was within his authority. The stock ultimately turned out worthless; and the trustee submitted to account for the principal with compound interest at six per cent.:—Held, that this was the extent of his liability, though eight per cent. might have been obtained on mortgages. *Ib.*

Defendant caused plaintiff's goods to be seized under an execution against his father, believing them to belong to the latter. The goods in question consisted of some articles of machinery, metal, &c., in the upper portion of a shop where plaintiff carried on his business. The sheriff did not take possession before the 20th, and an interpleader order was made on 29th January, and during part of this interval plaintiff was allowed to continue his business. The jury having given the plaintiff $1000 damages,—Held, excessive, as no damages were recoverable after the date of the interpleader order, and a new trial was ordered. *Lister* v. *Northern R. W. Co.*, 19 C. P. 408. See, also, *Kennedy* v. *Patterson*, 22 Q. B. 556.

Held, following Porter *v.* Flintoft, 6 C. P. 325, and Ruttan *v.* Beamish, 10 C. P. 90, that an action will not lie at the suit of the mortgagor of chattels against the mortgagee, for seizure of the chattels before default in payment, where there is no proviso in the mortgage for possession until default; and that even if an action would lie, the jury should be told that the plaintiff could recover only to the extent of his interest in the goods and for the damage done to such interest, instead of, as in this case, for their full value, as in the case of a wrong-doer. *McAulay* v. *Allen*, 20 C. P. 417.

In an action for injury to plaintiff's vessel, caused by collision with defendant's steamboat:—Held, that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment. *Brown* v. *Beatty et al.*, 35 Q. B. 328.

Semble, that in an action of trover for a vessel, the loss of profit may be recovered. *Ib.*

Where a plaintiff filed a bill for an injunction and payment of damages; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit was commenced:—Held, that the court had not jurisdiction to make a decree for the damages. *Brockington* v. *Palmer*, 18 Chy. 488.

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2. *Too Remote.*

The plaintiffs, living at Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were so sent in one of the mail steamers, but the captain of the "Regina" being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by the railway to Sarnia, where he would take them up on his way to Southampton. Defendants however shipped them from Kingston by a propeller, which was burned with the goods on board, in the River St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was cancelled. It was held in the Queen's Bench, Richards, C. J., doubting, that on the contract for not sending as directed, defendants were liable only for nominal damages, the loss by fire being too remote; and, Richards, C. J., diss., that they were not liable in trover. On appeal,—Held, reversing the judgment, that the defendants were liable on the contract for the value of the goods. *Wallace et al.* v. *Swift et al.*, 31 Q. B. 523, 28 Q. B. 563.

The plaintiff and his wife sued defendants for injury alleged to have occasioned to the wife by their neglect to have a railing or guard along an embankment leading down to a bridge on one of their leading highways in a populous township. It appeared that the wife and her son, about eight years old, were crossing the bridge in a buggy, when the horse shied at some new planks on the bridge, and backed to the end of it, where the hind wheel went over the bank, throwing her out and into the water about fourteen feet below. The jury found, upon the evidence set out in the case, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse:—Held, Morrison, J., doubting, that it was the duty of defendants to fence or guard the place in question: that the injury was caused by the want of such protection as the proximate cause, not by the horse becoming frightened or unmanageable; and that defendants therefore were liable. *Toms et al.* v. *The Corporation of the Township of Whitby*, 35 Q. B. 1[illegible] affirmed on appeal 15th September, 1875.

The authorities as to remote and proximate causes of damage reviewed. *Ib.*

Defendant, on the 14th of March, 1872, agreed to buy two acres of land in a village from the plaintiff for $325, and to complete upon it within eighteen months a brick factory of specified dimensions, and at or before its completion to commence and prosecute therein the manufacture of plated ware on a scale commensurate with its size; and that in case he should not perform his agreement in this respect he would at the end of the eighteen months reconvey the land to the plaintiff, receiving back the purchase money, $325, and compensating the plaintiff for damages, if any. The defendant did not pay the purchase money, and at the end of sixteen months elected not to go on with the agreement, whereupon the plaintiff sued, alleging in his

declaration that the plaintiff's adjoining land would have been much enhanced in value by the sale to defendant, and the erection of the factory, and claiming as damages profits which he would have derived therefrom :—Held, that such damages were not recoverable, being altogether too remote. Quære, whether he could recover interest, though he had demanded the $325, for he had not offered at the time to make a conveyance. *Dallea* v. *Taylor*, 35 Q. B. 395.

3. *Joint Wrongdoers.*

In an action against two justices for one act of imprisonment, charged in one count as a trespass, and in another as done maliciously, the jury found $800 against one defendant, and $400 against the other. Semble, that the damages could not be thus severed : but, Held, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. Quære, as to the proper mode of entering the judgment. *Clissold* v. *Machell*, 25 Q. B. 80 ; affirmed in appeal, 26 Q. B. 422.

4. *Nominal.*

When the term in a declaration in ejectment has expired, the plaintiff is entitled to recover nominal damages and his costs, although he cannot recover possession. *Doe* d. *Lick* v. *Ausman*, H. T. 6 Vict.

In proceeding in prohibition, the plaintiff can only recover nominal damages. If he wish to recover substantial damages, he must proceed by action on the case after the entry of judgment quod stet prohibitio. *Mittleberger* v. *Merritt et al.*, 2 Q. B. 413.

Where an attorney was retained to apply to relieve a sheriff from an attachment, and the jury found him in fault in conducting the application : —Held, that he was liable to nominal damages, although the special damage laid was not proved. *Mcleod* v. *Boulton*, 3 Q. B. 84. See *Doan* v. *Warren*, 11 C. P. 423.

Where a jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there had been neglect on the part of the sheriff from which the plaintiff had suffered some damage, returned a nominal verdict in favor of the plaintiff, the court refused to set it aside, under the facts stated in the case, on the ground that, even to sustain such a verdict for wrongfully arresting a defendant upon mesne process, some clear proof of an injury received from the neglect should have been given, and that none was offered. *O'Connor* v. *Hamilton*, 4 Q. B. 243.

In an action for not carrying goods safely, whereby they were lost, issues in fact were left to a jury, reserving the question of nominal or substantial damages for the opinion of the court : —Held, that the only question for the court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods : and that the question of mitigating the damages upon the facts proved, could not be considered. *Robson* v. *The Buffalo and Lake Huron Railway Co.*, 10 C. P. 279.

Plaintiff sued defendant, an agent of an express company, on an alleged undertaking to take and carry a copy of a lost note and present it for payment, and in case of non-payment to notify the endorsers. Breach—that defendant did not present or notify, in consequence of which the endorsers refused to pay the note. The evidence shewed no demand by the plaintiff upon the endorsers for the payment, nor refusal by them to pay :—Held, that without such evidence, the plaintiff could at most recover only nominal damages. *McQuarrie* v. *Fargo*, 21 C. P. 478.

In trespass, defendant justified cutting the ditch complained of under an award of fence viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage :—Held, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages. *Warren* v. *Desliippes*, 33 Q. B. 59.

The plaintiffs and defendant entered into a joint venture, to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the mineral right in the land. The plaintiffs accordingly procurred a by-law to be passed by the municipality for the sale of the mineral rights, under sec. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with the defendant's consent, made to one R. B. J., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance ; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. Defendant obtained an act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued defendant for not forming the joint stock company, or carrying on mining operations, and having obtained a verdict for $400 :—Held, that the verdict must be reduced to nominal damages. *Johns et al.* v. *Beck*, 24 C.P. 219.

5. *Exemplary.*

In an action against two justices, one of the defendants having used insulting expressions to the the plaintiff during the examination before them :—Held, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages. *Clissold* v. *Machell et al.*, 25 Q. B. 80 ; affirmed on appeal, 26 Q. B. 422.

6. *Matters in Mitigation or Reduction.*

Semble, if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recover damages equal to the value of the wheat delivered to defendant, he cannot bring an action for goods sold, for part of the wheat which had, in point of fact, been redelivered to the plaintiff ; and that such redelivery should have been given in evidence in mitigation of damages. *Andrus* v. *Burwell*, Tay. 382.

Trespass against a magistrate for seizing and selling plaintiff's goods. At the trial evidence

was given to shew that the plaintiff had been guilty of the offence charged, but such evidence was offered and received only in mitigation of damages; the provisions of the 16 Vict. c. 180, s. 12, which in such a case limits the damage to 2d., and deprives the plaintiff of costs, were overlooked; and the plaintiff obtained a verdict for full damages:—Held, that there must be a new trial without costs. *Brose* v. *Huber*, 15 Q. B. 625.

In assumpsit for breach of promise of marriage, the defendant is entitled, in mitigation of damages, to cross-examine the plaintiff's own witness respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 493.

Upon an assessment of damages for goods sold, defendant tried to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by defendant in consequence of their arriving with charges on them, and the jury found nominal damages only:—Held, that such matter should have been pleaded in bar, and was not available for defendant on an assessment of damages. *Comstock* v. *Thistle*, 7 C. P. 27.

Held, that where evidence offered at a trial and rejected affects only the amount of damages, and the amount involved is small; the court, in the exercise of the discretion vested in it by the Error and Appeal Act (C. S. U. C. c. 13, s. 24,) will refuse leave to appeal. *Myers* v. *Currie*, 9 L. J. 152.—Q. B.

In an action for not carrying goods safely, whereby they were lost, issues in fact were left to the jury reserving the question of nominal or substantial damages for the opinion of the court:—Held, that the only question for the court was, whether the plaintiff should be limited to nominal damages, or recover the actual value of his goods; and that the question of mitigating the damages upon the facts proved could not be considered. *Robson* v. *The Buffalo and Lake Huron R. W. Co.*, 10 C. P. 279.

II. In Actions for Personal Injuries.

1. *In General.*

Whether, under 27 & 28 Vict. c. 18, s. 40, which makes a tavern keeper liable in case any person while in a state of intoxication from excessive drinking in his tavern has come to his death "by shooting or drowning, or perishing from cold or other accident caused by such intoxication," proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the act at not less than $100, was a question raised but not decided. *Bobier* v. *Clay*, 27 Q. B. 438.

After a count by husband and wife for injury done to the wife during coverture, a second count, by the husband alone—after setting out the fact that the horse and cutter, in which both plaintiffs at the time were, having been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering—proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay and did pay large sums of money on account of her illness to nurses and medical men, &c., and also lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for the plaintiffs, and assessed damages generally on both counts:—Held, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that, treating it as such, it was well joined with the first count, under the C. L. P. Act, though damages were sought by him for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife. Held, also, that defendants were not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count. *Campbell et ux.* v. *The Great Western R. W. Co.*, 20 C. P. 345, 563.

The inability properly to calculate the damages to the plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, was held a sufficient ground for postponing the trial on terms. *Speers* v. *The Great Western R. W. Co.*, 6 P. R. 170.—C. L. Chamb.—Dalton, *C. C. & P.*

IV. In Actions on Contracts.

1. *Principles.*

Upon a breach of covenant, a party is liable only for such damages as are the natural consequences of his act or omission. Where, therefore, the vendee of land allowed it to be sold for taxes which had accrued during his vendor's time, and neglected to redeem it within the year afterwards:—Held, that he could not as of right recover damages to the value of the land so allowed to be sold. *McCollum* v. *Davis*, 8 Q. B. 150.

Assumpsit on an agreement, whereby defendants agreed to supply plaintiff with whatever funds he should require for carrying on his business, (a miller, &c.,) not exceeding, &c., to be secured by the promissory notes of plaintiff, and warehouse receipts for the flour, which was to be sold by defendants as agents and commission merchants in any market plaintiff might think proper, and that plaintiff should give a mortgage to defendants on his mill as collateral security. Breach, that although defendants advanced a small sum, yet they would not make any further advances, by means whereof the plaintiff has been unable to do such an extensive business, and gain such profits as he might have done. Second count, alleging a breach of the contract, in selling flour against plaintiff's will at Boston, whereby said flour brought a much less price, and plaintiff was put to great expense on the same. Defendants traversed the several averments in the declaration, and pleaded a substituted special agreement. After verdict for plaintiff on the first count £3030, and on the second for £227 12s. 6d.:—Held, that there should be a new trial: that as to the first count, the damages were not warranted by the evidence, there being no request of any specific sum proved, and that general evidence of plaintiff asking for and failing to obtain advances was not sufficient. Quære, as to the measure of damages for breach of the contract set out in the first count. *Hyde* v. *Gooderham*, 6 C. P. 21.

2. *On Non-delivery of Goods or Chattels.*

Assumpsit on a contract to make and deliver two pair of burr mill-stones. Breach, their insufficiency and bad quality. The jury, in addition to the cost of new stones, allowed certain separate sums for money expended in attempting to repair the broken stones, for dressing them, and for injury caused by their breaking to the machinery of the mill; damages being specially claimed in the declaration on these accounts:—Held, that the verdict was sustainable as to the last two items, but not as to the first. *Colton* v. *Good*, 11 Q. B. 153.

In an action by plaintiffs against defendants for damages occasioned by the non-delivery of a certain article of machinery contracted to be delivered by them for plaintiffs, it appeared that no notice had been given at the time of the contract to the defendants of the necessity for a prompt delivery of the machinery, nor of the use it was to be put to:—Held, on the authority of Cory *v.* The Thames Iron Works Co., L. R. 3 Q. B. 181, affirming Hadley *v.* Baxendale, 9 Ex. 341, that the plaintiffs could only recover the value of the missing article, and were not entitled to the loss of profits arising from this non-delivery, or the wages of certain workmen employed upon the building in which the machinery was to be used. *The Ruthven Woollen Manufacturing Co.* v. *Great Western R. W. Co.*, 18 C. P. 316.

Plaintiff had sold certain goods to M., which were at the time lying at the defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with plaintiff to carry and deliver them for him as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for non-delivery:—Held, that the plaintiff was entitled to recover the whole value of the property converted, and not merely the difference between the price at the time when defendants refused to deliver it, and when they tendered it back again. *Brill* v. *The Grand Trunk R. W. Co.*, 20 C. P. 440.

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3. *Other Cases.*

In an action on a covenant by lessee to insure the premises in the name of the lessor, the insurance money to be expended in the erection of new buildings:—Held, that the measure of damages was the value of the premises lost to the plaintiff by defendant's neglect to insure, such value not exceeding the sum in which defendant was to have insured by his covenant; and that it could make no difference that, on failure of the lessee to insure, the lessor was allowed by the lease to do so, and charge the premiums as rent. *Douglass* v. *Murphy*, 16 Q. B. 113.

Defendant agreed to saw for plaintiff a certain quantity of logs, which the plaintiff was to deliver at his mill, at specified rates. In an action for not sawing logs so delivered:—Quære, as to the measure of damages to be recovered. *Buchanan* v. *Anderson*, 16 Q. B. 331.

The plaintiff and defendants entered into an agreement, the former to perform certain work for the latter upon certain conditions. The plaintiff executed the contract, and the defendants' engineer signed it on their behalf, without attaching the seal of the company. Upon an action brought by plaintiff for work and labour performed and executed, the defendants put on the record a plea denying the contract:—Held, that by their pleadings having denied the contract, they could not invoke its aid to prevent the recovery of damages by the plaintiff. *Stock* v. *The Great Western Railway Co.*, 9 C. P. 134.

VII. By Reversioners.

Where in an action on the case for a nuisance, by landlords as reversioners, they recovered £250 damages, the court granted a rule nisi to reduce the verdict to 1s. on the nuisance being abated within a certain time, unless the landlords obtained a release from their tenants to the defendant of any cause of action accruing to them from the nuisance. The rule was afterwards discharged on a release being produced, although the release was not exactly in accordance with the terms of the rule. *Drew et al.* v. *Baby*, 6 O. S. 241.

In an action on the case by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages on the first trial, but may give damages commensurate to the injury which the plaintiffs may sustain by the possible continuance of the nuisance. *Drew et al.* v. *Baby*, 1 Q. B. 438.

Held, that an action is maintainable by the reversioner of a mill demised to a tenant for diversion or obstruction by a stranger of water from the mill head, the obstruction being of such a character as to render the sale of the reversion less valuable:—Quære, whether damages must be recovered once for all. *Rogers* v. *Dickson*, 10 C. P. 481.

In an action on a lease (having many years to run) for rent and non-repair of the premises: Held, that the reversioner, by reason of the length of the lease, was not restricted to nominal damages, but the measure of damages was the amount to which the reversion is injured by the premises being out of repair. *Atkinson* v. *Beard*, 11 C. P. 245.

The plaintiffs, lessors, proved that the damage to the reversion by reason of the defendant's omission to repair was $651, the estimate covering all injury up to the time of trial; the jury gave a verdict for $400. There was no misdirection complained of, nor was the judge asked to direct the jury to find in express terms the actual damage sustained by the reversion; nor were any affidavits filed to shew that the damages were excessive. The court refused to grant a new trial, on the ground of excessive damages. Marriot *v.* Cotton, 2 C. & K. 553, referred to, distinguished, and doubted. *Perry et ux* v. *The Bank of Upper Canada*, 16 C. P. 404.

Review of English authorities as to injuries to the reversion, the time of bringing the action therefor, and the measure of damages. *Ib.*

VIII. Costs, when Recoverable as Damages.

1. *Generally.*

In an action by the sheriff on an indemnity bond, the sheriff is entitled to recover from

the obligors in the indemnity bond the costs for putting off the trial of the cause against himself on account of the absence of a material witness. *Corbett* v. *Wilson et al.*, 8 Q. B. 22.

The plaintiff leased a house from defendant, and a dispute arose as to some repairs, for which defendant refused to pay. The plaintiff, being sued for the work done, defended on the ground that defendant only was liable to the contractor; but a verdict was rendered against him, which he paid, with costs. The plaintiff thereupon sued defendant:—Held, that he could recover the amount of such verdict only, not the costs. *Taylor* v. *Strachan*, 16 Q. B. 76.

The costs of an application under sec. 82 of the Surrogate Courts' Act, C. S. U. C. c. 16, for an assignment of a probate bond, in order to an action thereon at common law, cannot be taxed as costs in the action, but should be recovered as damages consequent on default. *Closson* v. *Post*, 6 L. J. 141.—C. L. Chamb.—Draper.

Defendants sold to the plaintiff and received the purchase money for some wheat, which they represented to be their own, but which belonged to one B., who obtained it from the railway company in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. The plaintiff then sued the defendants for the deceit, claiming as special damages the costs of this unsuccessful action:—Held, that such costs could not be recovered. *Merritt* v. *John Ne[illegible] et al.*, 20 Q. B. 540.

Held, that a person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent is answerable to the person who so contracts, for any damages which he may sustain, by reason of the assertion of authority being untrue; and, Held, further, that costs incurred by such third person in an action for the recovery of damages against the supposed principal, may be recovered as damages in an action against such unqualified agent. *Eckstein* v. *Whitehead*, 10 C. P. 65.

Action by the assignee of a replevin bond for costs incurred in setting aside the writ, and for damages for detention of the vessel replevied. Plea, non damnificatus. At the trial it appeared that the plaintiff had caused the vessel, for which the writ of replevin had issued, to be seized on certain fi. fas. placed in the sheriff's hands prior to her being replevied:—Held, that the plaintiff's property being seized under the writ of replevin, he had to take steps to defend the same, and was entitled to his costs of defence. *Burn* v. *Blecher*, 14 C. P. 415.

Defendant took an assignment of a lease from the plaintiff, a lessee, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence:—Held that under defendant's covenant to indemnify him, the plaintiff was entitled to recover the damages and costs in that suit, but not interest. *Spence* v. *Hector*, 24 Q. B. 277.

IX. Double or Treble Damages.

An action cannot be brought against a registrar for treble damages under the 10th section of the act 35 Geo. III. c. 5, until he has been convicted under that section of some offence for which he shall forfeit his office. *Hamilton* v. *Lyons*, 5 O. S. 503.

A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under the 2 Will. & M. c. 5, s. 4, the word "recover," used in the statute means "recover by the verdict of a jury." *Clark* v. *Irwin et al.*, 8 L. J. 21.—C. L. Chamb.—Burns.

Remarks as to the hardship of the statute allowing double damages for distraining when no rent due, where the landlord has acted on an erroneous construction of a doubtful lease. *Brown* v. *Blackwell*, 35 Q. B. 239.

X. Averment of, in Pleading.

Where a party, upon an alleged breach of an agreement, seeks to recover compensation not in the nature of general damages, to be left to the discretion of the jury, but in the shape of particular damages specially contracted for by the agreement itself, should he not aver in his declaration notice to defendant before action brought of such particular damages and the amount? *Henderson* v. *Nichols*, 5 Q. B. 398.

An allegation of damages on a ground on which the plaintiff is not entitled to recover, does not form ground for demurrer to a declaration. *Duffield* v. *Great Western Railway Co.*, 4 L. J. 47.—C. L. Chamb.—Draper.

In a special action on the case for obstructing an enquiry into the financial affairs of a township:—Held, that upon the declaration, which is fully set out in the report, the damage was sufficiently stated, and was a legal damage, being directly occasioned by the act complained of. *The Municipality of the Township of East Nissouri* v. *Horseman et al.*, 16 Q. B. 556.

In an action for breach of covenant by delaying the completion of a railway crossing, which afforded the best road to the plaintiff's saw mill:—Held, that evidence of special damage was not admissible, none being alleged in the declaration, and the plaintiff not having notified the defendants at the time of the fact of his suffering the loss of profit, which constituted the alleged damages. *Shaver* v. *The Great Western Railway Co.*, 6 C. P. 321.

In an action for delay in carrying goods:—Held, that under the averment in the declaration of the loss of market caused thereby, the evidence of loss caused by the corn sprouting, and thus deteriorating in quality, was improperly received. *Kyle* v. *The Buffalo and Lake Huron R. W. Co.*, 16 C. P. 76.

XI. Assessment of Damages.

1. *By Jury.*

The plaintiff must assess his damages after interlocutory judgment, in debt on a bond to the limits. *Callagher* v. *Strobridge et al.*, Dra. 159.

Where an interlocutory judgment was set aside by a judge's order, but the plaintiff proceeded and assessed damages—the court set the proceedings aside. *Staats* v. *Reynolds*, 4 O. S. 5.

Where there was an issue of fact and an issue in law, on which contingent damages are to be assessed, a notice of trial was held sufficient to enable the plaintiff to try the issue and assess damages. *Davis* v. *Davis*, 4 O. S. 322.

Where, in a country cause, a short time before the assizes an interlocutory judgment was set aside by a judge's order on payment of costs, and that the defendant should plead issuably and take twenty-four hours' notice of trial, and defendant tendered the costs and pleas the evening before the first day of the assizes, at the same time serving a written demand of replication, and offering to take one hour's notice of trial, notwithstanding which the plaintiff, having previously given notice of assessment, went on and assessed damages, the court held the assessment regular, the defendant filing no affidavit of merits, nor shewing that his pleas were issuable, and the delay in his proceeding after the order was granted being too great. *Jessup* v. *Frazer*, 1 Q. B. 390.—P. C.—Jones.

In trespass qu. cl. fr., defendant's attorney, seeking the advice of counsel upon some difficult points of pleading that were likely to arise in the defence, undertook to allow the plaintiff's attorney to enter his record at any time during the assizes. Defendant's attorney pleaded a special plea, to which the plaintiff new assigned, and defendant then pleaded specially to the new assignment, and the plaintiff demurred specially. Defendant thereupon gave the plaintiff notice that if he proceeded to assess contingent damages, he should move to set aside the proceedings for irregularity; the plaintiff proceeded to assess his damages, and the court set the assessment aside without costs. *Hodgkinson* v. *Donaldson*, 2 Q. B. 274.

A plaintiff cannot, under rule 23 of H. T. 12 Vict., assess contingent damages where there is nothing on the record but a demurrer to the whole declaration. *Elliott* v. *Wilson et al.*, 7 Q. B. 331.

Semble that in making up a record for assessment after judgment on demurrer, before the record is made up a judgment paper should be filed in the office; but the omission of it must be taken advantage of before damages assessed. *Gamble et al.* v. *Rees*, 7 Q. B. 406.

The fact that a nisi prius record contains a blank for the date of the judgment on the demurrer, is no ground for setting aside the assessment of damages. *Ib.*

When the writ of trial is only to try the issue, and contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested. *Hunter* v. *Vernon*, 7 Q. B. 532.

A plaintiff is not at liberty to go on and assess his damages, pending a summons to set aside his interlocutory judgment, and after it is returnable. *Pace* v. *Meyers*, 8 Q. B. 70.

There can be no assessment of damages where a verdict is found for defendant on an issue going to the whole cause of action. *Prynne* v. *Carroll*, 10 Q. B. 519.

In debt by executor on an annuity bond, made by defendant to the testator, and payable during the lifetime of the testator:—Held, that the issues tendered by the replications were sufficient, and that the allegations in the pleadings, set out in the case were sufficient to warrant the assessment of damages. *Smith* v. *Muirhead*, 13 Q. B. 9, in appeal.

Upon an assessment of damages for goods sold, defendants tried to prove a contract to deliver the goods in Toronto free of charge, and that they were refused by defendant in consequence of their arriving with charges on them, and the jury found nominal damages only:—Held, that such matter should have been pleaded in bar, and was not available for defendant on an assessment of damages. *Comstock* v. *Thistle*, 7 C. P. 27.

Held, that upon the evidence given in this case, a jury might assess several damages on each of the three counts; the first two being for assault and imprisonment on different days, and the third for malicious prosecution. *Appleton* v. *Lepper*, 20 C. P. 138.

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XII. Miscellaneous Cases.

An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal—(and this, although the bond might be considered as still subsisting and sufficient to sustain an action of debt)—and damage may be recovered against the obligor to the amount of the penalty. *The President, &c., of the Bank of Upper Canada* v. *Widmer*, 2 O. S. 222.

Where in indebitatus assumpsit the defendant, as to all the moneys in the declaration except as to £33 14s., pleaded the general issue, and as to that sum pleaded payment of £1 1s. 8d. into court, and no damages ultra; and the plaintiff replied, that he had sustained greater damages, but at the trial obtained a verdict for the difference between the sum of £33 14s., and £1 1s. 8d. paid into court, as a sum admitted on the record without giving any evidence—the court set the verdict aside, as it was incumbent on the plaintiff to prove damages, no specific sum being admitted on the record in this form of action. *Ross et al.* v. *Garrison*, 6 O. S. 626.

Semble, that though a license to erect a dam given by the plaintiff to the defendant not under seal, is insufficient to create an easement, yet that it may be sufficient, as a license, to prevent the plaintiff from recovering damages for the erection as a wrongful act. *Robinson* v. *Fetterly et al.*, 8 Q. B. 340. See, also, *Bluver* v. *Read*, 9 Q. B. 152; *Canada Company* v. *Pettys*, 9 Q. B. 669.

In an action against a harbour company, for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, as to the shares for which the plaintiffs were entitled to recover, that they were strictly entitled only to their value at the time of demand and refusal to transfer; but the jury having allowed a larger sum, and this question not having been pressed on the argument, the court did not reduce the verdict. *McMurrich et al.* v. *Bond Head Harbour Co.*, 9 Q. B. 333.

A bill being filed by the holder of debentures, issued by the defendants and payable to bearer,

to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued, was a necessary party to the suit, but did not name the person :—Held, that the company must be presumed to know who this person was ; that there was no presumption that the plaintiff knew him ; and that the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside* v. *The Toronto Street Railway Co.*, 14 Chy. 409.

In assumpsit on the common counts, defendant was duly notified to attend the trial of the cause as a witness on behalf of the plaintiff, which he neglected to do. The plaintiff proceeded with the trial of the cause, expecting to prove by defendant's attorney that he had offered £20 to compromise the action, which he failed to prove. A verdict was taken for the plaintiff, under the statute 14 & 15 Vict. c. 66, pro confesso, and damages were assessed at 1s. :—Held, on an application to increase the verdict to £50, the amount claimed by the plaintiff in his particulars, that the admission was only to be taken as to the cause of action, and not the amount of damages, and that a misunderstanding having arisen as to the offer of £20, the plaintiff was entitled to a new trial on the ground of surprise, on payment of costs. *Robertson* v. *Ross*, 2 C. P. 193.

Where one count is good and another bad, and the damages general, the court will not arrest judgment, but award a venire de novo. *Owens* v. *Purcell*, 11 Q. B. 390 ; *Decow* v. *Tait*, 25 Q. B. 188.

Interest is in practice much more frequently allowed by our juries, than English authority would seem to warrant. *Spence* v. *Hector*, 24 Q. B. 277.

In an action on an administration bond, the want of a decree is a good plea to a breach for not distributing, but it is no ground for staying proceedings, nor is the want of a citation for an account, nor the omission to shew the receipt and misappropriation of funds. On such breach full damages may be recovered. *Neill* v. *McLaughlin*, 4 P. R. 312.—C. L. Chamb.—Draper.

DEATH.

I. By Accident—*See* Negligence.

II. Abatement or Revivor of Actions or Suits.

1. *Generally*—*See* Practice at Law—Practice in Equity.

2. *Entering Judgment nunc pro tunc*—*See* Judgment.

III. Presumption as to—*See* Evidence.

IV. Death of Partner—*See* Partnership.

The court gave leave to enter judgment on cognovit against one defendant, the other being dead. *Nichall* v. *Cartwright*, Tay. 464.

Leave to enter a suggestion of death of plaintiff, and proceed under 210th sec. of C. L. P. Act, 1856, will be granted upon an ex parte application, upon affidavit shewing the nature and state of the action, and that the party applying is plaintiff's legal representative. *Reischmuller* v. *Uberhorst*, 3 L. J. 48.—C. L. Chamb.—McLean.

A sale of lands having been ordered under the 17th sec. of the Partition Act C. S. U. C. c. 88 to be made by certain persons agreed upon by the parties, one of the persons named refused to act, and the petitioners then applied on this ground to rescind the order for sale, and for partition to be made by the real representatives. Quære, whether the order might not have been properly varied or rescinded by consent of all those who consented to its being made ; or if one of those appointed to make the sale were to die or become incapable of acting, whether the court might not order the proceedings to be completed by those remaining. *In re Knowles et al.* v. *Post*, 24 Q. B. 311.

A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before that term began, and no successor was appointed until after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment :—Held, that he was right. *Leslie* v. *Emmons*, 25 Q. B. 243.

Death by "accident caused by intoxication." —Meaning of. See *Bobier* v. *Clay*, 27 Q. B. 438.

Held, following Bradbury *v.* Morgan, 1 H. & C. 249, that the death of one of two guarantors for the payment for goods, did not extinguish the guarantee, it not appearing that any notice had been given to plaintiff on behalf of the estate of deceased, or that the survivor supposed he was released by the death of the other ; but, on the contrary, acknowledged his liability as still subsisting, and promised to settle. *Fennell* v. *McGuire*, 21 C. P. 134.

By the death of the principal the authority of an agent is determined. Where, therefore, an agent obtained on credit from parties with whom his principal had been in negotiation previously, a supply of furniture for the house of the principal, in which he had intended carrying on business, but before any binding agreement was concluded, or the furniture delivered, the principal had died abroad, the court refused to decree a specific performance of the contract to purchase, and ordered the administrators, who had taken possession of the goods, to deliver them to the vendors, and pay the costs of the suit instituted for the purpose of obtaining possession of the furniture, or security for the price of it. *Jacques* v. *Worthington*, 7 Chy. 192.

The vendor of real estate had died before the execution of the conveyances, and his infant heirs filed a bill praying for specific performance of the contract, which the defendants (the vendees) admitted and expressed their willingness to carry out but for the obstacle created by the death of the vendor leaving his heirs-at-law infants. The court under the circumstances made a decree for specific performance of the agreement, but without costs to either party ; the costs of the infants to be defrayed out of the balance of purchase money payable by the defendants. *Weihe* v. *Ferrie*, 10 Chy. 98.

Where the surety of a receiver dies pending the suit, the receiver may obtain ex parte an order referring it to the master to approve of a new one. *Baldwin* v. *Crawford*, 1 Chy. Chamb. 264.—VanKoughnet.

DE BENE ESSE.

See EVIDENCE.

DEBENTURES.

I. MUNICIPAL—*See* MUNICIPAL CORPORATIONS.

The fact that a certain municipal debenture had been stolen previously to its being regularly issued:—Held, no bar to the claim of a bonâ fide holder for valuable consideration without notice. *The Trust and Loan Company of Upper Canada* v. *The City of Hamilton*, 7 C. P. 98.

An action of debt is not maintainable for interest only on debentures, the principal not being due. *Lyall* v. *The Mayor, &c., of the City of London*, 8 C. P. 365.

Declaration on a bond, whereby defendants covenanted to pay R., or the holder, at, &c., £200, on, &c., and interest thereon semi-annually, on the delivery at the Gore Bank of the warrants therefor to the bond annexed, and that the plaintiffs became the holders, and have always been ready and willing to deliver said warrants at, &c., but £12 for interest is now due:—Held, bad, in not averring an actual delivery of or an offer to deliver the warrants at the bank. *Osborne et al.* v. *Preston and Berlin R. W. Co.*, 9 C. P. 241.

The plaintiffs sued for interest on two bonds made by defendants on the 27th of January, 1855, for the payment to the plaintiffs or order of the principal money named, on the 1st of November, 1855, at the agency of the Bank of Upper Canada in Hamilton, together with interest thereon. Both counts alleged that although defendants paid the principal on the 29th of January, 1861, with interest up to the 1st of November, 1855, yet they had not paid any interest after that day. In the second count it was averred that the bond was in defendants' possession and cancelled by them, and the plaintiffs therefore could not present it on the day appointed for payment; and that on that day defendants had no money at the agency, and gave no instruction to the manager there to pay. Defendants pleaded, to the first count, that they were always ready to pay the principal and interest according to the bond, and did pay the same when presented, but that the bond was not presented at the said agency on the day appointed for payment, nor at any other time; and that defendants never owed nor covenanted to pay the plaintiffs interest after that day, when they were ready to have paid both principal and interest. And to the second count, that they had money at the said agency to pay the bond, but the plaintiffs had no one there, nor was any one there on that day or at any time after to receive the same; and that they never owed, &c., (as in the last plea):—Held, on demurrer, both pleas good; and that the omission to aver presentment in the first count was cured by the plea. *McDonald et al.* v. *The Great Western R. W. Co.*, 21 Q. B. 223.

At the trial it appeared that the bond declared on in the first count had never been in the plaintiffs' custody, having been retained at their request by defendants' solicitor, and it was proved that when the bonds fell due, and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented:—Held, that the pleas were proved: that defendants were not liable to pay interest after the bonds matured; and that the judge properly directed a verdict in their favour. *Ib.*

The defendants, under 24 Vict. c. 83, issued their debentures payable in 1887, to which were appended coupons for interest in the following form:" $40 coupon No. 1, $40. The Toronto Street Railway Company will pay to the holder hereof, on the 1st July, 1862, at the Bank of Upper Canada, Toronto, forty dollars, interest due that day on bond No. 3. Signed Alex. Easton, president." This action was brought by the plaintiff as a holder of said debentures, to enforce payment of the coupons for the interest appended thereto; and a verdict was rendered for the plaintiff. On motion for nonsuit on leave reserved, or for arrest of judgment:—Held, 1, That there was nothing on the face of the debentures to shew that in the issue thereof the company exceeded the powers conferred by the act above referred to; and that if it was sought to be contended that they had exceeded their powers, that contention should have been raised by the pleadings:—Held, 2, That no evidence having been given at the trial to shew that the plaintiff was not the person to whom the debentures in question were given, or for whom they were intended by the company, it was to be presumed that the plaintiff was the proper person, and therefore the judgment could not be arrested: 3. That the debentures were not void because they were not made payable to any particular named individual or company, as the legal effect of such an instrument must be construed to be an undertaking to pay the moneys therein mentioned, to the person to whom it was delivered, and who, by the effect of such delivery, became the payee in fact; 4. As the plaintiff was not proved to have been the original bearer or payee of the debentures sued upon, and they being choses in action and not assignable, this action could not be brought in his own name, unless he shewed he was the bearer or payee; 5. That the debentures or coupons could not be considered promissory notes, as the company had no power to make promissory notes. *Geddes* v. *The Toronto Street Railway Co.*, 14 C. P. 513.

Where a debenture was made in 1862, payable in 1872, "at the Bank of Upper Canada," without mentioning any locality;—Held, that it was not necessary in a declaration upon it to aver or excuse presentment there, as the words did not amount to an averment of a named place, and were either meaningless, or referred to a defunct banking company in its former business name, but without any words indicating its locality, such company being declared by the public statutes to have ceased to exist. *Becher et al.* v. *The Corporation of the Town of Amherstburg*, 23 C. P. 602.

Quære, whether when a contract is to pay at a particular place named in a declaration, the general averment that the defendant did not pay, is not sufficient; and any statement as to the plaintiff not being at the place named to receive the money, or that the defendant was there ready to pay it, must not arise by way of defence. *Ib.*

The bond produced acknowledged defendants to be "indebted to the holder hereof in the sum of £——, and do hereby promise to pay the same to such holder *at the agency of the Bank of Montreal, at Ottawa, on, &c., on the surrender of this bond*, with interest, at the rate of, &c., payable, &c., *upon presentation of the several warrants or coupons hereunto annexed, at the agency of the Bank of Montreal at the city of Ottawa aforesaid.*" The declaration stated that defendants, by their bond, sealed, &c., became bound to the holder thereof, in the sum of, &c., with interest, &c., to be paid to such holder thereof, on, &c., and the plaintiff became holder, thereof, &c., yet said sum with interest had not been paid. It was admitted at the trial that the bonds were not presented at the place where they were made payable; and it was proved that if they had been so presented, defendants had not funds there to meet them:—Held, that there was no variance between the bonds declared on and those produced; in the former being stated as payable to holders generally, while the latter were payable only on surrender and at a particular place:—Held, also, that it was not necessary for plaintiff, as a condition precedent to his recovery, to aver and prove presentment at the particular place, and a tender of the surrender of the bonds, or a readiness to surrender them. *Fellowes* v. *Ottawa Gas Co.*, 19 C. P. 174.

The holder of a debenture issued by the trustees of a Methodist church transferred it without consideration, by signing an endorsement as follows:—"Pay to J. G. or order," and delivered the same to the endorsee:—Held, that such transfer did not vest the debt in the transferee so as to prevent the claims of the creditors of the original holder attaching upon it. *Gott* v. *Gott*, 9 Chy. 165.

A person negotiating the sale of a municipal debenture is not answerable that the municipality will pay the amount secured by the debenture. Where, therefore, a township municipality in pursuance of the Municipal Corporation Act of 1849, passed a by-law for the purpose of granting a loan of money to the Bayham, Richmond, and Port Burwell road company, and issued debentures thereunder, which were subsequently declared to be illegal in consequence of the road company not having been properly constituted; the court, in the absence of any proof of fraud, refused to order one of the directors of the road company to refund the amount paid to him upon the sale of one of such debentures. *Sceally* v. *McCallum*, 9 Chy. 434.

A bill being filed by the holder of debentures, issued by the defendants and payable to bearer, to enforce payment of the debentures, the company by answer objected that the person to whom the debentures were issued, was a necessary party to the suit, but did not name the person:—Held, that the company must be presumed to know who this person was, that there was no presumption that the plaintiff knew him; and that the person not being named in the answer, the objection could not be insisted on at the hearing. *Wood* v. *Toronto Street Railway Co.*, 14 Chy. 409.

DEBT.

I. Action of.

1. *When it lies*, 1004.
2. *Pleadings*, 1005.
3. *Barred*—*See* Limitation of Actions and Suits.

II. Set-off—*See* Set-off.

I. Action of.

1. *When it lies.*

Debt lies on the Imperial Statute 6 Geo. IV. c. 114, to recover the penalty, though claimed by the informer for himself and the King, omitting to name the Lieutenant-Governor. *Jones* q. t. v. *Chase*, Dra. 322.

Debt does not lie for the first instalment of a mortgage before the others are due. *Forsyth et al.* v. *Johnston et al.*, 6 O. S. 97.

The city of Toronto and lake Huron railroad company have under the operation of the act 8 Vict. c. 83, amending the original act 6 Will. IV., a right to sue in debt one of the original stockholders for an instalment due upon the stock originally subscribed and called in by the directors appointed under the original act of incorporation. *The City of Toronto and Lake Huron Railroad Co.* v. *Crookshank*, 4 Q. B. 309.

Debt on simple contract does not lie on any collateral or conditional undertaking only. *McLeod* v. *Tinsley*, 7 Q. B. 40.

To support debt on simple contract, a consideration must have moved to the debtor himself, not as in assumpsit from the plaintiff to a third party. *Ib.*

Though debt will not lie for one instalment of a large sum due by instalments, yet where the plaintiff sued the defendant in debt on mortgage, setting out, in the first place, the deed between the parties, with the proviso in it that if the defendants should pay £900 in nine yearly instalments, and that the first payment of £100, parcel, &c., should be made, &c., and then a covenant of the defendant only to pay the £100 sued for, without any reference to the money due by instalments:—Held, that upon these averments in the declaration, (the proviso being a mere defeasance, and not an express undertaking to pay £900 by annual instalments) debt would lie. *De Tuyl* v. *McDonald et al.*, 8 Q. B. 171.

Where the proviso in a mortgage is a mere defeasance, that if the mortgagor pay the money by a certain day, he shall have back his land; but there is no covenant to pay the money, and where no evidence is given of a loan or debt, an action of debt will not lie. Where there is evidence of a loan or debt, of course a promise to repay it will be implied. *Hall* v. *Morley*, 8 Q. B. 584.

Debt does not lie by the grantee of a rent-charge to issue out of lands, where there is no

express covenant by the grantor to pay. *Dougall* v. *Turnbull*, 10 Q. B. 121.

Quære, if the grantee could bring debt whether his assignee might do so. *Ib.*

The plaintiff gave to defendant a bill of sale of certain timber, in which was contained a proviso for making the same void in case the defendant should pay the plaintiff £300 and interest on a day named; and it was added, "but if default be made in payment of said £300, in part of the whole, contrary to the manner and form aforesaid, then it," the bill of sale, "shall remain and be in full force and virtue:—Held, on demurrer, that debt would not lie, the deed not sufficiently importing a promise to pay. *McLaughlin* v. *Brouse*, 11 Q. B. 609.

A. enters into an agreement in writing, signed by him only, as follows: In consideration of £70 paid in hand by B., I hereby agree to sign a lease of lot 32 in the second concession of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz: To let B. have the farm for seven years, commencing from the first of April, 1848, at £70 per annum; the first payment having been this day paid by the said B., the receipt being acknowledged, and the next payment on the first of April, 1850, and so on. If B. wants to give up the farm before the expiration of four years, he is to pay £140 to me; if after four years, then £70. If I want to sell the farm, then I am to pay B. on the same terms. Six months' notice to be given to either party. I am to put up a frame barn, to be completed, &c., also a house, &c.; also to split 4,000 rails, and have them ready for hauling by 1st January, 1848, and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, &c.; and if he put in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off:—Held, that such agreement was not a lease creating a term of years but was only an executory agreement:—Held, also, that in this case debt for use and occupation, and not debt on the demise, was the proper form of action. *McLean* v. *Young*, 1 C. P. 62.

Held, that an action of debt is not maintainable for interest only on debentures, the principal not being due. *Lyall* v. *The Mayor, Aldermen, and Commonalty of the City of London*, 8 C. P. 365.

Though an assignment of the term by a lessee, and the acceptance by the lessor of the assignee, will prevent the lessor from bringing debt for the rent, he can still maintain covenant. *Montgomery* v. *Spence*, 23 Q. B. 39.

One of the defendants assigned certain rent to a co-defendant:—Semble, that debt might be maintained by the assignee for the rent. *Hope* v. *White*, 17 C. P. 52.

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2. *Pleadings.*

In debt on bond conditioned for the payment of rent, a plea that before the rent became due plaintiff assigned the premises to A. B., to whom defendant afterwards paid the rent:—Held, good on demurrer. *McDougall* v. *Young*, Dra. 111.

A verdict or an award specifying the amount of damages against one of two joint trespassers, is in itself a bar, whether paid or not, and has the same effect as a satisfaction by him would have had in precluding any action against his co-trespasser. It is therefore unnecessary in the plea to an action of trespass, setting out the award of the damages, to aver that the sum awarded has been paid. It would be different, however, in pleading an award to an action of debt, in which two are jointly bound: there unless payment of the award be averred, it is no bar. *Adams* v. *Ham*, 5 Q. B. 292.

Where the declaration is in debt, and the process in case, the declaration will be set aside. *Ketchum* v. *Rapelje*, 1 C. L. Chamb. 152.—Robinson.

DEBTOR AND CREDITOR.

I. Attachment of Debts—*See* Attachment of Debts.

II. Assignment for the benefit of Creditors—*See* Bankruptcy and Insolvency.

III. Assignment of Debts—*See* Chose in Action.

IV. Composition—*See* Bankruptcy and Insolvency.

V. Fraudulent Conveyances—*See* Fraudulent Conveyances.

VI. Collateral Security—*See* Collateral Security.

VII. Interest on Debts—*See* Interest.

VIII. Set-off of Debts—*See* Set-off.

IX. Payment to Creditors—*See* Payment.

X. Release of Debts—*See* Release.

XI. Parties to Actions or Suits—*See* Action and Suit.

DECEIT.

See Fraud and Misrepresentation.

DECLARATION.

I. In Pleadings—*See* Pleading at Law.

II. Of Right—*See* Practice in Equity.

III. Admissibility of in Evidence.

1. *Generally*—*See* Evidence.
2. *Dying Declarations*—*See* Criminal Law.

IV. Of Office—*See* Municipal Corporations.

DECREE.

I. In Foreclosure—*See* Mortgage.

II. On Bill for Sale—*See* Mortgage.

III. In Other Suits—*See* Practice in Equity.

IV. Amendment of.

1. *In Foreclosure Suits*—*See* Mortgage.
2. *In Other Suits*—*See* Amendment in Equity.

V. Appeal from—*See* Error and Appeal.

DEDICATION.

I. Of Roads—*See* Way.

Held, that under the evidence set out in this case a complete dedication of the land in question had been made by the Canada Company for a market square for the use of the town, and a perpetual injunction against the sale thereof by the company was decreed with costs. *Municipality of the Town of Guelph* v. *Canada Company*, 4 Chy. 632.

Land was conveyed to the town council of Goderich for a market place, and the council considering that less land was required for that purpose, agreed to grant a portion of it to the county council for the site of a court house. Upon an information filed to restrain the proceedings:—Held, that a corporate body acting as a trustee is as amenable in equity as an individual: that any alienation of the land was a breach of trust, and the land should be reconveyed; and if no conveyance had been executed, its execution should be restrained. *Attorney-General* v. *Goderich*, 5 Chy. 402.

The district council of the Home district, having reserved the land in question for the site of an engine house for the city of Toronto, upon which the city authorities erected a fireman's hall and engine house, the court restrained an action by the county council some years afterwards to obtain possession thereof, and declared the land dedicated to the use for which it had been so set apart. *City of Toronto* v. *Municipal Council of York and Peel*, 6 Chy. 525.

In 1830, when the site of the town of Brantford was laid out in building lots, a part containing nearly two acres was reserved for a public market square. In 1850, the municipal council of Brantford executed building leases for portions thereof, with covenants for renewal. Upon an information filed, the court restrained the renewal of such leases, or the granting of any new leases; the attorney-general assenting to the leases already made continuing for their respective terms. *The Attorney-General* v. *Municipality of the Town of Brantford*, 6 Chy. 592. See, also, *Wade* v. *Corporation of Brantford*, 19 Q. B. 207.

In 1836, the owner of land in the city of Toronto, laid it off into building lots. Part was enclosed, forming a large garden and grounds, on which was the residence which had always been occupied by the proprietor of the estate or his tenants. The surveyor represented this part on the plans as within fences, and wrote on the space, "McGill Square." Around this were laid off building lots, subsequently sold to several persons. In 1857, a bill was filed by the city, and the owner of one of the lots, for himself and all other purchasers of such lots, seeking to enjoin the proprietor from building upon or selling this space, on the ground either that the same had been dedicated to the public, or that the purchasers were entitled to free access thereto, or to have the same retained as an open space, alleging a verbal agreement to that effect at the time of the sale:—Held, that what had been done did not amount to a dedication to the public, and that the evidence was not sufficient to establish a grant of the easement claimed by the purchasers; and that if either claim had been established, there was a misjoinder of plaintiffs. *City of Toronto* v. *McGill*, 7 Chy. 402.

Held, that the corporation of the city of Toronto, had power under C. S. U. C. c. 84, to lease the fair green or Prince of Wales park, and that the facts shewed no dedication of it as a public park. *Attorney-General* v. *City of Toronto*, 10 Chy. 436.

DEDIMUS POTESTATEM.

Under C. S. C. c. 100, s. 3, the oath of qualification by a justice of the peace must be taken before some justice of the peace of the county for which he intends to act. It cannot be administered by the clerk of the peace for such county under the writ of dedimus potestatem issued with the commission of the peace. *Herbert* q. t. v. *Dowswell*, 24 Q. B. 427.

DEED.

I. Execution.

1. *Parties*, 1010.
   (a) *By Partners*—*See* Partnership.
2. *By Illiterate P* 1011.
3. *Seal*, 1011.
4. *Delivery*, 1011.
5. *Other Cases*, 1012.
6. *Proof of*—*See* Evidence.
7. *By Married Women*—*See* Husband and Wife.

II. Escrow, 1015.

III. Alteration, Cancellation, Mutilation, and Revocation, 1017.

IV. Construction and Operation.

1. *Recitals*, 1020.
2. *Description of Land.*
   (a) *In Patents*, 1022.
   (b) *Uncertainty*, 1027.
   (c) *Inconsistent Descriptions*, 1029.
   (d) *Evidence to Explain*, 1034.
   (e) *Other Cases*, 1035.
   (f) *In Sheriff's Deeds*—*See* Assessment and Taxes.
   (g) *Boundaries*—*See* Boundary—Survey—Water and Water Courses.
   (h) *Of Roads or Right of Way*—*See* Way.
3. *Conditions, Reservations, and Exceptions*, 1039.

4. *Habendum*, 1039.
5. *Deeds under the Short Forms Acts*, 1040.
6. *Bargain and Sale*, 1042.
7. *Estate Created*—*See* ESTATE.
8. *Evidence to Explain*—*See* EVIDENCE.
9. *Particular Deeds*—*See* INFRA.

V. RECTIFYING AND VARYING.
1. *Mortgages*, 1043.
2. *Other Deeds*, 1044.
3. *Parol Evidence to Vary Deeds*—*See* EVIDENCE.
4. *Assignments*—*See* BANKRUPTCY AND INSOLVENCY.

VI. REVIVING, 1047.

VII. LOST DEEDS, 1047.
1. *Evidence of*—*See* EVIDENCE.

VIII. SETTING ASIDE.
1. *For Fraud*—*See* FRAUD AND MISREPRESENTATION—FRAUDULENT CONVEYANCES.
2. *Cloud on Title*—*See* SALE OF LAND.

IX. REGISTRATION OF—*See* REGISTRY LAWS.

X. PARTICULAR DEEDS.
1. *Of Apprenticeship*—*See* APPRENTICE.
2. *Assignment or Composition* — *See* BANKRUPTCY AND INSOLVENCY.
3. *Contracts for the Sale of Land*—*See* SALE OF LAND.
4. *Ancient Deeds*—*See* EVIDENCE.
5. *Bonds*—*See* BOND—SALE OF LAND.
6. *Covenants* — *See* COVENANT — COVENANTS FOR TITLE.
7. *Bar of Dower*—*See* DOWER.
8. *Of Gift*—*See* VOLUNTARY CONVEYANCES.
9. *Of Right of Way*—*See* WAY.
10. *Of Release*—*See* RELEASE.
11. *Of Separation*—*See* HUSBAND AND WIFE.
12. *Leases*—*See* LANDLORD AND TENANT.
13. *Mortgages*—*See* MORTGAGE.
14. *Policies*—*See* INSURANCE.
15. *By Partners*—*See* PARTNERSHIP.
16. *Patents*—*See* CROWN LANDS.
17. *Quit Claim Deeds*—*See* RELEASE.
18. *By Infants*—*See* INFANTS.
19. *By Married Women*—*See* DOWER—HUSBAND AND WIFE.
20. *By Sheriffs*—*See* ASSESSMENT AND TAXES—EXECUTION.
21. *Trust Deeds*—*See* TRUSTS & TRUSTEES.
22. *To Religious Institutions*—*See* CHURCHES—MORTMAIN.
23. *Voluntary Conveyances*—*See* VOLUNTARY CONVEYANCES.

XI. OTHER MATTERS.
1. *Affidavits to hold to Bail in Actions on* —*See* ARREST.
2. *Lien of Attorney or Solicitor* — *See* ATTORNEY AND SOLICITOR.
3. *Preparation and Tender of* —*See* SALE OF LAND.
4. *Estoppel by Deed*—*See* ESTOPPEL.
5. *Memorials as Evidence* — *See* EVIDENCE.
6. *Presumptions as to Deeds*—*See* EVIDENCE.
7. *Profert*—*See* PLEADING AT LAW.
8. *Detinue for*—*See* DETINUE.
9. *Trover for*—*See* TROVER.

I. EXECUTION.

1. *Parties.*

By deed between A. B. and C. D., father and son, of the one part, and E. F. and G. H., partners, coach builders, of the other part, the son, with the consent of his father, bound himself apprentice to the coach builders. The instrument contained this clause: "And lastly, for true and faithful performance, &c., the said A. B., C. D., and E. F. and G. H., do bind themselves unto *each other* in the sum of, &c.:—Held, in debt by the father alone, against E. F. the surviving partner; 1. That all defendant's covenants were with the son and not the plaintiff: that the words, "unto each other," did not mean separately and individually, but that *each party* respectively, i.e., E. F. and G. H. jointly to A. B. and C. D. jointly, became jointly bound to the other; and that there was therefore a non-joinder of plaintiffs. Quære, the sufficiency of the declaration as given in the report. *Connell* v. *Owen*, 3 C. P. 249.

A husband by deed aliens land, and the wife though not named in the commencement as a formal party, in the body of it, releases her dower and both execute it:—Held, a sufficient bar of dower. *Bonter* v. *Northcote*, 20 C. P. 76.

The agreement sued on was headed "Specification of school-house in school section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded: "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of $708, one-half on the 15th May, and the other half when the said school-house is completed." Then followed the signatures of the three school trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st of March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him $400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly contructed, but the learned Queen's counsel, who tried the case without a jury, found for the plaintiff for the balance of the $708:—Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld. *Coghlan* v. *School Trustees of School Section No. 4, in the Township of Tilbury East, in the County of Kent*, 35 Q. B. 575.

2. *By Illiterate Persons.*

A deed executed by a person making his mark is not invalidated by the mere omission to read it over to him. *Doe* d. *Biggard* v. *Millard*, E. T. 3 Vict.

Where the subscribing witness swore that the agreement was not read as it stood upon the record :—Held, no execution. *Hatton* v. *Fish*, 8 Q. B. 177.

Where a blind and illiterate person, an Indian, had been induced to put his mark to a chattel mortgage without its being read over to him, although he desired such reading :—Held, not a sufficient execution. *Owens* v. *Thomas*, 6 C. P. 383.

3. *Seal.*

An L. S. need not be inserted to a deed set out upon oyer. *Moffat* v. *Loucks*, Tay. 305.

A circular flourish with the word "seal" inscribed, is not a legal seal. *Nagle* v. *Kilts*, Tay. 269.

Semble, there is no absolute necessity to put the hand on a seal in executing, or make any declaration of delivery. *Hatton* v. *Fish*, 8 Q. B. 177.

Defendant had signed the deed, and afterwards merely marked the paper with the end of a poker, opposite to his name, not even acknowledging the mark as his seal :—Held, not a sealed instrument. *Clement* v. *Donaldson*, 9 Q. B. 299.

Where a seal is set opposite to the name of the party signing, the document must be treated as under seal, although the testatum is, "I hereby subscribe myself." *Whittier* v. *McLennan*, 13 Q. B. 638.

Semble, that an impression upon the paper, without wax or any extraneous substance, is a sufficient seal. *Foster* v. *Geddes*, 14 Q. B. 239.

Defendants having signed a bond left in a hurry, without having it properly sealed, which was afterwards done, but it was clear they knew it to be a bond, and it was stated on the face of it to be under seal. The jury having found against the defence that the bond was not sealed, the court refused to interfere, holding it not one to be favoured. *The Mutual Fire Insurance Co. of Prescott* v. *Palmer*, 20 Q. B. 441.

A deed had been duly signed by the parties : but instead of any wax or wafer being affixed thereto for seals, slits had been cut in the parchment, and a ribbon woven through, so as to appear on the face of the document at intervals, opposite one of which each of the parties to the deed signed :—Held, a seal. *Hamilton* v. *Dennis*, 12 Chy. 325. Affirmed by the Court of Error and Appeal, 14th March, 1867.

4. *Delivery.*

In a bond for a deed, where the condition required that a deed should be "executed and delivered" before a certain day :—Held, that the due execution of the deed before the day and forwarding it to a third party for the obligee, though it was not received until after the day, was a sufficient delivery under the terms of the bond. *Muirhead* v. *McDougall et al.*, 5 O. S. 642.

A promise to deliver a conveyance, includes a promise to execute it. *Whittier* v. *McLennan*, 13 Q. B. 638.

A deed will be assumed to have been delivered on the day it bears date. *Hayward* v. *Thacker*, 31 Q. B. 427.

A mortgage in favour of parties in Europe was executed in this country, and left in the hands of the attorney who prepared the security with directions from the mortgagor not to register it until further orders. After the death of the mortgagor, the mortgage was delivered up to the agent of the mortgagees, who had the same registered :—Held, that there had been a sufficient delivery during the lifetime of the mortgagor, and that a person who entered into partnership with the mortgagor, and thereby acquired an interest in the mortgage estate, with a knowledge of the circumstances attending the execution of the mortgage, did so subject to the claim of the mortgagees. *Mackechnie* v. *Mackechnie*, 7 Chy. 23.

A suit was brought in this court against an Insurance Company to recover for loss sustained on the ground that the policy was not a perfected one, and therefore that the plaintiff had no remedy at law ; but the allegations in the bill were that the policy had been duly signed by the president and secretary, and countersigned by the agent at I, (the place where the insurance was effected) and was ready to be delivered to the plaintiff :—Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands ; and on this ground a demurrer for want of equity was allowed. *McFarlane* v. *Andes Insurance Co.*, 20 Chy. 486.

See *Bell* v. *McKindsey*, 3 E. & A. 9, p. 1019.

See II. p. 1015.

5. *Other Cases.*

A. received from B. a power of attorney to sell lands. Under the power A. delivered to C. a deed professing to be made as follows :—"Between A., by and under power of attorney, bearing date, &c., by and from one B., &c., yeoman, of the first part, and C. of the other part." Throughout the deed, A. the said party of the first part was made the grantor, and the deed was then executed. Signed A. [L.S.,] signed C. [L.S.]:—Held, that B.'s interest did not pass by the deed. Semble, that even if B. had been made the granting party, the deed would have been inoperative from the informal mode of execution. *Ducksteder* v. *Baird*, 5 Q. B. 591.

In order to except to the execution of a deed the defendant should plead non est factum; he should not demur. *Burns* v. *Robertson*, 8 Q. B. 280.

The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it in such terms that on the face of the deed no parcel could be distinguished from the rest, and allowed to pass alone :—Held, that he must be considered in the same light with any other person having a power to execute : that he could not be regarded as functus officio by the execution of the first deed which was wholly inoperative and void ;

that he might therefore, in 1849, make a deed of the part actually sold. Quære, whether, in this case, *the debtor having a title to all the land conveyed*, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone under such circumstances, though the case might be otherwise if the mistake had arisen from including land not owned by the debtor. Quære, also, whether the proper course would not have been to apply to the court to set aside what had been done under the execution. *Doe d. Tiffany* v. *Miller*, 10 Q. B. 65.

The crown, in 1798, granted 5000 acres, including the land in question, to J. and E. Hay, and three others, children of the late governor Hay. In 1800 E. H. became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838. In 1804 J. H. conveyed "all his fourth part or share" of the lands mentioned in the above patent, "containing in all 5000 acres," to his brother-in-law, M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection, and of $1 paid. When executed, the words "fourth" and "five thousand" were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks, and told M. to fill them up according to the fact; adding in a postcript, that if any errors should be found in the deed, he authorized M. to recify them, and that such corrections should be valid as if he had made them himself. The words "fourth" and "five thousand" were inserted after M. received the deed in Lower Canada. On the 19th of January, 1805, M. and his wife A., and J. H., by deed reciting the patent, conveyed to R. and D. 2000 acres, parcel of the 5000 granted "being the undivided part and portion of the said 5000 acres belonging under and by virtue of the said letters patent to J. H. and A. M. The plaintiff claimed under these conveyances; defendant under a deed from the heir-at-law of J. H.:—Held, 1. That by the deed of 1804, J. H.'s share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstance; 2. That the conveyance of 1805 passed his share as belonging to M., though the execution by M., as his attorney, could have no effect for want of authority. *Stuart* v. *Prentiss*, 20 Q. B. 513.

Where four parties, described not by their own names and personal descriptions, but as a collective body, not shewn to be corporate, signed and sealed a deed with their own names and seals, they were held to be individually bound. *Cullen* v. *Nickerson*, 10 C. P. 549.

A mandamus will lie to compel a witness to prove the execution of a deed and memorial for registry. *Regina* v. *O'Meara*, 15 Q. B. 201.

A conveyance of land, dated 27th March, 1824, was to hold to the grantee from the 30th day of the same month until the day of her decease:—Held, that though it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; and that, under the facts stated in the case, the jury might properly have been asked to presume one or both of these propositions in favour of the grantee. *Nolan* v. *Fox*, 15 C. P. 565.

Held, that the word "signed" before the lessor's name to a lease, raised no presumption that the instrument was a copy, not the original. *Becher* v. *Woods*, 16 C. P. 29.

Defendants, B. and A., being in partnership, agreed under seal to buy a quantity of tobacco, B. signing the name of defendant's firm opposite to one seal. Quære, whether one or both defendants could be held liable upon the deed. *Moor* v. *Boyd et al.*, 23 Q. B. 459.

Executors empowered under a will to sell lands, are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman et al.*, 28 Q. B. 337.

G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county judge on the 2nd December, 1868, but the confirmation was reversed in this court in March following, on the ground that the insolvents had not executed it. Afterwards in the same month the insolvents executed the deed, without any previous leave from the judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note. Per Richards, C. J. The deed was invalid, because not properly executed by the insolvents. Per Wilson, J. Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering, it by executing; but the deposit of such deed with and notice thereof by the assignee, under sec. 9, sub-s. 2 of the Act of 1864, were necessary after the execution by the insolvents, and for want of this, it was ineffectual:—Held, also, that it was no objection that some of the assenting creditors had executed in the name of their firms and by procuration, and that no power of attorney was proved, for they had accepted the composition under it. *Allan* v. *Garratt et al.*, 30 Q. B. 165.

Upon an application under 29 & 30 Vict. c. 45, for the discharge of a prisoner committed under the Apprentices and Minors' Act for disobedience to his masters, on the ground, inter alia, that the indenture of apprenticeship was not a binding contract, it having been executed by one only of the employers, in the name of the firm:—Held, that it was binding at all events upon the apprentice and the partner who had signed it, and there was nothing to shew that his copartners had not been present and assented to the execution. *Regina* v. *McNaney*, 5 P. R. 438.—C. L. Chamb.—A. Wilson.

A debtor, on going away to raise funds to pay his debts, signed and sealed a printed form of mortgage upon certain lands, without inserting either the name of himself or the mortgagee therein; his wife also executed it, and he locked it up in his desk. From Halifax, he wrote to his agent here instructing him to fill up the blanks as he should find necessary, which was accordingly done, and handed over to the mortgagee:—Held, that this was a sufficient execution of the mortgage; and that it was valid. *Bank of Montreal* v. *Baker*, 9 Chy. 97.

Held, affirming the last case, that whether the deed there mentioned as having been executed in blank operated as a deed, or as a mere parol agreement, it created a charge upon the equitable estate of the debtor; and that a registered judgment creditor, having notice thereof before the registration of his judgment, would be bound thereby. *Bank of Montreal* v. *Baker*, 9 Chy. 298.

The court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value. *Ross* v. *Fox*, 13 Chy. 683.

A prior deed, through which the title comes to the vendor, having been executed by the attorney of the grantor, does not render the title invalid, or such as a purchaser will not be bound to accept. *Farrell* v. *Moore*, 1 Chy. Chamb. 139. —VanKoughnet.

Deeds executed in England, conveying land in this province, do not require to be stamped under the provisions of the English Stamp Acts, but are valid in this province though unstamped. *Murray* v. *VanBrocklin*, 1 Chy. Chamb. 300.—Mowat.

An application for an order to compel a party to execute a deed directed to be executed should be on notice, and will not be granted ex parte. *Westmacot* v. *Cockerline*, 2 Chy. Chamb. 442.—Taylor, *Secretary*.

II. Escrow.

Detinue for an indenture of bargain and sale. Pleas, 1. Non-detinet; 2. That the deed was not the plaintiff's. The jury found that the indenture was delivered by one A. to the defendant, to be delivered to the plaintiff after A.'s death, on condition that he (the plaintiff) should keep A. until his death, and should pay his debts; and that the plaintiff had not maintained A., but after his death was ready to pay his debts. Defendant, who was one of A.'s creditors, had refused to accept his debt from the plaintiff, and had destroyed the deed:—Held, that on these facts and pleadings the plaintiff could not recover; for, as to the first plea, the writing being delivered to the defendant merely as an escrow, was not in fact a deed as described in the declaration; and, as to the second plea, the plaintiff had forfeited his right by a breach of one of the conditions. *Reynolds* v. *Waddell*, 12 Q. B. 9.

The jury having found that a deed by father to son had been absolutely delivered, although the father asserted the delivery to have been as an escrow only:—Held, that the evidence, set out in the case, supported their verdict. *Young et al.* v. *Hubbs et al.*, 15 Q. B. 250.

To an action for work and labour, the defendants pleaded a release by agreement under seal, making profert. The plaintiff replied that the agreement was delivered to a third party as an escrow, on condition that it should be void on default made by the defendants in payment of £200 by a certain day; that the defendant did not pay, whereby the agreement became void, and so was not the plaintiff's deed:—Held, that the defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery as part of his case. *Light* v. *Woodstock and Lake Erie R. W. & H. Co.*, 13 Q. B. 216.

Declaration on a covenant by defendant as surety for the payment of rent by one B. Plea, on equitable grounds, that the defendant executed on the understanding and representation, that Y. K. & E. should also execute, and that he should be responsible with them and not solely; and that it was represented to him by B. and by the said K., that immediately after defendant's execution, the other three would execute. It was then alleged that they never did execute, and before any breach and with all due dilligence, he gave notice to the plaintiffs of the premises; and that he claimed to have been released by such non-execution. There was also a plea of non est factum:—Held, that the defence was admissible under this plea, as shewing in substance that defendant executed the deed conditionally only, and as an escrow. *The Corporation of the County of Huron* v. *Armstrong*, 27 Q. B. 533.

To an action against V. & G., and on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and delivered by him as an escrow, until C. should execute, which C. afterwards refused to do, and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied that after both the defendants had executed, V. ratified the agreement and accepted the other defendant as his co-surety. There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition; C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent:—Held, that this was evidence from which a ratification might be inferred, and as the defendant had laid by for years, leaving the plaintiff to believe and telling others that he was bound, a verdict for the plaintiff was upheld. *Henderson* v. *Vermilyea et al.*, 27 Q. B. 544.

To a declaration on a covenant for quiet enjoyment in a mortgage to the plaintiffs, executed by T., the defendants' grantee, one defendant pleaded that T. did not, after the making of that deed, convey to the plaintiffs. The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th of April, 1855. Both were registered on the 28th July; the deed first. It appeared that there were two mortgages from T. to the plaintiffs on another lot when this mortgage was made, and instead of which it was given. After executing this mortgage T. found that a deed from defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August:—Held, that the whole transaction shewed that the mortgage was not intended to take effect until the perfecting of T.'s title and the discharge of the other mortgages for which it was given, and that the plaintiffs therefore could recover. *The Trust and Loan Co.* v. *Covert et al.*, 32 Q. B. 222.

Plaintiff was defendant's tenant of premises in Toronto, for which rent was in arrear to the

amount of $145.83. Defendant sold the premises to the crown. The deed, dated the 23rd of October, 1872, was delivered by F., the agent at Toronto of the minister of justice, to M., the agent of the defendant, on the 15th of November, for execution. On the 16th it was executed, and was by M. handed to F. as an escrow, to become a deed when the money was paid. The deed was returned to F. on the 26th of November, and he registered it on the 29th, but the money was not paid till the 7th of December. Defendant having distrained on the plaintiff for rent on the 29th of November :—Held, that the deed did not become operative from its original delivery by relation back, in which case defendant would have had no reversionary interest at the time of the distress, but from the payment of the purchase money only. *Oliver* v. *Mowat*, 34 Q. B. 470.

R. being indebted to B. and V., the plaintiffs, in $979.76, gives his note in September, 1859, at six months, payable at the Bank of Montreal, in Guelph, with current rate of exchange on New York. In June, 1860, R. made an assignment, to which the plaintiffs were executing parties, which —after reciting an agreement by R.s creditors to accept 5s. in the £, payable in six and twelve months, to be secured by notes satisfactorily endorsed, and a covenant by R. to pay that sum—contained an absolute release of R. from all those executing it. The plaintiffs before executing this instrument claimed the promised endorsed notes, or to hold the original note till the compromise was paid. On the 6th of August, 1860, another assignment was made by R., in trust, till he should pay his creditors their dividend, and was sent to the plaintiffs for execution, with the statement that he (R.) could not get the security wanted, "the party that promised to become a partner drew back." This assignment the plaintiffs did not sign, because when the first offer fell through they sold the original note, and claimed to have nothing more to do with the matter :—Held, that the giving of the notes by R. was not a condition precedent to the delivery of the first assignment, and that the execution and delivery of it, as it contained an absolute release, operated as a discharge of the original debt. *Benedict et al.* v. *Rutherford*, 11 C. P. 213.

See *Mackechnie* v. *Mackechnie*, 7 Chy. 23, p. 102.

III. Alteration, Cancellation, Mutilation, and Revocation.

A blank having been left in the bond, which was afterwards filled up with the consent of the debtor, although not in his presence, was held no variance on non est factum. *Leonard* v. *Merritt*, Dra. 281.

An action of trover may be maintained against the obligor in a bond for securing the fidelity of a clerk, the obligor having torn off his seal (and this although the bond might be considered as still subsisting and sufficient to sustain an action of debt) and damages may be recovered against the obligor to the amount of the penalty. *The President, &c., of the Bank of U. C.* v. *Widmer*, 2 O. S. 222.

A several obligor is a competent witness in an action against a co-obligor to prove the cancelling of the obligation by tearing off the seal of the co-obligor. *Ib.*

A bond may be given up to be cancelled by the president and directors of a banking corporation, without the appointment of an attorney. *Ib.*

A lease having been granted by plaintiff to one T., the defendant, before the expiration of the term, without the plaintiff's knowledge, struck out T.'s name and put his own opposite to the seal, and entered and paid rent :—Held, that the plaintiff could not maintain covenant against defendant on such lease. *Lapp* v. *May*, 14 Q. B. 47.

If it be clear that a deed or patent, once perfect, has afterwards had its seal and signature torn off, or has become otherwise mutilated by accident, or the effect of time, such mutilation does not render it invalid. *Doe* d. *Ellis* v. *McGill*, 8 Q. B. 224; *Todd* v. *Cain*, 16 Q. B. 516.

The crown, in 1798, granted 5000 acres, including the land in question, to J. and E. Hay and three others, children of the late governor Hay. In 1800 E. H. became a nun in Montreal, by which, according to the law of Lower Canada, she became civilly dead as regarded her property, and she afterwards died there in 1838. In 1804 J. H. conveyed "all his *fourth* part or share" of the lands mentioned in the above patent, "containing in all 5000 acres," to his brother-in-law, M., the husband of one of the patentees. This deed was executed in Indiana, and was expressed to be in consideration of natural love and affection, and of $1 paid. When executed, the words "fourth" and "five thousand" were omitted, but attached to the deed was a letter of the same date, signed by the grantor, and addressed to M., in which he mentioned these blanks, and told M. to fill them up according to the fact; adding in a postcript, that if any errors should be found in the deed, he authorized M. to recify them, and that such corrections should be valid as if he had made them himself. The words "fourth" and "five thousand" were inserted after M. received the deed in Lower Canada. On the 19th of January, 1805, M. and his wife A., and J. H., by deed reciting the patent, conveyed to R. and D. 2000 acres, parcel of the 5000 granted "being the undivided part and portion of the said 5000 acres belonging, under and by virtue of the said letters patent, to J. H. and A. M. The plaintiff claimed under these conveyances; defendant under a deed from the heir-at-law of J. H. :—Held, 1. That by the deed of 1804, J. H.'s share passed to M., the consideration being sufficient, and the insertion of the words mentioned not being fatal under the circumstances; 2. That the conveyance of 1805 passed his share as belonging to M., though the execution by M., as his attorney, could have no effect for want of authority. *Stuart* v. *Prentiss*, 20 Q. B. 513.

The plaintiff, by lease, consisting of seven sheets, and bearing date March 15th, 1862, demised certain premises to W. On the 21st of July following, this lease was cancelled by an instrument under seal; the second and fourth sheets were taken out and replaced by others, and it was re-executed and re-delivered without any other alteration. As it then stood it was dated as before, to hold "from the first day of April now next," for nine years "from thence next ensuing," at a yearly rent, payable" in ad-

vance, that is to say, on first of April, 1862, and on the first of April in each year during the term;" the conclusion being, that the parties had thereunto set their hands and seals, "the day and year first above written:"—Held, that the lease took effect from the delivery, on the 21st of July, 1862, not the date: that the term began on the 1st of April, 1863: that the first year's rent, payable "in advance," was not due until that day, the words, "that is to say, on the 1st of April, 1862," being merely falsa demonstratio. *Bell* v. *McKindsey*, 23 Q. B. 162.

Held, affirming the judgment of the Queen's Bench, in the last case, that the lease spoke from the day of re-execution, not from its date; and that the provisions of the lease, in connection with the surrounding circumstances, did not afford sufficient evidence of a contrary intention to justify a different construction. Spragge, V. C., A. Wilson, J., and Mowat, V. C., diss. *Bell* v. *McKindsey*, 3 E. & A. 9.

The cancellation of a deed does not divest the estate which has passed by it. *Fraser* v. *Fraser*, 14 C. P. 70; *Laur* v. *White*, 18 C. P. 99; *Fraser* v. *Fralick*, 21 Q. B. 343; *Doe* d. *Burr* v. *Denison*, 8 Q. B. 185.

The erasure of the date is not to be presumed to have been made after execution; but even if it were, the deed takes effect from its delivery. *Fraser* v. *Fraser*, 14 C. P. 70.

A person who has executed a deed cannot be bound by an alteration made in his absence by his verbal direction. Quære, whether upon the evidence, more fully stated in the case, defendant could be held estopped by his acts from disputing the bond so altered. *Martin* v. *Hanning*, 26 Q. B. 80.

To bind a person to a deed altered out of his presence, and by his verbal directions only, the acts done should be unequivocal, and consistent only with his positive assent. *Ib.*

To an action against V. & G. on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and was delivered by him as an escrow until C. should execute, which C. afterwards refused to do; and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied, that after both defendants had executed. V. ratified the agreement and accepted the other defendant as his co-surety. There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition, C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent:—Held, that this was evidence from which a ratification might be inferred; and as the defendant had laid by for years, leaving the plaintiff to believe, and telling others, that he was bound, a verdict for the plaintiff was upheld. *Henderson* v. *Vermilyea et al.*, 27 Q. B. 544.

By an indorsement under seal upon a lease of premises, it was agreed between landlord and tenant that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased; but that, if the agreement became void by reason of the non-fulfilment of its terms before or at the time of payment of the second instalment, the lease was to remain in full force; and in case of the lease being cancelled, no rent was to be paid after 3rd February, 1863, the date of the agreement to purchase. Under the lease, the rent was payable in advance, and at the date of the agreement to purchase, a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid under the agreement, and the interest also, according to the tenant's evidence, but according to the landlord's, it was not paid at the time, though he admitted that he had agreed to allow it to stand for some months afterwards:—Held, that by the memorandum under seal, indorsed on the lease, the rent under it, payable in advance, was not to be paid in case the lease was cancelled; and that the deed was cancelled, in accordance with the agreement, by the payment of the second instalment of purchase money, even supposing the interest not to have been paid, for the landlord admitted he had waived its payment at the day, by suspending it to a future time. *Forge* v. *Reynolds et al.*, 18 C. P. 110.

G. & Co. having made an assignment on the 4th July, 1868, a deed of composition and discharge, dated 8th August, was filed on the 14th September, 1868, not being then signed by the insolvents. It was confirmed by the county judge on the 2nd December, 1868, but the confirmation was reversed in this court in March following, on the ground that the insolvents had not executed it. Afterwards, in the same month, the insolvents executed the deed, without previous leave from the judge, and without refiling it; and they then set it up as a defence to this action previously brought on a note:—Held, that the plaintiff, a non-assenting creditor, was not bound by this deed, for the evidence (set out in the case), shewed that the members of the insolvent firm had individual creditors, and it provided only for partnership debts. Per Richards, C. J.—The deed was invalid also, because not properly executed by the insolvents. Per Wilson, J.—Such execution was not an alteration of the deed, for the insolvents being named in and parties to the deed were only perfecting, not altering it, by executing. *Allan* v. *Garratt et al.*, 30 Q. B. 165.

An injunction restraining a corporation from permitting certain buildings to be completed under a contract, was dissolved, it appearing that the contract which had been entered into between the corporation and a contractor had been cancelled. On production of the contract in court, it appeared that the rescission referred to had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made; VanKoughnet dubitante as to any necessity therefor. *The Edinburgh Life Assurance Co.* v. *The Municipality of the Town of St. Catharines*, 10 Chy. 379.

IV. Construction and Operation.

1. *Recitals.*

K. having agreed with the plaintiffs for the purchase of some lumber, the defendants con-

sented to guarantee his punctual payment for the same; but inadvertently the first agreement in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties, as bearing date the 22nd December, 1851, whereas it was dated on the 8th January, 1852. Semble, that on such an issue if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth et al.* v. *Townley et al.*, 10 Q. B. 579.

The plaintiff proved a deed to himself from D., dated 3rd of July, 1851, registered on the 7th of the same month. The defendant put in an instrument under seal, dated 3rd of June, 1847, between one M. and D., reciting that differences had arisen between them, and that M. had brought ejectment to recover possession of this lot, "belonging to the said M.," and in consideration of M. withdrawing the record, D. agreed that the lot should be valued by certain parties, and covenanted to pay to M., or secure by mortgage on the land, whatever that value might be. No valuation was made:—Held, this agreement being unregistered, that the recital in it could not affect the plaintiff's title. *Rutledge* v. *McLean*, 12 Q. B. 205.

The recitals in a deed put in as evidence,—Held, not conclusive as to the facts therein stated. *Neale* v. *Winter*, 9 C. P. 394.

The recitals in a deed poll are not binding on the grantee, being entirely the language of the grantor, and the grantee is not estopped from setting up the contrary in an action not founded on the instrument, and wholly collateral to it. *Minaker* v. *Ash*, 10 C. P. 363.

Ejectment on a sheriff's deed, which recited, that by a ven. ex. he had seized the lands, and since the seizure made by virtue of the said writ, had exposed them to public sale, &c., and then granted to the purchaser. It appeared that the lands had been seized under a fi. fa. previously issued, and that the ven. ex. ordered him to sell the lands so seized:—Held, that the misrecitals did not invalidate the deed, and that the plaintiffs might shew what the facts were. *Roe et al.* v. *McNeill*, 14 C. P. 424.

Lands were conveyed, in 1804, by deed to W. R. By a deed poll endorsed upon the deed of 1804, and dated in 1823, W. R., described as "the within named W. R." granted the same lands to trustees of a marriage settlement executed in 1820, under which plaintiffs claimed:—Held, that the W. R. who executed the deed poll would be presumed to have been the grantee of the deed of 1804, notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee of the deed of 1804 was dead before 1820. *Thompson et al.* v. *Bennett*, 22 C. P. 393.

A testator devised property to his wife, who conveyed to D. in fee. Afterwards D., and S., his wife, joined in a deed for valuable consideration, to M. and his wife, reciting that she was entitled to the property as co-heiress of the testator. Subsequently M. and his wife conveyed to a trustee for S. The plaintiff claimed under S., and notwithstanding the erroneous recital, the court held her entitled to a conveyance. *Lawlor* v. *Murchison*, 4 Chy. 284.

2. *Description of Land.*

(a) *In Patents.*

The description in a grant will be taken as correct unless proved wrong by the clearest testimony. *Doe* d. *Smith* v. *Meyers*, 2 O. S. 301.

Held, that a grant from the crown of "all that certain parcel or tract of land in the township of York, containing 200 acres more or less (including lot 21 in the 7th concession), being the clergy reserve lot 21, in the 6th concession west of Yonge Street, in the said township," the land not being set out by metes and bounds, conveyed to the grantee lot 21 in the 7th concession as well as lot 21 in the 6th concession. Robinson, C. J., diss. *Doe* d. *Keating* v. *Wyant*, 6 O. S. 314.

Where land was granted by the crown bordering on lake Ontario, and was described in the grant thereof as extending to the water's edge, it was held that under this description the water's edge must be the boundary wherever it might be, and therefore that land which was gradually and imperceptibly formed by the receding of the water would belong to the grantee, the boundary of the lake being fluctuating, and the grantee not being restricted to the land extending to where the water's edge was at the time of the issuing of the grant. *Doe* d. *McDonald* v. *The Cobourg Harbour Co.*, M. T. 7 Vict.

Land gradually and imperceptibly formed by the washing of sand and shingle from the lake, is the property of the owner of the adjoining land, even although the formation is caused by the artificial erections of a harbour company who are entitled to particular privileges by act of parliament. *Ib.*

The point of commencement "in front on lake Erie, at the south-east angle of the lot," means the south-east angle as it stood at the time the grant issued, and not a point shifting with the encroachment of the lake. *Iler* v. *Nolan et al.*, 21 Q. B. 309.

A grant conveying land to within one chain of a river, means to within one chain of the edge of the river, and not of the top of the bank. *Stanton* v. *Windeat*, 1 Q. B. 30.

In a patent the land was described as "a certain parcel of land in the township of Niagara, containing by admeasurement thirty-five acres, more or less, which said thirty-five acres of land are butted and bounded as follows," &c. The boundaries given would embrace about seventy acres, including several lots in the town of Niagara, which it was clear was not the intention of the government:—Held, 1. That the description as in the township, coming first, must govern, and therefore that no land could pass which was then in the town; 2. It being shewn that in patents dated both before and after this the lots claimed by defendant were declared to be set apart as clergy reserves, that such declaration was conclusive as against the crown, and would prevent the land so appropriated from passing to the defendant, independently of the first objection. *Doe* d. *Campbell* v. *Crooks*, 9 Q. B. 639.

A license to cut timber "from lots one to thirteen," Held, to exclude both one and thirteen. *Haggart* v. *Kernahan*, 17 Q. B. 341.

The question in dispute was, what quantity of land was granted by the patent, which described it as "beginning about eighteen chains below a small creek which empties itself into the river Thames, in lot number seventeen," thence, &c.,—there being two creeks. An old map from the surveyor-general's office was put in evidence, under which the lot had evidently been granted; and a surveyor called for the defence stated that the ground contended for by the plaintiff corresponded best with the old map:—Held, that as the description contended for by the plaintiff corresponded best with this plan, and with a survey since made for the purpose of tracing out or completing parts not fully surveyed before, he was entitled to recover. *Horne* v. *Munro*, 7 C. P. 433.

Semble, per Draper, C. J., the crown may grant a tract of land by a sufficient description to designate the portion meant, although the township within which the land lies has not been surveyed and laid out into lots and concessions, and the grantee will be entitled to hold it although a subsequent survey made by authority of the crown makes it by name a different lot, or places it in a different concession from that named in the patent, or the surveyor laying it out projects a road through it. *Ib.*

On the 8th January, 1836, a surveyor in compliance with instructions from the government agent, laid out a road or street on the northern limits of the town of London, two chains wide, a portion of which was then and had for some time been in the actual possession of the Episcopal church, to which body a patent subsequently and on the 18th January, 1836, was issued, granting to them all that parcel or tract of land "on which the Episcopal church now stands, and containing four acres and two tenths of an acre or thereabouts." Upon an indictment for a nuisance in stopping up the highway:—Held, that this survey, although made after the grantees had gone into possession, must prevail against such possession. Hagarty, J., diss. *Mountjoy* v. *The Queen*, 1 E. & A. 429.

In 1804, a patent issued to J. McG., for lot 20 in the first concession of the township of Chatham, containing 200 acres, more or less, and described as "commencing in front on the river Thames, at the north-east angle of the said lot, then N. 45° W. 58 chains, more or less, *to within one chain* of the lands granted to Hugh Holmes," &c. In 1809, a survey of the lands was made, the plan of which shewed a road between the first and second concessions fifty-eight chains from the river, which had never been opened however, and the lands remained in the same position as in 1792, when a description had been issued for this lot in the name of one W. as running north sixty-seven and a half chains, more or less, to a post, containing two hundred acres, more or less, but no patent had ever been completed on such description. McG.'s interest in this land was subsequently sold by the sheriff in 1811 under execution, and the conveyance was of lot twenty in the first concession, containing two hundred acres, more or less; not expressing any metes or bounds. The deed to the plaintiff was made in 1843, and purported to convey the lot (twenty) as containing two hundred acres, "bounded in front by the river Thames; in the rear by the allowance for road between the first and second concessions," &c.:—Held, reversing the judgment below, that the plaintiff was restricted in his claim to land to a space of fifty-eight chains from the river Thames, and that he had no title upon which to found an action for trespass to lands to the north thereof, although the same were situate at a distance greater than one chain from the lands granted to Holmes. A. Wilson, J., diss. *Crow* v. *Martin*, 2 E. & A. 425; 22 U. B. 485.

In 1792 lot seventeen in the second concession of Harwich was appropriated by the land board for the district of Hesse to O'B. He had made no improvements, however, up to 1794, and in 1853 the location made to him by the board was formally cancelled. In 1801 a patent issued to F. for lot seventeen in the front concession of Harwich, which had been appropriated to him by the land board about a year after their grant to O'B., described as commencing in front of the concession at the N. E. angle of the lot, on the river; *then S. 45° E. 80 chains, more or less, to the lands of O'B.;* then S. 45° W. 30 chains, more or less, to lot 16; then N. 45° W. 68 chains to the river; then along the water's edge northeasterly to the place of beginning, containing two hundred acres, more or less. Up to this time there had been no second concession line run. In 1863 the crown granted to defendant the rear part of the lot, 188½ acres, and the plaintiff, claiming it under the patent to F., brought trespass:—Held, that as O'B. never got a patent or became entitled to claim one, the reference to his land was falsa demonstratio, and that the plaintiff was confined to the distance of 80 chains mentioned in the patent to F. *Fields* v. *Miller*, 27 Q. B. 416.

The crown in 1808 granted the continuation of lots 12 and 13 in the 1st concession of Gosfield, by two separate patents, describing each as containing 100 acres, more or less, and giving metes and bounds, beginning at a certain distance from the S. E. angle of each lot on lake Erie, and extending a fixed distance north, not saying more or less. The front portion had been granted, it was said, it 1790, and it was not shewn whether the line between the first and second concessions had been run in 1808, or at what time. The distance given would carry the land into the second concession, and the defendant claimed the land there covered by the metes and bounds as against the plaintiff, who claimed the lots in the second concession under a later patent:—Held, that only land in the first concession would pass by the patents of 1808; for this, in the absence of any proof as to the concession line, was evidently the intention of the crown, and the description by metes and bounds must be rejected as erroneous. *Wigle* v. *Stewart*, 28 Q. B. 427.

One R., in 1829, first surveyed part of the township of Plympton fronting on lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the crown land office, from surveys of three separate portions of it, made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the

deeds were according to the scale on which the plan was compiled. This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan:—Held, that it was competent for the government to make such allowance for the road, not being inconsistent with any work on the ground. Held, also, that in order to give effect to the change made by such allowance—to avoid an irregular rear boundary for such front lots—and to reconcile the plans, and the grants for one of the front lots and two gore lots in rear of it, which could not all three be carried out, owing to a deficiency in the land—a proportionate reduction should be made in each of such lots. *Hagarty* v. *Britton*, 30 Q. B. 321.

The description of a lot by metes and bounds, from the crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession. *Ib.*

In 1857 a patent issued for "the north-westerly quarter" of a 200-acre lot, the side lines of which ran N. 45° W., and S. 45° E., (or north-west and south-east); and in 1859 another patent was issued for "the S. E. ½ of the N. W. ½" of the same lot:—Held, that the first patent covered 50 acres, extending half the depth and half the width of the whole lot, not 50 acres extending one-fourth of the depth and the whole width. Held, also, that the subsequent patent could not affect the construction of the first, for the question must be, what did the patent cover when it was issued. Held, also, that the assignments to the respective patentees by the original purchaser from the crown of the N. W. ½ of the lot, could not be resorted to to aid in interpreting the patent. *Davis* v. *McPherson*, 33 Q. B. 376.

On the 9th February, 1852, a patent issued to F., under whom the plaintiff claimed, for a mill site in Owen Sound, described by metes and bounds, by which, after going "1 chain 70 links, more or less, to the top of the bank of the river," it proceeded, "then south-easterly along the top of the bank, to the limit between park lots 5 and 4; then southerly to the southerly limit of the town plot, or park lot 1, keeping in all places at such a distance inland from the river as will allow of 13 feet head of water being raised at the mill," &c. It then crossed the river "to a point to which the water will be backed by being raised 13 feet, as before mentioned, at the mill," and then ran northwardly eastwardly, and northwestwardly (being the general directions of the river) "keeping always, *as on the other side of the river*, at such a distance inland therefrom as ensures to the mill owner the privilege of raising 13 feet head water as aforesaid, to the place of beginning." A well-defined bank of the river about 30 feet above the water extended from where the line first mentioned struck the top of the bank to the limit between lots 4 and 5, and then the bank died away into a flat:—Held, that under this patent the limit of the land granted was the top of the bank as far as the limit between park lots 4 and 5, not the line formed by the 13 feet head of water. *Harrison* v. *Frost*, 34 Q. B. 110.

On the 14th of February, 1852, a patent issued to F. (presumably the same person as the patentee of the mill site) for park lots 4 and 5. The description of these lots by metes and bounds was in part "commencing where a post has been planted in the N. W. angle of park lot 5; then N. 82° 45' E., 9 chains 30 links, more or less, to the water's edge of the mill dam in the mill-site block, in the said town aforesaid, by 13 feet head of water being raised at the mill; then southerly following the water's edge thus formed," &c.:—Held, that the first patent could not be controlled by the second; and the latter being to the first patentee, he thus acquired the whole land in dispute, and there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second. *Ib.*

In 1796 a patent issued to R. for 528 acres, more or less, "being composed of lots 16 and 17, front concession, 16 and 17, second concession, and 17, third concession, with the broken fronts of 16 and 17 on Burlington Bay, in the township of Barton, butted and bounded as follows: beginning at the N. W. angle of lot 15 on Burlington Bay; thence S. 18° W. 115 chains; then N. 72° W. 21 chains; then S. 18° W. 51 chains; then N. 72° W. 20 chains; then N. 18° E. to Burlington Bay; then easterly along the bay to the place of beginning. Barton is on the south shore of Burlington Bay, and the lots number from the east. At the west side of lot 15 the shore turns suddenly to the south, for some distance, so that the broken front of lots 16 and 17 are on a line with what to the eastward is the first concession, and these broken fronts contain together only 28 acres. In the description for this patent in the department the lots were called 16 and 17, "front or first concession." The question was, whether lot 16 in the third concession proper, passed by this grant. It was shewn that the government had never asserted any right to it; and the entries in books and plans in the crown lands department shewed that it had always been assumed to have been granted to R. The descriptions for patent, and the patents of the surrounding lots, agreed with this view; the number of acres mentioned, 528, would not otherwise be covered by the grant; and R., and those claiming under him, had held possession for more than forty years. It was shewn, also, that the N. W. angle of lot 15, on the bay, was about 14 chains N. of the concession road in front of the second concession proper. The defendant in ejectment, R.'s heir-at-law, contended that the description excluded this lot, so that the title was still in the crown, and relied, among other things, upon certain old plans from the department, which the plaintiffs asserted to be incorrect:—Held, that the lot passed by the patent. *Juson* v. *Reynolds*, 34 Q. B. 174.

Remarks as to the nature of the evidence admissible,—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent. *Ib.*

Quære, whether the defendant, a mere stranger, could set up the title in the crown as against the plaintiffs' possession for forty years, with the privity of the crown. Semble, that at all events the plaintiffs could have maintained trespass against him. *Ib.*

Held, under the facts and evidence set out in this case, that the plaintiff, claiming under a

patent for part of lot 29, in concession A. "according to a plan of survey by provincial land surveyor O'H., dated on the 9th January, 1860, of record in the crown lands department," was confined to and governed by the plan mentioned, and could not claim according to the legal limits of the lot by the original survey. *O'Donnell* v. *Tiernan*, 35 Q. B. 181. See *Mahony* v. *Campbell*, 15 Q. B. 396.

Quære, whether a boundary intended by a grant from the crown might be varied or departed from by subsequent acts and acquiescence of parties interested in the position of such boundary, who would be accordingly bound. *Hart* v. *Bown*, 10 Chy. 266.

The question was as to the true boundary line between lots 26 and 27 in the sixth concession of Wainfleet, which the plaintiff contended should be ten chains further east than where the defendant asserted it should be. The patent under which the defendant claimed described his land as commencing at the S. W. angle of his lot, 26, and then running north "56 chains, more or less, to the lands granted to B." It was shewn that taking the defendant's point of commencement this course would not reach B.'s land, and that commencing at the point contended for by the plaintiff it would reach B.'s land:—Held, 1. That upon the evidence stated in the case—the original instructions to the surveyors, the field notes, character of the land, &c.—the defendant was right in his contention; 2. That the description in the patent under which defendant derived title was not sufficient alone to outweigh all the other facts in his favour; and that under the circumstances the words, "to the lands granted to B.," should rather be rejected. *Hoover* v. *Sabourin*, 21 Chy. 333.

See *Manning* v. *Doe* d. *Fergusson*, H. T. 2 Vict. p. 1031; *Miller* v. *Palmer*, 3 O. S. 425, p. 1034; *Doe* d. *Murray* v. *Smith*, 5 Q. B. 225, p. 1029; *Dixon* v. *McLaughlin*, 1 E. & A. 370, p. 1029; *Cartwright* v. *Detlor*, 19 Q. B. 210, p. 1029; *Iler* v. *Nolan*, 21 Q. B. 309, p. 1030; *Henderson* v. *Harris*, 10 C. P. 374, p. 1031.

(b) *Uncertainty.*

Where, in ejectment, the deed under which the lessor of the plaintiff claimed, was in several parts illegible, and contained no description by which the part of the lot intended to be conveyed could be certainly ascertained, and there was strong evidence that the deed was made to defeat creditors, the court set aside a verdict for the plaintiff. *Doe* d. *McDonald* v. *McDonald*, 2 Q. B. 267.

Where land is so described by its local abutments as to enable any one to find it with certainty, it is unnecessary to state further in what lot in the township the land lies. If, therefore, the land so described is stated to be part of lot 42, when it is in reality part of lot 45, the deed is nevertheless certain and good. *Doe* d. *Notman* v. *McDonald*, 5 Q. B. 321.

Defendant agreed to sell to plaintiff certain buildings specified, "with the land which they occupy, with the whole of the dam and water privilege." Quære, per Robinson, C. J., as to the effect of the uncertainty in the agreement with regard to the description of the premises. *Snyder* v. *Proudfoot*, 15 Q. B. 532.

An agreement to sell and convey, or a deed of, "one acre of land, being part of the north-east quarter of lot 19, in the seventh concession of Darlington," is not void for uncertainty, but the purchaser may elect what acre he will have. *Cummings* v. *McLachlin*, 16 Q. B. 626.

A surveyor's deed to plaintiff granted land as being "the public highway or road leading from Wellington to the carrying place," and described it thus, "commencing at the base line in front of lot No. 7, then on a north-westerly course along the north-easterly edge till it intersects the limits between lot No. 8 and 9; thence south 20° east to the southern limits of said road; thence along the south-westerly edge of said old road, till it intersects the base line in front of lot No. 7; thence along said line to the place of beginning," with the exception of what is occupied by the main road, meaning, by the new quarter sessions road, which traversed the old road on defendant's lot No. 8. Semble, that the description was too uncertain to convey anything. *Clapp* v. *Haight*, 19 Q. B. 94.

The modern doctrine in interpreting the meaning of a grant or other instrument, is to ascertain the surrounding facts at the time the same was made. In ejectment for part of lot 41 in the first concession of the township of Colchester, it appeared that the patentee of the whole lot granted to the plaintiff "all that parcel of land commonly known by part of lot 14, (not giving the township or concession) containing 50 acres," describing it by boundaries which corresponded with the 50 acres off the rear part of the lot on which it was proved he lived at the date of the deed, being also himself described in the deed as of the same place. The grantee with her husband thereupon went into possession of that land and there was no evidence that the grantor owned any other lot 41. Held, that the words in the deed, with the surrounding facts, together with what followed immediately after its execution, were sufficient to shew with reasonable certainty what land passed by the deed; and that evidence of such facts was properly received at the trial. *Nolan* v. *Fox*, 15 C. P. 565.

The mortgage under which the plaintiffs claimed, executed in 1861, described the land as lot 5, in the 4th concession of Flos, containing 200 acres, "save and except 35 acres sold off the east side of said lot 5 to L. for taxes." L. had bought 35 acres in 1858. The certificate of purchase then given to him by the sheriff had a diagram sketched on it, shewing this to be the east 35 acres, and the said diagram was on the certificate and deed given in 1865 and 1866 to one J., who purchased the remaining 165 acres for taxes, and under whom the plaintiffs claimed:—Held, that the description in the mortgage was sufficient, the exception being thus clearly defined. *The Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

Where a contract was for the sale of lot 16, "and as much of lot 17 as should require to be flooded for the purpose of working a mill on lot 16:"—Held, that as the quantity of land on lot 17, could be ascertained by a jury or the master, there was not such an uncertainty as to make the contract void:—*Hook* v. *McQueen*, 2 Chy. 490.

in advertising lands for sale for taxes they were described as "Race lands, Paris Hydraulic Co.," no further specification of the locality or quantity to be sold being given:—Held, that the description was insufficient, and the sale void. *Greenstreet* v. *Paris*, 21 Chy. 229.

(c) *Inconsistent Descriptions.*

General and Particular Descriptions.]—Where land is described generally as part of lot 4, and the specific description afterwards given clearly embraces a part of lot 3, the specific will govern. *Doe* d. *Murray* v. *Smith*, 5 Q. B. 225.

The crown in 1838 granted a parcel of land as containing 70 acres, being the E. ½ of lot 30 in the 7th concession of Albion, giving the metes and bounds as commencing at the S. E. angle of the rear or E. ½ of the lot, (such point being known and undisputed, and the crown at the time owning all the land in that concession beyond that lot); then on a course N. 45° 45' W. 70 chains, *more or less*, to the allowance for road on the northern boundary of the township, (which was also well known and ascertained); then S. 74° W. 35 chains, 50 links, more or less, to the allowance for road between lots 30 and 31; then S. 39° 30' W. 1 chain 50 links, more or less, to the centre of the concession, &c.; and in 1850 another grant was made of lot 31 in the 7th concession, as containg 34 acres, without any description. In the original survey the allowance for road between lots 30 and 31 had never been run through, or any posts planted on the rear of the lots, although posts had been planted at the front angles, and by producing the line as between lots 30 and 31 in the 6th concession, a distance of 35 chains and 50 links, as given in the patent, along the allowance for road on the northerly side of the township, would be materially lessened. The owner of lot 31, treating the person in possession of lot 30 as a trespasser, in respect of all the land not included within such limits, brought trespass against him; Held, reversing the judgment below, that the grantee, under the patent of 1838, in the absence of any post to mark the allowance for road, was entitled to the full distance of 35 chains and 50 links, as specified in the grant, without any reference to the posts planted at the front angles of the lot. Macaulay, C. J., Esten and Sprague, V. C., diss. *Dixon* v. *McLaughlin*, 1 E. & A. 4.

The crown in 1804 granted lots 18 and 19 in the 6th concession of F. containing 247 acres, more or less, and bounded as follows: "commencing in front of the said concession at the S. angle of the said lot 19; *then N. 31° W. 65 chains*; then S. 59° W. 38 chains, more or less, to the allowance for road between lots 18 and 19; then S. 31° E. 65 chains, more or less, to the allowance for road in front of the said 6th concession; then N. 59° E. 38 chains, more or less, to the place of beginning:—Held, to include all of lots 18 and 19, not merely that part extending 65 chains back from the front or south end. *Doe Dwright* v. *Dettor*, 19 Q. B. 210.

The crown in 1836, granted to S., under whom defendants claimed "200 acres, more or less, in the township of Colchester, being lot 41, in front on lake Erie, in the said township," and described it as "commencing in front, on lake Erie, at the S. E. angle of the said lot; thence N. 175 chains," &c. In 1839 a grant issued to B. for the rear parts of lot 41, 42, and 43, in the front or first concession of Colchester," described as commencing in the limit between lots 40 and 41, at a distance of 175 chains from the S. E. angle of the said lot 41; and then going north:—Held, that the first grant must be taken to include the whole of lot 41, notwithstanding the particular description, and therefore that nothing could pass by the second patent. *Iler* v. *Nolan*, 21 Q. B. 309.

J. A., by deed, dated 22nd of January, 1840, conveyed to the plaintiff lots 134, 135, and 136, in the third concession of Sandwich, adding this description, "which said lots were patented to the said J. A., bearing date the 15th of March, 1836, and which was surveyed and laid off by J. A. Wilkinson, D. P. S., on 21st of January, 1840:"—Held, that the plaintiff was not bound by such survey, but could claim the whole of lot 136, as laid out by government. *Mahony* v. *Campbell*, 15 Q. B. 396.

Ejectment for part of the E. ½ of lot 95. The mortgage under which the defendants claimed described the land as "part of broken lot No. 94, and Nos. 95 and 96," butted and bounded as follows: "lot 94, commencing at the eastern angle of said lot," &c. The metes and bounds given would cover the whole of the lot, or part of 93 and part of 94, but it did not appear from them which was intended, except that the last course was "to the place of beginning *in* lot 94."—"Also lot 96, *commencing 9 chains and 40 links on a course S. 45° W. from the northerly angle of said lot*," and running westerly to the distance of 6 chains 50 links beyond the limit between lots 95 and 96, being a description in fact of parts of 95 and 96. "Also lot 96," commencing, &c., giving boundaries to include only that part of 96 not covered by the previous description. The patent to A., under whom defendant claimed, was put in, covering lots 95, 96, and the W. ½ of 94; and it was admitted that he had conveyed to the mortgagor. By commencing at the eastern angle of the W. ½ of 94, instead of at that angle of the whole lot, the descriptions given would cover this land, and the distances given for the courses from north to south would then agree very closely with the measurement on the ground, but would be incorrect otherwise. There was no evidence that the mortgagor owned any part of 94 but the west half:—Held, that by the general description the whole of lot 95 passed; and (reversing the judgment below) that the particular description, being clearly inaccurate in many respects, could not control the previous grant, so as to exclude the part of that lot not described. Semble, however, that had the description by metes and bounds been consistent with itself, and excluded clearly a part of 95, the whole would still have passed by the previous words. *Jamieson* v. *McCollum*, 18 Q. B. 445; *McCollum* v. *Wilson*, 17 Q. B. 572.

In ejectment brought to recover possession of certain land, called part of 22 in the 8th concession of Hamilton, and described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township, (called the 9th) between the 8th, to the north thereof, and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as ex-

tending to the bank of Rice Lake, but the deed to himself only stated the lot without giving metes and bounds :—Held, that although the specific description in the patent, and not the general description, would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, defendant was entitled to a verdict. *Henderson* v. *Harris*, 10 C. P. 374.

A mortgage described the land as all those certain parcels of land situate in the township of N., containing 2½ acres, more or less, being composed of part of lot 23, in the 5th concession of the said township of N., particularly described in the deed of conveyance thereof made between, &c. This deed referred to was for 2½ acres, part of lot 23, in the 4th concession, and of lot 23 in the 5th concession, describing the part in each concession separately by metes and bounds, that in the 5th containing less than half an acre :—Held, that the mortgage included only the land in the 5th concession. *Ferrie* v. *Wright*, 20 Q. B. 644.

Plaintiff claimed under a deed from one C. of "all that parcel of land being composed of lot 26, as laid down upon a plan of lots laid out by G. T. and W. T., being on the west side of G. street in the town of Belleville, described as follows," adding a description by metes and bounds, which left a small strip at the south end of the lot uncovered :—Held, that the whole lot passed, and that the description curtailing its size should be rejected as falsa demonstratio. Held, also, that evidence of what took place between the parties when C. afterwards conveyed the small strip to defendant, and as to defendant's possession thereunder, and the acquiescence therein of the person through whom plaintiffs claimed, &c., was properly rejected. *Gillen et ux.* v. *Haynes*, 33 Q. B. 516. See *Haynes* v. *Gillen*, 21 Chy. 15.

Held, the general description being wholly insufficient, that the particular description by metes and bounds which followed, not being a falsa demonstratio added to a complete description, but an entire description in itself, governed. *Hart* v. *Bown*, 10 Chy. 266.

See, also, *Doe Keating* v. *Wyant*, 6 O. S. 314, p. 1022 ; *Doe Notman* v. *McDonald*, 5 Q. B. 321, p. 1027 ; *Doe Campbell* v. *Crooks*, 9 Q. B. 639, p. 1022 ; *Crow* v. *Martin*, 2 E. & A. 425, p. 1024 ; *Wigle* v. *Stewart*, 28 Q. B. 427, p. 1024.

Other Cases.]—Where the number of acres mentioned in a patent does not correspond with the quantity of land according to the description in the grant, the description will control. *Manning* v. *Doe* d. *Fergusson*, H. T. 2 Vict.

Where in a deed a certain quantity of land, and half of a saw-mill thereon erected, were conveyed, and the description of the premises covered the whole site of the mill :—Held, that the vendee was entitled to only one-half of the mill. *Doe* d. *Miller* v. *Dixon*, 4 O. S. 101.

A surrendered to the crown in consideration of £636 5s., "all that parcel of land overflowed and covered with water, being and composed of lots 37, 38, 39, in the first concession of the township of Kingston, containing by admeasurement 462 acres more or less, and more particularly described in the plan thereof hereunto annexed, to the intent that the said land and premises covered with water should forever be vested in His Majesty," &c. There was attached to the deed a plan verified by one Burke, the surveyor who made it, and certified by him thus "I do hereby certify that the above diagram is drawn from actual survey, and in actual accordance with the deed held by the proprietor, and that there are 462 acres 16 roods, permanently covered with the waters of the Rideau canal. Across the land from one side to the other was drawn an irregular line, exhibiting on the one side, (which was the front end of the lots), the 462 acres surrendered to the government, as being covered by the overflowing of the canal, and on the other side, or in rear of this line, 123½ acres, which was marked "land." Afterwards A. conveyed to B. "all those certain parcels of land in the township of Kingston, and being the rear parts of lots 37, 38, and 39, (as laid down on a certain plan drawn by Mr. Burke the surveyor in the fifth concession of the township of Kingston, and by the said B. stated to contain 123½ acres." The land surrendered to the crown had been paid for to A. at a price per acre, assuming it to contain 462 acres, according to Burke's survey ; but it afterwards turned out that the plan did not correspond with the facts, the survey being extremely inaccurate, for there was not as much land covered with water as the plans represented by 141 acres :—Held, that the deed made to B. carried only such land (123½ acres,) as upon the scale of measurement upon which the plan was framed formed the area in rear of the irregular line drawn across the lots, without regard to the fact of what portion of the lots was actually covered with water, and that the whole 462 acres had, under the deed of surrender, vested in the crown. Robinson, C. J., diss. *Doe* d. *Gildersleeve* v. *Kennedy*, 5 Q. B. 402.

The defendant agreed, under seal, with the plaintiff to pay them £275 by a certain day, for "the south 100 acres of lot 15 in the 7th concession of Norwich, beginning at the S. E. corner, and run by the surveyor 100 acres exactly." Held, upon the facts stated in the case, that under these words defendant was entitled to the tract as "run by the surveyor," that being in accordance with the substance of the agreement, and the latter words being the principal feature of the description, not the words, "the south 100 acres." *Joiner* v. *Colborne*, 11 Q. B. 631.

A conveyed to B. all and singular those lands and premises, with the appurtenances, situate at Point Iroquois Canal, in the township of Matilda, being composed of the wharf, stores, houses, and appurtenances built on part of the east half of lot 24, in the first concession of the said township, south of said Point Iroquois Canal, commonly known as Carman's wharf :—Held, that by such deed all the premises known as Carman's wharf would pass to B., although part of said wharf was in fact built in front of lot 23. *Carman* v. *Molson*, 3 C. P. 124.

When the description in a deed which was supposed to contain half a lot, in giving metes and bounds, stated as a measurement 40 chains "being half the length of the lot," as the lot conveyed :—Held, that it was necessary for the grantee to prove the whole lot contained 80

than 80 chains from front to rear, to entitle him to any greater quantity, for the production of the deed alone would entitle him to 40 chains only. *VanEvery* v. *Drake*, 9 C. P. 478.

One S. B. by deed, dated January, 1851, conveyed to W. T. 120 acres of the south part of lot 6 in the 2nd concession of Canborough, describing it by metes and bounds. In March, 1855, W. T. and wife conveyed to the defendant J. T. the southerly part of lot No. 2, in the 2nd concession of Canborough, "which said southerly part was sold by S. B. to W. T." The defendant J. T. and wife conveyed to T. H. the north 65 acres of the southerly part of No. 2, in the 2nd concession of Canborough, described as follows: "which said southerly part was sold to W. T. by S. B., and by the said W. T. conveyed to J. T. by deed," &c. T. H. and wife conveyed to one M. in fee 65 acres of the southerly part of lot No. 6, in the 2nd concession of Canborough, by metes and bounds, and concluding, "the same being the lands originally sold by W. T. to J. T. and by J. T. to H." M. entered into possession and demised for one year to the plaintiff D., who entered, and being disturbed by defendants, brought this action to recover possession. It was admitted there was no lot No. 2, in the 2nd concession of Canborough:—Held, the description of lot No. 2 being a falsa demonstratio, and it appearing in evidence that B. did convey the south part of lot No. 6, in the 2nd concession of Canborough, to W. T., and by rejecting the words "No. 2," sufficient remained to shew that 65 acres of No. 6 were conveyed, therefore the plaintiff was entitled to recover. *Dohn* v. *Tice et al.*, 11 C. P. 289.

Held, that upon the lease and assignment, as set out in the declaration in this case, there was nothing to sustain the defence relied on, that the lease was intended to include land on Front street, in the city of Toronto, for Front street was not mentioned in either, except in defendants' covenant, where it must be treated as merely a falsa demonstratio of what had been already clearly described. *Talbot* v. *Rossin et al.*, 23 Q. B. 170.

Where land was described as commencing at a post planted 4 chains and 50 links from the N. E. angle of a lot:—Held, that the post (the existence and position of which were satisfactorily established) was the point of commencement, though its distance from the true N. E. angle was inaccurately given. *Marrs* v. *Davidson*, 26 Q. B. 641.

A description of land in a deed, after running to a point two chains from a line with the east side of the Port Colborne guard lock, on the Welland canal, proceeded; "thence S. half a degree E. 25 chains, more or less, always at a distance of two chains from a line with the east side of said guard lock, to the northern limit of said lot 27," thence, &c. The course should have been north instead of south, and the effect of it as written was to go away from the northern limit of the lot, and exclude the land in question:—Held, that the course might be rejected, and a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot. *Corporation of the County of Welland* v. *The Buffalo and Lake Huron R. W. Co.* 30 Q. B. 147.

(d) *Evidence to Explain.*

Where, in trespass for cutting timber, the question was, in which of two townships there was an allowance for road, and the grants from the crown not being very explicit, the plaintiff endeavoured to support his construction of the grant by parol evidence, which was rebutted by the defendant by parol testimony also, and the jury found for the defendant—the court held such finding right, and that parol evidence was admissible. *Miller* v. *Palmer et al.*, 3 O. S. 425.

Trespass to try title to lands lying adjacent to the river Humber, and occasionally overflowed during freshets. The defendant's deed gave him the bed of the river, and two rods beyond "high water mark" on both sides of it. The evidence was conflicting as to the position of posts mentioned in the deed, and defendant contended that he was entitled to two rods beyond the highest point to which the water of the river ever rose, including the lands in question. A bond containing the agreement between the parties, in pursuance of which the conveyance appeared to have been made, defined "high water mark" to be "where the water has already, or may hereafter, be flowed for mill conveniences or other machinery:"—Held, that the language of the deed was explained by the bond, and that high water mark was the line to which the water was flowed for the purposes therein mentioned. *Grahame* v. *Brown*, 12 C. P. 418.

Defendant leased to plaintiff a lot of land, "known as the park, in front of Denison terrace residence, and to embrace all the land from the carriage drive in front of the house to Dundas street on the south, *to be bounded on the east by the garden fence of my old cottage*, and on the west by McGregor's garden and my orchard, and to embrace all the flats even with the north part of the cottage now occupied by my carpenter, and which cottage is to go into the bargain with the land." It appeared that the garden fence extended only part of the way to the drive from Dundas street, and the dispute was as to the eastern boundary beyond it:—Held, that the plaintiff was not therefore entitled to claim to the eastern boundary of all the land known as the park, but that, this being a latent ambiguity, parol evidence was admissible to ascertain what was intended by the parties. *Burgess* v. *Dennison*, 16 Q. B. 457.

Defendant, owning a block of land which had been laid out in village lots, conveyed it to S., the plaintiffs' grantor, reserving thereout several village lots, and among them lots 1, 2 and 3 on the south side of Queen street, in tier 2. There was in fact no such lot 1 laid out, either on the plan of the village or on the ground, the first lot on the south side of Queen street being No. 2. S., in 1870, conveyed to the plaintiffs part of village lot 4, on the south side of Queen street, in tier 2. The adjoining lot, 5, was then pointed out to the plaintiffs as being 4, and they built upon it, defendant occupying 2, 3, and 4, and having a blacksmith's shop on 4, which lot he had occupied ever since his sale to S., as one of the reserved lots. The plaintiffs having brought ejectment for lot 4:—Held,—Richards, C. J., doubting—that, as the extrinsic evidence shewing that there was no lot 1 disclosed a mistake in the description of the lots reserved, and a latent ambiguity, parol evidence might be re-

ceived to explain it; and that the reservation might be construed as meaning lots 2, 3, and 4, or the first, second and third lots on that side of the street. *Kean et al.* v. *Dropr*, 35 Q. B. 415. See *Orser* v. *Waddell*, 36 Q. B. Not yet reported.

Evidence to explain patents. See *Doe Campbell* v. *Crooks*, 9 Q. B. 639, p. 1022; *Hagarty* v. *Britton*, 30 Q. B. 321, p. 1025; *Davis* v. *McPherson*, 33 Q. B. 376, p. 1025; *Jason* v. *Reynolds*, 34 Q. B. 174, p. 1026; *Hoover* v. *Sabourin*, 21 Chy. 333, p. 1027.

See, also, *Nolan* v. *Fox*, 15 C. P. 565, p. 1028; *Gillen* v. *Haynes*, 33 Q. B. 516, p. 1031.

(c) *Other Cases.*

The front half of a lot supposed to contain in all 200 acres, but in reality consisting of more, was construed to mean half the real quantity. *Ellis* v. *Waddel*, 5 O. S. 639.

Trespass q. c. f. The plaintiff claimed under deeds from A. M. to S. M. in 1834, and from S. M. to the plaintiff in 1843. In 1829, A. M. had made a deed to his step-mother, intended to be in lieu of her dower in his father's lands. It was clear by evidence at the trial, and by the mention made in this deed of the lands adjoining, that the grantor's intention was to convey the west part of lot 5; but the deed described the land as "*being composed of the easterly part of lot 5*, in the first concession of the said township of S.," adding a description by metes and bounds, beginning *at the S. E. angle of the said lot*, which could be well carried out. It was proved, however, that S. M. had been in possession of the land in 1829, and that he and the plaintiff had held it ever since:—Held, that the deed could pass no land which was not part of the easterly part of lot 5. *White* v. *Myers*, 10 Q. B. 574.

A mistake of a surveyor in marking the number of the concessions wrong on some of the posts of an original survey will not make it proper to describe the lots so marked as being in the concession numbered on the posts. *Jarvis* v. *Morton*, 11 Q. B. 431.

In ejectment for 20 acres the plaintiff claimed under a patent. Defendant put in a mortgage from the plaintiff to one P. of 1300 acres, described as "being comprised in the schedule and map attached." The land in the patent was not mentioned in the schedule, though it was laid down on the map, but it was proved that the map contained other lands belonging to other parties, and was not made with reference to the mortgage, and that the schedule embraced lands not appearing on the map:—Held, clearly insufficient to disprove the plaintiff's claim. *Cotton* v. *McCully*, 21 Q. B. 550.

In trespass q. c. f. it appeared that defendant conveyed to the plaintiff 19 acres of lot 2 in the 5th concession of Barton, described by metes and bounds, commencing at the N. E. angle of the lot. This starting point upon the ground was undisputed; and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to the boundary between lots 1 and 2. *Crosswaite* v. *Gage*, 32 Q. B. 196.

An oblong tract of land, 20 by 100 chains, containing two hundred acres, was sub-divided into smaller lots, with a lane laid out and staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries. Part of the tract lying to the east of the lane was sold and conveyed; and in the deed of that part reference was made to a plan, which shewed the lane as laid out through the centre of the whole tract, and the lane was therein declared to be the western boundary of such piece. In the same deed a right of way was granted to the purchaser in and over the said lane or way, being 83 links in width, "*which said way is already staked and laid out for the benefit of the occupiers of the said lots.*" Afterwards it was discovered that the eastern and western boundaries of the whole two hundred acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed, and if those boundaries were shifted to their proper places, as had been done by the owners of adjoining lots, the lane as originally laid out could not remain in the centre of the lot when shifted:—Held, in ejectment by the purchaser of the piece to the east of the lane, that his western limit could not extend beyond the east side of the lane as *staked out* before the execution of the deed. *Dunn et al.* v. *Turner*, 30 P. 104.

When two deeds were given to different parties of a lot containing 150 acres, the first covering fifty acres by metes and bounds, the last containing the whole lot, and commencing at the same point as the first, "except fifty acres already sold," it was Held, that the last deed covered only the remaining 100 acres of the lot. *Arner* v. *McKenney*, 8 C. P. 373.

The plaintiff owned part of lot 7, and agreed verbally, in 1859, to buy from one M. two acres more adjoining on the north, of which he went into possession. In 1860 M. gave to defendant a bond to convey to him thirty acres of the lot, more or less, describing it as "all that part of the said lot 7 lying north of the land owned by D," the plaintiff, "and south of the road through the said lot to Cramahe Hill." He afterwards conveyed the two acres to the plaintiff, who brought ejectment. M. swore upon the trial that these two acres were not intended to be included in the bond to defendant, but were looked upon as a part of the plaintiff's land referred to in it, and that defendant had without them his full 30 acres:—Held, that the plaintiff must recover, for, 1. The bond, under the circumstances, should be construed as referring to all the land in the plaintiff's visible possession as owner, thus excluding the two acres; and 2. The deed at all events vested the land with the plaintiff, and defendant's [illegible] under the bond afforded no defence. *Dunsbury* v. *Pal[illegible]* Q. B. 462.

Where land described as commencing at the intersection of a road allowance by a stream, and the boundary lines at once diverge from the stream on either course: Quære, where is the point of commencement, in the middle of the stream or on the bank, and what are the owner's rights as regards the water? This question was discussed, but not decided, as the plaintiff failed to shew that any part of his land came to the stream. *Hamilton* v. *Gould*, 24 Q. B. 58.

P., owning land on both sides of a stream, conveyed a piece on the south side, described as extending "to the water's edge of the creek; then keeping along the water's edge of said creek with the stream until," &c.; reserving a road fifteen feet wide along the bank:—Held, to pass the land to the centre of the stream. *Kains* v. *Turville*, 32 Q. B. 17. See *Robertson* v. *Watson*, in C. P. and in appeal, not yet reported.

The north half of lot 24 in the 2nd concession of Darlington, according to the original survey, contained 108 acres. B. conveyed to defendant "the south 100 acres of the north half," and afterwards to the plaintiff, "eight acres, more or less, being the north eight acres of lot 24," &c., "and being all the north half of said lot contains over 100 acres." The Kingston road, not being an original allowance but substituted for it owing to natural obstructions, ran through the south part of the north half, taking up two acres, and had been established as a highway by user for forty years. Whether it existed before the deed to defendant, or whether the soil had become vested in the crown under our statutes, did not appear:—Held, that the deed to defendant could cover only 100 acres in all, not exclusive of the road, and that the plaintiff was entitled to the remaining eight acres. *Ash* v. *Somers*, 22 Q. B. 191.

A right of way ten feet wide, described as running north from a certain street equally upon, along, and between two lots to the depth of 60 feet, and then at right angles:—Held, to extend only 60 feet between the lots, so that the crossway would lie within that distance, not ten feet beyond it, which would make the depth 70 feet. *McCammon* v. *Beauprè*, 25 Q. B. 419.

J. L. conveyed to G. L. a piece of land extending 103 feet 6 inches along the south side of Wellington street, easterly, from its intersection with Elgin street, covenanting that, should the line of Wellington street be shifted to the north, he would grant to G. L. any land thus left intervening between that street so changed and the land now granted. The south side of Wellington street was shifted about 23 feet to the north, and as Elgin street intersected it at an acute angle, the intersection was about 11 feet further west than before. G. L. having obtained a conveyance in accordance with the covenant:—Held, that he was entitled to have his eastern boundary produced on its original course, at right angles to Wellington street, though he would thus have more than 103 feet 6 inches on that street; for the intention was to give him all the land in front of that first conveyed to him, and between it and the street as altered. *Lang* v. *Matthewman*, 32 Q. B. 126.

Defendant gave a bond to the plaintiff in $1000, reciting that he had that day purchased certain land known as "the mill property," in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over 2½ acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed by J. included over 4 acres, part of which at the eastern end was covered with water:—Held, that defendant clearly was not entitled to retain 2½ acres of *dry land* in addition to that covered with water, but only 2½ acres of the whole. *Greer* v. *Johnston*, 32 Q. B. 77.

Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective descriptions the conveyance to A. comprised B.'s land, and did not comprise A.'s own, nor did the conveyance to B. comprise A.'s land; but each took and kept the land actually intended for him:—Held, Spragge, V. C., diss., that, to a bill filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party. *Rowell* v. *Hayden*, 2 Chy. 557.

The owner of the west half of a lot of land, supposing himself to be the owner of the east half, and not the west half, contracted with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly. He filed a bill to compel the other party to the agreement to accept a conveyance of the west half, and specifically perform the contract entered into between them, by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of "east" instead of "west." It appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either; but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court—Held, that the west half could not be substituted for the east half, and refused the relief asked. *Cottingham* v. *Boulton*, 6 Chy. 186.

The plaintiff sold to defendant a lot of land; the contract did not mention the number of acres it contained; the conveyance stated the quantity to be 200 acres, more or less, and the covenants did not warrant the quantity. Part of the purchase money remained as a lien on the land, and many years afterwards, but before the purchase money was fully paid, the vendee discovered that there was a deficiency of 24 acres in the supposed contents of the lot:—Held, that the vendee was not entitled to compensation from the plaintiff for deficiency as against the unpaid purchase money. *Follis* v. *Porter*, 11 Chy. 442.

W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only: A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that before the sale to the plaintiff W. had sold all he purchased to A.:—Held, that this was sufficient proof of that actual notice which is requisite in this class of cases. *Wigle* v. *Setterington*, 19 Chy. 512.

The owner of two town lots, 25 and 26, sold a portion of 26 to one P., but by mistake the description in the deed was such as at law to pass the whole lot. He subsequently sold lot 25 and all that part of lot 26 not before sold to P. to the plaintiff, and the deed thereof was duly registered. Subsequently to the registration of this deed, defendant obtained a conveyance from P., the description of the land being the same as

that in the deed to P. :—Held, that the registration of the plaintiff's deed was notice to the defendant of the plaintiff's claim to that part of lot 26 not sold to P., and that the plaintiff was entiled to a reconveyance thereof. Gillen *v.* Haynes, 33 Q. B. 516, followed but not concurred in. *Haynes* v. *Gillen*, 21 Chy. 15.

See *McMaster* v. *Phipps*, 5 Chy. 253, p. 1045; *McDonald* v. *Ferguson*, 17 Chy. 652, p. 1046; *Calvert* v. *Linley*, 21 Chy. 470, p. 1046.

See V. 1, p. 1043.

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3. *Conditions, Reservations, and Exceptions.*

Defendant claimed under a deed in fee, in which, after the habendum, was contained a proviso that the conveyance should be void, and the estate revert to the grantor, if the grantee should make default in performing the covenant thereinafter contained. This covenant was, that the grantee should cultivate the land during the life of the grantor for his benefit :—Held, that the proviso was void, as being inconsistent with the grant. *Brown* v. *Stuart*, 12 Q. B. 510.

Where lands were held by A., upon express condition to alienate only to his children, and under an execution against him the sheriff sold and conveyed his interest by a deed sufficient to pass the fee :—Held, not a breach of the condition. *Reaume* v. *Guichard*, 13 Q. B. 275.

H., by deed poll, in consideration of natural love and affection, and of 5s., conveyed land to her daughter, R., in fee, adding after the habendum, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues, and profits of the said above granted premises for and during the term of my natural life" :—Held, a conveyance of the fee simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. Quære, whether the reservation was void, or whether only the reversion passed subject to the life estate. *Simpson* v. *Hartman*, 27 Q. B. 460.

Held, that the reservation in the above deed was not void, but that the deed might be construed as a covenant to stand seized of the reversion to the use of R., the life estate remaining in H. *Hartman* v. *Fleming*, 30 Q. B. 209.

The patent to A. C. in 1796, contained the clause then usual, saving and reserving to the crown all white pine trees :—Held, that notwithstanding this reservation, the plaintiff, claiming under the patentee, could maintain trover against defendant for the white pine, for the soil in which they grew was his, and he was entitled to their shade as against a stranger. *Casselman* v. *Hersey*, 32 Q. B. 333.

See *Reynolds* v. *Waddell*, 12 Q. B. 9, p. 1015.

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4. *Habendum.*

Where the granting part of a deed of assignment transfers the indenture simply, and the habendum the estate in the indenture, the estate passes. *Doe* d. *Wood* v. *Fox*, 3 Q. B. 134.

It is superfluous in any deed of bargain and sale to express that the land is to be held "to the use of" the bargainee. *Gamble* v. *Rees*, 6 Q. B. 397.

By deed of bargain and sale, A. M. conveyed to H. M. *her heirs and assigns*, certain freehold premises, to hold the same to the said H. M. her heirs and assigns, "so long as she remains the widow of M. M., but should she marry or decease, the above described land will become the property of the two sons of the said H. M., C. M., and J. M. forever." Covenants for title were added to the said H. M., her heirs and assigns :—Held, that the habendum constituted a limitation and not a condition : that such limitation was void, as being repugnant to the grant in the premises; and that the grantee took a fee simple. *Doe* d. *Meyers* v. *Marsh*, 9 Q. B. 242.

Under a conveyance to A., her heirs and assigns, habendum to A., her heirs and assigns, and in case of her decease leaving issue, then in trust to O., (her husband) his heirs or assigns, to and for the benefit of the said children, their heirs or assigns, to be sold for their benefit, if the said O., his heirs or assigns, should think fit; and if the said A. should not survive the said O., leaving no issue, then to the said O., his heirs and assigns forever :—Held, that the habendum being inconsistent with the premises, the former must govern, and that A. took a fee. *Owston* v. *Williams*, 16 Q. B. 405.

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5. *Deeds under the Short Forms Acts.*

S. being owner in fee, by deed expressed to be made in pursuance of the act to facilitate the conveyance of real property, in consideration of £75, did quit claim to one G., his heirs and assigns for ever, all his right and title to the land in question. It was added that G. might take possession, that S. would execute such further assurances as might be requisite, that he had done no act to encumber, and he released and quitted claim to G. all his claim upon said lands :—Held, sufficient to pass the title in fee. *Nicholson* v. *Dillabough*, 21 Q. B. 591.

One J. S. being owner of the east half of one and the west half of an adjoining lot, by deed, under the act respecting Short Forms, conveyed to G. S. in fee, the west half, without express mention of any easements, &c. There were then on the west half a saw-mill and factory, which then and for some years during unity of title to both lots, were driven by a river, which was dammed back to form a pond on both lots, by a dam and embankment extending on to both. There was on the west half a grist mill, ready for the reception of machinery, and the embankment was partly cut through to carry the water therefrom to another pond partly begun, from which the grist-mill was to be supplied. After the conveyance, G. S. finished the cut through the embankment, carried the water required from one pond to the other by a flume, and thus worked the grist-mill, which could not otherwise have been worked. By this he diverted the water from the first pond and from the east half, more than before the conveyance. Such diversion and working of the mill were with the parol license of J. S. The cutting, flume, and grist-mill pond were all on the west half, and the water was returned from the mill to the river below the east half :—Held, that as by the statute the deed included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or ease-

ment to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purposes of the *saw-mill and factory*, to the same extent as before the conveyance. But, Held, per A. Wilson, J., Richards, C. J., concurring, though absent, that no right or easement passed in respect of the grist-mill; and also, that the parol license was revocable; but that the plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S. and those claiming under him from interfering with the right claimed respecting the grist-mill. Per J. Wilson, J., that there passed by implied grant all the easements claimed, including those in respect of the grist-mill. *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63.

A covenant in a deed, purporting to be made in pursuance of the act respecting short forms of conveyances, that the grantor "hath the right to convey the said land to the said party of the second part," omitting the words "notwithstanding any act of the covenantor," contained in column one, of schedule 2 of the act:—Held, not a covenant within the statute; but to mean that the covenantor had the right to convey as he had conveyed, i. e., in fee simple:—Held, also, that the omission of these words did not affect the succeeding covenants for quiet possession and further assurance, and that defendant had done no act to encumber, by making them absolute covenants; these covenants being in accordance with the form in column one. *Brown* v. *O'Dwyer*, 35 Q. B. 354.

In a mortgage for $103, purporting to be made in pursuance of the act respecting short forms of mortgages, between A. and B., described only as the parties of the first and second parts, the grant of the land was by "the said mortgagor unto the said mortgagee," and the parties were afterwards described throughout as "mortgagor" and "mortgagee," the covenant for payment being "the said mortgagor covenants with the said mortgagee that the mortgagor will pay," &c. In the margin was this receipt: "Received on the date hereof, from the said mortgagee, the sum of $103, being the full consideration money herein mentioned," signed by the party of the first part. The mortgage was executed by A. only. It was objected, in an action against A. on the covenant to pay, that there was nothing in the deed to shew who was covenantor and who covenantee: but, Held, that by referring to the receipt for the date and sum received to the mortgage, the defendant had made the receipt part of the mortgage, and it clearly shewed him to be the mortgagor; or, if this were not so, that the possession of the deed by the plaintiff, delivered to him by defendant, and the acknowledgment in the receipt, shewed the plaintiff to be the mortgagee. *McDonald* v. *Clarke*, 30 Q. B. 307. See, also, *Coghlan* v. *School Trustees of Tilbury East*, 35 Q. B. 575.

The provisions and covenants in a mortgage under the act were—Held not to be deprived of the meaning given to them by the act, because they were not numbered as in the schedule to it. *Worthey* v. *Trumenhiser*, 30 Q. B. 426.

A lease made in 1870, purported to be made in pursuance of the Act to facilitate the leasing of lands and tenements," being the title of the 14 & 15 Vict. c. 8, consolidated in c. 92, C. S. U. C., instead of "in pursuance of an Act respecting short forms of leases," which is the title of the consolidated act:—Held, nevertheless, a sufficient reference to the consolidated act, so as to bring the lease within its provisions. *Davis* v. *Pitchers*, 24 C. P. 516.

Where, therefore, the plaintiff (the lessee), was evicted by title paramount to the lessor:—Held, that he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to the acts of the lessor, and those claiming under him, nor under an implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment. *Ib.*

The covenant in a lease purporting to be made under the Short Forms Act, was, "And the said lessee for himself, his heirs, executors, administrators and assigns, hereby covenants with the said lessor, his heirs and assigns, to pay rent, and to pay taxes, and will not assign or sublet without leave. * * Proviso for *re-entering* by the said lessor on non-performance of covenants or seizure or forfeiture of the said term for any of the causes aforesaid."—Held, 1. That the covenant not to assign not being in the form given by column 1, of the act, was not to be read as if in the form given in column 2: that it did not bind the administrator of the lessee not to assign, and that an assignment of the lease, therefore, by the administrator gave no right to re-enter; 2. That such right was given only for the non-performance of positive covenants, and therefore not in this case, where the breach was the doing something which should not have been done; 3. That there was no substantial difference between "re-entering," the word used in the lease, and "re-entry," used in the act. *Lee* v. *Lorsch*, T. T. 1875, not yet reported.

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6. *Bargain and Sale.*

The registry of a deed of bargain and sale, relates back to the time the conveyance was made. *Doe* d. *Spafford* v. *Brown et al.*, 3 O. S. 92.

A deed purporting to be a deed of bargain and sale, but containing no statement of consideration, pecuniary or otherwise, and no sufficient proof of consideration given aliunde, was held void in law against a bonâ fide purchaser for value at sheriff's sale, under judgment and execution, although the jury had negatived any fraud in fact in the deed expressing no consideration. *Doe Proudfoot* v. *McCrae*, 6 O. S. 502.

A deed poll will operate as a bargain and sale; and the 4 Will. IV. c. 1, s. 47, has a retrospective operation so as to make deeds of bargain and sale executed before the act valid, without registry. *Rogers et al.* v. *Barnum*, 5 O. S. 252. See, also, *Doe* d. *Rogers* v. *Barnum*, 2 Q. B. 470.

It is superfluous in any deed of bargain and sale, to express that the land is to be held "to the use of" the bargainee. *Gamble* v. *Rees*, 6 Q. B. 396.

In an indenture, the granting words were, "grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the parties of the second part, their heirs and assigns, all and singular, &c.: To have and to hold unto the said parties of the second part, their heirs and assigns forever, to the use and upon the trust

following, that is to say, to and for the use of, &c., infant children of, &c.; their heirs and assigns forever." It appeared that upon the execution of this deed by the grantor, which was executed in completion of a sale of his equity of redemption to the grantees, in settlement of an overdue mortgage held by them as representing the deceased mortgagee, the grantees discharged this mortgage and then mortgaged the estate back to the grantor to secure the purchase money of his equity. In ejectment, brought by the infant children against the lessee of the grantees:—Held, that the use was not executed in them, (the children,) but that, notwithstanding the use of the word "grant" in the deed, and C. S. U. C. c. 90, s. 2, the old rule, that deeds "shall operate according to the intention of the parties, if by law they may," must govern, and that intention, to be gathered from the mortgage transaction, which would otherwise be defeated, clearly was that the deed should operate as a bargain and sale, vesting the use in the bargainees, the subsequent use being a trust. *Mitchell et al.* v. *Smellie*, 20 C. P. 389.

V. Rectifying and Varying.

1. *Mortgages.*

The owner of a lot of land mortgaged the west half thereof when it was supposed that the east and west halves were divided by a highway. Subsequently it was discovered, upon a survey made, that a small portion of the east half was embraced in what was always taken to be the west half only. At the time of the mortgage there was a grist and saw mill under one roof, about one-third of which was on the strip; there were also a tavern, storehouse, barn, and piggery, all on the strip, and the west half and strip had always been occupied by the mortgagor as one property, who delivered up possession of the whole to the agent of the mortgagee. Afterwards the mortgagor sold the east half up to the road; and subsequently, having become bankrupt in the meantime, took a lease of the west half, "with a grist mill, saw mill, tavern, sheds, store," &c., and no mention was made in the bankrupt's schedule of assets of any claim upon this property. On a bill filed by the holder of the mortgage against the mortgagor's assignee in bankruptcy:—Held, that the plaintiff was entitled to have the mortgage rectified, and to a decree of foreclosure for the whole of the property, including this strip; but, under the circumstances, without costs. *Russel* v. *Davey*, 6 Chy. 165.

A., being in possession of the east half of a lot, claiming title thereto, mortgaged the west half. On a bill against his heir to reform the mortgage by substituting the east half, it was shewn that A. had no claim to the west half, which was an improved farm, of which others had, for many years, been in possession. The defendant neither admitted nor denied the mistake:—Held, that the plaintiff was entitled to a decree for reforming the mortgage. *White* v. *Haight*, 11 Chy. 420.

To induce the court to vary a written instrument, on the ground of alleged mistake, the evidence must be of the strongest character. Where, therefore, a bill was filed to rectify an alleged error in a mortgage, by inserting "£225" instead of "£125," and defendants denied any mistake, and the conveyancer who drew the deed swore that he had read over distinctly the written portion of the conveyance, that the mortgagee had corrected him as to the time of payment, and that he thought he could not have been understood as reading "two" when he read "one," and it also appeared that the instructions for the mortgage had been given to another person in the absence of the conveyancer, and were read over to the parties at the time, the court dismissed the bill with costs. *Williams* v. *Felker*, 7 Chy. 345.

D. having a mortgage over 23 acres, filed his bill to foreclose. A., B., and C. having liens, were made parties, and their position settled by the master. A. held a mortgage as executor of a deceased mortgagee. B. redeemed and applied by petition to rectify an alleged mistake in C.'s mortgage, so as to make it a lien over an additional 25 acres prior to A.'s, over the same land. B. failing to prove that A.'s testator had notice of the error at the time of taking his mortgage, the relief sought was refused. *Ogilvie* v. *Squair*, 10 Chy. 444.

A mortgage may be reformed by inserting additional parcels, on clear parol evidence that the omission was by mutual mistake. *Forrester* v. *Campbell*, 17 Chy. 379.

Where a mortgage on land was executed to a municipal corporation, for the purpose of securing a debt due to the corporation by its treasurer, and by a mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage, it was held that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled. *Brown* v. *McNab*, 20 Chy. 179.

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2. *Other Deeds.*

As to reformation of a policy of insurance, when not in accordance with the intention of the parties. See *Wyld* v. *The London and Liverpool and Globe Ins. Co.*, 33 Q. B. 294.

Defendant on the 2nd September, 1872, leased land to the plaintiff for five years from the 1st October, 1872, at the yearly rent of $230, payable "on the 1st day of October of each year in each and every year" during the continuance of the term, "the first payment of $200 to be made on the 31st December, 1872, in advance, the balance of said year's rent, amounting to $30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th October, 1873, for the second year's rent, defendant pleaded the general issue by statute:—Held, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease in accordance with the agreement of the parties; and a verdict for the plaintiff was set aside on payment of costs to enable him to do so. *Brown* v. *Blackwell*, 35 Q. B. 239.

A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties "and their successors," which words it was proved would convey the fee simple according to the law of Lower Canada, and it was shewn that

the grantor's intention was to convey the lands absolutely. The court ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada. *Allan* v. *Thorne*, 3 Chy. 645.

A deed of trust was executed by a debtor, and by a mistake in setting out the metes and bounds a portion of the property intended to be conveyed was omitted; subsequently to which a creditor obtained and registered a judgment against the debtor:—Held, that the assignees in trust were entitled to have the mistake rectified, and that the lien of the judgment creditor did not attach upon the land. *McMaster* v. *Phipps*, 5 Chy. 253.

In suits for the rectification of deeds, the court allows great weight to the statements made by the answer. On the sale of a steamboat, the vendors gave a bond binding themselves unconditionally to procure a conveyance of the vessel to the purchasers within three months, and delivered possession to them; but the conveyance was not made, and two years afterwards the vessel was taken from the purchasers, upon process against the owner, and under a mortgage previously existing upon the vessel. A bill was filed by the vendors to rectify the bond, by introducing certain stipulations set forth in a memorandum made by the holder of the incumbrance at the foot of the vendor's bond, and which the incumbrancer swore he had made in order that the purchaser might have notice of his claim, and also a receipt given by him when paid part of the claim he held against the vessel. The purchasers in their answer asserted that they never had intended to abridge their rights under the bond, and never would have consented to any stipulation therein to that effect; and as the alteration proposed would have materially affected the rights of the purchasers to their prejudice, and there was nothing inconsistent in the facts being as the purchasers alleged them to be, the court refused the relief prayed, and dismissed the bill with costs. *Cotton* v. *Corby*, 7 Chy. 50; affirmed in appeal, 8 Chy. 98.

The court will not, in favour of a volunteer, order the due execution of an instrument informally executed, although the relief would be granted to a purchaser for value. *Ross* v. *Fox*, 3 Chy. 683.

The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed by plaintiffs in these suits, for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in this court, to reform the deed executed by defendant, or, treating it as a contract only, for a specific performance thereof:—Held, 1. That though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the elder, and having the legal title in his favour, the court would not interfere to give the plaintiffs relief; 2, that though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief, were he a plaintiff, still they were no ground for granting the plaintiffs the relief sought; and the court dismissed the bill with costs. *Livingstone* v. *Acre*, 15 Chy. 610.

On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain nonresident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available; and its supposed existence had been an element in determining the amount to be paid:—Held, on rehearing, that the corporation was not entitled to have the agreement altered so as to make the money payable by the other absolutely. *Arran (Township)* v. *Amabel and Albemarle, (Townships)*, 17 Chy. 163. See *S. C.* 15 Chy. 701.

By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder to her issue, but through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in the writ. The purchaser afterwards claimed the fee in the lands under the terms of the deed of gift and the conveyance from the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred on the ground that the plaintiffs had not shewn any interest in the land:—Held, the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified; and that their delay in filing the bill was not such as should deprive them of their right to relief. To such a bill it was considered that the grantor, in the deed of gift was not a necessary party, but that the grantee must be made a party, as she had a right to insist that the deed had been correctly drawn, and the defendant had a right to have her before the court in order to protect him from another suit. *Calvert* v. *Linley*, 21 Chy. 470.

The plaintiff was entitled to a conveyance from defendant of half a lot of 160 acres; defendant wished to give fifty acres only. A friend of both, aware of their mutual rights, was requested by the plaintiff to obtain the deed as claimed by him; he procured the defendant to execute a deed which conveyed fifty acres only, and which the defendant executed in that belief, as this person knew; but he thought that it really conveyed the half lot or the 80 acres, to which the plaintiff was entitled. He took the deed to the plaintiff, telling him that it conveyed the 80 acres, on which the plaintiff accepted the deed; The plaintiff was not then aware of the different belief which the defendant had in signing it:—Held, that the plaintiff was entitled to have the deed corrected, and made to embrace the 80 acres. *McDonald* v. *Ferguson*, 17 Chy. 652.

Where there was a contract for the sale of a reversion, and the deed purported to relinquish

and quit claim the property, with no other words of transfer, the court held that, in order to remove any doubt, the vendee was entitled to have proper technical words introduced. *Collver* v. *Shaw*, 19 Chy. 599.

Where there was a material error in a confirmation deed of lands sold with the sanction of the court under C. S. U. C. c. 69, an application made after the repeal of that act for an order authorizing the execution of a new deed was refused. *Re United Presbyterian Congregation of London*, 6 P. R. 129.—Chy. Chamb.—Holmested, *Referee*.

See *Rowsell* v. *Hayden*, 2 Chy. 557, p. 1038; *Cottingham* v. *Boulton*, 6 Chy. 186, p. 1038; *Wigle* v. *Setterington*, 19 Chy. 512, p. 1038; *Haynes* v. *Gillen*, 21 Chy. 15, p. 1039.

VI. Reviving Deed.

Semble, where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so after reconciliation and subsequent separation at his instance, the deed is thereby revived. *McArthur* v. *Webb et al.*, 21 C. P. 358.

VII. Lost Deeds.

Where the plaintiff was nonsuited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, the nonsuit was set aside and a new trial granted on payment of costs, the bond having been afterwards found. *Muirhead* v. *McDougall*, H. T. 2 Vict.

Where an attorney's clerk had lost his articles of clerkship, he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *In re Loring*, M. T. 2 Vict.

G., in consideration of his support and maintenance, conveyed to McR. certain land. The arrangement fell through, and the land, it was alleged, was reconveyed by a deed, which was supposed to have been lost, and which contained a covenant for further assurance. Before such reconveyance, however, G. made a similar arrangement with R., and McR., at the instance of G., conveyed the same land to R. This arrangement was also abandoned, and a new one similar in its object was entered into between G. and M., which lasted for upwards of six years, and the conveyance executed pursuant thereto was considered effectual. With full notice of this K. also entered into an arrangement with G., and with his assent took a conveyance from R., which gave him the legal estate. N. having died, his son filed a bill, alleging the loss of the conveyance by McR., and seeking to compel the execution of another deed by him to G. in place of the last one, or a conveyance to himself as claiming under G., praying, also, that K. might be ordered to join in such conveyance. At the examination of witnesses the supposed lost deed came to light in the hands of the attorney with whom it had been deposited, but its genuineness was denied by McR. K. had supported G. for some time, and in his answer sought to avoid the conveyance to N., by alleging insufficient support of G. Under these circumstances the bill, as against McR., was dismissed with costs, but it being considered that under the pleadings relief might properly be given as against K., although the bill was not filed principally with that object, K. was ordered to convey to the plaintiff, on receiving compensation in respect of his support of G., not exceeding the amount which N. had agreed to pay in the event of his failure to provide G. with support, the plaintiff as against K. being allowed only such costs as he would have been entitled to if the suit had been instituted against him alone upon the equity existing between himself and K. *Nickles* v. *McRoberts*, 10 Chy. 473.

Where a mortgagee loses the mortgage deed, he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand third persons may have acquired, by deposit of the deed or otherwise, to the money, or any part thereof. *McDonald* v. *Hime*, 15 Chy. 72.

After the loss of a mortgage deed, the mortgagor offered to pay the over-due interest, on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults:—Held, that the plaintiffs must bear the expense of proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. *Ib.*

DEFAMATION.

I. Privileged Communications, 1049.

II. Charge of Indictable Offence, 1052.

III. Affecting Persons in Trade or Business, or in Office, 1054.

IV. Immorality and Unfitness for Society, 1055.

V. Slander of Title, 1055.

VI. Action for.

1. *Generally*, 1046.
2. *Declaration.*
   (a) *Venue*, 1057.
   (b) *Inducement and Innuendo*, 1057.
   (c) *Statement of Defamatory Matter*, 1058.
   (d) *Other Cases*, 1059.
3. *Pleas of Justification*, 1059.
4. *Evidence.*
   (a) *Proof of Defamatory Matter and Innuendo*, 1063.
   (b) *Under the General Issue*, 1066.
   (c) *Of Malice and in Aggravation or Mitigation of Damages*, 1066.
   (d) *Of Character*, 1067.
   (e) *Other Cases*, 1067.
5. *Damages*, 1068.
6. *Costs*, 1069.
7. *New Trial*—*See* New Trial.

VII. Criminal Procedure for Libel, 1069.
VIII. Apology, 1071.
IX. Miscellaneous Cases, 1071.

I. Privileged Communications.

In actions for slander or libel it is the province of the judge to determine whether the occasion of uttering the slanderous words, or writing the libellous matter complained of, was or was not privileged; and if privileged, in the absence of evidence of malice, there is nothing to be left to the jury as to bona fides or otherwise. *McIntee* v. *McCulloch*, 2 E. & A. 390, reversing the decision below, 13 C. P. 438.

Where the words were spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice, upon evidence sufficient to warrant their finding, before defendant can be pronounced guilty. *Richards* v. *Boulton*, 4 O. S. 95.

Where the libel complained of is clearly a privileged communication, the inference of malice cannot be raised upon the face of the libel itself, as in other causes it might be, but the plaintiff must give extrinsic evidence of actual express malice; he must also prove the statement to be false, as well as malicious; and defendant may still make out a good defence by shewing that he had good ground to believe the statement true, and acted honestly under that persuasion. *McIntyre* v. *McBean*, 13 Q. B. 534.

Where defendant, a clerk in the receiver-general's office, told his principal that the plaintiff, another clerk, had robbed him (the receiver-general,) there being no proof that any money had been stolen, or that the receiver-general had ever suspected it:—Held, not privileged. *Prendergast* v. *Hamilton*, Dra. 398.

A petition to the lieutenant-governor complaining of the conduct of commissioners of the Court of Requests, and charging them with partiality, corruption, and connivance at extortion, signed by a number of persons, and praying for redress, is absolutely privileged, even though defendant had circulated it and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in it, and supposed it to be a totally different matter. *Stanton* v. *Andrews*, 5 O. S. 211.

A complaint addressed to a public body, or to a government, respecting the conduct of an officer under their control, is not necessarily privileged. That depends on the motives with which it was made. *Corbett* v. *Jackson*, 1 Q. B. 128.

An action for libel contained in communications to the executive government with a view to obtaining redress, cannot be sustained, unless the party making them acted maliciously and without probable cause. *Rodger's* v. *Spalding*, 1 Q. B. 258.

A representation by the assessed inhabitants of a school section as to the character of the teacher, made with a view of obtaining redress, is a privileged communication, which it is of importance to the public to protect; and such a statement would not be the less privileged if made by mistake to the wrong quarter. *McIntyre* v. *McBean*, 13 Q. B. 534.

Quære, whether a communication of this nature, made by an inhabitant of any other part of the province, would not be privileged. *Ib.*

Differences having arisen between a municipal council and a road company, of which the plaintiff was a director, defendant was appointed by the council to act as their attorney, and to examine the books of the company and report to the council. The directors were then negotiating with the Trust and Loan Company for a loan for the purposes of the road, and defendant, in the name of the firm of which he was a member, wrote a letter to that company, saying that they had been requested by three of the councillors of the township to inform them that the loan was contrary to the wishes not only of the majority of the council, but of the majority of the stockholders: that the directors were strongly suspected of misappropriation of the funds of the company, and refused an account of their expenditure to the council, &c. "All of which we can ourselves vouch for. Respectfully yours, (signed) Farmer & DeBlaquiere." It appeared that the directors of the road company had been acting in a manner of which the council disapproved: that defendant was told that a majority of the council were opposed to the loan, and was urged to interpose and prevent it. It was also proved that the affairs of the road company were in confusion, and that the council had good reason for wishing to check the proceedings of the directors:—Held, that the term "misappropriation" might be considered in its gravest sense libellous, but that in this case it was necessary to shew a malicious intent on the part of the defendant, for otherwise the communication would be privileged, and he would stand excused on account of his particular and legitimate connexion with the subject of which he was writing. *Hanna* v. *DeBlaquiere*, 11 Q. B. 310.

Defendant published a letter addressed to the editor of a public paper, in which he stated that the plaintiff, a medical practitioner, was unlicensed:—Held, that the learned judge might either have ruled this to be privileged, or at all events have left it to the jury with strong caution as to the usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those in the charge in Turnbull *v.* Bird, 2 F. & F. 508. *Shaver* v. *Linton*, 22 Q. B. 177.

Defendant, being clerk of the peace, in conversation with the sheriff as to the medical examination of a lunatic in gaol, said he would not employ the plaintiff, as he had not the governor's license, adding, that he thought the sheriff had more pluck than to ask him after what he, the defendant, had written (referring to some article in a medical journal.) On being applied to by one M. on the plaintiff's behalf for an apology, he repeated that defendant was not a qualified physician in Upper Canada, and could not legally practise here without the governor's license:—Held, that both conversations were privileged, and that there being no evidence in either, and no extrinsic evidence, of malice, there was nothing to leave to the jury. *Ib.*

Defendant, a government detective, knowing that one M. was in partnership with the plain-

tiff, informed him that the plaintiff was connected with a gang of burglars which defendant had been the means of breaking up, and put him on his guard :—Held, that the communication was privileged. *Smith* v. *Armstrong*, 26 Q. B. 57.

S., the general manager of the defendants' railway, without special instructions of the directors, dismissed the plaintiff, a conductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices, (in some of which they were seen by strangers,) and in the circular books of the conductors, for the information and warning of the company's employees, two thousand in number: —Held, affirming the judgment of the court below, 1. That defendants were liable for the publication, as being an act done by their general manager in their interest and within the general scope of his duty; 2. That the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest; 3. Per Draper, C. J. of Appeal, Hagarty, C. J. C. P., Gwynne, J., Galt, J., Strong, V. C., and Blake, V. C., reversing the judgment below, that the evidence shewed a reasonable mode of publication, and no excess such as to take away the privilege or shew malice. Per Richards, C. J., Spragge, C., and A. Wilson, J., there was excess in the mode of publication, which was evidence of malice; 4. That this was not an action within 16 Vict. c. 99, s. 10, and necessarily to be brought within six months. *Tench* v. *Great Western R. W. Co.*, 33 Q. B. 8; *S. C.* 32 Q. B. 452.

The plaintiff, who was at one time an agent of defendants, having left them, defendants published in a newspaper an advertisement, headed, "Caution," and containing the words, "N. B.—Notwithstanding the false statements of (plaintiff) to the contrary he is no longer an agent of this company." Defendants justified, pleading that after he ceased to be in defendants' employ, the plaintiff stated to M. & G. that he was still defendants' agent. At the trial it appeared that the plaintiff after he had ceased to be defendants' agent, asked G., who had been insured in defendants' company, to insure. G. believed he was still acting for defendants, but after signing the application discovered that it was to another company, and the plaintiff then refused to allow him to withdraw. One M., who had previously insured with plaintiff in defendants' company, said the plaintiff called when the time to renew came, and being asked if he came to renew the policy, said "yes," and expressed annoyance when he found she had already renewed it with defendants. The plaintiff denied these statements:—Held, that this evidence, if believed, was sufficient to prove the plea; and it having been withdrawn from the jury, a new trial was granted for misdirection. Semble, that the communication was privileged; but this ground was not taken at the trial. *Holliday* v. *Ontario Farmers' Mutual Fire Ins. Co.*, 33 Q. B. 558.

This case was carried to appeal, but the appeal was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial. *Ib.*

Plaintiff's daughter had been in defendant's service for some time, and after she had left defendant's wife went to where she was staying, at her sister's, and claimed some things as her property, as being taken by the girl. The girl and her sister went and told this to their father, the plaintiff; and the plaintiff, his wife, the girl, the sister, and the sister's husband, went together to defendant. Plaintiff said he came to enquire about the charge against his daughter. Defendant said she had been stealing all the time she had been at his house. Plaintiff then said, that if so defendant should not have kept her in his service. Defendant then said that the plaintiff was a thief, and that his family were all thieves, and that they were all tarred with the same stick:—Held, not a privileged communication, so as to require proof of express malice. *Miller* v. *Johnston*, 23 C. P. 580.

See *Jones* v. *Stewart*, Tay. 453, p. 1054; *Swan* v. *Clelland*, 13 Q. B. 335, p. 1065; *Black* v. *Alcock*, 12 C. P. 19, p. 1066.

II. Charge of Indictable Offence.

An action will lie for words spoken here imputing the commission, in a colony subject to the British criminal law, of a crime punishable by that law. *Malloch* v. *Graham*, 2 O. S. 341.

It is actionable to charge a man with the commission of felony in a foreign country. *Smith* v. *Collins*, 3 Q. B. 1.

But words spoken imputing the crime of arson, where the burning of the building of which plaintiff was accused would not have constituted such crime, are not actionable. *McNab* v. *Magrath*, 5 O. S. 516.

Declaration, that one A. had been murdered, and that defendant had said to the plaintiff, of the deceased, "that boy who is now lying a lifeless corpse on the floor, you have been the cause of his murder, and his blood lies upon your head," meaning thereby that the plaintiff had feloniously murdered the said A. Demurrer, because the innuendo was unwarranted by the charge:—Held, declaration good, for it was for the jury to determine whether the words were spoken in the sense imputed. *Jackson* v. *McDonald*, 1 Q. B. 19.

The declaration set out that the plaintiff carried on the business and trade of a weaver in, &c., and defendant had employed plaintiff to weave thirty-five pounds of yarn for him, and had delivered such yarn to the plaintiff for that purpose: that upon said yarn being wove, &c. it had been alleged by defendant that five pounds of the yarn was deficient, and had been feloniously stolen by the plaintiff. The declaration then, in the third count, alleged that the defendant, in a certain other discourse of and concerning the yarn, and in the presence and hearing of divers persons, spoke and published the following words, that is to say: "T. Y. (the plaintiff) stole five pounds of my yarn; it was a roguish trick." And in the fourth count the words are alleged to have been, "T. Y. stole five pounds of my yarn:"—Held, that the words, spoken in the presence of strangers, ignorant of the particular circumstances relating to the yarn, were actionable. Held, also,—on motion in arrest of judgment on the ground that the plaintiff being a bailee could not be guilty of larceny,—that the

use of words imputing an indictable offence is actionable or not according to the sense in which they may be fairly understood by bystanders not acquainted with the matter to which they relate. *Young* v. *Sloan*, 2 C. P. 284.

The declaration charged as a libel the following words: "You have stolen goods in your house, and you know it;" innuendo, that defendant knew the goods were in his house and were stolen:—Held, not actionable, though spoken of and to an innkeeper. *Paterson* v. *Collins*, 11 Q. B. 63.

Declaration for slander averred that defendant used and published the words, "Old Groff made false writings," meaning that the plaintiff forged writings, &c., and was guilty of forgery:—Held, good, on demurrer, as shewing a good cause of action for accusing plaintiff of forgery. *Groff* v. *Bricker*, 4 C. P. 154.

Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceeding, or on any occasion where it would be an offence in law, are not actionable; but where the jury on such a charge gave £2 10s damages the court refused a new trial in order to give defendant his costs, but arrested the judgment. *Hogle* v. *Hogle*, 16 Q. B. 518.

Declaration charged defendant with saying that one M. at the time of the election had mortgaged his property to the plaintiff without consideration, and that the plaintiff afterwards foreclosed and took it from him without paying anything, and adding, "The fact is, he is a villain, and a thundering thief:"—Held, not actionable. *Fellowes* v. *Hunter*, 20 Q. B. 382.

"Go home, you whore, and steal more potatoes from Peggy's field, and steal more chemises from us:"—Held, actionable, for it imputed that the person addressed had previously stolen other things of the same kind; and the potatoes might have been severed, and so the subject of larceny. *Hunter et ux.* v. *Hunter et ux.*, 25 Q. B. 145.

To a declaration containing six counts, each charging defendant with having accused the plaintiff of misappropriation of moneys entrusted to him as trustee, defendant pleaded not guilty, only; and the jury gave a general verdict for £400. On motion for a new trial, the substantial ground being that the verdict was general, while some of the counts were defective:—Held, that if so, the proper course would not be a new trial but a trial de novo, which might be ordered on motion for a new trial; but held, that each count disclosed a sufficient cause of action, for in each the defendant was charged with a misdemeanor, within the C. S. C. c. 92, s. 51, and there was no plea denying that he was a trustee as alleged. *Drew* v. *Tait*, 25 Q. B. 188.

Held, that a declaration in slander for calling defendant a "sodomite," sufficiently imputed the charge of an indictable offence, without any innuendo. But if this were otherwise, defendant having by his plea justified the words as imputing the statutable crime:—Held, that an amendment, by adding the innuendo, should have been allowed. *Anon.* 29 Q. B. 456.

See *Caverley* v. *Caverley*, 3 O. S. 338, p. 1063.

III. Affecting Persons in Trade or Business or in Office.

Where a paper contains matter that is grossly libellous per se, and without reference to any particular situation or office to make it so, it is no objection to a verdict upon such libel that the plaintiff filled no such office as mentioned in the declaration. Nor is such libel excused on pretence of its being a formal application to the head of the department for redress of grievances, the plaintiff being a postmaster. And charging a person with violating a public trust, are words libellous per se, and do not require connection with any particular office; an office may be introduced as an explanatory circumstance. *Jones* v. *Stewart*, Tay. 453.

The first count set out that the plaintiff was a trader in the purchase and sale of land, and in lending money: and that defendant had purchased a lot of land for himself and the plaintiff which they agreed to divide by lot, one to take the east and the other the west half, the latter being of most value. And it was alleged that in speaking of the plaintiff in reference to his said trade and to the drawing lots, defendant had asserted that the slips were prepared by the plaintiff in such a way (explaining it) that defendant was precluded from getting anything but the east half. In another count, after stating the same trick, defendant was alleged to have added, "It then struck me I was swindled." And in another he was said to have prefaced the relation with, "He cheated me out of 100 acres of land," and concluded by saying, "so he cheated and swindled me out of the lot:"—Held, on demurrer, that no cause of action was shewn, for the words alleged in the first count could not be treated as spoken of the plaintiff in any trade or business, but in a private transaction; and the additional words stated in the other counts were not of themselves actionable. *Fellowes* v. *Hunter*, 20 Q. B. 382.

Plaintiff and defendant were tailors, the latter also selling dry goods. Plaintiff went into defendant's shop to buy cloth to make up a pair of trowsers for one A., who was with him, when defendant said to A., "Don't you have anything to do with that man; that man will rob you; he is a rogue." He also asked A. to let him make the trowsers. The jury were directed that the words were actionable if spoken of the plaintiff in the way of his trade; and a verdict found for the plaintiff was upheld. *Sloman* v. *Chisholm*, 22 Q. B. 20.

The plaintiff alleged that he was a commission merchant buying wheat, and that defendant spoke of him, in relation to his said trade, "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales, he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronize him any more:—Held, clearly a slander of the plaintiff in his business. *Marsden* v. *Henderson*, 22 Q. B. 585.

In an action by husband and wife for a verbal slander of the latter, not actionable without special damage, the affidavit stated only that persons not named had in consequence withdrawn their custom from her husband, who was a tailor. The learned judge expressed surprise and regret that an arrest should have been

ordered on such statements, but set it aside on the ground of irregularity only. *Allman et ux.* v. *Kensel*, 3 P. R. 110.—C. L. Chamb.—Hagarty

See *Russell* v. *Wilkes*, 27 Q. B. 280, p. 1062.

IV. Immorality and Unfitness for Society.

Held, per Robinson, C. J., and Jones, J., that words imputing the crime of incest to a paid preacher or lay exhorter of the Methodist Church, are of themselves actionable, without special damage, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office, even though it was not spoken with reference to the office. Macaulay, J., and Hagerman, J., diss. *Starr* v. *Gardner*, 6 O. S. 512.

Saying of a Methodist preacher, that he kept company with a prostitute, and defendant could prove it:—Held, not actionable, at all events without special damage. *Breeze* v. *Sails*, 23 Q. B. 94.

Declaration, that the plaintiff was and is a clergyman of the Church of England, and that the defendant falsely and maliciously spoke and published of him, in relation to his said profession, "He will get drunk: I have seen him drunk," meaning thereby that the plaintiff was an unfit and improper person to exercise his said calling, whereby the plaintiff was injured in his good name, &c., and shunned by divers persons, without any averment of special damage:—Held, on demurrer, declaration bad. *Tighe* v. *Wicks*, 33 Q. B. 479.

V. Slander of Title.

An action for slander of title will not lie when the alleged slander is spoken bonâ fide and in assertion of right. *Boulton* v. *Shields*, 3 Q. B. 21.

Declaration for publishing of and concerning plaintiff, and of and concerning him in relation to his business, and of and concerning certain letters patent and the invention patented, and the plaintiff as inventor and proprietor thereof, the following: "Caution—to all persons who may be entering into any arrangements with J. M. C. for his self-acting cattle and stock pump, who claims to have patented the same in April last, I wish by this notice to caution the public against having anything to do with Cousins or his pumps, it being an infringement on my patent, which was obtained by me in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs:"—Held, that the declaration set out a cause of action for slander of title, in the allegation that plaintiff's pumps were an infringement on defendant's patent, for which defendant intended to prosecute plaintiff immediately. Held, also, that it disclosed a libel on plaintiff personally in the caution against having anything to do with plaintiff or his pumps, and in the words, "beware of the fraud," in relation to the infringement of the patent. The evidence shewing that defendant was entitled to a verdict as to the slander of title, and the verdict for plaintiff being general:—Held, that the verdict must be set aside, unless plaintiff would confine it to the general issue applicable to the personal part of the libel. In such an action the attention of the jury should be directed to the separate character of the publication, in view of their finding one part to be true and the other untrue; and the damages should be specially awarded for that part which is untrue. *Cousins* v. *Merrill*, 16 C. P. 114.

In an action for slander of title, the declaration should not only contain an allegation that the words complained of as conveying the slander are false and maliciously uttered, but also an express allegation of some special damage resulting from the slander *actually sustained*, which must appear upon the declaration to be the necessary natural and direct consequence of the words complained of. In this case the averment, "whereby said M. was prevented from carrying out and completing, and refused to carry out and complete said contract for the purchase of said land from plaintiff, and plaintiff has hitherto lost the sale of said land and the use of the purchase money thereof, and has been unable to sell and dispose of said land, and has incurred and been put to great loss and expense in and about said contract with M., and the enforcement thereof, and in and about quieting the title to said land," was held a sufficient averment of special damage. *Ashford* v. *Choate*, 20 C. P. 47.

Case for libel in publishing a printed notice denying the plaintiff's title to certain land, to which the declaration alleged that he was seised in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in Chancery to establish her undoubted right. Second plea, that the plaintiff was not, at the said time when, &c., seised as of fee of or in the land, or any part thereof. Third plea, that the matters published by the defendant were at the said times when, and still are true in substance and effect. Fourth plea, that the said C. J. had and still has an undoubted right to the land; and that the defendant so believing, as her agent, and at her request, published the notice to protect her right, and without malice. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee: that the said indenture was given to secure usurious interest: that the said K. died intestate, and his heir gave to the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c., (as in the fourth plea.) The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious:—Held, on demurrer, second plea good; third plea bad, as too general; fourth and fifth pleas bad, for omitting to justify the statement that a Chancery suit was pending, that being a very material part of the libel. Semble, that the replication to the fifth plea shewed an estoppel. *Mair* v. *Culy*, 12 Q. B. 71.

VI. Action for.

1. *Generally.*

A joint action may be maintained against several persons for the joint publication of a libel. *Brown* v. *Hirley et al.*, 5 O. S. 734.

No action will lie for words spoken when they only refer prospectively to some act which, if committed, would be a crime. *Conkey* v. *Thompson*, 6 C. P. 238.

An action for oral slander will not lie against several defendants jointly. *Carrier* v. *Garrant et al.*, 23 C. P. 276.

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2. *Declaration.*

(a) *Venue.*

An application to change the venue in an action of libel to a county where the cause of action arose and the witnesses resided, and whereby there would be a great saving of expense, was opposed on the ground that a fair trial could not be had in such county, owing to alleged prejudice against the plaintiff, arising from a political excitement occasioned by an election held there three years previously:—Held, that the venue must be changed, the action being for a private injury, and not a matter of public interest, and the probabilities of the case being against the belief that a fair trial could not be obtained, as alleged, and the preponderance of convenience and expense being greatly in favour of the change. *Roche* v. *Patrick*, 5 P. R. 210.—C. L. Chamb.—Dalton, *C. C. & P.*

When in an action for a libel contained in a newspaper, the plaintiff lays the venue in a county distant from that in which the newspaper is published and the parties reside, so that the trial may be free from local influences, it will not be changed to the county in which the cause of action arose, merely because it would be more convenient and less expensive to try the case in the latter county. The obtaining of a fair trial must overbear every consideration of convenience. *Blackburn* v. *Cameron*, 5 P. R. 341.—C. L. Chamb.—Dalton, *C. C. & P.*

(b) *Inducement and Innuendo.*

[The inducement appears now to be unnecessary, by C. S. U. C. c. 103, s. 2.]

Words cannot be amplified in their meaning by unwarranted innuendoes. *Morley* v. *Nichols*, 1 Q. B. 235.

Plea negativing the inducement only:—Held, bad, on special demurrer, as tendering an immaterial issue. *Johnston* v. *McDonald*, 1 Q. B. 384.

A declaration on the following words, as varied in three different counts: "I saw Peter (meaning the plaintiff) with the heifer," (meaning that the defendant saw the plaintiff commit the crime of sodomy with the heifer); 2. "I saw Peter with the heifer just at the cross way," (meaning that the defendant saw the plaintiff then commit the crime of sodomy with the defendant's heifer); 3. "I have seen Peter Johnson with my heifer; Peter Johnson is the man that did it, and I can swear within a foot to the ground where he stood when he committed the crime aforesaid:"—Held, bad, in arrest of judgment, on the ground that the words did not of themselves import what was charged as their meaning, and that there was no sufficient inducement or statement of prefatory matter, to which the innuendoes in the declaration could refer. Robinson, C. J., diss. *Johnson* v. *Hedge*, 6 Q. B. 337.

The plaintiff averred that she was the mother of one B., and then complained that the defendant well knowing this, published in his paper the following libel, which she averred imported that she was the mother of an illegitimate child: "Of the Barkers—that was the name of his reputed father; what was his mother's I either never knew, or have forgot, but I know it was not Barker." Demurrer to the declaration, as not containing inducements sufficient to support such an innuendo; but—Held, declaration good. *Anderson* v. *Stewart*, 8 Q. B. 243.

Where the words spoken were, "Green, you have been mad with me ever since I caught you with your daughter," innuendo, having sexual intercourse with his daughter under the age of twelve:—Held, that the declaration should have averred that the plaintiff had a daughter either under the age of ten or above that age and under twelve, and that the words spoken had reference to such daughter. *Green* v. *Campbell*, 6 C. P. 50.

Remarks as to the effect of C. L. P. Act, s. 110, now C. S. U. C. c. 103, s. 2, and as to the decision in Hemmings *v.* Gasson, E. B. & E. 346. *Block* v. *Alcock*, 12 C. P. 19.

(c) *Statement of Defamatory Matter.*

When words are libellous in themselves, it is not necessary to aver that they were spoken of the plaintiff in any particular character, or in reference to any particular fact. *Bell* v. *Stewart*, E. T. 11 Geo. IV.

When the plaintiff declares against the defendant for charging him with being "a public robber," with an innuendo that "he, the plaintiff, had defrauded the public in his private dealings with them," it is not necessary for the plaintiff to aver that he is in any office, trade, or employment, in which he could have defrauded the public. Macaulay, J., diss. *Taylor* v. *Carr*, 3 Q. B. 306.

The plaintiff, a schoolmaster, sued defendant for libel, and laid as special damages his dismissal from his school. It appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent with a view to his qualification for receiving a renewed certificate. The plaintiff applied at the trial for leave to amend the special damage to meet the evidence, which was allowed:—Held, that the judge at nisi prius, had power to make the amendment. *Jackson* v. *Simpson*, 4 Q. B. 287.

As to the degree of certainty formerly required in making the colloquium refer to the inducement, See *Marter* v. *Digby*, 4 Q. B. 441.

The words alleged in the declaration were, "It's my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker." Innuendo, that the plaintiff took medicine to procure abortion:—Held, that the declaration charged a good cause of action; also, that the damages (£100) though large, were not under the circumstances excessive. *Miller* v. *Houghton*, 10 Q. B. 348.

Held, that in this case a sufficient cause of action for libel was stated, the article complained of charging the plaintiff with being concerned in a system of plundering visitors to the Falls,

and that there was no ground for arresting judgment. *Barnet* v. *Davis*, 14 Q. B. 271.

Several counts for repeated utterances of the alleged slander on the same occasion were allowed. *Forbes* v. *McClelland*, 4 P. R. 272.—C. L. Chamb.—Draper.

The first and second counts of a declaration, in an action by husband and wife, charged slander of the wife, consisting of imputations of adultery and prostitution, without setting out the words:—Held, clearly bad. The third count was for assaulting the wife, whereby, &c.; and the fourth and fifth counts were respectively for assault of the wife, per quod consortium amisit, and of the husband himself. The plaintiffs claimed damages jointly under the first four counts, and the husband alone under the fifth count. Semble, that the claim for damages by both plaintiffs, though bad as to the fourth count, was good as to the first three; but that both plaintiffs being expressed in the declaration to sue in respect of all the counts, though the husband alone, at the conclusion, claimed in respect of the fifth count, the whole declaration was bad. *Breen et ux.* v. *McDonald*, 22 C. P. 298.

(d) *Other Cases.*

One count for slander stated a cause of action accruing to the plaintiffs as partners, by reason of its being an injury to them in their joint business; other counts in the same declaration charged defendant with imputing forgery to the plaintiffs as partners, &c.:—Held, the imputation of forgery not being a partnership imputation, that the declaration was bad for misjoinder of counts. *Morley et al.* v. *Nichols*, 1 Q. B. 235.

A defendant will not be allowed in slander to single out some of the words of a count, and demur to them as not actionable, while the same count contains other words uttered in the same conversation which are clearly actionable. Macaulay, J., diss. *Taylor* v. *Carr*, 3 Q. B. 306.

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3. *Pleas of Justification.*

In case for a libel charging the plaintiff with being a "convicted felon," a plea that in a memorial to the lieutenant-governor he had confessed being guilty of bigamy, is bad, as an argumentative and insufficient way of pleading a justification. *Longworth* v. *Hyndman*, 1 Q. B. 17.

To an action for slander, in saying of the plaintiff, "I am told that Muma was the man that killed the pedlar, and I believe it," defendant pleaded that he was told that the plaintiff was the man that killed the pedlar, and he did believe it:—Held, insufficient. *Muma* v. *Harmer*, 17 Q. B. 293.

Held, upon the delaration for libel and the several pleas thereto, set out in this case, that the pleas were bad; the second and third as being too general, and not stating the facts on which defendant formed his opinion as given in the libel of the plaintiff's want of respectability and influence, and the fourth as not co-extensive with that part of the publication which it attempted to justify. *Gibb* v. *Shaw*, 18 Q. B. 165.

The sixth count was for a libel, in which defendant had stated that the plaintiff stood charged with the crime of forgery, committed not against one man, but a whole community. Defendant pleaded, justifying this charge by setting out at length a fraud committed by plaintiff and others at an election by falsifying the poll books, and inserting fictitious votes, and his trial and conviction therefor; and he alleged that this was what he referred to in that part of the libel, and was understood to mean by all to whom it was published:—Held, sufficient. *Fellowes* v. *Hunter*, 20 Q. B. 382.

As to an assertion in the libel complained of that the plaintiff "left New York with his creditors in the lurch," defendant pleaded that before the alleged grievances the plaintiff resided in New York, and came to Canada permanently to reside without having paid or satisfied his creditors in New York:—Held, upon demurrer, bad, as for all that was stated in the plea the plaintiff might have left New York with the consent and approbation of his creditors. As to a charge that the plaintiff "resorted to that style of financiering which in the vernacular is called swindling," defendant pleaded that the plaintiff obtained from one W. R. B. a certain promissory note, with the understanding that he, W. R. B. should at the maturity thereof pay the amount actually due between the plaintiff and himself and that the plaintiff should retire the note; and that W. R. B. did pay plaintiff the amount so due, but plaintiff did not retire the note, and W. R. B. was sued thereon. Secondly, that the plaintiff obtained from one W. a promissory note for $200, and upon its maturity a renewal for $100 and $100 in cash, upon the express understanding that he would retire the $200 note, which he did not, but used and appropriated the funds and new note to his own use:—Held, that the receipt and application of the funds as above stated did not in the first case amount to swindling; and that the facts of the second case stated as a justification were sufficiently stated to entitle defendant to the decision of a jury thereon. *Brown* v. *Beatty*, 12 C. P. 107.

This was an action of libel. The matter relied upon as libellous was that the plaintiff "has for the past twelve months made his paper a receptacle for coarse abuse, scurrilous personalities, and in some cases gross slanders on private individuals who happened to come within the pale of his displeasure. That he had dragged into print in the most offensive manner the names of some of our most respectable and philanthropic citizens, invaded the privacy of their personal relations, and held their peculiarities up to ridicule, and has, by heaping unmerited abuse on some of our most valued institutions, endeavoured to turn them into a bye-word and a laughing stock. There is, no doubt, a generous impulse in our nature, . . . but it is surely carrying such an impulse a great deal too far . . if we so far lose the sense of his moral turpitude as to elevate into an oppressed hero the man who is suffering the merited consequences of a long course of deliberate, determined, and reckless wickedness." Defendant justified, setting out articles from the newspaper published by the plaintiff twelve months previous to the publication by the defendant of the communication complained of, and alleging that the said matters published by the plaintiff were false and malicious, and that the persons so libelled were persons of good name," &c.; and it was held,

that primâ facie the articles set forth in the pleas afforded a justification for the alleged libel. Held, also, in accordance with Brown *v.* Beatty, 12 C. P. 197, that the plea was not bad for multifariousness. *Stewart* v. *Rowlands*, 14 C. P. 485.

Declaration for a libel charging defendant, an inspecting field officer of militia with swearing and drunkenness on a specific occasion and generally. Plea, that the statements complained of were true in the sense in which they were alleged to have been used:—Held, plea bad, as being too general. *Baretto* v. *Pirie*, 26 Q. B. 468.

A plea seeking to justify the use of the words in a sense different to that imputed was disallowed, but defendant was permitted to justify generally. *Forbes* v. *McClelland*, 4 P. R. 272.—C. L. Chamb.—Draper.

The alleged libel purported to be founded on information given to defendant by "a resident of this city yesterday," meaning the day before the publication. One of the pleas sought to be pleaded alleged that the gravamen of the charge was matter of "public notoriety and discussion," and that the words used were a fair comment, &c., and made other statements which it was alleged would enable defendant to introduce evidence of irrelevant matters:—Held, that the general plea, that the publication was a fair bonâ fide comment, &c., might be pleaded, but the plea as framed and set out in the case, was inconsistent with the words used in the alleged libel, and could not be allowed. *Devlin* v. *Moylan*, 4 P. R. 150.—C. L. Chamb.—A. Wilson.

As to part of a libel complained of, charging that the plaintiff had narrowly escaped being indicted for perjury, defendant justified, alleging that in a certain suit the plaintiff, as plaintiff's attorney therein, in an affidavit for a ca. sa. had sworn falsely to certain specified statements made to him by one R.: that defendant in that suit had recovered damages against the plaintiff for falsely and maliciously making such affidavit, and contemplated a prosecution of the plaintiff for perjury, but was dissuaded:—Held, a good plea. In the second count, the libel alleged was in part the publication of an affidavit made by R., in which he set out the action against the plaintiff, and the statements sworn by plaintiff to have been made to him by R., and averred that on the trial of that action he, R., had sworn that these statements were false, as in fact they were. Defendant in a plea to this part of the libel, averred that these statements made by R., repeating them, were true:—Held, sufficient. In a third count the libel was, that the plaintiff, a practising barrister and attorney, was a pettifogger and without character. This defendant justified, by setting out one matter (the suit mentioned in the other pleas) in which the plaintiff was alleged to have acted as charged in the libel:—Held, bad, for the general charge could not be justified by a single instance. *Fitch* v. *Lemmon*, 27 Q. B. 273.

The first count set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words, "Chronometer makers to the Queen." The libel complained of charged in substance that a large proportion of the watches advertised by them were merely Swiss watches, imposed upon the public as English, and at twice their true value. In the second count the libel alleged charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public. Plea to each count, that the plaintiffs marked their Swiss watches with the name, "Thomas Russell & Sons, London and Liverpool," not "Thomas Russell & Sons," only, as alleged:—Held, bad, as offering an immaterial issue. Held, also, that each count shewed a good cause of action. *Russell et al.* v. *Wilkes*, 27 Q. B. 280.

The declaration was for a libel of the plaintiff, in the following words: "Old S., who was naturalized by serving a term in the penitentiary of New York state." Innuendo, that the plaintiff had served a term as a convict in said prison. Defendants justified by setting up a conviction of the plaintiff of an indictable offence before the Recorder's Court in Buffalo, prior to the publication of the libel, his sentence to imprisonment in the state prison of New York state for two years, and his detention there for that period. Replication, that within three months from the alleged conviction, and before the plaintiff was imprisoned for said term, the conviction was reversed by the Supreme Court of the state, and the plaintiff released from custody upon the charge against him:—Held, on demurrer, replication good. *Davis* v. *Stewart*, 18 C. P. 482.

The plaintiff complained of a libel describing him as an ex-penitentiary bird from the state prison at Auburn, in the state of New York. Innuendo, that the plaintiff had served a term in the penitentiary as a convict, to which it was alleged that he was sent on a conviction for obtaining money by false pretences. Defendant pleaded, as to the words without the meaning alleged, that the plaintiff, before the libel, had been duly convicted of the offence mentioned, and imprisoned at Auburn under sentence therefor. The plaintiff replied that the alleged conviction was obtained without legal evidence, and afterwards, on appeal to the proper court, was reversed and annulled, as defendant well knew before publishing the libel:—Held, on demurrer, replication good. Held, also, plea good, although pleaded to the words without the innuendo. *Davis* v. *Stewart*, 29 Q. B. 441.

Declaration, that the plaintiff was a conductor in the employment of a railway company of which the defendant was manager, and had been dismissed therefrom, and that defendant falsely and maliciously published of the plaintiff, in relation to his conduct while so employed and his dismissal, in the form of a hand-bill addressed to the employees of the company, the following: "It having come to the knowledge of the directors of the company that an envelope was mailed at Hamilton, containing four coupon tickets for passages from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office in accordance with the regulations, and which envelope was addressed in the handwriting of conductor T. (the plaintiff), to a conductor on the New York Central Railway Company, conductors and others are informed that conductor T. has been dismissed from the service of the Great Western Railway Company." Innuendo, that the plaintiff had conducted himself fraudulently in his said employment, and attempted to defraud the company, and had been dismissed therefor. Plea, that it is

true, as stated in the alleged libel, that an envelope was mailed at Hamilton containing four coupon tickets for passages from Suspension Bridge to Detroit, which had been previously used, but not cancelled or returned to the audit office in accordance with the regulations, and which envelope was addressed in plaintiff's handwriting to a conductor on the New York Central Railway Company, and that conductors and others were informed that the plaintiff had been dismissed from the service of the Great Western Railway Company:—Held, on demurrer, that under C. S. U. C. c. 103, s. 2, the plea was a good defence, for that the defendant undertook by it to justify the libel with the innuendo. *Tench* v. *Swinyard*, 29 Q. B. 319.

The libel for which the plaintiff sued alleged in substance that the plaintiffs, a life assurance company, had lost heavily on debentures taken at par, and nearly worthless, which they had nevertheless continued to value: that they were compelled by public opinion to call in an actuary, but prevented him from making a proper valuation: that their history was one of outrageous extravagance and dangerous debility: that for years they had trembled on the very verge of disaster; and that they were in an unsound and precarious condition, &c. The plea to the whole declaration alleged only, in substance, that defendants had for several years made untruthful annual statements: that they had lost large sums of money by investments; and that they paid larger bonuses and dividends and salaries than their true financial position would justify:—Held, that the plea did not justify all the material charges in the declaration, and was therefore bad. *Canada Life Assurance Co.* v. *O'Loane*, 32 Q. B. 379.

Declaration, that the plaintiff voted at a certain parliamentary election, and took the oath prescribed by sec. 41 of the election law of 1868, and that in reference to such oath defendant falsely and maliciously spoke, &c., of the plaintiff the words: "He swore to what was false, and I can prove it," meaning that the plaintiff was guilty of wilful and corrupt perjury. Plea, to so much of the declaration as related to the speaking of the alleged words without the alleged meaning, that the plaintiff did swear false in swearing that he was a resident of a certain electoral division, and as such entitled to vote, &c.:—Held, on demurrer, plea bad, because if it intended to specify perjury, it should have distinctly charged that offence, and if not, the general issue should have been pleaded. *Strachan* v. *Barton*, 34 Q. B. 374.

Justification in Criminal Proceedings. See VII. p. 1069.

See *Small* v. *McKenzie*, Dra. 174, p. 1066.

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4. *Evidence.*

(a) *Proof of Defamatory Matter and Innuendo.*

Held, that a declaration alleging that defendant charged the plaintiff with stealing a bond, without any inducement as to what description of bond it was, was not supported by proof of the plaintiff having surreptitiously taken a bond for the conveyance of land to the plaintiff, which he had previously delivered up to be cancelled, this not being a crime under 2 Geo. II. c. 25. *Caverley* v. *Caverley*, 3 O. S. 338.

Words stated in the declaration as if narrated by defendant in the third person, are not supported by proof of words spoken by him in the first person. *Phillips* v. *Odell*, 5 O. S. 483.

Where, in case for slander of the plaintiff's steamboat, it was averred in the declaration that certain persons were going on a voyage in the steamboat, and that the slanderous words were spoken in the hearing of a particular person and others, but no proof was given of the voyage nor of the persons who were going on it, nor of the individuals in whose hearing the words were stated to have been spoken, and the jury found for the plaintiff, the court held that the evidence did not support the declaration, and a new trial was granted without costs. *Hamilton* v. *Wallace*, 4 O. S. 24.

Where the words charged were, "You robbed the mail," and those proved, "I am not like you, running about the country with forged deeds and robbing the mail as you did:"—Held, that the variance was fatal. *McBean* v. *Williams*, 5 O. S. 689.

Where the innuendo was "That the plaintiff in performing his duties of the office of treasurer of a district, had made a false return under oath to the government of the amount of assessments received by him," and at the trial the witnesses stated that they understood the words to mean that the plaintiff had sworn that he had paid over moneys that he had not paid over, a verdict for the plaintiff was set aside, as the meaning charged was negatived by evidence. *Johnston* v. *McDonald*, 2 Q. B. 209.

Where the words charged were, "He (meaning the plaintiff) burnt my barn," meaning, thereby, that the plaintiff had feloniously burnt defendant's barn, and the words proved were, "there is the man that burnt my barn; if he were not guilty of it he would not carry pistols:" it was held that the proof did not support the declaration. *Vankeuren* v. *Griffis*, 2 Q. B. 423.

Where the declaration only charged defendant with saying of the plaintiff, "he burnt Knox's barn," and the proof was that defendant added, "because one of the girls would not marry him." Quære, whether there was not a fatal variance. *Manly* v. *Corry*, 3 Q. B. 380.

Mere proof of the defendant saying of the plaintiff, "he burnt Knox's barn," without proof of the colloquium respecting Mrs. Knox's barn, alleged in the declaration was insufficient. *Ib.*

The words charged were, "He stole wheat last winter." The words proved were, "he (the plaintiff) stole away the wheat in the night, and I was well aware of it, and could have put him in gaol for doing it:"—Held, a fatal variance. *McNaught* v. *Allen*, 8 Q. B. 304.

The last sentence of the libel as set out was, "We supposed that they had become aware of the fact," &c. The sentence as proved was, "We supposed that they had by this time become aware of the fact:"—Held, variance immaterial. *Smiley* v. *McDougall*, 10 Q. B. 113.

The words charged were spoken at an election, with reference to plaintiff's qualification, a matter in which defendant had an interest, and on which it is of consequence to encourage freedom of discussion. The evidence was doubtful as to the sense in which they were used, and the

damages large. The court, under these circumstances, granted a new trial on payment of costs. *Sean* v. *Clelland*, 13 Q. B. 335.

In an action against husband and wife, the declaration alleged the slander to have been spoken by both defendants, while the evidence proved the wife alone to have used the words:—Held, that the declaration was not supported by the evidence. *Wilson* v. *West et ux.*, 11 C. P. 127.

A declaration for libel set out the following words: "The farmers, as a class of producers, are the only ones that I am aware of who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision." This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat buyers, and make it their business to levy black-mail upon every man that sells them a load of wheat. This is done by a species of thimblerigging performed on the platform scales, by which from five to ten bushels are taken from every hundred bushels bought," with an innuendo that all this was intended to charge the plaintiff with such practices. In the libel proved, at the place marked with a star, this sentence was contained: "This state of helpless dependency has been introduced with the platform scales, which the farmer has not yet learned to use, for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected:"—Held, not a substantial variance, for the same imputation appeared upon the writing with or without the part omitted. Held, also, that though a class only was described, the plaintiff might be referred to, and that a verdict in his favour was justified by the evidence of witnesses who stated this to be their understanding and belief. *Marsden* v. *Henderson*, 22 Q. B. 585.

The first count of the declaration set out that the plaintiff was an unmarried woman: that there had been a coroner's inquest held on the body of an infant found on defendant's premises, whose death the jury found was caused by desertion and exposure by persons to them unknown; and it then alleged that the defendant, speaking of and concerning the plaintiff, the said infant, and the inquest then being held, said to one B., a constable attending on the inquest, "Why did you not bring Miss B. (the plaintiff) down with you? She has had time to change her appearance. I could see the child looked like the mother, Miss B., because she has red hair and so had the child,"—meaning thereby that the plaintiff was the mother of the said child, and had deserted and left and exposed it, or caused and procured it to be left and exposed on or near the defendant's premises, whereby the child, being of so tender an age as to be unable to take care of itself, died in consequence of being deserted and left as aforesaid." In a second count the defendant was charged with saying that the child was the very image of its mother, and with naming the plaintiff in answer to a question who was the mother, the innuendo being the same as in the first count. Defendant pleaded only not guilty. The words charged were proved; and the jury having found for the plaintiff:—Held, that the words, coupled with the facts, were capable of the meaning imputed to them, and might therefore sustain the action; but that as there was nothing to shew that defendant was speaking of or alluding to the cause of the child's death, and not merely in reference to the question who was its mother, the innuendo was not supported by the evidence. Held, also, that the communication was not privileged. Remarks as to the effect of the C. L. P. Act, sec. 110, and as to the decisions in Hemmings *v.* Gasson, E. B. & E. 346. *Black* v. *Alcock*, 12 C. P. 19.

(b) *Under the General Issue.*

In an action for libel the truth of defendant's remarks is not admissible under the general issue. *Small* v. *McKenzie*, Dra. 174.

In case, for slander, defendant may, under the general issue, shew that the words spoken were used in a privileged communication. *Richards* v. *Boulton*, 4 O. S. 95.

Or give evidence to repel the inference of malice. *McNab* v. *Magrath*, 5 O. S. 516, *Keegan* v. *Robson*, 6 Q. B. 375.

All the circumstances immediately attending and preceding the speaking of the words may be given in evidence under not guilty. *Keegan* v. *Robson*, 6 Q. B. 375.

In slander not guilty puts in issue the defamatory sense imputed to the words. *Forbes* v. *McClelland*, 4 P. R. 272.—C. L. Chamb.—Draper.

(c) *Of Malice and in Aggravation or Mitigation of Damages*

In slander the defendant may give facts and circumstances in evidence in mitigation of damages. *Johnson* v. *Eastman*, Tay. 243.

Slander of the plaintiff as a physician, with respect to his treatment of one H., deceased, whom he had attended after her confinement. Plea, not guilty. Evidence of statements made by H. to the same effect as the words charged was received, though objected to, as shewing that defendant did not originate the alleged slander; and the plaintiff had a verdict of 1s. Quære, whether such evidence was admissible, but held, that its proper reception would be no ground for a new trial, for the plaintiff had notwithstanding obtained a verdict, and he did not move for smallness of damages. *Rogers* v. *Munns*, 25 Q. B. 153.

In an action of slander for charging the plaintiff with perjury committed as a witness at a trial between defendant and another, the defendant pleaded and tried to prove a justification, but having failed in the attempt abandoned the plea. The jury were told that if defendant believed the charge to be true, and acted bonâ fide, and did not make it before more persons or in stronger language than was necessary, they might consider the circumstances of the speaking, and entertain them as evidence to rebut the legal inference of malice:—Held, there being no ground for saying that the communication was privileged, that this was misdirection. Held, also, that the jury should have been told that they might consider defendant's conduct in pleading and attempting to prove the justification as some evidence of malice, and an aggravation of the injury. *Faucitt* v. *Booth*, 31 Q. B. 263.

(d) *Of Character.*

Held, that in an action of slander, evidence of the plaintiff's general bad character is inadmissible, even in mitigation of damages. The verdict being for $15, and such evidence urged only in mitigation, the court refused leave to appeal. *Myers* v. *Currie*, 22 Q. B. 470.

In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification:—Held, that evidence of the plaintiff's general bad character for honesty was properly rejected. Semble, per Hagarty, J., that it would have been inadmissible even without the justification; but that if not guilty only be pleaded, defendant may shew, solely in mitigation of damages, and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged. *Edgar* v. *Newill*, 24 Q. B. 215.

(e) *Other Cases.*

Proof that several persons practising physic had purchased medicines from the plaintiff:—Held, sufficient to prove an allegation that plaintiff was a druggist, vendor of medicines, and apothecary. *Terry* v. *Starkweather*, Tay. 57.

Where in an action for libel, the plaintiff set out with an inducement of character as "a physician and surgeon, licensed to practice according to the laws of the province," it was held, that proof that he acted as such was insufficient without shewing a license; but that, as he was libelled in his private character, he was entitled to recover on that ground, notwithstanding the failure of proof of the other averment; and the omission of part of the libel, which did not alter the sense, was considered immaterial. *Hamilton* v. *Burwell*, 2 O. S. 205.

In an action for libel the publication given in evidence consisted of the report of a trial given in a newspaper of which the defendant was editor and publisher, together with his comments thereon. The libellous matter set forth in the declaration was altogether contained in the comment, and at the trial defendant gave in evidence under the general issue in justification of his comments, that the report of the trial was correct; but the court, considering that this evidence was inadmissible, granted a new trial without costs. *Small* v. *McKenzie*, Dra. 174.

In an action for a libel published in a newspaper against the plaintiff in his professional capacity as town engineer of, &c., where a verdict was rendered for the defendant on evidence preponderating greatly in plaintiff's favour, the court set aside such verdict, and granted a new trial, on payment of costs. *Peters* v. *Wallace*, 5 C. P. 238.

In an action for libel against a surgeon respecting unskilful treatment by him of a fractured thigh, the question was raised, whether the failure to cure was not owing to the rough treatment of the patient by his master; and defendant desired to prove that the patient had been heard to complain of such usage. Semble, that such evidence was admissible. *Smith* v. *McIntosh*, 14 Q. B. 592.

In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper containing the publication, but did not file it, or read the article containing the alleged libel. Defendant's counsel opened his case, and said he would call no witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned judge allowed, reserving leave to the defendant to move to enter a nonsuit, if according to *strict practice* the plaintiff was not entitled to read the papers:—Held, that the evidence offered was not admissible, except in the discretion of the judge trying the cause, and a nonsuit was therefore ordered. *Cross* v. *Richardson*, 13 C. P. 433.

5. *Damages.*

The court will not grant a new trial for smallness of damages in an action for slander. *Atkins* v. *Thornton*, Dra. 239; *Proctor* v. *Allen*, T. T. 2 & 3 Vict.

In slander for accusing the plaintiff of larceny, and a verdict of £150 damages, the court refused a new trial for excessive damages. *Eakins* v. *Evans*, 3 O. S. 383.

In an action for libel, the imputations being of a very slanderous character, and a plea of justification pleaded which was not attempted to be proved, the court refused a new trial for excessive damages, though they would have been much better satisfied with a smaller verdict. *Gfroerer* v. *Hoffman*, 15 Q. B. 441.

The evidence in support of one of the pleas of justification of charge of theft was very strong, sufficient to have warranted a conviction if the plaintiff had been on his trial. The charge, however, was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $450 damages, the court refused to interfere. *Edgar* v. *Newell*, 24 Q. B. 215.

The plaintiff, a schoolmaster, sued the defendant for a libel, and laid as its consequence, by way of special damage, his dismissal from his school; whereas it appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification for receiving a renewal certificate. The plaintiff applied to the judge at Nisi Prius to amend his special damage to meet the evidence, which the learned judge allowed:—Held, on a motion for a nonsuit, that the judge at Nisi Prius had power to make such amendment. *Jackson* v. *Simpson*, 4 Q. B. 287.

The second count of the declaration was for defamation in the use of words not actionable without special damage alleged, and the averment was, "whereby plaintiff lost the friendship, assistance, and hospitality of (specifying certain parties,) and many others of his neighbours, divers of whom refused and were unwilling, as theretofore, to deal with and transact business with the plaintiff, and from whose friendship, hospitality, and business dealings plaintiff had derived profit and advantage:—Held, insufficient. *Ashford* v. *Choate*, 20 C. P. 471. See *S. C.*, p. 1065.

See *Swan* v. *Clelland*, 13 Q. B. 335, p. 1065; *Miller* v. *Houghton*, 10 Q. B. 348, p. 1058; *Breen et ux.* v. *McDonald*, 22 C. P. 298, p. 1059.

6. *Costs.*

In an action of libel wherein the plaintiff recovered only 20s. damages, the judge who tried the cause refused to certify. *Cameron* v. *McLean*, Tay. 381.

Where the jury found, in an action of slander, damages and full costs of suit, full costs were allowed. *Skinner* v. *Mair*, 5 O. S. 337.

The certificate under 16 Vict. c. 175, s. 26, did not necessarily entitle the plaintiff to full costs, but only to such costs as might otherwise have been recovered, and did not interfere with the 21 Jac. I. c. 16. Where, therefore, in slander (no special damage being laid) the verdict was for 1s., and the judge certified, under 16 Vict., that the grievance was wilful and malicious, the plaintiff was restrained by the 21 Jac. from obtaining more costs than damages. *Pedder* v. *Moore*, 1 P. R. 117.—Q. B.

In an action for slander plaintiff is entitled, under a certificate for full costs, pursuant to 31 Vict. c. 24, O., to tax full costs of suit; but, per Gwynne, J., he is not so entitled without a certificate, where some of the words mentioned in the declaration are not actionable without special damage laid. *Stewart* v. *Moffatt*, 20 C. P. 89.

VII. Criminal Procedure for Libel.

Where a party on moving for a criminal information for a libel, swears that the libel was published of him, and his affidavits set out the libel, which does not charge him in express terms, nor is made to refer to him by innuendo, the court will grant a rule. *Regina* v. *Crooks*, M. T. 3 Vict.

In such a case, a verified copy of the letter containing the libel is sufficient to move upon, without the production of the original. *Ib.*

The defendant was indicted for a libel, which alleged that the prosecutor, G. N., had been prosecuted for perjury, in swearing that defendant had attempted to assassinate him. Defendant pleaded two pleas in justification, the gist of which were, that one G. N. had falsely laid an information on oath against the defendant, charging defendant with attempting to assassinate him by firing a pistol at him; and, 2. That said G. N. was presented for perjury for having laid this false information. It was shewn at the trial that the said G. N. had been presented by the grand jury for perjury, but not for the matters complained of by defendant, and the jury found for the crown. The court refused a new trial. *Regina* v. *Gosan*, 7 C. P. 136.

Where an order for payment of costs is sought which may, under C. S. U. C. c. 24, s. 19, be followed by execution, as in this instance, for payment of costs of a prosecution for libel under C. S. U. C. c. 103, the service of the summons must in general be personal. The court may, under special circumstances, dispense with personal service. Where the defendant is abroad, or it is known where he lives, personal service will not be dispensed with, unless it be made to appear that defendant is keeping out of the way to evade service; and even in this case it is by no means clear that personal service will be dispensed with. Service on the attorney on the record, and on the wife of the defendant, it not being shewn that he was keeping out of the way to avoid service, was held insufficient, though it was shewn that he had left Upper Canada, and gone to reside in the United States. *Regina* v. *Simpson*, 10 L. J. 220.—C. L. Chamb.—A. Wilson.

Upon an indictment for libel, published at defendants' instance in a newspaper, it appeared that the editor (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted:—Held, not such a defence for the parties indicted as to render a conviction illegal, and a new trial was refused. *Regina* v. *McElderry et al.*, 19 Q. B. 168.

A plea to an information for libel under the C. S. U. C. c. 103, s. 9, must allege the truth of all the matters charged; and—Held, upon the information and plea set out in this case, that the plea was clearly insufficient in that respect. *Regina* v. *Moylan*, 19 Q. B. 521.

On an application for a criminal information against defendants for a libel, the applicant's affidavit stated that he had read an article published in the *National* newspaper in Toronto, on the 16th of July, 1874, setting it out: that he was the person referred to: that the statements therein were untrue, and that they were intended to prejudice and injure him: that the defendants were, on the 16th of July, proprietors and publishers of said paper; and that the article was printed and published by them, and is the same article contained in the said newspaper, attached to the affidavit of R., "filed on this application." R.'s affidavit was sworn on the 22nd of August, and stated that "the annexed copy of the *National* newspaper, bearing date the 16th of July, 1874, was on that day published in Toronto, at No. 21 Adelaide street East," by defendants, "who are the publishers and proprietors thereof." The newspaper contained the libel set out in the applicant's affidavit. The application was not made until the 24th of August, two days after the affidavit was sworn:—Held, that the applicant's affidavit was sufficient: that the reference to R.'s affidavit as "filed on this application" could only mean, there being only one application, the application about to be made on these affidavits. Held, also, that it was no objection that the rule nisi was stated to have been moved by counsel for the crown, instead of for the applicant. Held, also, that it was no objection that the affidavit described the applicant as "Esquire" only, for it was not necessary to shew that he occupied any public or official position. In answer to the application, defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they believed to be reliable and trustworthy: that the *Globe* newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice:—Held, no answer. *Regina* v. *Thompson et al.*, 24 C. P. 252.

The 37 Vict. c. 38, s. 11, enacts that the right of the crown to cause jurors to stand aside shall not be exercised "on the trial of any indictment

or information by a private prosecutor for the publication of a defamatory libel:"—Held, to include all cases of defamatory libels upon individuals, as distinguished from seditious or blasphemous libels; and that the fact of the prosecution being conducted by a counsel appointed by and representing the attorney-general, would make no difference. *Regina* v. *Patteson*, 36 Q. B. 127.

The learned judge at the trial allowed the crown counsel in such a case to direct jurors to stand aside, but after the verdict, entertaining doubts, he reserved a case for the opinion of this court, as to the propriety of his having permitted it:—Held, that he was clearly not precluded from such reservation by having allowed the right when claimed, and that such question was a question of law which arose on the trial, within the meaning of the statute. *Ib.*

The prosecutor's usual residence was in England, but he had come here with emigrants, and at the time of the publication of the libel had gone back for a temporary purpose, intending to return:—Held, that his absence was no answer to the indictment. *Ib.*

The libel contained several distinct charges, all of which were justified by a general plea of their truth, and the jury were directed that unless all the charges which were libellous were justified, they should convict:—Held, that the charge was right. *Ib.*

VIII. Apology.

This action was brought for libels published in a newspaper called the *Daily Leader*, of which defendant was proprietor. Plea: The first publication appeared on the 29th October, 1862, the second on the 5th of November. This action was commenced on the 15thof December, and the declaration was dated on the 24th December, 1862. On the same day an apology was published in the same paper, which the plaintiff's counsel, on argument, admitted was sufficient, if published in time, under the statute, which point being left by the judge who tried the cause to the jury, they found for the defendant. Upon motion for a new trial,—Held, that the question of the publication of the apology within a reasonable time was properly left to the jury to decide. Semble, the apology was too late; but the evidence shewed neither actual malice nor gross negligence in the publication of the libel, and the court refused to set aside a verdict for defendant. The publication of the apology "at the earliest opportunity," is to be construed as meaning within a reasonable time, the circumstances of the case, and the opportunities of the defendant to publish it, being considered. *Cotton* v. *Beaty*, 13 C. P. 243.

IX. Miscellaneous Cases.

An order to arrest was refused in actions for malicious arrest and libel. *O'Connor* v. *Anon. and Darcus* v. *Hall*, T. T. 2 & 3 Vict. See *Allman* v. *Kensel*, 3 P. R. 110.

Where in trespass for assault and battery the defendant offered to prove in mitigation of damages that the plaintiff had slandered his wife, and that he had committed the trespass immediately on being informed of such slander. The evidence having been rejected, and a verdict found for £140, a new trial was granted that all the circumstances might be elicited. *Short* v. *Lewis*, 3 O. S. 385.

Held, in an action for assault, that libellous and abusive articles reflecting on the defendants, published on the day of, and preceding the assault, in a newspaper of which the plaintiff was the proprietor, were admissible in evidence in mitigation of damages. But where the verdict was for $50 only, and though such evidence was rejected the jury were fully informed by defendants' counsel that the assault was committed in consequence of these articles, and the court saw no reason to believe that defendants had been prejudiced by the ruling, a new trial was refused, but, under the circumstances, without costs in term to either party. *Percy* v. *Glasco et al.*, 22 C. P. 521.

DE INJURIA.

See Pleading at Law.

DELIVERY.

I. Of Deeds—*See* Deed—Mortgage.

II. Of Goods—*See* Sale of Goods.

DELIVERY ORDERS.

Where A., having 217 bushels of wheat stored in B.'s warehouse, gave C., who had paid the price of the wheat, a delivery order upon B., who refused to deliver the wheat to C. until he, B., had been previously satisfied a demand of his own against C., wholly unconnected with the transaction between A. and C.:—Held, that upon such refusal C. could sustain an action against A. for the non-delivery of the wheat; the delivery order when given to the purchaser not being an actual delivery of the wheat, but merely an evidence in the hands of the seller that he had the wheat in B.'s warehouse, and in the hand of the purchaser that he had the right to demand the wheat from B. *Proudfoot* v. *Anderson*, 7 Q. B. 573.

Held, that the delivery of warehouse receipts for flour, and the delivery orders therefor, is not a constructive delivery of possession of the flour. *Deady* v. *Goodenough*, 5 C. P. 163.

DEMAND.

I. Particulars of—*See* Practice at Law.

II. Of Possession—*See* Ejectment—Landlord and Tenant.

III. In Actions of Trover—*See* Trover.

DEMURRAGE.

See Ship.

DEMURRER.

I. Generally—*See* Pleading at Law—Pleading in Equity.

II. Amendment of Pleadings after Judgment on—*See* Amendment at Law.

DEPARTURE IN PLEADING.

See Pleading at law.

DEPOSIT RECEIPT.

See Banks.

DEPOSITIONS.

I. Certiorari to bring up, in Criminal Cases.—*See* Certiorari.

II. Under Commissions.—*See* Evidence.

III. In Criminal Cases—*See* Criminal Law.

DEPUTY CLERK OF THE CROWN.

See Crown Office.

DEPUTY REGISTRAR OF THE COURT OF CHANCERY.

Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in the Court of Chancery, although they may not actually share in the emolument of suits. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

DEPUTY SHERIFF.

See Sheriff.

DESCENT.

See Estate.

DESCRIPTION OF GOODS.

I. In Bills of Sale and Chattel Mortgages—*See* Bills of Sale and Chattel Mortgages.

II. In Pleadings in Actions of Detinue *See* Detinue.

DESCRIPTION OF LANDS.

I. In Ejectment—*See* Ejectment.

II. In Deeds—*See* Deed.

III. In Patents—*See* Deed.

IV. In Wills—*See* Will.

V. Boundaries—*See* Boundary—Survey—Water and Water Courses.

VI. Roads or Right of Way—*See* Way.

VII. In Sales and Deeds for Taxes—*See* Assessment and Taxes.

VIII. In Sales by order of the Court—*See* Sale of Land by Order of the Court.

IX. In Sales by Sheriff—*See* Sheriff.

X. Compensation for Error in—*See* Specific Performance.

DESERTION.

I. Assisting Soldiers or Sailors to Desert—*See* Criminal Law.

II. Alimony for—*See* Husband and Wife.

DESISTMENT.

See Railways and Railway Companies

DESJARDINS CANAL COMPANY.

A railway company had the control of a swing bridge over this canal. The plaintiff's ship was navigating the canal when trains were about passing and repassing the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the company's servants by signal that the bridge could not then be swung, and the plaintiff's vessel was injured by running against the bridge while it remained closed:—Held, that as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge, and were not liable for such injury, to which the plaintiff had contributed by his own negligence. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536.

Held, that the G. W. R. Co., were bound by the 5th sec. of 16 Vict. c. 54, to maintain in repair the bridge over the Desjardins canal, which it allows them to erect. That bridge forms part of a road leading into the plaintiffs' road:—Held, that the loss of custom and tolls occasioned to the plaintiffs, was not sufficient to enable them to maintain an action against defendants for allowing such bridge to fall out of repair. *Hamilton and Brock Road Company* v. *Great Western R. Co.*, 17 Q. B. 567.

Held, that, by the various acts of parliament referring thereto, the erection of defendants' drawbridge over the Desjardins canal was sanctioned and recognized; and that it must be assumed to have been lawfully erected, though the formalities required by sections 136, 137, and 138 of the Railway Act, might not have been complied with. *The Desjardins Canal Co.* v. *Great Western R. W. Co.*, 27 Q. B. 363.

Held, also, that the first count of the declaration, charging defendants with neglect and refusal to open the bridge and permit vessels to enter or leave the canal, was defective, in not alleging that it was not at such times being actually used by defendants for the passage of

their trains; and that the second count was good. *Ib.*

The Desjardins canal company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the G. W. R. Co.:—Held, that they, and not the company, were bound to keep such bridge in repair. *Regina* v. *Desjardins Canal Co.*, 27 Q. B. 374.

Injunction granted at the suit of the creditors of the Desjardins canal company, who had a lien on the canal, against a sale thereof under a subsequent execution. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Chy. 27.

An act of parliament having provided that it should be lawful for the Desjardins canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal, and the bridge after being erected having become unsafe through the default of the canal company, an incorporated road company, which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would impede the navigation of the canal:—Held, reversing the decision below (17 Chy. 31), that they had no right to do so, and a permanent injunction was granted. Spragge, C., and Mowat, V. C., diss. *Town of Dundas* v. *Hamilton and Milton Road Co.*, 18 Chy. 311, in appeal.

DETAINER.

I. Of Persons—*See* Arrest—Prisoner.

II. Forcible Entry and Detainer—*See* Criminal Law.

III. Of Goods—*See* Detinue—Trover.

DETINUE.

I. Where it lies, 1075.

II. Pleadings and Evidence, 1077.

III. Damages, 1077.

I. Where it lies.

Defendant having a claim against one R., sued out an attachment from a Division Court, under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the Division Court, in whose possession they continued until the bringing of this action:—Held, that as the goods were seized in the possession of the defendant in the attachment, an action of detinue could not be maintained against this defendant, even admitting the goods to have been all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim, and demanded to have them given up. *Clark* v. *Orr*, 11 Q. B. 436.

Detinue for an indenture of bargain and sale. Pleas—1. Non detinet. 2. That the deed was not the plaintiff's. The jury found that the indenture was delivered by one A. to the defendant, to be delivered to the plaintiff after A.'s death, on condition that he (the plaintiff) should keep A. until his death, and should pay his debts; and that the plaintiff had not maintained A., but after his death was ready to pay his debts:—Held, that the plaintiff could not recover; for the writing being delivered to the defendant merely as an escrow, was not in fact a deed as described in the declaration, and the plaintiff had forfeited his right by a breach of one of the conditions. *Reynolds* v. *Waddell*, 10 Q. B. 9.

Detinue for a watch and chain. It appeared that defendant had obtained possession of the things by redeeming them, at plaintiff's request, from a person with whom they were pledged, and that he had refused to give them up on payment of the money advanced, claiming a further sum due by the plaintiff for board. A verdict having been found for the full value of the articles, it was shewn upon affidavits that before the trial the defendant had obtained execution against the plaintiff for this sum in the Division Court, under which the bailiff, by the plaintiff's directions, had seized this watch and chain in the defendant's possession; and that to prevent their being sold, the plaintiff had procured some one to advance the money on being allowed to retain them as security:—Held, that this action should not have been proceeded with, and a new trial was ordered without costs, unless the plaintiff would reduce his verdict to nominal damages; and that he should in either case pay the costs of this application. *Johnson* v. *Lamb*, 13 Q. B. 508.

Detinue for a conveyance of land bought by the plaintiff from one G.:—Held, that upon the facts and evidence set out in this case, defendant was not shewn to have been acting otherwise throughout than as the agent of G.: that the deed was in defendant's hands simply as G.'s agent, and the detention was not defendant's act: that if this question had been left to the jury they ought to have found for defendant; and a new trial was ordered. *Parker* v. *Stone*, 12 C. P. 81.

Held, that the Division Courts have jurisdiction in actions of detinue. *Lucas* v. *Elliott*, 1 L. J. 147.—C. C.—Robinson.

Detinue is maintainable though defendant has not the goods when action brought: it is sufficient if he once had, and improperly parted with them. *Mathers* v. *Lynch*, 28 Q. B. 554.

The plaintiff's servant, one O., being in charge of his horses, sold one, without the plaintiff's authority, to the defendant's wife, who had the management of defendant's business, receiving $20 in cash, and defendant's note for $55, payable to O. Afterwards, meeting O., the plaintiff got from him the note, and $17 in cash. The plaintiff demanded the horse from the defendant's wife, and offered her the note and the $17, which, however, she did not take. He then brought detinue:—Held, that the plaintiff was entitled to recover; for that he was not bound to tender to defendant the note and the money he had received, nor could defendant retain the horse until he obtained them, at all events with

out giving notice that he would do so, after first demanding them. *Morton* v. *Stone*, 30 Q. B. 158.

II. Pleadings and Evidence.

A lien may be specially pleaded in an action of detinue. *Riorden* v. *Brown*, 1 C. P. 199.

A re-delivery of the goods to plaintiff pending the suit, or after plea, must be pleaded. *Johnson* v. *Lamb*, 13 Q. B. 508.

Where the goods have been replevied under the 14 & 15 Vict. c. 64, and the declaration is for detaining merely, the pleadings should be as in detinue, and a lien cannot be given in evidence under a plea denying the plaintiff's property. *Stephens* v. *Cousins*, 16 Q. B. 329.

Detinue for a cheque. Plea, that defendants received the cheque from the plaintiff to present and collect it from the bank on which it was drawn: that they did present it, but payment was refused by the bank manager, who retained and kept the same, alleging that the names of the drawers thereto were forged:—Held, a good defence; for if the cheque was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank. *Brown* v. *Livingstone et al.*, 21 Q. B. 438.

Held, on motion to arrest judgment, that the goods were sufficiently described in a count in detinue as 600 bushels of rye. *Richardson* v. *Gray*, 29 Q. B. 360.

See, also, as to description of goods in detinue, *Wilks* v. *King*, 14 C. P. 223.

Detinue for the keys of plaintiff's dwelling house. Plea, leave and license. Second replication, that before the detention the plaintiff revoked the alleged leave, of which the defendant had notice. Rejoinder, that within a reasonable time after the revocation and notice of it, defendant re-delivered the keys to the plaintiff, who accepted them:—Held, replication and rejoinder both good. *Bain* v. *McDonald*, 32 Q. B. 190.

The word "detained" in a declaration means an adverse detention, and it is unnecessary, therefore, to plead leave and license specially. *Ib.*

Third replication, that defendant, as sheriff, entered the house with the plaintiff's consent, to levy under a fi. fa. against the plaintiff's goods, having first obtained the keys for that purpose; and that, in excess of his duty as sheriff, he retained the keys from the plaintiff, and locked him out of his house for several days, whereby the plaintiff suffered the injuries complained of in the declaration:—Held, good, as being in the nature of an informal new assignment. *Ib.*

III. Damages.

Semble, that in detinue for a conveyance of land, where the plaintiff shews himself entitled to the deed, but defendant, intending to do right, has given it up to another, the damages should be left as a question for the jury under the circumstances, and should not as of course be the value of the land. *Reynolds* v. *Waddell*, 12 Q. B. 9.

In detinue for a deed, Quære, whether the plaintiff can recover damages for having been prevented by the want of it from obtaining leases to cultivate his farm. *Wood* v. *Bowden*, 4 B. 466.

DEVASTAVIT.

See Executors and Administrators.

DEVIATION.

I. Of Ship—*See* Insurance.

II. From Contract—*See* Work and Labour.

DEVISE.

See Will.

DIRECTOR.

See Corporations.

DISCLAIMER.

I. Of Title—*See* Ejectment—Landlord and Tenant.

II. In Suits on Mortgages—*See* Mortgage.

III. In Controverted Elections—*See* Municipal Corporations.

DISCONTINUANCE.

I. Of Action—*See* Practice at Law.

II. Of Possession—*See* Limitation of Actions and Suits.

DISCOVERY.

I. Of Documents—*See* Evidence.

II. Bills of.

To a bill of discovery in aid of an action at law, in which defendant has pleaded, defendant cannot plead a legal defence in bar, unless such defence has been relied upon in the action. *Peel* v. *Kingsmill*, 1 Chy. 584.

The plaintiff in a bill of discovery was out of the jurisdiction of the court, and the defendant, having answered, had obtained the usual order for the payment of his costs, but with which order the plaintiff neglected to comply, in consequence of which the defendant was obliged to take out a subpœna, and apply to the court for leave to serve the plaintiff therewith out of the jurisdiction. The court gave the defendant leave to serve the plaintiff out of the jurisdiction, and directed the plaintiff to pay the costs of the motion. *S. C.* 2 Chy. 272.

A bill will not lie to discover facts which the plaintiff in equity may prove aliunde in his defence at law. *Hamilton* v. *Phipps*, 7 Chy. 483.

Where several persons severally liable on a note or bill, are jointly sued at law by the holder, one of the defendants in the action at law cannot obtain discovery against the plaintiff at law and the other defendants, the defendants

as between themselves not being litigating parties, but witnesses. A bill filed for the purpose is demurrable. *Ib.*

The orders of court of 1853, which abolish all interrogatories in bills, do not apply to bills for discovery in aid of an action at law. The old practice still prevails. *Hayball* v. *Shepherd*, 12 Chy. 426.

Although, since the C. L. P. Act, bills for discovery in aid of defences at law are rare, yet they will lie; but in such a case the plaintiff cannot move for an injunction to restrain the proceeding at law until he has filed interrogatories. Under special circumstances, however, the court directed the defendant to submit to an examination in aid of such motion, or in default ordered the injunction to go. *James* v. *Snarr*, 15 Chy. 229.

DISMISSING BILLS.

I. GENERALLY—*See* PRACTICE IN EQUITY.

II. IN FORECLOSURE—*See* MORTGAGE.

DISORDERLY HOUSE.

See BAWDY HOUSE.

DISTILLERS.

See REVENUE.

DISTRESS.

I. RENT.

1. *Persons Distraining*, 1080.
2. *For what Rents.*
   (a) *Rent not payable in Money*, 1082.
   (b) *Other Cases*, 1082.
3. *Time of Distraining*, 1084.
4. *How to be made*, 1084.
5. *What may be Distrained.*
   (a) *Goods of Third Parties*, 1085.
   (b) *Exemptions for benefit of Trade*, 1085.
   (c) *Chattels in use*, 1086.
   (d) *Sheep*, 1086.
   (e) *Militia Horses*, 1086.
   (f) *Chattels in Execution or Custody of the Law*, 1086.
   (g) *After Removal*, 1087.
   (h) *Vessels at Wharves*, 1087.
   (i) *Fixtures—See* FIXTURES.
6. *Second Distress*, 1087.
7. *Sale of Goods Distrained*, 1088.
8. *Wrongful, Irregular, or Excessive Distress.*
   (a) *Remedy for*, 1089.
   (b) *Pleadings in Actions*, 1089.
   (c) *Justification under Warrant of Distress*, 1091.
   (d) *Damages*, 1091.
   (e) *Other Cases*, 1093.
9. *Pleas to Avowries of Distress for* [illegible] *—See* REPLEVIN.

II. RATES.

1. *Municipal—See* ASSESSMENT AND TAXES.
2. *School Rates—See* PUBLIC SCHOOLS.

III. DAMAGE FEASANT, 1094.

IV. IMPOUNDING—*See* POUND-KEEPER.

V. COSTS OF DISTRESS, 1095.

VI. UNDER MAGISTRATES' WARRANT—*See* JUSTICES OF THE PEACE.

VII. LANDLORD'S CLAIM FOR RENT ON EXECUTION—*See* SHERIFF.

I. RENT.

1. *Persons Distraining.*

Where a mortgagee received rent from a tenant of the mortgagor by lease subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he did: Held, that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent. *Lambert* v. *Marsh*, 2 Q. B. 39.

A. demises to B. for a term: B. during the term absconds and abandons the property: A. finding the place vacant, puts a person in possession, and makes a demise to D.; A. distrains for rent under his lease to B.:—Held, distress legal. *Rudolph* v. *Bernard*, 4 Q. B. 238.

A testator, by his will, desired that his executors should sell and dispose of his land, and [illegible] nominated and appointed his executors, their executors and administrators, to seal, execute, and deliver any deeds that might be necessary for making a title to the purchaser:—Held, that this devise vested no interest in the executors, but gave them a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nash* v. *Cotter*, 5 Q. B. 564.

A landlord cannot distrain after his interest in the estate has expired. *Hartley* v. *Jarvis*, 5 Q. B. 545.

A distress made by an agent for the benefit of his principal, in his own name, and subsequently ratified by the principal:—Held, legal. *Gorham* v. *McMillan*, 10 C. P. 536.

Defendant leased to the plaintiff by deed for three years, there being another person in possession of part, as a monthly tenant, who succeeded by two others, holding under defendant:—Held, that the lease to the plaintiff [illegible] under seal, operated as a grant of the reversion (with the rent incident thereto,) as to the part thus held, and that defendant was entitled therefore to distrain for the whole rent in arrear. *Kelly* v. *Irwin*, 17 C. P. 357, remarked upon and not followed. *Holland* v. *Vanstone*, 27 B. 15.

One of the defendants in an action for wrongful distress, had assigned certain rent to a defendant, who gave the tenant (plaintiff) notice

—Held, that such an assignment conferred an estate, and that under 4 Anne, c. 16, ss. 9, 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not. *Hope* v. *White*, 17 C. P. 52.

A landlord, after leasing certain premises, by deed "assigned, transferred, and set over" to M. two instalments of the rent reserved, and appointed him his attorney to sue for, collect or levy by landlord's warrant, if necessary, in his (the landlord's) name :—Held, that the instrument contained a grant, and of a rent charge, as an incorporeal hereditament, accompanied with a clause of distress, and therefore not of a rent seck, and that M. could distrain for the rent in his own name; but that, whether rent charge or rent seck, he had equally the power of distress under 4 Geo. II. c. 28. *Hope* v. *White*, 19 C. P. 479, affirming *S. C.* 18 C. P. 430.

A clause in a mortgage, that the mortgagor shall continue in possession, coupled with his occupation in pursuance of it, and with a covenant for distress, in accordance with the terms of clause 15 of the second schedule to 27 & 28 Vict. c. 31, creates the relationship of landlord and tenant at a fixed rent :—Held, that by the indenture of mortgage set out, the tenancy created was until the day of repayment of the principal, for a determinate term, and thereafter a tenancy at will at an annual rent, incident to which tenancy was the right of distraining upon the goods of third persons upon the premises. *Royal Canadian Bank* v. *Kelly*, 19 C. P. 196.

In replevin, charging a distress of plaintiff's goods, defendant avowed setting out a mortgage executed to him by one D., in pursuance of the Act respecting short forms of mortgages, and averred that under the proviso therein D. was possessed of the premises as tenant of defendant, and so continued until after said distress: that D. made default in payment under the mortgage, but defendant did not enter by reason thereof, but permitted D. to continue in occupation as his tenant; avowing the taking of plaintiff's goods as distress for arrears of interest:—Held, on demurrer, good, for that D., so occupying, was tenant of defendant at a fixed rent, being the interest on the principal sum secured; that defendant had the right to distrain for such interest, "by way of rent reserved," on the property of third persons on the lands mortgaged; and that the continuance of the mortgagor in possession, after the day named for payment, with the permission of the mortgagee, constituted him thereafter tenant at will of the mortgagee, and on the terms of distress contained in the mortgage. *S. C.* 19 C. P. 430. See also, *S. C.* 20 C. P. 519, reversed on appeal, 21 C. P. 279.

An order had been made giving a receiver liberty to distrain for arrears of rent. Upon the application of a tenant distrained upon for a discharge of this order, it appeared that the tenancy had determined more than six months before the order to distrain was made, so that arrears could not be made under 8 Anne, c. 14, ss. 6 and 7. The order to distrain was therefore discharged. *Paxton* v. *Dryden*, 6 P. R. 127. Chy. Chamb.—Holmested, *Referee*.—Blake,

No notice need be given to a tenant of an application for an order giving a receiver leave to distrain. *Ib.*

2. *For what Rents.*

(a) *Rent not payable in Money.*

A distress may be made for rent for a sum certain payable in produce at the market price, and such distress may be sold. *Thompson* v. *Marsh*, 2 O. S. 355.

A rent of a sum certain reserved payable in leather, may be distrained for. *Cumming* v. *Hill*, 6 O. S. 303.

Quære, as to the right to distrain for the non-fulfilment of a contract respecting certain rails agreed to be delivered in lieu of rent. *Robinson* v. *Shields*, 15 C. P. 386.

Defendant leased a farm to the plaintiff for five years from 31st March, 1866. He was to find the team and seed for the first year, "to receive as rent for the first year two-thirds of all the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half the hay; for the remainder of the term to receive one-third of all the crops, with the exception of the hay, of which one-half." Semble, that the rent was sufficiently certain to warrant a distress, and that such distress might be sold. *Nowery* v. *Connolly*, 29 Q. B. 39.

(b) *Other Cases.*

A plea of distress for rent, on a demise of a house and other premises to A. at a certain rent, and that the plaintiff occupied the house with A. during A.'s lifetime, and after his death continued as defendant's tenant, and that defendant distrained for the rent of the house and other premises on the plaintiff's goods in the house, was held bad, as the plaintiff, under the demise to him, was liable for the rent of the house only after A.'s death, and could not be distrained on for the rent due for the entire premises demised to A. *Strathey* v. *Crooks*, 6 O. S. 387.

A landlord agreed with his tenant that if he should not paint the tavern outside, and the sheds and driving house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the buildings on the 12th of July, 1845, when the landlord distrained for a quarter's rent due on the 1st of July, 1845:—Held, in replevin, that under the terms of the lease with respect to the painting, the landlord might distrain for the quarter's rent due on the 1st of July, 1845, though the painting which had been then begun, but not completed, exceeded the quarter's rent for which the landlord had distrained. *Millmine* v. *Hart*, 4 Q. B. 525.

Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law of the lease; the relation of landlord and tenant no longer exists; and consequently the right to distrain is gone. *Lewis* v. *Brooks*, 8 Q. B. 576.

A landlord may assign rent, and since the 4 Geo. II. c. 28, s. 5, rent charge or rent seck may be distrained for, and by one who has not the

reversion, as, for instance, the assignee of the landlord. *White* v. *Hope*, 17 C. P. 52; *S. C.* 19 C. P. 479.

The first and second counts of the declaration were respectively for distraining where no rent was due and for excessive distress for rent. It appeared that defendant had leased to plaintiff for a term of years certain premises, portions of which were at the time in the possession of other parties, and that these parties retained possession against the plaintiff, and refused to give them up to him. In consequence of this, defendant *after the expiration of the first year*, agreed with plaintiff to an abatement in the rent for that year, and gave him a receipt for the balance, which plaintiff paid as the amount of rent due upon the premises; defendant, however, subsequently distrained for the sum agreed to be remitted:—Held, distinguishing Watson *v.* Waud, 8 Ex. 335, that the agreement between plaintiff and defendant as to the abatement of the rent did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor, because the agreement was not made *until after the expiration* of the year, to which it alone had reference, so that the relationship of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but a mere sum in gross, and could not consequently have been distrained for:—Held, also, that the plaintiff could not recover on the first and second counts, which were framed upon the assumption that the plaintiff was tenant to defendant at a certain rent. *Kelly* v. *Irwin*, 17 C. P. 351.

Defendant leased to plaintiff certain land at a yearly rent of 15s. per acre, and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbitration in case of dispute. The Grand Trunk railway company gave notice to defendant that they required a portion of the land, which he conveyed to them after an arbitration as to price:—Held, 1. That the land taken by the company was sold by defendant within the meaning of the lease; 2. That the abatement from the rent should not be measured by the interest of the money paid by the railway company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s. per acre as the average value of the whole; 3. That after the sale the lessor could not distrain, without first arranging or offering to arbitrate as to the amount to be deducted; 4. That there was no ground for claiming any abatement of the taxes from the £10 on account of the sale. *Bickle* v. *Beatty*, 17 Q. B. 465.

Defendant leased to one M. at an annual rent, and as one of the covenants in consideration of which the demise was made—after reciting that M. had agreed to pay $700, *by way of additional rent*, for the purchase of the good will of the demised premises—M. covenanted to pay the $700 in ten quarterly payments of $70 each, with a proviso that in case of forfeiture of any of his covenants, the said $700, or the balance thereof, was to become at once payable *by way of rent*, and with a further covenant that, if M. should become insolvent, or take the benefit of any insolvent act, the then current quarter's rent should immediately become payable, and the term void. M. failed to pay any portion of the $700, and after the accrual of the third quarterly payment became insolvent:—Held, that defendant had the right to distrain upon the goods on the demised premises for the three quarterly payments of $70 each that had accrued due before the insolvency, but that, notwithstanding the different provisions contained in the lease, he could not, having regard either to the common law, the statute 8 Anne, ch. 14, sec. 6, or the 14th section of the Insolvent Act of 1865, distrain for the whole $700. *Griffith* v. *Brown*, 21 C. P. 12.

The 81st section of the Insolvent Act of 1869, 32 & 33 Vict. c. 16, restricts the landlord to one year's rent where he has distrained for more before the insolvency of the tenant. *Mason* v. *Hamilton*, in appeal, 22 C. P. 411, reversing the decision below, 22 C. P. 190.

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3. *Time of Distraining.*

A distress more than six months after expiration of the tenancy is illegal, and a continuation of the tenancy will not necessarily be implied from the mere fact of the party remaining in possession. *Soper* v. *Brown*, 4 O. S. 103.

A plea of distress for rent under a demise after the lease had expired, was held bad, for not stating that the distress was made within six calendar months after the determination of the lease, according to 8 Anne, c. 14. *Strathy* v. *Crooks*, 6 O. S. 587.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year, if the tenant remain in possession; and the landlord may distrain for the first year's rent at the end of the second year. The 4 Will. IV. c. 1, s. 20, (C. S. U. C. c. 88, s. 9,) does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards. *McCleneghan* v. *Barker*, 1 Q. B. 26.

A landlord cannot distrain after his interest in the estate has expired. *Hartley* v. *Jarvis*, 7 Q. B. 545.

See *May* v. *Severs*, 24 C. P. 396, p. 1088.

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4. *How to be made.*

Where a sub-tenant has an apartment with a outer door, it is illegal to break into that apartment to make a distress. *McArthur* v. *Walker*, M. T. 4 Vict.

The 1 Vict. c. 16, has not dispensed with the necessity for two sworn appraisers. *Stoddart* v. *Arderly*, 6 O. S. 305.

Replevin against a landlord and his bailiff for goods distrained. It appeared that the bailiff had gone to the plaintiffs' store, who told him to proceed and they would replevy, and that requested him to seize some barrels of spirits which he did, and afterwards advertised them for sale in the usual manner; he did not touch the casks, or leave any one in possession, or take security for their production at the time of sale relying, as he said, on the plaintiffs' assurance and knowing that they intended to replevy

Held, a sufficient seizure. *Finn et al.* v. *Morrison*, 13 Q. B. 568.

A bailiff seized certain goods under a landlord's warrant, for rent in arrear, but did not remain in possession, or take any further steps to execute it, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, a person having a mortgage on the goods took possession under it, and removed the goods, for which the landlord replevied:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

See *Maguire* v. *Post*, 3 O. S. 1, p. 1092.

5. *What may be Distrained.*

(a) *Goods of Third Parties.*

A stranger, whose goods have been seized on the premises of a tenant and distrained for rent, cannot, any more than the tenant himself, question the landlord's right to demise. *Smith* v. *Ashley*, 7 Q. B. 90.

C. owned a boiler and smoke-pipe which had been erected in a building of which he was sub-lessee. On the 19th February, they were sold for city taxes due by him, and bought by the plaintiff; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd, he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord:—Held, that they were liable to such seizure. *Langton* v. *Bacon*, 17 Q. B. 559.

Held, that a pair of horses belonging to a stranger, which were driven on to the premises and tied, the party in whose charge they were going into the house, were not seizable for rent if they were in actual use at the time of the distress. *Couch* v. *Crawford*, 10 C. P. 491.

(b) *Exemptions for the benefit of Trade.*

M., a ship-builder, carried on his business in a yard leased from A. The plaintiff sent two vessels there to be repaired, but M. not having sufficient means, it was agreed that the plaintiff should furnish the materials, and he purchased from M. for the purpose some oak timber then in the yard. The plaintiff's foreman took possession of it, and a portion had been worked up by the plaintiff's and M.'s men, when A. distrained both it and the vessels for rent:—Held, that both it and the vessels were exempt from distress. *Gildersleeve* v. *Ault et al.*, 16 Q. B. 401.

Goods were consigned to R. by plaintiff, with certain prices affixed in the invoice, below which he was not to sell, and all above which he might keep for himself; and it appeared that he was in the habit of transferring them when convenient in payment of his own debts, charging himself with them as sold at the invoice prices. Under any circumstances, therefore, he was not paid any commission on the sales:—Held, that such goods were not exempt from distress for rent due by R. *Hurd et al.* v. *Davis et al.*, 23 Q. B. 123.

An engine and boiler were left with D. by the plaintiff to be repaired and sold by him, the repairs to be made in consideration of the use of the engine and boiler while in his possession; if a sale should be made within six months, D to pay plaintiff $400, and retain anything over as his commission; if not sold in six months, plaintiff to be at liberty to retain the goods, D. to leave the same in repair, without charge, and to pay nothing for their use:—Held, that D. acquired no beneficial interest until the repairs were made; and, Semble, that they were exempt from seizure, for his rent. *May* v. *Severs et al.*, 24 C. P. 396.

(c) *Chattels in use.*

The actual user of goods, of whatever kind, exempts them from seizure, either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other goods on the premises liable therefor. *Miller* v. *Miller*, 17 C. P. 226.

See *Couch* v. *Crawford*, 10 C. P. 491, p. 1085.

(d) *Sheep.*

It is illegal to distrain sheep for rent when there are other goods upon the premises sufficient to satisfy the claim. *Hope* v. *White*, 22 C. P. 5.

(e) *Militia Horses.*

A person serving with or attached to a militia cavalry troop as quartermaster is an officer thereof, and his horse protected from distress under sec. 31 of 18 Vict. c. 77. *Davey* v. *Cartwright*, 20 C. P. 1.

(f) *Chattels in Execution or Custody of the Law.*

A sheriff seized goods under execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested:—Held, that the sheriff had not such a possession of the goods as precluded the landlord from distraining. *McIntyre* v. *Statia et al.*, 4 C. P. 248.

C. owned a boiler and smoke-pipe, which had been erected in a building of which he was sub-lessee. On the 19th February, they were sold for city taxes due by him, and bought by the plaintiff; but the whole purchase money not being paid, they were left in charge of the city chamberlain. On the 23rd, he settled the balance, and was removing the goods on the 26th, when they were seized for rent due to the original landlord:—Held, that the goods could not be considered as in the custody of the law after the sale on the 19th of February. *Langton* v. *Bacon*, 17 Q. B. 559.

Although goods seized by the sheriff cannot be distrained in his custody, still they must be removed within a reasonable time after sale, in order to protect the purchaser against a distress for rent; and in this case, under the facts set out, it was Held, A. Wilson, J., dubitante, that the goods had not been removed within a reasonable time either after the sale or after notice to plaintiffs to remove them, and that in either view they were liable to defendant's distress for rent. *Hughes et al.* v. *Towers*, 16 C. P. 287.

A bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession or take any further steps to execute the warrant, except that as the jury found the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After more than a month, the defendant having a chattel mortgage on the goods, took possession under it and removed the goods for which the landlord brought replevin:—Held, that the action could not be maintained. *Roe* v. *Roper*, 23 C. P. 76.

See *Williams* v. *Grey*, 23 C. P. 561, p, 1089.

(g) *After removal.*

Cattle may be taken on the highway as a distress, if driven off the land in the view of the bailiff; and if the legality of a distress turn upon the place of seizure, as whether it was a highway or not, that point should be left clearly to the jury. *Halsted* v. *McCormack et al.*, E. T. 3 Vict.

In case of a fraudulent removal, the landlord can follow the goods of his tenant only, and not those of a stranger, which had been on the premises. *McArthur* v. *Walkley et al.*, M. T. 4 Vict.

A landlord on the day of the removal of goods, rent being in arrear, forbade such removal until it was paid. Upon a seizure on the highway for such rent:—Held, that a sufficient inception of distress had taken place to warrant such seizure. *Pulver* v. *Verex et al.*, 9 C. P. 270.

(h) *Vessels at Wharves.*

Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained for rent, not being on the premises demised. *Sanderson* v. *The Kingston Marine R. W. Co.*, 3 Q. B. 168.

6. *Second Distress.*

A. having distrained the goods of B. for rent said to be due to him by B., and abandoned the same without realizing, and subsequently, upon a second distress for the same rent, having sold the goods:—Held, in an action for illegal distress, that the defendant having shewn no sufficient ground for the abandonment of the first distress without realizing, the second was illegal; and a verdict against him for $20 in the County Court was upheld. *Lyness* v. *Sifton*, 13 C. P. 19.

D. was tenant to M. under a lease, which provided that in the event of D. making an assignment in insolvency the term should become forfeited and void, but that the then current quarter's rent, as well as the next succeeding current quarter's rent, should immediately become due and payable. On the 21st of June, 1872, D. made an assignment in insolvency to K., an official assignee; and M. immediately distrained for the rent, including two quarters due by virtue of the forfeiture. At the request of the official assignee, M. abandoned the distress, and in lieu thereof agreed to look to the insolvent estate, the assignee thinking that there would be abundance of property to pay it, but repudiating any interest in the term. Subsequently, the goods proving insufficient, by reason of a chattel mortgage, the assignee told M. that he could not continue responsible, and M. thereupon, on the 24th of September, issued a second distress for same rent;—Held, that the second distress was bad, for on the abandonment of the first distress, which could not be said to have been at the request of the tenant, M.'s right to distrain was gone, and he could only look to the insolvent's goods, which passed, without the term, to the assignee. Held, also, that the second distress could not be supported under the statute of Anne, as having been made within six months after the determination of the term. *May* v. *Severs et al.*, 24 C. P. 396.

7. *Sale of Goods Distrained.*

The purchaser of property sold for rent, must remove the same off the premises within a reasonable time after the sale. *Abray* v. *Anderson*, 5 Q. B. 34.

If the property be sold on the 15th of February, and the purchaser enters to remove it off the premises on the 26th March following, he will be liable as a trespasser. *Ib.*

In the case of distress for rent, there must be five clear days between the day of distress and the sale, at the expiration of which the landlord is at liberty to sell; but he has a reasonable time after the five days so to do, and what is a reasonable time is a question for the jury. In this case, therefore, the judge having directed the jury that the landlord was bound to proceed to sell on the sixth day:—Held, that the direction was improper, and that the right direction would have been, after having told the jury the time when the goods could first have been sold, to leave them to find whether under all the facts the defendant had remained an unreasonable time in possession after the five days before selling. *Lynch* v. *Bickle*, 17 C. P. 549. See *Thompson* v. *Marsh*, 2 O. S. 355.

Plaintiff distrained upon his tenant, and at the sale, with the latter's consent, purchased a portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, and partly by the delivery of the tenant to him:—Held, that though as a general principle no one can sustain the double character of seller and buyer, yet where, as in this case, the tenant consents to the purchase by the landlord, the sale can be supported; and therefore—Held, that the property sold passed to the plaintiff, and that he could hold it against defendant's execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession, under C. S. U. C. c. 45, s. 4. *Woods* v. *Rankin*, 18 C. P. 44.

In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for

£75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 extra in settlement with him, making $200 in all:—Held, that the evidence sufficiently shewed the piano to be the plaintiff's property, and that he was entitled to maintain trover for it against defendant:—Held, also, that the sale to the defendant passed nothing, for as landlord he could not himself purchase goods sold by his bailiff, under 2 Will. & M. sess. 1, c. 5, s. 2; and although as between J. and defendant, the defendant's claim might be complete by the subsequent arrangement with J., yet the plaintiff, (the owner) was not bound by it:—Held, also, that defendant could not set up a lien for the rent as against the plaintiff, for the distress was at an end, and the goods in no way in the custody of the law. *Williams* v. *Grey*, 23 C. P. 561.

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8. *Wrongful, Irregular, or Excessive Distress.*

(a) *Remedy for.*

Trespass lies for the sale of property seized as a distress and allowed to remain on the premises more than five days after seizure, but the full value of the property cannot be recovered. *Thompson* v. *Marsh*, 2 O. S. 355.

Where some of the rent distrained for was not due:—Held, that case and not trespass was the proper remedy. *Kendrick* v. *Lee*, 6 O. S. 27.

Part of the plaintiff's goods having been distrained for rent off the premises:—Held, that he might recover their value either in trespass or trover. *Huskinson* v. *Lawrence*, 26 Q. B. 570.

Where goods had been distrained for rent:—Held, that the plaintiff was entitled to maintain trespass for a wrongful continuance in possession beyond the time defendant was reasonably authorized to keep the same. *Lynch* v. *Bickle*, 17 C. P. 549.

The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant brought trespass against the receiver. The court restrained the action. *Simpson* v. *Hutchison*, 7 Chy. 308.

(b) *Pleadings in Actions.*

In an action upon the 3 Will. & M. c. 5, for taking a distress when no rent was due, the declaration need not set forth any tenancy between the parties; it is sufficient if it appear that the seizure was made under colour of a distress. *Stoddart* v. *Arderly*, 6 O. S. 305.

A count in case for maliciously seizing a horse of large value as a distress for a very small sum, when there were other chattels of smaller value, and that the defendant afterwards sold the horse for much less than he was worth, is not bad for duplicity. *Higson* v. *Thompson*, 8 Q. B. 561.

Declaration for distraining for more rent than due, &c.:—Held, bad, because it did not admit the amount of rent distrained for to be in arrear, or shew where the distress really took place. *Mooney* v. *Jackson*, 1 C. L. Chamb. 29.—Macaulay.

Count in a declaration for a wrongful distress, admitting that some rent was due:—Held, bad on demurrer. *Cochran* v. *Welsh*, 7 C. P. 21.

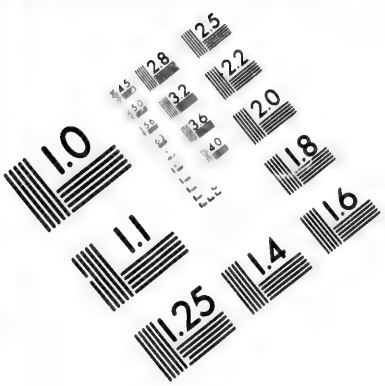
Defendant, in October, 1855, leased premises to one W. and the plaintiff as joint tenants, for seven years from the 1st of October, at a yearly rent, payable quarterly in advance, from the 1st of October, &c., the first payment to be made at the commencement of the term; and in the conclusion of the lease it was agreed that the first three quarters' rent should be due and paid "on the day when the said term commences." On the 1st of January, 1856, defendant distrained for two quarters' rent, due on the 1st of October preceding. Plaintiff brought trespass, complaining that the distress, if rightful, was merely, a pretence for getting possession. He gave evidence tending to shew this, and proved that defendant entered into the house, assumed the management of it as if the term were at an end, insisted on the plaintiff's wife leaving a room down stairs which she occupied as a bed room, and taking another above, and remained there nine days against the plaintiff's will. For the defendant it was proved that W., the co-tenant, had surrendered to him his interest in the lease, and that the plaintiff, who had never paid his rent, though not then assenting, a few days afterwards (on the 9th of January) entered into an arrangement by which he gave up possession. The jury gave £75 damages:—Held, that any authority derived from W., the co-tenant, could not be given in evidence under the general issue, per stat. 11 Geo. II. c. 19; and that at all events it could not have justified defendant's conduct. *Chase* v. *Scripture*, 14 Q. B. 598.

In an action by a tenant against his landlord for wrongful distress and sale, the gist of the action is the wrong complained of, and therefore a variance between the contract set out in the declaration and that proved is immaterial. *Robinson* v. *Shields*, 15 C. P. 386.

In such an action it is necessary to state correctly to whom the rent is due. "Not guilty" puts in issue the tenancy and the ownership of the goods. *Ib.*

The first count alleged that one H. held premises as tenant to defendants at a certain rent: that the plaintiff's goods being there, defendants wrongfully seized the same, as well as all the tenant's goods, as a distress for alleged arrears of rent, to wit, $401, then claimed by defendants, and afterwards sold the same for such arrears and costs, whereas only $38 was really due, for which one-fifth of the goods would have sufficed, and the tenant's goods alone would have been more than sufficient:—Held, under the authority of French *v.* Phillips, 1 H. & N. 654, that the count disclosed no cause of action, for, as a count for distraining for more than was due, it averred no tender of the proper sum, and though the plaintiff could make no tender, he could avail himself of one made by the tenant; and if for excessive distress, it should have alleged distinctly that the distress was excessive and unreasonable, or that the proceeds were more than reasonably sufficient. *Huskinson* v. *Lawrence et al.*, 25 Q. B. 58.

The second count, after stating the tenancy, and that the plaintiff's goods were on the premises, alleged that the defendants wrongfully



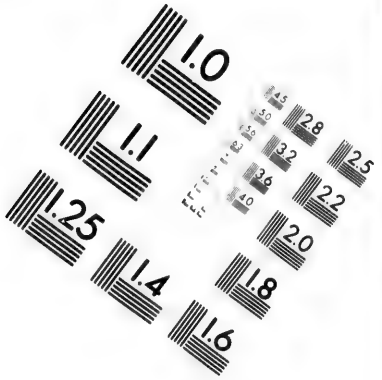
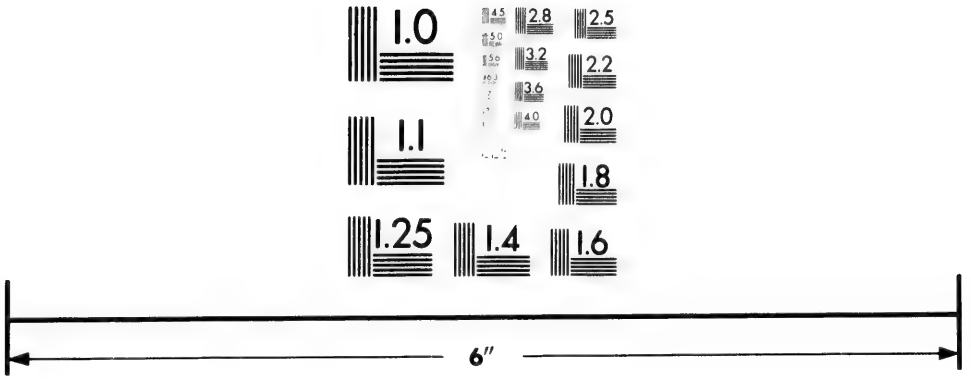
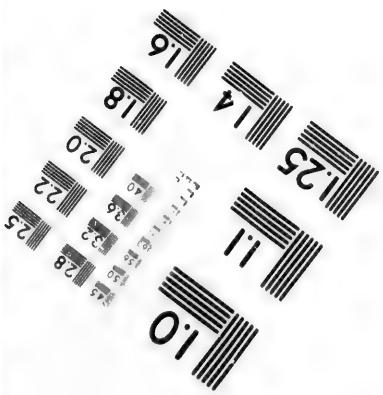
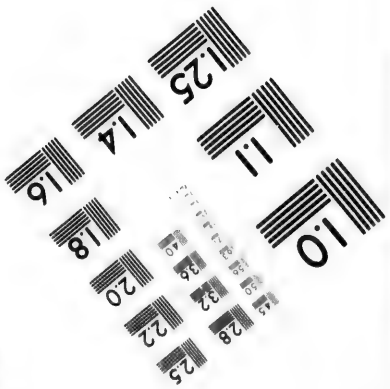


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distrained for arrears of rent the said goods of greater value than such arrears and costs, although a small part would have sufficed, and although the tenant's goods also distrained were of themselves sufficient; and that defendants thereby made an excessive and unreasonable distress for said arrears, contrary to the statute:—Held, good, and that it was clearly unnecessary to allege malice. *Ib.*

Action for taking goods. Third plea, avowry as bailiffs of W. H., for rent due by one W. B., the goods being on the demised premises. Third replication, that on the 7th May, 1870, the tenant, by deed, released to the plaintiff all his estate in the land, and the landlord, in consideration thereof, released the tenant from the rent and covenants:—Held, good, for though the plaintiff would be estopped from denying the landlord's right to distrain, the release shewed that no rent was payable. *Hayward* v. *Thacker*, 31 Q. B. 427.

Third plea, avowry and cognizance under a distress for rent due upon a demise from defendant A. H. to W. B. Second replication, that before the demise one W. H. was seized in fee of the land, and by deed, dated 30th October, 1869, granted it to the plaintiff, who entered and took possession, and held it as owner in fee at the time of the distress. It was objected that, consistently with this replication, A. H. might have held such an interest in the land as would enable him to make the lease prior and paramount to plaintiff's title:—Held, replication clearly good. *Ib.*

(c) *Justification under Warrant of Distress.*

A bailiff distraining for rent need not have a written warrant of distress, for if the warrant be insufficient, but the landlord adopt the distress, the bailiff may justify under him. *Halsted* v. *McCormack et al.*, E. T. 3 Vict.

Where a party assumes to act as *principal* in making a distress for rent, he cannot afterwards justify as *bailiff*, on the subsequent confirmation of the party entitled to the rent. *Lambert* v. *Marsh*, 2 Q. B. 39.

To an action of trespass q. c. f., defendant justified the entry under a warrant of distress, and the plaintiff replied de injuriâ:—Held, that under these pleadings, and under the facts proved, there could be no enquiry into defendant's motives; and that the plaintiff, having prevented the defendant from distraining, was not at liberty to shew that he had no intention of executing the warrant when he entered, although nothing was done inconsistent with such an intention. Lucas *v.* Nockells, 4 Bing. 740, distinguished. *Scott* v. *Vance*, 9 Q. B. 613.

(d) *Damages.*

Trespass lies for a seizure and sale of goods where they have been left on the premises after a distress longer than five days, no person being in charge of them, the seizure and sale for which the action is brought being subsequent to the five days after the first seizure; but in such case the full value of the goods cannot be recovered, but only special damages. *Thompson* v. *Marsh*, 2 O. S. 355.

In case for illegal distress, the plaintiff is entitled to succeed on shewing that there was no such appraisement as the law directs, even though but for nominal damages. *Maguire* v. *Post*, 5 O. S. 1.

In an action for distraining when no rent was due, where the case was left to the jury as an ordinary case, without being expressly left to them to find double damages, and without their being apprised of the provisions of the statute, the court refused to increase the verdict to double the value of the goods distrained. *Shipman* v. *Graydon*, 5 C. P. 465.

Defendant in October, 1855, leased certain premises to one W. and the plaintiff as joint tenants, to hold for seven years from the 1st of October, at a yearly rent, payable quarterly in advance, on the 1st of October, &c., the first payment to be made at the commencement of the term; and in the conclusion of the lease, it was agreed that the first three quarters' rent should be due and paid "on the day when the said term commences." On the 1st of January, 1856, defendant distrained for two quarters' rent, due on the 1st of October preceding. Plaintiff brought trespass, complaining that the distress, if rightful, was merely a pretence for getting possession. He gave evidence tending to shew this, and proved that defendant entered into the house, assumed the management of it as if the term were at an end, insisted on the plaintiff's wife leaving a room down stairs which she occupied as a bed room, and taking another above; and remained there nine days against the plaintiff's will. For the defendant, it was proved that W., the co-tenant, had surrendered to him his interest in the lease, and that the plaintiff, who had never paid his rent, though not then assenting, a few days afterwards (on the 9th January,) entered into an arrangement by which he gave up possession. The jury gave £75 damages:—Held, that any authority derived from W. the co-tenant, could not be given in evidence under the general issue, by statute (11 Geo. II. c. 19): that at all events it could not have justified the defendant's conduct; and that, although the damages seemed excessive, the verdict must stand. *Chase* v. *Scripture*, 14 Q. B. 598.

Held, that the words, "recover double of the value of the goods or chattels so distrained, and sold together with full costs of suit," in the Imperial statute 2 Will. & M. Sess. 1, c. 5, s. 5, does not mean double the value of the goods, &c., distrained *and* double costs, but only double the value of goods, &c., and full or ordinary costs of suit. *McCallum* v. *Snider*, 6 L. J. 187.—C. L. Chamb.—Burns.

A reference to arbitration disentitles a plaintiff from recovering treble damages and costs in cases where he would otherwise be entitled to them under the 2 Will. & M. c. 5, s. 4. The word "recover," used in the statute, means "recover by the verdict of a jury." *Cark* v. *Irwin et al.*, 8 L. J. 21.—C. L. Chamb.—Burns.

The action for double value, under 2 Will. & M. sess. 1, c. 5, s. 5, for illegal distress for rent, is not confined to the landlord only, but extends to those who distrain on his behalf, or in his name or right. *Hope* v. *White et al.*, 17 C. P. 52.

Remarks as to the hardship of the statute allowing double damages for distraining when

no rent due, when the landlord has acted upon an erroneous construction of a doubtful lease. *Brown* v. *Blackwell*, 35 Q. B. 239.

Where a tenant, to relieve his goods from an illegal distress, pays the amount of the distress and recovers his goods: Semble, that in an action of trespass for the wrongful seizure, he is not entitled to recover as damages at least the value of the goods. *Matheson* v. *Kelly*, 24 C. P. 598.

(e) *Other Cases.*

In trespass to land and goods, the defendant justified the seizure of the goods as a distress for rent under a demise to A. B. The plaintiff replied that A. B. and the plaintiff at the time of said demise were partners in trade: that before the rent accrued A. B. died, and the defendant and A. B.'s executors, in consideration that the plaintiff would carry on the business for his and their benefit, demised the same premises to plaintiff for so long as he should so carry it on, without payment of rent: that the plaintiff under this demise entered and occupied, and thereupon the demise to A. B. was surrendered and determined:—Held, a good answer to the plea, as shewing that there was no right to the rent distrained for. *Strathey* v. *Crooks*, 6 O. S. 587.

A landlord when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale. *Gibbs* v. *Crawford et al.*, 8 Q. B. 155.

In an action for wrongful distress, the receipt by the tenant from the bailiff of the surplus of the proceeds of the sale, was Held no condonation of the wrong complained of, the payment having been neither made nor accepted in satisfaction or compromise of the injury suffered. *Robinson* v. *Shields*, 15 C. P. 386.

The bailiff having a warrant from defendant to distrain, seized property off the premises. This was done without defendant's knowledge, and there was no evidence of his having adopted the act:—Held, that defendant was not liable, and that the plaintiff could not maintain replevin against him. *Ferrier* v. *Cole*. 5 Q. B. 561.

A count charging *the landlord* with selling the goods for extortionate and illegal charges, cannot be sustained, for the charge of extortion lies only against the bailiff who received the fee. See 1 Vict. c. 16, s. 4, now C. S. U. C. c. 123, ss. 7, 8. *Nichols* v. *Mooney et al.*, 1 Q. B. 199.

The rent due was $401, and the value of the goods distrained $469:—Held, that the difference was insufficient to support an action for excessive distress. *Huskinson* v. *Lawrence*, 26 Q. B. 570.

A plea to an avowry was held not objectionable for duplicity, for stating that the articles distrained and replevied were beasts of the plough and an implement of husbandry, and also that they were in actual use of the plaintiff; because the articles were not absolutely privileged, but only sub modo, and to constitute an absolute privilege it was necessary further to have alleged that there was a sufficiency of other goods on the premises liable to be distrained; but as that could not be alleged in this case, the plaintiff was entitled to rely on the actual user at the time of distress, which exempted them as fully as if there had been other goods liable to seizure. *Miller* v. *Miller*, 17 C. P. 226.

A plea which alleged that there were other articles on the premises besides the privileged article:—Held, good, as affording a sufficient answer to the seizure. *Ib.*

Per Gwynne, J.—To divest a landlord of his right to distrain, a strict legal tender must be shewn. *Matheson* v. *Kelly*, 24 C. P. 598.

III. Damage Feasant.

Trespass for taking, impounding, and selling plaintiff's horses. Plea, that horse was damage feasant. Replication, that by town meeting regulations, fences should be five feet high, and that defendant's fences not being that height, but ruinous and out of repair, plaintiff's horses escaped out of his close into defendant's close without the knowledge and consent of plaintiff:—Held, good on general demurrer. *Ives* v. *Hitchcock*, Dra. 247.

On the question of the sufficiency of a fence according to township regulations, where cattle are distrained damage feasant, the award of fence viewers is conclusive. *Stedman* v. *Wasley*, E. T. 4 Vict.

The plaintiff's horse escaped from his stable and got into the plaintiff's pasture field, but was immediately pursued by M., the plaintiff's son-in-law, who saw it escape, and was leading it out of defendant's field, when defendant seized and detained it. The plaintiff replevied, and defendant avowed as for distress damage feasant:—Held, that the horse, under the circumstances, was not distrainable. *McIntyre* v. *Lockridge et al.*, 28 Q. B. 204.

Plaintiff sued defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea reserving a right of way along the west side thereof, and the alleged trespass was the use of such way. Rejoinder—that the trespass was beyond the right of way. Surrejoinder—that at the time of the lease there was a fence along the east side of the way to prevent horses, &c., straying therefrom; that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter—that the lease contained covenants allowing the plaintiff to enter on the land and view the state of repair, and that defendant would repair according to notice; that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that upon the evidence, set out in the case, the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed, that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land.

Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 Q. B. 307.

V. Costs of Distress.

The form of order given in the schedule to C. S. U. C., c, 123, (respecting the costs of distress for rents and penalties not exceeding $80,) states the unlawful charges to have been taken from the complainant, "under a distress for (as the case may be :")—Held, sufficient to say "a distress for rent," and that it was unnecessary to state such rent to have been under $80, in order to shew jurisdiction. *Regina* v. *Stewart*, 25 Q. B. 327.

DISTRIBUTION OF ESTATE

I. Partition of Estate—*See* Partition.

II. According to Testamentary Depositions—*See* Will.

III. Administration Suits—*See* Administration Suit.

IV. Parties to Distribute—*See* Executors and Administrators.

A testator placed his two sons in possession of portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Chy. 135.

A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land:—Held, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. Quære, in such a case, whether the son is not entitled to an absolute decree for the land. *Biehn* v. *Biehn*, 18 Chy. 497; *Hovey* v. *Ferguson*, 18 Chy. 498.

A division of the residuary personal estate of a testator was made between his legatees, with their concurrence, appropriating to one of them, as part of her share, a mortgage for about £10,000, assumed to be good, but which, from defective title and other causes, was not worth one-fourth of that sum:—Held, that in consequence of the mistake as to the character and value of the mortgage, the appropriation was not binding on such legatee. *Clarke* v. *Hawke*. 11 Chy. 527.

An unequal and unjust division of a residuary estate was agreed to in 1858, under circumstances, which are fully stated in the report, and which rendered the transaction invalid. The division was acted on to a certain extent by both parties, though conveyances had not been executed. A bill being filed in 1864, to set aside the division, and the delay sufficiently accounted for, a decree was made as prayed, and it was referred to the master to make a new division, not disturbing the old division more than should be necessary. *Ib.*

A testator devised to his son a certain named lot: the residue of his estate, after certain other specific devises, he directed to be divided between his two brothers and sister, amongst whom, after the death of the testator, the property was divided. In this division, by mistake, the lot devised to his son was included, and was allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake which had been committed applied to those interested in the residuary estate to have the mistake rectified. It then appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible, and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate, at its present value, one-third of which, with interest from the date the first division was made, to be contributed ratably by the other residuary devisees, or their representatives, or, if desired by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Chy. 94.

A. who was domiciled in Scotland, died there intestate, leaving some personal property. Three of his next of kin, a brother and two sisters, concurred in appointing an agent in Scotland to wind up the estate and transmit and account to them therefor; the agent did so, and transmitted to the brother some money and personal chattels as all that remained after paying the intestate's debts and funeral expenses. The brother paid the sisters their shares of the money, but kept all the chattels. In a suit by the sisters for a division of these, an objection taken to the absence of any personal representative of the deceased in this country, was over-ruled. *Sutherland* v. *Ross*, 13 Chy. 507.

One of several heirs of an intestate being lunatic, an act was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and it was Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Chy. 254.

By the statute 29 Vict. c. 28, s. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors pari passu, without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors and execution to be issued, under which they were paid nearly in full, when by applying to the court in that action the proper distribution of the estate would have been ordered, the court charged her,

in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the court, and to this extent they were held entitled to recover their costs. *Taylor* v. *Brodie*, 21 Chy. 607.

DISTRICT COURT.

See COUNTY COURT.

DISTRINGAS.

Quære, if a venire and distringas should not issue for a special jury. *Morvey* v. *Maynard*, 4 O. S. 323.

This writ is not the proper process to commence a suit against a corporation. *Cooper* v. *The Canada Company*, Dra. 189.

In proceeding against a corporation to enforce obedience to a decree or order, it is not necessary to sue out a writ of distringas; the proper mode of proceeding is by orders nisi and absolute for a sequestration. Spragge, V. C., dubitante. *Attorney General* v. *Brantford*, 1 Chy. Chamb. 26.—Chy.

DITCH.

See WATER AND WATER COURSES.

DIVISION COURTS.

I. JURISDICTION.

1. *Where Actions must be brought and Proceedings carried on*, 1098.
2. *Title to Land*, 1099.
3. *On Accounts*, 1099.
4. *Splitting Causes of Action*, 1101.
5. *Other Cases*, 1101.

II. REMOVAL OF CAUSES—*See* CERTIORARI.

III. INTERPLEADER, 1102.

IV. PRACTICE AND PROCEDURE, 1104.

V. APPLICATION FOR COUNTY COURT COSTS—*See* COSTS.

VI. EXECUTIONS.

1. *Generally*, 1106.
2. *Attachments*, 1109.
   (a) *Maliciously Issuing*—*See* MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

VII. EXAMINATION OF JUDGMENT DEBTORS—*See* BANKRUPTCY AND INSOLVENCY.

VIII. TRANSCRIPT OF JUDGMENT, 1110.

IX. JUDGE.

1. *Actions against*, 1111.
2. *Criminal Information against*—*See* CRIMINAL INFORMATION.
3. *Mandamus to*—*See* MANDAMUS.
4. *Prohibition to*—*See* PROHIBITION.

X. CLERK AND HIS SURETIES.

1. *Liability of, and Actions against*, 1112.

XI. BAILIFF AND HIS SURETIES.

1. *Actions by and against*, 1113.
2. *Notice of Action to Bailiff*—*See* ACTION AND SUIT.

XII. MISCELLANEOUS CASES, 1117.

I. JURISDICTION.

1. *Where Actions must be brought and Proceedings carried on.*

The jurisdiction of the Division Court, under 13 & 14 Vict. c. 53, did not extend to persons residing out of the county. *Dulmage* v. *The Judge of Leeds and Grenville*, 12 Q. B. 32.

Held, affirming Bongard *v.* McWhirter, 12 Q. B. 143, that under 16 Vict. c. 177, s. 9, a suitor desiring to remove the cause to another division, must apply to the judge who ordinarily would have cognizance of the cause, not to the judge of the division to which he desires to transfer it. But the only issue taken being as to which division was most convenient to try in, upon that point the decision of the judge who had granted the order was held to be decisive. *McWhirter* v. *Bongard*, 14 Q. B. 84.

On an application for a prohibition on the ground that the cause of action did not arise within the jurisdiction of the judge of the county of Lambton, it appeared that the defendant resided at G., where a bargain was made for the delivery of goods at W., and the bargain was fulfilled by such delivery and acceptance:—Held, that the cause of action arose partly at G. and partly at W., and the judge of the county where W. was situate had no authority in respect of the cause of action. *Kemp* v. *Owen*, 14 C. P. 432.

Defendants, residing at Toronto agreed to sell to the plaintiffs at Kingston certain barrels of oil. Upon the oil being delivered at Kingston, it was found to run short, and an action was brought for the shortage in the Division Court there:—Held, that it should have been brought at Toronto, where defendants resided. *Carsley* v. *Fisken et al.*, 4 P. R. 255.—C. L. Chamb.—Morrison.

Where defendants, residing at Goderich, made a contract at Brantford with one W. to deliver to him certain goods at the railway station at Goderich:—Held, that an action in the Divison Court for the bad quality of the goods delivered must be brought at Goderich, as the whole cause of action did not arise at Brantford. *Watt* v. *Van Every*, 23 Q. B. 196.

Section 7, sub-s. 1 of the Ontario Division Court Act, 32 Vict. c. 23, provides that the garnishee summons shall issue, "out of the Division Court of the division in which the garnishee lives or carries on business":—Held, in the case of a foreign railway doing business within this province, to mean that proceedings may be taken in the division in which the principal offices for

the province are located. By 29 & 30 Vict. c. 92, the G. T. Railway Co., whose head office is at Montreal, leased the Buffalo and Lake Huron R. W., whose principal offices were at Brantford:—Held, that garnishee proceedings against the company, were properly taken at Brantford. *Fair* v. *James*, 6 L. J. N. S. 320.—C. C.—Jones.

Held, that a railway company does not "live and carry on business," within the meaning of 32 Vict. c. 23, s. 7, O., at any other place than its head office, at which its business is managed. Where the garnishees had their principal station at Montreal, and a local station at Berlin, at which they took passengers and received goods, and the plaintiff issued a garnishee summons against the company out of the Division Court at Berlin, under that section, on the ground that they lived and carried on business there:—Held, that the judge of said Division Court had no jurisdiction, and a prohibition was ordered. *Ahrens* v. *McGilligat*, 23 C. P. 171.

Statutes regulating the practice and procedure of a court apply only to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question. *Ib.*

"Cause of action," within the Division Court Act, C. S. U. C. c. 19, s. 71, means the "whole cause of action:" and therefore where the plaintiffs sued defendant in the Division Court at Ingersoll, in the county of Oxford, on a note payable there, but made at Strathroy, in the county of Middlesex, where defendant resided:—Held, that as the whole cause of action did not arise at Ingersoll, the action would not lie there, but should have been brought at Strathroy, where defendant resided; and that a prohibition was properly ordered. Vaughan *v.* Weldon, L. R. 10 C. P. 47, and the cases on the C. L. P. Act, s. 44, distinguished. *Noxon et al.* v. *Holmes et al.*, 24 C. P. 541.

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2. *Title to Land.*

Primâ facie proof of a title to land being given, and that such title must come in question, and no cause being shewn to the contrary, a prohibition was granted. *Macara* v. *Morish*, 11 C. P. 74.

A., intending to make a line fence between his land and that of B., by mistake made the fence on B.'s land. Afterwards, a correct line having been run, it was agreed that A. and B. should each make a portion of the fence on the correct line. B., in making his share, used the rails of the old fence made by A. A. sued B. in the Division Court for the price of the rails so used, and the judge having decided in his favour, B. applied for a prohibition; but—Held, that the judge had jurisdiction. *Re Bradshaw* v. *Duffy*, 4 P. R. 50.—C. L. Chamb.—Hagarty.

The judge of a Division Court may entertain an interpleader application to try the property in goods, even though the enquiry may involve the title to land. The judge *himself* must decide such application *without the aid of a jury*. *Munsie* v. *McKinley*, 15 C. P. 50.

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3. *On Accounts.*

The plaintiff sued defendant, a married woman, on a demand exceeding $200, but abandoned the excess above $99.75. Defendant claimed a set off exceeding $400, but consisting of various unconnected items:—Held, that no ground was shewn for a prohibition to the Division Court: that the suit was clearly within the jurisdiction; and that the defence of coverture should have been set up in the court below. *Read* v. *Wedge*, 20 Q. B. 456.

Plaintiff stated his claim to be for goods sold, £26 14s., and four years' interest thereon, and for two promissory notes, £15 each, and interest, in all, £73, and gave credit for cash payments of £46, abandoning the excess of the balance above £25. At the trial, defendant objected to the jurisdiction, and judgment having been given against him, he afterwards obtained a new trial on affidavit of merits. In granting it, the judge allowed the plaintiff to amend his claim, and the account then rendered claimed only the balance due on the notes, in all, £49, gave credit for £23, and abandoned all but £25 of the balance:—Held, that as amended the claim was clearly within the jurisdiction, and that the amendment being improper would form no ground for prohibition. Quære, whether the first account shewed a claim beyond the jurisdiction, as without the notes, which were liquidated demands, the account would not exceed £50. *In re Higginbotham* v. *Moore*, 21 Q. B. 326.

An action on an unsettled account exceeding $200, reduced by payment to $100:—Held, not to be within the jurisdiction: Miron *v.* McCabe, 4 P. R. 171, considered. *Waugh* v. *Conway*, 4 L. J. N. S. 228.—C. C.—Logie.

The plaintiff in a Division Court may recover $100, being the balance of an unsettled account not exceeding $200, but when the whole account exeeeds that sum there is no jurisdiction. An unsettled account means an account the amount of which has not been adjusted, determined, or admitted by some act of the parties. The plaintiff here sued for $84, being the balance due for rent of premises occupied by defendant as his tenant for several years, at $160 a year, after deducting the payments made from time to time:—Held, not within the jurisdiction. *In re Hall* v. *Curtain*, 28 Q. B. 533; overruling *Miron* v. *McCabe*, 4 P. R. 171.

The plaintiff claimed $94.88, annexing to his summons particulars of claim, shewing an account for goods for $384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of $33 given for some returned barrels, but which still left an unsettled balance of upwards of $300:—Held, not within the jurisdiction, and a prohibition was ordered. *In re the Judge of the County Court of the United Counties of Northumberland and Durham*, 19 C. P. 299.

Plaintiff, having been employed by defendants to purchase wool for them on commission, sued them in the Division Court for this commission, and for $10 paid to an assistant. It appeared that defendants had furnished the plaintiff with $1,100, and that the plaintiff had expended $36 beyond this sum in the purchase of the wool, but no question was made at the trial as to the due expenditure of the $1,100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the

$36, or any portion of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid:—Held, not an action for the balance of an unsettled account exceeding $200, the balance of the unsettled account between the parties being $36, which was not in question in this suit; and a prohibition was therefore refused. *McRae* v. *Robins et al.*, 20 C. P. 135.

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4. *Splitting Causes of Action.*

Where plaintiff sued defendants on an alleged promise to return a yoke of oxen in as good condition as when hired, alleging as a breach that they were not so returned, &c, but were injured, &c., and it appeared on the trial that defendants had been before sued by the plaintiff for the hire of the same oxen on the same contract for hiring, which suit resulted in judgment for the plaintiff:—Held, a splitting of the plaintiff's cause of action, within the meaning of the Division Courts Act, and judgment was given for defendants. *Light* v. *Lyons et al.*, 7 L. J. 74.—C. C.—Hughes.

Plaintiff rendered an account to defendant, commencing with the amount of an account rendered on the 30th of June, 1862, and continued to the 14th of October, when the balance, after allowing a credit of $4.25, was $106.43. In February, 1863, he sued in the Division Court, the statement of claim commencing with the 24th of April, and ending on the 10th of October, 1862, amounting to $99.31. He was allowed to recover without abandoning the excess, notwithstanding the production of the larger account rendered; and in May he sued for the items included in that account, but not in the former action, and was also allowed to recover. Defendant then applied for a prohibition. Semble, that the application should have been made in the first suit, but the point was not settled, as, after rule nisi granted, the plaintiff consented to the writ going without costs. *In re Grace* v. *Walsh*, 3 P. R. 196.—Q. B.

Claims, such as promissory notes, which would each constitute a distinct cause of action if sued upon directly, come within the rule as to splitting of causes of action when sued upon indirectly, as in an action for money paid by an endorser to the use of the maker. *Gilbert* v. *Gilbert*, 4 L. J. N. S. 229.—C. C.—Logie.

Held, on the facts of this case stated, supra, that there was no splitting, the plaintiff having two separate causes of action, one for work and labour, and the other for a balance due for money paid by him for goods in excess of the amount furnished to him. *McRae* v. *Robins et al.*, 20 C. P. 135.

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5. *Other Cases.*

A township collector might sue for an assessment for common schools, under 4 & 5 Vict. c. 48, s. 10, in a Division Court. *McGregor* v. *White*, 1 Q. B. 15.

Courts of Requests can entertain a suit for the balance remaining due upon a written undertaking to pay a larger sum. *Longworth* v. *McKay*, 6 O. S. 149.

Sec. 27 of 13 & 14 Vict. c. 53, does not restrict infants from suing in the Division Courts for anything but wages, but enables them to recover for their own labour, contrary to the principles of the common law. *Ferris* v. *Fox*, 11 Q. B. 612.

The jurisdiction of Division Courts is restricted to $40 in actions brought purely and simply to recover uncertain damages depending on matters of opinion whether the cause of action arose out of tort or breach of agreement. *Hyland* v. *Warren*, 6 L. J. 116.—C. C.—Mackenzie.

Division Courts have jurisdiction in actions of detinue. Where, therefore, the plaintiff sued in a County Court, and the value of the article detained was found to be $1, and no certificate granted for full costs, the plaintiff was restricted to Division Court costs only, and set-off of costs allowed. *Lucas* v. *Elliott*, 9 L. J. 147.—C. C.—Robinson.

Held, that under 32 Vict. c. 23, O., a judge of a Division Court has power in garnishment proceedings, when the justice of the case requires it, to grant a new trial after the lapse of fourteen days, notwithstanding C. S. U. C. c. 19, s. 107. *McLean et al.* v. *McLeod*, 5 P. R. 467.—C. L. Chamb.—Hagarty.

Held, that an action for breach of a warranty of a horse where the damages recovered were over $40 and under $100, was within the jurisdiction of the Division Court. *Morris* v. *Cameron*, 12 C. P. 422.

Held, that a party not raising the question of jurisdiction on the first trial of a case in the Division Court, is not prohibited from raising the question upon the second trial, a new trial having been granted. *Deadman* v. *Agricultural and Arts Association*, 6 P. R. 176.—C. L. Chamb.—Galt.

Held, that Division Courts are, by virtue of 32 Vict. c. 23, s. 1, O., courts of record. *Corsant* q. t. v. *Taylor*, 10 L. J. N. S. 320.—C. C.—Elliot.

Held, also, that a penal action for not returning a conviction is founded on tort, and for that reason cannot be brought in a Division Court. *Ib.*

See *Graham* v. *Smart et al.*, 18 Q. B. 482, p. 1112.

III. Interpleader.

A. had claimed certain steers seized under a Division Court attachment against one F. The bailiff who seized obtained a summons to determine such claim, which was heard on the 24th of June, 1853; and on the 8th of July, 1853, an order was made by the judge of the Division Court deciding against A.'s claim. A. then brought trespass against the bailiff:—Held, that the regularity of the proceedings on the interpleader summons could not be enquired into, and that all proceedings in this action since the issuing of such summons must be stayed. *Finlayson* v. *Howard*, 1 P. R. 224.—C. L. Chamb.—Draper.

An interpleader issue in a Division Court was held not to be within sec. 51 of the Division Courts Act, and so not removable by certiorari. *Russell* v. *Williams*, 8 L. J. 277.—C. L. Chamb.—Richards.

The plaintiff in November, 1856, sued defendant, a bailiff of a Division Court, in trespass for seizing his goods. Defendant thereupon, in Feb-

ruary, 1857, obtained a summons in this court, calling on the plaintiff to shew cause why the action should not be stayed, and why the judge issuing the summons should not adjudicate upon the plaintiff's claim. When this summons was obtained, an interpleader order was pending in the Division Court, which the judge of that Court determined in March, by deciding that the plaintiff was entitled to the proceeds of the goods sold, and £15 as damages for taking them, which the execution plaintiff then paid into the Division Court. In the meantime, however, the summons in this court had been discharged; and afterwards the plaintiff proceeded with this action by filing a declaration in August, to which the defendant pleaded; and a trial took place, which resulted in a verdict for the plaintiff. The defendant then applied to rescind the order discharging the summons in this court, and to stay proceedings:—Held, that the summons should not have been discharged altogether, but proceedings should have been stayed, as directed by the 16 Vict. c. 177, s. 7; and that the defendant was still entitled to a stay of proceedings, under the statute, notwithstanding his laches; but on account of his delay the rule was made absolute without costs. Under the 13 & 14 Vict. c. 53, s. 102, and 16 Vict. c. 177, s. 7, amending it, the judge of the Division Court must adjudicate upon the claim to goods seized; but the application to stay proceedings in any action brought for the seizure, must be made to the court, or a judge of the court, in which such action is pending. *Washington* v. *Webb*, 16 Q. B. 232.

Certain goods, being seized under an attachment from the Division Court, were placed by the bailiff in custody of the clerk, from whom they were replevied by the plaintiff. A summons then issued from the Division Court, calling before the judge there the attaching creditors and the plaintiff as claimant of the goods:—Held, that under the 16 Vict. c. 177, the proceedings in the replevin suit in this court must be stayed:—Held, also, that if the plaintiff had been allowed to proceed, he must have failed, for neither trespass nor trover would lie against the clerk, and therefore replevin could not be maintained. Quære, as to the remedy which the defendant, the clerk of the Division Court, or the attaching creditors, would have in case the plaintiff in replevin should be held by the judge to have no claim. *Caron* v. *Graham*, 18 Q. B. 315.

Held, following Jones *v.* Williams, 4 H. & N. 706, that under the Division Courts Act, C. S. U. C. c. 19, s. 175, this court has no power to stay proceedings in an action brought after the adjudication by the judge in the Division Court. *Shamehorn* v. *Traske*, 30 Q. B. 543.

The decision of the judge of the Division Court on an interpleader, is final, under C. S. U. C. c. 19, c. 175. *Keane* v. *Stedman*, 10 C. P. 435.

In trespass against a Division Court bailiff and one B., for entering plaintiff's close and taking goods, defendants pleaded that one H having recovered judgment and execution in a Division Court against O., the plaintiff's mother, and these goods having been seized there, the plaintiff claimed them, whereupon, on an interpleader, the judge adjudged that the goods were the property of said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute endorsed by the judge, adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff's witnesses swore that the judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days; but, Held, that the minute of adjudication and order were conclusive:—Held, also, that the minute, though informal was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff. Defendant B. having declared that he owned the debt, and that the execution was issued at his instance, and having appeared for the execution creditor on the interpleader summons:—Held, sufficient evidence to go to the jury of his being a joint trespasser. *Oliphant* v. *Leslie et al.*, 24 Q. B. 398.

On an interpleader in the Division Court, the judge may determine the claimant's right to an equitable interest. *McIntosh* v. *McIntosh*, 18 Chy. 58.

Goods seized under a Division Court execution were claimed by the plaintiff, and the bailiff sold them expressly subject to the result of an interpleader, for which he intended to apply. Nothing was paid, and they were to remain in his custody until the decision. Afterwards, on an interpleader, the judge determined that the goods belonged to the execution debtor, and the plaintiff sued the bailiff in this action for selling the property:—Held, that he could not recover, for the interpleader proceedings were not invalid, as having taken place after sale, the sale upon such conditions being ineffectual; and the goods, therefore, still remained subject to the execution. *Harmer* v. *Cowan*, 23 Q. B. 479.

See *Munsie* v. *McKinley*, 15 C. P. 50, p. 1099; *McArthur* v. *Cool*, 19 Q. B. 476, p. 1115.

IV. Practice and Procedure.

Quære, can a Division Court judge set aside a judgment and execution on which the money has been regularly made, on an application to him for a new trial, where the papers were not regularly filed with the clerk of the court? *McKenzie* v. *Keene*, 5 L. J. 225.—C. L. Chamb.—Robinson.

It is an established rule of English law that negligence or breach of duty cannot be set up as a defence in an action for the recovery of freight where the defendant has derived a partial benefit under the contract, but defendant must bring a cross action for damages; and such rule must be taken to prevail in Division Courts, notwithstanding the provisions of the Division Courts Act enabling the judge to decide according to equity and good conscience. *Brown* v. *Muckle*, 7 L. J. 298.—D. C.—Duggan.

Held, that the Imperial statute 43 Eliz. c. 5, as to removal of causes by certiorari, applies to cases in Division Courts, where a jury is empannelled by the judge, and a verdict rendered before delivery of the writ of certiorari to the judge. *Black* v. *Wesley*, 8 L. J. 277.—C. L. Chamb.—Richards.

Semble, the act in spirit applies to cases where the plaintiff's witnesses are sworn, although no jury is called. *Ib.*

Semble, that a recovery should not be allowed in a Division Court against an endorser of a note, without proving presentment or notice. *Siddall v. Gibson*, 17 Q. B. 98.

In an action on a note payable to plaintiff or bearer, brought in the name of the plaintiff, under the Division Courts Act, C. S. U. C. c. 19, s. 152, by a person who had obtained execution against him in that court, defendants pleaded, among other pleas, that the plaintiff was not the legal holder. It appeared that the note had been seized by the bailiff in the hands of one T., to whom the plaintiff had handed it for collection:—Held, that it was not indispensable that the declaration should shew the suit to be brought under the statute, but that defendants were entitled to succeed on the plea, for the plaintiff was not in fact the holder, and to entitle the real plaintiff to shew his right under the statute to sue in the name of the nominal plaintiff, the facts should have been specially replied. It is safer in such actions to aver and prove a judgment to support the execution, but semble, that it is not essential. *McDonald* v. *McDonald et al.*, 21 Q. B. 52.

The real plaintiff need not shew upon the trial that security for costs has been given as required by sec. 154. If not given, defendants may move to stay proceedings, or perhaps may plead it in bar of the action. Quære, as to the meaning of that clause in the statute. *Ib.*

Held, that a judgment in a Division Court may be set off and allowed against the judgment of a superior court of record. *Robinson* v. *Shields*, 2 L. J. N. S. 45—C. L. Chamb.—Richards.

A suit in the Division Court having been tried on the 18th July, before a deputy judge duly appointed, the defendant on the 22nd July, applied for a new trial, by which, under rule 52 of the Division Courts, proceedings were stayed. The judge died on the 26th; the deputy judge before whom the case had been tried did nothing in the matter, and the new judge was not appointed until October. In January following he ordered a new trial:—Held, that he was authorized to do so under sec. 107 of the Division Courts Act C. S. U. C. c. 19, and the Interpretation Act, C. S. C. c. 5, s. 6, sub-s. 23, taken together. *Appelbe* v. *Baker*, 27 Q. B. 486.

A discharge under the Insolvent Act, does not prevent a party from being committed upon a judgment summons under the Division Courts Acts. *In re Mackay* v. *Goodson*, 27 Q. B. 263.

A Division Court judge may, under sec. 86 of the Division Court Act, adjourn the hearing of a cause from a regular sitting of the court to his chambers within the division, and such adjournment is, if not objected to by the parties, an adjournment of the court to hear that cause. *In re Burrowes*, 18 C. P. 493.

Where a District Court judge, at the close of the hearing of a cause, said he would take time to consider, and deliver judgment at his chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the clerk of the court, who read it in his office to the agents of both parties on that day:—Held, a sufficient delivery of a written judgment within section 106 of the Division Courts Act. *Ib.*

A Division Court judge may, under section 102 of the Division Courts Act, examine under oath the plaintiff or defendant in any cause before him in that court, although the demand exceed $8. *Ib.*

Held, that under 32 Vict. c. 23, O., a judge of a Division Court has power in garnishment proceedings, when the justice of the case requires it, to grant a new trial after the lapse of fourteen days, notwithstanding C. S. U. C. c. 19, s. 107. *In re McLean* v. *McLeod*, 5 P. R. 467.—C. L. Chamb.—Hagarty.

Nonsuit after payment of money into court—Division Court rule 130—Impounding money for defendant's costs. *Oakes* v. *Morgan*, 8 L. J. N. S. 248.—C. C.—Hughes.

No person except a barrister or attorney duly qualified, is entitled to prosecute or defend suits in Division Courts. *In re Judge of the County Court of York*, 31 Q. B. 267. See, also, *Regina* v. *Erridge*, 3 L. J. 32.—C. C.—Gowan.

[See now 35 Vict. c. 8, O., empowering all persons to appear on behalf of others in the Division Courts.]

A notice of action in trespass under the Division Courts Act, C. S. U. C., c. 19, s. 193:—Held, insufficient for not stating the time and place of the alleged trespass. There is no substantial difference in this respect between the form of notice required under that act and under C. S. U. C. c. 126. *Moore* v. *Gidley*, 32 Q. B. 233.

A claim in a Division Court for $40, for "detention of plaintiff by defendants, on a journey from Toronto to Detroit and back (the journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back)," was removed by certiorari into the Queen's Bench, where the declaration was in contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar, considering the want of technicality in Division Court pleadings. *Hunter* v. *Grand Trunk R. W. Co.*, 6 P. R. 67.—C. L. Chamb.—Dalton, *C. C. & P.*

Statutes regulating the practice and procedure of a court apply only to matters within its jurisdiction, and cannot be called in aid to give jurisdiction where it is in question. *Ahrens* v. *McGilligat*, 23 C. P. 171.

The Administration of Justice Act, 1873, secs. 24 et seq., authorizing the examination of parties to a suit, &c., does not apply to Division Courts. *In re Willing* v. *Elliott*, 7th Dec. 1875, Wilson, J., sitting alone. Not yet reported.

VI. Executions.

1. *Generally.*

The bailiff of a Division Court from which a warrant of execution issued could, under 13 & 14 Vict. c. 53, execute it in any other county in which defendant had goods. *Chrysler* v. *Serpell*, 10 Q. B. 647.

[See now C. S. U. C. c. 19, s. 136.]

Executions from a Division Court do not bind the property before they are placed in the bailiff's hands; and, Quære, whether before an actual seizure. *Culloden* v. *McDowell*, 17 Q. B. 359.

In an action by the plaintiff upon an agreement for moneys alleged to be due him, a special plea

setting out that while the moneys remained in defendant's hands they were seized by a bailiff of a Division Court, under an execution issued from that court against the plaintiff, at the suit of one O. :—Held, bad, on demurrer, as it imported only that defendant was indebted to the plaintiff in a certain sum, and such a claim could not be seized under 13 & 14 Vict. c. 53, s. 89. Quære, if defendant had set out the amount of plaintiff's money in his hands, and averred that this sum remained separate and apart from his own for the plaintiff when it was seized, whether that would have been a good defence. *Clarke* v. *Easton*, 14 Q. B. 251.

Plaintiff claimed a horse as purchaser. Defendant claimed under a sale upon a Division Court execution, which it appeared had not been regularly renewed :—Held, that the execution not having been kept regularly in force, the sale in the interval cut it out, and that the plaintiff was entitled to recover. *Carroll* v. *Lunn*, 7 C. P. 510.

A term for years in land cannot be sold under a Division Court execution, but only such things as can be delivered over to the purchaser, or such securities as the C. S. U. C. c. 19, s. 151, expressly authorizes the seizure of. *Duggan* v. *Kitson*, 20 Q. B. 316.

On the 18th of March, 1855, the Buffalo, Brantford, and Goderich railway company mortgaged the goods in question to Her Majesty, to secure £15,000; and on the 17th of April, 1855, they executed a second mortgage of the same property to other parties. These mortgages were duly filed. On the 20th of February, 1856, an execution was issued at the suit of Her Majesty for the same debt, on which the property was seized, and afterwards other executions came. The sheriff put defendant, who was a bailiff of a Division Court, in possession on the 29th of April, 1856, to hold, first, on account of the sheriff, and next on account of several executions which defendant had in his hands from Division Courts. On the 11th of February, 1856, the Buffalo, Brantford, and Goderich railway company sold out to the Buffalo and Lake Huron railway company, which was confirmed by the 19 Vict. c. 21; and that company having arranged the executions, the sheriff afterwards delivered possession to their agent of the property at Brantford, in the name of the whole. Defendant however, claimed to hold, notwithstanding, under the Division Court executions. These executions were all subsequent to the sale made on the 11th February, 1856, and had expired before the sheriff gave up possession. The plaintiffs (the Buffalo and lake Huron railway company) having replevied from defendant :—Held, that they were entitled to recover. *The Buffalo and Lake Huron R. W. Co.* v. *Brooksbanks*, 16 Q. B. 337.

Defendant, a bailiff, having an execution against L., seized a yoke of oxen, which he allowed L. to retain on receiving an acknowledgment of the levy endorsed on the writ. L. absconded leaving the oxen with plaintiff. In an action against defendant for taking them away :—Held, that by the acknowledgment given the debtor had put it out of his power to transfer the goods seized. *Lossing* v. *Jennings*, 9 Q. B. 406, p. 1114.

A seizure of goods under a Division Court execution being entitled, under sec. 266, C. S. U. C. c. 22, to priority over a seizure subsequently made by the sheriff, trespass will not lie against the latter for the seizure made by him, the goods being, under the Division Court writ, already in the custody of the law. *King* v. *Macdonald*, 15 C. P. 397.

Held, also, in the absence of a count in the declaration for money had and received, that the plaintiff could not recover for the surplus money which, under sec. 251, the sheriff could have seized in the hands of the Division Court bailiff after satisfaction of the prior execution. *Ib.*

Executions for about $200 issued against the plaintiff from Division Court, the first of the county, under which lumber was seized at his mill, within that division. A sale was attempted there without success, and by direction of one of the execution creditors the bailiff had the lumber removed to the county town, thirty miles off, in the fifth division, which cost $160. It was there bought by G., the deputy sheriff, for $100, and defendant purchased from him. The plaintiff having brought trover, a nonsuit was ordered, for though sec. 151 provides only for sale in the division where the goods have been seized, yet a sale in another division to a bonâ fide purchaser would pass the property, leaving the party injured to sue the bailiff; that G. must be assumed to be such a purchaser, and that defendant could not be made liable for purchasing from him. Quære, whether on the evidence, stated in the case, the jury might not have found that G. was in fact purchasing for defendant, who was a Division Court bailiff; and, if so, under sec. 157, the sale would have been void. Remarks as to the hardship of the case upon the plaintiff. *Campbell* v. *Coulthard*, 25 Q. B. 621.

A declaration against a Division Court bailiff for not levying under an execution, alleged that the plaintiff recovered a judgment in the first Division Court of the county, and thereupon sued out an execution directed to defendant as bailiff of the second Division Court, commanding him to make the money out of the goods of defendant in the suit, wheresoever the same might be found; and that there were goods of such defendant within the bailiwick of defendant, out of which he could have levied :—Held, that the count was bad; that the writ was not shewn to be within the 32 Vict. c. 23, ss. 18, 19, for it was not alleged that the fi. fa. was to be executed in the defendant's division or near to it, or that the goods were within such division, the defendant's bailiwick extending to the whole county. *Dary* v. *Johnson*, 31 Q. B. 153.

Section 59 of the Insolvent Act of 1869, applies to judgment debts recovered in Division Courts, on which execution has been issued to and the money levied thereunder by a bailiff of such courts, although the section speaks only of executions delivered to *the sheriff*. In this action by the assignee in insolvency for money levied under executions against the insolvent, or received by defendant the clerk of a Division Court, it was objected that the defendant received the money only as clerk of the court, but it appeared that the sale had taken place after the assignment; and it was,—Held, that there being no lien created by the mere seizure, which took place before the assignment, the plaintiff as assignee, was entitled to the money as part of the insolvent's estate, no matter in whose hands it might be. *Patterson* v. *McCarthy*, 35 Q. B. 14.

2. *Attachments.*

Affidavit for.]—In trespass for taking goods, defendant justified under an attachment from a Division Court, which he averred to have been issued on his affidavit that the plaintiff was about to abscond from this province, or leave the county with intent and design to defraud him of his said debt, taking away personal estate liable to seizure under execution for debt: Held, plea bad, the affidavit neither averring the conditions enacted by the statute on which an attachment may issue, nor answering to the form of affidavit given in the schedule. *Boyle* v. *Ward*, 11 Q. B. 416.

Semble, as there is a material difference between the enacting clause and the form of affidavit given, that the former must govern. *Ib.*

The affidavit on which the attachment issued, stated, the indebtedness of plaintiffs to defendant; that defendant had good reason to, and did believe that plaintiffs "hath" absconded from the province of Canada, with intent, &c., to defraud, &c., *or* that the plaintiffs "is" about to abscond, &c., to defraud, &c., *or* leave the county of Prince Edward, with intent, &c., taking away personal property liable to seizure, &c., *or* that plaintiffs "is" concealed within the county of Prince Edward, to avoid being served with process, with intent, &c.:—Held, bad, as not containing any one of the three alternatives in the statute, C. S. U. C. c. 19, s. 199. *Quackenbush et al.* v. *Snider*, 13 C. P. 196.

A magistrate having issued a warrant of attachment under sec. 200 of the Division Courts Act, without the affidavit required, under which goods were seized:—Held, that he had no jurisdiction whatever, and was therefore a trespasser. *Grey* v. *McCarty et al.*, 22 C. P. 568.

Defendant, a justice of the peace, issued a warrant of attachment under the Division Courts Act, sec. 199:—Held, that it was unnecessary, in order to give defendant jurisdiction, that the affidavit should be filed with the clerk, though his neglect to do so might be a breach of duty. *Moore* v. *Gidley*, 32 Q. B. 233.

Other Cases.]—Goods in the hands of a Division Court clerk under an attachment are liable to an execution issuing from a superior court before the attaching creditor has obtained judgment. The sheriff, therefore, may seize such goods; but, Quære, if the seizure were illegal, whether an action on the case would lie *by the attaching creditor* against the sheriff and the plaintiff in the execution. *Francis* v. *Brown*, 11 Q. B. 558.

A constable of any town within the county in which a warrant of attachment is issued under 12 Vict. c. 69, s. 1, may execute such warrant. *Delany* v. *Moore*, 9 Q. B. 294.

Secs. 55 and 56 of C. L. P. Act only apply to suits in which an original process has been served. *Fisher* v. *Sulley*, 3 L. J. 89.—C. L. Chamb.—Hagarty.

An *execution* of a superior court always takes precedence of an attachment of the Division Court. *Ib.*

Attaching creditors in a Division Court of the defendant in a judgment in the superior court, will not be admitted to except to such judgment on the ground of fraud. *Ib.*

Goods seized under an attachment from the Division Court may be replevied by a third party claiming them as his own. *Arnold* v. *Higgins*, 11 Q. B. 191.

The defendant having a claim against one R. sued out an attachment from a Division Court, under which he directed the bailiff to seize certain goods in the house where R. was living with the plaintiff, and he was present when such seizure was made. The goods were placed by the bailiff in the custody of the clerk of the Division Court, in whose possession they continued until the bringing of this action:—Held, that as the goods were seized in the possession of the defendant in the attachment, an action of detinue could not be maintained against this defendant, even admitting the goods to have been all the time under his absolute control, without shewing that the plaintiff had made him acquainted with her claim, and demanded to have them given up. *Clark* v. *Orr*, 11 Q. B. 436.

In an action for seizing goods under Division Court attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer:—Held, that this plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiffs' creditors, and to maintain trespass for seizing the same goods as if they were his own. *McPhatter et al.* v. *Leslie et al.*, 23 Q. B. 573.

See *Caron* v. *Graham*, 18 Q. B. 315, p. 1103.

VIII. Transcript of Judgment.

Held, under C. S. U. C. c. 19, s. 142, that a transcript omitting to state the issue and return of a fi. fa. goods was a nullity, and therefore that a fi. fa. lands could not issue thereon. *Farr* v. *Robins*, 12 C. P. 35.

Upon ejectment for land which had been sold and conveyed by the sheriff under a ven. ex. issued upon a County Court judgment, based upon a Division Court judgment, the sale was held void, inasmuch as the transcript of the judgment from the Division Court did not conform to the requirement of sec. 142 of the Division Courts Act, by stating the proceedings in the cause in the court below. *Jacomb* v. *Henry*, 13 C. P. 377.

A transcript of judgment in the Division Court for $63, having been filed in the County Court:—Held, 1. That it thereby became a judgment of the County Court, so that under C. S. U. C. c. 24, s. 41, defendant could be examined under it, and, 2. That under sec. 41 a ca. sa. might be issued by the judge for unsatisfactory answers, though the judgment was for less than $100. This section is to be read as independent of sec. 12, and the ca. sa. under it being issued by the judge, and not by the plaintiff, there is no limit as to the sum. *Kehoe* v. *Brown*, 13 C. P. 549.

Ejectment having been brought for land sold and conveyed by the sheriff to the plaintiff under a writ of ven. ex. issued upon a County Court judgment, based upon a Division Court judgment, recovered on proceedings commenced by attachment and summons issued the same day:

—Held, that the sale under the ven. ex. was void, by reason of the transcript of the judgment from the Division Court not having shewn that the proceedings in that court were commenced by attachment. *Hope* v. *Graves*, 14 C. P. 393.

Held, that under the Division Courts Act, C. S. U. C. c. 19, ss. 142, 143, 145, an execution against goods and chattels, must first issue out of the Division Court in which judgment was originally recovered, and be returned nulla bona, before a transcript of the judgment can be transmitted and filed in a County Court. Where, therefore, without the issue of such execution and its return nulla bona, a transcript was filed in the County Court, under which plaintiff's lands were seized by the sheriff and sold:—Held, that the sale was void. *Burgess* v. *Tully et al.*, 24 C. P. 549.

IX. Judge.

1. *Actions against.*

Attachment lies against commissioners of a Court of Requests who try causes in which they have an interest. *Rex* v. *McIntyre et al.*, Tay. 22.

Commissioners of the court of requests under the old Court of Requests Act, who had given judgment in a matter beyond their jurisdiction:—Held, not to be liable for a seizure committed under an execution issued on the judgment by the judge of the District Court, under the Division Court Act. *Davis* v. *Moore et al.*, 2 Q. B. 180.

Held, that it is the duty of the judge to fix the amount and number of sureties to be given by the Division Court clerk, before the clerk enters on his duty; and that permitting the clerk to enter on his duty without it, gives a right of action to a party grieved, if damages be shewn resulting from it. A count admitting the fulfilment of the requirements of the statute, but denying that the sureties were freeholders or residents of the county:—Held, bad on demurrer. The judge is not responsible for the filing of the securities of the Division Court clerk, and the non-filing of the security would not relieve the sureties. *Parks* v. *Davis*, 10 C. P. 229.

An action was brought in the Division Court of Hastings by A. and B. against C., who lived in Wolford, county of Grenville, for the price of a reaping machine. No defence was offered or objection taken, and judgment was given for the plaintiff, it being proved by a witness that the machine had been ordered by C. in Hastings, or contracted for there by him. The clerk of the court, on the application of one of the plaintiffs, transmitted a transcript of the judgment to the clerk of the Division Court of Wolford, on which he issued execution, and gave it to a bailiff, who made the money under it, being indemnified. The defendant in the Division Court thereupon sued the judge who decided the case, the clerk of his court, the two plaintiffs in the suit, the clerk of the court in Wolford, the bailiff, and the two persons who indemnified him, resting his case on the ground that the judge had no jurisdiction:—Held, that the clerks and the bailiff were clearly not liable, as they acted only in a ministerial capacity and in the performance of their duty, and that the parties indemnifying them for doing so were equally free: that no action would lie against the judge, for the evidence justified him in assuming that the cause of action arose within his jurisdiction, and the plaintiff (defendant in the suit) had at all events waived the objection by not taking it at the trial and that the plaintiffs in the suit were not liable, as they had done nothing but state their claim. Held, also, that evidence to shew want of jurisdiction, which had not been given in the Division Court, was rightly rejected. *Graham* v. *Smart et al.*, 18 Q. B. 482.

X. Clerk and his Sureties.

1. *Liability of, and Actions against.*

A mandamus was granted against the clerk of a Court of Requests to give up the book and papers of the court, which he had refused to do on being removed from office. *In re Larrois*, 4 O. S. 339.

In an action by a treasurer of a district, under the Division Courts Act, against the clerk of a Division Court, for not paying over moneys received, it is sufficient to declare in the treasurer's own name for money had and received by defendant to the use of the plaintiff for the purposes of the act. *Howard* v. *Walton*, 2 Q. B. 266.

The sureties of the clerk having entered into the bonds authorized by 4 & 5 Vict. c. 3, and 8 Vict. c. 37, are liable upon such bond to the crown for moneys collected by the clerk for suitors. *Regina* v. *Patton*, *Regina* v. *McCullough*, *and Regina* v. *Moran*, 7 Q. B. 83.

Semble, that in such action the crown would be entitled to a verdict for the penalty of the bond, and not merely for the sum received and not paid over. *Ib.*

The bailiff of a Division Court may sue the clerk's sureties upon the bond given under 13 & 14 Vict. c. 53, for fees on the service of process received by him for the bailiff and not paid over. The declaration in such a case need not specify the names of the parties from whom, or the suits in which, the moneys claimed were received. Whether the money received was payable before action brought, or whether the clerk was justified in withholding it under the act, is a question of evidence as to each sum. *Cool* v. *Switzer et al.*, 19 Q. B. 199.

In an action against a clerk of the Division Court for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provision of an act for that purpose:—Held, evidence against the sureties. *Middlefield* v. *Gould et al.*, 10 C. P. 9.

Held, that it is the duty of the judge to fix the amount and number of sureties to be given by the Division Court clerk, before the clerk enters on his duty, and permitting the clerk to enter on his duty without it gives a right of action to a party grieved, if damage be shewn resulting from it. *Parks* v. *Davis*, 10 C. P. 229.

A count admitting the fulfilment of the requirement of the statute, but denying that the sureties were freeholders or residents of the county:—Held, bad on demurrer. *Ib.*

The judge is not responsible for the filing of the security of the Division Court clerk; and

the non-filing of it would not relieve the sureties. *Ib.*

An action against the sureties of a Division Court clerk for moneys received by him for the plaintiff having been referred to arbitration, the arbitrator submitted a special case, stating that in 1838 the plaintiff sued the clerk for goods sold to him: that the clerk then produced a memorandum of settlement between them, signed by the plaintiff, relating to suits in the Division Court, which shewed a sum of £30 0s. 8d. due to the clerk; and that the judge thereupon, against the clerk's wish, and without any particulars of set-off having been given, treated this as a set-off and deducted it from the plaintiff's claim. The sureties, defendants in the suit referred, contended that the plaintiff's demand then sued for being a private account against the clerk, that sum was improperly set off, and they claimed to have it credited to them in this action against moneys since received for the plaintiff:—Held, that what had been done in the former suit could not be thus reviewed, and that as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin* v. *Cream et al.*, 20 Q. B. 84.

Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the Division Court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use:—Held reversing the judgment of the County Court, that he could not recover, for the money was not received by defendant in his official capacity as the plaintiff's, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quære, per Hagarty, J., whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 Q. B. 348.

Semble, that notice to a Division Court clerk is sufficient if it complies with C. S. U. C. c. 19, ss. 193, 194, though it may not contain all that is required by c. 126, for the latter act does not overrule the former, but they establish rules for distinct cases. *McPhatter* v. *Leslie*, 23 Q. B. 573.

See *Graham* v. *Smart*, 18 Q. B. 482, p. 1112.

XI. Bailiff and his Sureties.

1. *Actions by and against.*

Trespass q. c. f., with a count for taking goods. The defendants justified as commissioners and bailiff of the Court of Requests, and the plaintiff replied that he was not duly summoned to attend at the court at which judgment was recovered:—Held, replication bad on general demurrer. *Stevens* v. *Cowan et al.*, 5 O. S. 572.

Case held maintainable against a bailiff of a Court of Requests for falsely swearing to the service of a summons, whereby judgment was given against the plaintiff. *Cline* v. *McDonald*, E. T. 2 Vict.

Held, that the bailiff seizing under an execution issued by the judge of a District Court under the Division Courts Act, on a judgment given by the commissioners of the court of requests under the old Court of Requests Act, in a matter beyond their jurisdiction, was not liable, but that his defence must be pleaded specially; but, quære, whether he was not within the 21 Jac. I. c. 12. *Davis* v. *Moore*, 2 Q. B. 180.

The plaintiff declared in trespass for breaking and entering the plaintiff's close in the Niagara district, &c. The defendant pleaded that being bailiff of a Division Court in the district of Brock, he committed the alleged trespass in discharge of his duty as such; and that no notice was given to him of the action one month before it was brought. Demurrer to the plea, on the ground that it is not shewn by what authority the defendant, though a bailiff in the district of Brock, acted in the district of Niagara where the trespass is laid:—Held, plea bad. *Davis* v. *Moore*, 4 Q. B. 209.

The defendant, a bailiff of a Division Court, having an execution against L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving an acknowledgment of the levy endorsed on the writ. L. absconded leaving the oxen with the plaintiff. The defendant took them away, whereupon she brought trespass, alleging that she had received them from L. on the day of his departure in payment of a debt:—Held, that under a plea denying the plaintiff's property, it was competent for the defendant to give in evidence the execution and seizure under it. Held, also, that by the acknowledgment given, the debtor had put it out of his power to transfer the goods seized. *Lossing* v. *Jennings*, 9 Q. B. 406.

The 16 Vict. c. 177, s. 14, (C. S. U. C. c. 19, s. 195,) requiring demand of perusal and copy of warrant does not apply in an action against a bailiff acting under a warrant of attachment or execution from a Division Court, where the wrong complained of is the misconduct of the defendant, and not anything illegal in the writ itself, or in the act of granting it. *Sayers* v. *Findlay*, 12 Q. B. 155. Followed in *Oliphant* v. *Leslie*, 24 Q. B. 398, and *Pearson* v. *Ruttan et al.*, 15 C. P. 79.

Held, that the surety of a Division Court bailiff under C. S. U. C. c. 19, s. 25, is not relieved from liability under his covenant by neglect of his principal to execute such covenant. *Miller* v. *Tunis*, 10 C. P. 423.

Sec. 25 of C. S. U. C. c. 19, is directory, not mandatory:—Held, therefore, in an action against a bailiff and his sureties for an excessive seizure by the former, &c., that the fact of the sureties of a Division Court bailiff being non-residents of the county in which the bailiff's duties lay, did not avoid their covenant. *Pearson* v. *Ruttan*, 15 C. P. 79.

In an action against a bailiff of a Division Court, the venue being local was by mistake laid in the wrong county, and the plaintiff discovering the mistake did not go to trial in pursuance of his notice. Cross rules having been obtained, the plaintiff was allowed to amend by changing

the venue, and the defendant's rule for judgment as in case of nonsuit was discharged on the peremptory undertaking, and on payment of costs. *Ward* v. *Sexsmith*, 1 P. R. 382.—P. C.—Richards.

The bailiff of a Division Court may sue the sureties for the clerk, upon the bond given under 13 & 14 Vict. c. 53, for fees on the service of summonses, executions and warrants, received by him for the bailiff and not paid over. In the declaration in such a case, it is not necessary to specify the names of the parties from whom, or the suits in which the moneys claimed were received. Whether the money received was payable before action brought, or whether the clerk was justified in withholding it under the act, is a question of evidence as to each sum. *Cool* v. *Switzer*, 19 Q. B. 199.

Declaration against a bailiff of a Division Court and his sureties on their covenant, under C. S. U. C. c. 19, s. 25, alleging that the bailiff, under an execution against B., wrongfully seized and sold the plaintiff's goods, and received the proceeds; that the plaintiff having sued the bailiff in the County Court, the bailiff issued an interpleader summons, on which the judge of the Division Court determined that the plaintiff owned the goods, and was entitled to the money received by defendant, with the costs: that the bailiff still refused to pay the money to the plaintiff, whereupon the plaintiff proceeded with his suit in the County Court, and issued execution thereon, which was returned nulla bona. And so the plaintiff alleged that the bailiff had neglected to pay said money so received by him as such bailiff to the plaintiff, being the party entitled thereto, and had misconducted himself in his office, to the plaintiff's damage. Plea, by the sureties, that the said bailiff did pay to the plaintiff all the money he had received by virtue of his office, to which the plaintiff was entitled, and had not misconducted himself, &c.:—Held, on demurrer to the declaration, 1, that the defendants could be properly sued on the covenant in a joint action; but, 2. McLean, J., diss., that no cause of action upon the covenant was shewn: that the wrongful act of the bailiff, in seizing by mistake the goods of a stranger, was not misconduct or neglect of duty for which his sureties were liable; that the money received by him, though not received for the plaintiff at first, became the plaintiff's by virtue of the interpleader order, but (McLean, J., diss. on this point only) that the plaintiff had lost his right to sue for it upon the covenant by proceeding with the County Court action, and obtaining judgment there. *McArthur* v. *Cool and Nixon* v. *Stafford*, 19 Q. B. 476.

The plaintiff sued C., a Division Court bailiff, and his sureties, on their covenant, alleging a judgment recovered by himself against C., for selling his goods under execution, contrary to the orders of the plaintiff in the suit:—Held, declaration bad; for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause. *Sloan* v. *Creasor et al.*, 22 Q. B. 127.

Defendant M., a magistrate, gave a warrant to defendant K., a constable, on the 23rd of September, under sec. 200 of the Division Courts Act, to attach the goods of G. in the possession of the plaintiff and others, who were about to abscond. Under this certain goods were seized, and to an action brought against the constable, the magistrate, and the creditor, the constable, K., pleaded not guilty, by secs. 196, 197, and 198 of the act:—Held, that these sections had clearly no application, for K. was not shewn to be a bailiff of any Division Court, and had no warrant from the clerk. *Gray* v. *McCarty et al.*, 22 Q. B. 568.

In an action of trespass against a Division Court bailiff and one B. for entering plaintiff's close and taking goods, defendants pleaded that one H. having recovered a judgment in a Division Court against O., the plaintiff's mother, and the goods in question having been seized under an execution issued thereon, the plaintiff claimed them, whereupon the bailiff obtained an interpleader summons, on which the judge, after hearing the parties, adjudged that the goods were the property of the said execution creditor, and liable to said execution. The interpleader summons was produced, with a minute endorsed by the judge, adjudging that the goods were "the property of the execution creditor," and ordering the costs to be paid by the claimant in fifteen days. The plaintiff called witnesses who swore that the judge did not decide the matter, but put off the hearing on payment of costs by the plaintiff within fifteen days:—Held, that the minute of adjudication and order were conclusive to shew that the summons was not enlarged, and that the jury should have been so directed. Held, also, that although the minute was informal, in adjudging that the goods were the property of the execution creditor, instead of saying that they were the claimant's, or not the execution debtor's, yet it was in substance a dismissal of the plaintiff's claim, and a protection to the bailiff. *Oliphant* v. *Leslie*, 24 Q. B. 398.

In an action against a Division Court bailiff and two execution creditors for seizing goods:—Held, upon the facts set out in this case, that there was evidence to shew that it was one seizure and one sale under the direction and for the benefit of the two defendants holding separate executions, and that they were therefore jointly liable. *Lough* v. *Coleman*, 29 Q. B. 367.

A declaration against a Division Court bailiff for not levying under an execution, alleged that the plaintiff recovered a judgment in the first Division Court of the county, and thereupon sued out an execution directed to defendant as bailiff of the second Division Court, commanding him to make the money out of the goods of defendant in the suit, wheresoever the same might be found; and that there were goods of such defendant within the bailiwick of defendant, out of which he could have levied:—Held, that the count was bad; that the writ was not shewn to be within the Act 32 Vict. c. 23, ss. 18, 19, for it was not alleged that the fi. fa. was to be executed in the defendant's division or near to it, or that the goods were within such division, the defendant's "bailiwick" extending to the whole county. *Davey* v. *Johnson*, 31 Q. B. 153.

Defendant, a Division Court bailiff, received an execution against K. on the 12th of May, 1873, on a judgment recovered on that day, under which, on the 14th, he seized two horses. On the 10th, K. executed a voluntary assignment under the Insolvent Act, but the assignee on being made acquainted with it advised a private

settlement, and did not receive and act on the assignment until the 7th June. The bailiff who had left the horses in K.'s possession, taking a bond for their forthcoming, took them again and advertised them for sale on the 2nd June, but on being notified by the official assignee, he delivered them over to him on the 9th. The plaintiff then sued the bailiff and his sureties on their covenant, for not selling and paying over the money between the seizure and the claim by the assignee:—Held, that he could not recover; for, 1. There was no misconduct, because the horses passed to the assignee on the execution of the assignment, which was before the judgment; and, 2. If the delivery was a breach of duty, the plaintiff had sustained no damage, from it, for if the bailiff had proceeded to sell sooner, the assignee would no doubt have claimed the horses, as he did afterwards. *Brown* v. *Wright et al.*, 35 Q. B. 378.

XII. Miscellaneous Cases.

An action is not maintainable in this court on a judgment obtained in a Division Court, under 13 & 14 Vict. c. 53. *McPherson* v. *Forrester*, 11 Q. B. 362.

Held, affirming the judgment of the County Court, and following the previous case, that an action would not lie in a County Court upon a Division Court judgment. *Donnelly et al.* v. *Stewart*, 25 Q. B. 398.

Semble, that debts of accounts within the jurisdiction of Division Courts, will not be attached by the superior courts under C. L. P. Act, 1856, s. 194. *Topping* v. *Salt*, 3 L. J. 14, C. L. Chamb.—Hagarty.

A claim in a Division Court for $40, for "detention of plaintiff by defendants, on a journey from Toronto to Detroit and back (journey occurring between 28th November, when he started from Toronto, and 3rd December, when he got back,)" was removed by certiorari into the Queen's Bench, where the declaration was on contract for $500 for delaying the plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar considering the want of technicality in Division Court pleadings. *Hunter* v. *The Grand Trunk R. W. Co.*, 6 P. R. 67.—C. L. Chamb.—Dalton, *C. C. & P.*

DIVISION LINES.

See Boundary—Survey.

DOCTOR.

See Medical Practitioners.

DOGS.

The corporation of the city of Toronto have power from time to time, at their discretion, to make by-laws by which dogs found running at large within the limits and liberties of the said city, after proclamation of such by-laws, may be shot. *McKenzie* v. *Campbell*, 1 Q. B. 241.

DOMICILE.

See Foreign Law.

The law of England as to granting probate or committing letters of administration, is the law to be administered by our Probate and Surrogate courts. Where a party domiciled in the state of New York died suddenly, in itinere, in the county of Wentworth, in this province, having trifling personal effects about him of less value than £5:—Held, that the Surrogate Court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted by the Surrogate Court only to an inhabitant of the province. *Grant* v. *The Great Western R. W. Co.*, 7 C. P. 438; affirmed on appeal, 5 L. J. 210.

The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the United States Courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the State of Michigan, she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive (23 Vict. c. 24), it was competent to consider the "cause assigned" by the father; and so it was held (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her. *In re Kinney*, 6 P. R. 245.—C. L. Chamb—A. Wilson.

The writ of ne exeat granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife. *McDonald* v. *McDonald*, 5 L. J. 66.—Chy.—Blake.

A woman left her husband in consequence of disagreements, without any threats of personal violence, or any well founded apprehension on her part of violence; and the husband expressed his readiness and willingness to take her back. The wife failed to return, however, and the husband left this province and went to reside permanently in the United States. The wife, without any communication with her husband, or any intimation of a desire on her part to

renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion,—Held, that in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence. *Edwards* v. *Edwards*, 20 Chy. 392.

Per Strong, V. C., the will in question in this case, having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the province of Ontario could not be affected by any act of the legislature of this province, the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and therefore the contingent interests of the grandchildren was not "property, or a civil right" within the province. *In re Goodhue*, 19 Chy. 366.

DONATIO MORTIS CAUSA.

See WILL.

DORMANT EQUITIES.

The Dormant Equities Act 18 Vict. c. 124, (C. S. U. C. c. 12, ss. 59, 60) applies only to cases when the cause of suit arose before the passing of the Chancery Act, (1837). The locatee of lands of the crown in 1824 contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific performance of the contract, the patent from the crown having been issued in 1830. The court dismissed the bill with costs. *Silcox* v. *Sells*, 6 Chy. 237.

Semble, that the act applies as well to express trusts as to trusts created by implication of law. Spragge, V. C., diss. *Wragg* v. *Beckitt*, 7 Chy. 220, in appeal.

Held, otherwise, and the preceding case commented on in *Caldwell* v. *Hall*, 6 L. J. 141; affirmed in appeal, 7 L. J. 42; *Attorney-General* v. *Grasett*, 6 Chy. 485, and *Tiffany* v. *Thompson*, 9 Chy. 244.

Quære, whether it extends to every case of express trust. *Attorney-General* v. *Grasett*, 8 Chy. 130, in appeal.

It does not extend to cases of mortgage, and it makes no difference that the mortgage is created by a deed absolute in form. *Caldwell* v. *Hall*, 6 L. J. 141; *Hall* v. *Caldwell*, 7 L. J. 42, in appeal; *Malloch* v. *Pinhey*, 9 Chy. 550; *McDonald* v. *McDonell*, 2 E. & A. 393.

In 1832, a person who held a bond for the conveyance of land on which he had erected a steam saw-mill and other buildings, having become involved, assigned his property to certain creditors as trustees, to work the mill and sell the lumber, and apply the proceeds in payment of his debts, &c., and then went to the United States, where he remained for some years. One of the trustees took the sole management of the trust estate and went into possession. Subsequently, under an execution against the goods of the owner, the sheriff sold the steam engine set up in the mill, which the managing trustee, who was agent only for one of the creditors, purchased for his principal, at a great undervalue, and removed the same from the mill, and afterwards procured a deed of the property in his own name from the proprietor, which he also transferred to his principal. In 1855, the assignor filed a bill for an account of the trust property, alleging that his poverty in the meantime had prevented him from enforcing his rights. It was—Held, in the court below, that he was entitled to the relief sought, notwithstanding the Statute of Limitations and the Dormant Equities Act. *Beckit* v. *Wragg*, 6 Chy. 454.

But on appeal the decree was reversed, and the bill in the court below was dismissed with costs. *S. C.* 7 Chy. 220.

In 1834, a contract was made for the purchase of the easterly fifty acres of a lot of land, but through mistake the deed covered the whole N. ½, thus conveying the legal title to the north-easterly and north-westerly quarters, but the purchaser went into possession of the portion actually intended to be conveyed, and shortly after the vendee of the westerly portion went into possession of and occupied it without any disturbance of his title or assertion of right by the party to whom the conveyance had been made by mistake, (although all parties knew of the error that had occurred,) until the year 1857, when the assignee of the person holding the legal title instituted proceedings in ejectment, and recovered judgment; the evidence of adverse possession not being sufficient to outweigh the legal effect of the deed which had been so erroneously executed. The court, upon a bill filed for that purpose, restrained the owner of the legal title from proceeding to recover possession, and ordered him so convey the legal title in the land to the plaintiff, who was equitably entitled thereto, and to pay the costs of the suit, holding that the Dormant Equities Act did not apply to bar the plaintiff. *Arner* v. *McKenna*, 9 Chy. 226.

DOWER.

I. RIGHT OF.
1. *Widows of Aliens*, 1121.
2. *Mortgaged Property*, 1121.
3. *Lands sold under Execution or for Taxes*, 1125.
4. *Other Cases*, 1125.

II. BAR OR CONVEYANCE OF DOWER AND FORFEITURE.
1. *By Release.*
(a) *Certificate of Bar of Dower*, 1127.
(b) *After Second Marriage*, 1128.
(c) *Other Cases*, 1129.
2. *By Election.*
(a) *Accepting Devises or Bequests*, 1131.
(b) *Other Cases*, 1136.

3. *By Marriage Settlement*, 1136.
4. *By Adultery*, 1137.
5. *Statute of Limitations*, 1137.
6. *Other Cases*, 1137.

III. Exchange of Lands, 1139.

IV. Assignment of Dower, 1140.

V. Sale of, under Executions, 1140.

VI. Actions and Suits for.

1. *Who may be Defendants*, 1141.
2. *Pleading*, 1142.
3. *Practice.*
   (a) *Writs*, 1143.
   (b) *Other Cases*, 1143.
4. *Evidence.*
   (a) *Of Marriage*, 1145.
   (b) *Of Seisin*, 1145.
   (c) *Other Cases*, 1147.
5. *Damages and Costs.*
   (a) *When Recoverable*, 1147.
   (b) *Demand and Offer to Assign under 13 & 14 Vict. c. 58, C. S. U. C. c. 28*, 1148.
   (c) *How Estimated*, 1152.
   (d) *Other Cases*, 1152.

VII. Rights of Purchasers where there is Outstanding Dower, 1153.

VIII. Miscellaneous Cases, 1153.

IX. Action on Covenant for title when Claim for Dower Exists—*See* Covenant for Title.

[*The present Dower Act of Ontario is the 32 Vict. c. 7, by which C. S. U. C. c. 28, and 24 Vict. c. 40, are repealed. This Act is retrospective: Re Tate, 5 L. J. N. S. 260.*]

I. Right of.

1. *Widows of Aliens.*

The widow of an alien naturalized is entitled to dower. *White* v. *Laing*, 2 C. P. 186.

The widow of an alien is entitled to dower in land of which her husband has been seised during his lifetime. *Davenport* v. *Davenport*, 7 C. P. 401.

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2. *Mortgaged Property.*

D. S., seised in fee of lands, mortgaged them for 999 years to one S., who took possession. D. S. afterwards conveyed in fee to C., and after C.'s death the premises were sold to defendant at sheriff's sale under judgment against C. His widow then sued for dower:—Held, that she should have judgment for dower, with a cesset executio during the term; but Semble, that to authorize a cesset executio, the facts respecting the term should have appeared on record. And quære as to plaintiff's right if defendant had satisfied the mortgage, and had not taken an assignment of it, or kept it alive. *Chisholm* v. *Tiffany*, 11 Q. B. 338.

The wife of a mortgagee is not entitled to dower. *Ham* v. *Ham*, 14 Q. B. 497.

Where an estate was conveyed to a vendee, and immediately mortgaged back again to the seller to secure payment of the purchase money:—Held, that the widow of the mortgagor was entitled to dower, Robinson, C.J., diss. Semble, per Burns, J., that to raise this question the tenant must plead specially, and cannot rely upon the plea denying seisin. *Potts* v. *Meyers*, 14 Q. B. 499.

A. conveyed land to B. in 1833, and on the same day took a mortgage for the whole purchase money. B. paid nothing for either principal or interest, and in 1840 re-conveyed absolutely to A., the land being then vacant. B.'s wife did not join in either mortgage or reconveyance, and eighteen years after B.'s death, brought an action against C., who had purchased from A. soon after the reconveyance, and had erected valuable buildings:—Held, in appeal, affirming the judgment of the Queen's Bench, 20 Q. B. 213, and Potts *v.* Meyers, 14 Q. B. 499, that the seisin of the husband, B., was complete, and that the widow was entitled to dower. *Smith* v. *Norton*, 7 L. J. 263.—E. & A. See, also, *Lynch* v. *O'Hara*, 6 C. P. 259.

Dower may be maintained against a mortgagee in fee, although not in possession, and although the mortgage entitles the mortgagor to hold until default, which has not been made. *Stewart* v. *Kay*, 25 Q. B. 15. See, also, *Walker* v. *Boulton*, 6 O. S. 553.

Held, that the equitable defence in ejectment in this cause, filed under the Administration of Justice Act of 1873, secs. 3 and 4, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, fully set out in the report of this case, though probably not affording a good equitable defence, should be allowed:—Held, also, that a plaintiff may reply and demur to such an equitable defence. 36 Vict. c. 22, as to improvements on land made in mistake before notice, and the lien therefor, discussed. *Carrick* v. *Smith*, 34 Q. B. 389.

A married woman is not, in respect of dower, a necessary party to a bill for the foreclosure of a mortgage in which she has joined to bar dower. On an application, however, for a married woman so made a party to answer separately an order will be granted, but the plaintiff will take it at the risk of having the costs of making her a party afterwards disallowed. *Davidson* v. *Boyes*, 6 P. R. 27.—Chy. Chamb.—Strong, on appeal from Holmested, *Referee*.

Where a mortgagor has executed several mortgages, in one only of which his wife joined, the proper decree on a bill for foreclosure against the widow and devisees of the mortgagor, is one in the usual form against them all, with a declaration that upon payment of the mortgage executed by the widow, she shall, if she choose, be let into her dower. *Thibodo* v. *Collar*, 1 Chy. 147.

A person equitably entitled to lands (one who had not paid up his purchase money or obtained a conveyance) mortgaged them with a power of sale. The power was not exercised until after

the death of the mortgagor; afterwards his widow filed a bill against the purchaser under the power for dower. A demurrer for want of equity was allowed; dower attaching only to such equitable estates as the husband dies seised of, and the sale when made having relation to the time of creating the power, and thereby overreaching the title to dower, which had in the meantime attached. *Smith* v. *Smith*, 3 Chy. 451.

L. purchased from S., who conveyed to him, and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another party. L. having died, his widow sued at law for dower. A bill was filed, praying an injunction to stay the action, and for a declaration that the widow was, under the circumstances, not entitled to dower:—Held, that the mortgage was not extinguished as a charge on the purchase of the equity of redemption by S. from H., or merged in his legal estate; but the court refused to restrain the action at law, and declared that the dower to be allotted should be charged with the payment of one-third of the interest of the mortgage money unless defendant chose to pay off one-third of the mortgage debt. Equity will assist a dowress by removing out of her way a satisfied mortgage, and will allow her to redeem an unsatisfied mortgage. Per Esten, V.C., that the question of merger is one of intention; in the absence of evidence of intention, the court will consider that course selected by the purchaser which was most for his benefit; and that in this case the mortgage became merged in S.'s estate: that the plaintiff had no equity to restrain the action for dower, and that the bill should be dismissed. Per Spragge, V. C., that L. had in him before his conveyance to H. the beneficial legal estate, being entitled to the value of the land beyond the mortgage debt, and any other incidental advantage; and that in the interval between the execution of the conveyance and mortgage, L. was a trustee for S., but not a bare trustee. *Heney* v. *Low*, 9 Chy. 265.

If the wife of the mortgagor join in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser. *Moore* v. *Shinners*, 1 Chy. Chamb. 59.—VanKoughnet.

A final order for foreclosure having been obtained, some time afterwards the mortgagor filed a bill to redeem, and the court had opened the foreclosure and granted redemption, it appearing that no change had taken place in the relative position of the parties:—Held, on a motion by the mortgagee for payment out of the court of the mortgage money, that it was unnecessary for the wife of the mortgagee to join in the conveyance to the mortgagor to bar dower. *Simpson* v. *Simpson*, 1 Chy. Chamb. 265.—Esten.

Where a woman bars her dower in a mortgage to secure a debt of her husband, and after his death the property is sold for more than the claim of the mortgagee, the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband. *Sheppard* v. *Sheppard*, 14 Chy. 174. But see *White* v. *Bastedo*, 15 Chy. 546.

A widow who has barred her dower in a mortgage given by the husband for his own debt, is entitled to have the mortgage paid off by the husband's assets. If she claim dower merely out of the equity of redemption, she has priority over creditors, but if out of the corpus of the property, she is postponed to them. On a sale of the lands, as soon as the debts of the husband are paid, she takes precedence over the heir and volunteers claiming under the husband, and becomes absolutely entitled to her rights as dowress in the balance of the proceeds. Sheppard *v.* Sheppard, 14 Grant 174, noticed. *Re McMorris*, 8 L. J. N. S. 284.—Boyd, *Master*.

A mortgage was created by an absolute conveyance with a separate defeazance, and the mortgor having died, his heir effected an arrangement with the mortgagee, who conveyed to the heir, and accepted from him a deed of a portion of the land in discharge of the mortgage debt. The heir afterwards sold to a party who had notice of the several conveyances:—Held, that the widow of the mortgagor was entitled to dower in the portion conveyed by the heir to the purchaser. *McIntosh* v. *Wood*, 15 Chy. 92.

A testator while married purchased the equity of redemption in lands to which he afterwards died beneficially entitled. The widow claimed dower out of the whole property both legal and equitable, and that the surplus money produced by a sale of the premises after paying off the mortgage, being less than one-third of the whole purchase money, should be invested for her benefit, as her dower; but there being creditors, and specific and pecuniary legatees under the will of the testator, whose claims would exceed the surplus:—Held, that the widow was only entitled to dower in the surplus money which represented the value of the equity of redemption. *Thorpe* v. *Richards*, 15 Chy. 403.

Where the wife joins in a mortgage of her husband's estate as a security to the mortgagee, and for no other purpose, she parts with her dower so far only as may be necessary for that purpose, and she is a necessary party to a subsequent sale by the husband free from dower. *Forrest* v. *Laycock*, 18 Chy. 611.

A wife joined in a mortgage of her husband's estate to secure a loan of one-fourth or one-fifth of the value of the property, and he subsequently sold the property; his wife claimed to be entitled to dower, and refused to join in the conveyance without a reasonable compensation being made to her; her right to dower being supposed by all parties to exist, her husband had a piece of land conveyed to her, which she accepted, and thereupon she signed the conveyance of the mortgaged estate. The transaction appearing to have been for the interest of creditors, it was held to be valid, independently of the question whether her claim to dower was in such a case well founded in point of law or not. *Ib.*

Where a wife joins in a mortgage she is not entitled on the death of her husband, insolvent, to have the debt paid in full out of the assets to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Chy. 113. See, also, *White* v. *Bastedo*, 15 Chy. 546.

A vendor took from the purchaser a mortgage for the whole purchase money, in which his wife joined to bar dower:—Held, the husband having died, and the property having been sold, that

the widow was entitled to dower in the excess, after payment of mortgage money and interest, but no more. *Campbell* v. *Royal Canadian Bank*. 19 Chy. 334.

See *Cumming* v. *Alguire*, 12 Q. B. 330, p. 1141.

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3. *Lands Sold under Execution or for Taxes.*

The dower of a wife is not barred by the sale in execution of her husband's estate. *Walker* v. *Powers*, M. T. 4 Vict.

C. died seised in fee of land, having devised the same to his wife for life, and after her death to his son, the demandant's husband, in fee. The testator's widow, the devisee for life, died before demandant's husband, and during her life his interest was sold under a fi. fa. against lands, and conveyed to one J., who having recovered possession sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shewn whether all the mortgage money had been paid or not; but the time for payment of several of the instalments had not arrived:—Held, that the demandant could not succeed, for the husband was never so seised as to entitle his widow to dower, his reversionary interest having been sold during his lifetime. *Cumming* v. *Alguire*, 12 Q. B. 330; affirmed in *Pulker* v. *Evans*, 13 Q. B. 546.

A sale of land for taxes destroys the right of the widow of the owner to dower. *Tomlinson* v. *Hill*, 5 Chy. 231.

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4. *Other Cases.*

Where a nominee of lands before patent issued conveyed them away, being unmarried, and afterwards, having obtained the patent, made a new conveyance to the same party, being then married:—Held, that his wife could not claim dower, as she was estopped by the deed made before the patent issued. *McLean* v. *Laidlaw*, 2 Q. B. [illegible].

A testator, after making specific devises of certain lands, added, "at which time," (i. e., after his youngest son should have arrived at the age of twenty-one years,) "it is my will that the whole of my lands be divided in four equal parts; one part of which I give and bequeath to my two daughters, A. and B., the other three parts to be divided among my three sons, C., D., and E." Semble, that under this devise of the residuary estate the devisees took not a vested estate, but a contingent and future estate, and that for life only; the estate in the meantime resting in the heir-at-law. Semble, also, that the heir-at-law would then have an estate which would not entitle his widow to her claim for dower, the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will. *McLellan* v. *Meggatt*, 7 Q. B. 554.

A. conveys land without consideration to N. W., who remains in possession some years and leaves. A. subsequently conveys to T. W., for value, the same land. In an action for dower by the widow of N. W. against T. W.—Held, that the first deed being without consideration was fraudulent as against the second, and that the claim for dower resting upon the seisin under it was not sustainable. *Wilson* v. *Wilson*, 8 C. P. 525.

A. by will devised a certain lot of land to B. for her natural life, and then to C. during his natural life, and then to his heirs forever. B. subsequently executed a writing, by which she agreed to demise the land in question for all her term and interest to C. in consideration of his allowing her the occupation and use of certain portions of the premises, &c.:—Held, that the force of the surrender to C. which was effected by the demise to him of all the term of the interest of B., the tenant for life, passed to him an estate of fee simple in possession, whereof his wife was entitled to dower. *Brass* v. *Hardy*, 9 C. P. 120.

Where the husband is seised as tenant in common, his wife may be endowed. *Ham* v. *Ham*, 14 Q. B. 497.

The death of one of two joint tenants during their joint seisin passes the title to the other joint tenant free from dower of the deceased tenant's widow. *Haskill* v. *Fraser*, 12 C. P. 383.

Dower. Plea, on equitable grounds, that the land was part of the partnership property and the stock in trade of the husband and S. trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership money, and used in the said partnership business, and that the husband was never seized thereof, otherwise than as such partner:—Held, that the plea sufficiently shewed the land to have been purchased for partnership purposes, and formed a good defence. *Conger* v. *Platt*, 25 Q. B. 277.

Held, that a devise of land by the husband to his widow for her own and her son's support till they should come of age, did not make her tenant of the freehold, so as to prevent her from recovering dower, she not having elected to take under the devise. *Reynolds* v. *Reynolds et al.*, 29 Q. B. 225.

A widow is entitled to dower in lands purchased from the crown by her husband, and whereof he died possessed, although no patent issued, and the purchase money had not been all paid. She is also entitled to one-third of the rents and profits for six years before the suit. *Craig* v. *Templeton*, 8 Chy. 483.

The seisin of a husband when he takes an estate in fee, and immediately mortgages it to secure a portion of the purchase money, is sufficient for the wife's right of dower to attach to it. *Lynch* v. *O'Hara*, 6 C. P. 259.

A. entered into an agreement whereby he conveyed part of his land to his son, L., "on account of natural love," the son to give his father one-half of the produce, if demanded:—Held, a valuable consideration. A. afterwards by deed conveyed to others these premises, and their assignee having commenced ejectment, L.'s widow obtained an injunction against the action. L.'s widow having meantime intermarried, the assignee moved to dissolve, urging that the widow's estate had determined, and that it was defeasible, and had been defeated by the testator's subsequent transfer for value, under 27 Eliz. c. 4; but the application was, under the circumstances, refused. *Leech* v. *Leech*, 11 Chy. 572.

The 4 Will. IV. c. 1, giving dower out of equitable interests, applies as well where the parties were married after as before the act. *McIntosh* v. *Wood*, 15 Chy. 92.

Where property was conveyed to a husband, under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion :—Held, that the widow of the grantee had no right to dower out of this portion during the life of the grantor. *Slater* v. *Slater*, 17 Chy. 45.

Property owned by a married woman was in possession of her and her husband; W. their second son lived with them. The wife died, and the husband afterwards left the premises, but W. continued to reside there. After the death of their father, J., the eldest son of the original owner, conveyed in 1832 to W., who was still in sole possession: J.'s wife did not join in the conveyance:—Held, that there having been no disseisin, and J. having conveyed before the passing of the Real Property Act, his widow was entitled to dower. *Re Higgins*, 19 Chy. 303.

See *Burns* v. *Burns*, 21 Chy. 7, p. 1139.

II. Bar or Conveyance of Dower and Forfeiture.

1. *By Release.*

(a) *Certificate of Bar of Dower.*

[*By the 37 Geo. III. c. 7, (C. S. U. C. c. 84, ss. 5, 6,) a person entitled to dower might release her right by deed, executed either alone or jointly with other persons; but to make such deed effectual, it must be acknowledged before the chief justice or one of the judges of the Queen's Bench, or before the Quarter Sessions, and a certificate of such examination was required to be indorsed on the deed. By 2 Vict. c. 6, this acknowledgment was dispensed with whenever the married woman should join with her husband in any deed containing a release of dower. By the present Dower Act, 32 Vict. c. 7, s. 23, O., the absence of or any informality in the acknowledgment is rendered immaterial.*]

Held, that on the pleadings set out in this case it could not be held, from the state of the record, that the defendant had given her consent before a judge to be barred of her dower. *Huffman* v. *Askin*, 2 C. P. 423.

A certificate of bar of dower indorsed on a deed, in 1830, stating that the wife "being duly examined," &c., did appear, &c., but not stating that she was "privately" examined, &c. :—Held, sufficient. *Buck* v. *McCallum*, 13 C. P. 163.

The husband, who died before the 24 Vict. c. 40, having conveyed land in 1849, in the following year his wife by deed, with his concurrence, testified by his execution thereof, released her right of dower to T., through whom the tenant claimed. There was no certificate of acknowledgment before magistrates, &c. :—Held, that such release was effectual, being within the letter of 2 Vict. c. 6, s. 3, which is not confined to deeds by which the husband is conveying lands; and that were this otherwise, the action would be barred by sec. 19 of 24 Vict. c. 40, which is not limited in its application by sec. 16. *Hill et ux.* v. *Greenwood*, 23 Q. B. 404.

A certificate on a deed executed in 1816, to which the wife of the grantor was not a party, stated, that "on the 30th May, 1829, personally came before me A. F., judge of the Midland District Court, Mary, wife of the within named conRobert McNally," and being examined, &c., sented to be barred of her dower. The grantor was described in the deed as of the town of Kingston, county of Frontenac. It was objected that the wife did not appear to have been resident in the county when the certificate was given; but—Held otherwise, for the presumption was that she resided with her husband, and that his residence continued the same. Held, that the 2 Vict. c. 6, s. 4, clearly removed any objection on the ground that she was not a party to the deed. *McNally* v. *Church*, 27 Q. B. 103.

Hunter *v.* Johnson, 14 C. P. 128, remarked upon. *Ib.*

Where the right to dower is released by an instrument separate from the conveyance by the husband, an examination and certificate is still necessary, as before the late statute. *Bogart* v. *Patterson*, 14 Chy. 624.

Where after a husband's estate had been vested by order of the court in A., a purchaser, his wife executed a deed to A., in which the husband joined, containing a release of dower by her, but no words of release or conveyance by the husband :—Held, sufficient, without examination or certificate. *Heward* v. *Scott*, 2 Chy. Chamb. 2[illegible] —Mowat.

(b) *After Second Marriage.*

A woman under a second coverture cannot, without her husband's concurrence, release her right to dower in lands of her first husband; and Quære, whether she could release this right by a conveyance in accordance with the statutes for enabling married women to alienate their real estate. An action was brought in the names of the husband and wife for dower in lands of her first husband. After action the wife executed a release to the defendant of her right, and obtained a certificate of her examination and consent, according to 50 Geo. III. c. 10 :—Held, that such release was no bar, being without the concurrence of the husband, and not being a conveyance for any purpose contemplated by the different statutes for barring dower. *Howard* v. *Wilson*, 10 Q. B. 186; affirmed in *McGill* v. *Squire*, 13 Q. B. 550.

Action for dower by S., and M. his wife, in land of M.'s former husband. Plea, a release under seal by S. of all *his* interest in the land :—Held, bad, as being no bar to the action. *Lawson* v. *Montgomery*, 10 Q. B. 528.

Dower—Defendant pleaded that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1838, the demandant, by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd of April, was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark, and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: See Clark v. Stevenson, 22 Q. B. 575. The defen[illegible]

int therefore proved the execution of the eed of the 21st of August, 1837, which was xecuted by the demandant, though she was party to it, and it contained no release of ower. A certificate of two justices was indorsed, ated 2nd of March, 1850, that the demandant ad appeared before them, and duly barred her ower; and one of them proved that she was xamined, executed the deed, and received $10. T. C., the grantee, proved that she agreed to ar her dower, and that he took her to the ustices for that purpose, but finding that the roceeding before them was ineffectual, he had he release of the 23rd of April, 1850, prepared, nd sent it to her by defendant, with a note for 40, which he held against her husband, to be ept if the release was executed, otherwise re- turned; and that T. C. brought back to him the release apparently executed, but not the note. This evidence was received, (though objected to) s tending to strengthen the probability that the elease was really executed; it being also sworn n confirmation that the demandant's name to the release was [illegible]en by her husband: that in May followi[illegible].e demandant told witness that defendant [illegible] been to her to sign a paper for T. C., which she had signed; and that the next day she told defendant she had no rights there. The jury found for defendant. Draper, C. J., doubted whether there was sufficient to go to the jury as evidence of the execution of the release: but, Held—Morrison, J., concurring—that defendant, being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside. Morrison, J., thought the evidence objected to inadmissible as being irrelevant to the issue. Hagarty, J., dissented, holding that the evidence was properly received as forming part of the history of the whole transaction, and tending to shew why the release was for a nominal consideration only, and in a form implying a previous conveyance of the fee, which might otherwise have given rise to suspicion; and that defendant was not bound to call the demandant. *Clark* v. *Stevenson*, 24 Q. B. 200.

(c) *Other Cases.*

The demandant on the 6th March, 1863, executed a power of attorney to one M. to demand her dower in all lands of her late husband, to compound for her claim, and to accept such sum in lieu thereof, either by annual payments or in one sum, as he should think fit, and to execute releases of such dower. On the 22nd of May he released, in her name, to defendants her dower in the lands in question, for a consideration expressed of $400, but M. swore that he agreed to take $300, and that this was not paid until July. The power was revoked on the 23rd of May, and the jury found that the release had been previously executed:—Held, that the power to release was not condtional upon receiving a cash payment or an arrangement for an annuity: that the difference between the sum mentioned in the release and that received by M. could not avoid the release; and that the tenants therefore were entitled to succeed. *Williams* v. *The Commissioners of the Cobourg Town Trust*, 23 Q. B. 330.

Plea, that demandant during her husband's lifetime joined with him in a conveyance by deed of the lands to a purchaser, in which deed a release of dower was contained:—Held, good, though the purchaser was not named or shewn to have taken a freehold estate. *Miller* v. *Wiley*, 16 C. P. 529.

After recovery in ejectment against the husband by the purchaser at sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him to release her dower in a conveyance in fee of the land, by way of bargain and sale, to a third party. No money consideration passed, the grantee executing a mortgage back for the whole purchase money mentioned in the deed to him, and the husband remained in possession until dispossessed by the sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at sheriff's sale:—Held, that the demandant was entitled to her dower in the land in question; for that the husband not having at the time the estate he professed to grant, nothing passed by his deed, and the release of the wife, as incident to, fell with it, as there was nothing upon which it could attach: that it was not a case within the 24 Vict. c. 40, s. 19: that though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants, being no parties to the deed, but claiming adversely to it, could not conclude the demandant from saying she had not released her dower to a purchaser. *Miller* v. *Wiley*, 17 C. P. 368.

Quære, whether husband and wife can at law convey the right of dower as a distinct subject of bargain and property; or whether she herself can do so after his death, and before the assignment of it. If so, Semble, that the remedy should be pursued by the assignee in his own name. *Ib.*

A husband by deed aliens land, and the wife, though not named in the commencement as a formal party, in the body of it releases her dower, and both execute it:—Held, a sufficient bar of dower. *Bonter* v. *Northcote*, 20 C. P. 76.

Semble, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and separation, at his instance, the deed is thereby revived. *McArthur* v. *Webb et al.*, 21 C. P. 358.

In setting aside a deed for fraud, at the instance of a judgment creditor, by a decree of the Court of Chancery, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property. The court will not simply set aside the deed and allow the judgment creditor to proceed and enforce his claim at law; and where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate and interest of the grantor, the creditor not being entitled to the benefit of such release of dower. *Bank of U. C.* v. *Thomas*, 2 E. & A. 502.

Quære, in such a case, what is properly the effect following from the release of dower, and to whose benefit it will enure. *Ib.*

Where a married woman had signed a deed which, however, contained no bar of dower, the

secretary refused to direct a reference to inquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred. Such relief would be properly the subject of a bill. *Thompson* v. *Thompson*, 2 Chy. Chamb. 211.—Taylor, *Secretary*.

Where a wife joins in a mortgage of her husband's estate as a security only to the mortgagee, she parts with her dower so far only as may be necessary for that purpose, and she is a necessary party to a subsequent sale by the husband free from dower. *Forrest* v. *Laycock*, 18 Chy. 611.

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2. *By Election.*

(a) *Accepting Devises or Bequests.*

Where a will expressly declares that what is given to the widow is intended to be in lieu of dower, and the widow accepts it, she is as much bound by her election in a court of law as in equity. *Walton* v. *Hill*, 8 Q. B. 562.

A widow cannot so far elect to take under a devise as to enter into possession of the whole property out of which she claims dower, and yet sue for her dower, when that was part of the property expressly devised to her in lieu of dower. *Ib.*

Held, that a plea of election by demandant to take under her husband's will was not sustained upon the evidence set out in this case. *Pulker* v. *Evans*, 13 Q. B. 546.

Dower. Plea, on equitable grounds, that the husband devised to demandant half an acre of land, after the decease of the husband's parents, for her life, and all the rest of his real and personal estate to defendants in trust to support demandant and testator's children, and $12 for her mourning, and $10 annually for clothing if she should continue to live in the homestead, and if not, then $30 a year in lieu of her dower: that another previous will was revoked, and this will made on the express agreement by demandant that she would accept these provisions in lieu of dower: that after the death of the husband demandant received from defendants, executors under the will, the said sum of $12 for mourning, and continued to live on the land under the will for six months, when she left of her own accord: that defendants have been and are ready to carry out the provisions of the will in her favour; and so defendants say that the demandant ought not in equity to have dower, and duly elected to accept the provisions of the said will in lieu thereof:—Held, on demurrer, no defence, for the acceptance of the $12 and continuing on the land for six months was not a sufficient election: that the words, "in lieu of dower," in the will applied rather to the $30; and the averment of election was stated only as a conclusion from the previous facts. *Cooper* v. *Watson et al.*, 23 Q. B. 345.

Plea, on equitable grounds, that the husband devised the land to defendant, in trust to maintain the demandant during her life in everything necessary for her comfort, and allow her two rooms in the house, and all the furniture, and provide her with a horse, two cows, and a servant girl; or if she preferred it should give her £50 a year, payably quarterly: that such allowance and maintenance was intended by testator to be in lieu of dower; and the demandant, since his death hitherto, in lieu of her dower hath elected to occupy the rooms, &c., and defendant hath provided her with all things required by the will, which she elected to take and did take in lieu of her dower:—Held, plea bad, as not shewing a case in which equity would put the widow to her election. *Baker* v. *Baker*, 25 Q. B. 448.

Dower—First plea, that demandant's husband by his will gave her an annuity of £25, chargeable on his estate, and a life estate in certain lands, and thereby declared that such annuity should be in lieu of dower: that demandant entered into possession of such property, and received the annuity, and elected to take and did take the same in lieu and satisfaction of her dower. Second plea, on equitable grounds, that by said will the husband gave demandant an annuity of £25, which was declared to be in lieu of dower, and was to be paid out of his estate by his executor, and by the same will he devised certain land to her for life: that he afterwards died, leaving, besides land, personal estate sufficient to pay the annuity: that demandant entered on said land, and elected to receive said annuity and devises in lieu of her dower: but before any payment of such annuity had fallen due, she, against the will of the executor possessed herself of the personal estate, and converted the same to her own use; and the executor having no other property out of which he could pay such annuity, was thereby prevented from paying the same, as he would otherwise have done pursuant to the will:—Held, on demurrer, both pleas good: that the first was clearly a good defence at law; and as to the second, though the demandant's wrongful act alone would not defeat her claim, yet there was besides an express averment that she elected to take the annuity and devises in lieu of dower which was sufficient without shewing the receipt of any portion of the annuity. *Walmsley* v. *Walmsley*, 26 Q. B. 392.

It appeared on the trial that demandant's husband, who was a potter, devised to each of his children certain real estate, and gave to his wife an annuity of £25, to be paid half yearly by his executor, and to be in lieu of dower, and devised to her certain town lots for life. The pottery was directed to be rented until his son J. should come of age, when all his estate not otherwise devised was to be divided amongst his children subject to the annuity. She was to have fire-wood off the premises in question; and his executors were to sell all his stock and farming utensils, &c. After the testator's death, in 184[illegible] the executor, who consented to act at the demandant's urgent request, sold the stock, &c., and handed the whole proceeds to her. She kept the pottery until her son came of age, collected the debts, and having married six months after the testator's death, she and her second husband managed all the real estate and received the rents. The annuity was never specifically paid to her, but the rents exceeded it:—Held, that there was sufficient evidence to warrant a verdict for the tenant on a plea of election. *Walmsley* v. *Walmsley*, 29 Q. B. 214.

To an action of dower defendant pleaded, on equitable grounds, that before the husband was seised his father owned the land, and convey-

it to the husband in consideration of natural affection, and that the grantor and his wife should enjoy it for their lives and that of the survivor: that the husband leased it to his father and mother during their joint lives and the life of the survivor, which was intended for their support, and the mother, the survivor and one of the tenants, has no other means of support: that afterwards the husband devised his personal property and all his real estate to demandant until his two sons should come of age, on which event he devised a portion to each, subject to certain charges in favour of his wife, which devise he intended and by his will declared to be in lieu of dower: that neither of the sons attained twenty-one: that after the death of her husband the demandant took possession of, and had since enjoyed, all her husband's real estate, and took also the personal estate, and had used and disposed of the same for her own use:—Held, on demurrer, a bad plea, for not alleging expressly an election by the widow, but leaving it to be inferred from the other statements. *Reynolds* v. *Reynolds*, 29 Q. B. 225.

The evidence shewed that the testator died in debt: that the executor declined to prove the will, there being no money to pay probate or funeral expenses: that the widow sold some of the stock, horses and cows, to support the family, and others because there was no fodder to keep them: and the furniture, &c., was sold by the sheriff under execution. The real estate consisted of forty-five acres, without a house on it, leased on shares, and worth about $80 a year; and on her claiming dower five years before, the person working it had agreed to pay her $50 a year, which had been paid for one year:—Held, no evidence of an election to take under the will in lieu of dower. *Ib.*

Held, that the widow, under the devises mentioned in the will in this case, was put to elect whether she would take under the will, or claim her dower. *Kerr* v. *Leishman*, 8 Chy. 435.

A testator by his will gave to his wife a life interest in certain portions of his real estate, and certain annual allowances, both in money and kind, such as to exclude the probability that she would require any other means for her support. The rents and profits of the real estate after payment of such annual allowance being insufficient to satisfy the widow's claim for dower:—Held, that she was bound to elect. *Becker* v. *Hammond*, 12 Chy. 485.

A testator devised to his wife all his real and personal property during widowhood, under which she entered upon the real estate, and took and applied to her own use the personal property. The court restrained an action for dower brought by her and her second husband, holding that she had elected to take under the will. *Westcott* v. *Cockerline*, 13 Chy. 79.

Quære, whether a provision for the maintenance of testator's widow, charged on the real estate, is by implication in lieu of dower. *McLennan* v. *Grant*, 15 Chy. 65.

A testator devised his farm to his eldest son in tail, upon condition, amongst other things, that he should support the testator's widow during her life: that she should be mistress and have the control of the dwelling-house on the farm, and should have the proceeds of one-half the cows and sheep kept on the premises; and that the farm should be a home for the testator's son J., so long as it might be necessary for him to remain, and for another son, D., should any misfortune happen to him:—Held, that the widow was not entitled to dower in addition to this provision made for her. *McLennan* v. *Grant*, 15 Chy. 65.

Where the question as to whether the widow had elected to take an annuity in lieu of dower, arose in connection with a claim of the defendant for past maintenance and education of the plaintiff, and was a mere matter of inference, depending to a certain extent on the amount of moneys the widow had received, the point was reserved until after the master had made his report. *Walmsley* v. *Bull*, 15 Chy. 210.

Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of shewing that he intended it to be in lieu of dower was held inadmissible. *Fairweather* v. *Archibald*, 15 Chy. 255.

Where a testator by his will, after providing for his widow, directed certain of his real estate to be sold at the expiration of a lease thereof then existing, and the proceeds to be divided among his three daughters, and that in the meantime the rent was to be divided among them:—Held, that this latter expression was not inconsistent with her claim to dower. *Ib.*

An intending purchaser of devised lands doubting whether a provision made by testator was in lieu of dower, asked the widow whether she had or claimed dower:—Held, that even if her answer was in the negative, it afforded no ground for the purchaser applying to this court to restrain her action for dower, brought on her being advised that under the will she was not put to her election. *Ib.*

Where a testator devised one parcel of land to his wife in lieu of dower, and another parcel without expressing that it was to be in lieu of dower, and then devised his remaining lands to other parties, and the will contained other evidence shewing an intention that such last mentioned devises should be free from dower:—Held, that on the widow electing to take dower she forfeited both parcels of land. *Stewart* v. *Hunter*, 2 Chy. Chamb. 336.—Mowat.

A testator devised to his daughter for life a house and four acres of land, and the will shewed that he contemplated that the devisee should reside on this property:—Held, that the testator had thereby sufficiently indicated his intention to devise free from the widow's dower; and that therefore the widow could not have dower in either this land or the other lands devised, without foregoing the provisions in her favour in the will. *Hutchinson* v. *Sargent*, 16 Chy. 78.

A testator by his will made certain gifts to his widow, not saying they were in lieu of dower. It was suggested that the estate was not sufficient to answer these gifts in addition to the dower:—Held, that the other devisees were entitled to an inquiry as to this, and the weight to be attached to the circumstance would be considered after the result of the inquiry was ascertained. *Lapp* v. *Lapp*, 16 Chy. 159.

A testator at the time of making his will and of his death had real estate to the value of $7,600,

and personal estate to the value of $305, which realty to the amount of about $3,805 he disposed of by his will during his wife's life; and he left legacies to the amount of $3,100. To his wife he left a life interest in his homestead farm, and a legacy of $1,000. The other real estate he directed to be sold. The residue he divided; but there would be no residue if the widow was to have her dower:—Held, that the widow must elect between the provision made for her by the will and her dower. *Lapp* v. *Lapp*, 19 Chy. 608.

A testator devised his farm to his widow for life, determinable upon her marrying again, and gave her a certain portion of the dwelling house thereon; and subject to this the will shewed an intention that the rest of the house and the farm should be kept in entirety, and be personally occupied by his sons until the youngest should attain twenty-one:—Held, that the widow must elect. Held, also, that a second marriage, after having elected under the will, would not resuscitate the right to dower. *Coleman* v. *Glanville*, 18 Chy. 42.

In such a case the widow remained on the farm, and received some small sums of money for her own use, but had never had set apart for her exclusive enjoyment the portion of the house devised to her;—Held, that these acts did not amount to that deliberate and well considered choice, made with a knowledge of rights and in full view of consequences, which is necessary to constitute an election. *Ib.*

A testator by his will gave to his widow an annuity of $4,000 in lieu of dower. His will contained certain devises, and gave other legacies and annuities which the testator charged on the whole of his estate not before devised, and he empowered his executors to sell any of his property which they should think necessary. The widow elected to take the annuity:—Held, that she was not entitled to dower out of any of the testator's lands, whether devised or not. Held, also, that the legacies and annuities were payable primarily out of the personal estate. *Davidson* v. *Boomer*, 18 Chy. 475, in appeal.

A testator bequeathed a sum of money to his wife in lieu of all dower, &c., and revoked "all gifts or deeds or deed of gift of any real estate made by me at any time heretofore:"—Held, that the widow was put to her election whether she would accept the bequest or retain an estate conveyed to her by a deed of gift during the lifetime of her husband. *Lee* v. *McKinly*, 18 Chy. 527.

A testator devised land to his children in tail with cross remainders, and in the event of their dying without issue, to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying she was to receive one-half thereof for life:—Held, that the contingency of the widow surviving all the children was too remote to put her to elect. *Travers* v. *Gustin*, 20 Chy. 106.

A testator by his will gave to his widow 100 acres of land, which he expressed should "be my wife's portion during her natural life," and the balance of his real estate, fifty acres, he directed to be sold, and until sold that the same should be rented, "and the rent shall be given to my wife to assist her in keeping and supporting of herself and the children that may choose to reside with her:"—Held, that the widow was not entitled to her dower in the fifty acres and also to the provision made for her by the will; but that she was bound to elect. *Armstrong* v. *Armstrong*, 21 Chy. 351.

A testator directed, first, that all his debts, funeral and testamentary expenses, should be paid; and then, that all his real and personal estate, of every nature and description, should be equally divided between his wife and mother, share and share alike:—Held, that the widow was not entitled to dower and to the provision made for her by the will; but that she was put to her election. *McGregor* v. *McGregor*, 20 Chy. 450.

A testator devised all his real and personal estate to trustees, with full power of leasing, incumbering, and selling the same, as in their opinion might be advisable, and at a certain period to convey the same to his children or child then surviving. By a codicil he directed all his personal property to be equally divided between his three daughters and his widow:—Held, that the widow was, under the terms of the will, bound to elect between the provision for her by the will and her dower. *Patrick* v. *Shaver*, 21 Chy. 123.

(b) *Other Cases.*

A wife cannot be endowed of land given and taken in exchange, but she has her election to take one or the other. *McLellan et ux.* v. *Meygatt*, 7 Q. B. 554; *White* v. *Laing*, 2 C. P. 186.

Such election must be pleaded by a party defending in an action for dower. *White* v. *Laing*, 2 C. P. 186.

As to the form of such a plea, See *Leach* v. *Dennis*, 24 Q. B. 129.

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3. *By Marriage Settlement.*

Dower. Equitable plea, that by deed, before and in consideration of demandant's intended marriage, it was agreed between her and her intended husband that certain lands should be conveyed by him after marriage to trustees, to his use for life, then to her use for life, then to the use of the issue of the marriage, and in default of such issue to his heirs: that after the marriage the lands were accordingly so conveyed, and demandant after her husband's death became seized and entered into possession of such lands under the settlement in lieu and satisfaction of her dower in all his lands, according to said settlement:—Held, a bad plea, for there was no provision, express or implied, that such settlement was to be in lieu of dower; and the allegation of entry in lieu, the land being her own, could make no difference. *Gilkison* v. *Elliott*, 27 Q. B. 95.

By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "customary, prefix, or stipulated," no mention being made of lands in Upper Canada:—Held, affirming the judgment of the Common Pleas, that this did not preclude her from claiming dower out of lands in Upper Canada, held by her husband during the coverture; and this notwithstanding

the contract so entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. VanKoughnet, C., diss. *Jamieson* v. *Fisher*, 2 E. & A. 242, 12 C. P. 601.

4. *By Adultery.*

A wife abandoned by her husband, and subsequently guilty of adultery,—Held, not barred from dower. *Graham* v. *Law*, 6 C. P. 310.

It is the voluntary living apart in adultery that deprives a wife of dower, whether leaving the husband's roof was sua sponte, or in consequence of his violence, or whether he abandoned her without provision. *Woolsey* v. *Finch*, 20 C. P. 132; affirmed in *Neff* v. *Thompson*, 20 C. P. 211.

5. *Statute of Limitations.*

[*By 32 Vict. c. 7, s. 32, O., no action of dower shall be brought but within twenty years from the death of the husband of the demandant. The same provision was contained in 24 Vict. c. 40, s. 18, and the law was the same under 4 Will. IV. c 1. German v. Grooms, 6 Q. B. 414; McClelland v. Meggatt, 7 Q. B. 31; McDonald v. McIntosh, 8 Q. B. 388.*]

Though the widow has been allowed to remain in possession for nearly twenty years from the husband's death, she must still sue for her dower within the twenty years after his death. *McDonald* v. *McIntosh*, 8 Q. B. 388.

In dower defendant pleaded that the right accrued more than twenty years before the action, to which the plaintiff replied that the husband while seised, and during his marriage, conveyed to H. M. Geo. IV., his heirs and successors, certain lands, including those in the declaration, of which he and his successors continued tenants in fee until twenty years before this suit: that forty years had not elapsed since the husband's death; and that H. M. Queen Victoria and her predecessors had at all times been out of the jurisdiction:—Held, replication no answer, for the exceptions to the operation of the statute (C. S. U. C. c. 88, s. 1,) arise only out of the plaintiff's position, not defendant's. *Begley* v. *The St. Patrick's Literary Association of the City of Ottawa*, 23 Q. B. 395.

Quære, as to the operation of 24 Vict. c, 40, s. 18, and the effect upon it of sec. 16. *Ib.*

Plea, that the seisin of the husband was a seisin in law, and that he was seised upwards of forty years before this suit, and for upwards of that time before this suit the tenant, and those under whom he claimed, were in actual possession of the lands, claiming title adversely to the husband:—Held, no defence, for though a dowress in one sense claims through her husband, yet the right claimed is one that first accrues, not to him, but to her on his death. *Leach* v. *Dennis*, 24 Q. B. 129.

6. *Other Cases.*

Where a father had conveyed a house and premises to his son in fee, and the son afterwards leased to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son, that he should occupy the house, except certain rooms, and take the rents and profits upon certain conditions, on breach of any of which he was to go out of possession, but his mother did not release her right under the statute: Semble, that the mother could not, after the father's death, on the ground that she had not barred her dower under the life lease, maintain ejectment for the whole of the premises, without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe* d. *Peck* v. *Peck*, 1 Q. B. 42.

The demandant had accepted for her claim a bond from the tenant, securing to her, as part of a family arrangement, a maintenance which, after enjoying for some time, she relinquished. She had also executed the bond:—Held, that even though the recitals in the bond did not operate by way of estoppel, a jury were warranted in finding that it amounted to a satisfaction of her claim to dower. *Germain* v. *Shuert*, 7 C. P. 316.

A plea setting up a conveyance by the husband to the king; and that the land afterwards, under the 7 Vict. c. 11, became vested in the principal officers of ordnance, who conveyed to the tenant:—Held, bad on demurrer, for that demandant's right was not extinguished by the conveyance to the crown, nor by the provisions of the statute. *Begley et ux.* v. *Gibson*, 19 Q. B. 458.

Plea, that demandant from the 2nd of November, 1858, had been tenant of the premises to defendant under a demise, at the rent of £15 a year, one-third of which she was to retain, and still does retain, for her dower, and the demandant accepted the same in lieu of her dower; and so the tenant averred that she assigned to demandant, and demandant accepted her said dower. To support this plea, the following instrument was put in, signed by the demandant only, not under seal: "I do hereby attorn to C. S. for (describing the land,) and I agree to become her tenant therefor at the yearly rental of £15 a year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to C. S. during her life. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months' notice previous to the end of any quarter:"—Held, that the plea was not proved, for the instrument passed no interest in the land to demandant, and could not bar the right to dower, or be treated as a satisfaction of it. *Sarsfield* v. *Sarsfield*, 22 Q. B. 59.

A plea that demandant had been in possession of the land in which dower was claimed since her husband's death:—Held, no bar, for this could not deprive her of her right to have dower assigned. *Gilkison* v. *Elliott*, 27 Q. B. 95.

A widow having by her conduct parted with her right to equitable dower in favour of her son, a subsequent creditor of hers was not entitled to have her dower set out and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it. *Cottle* v. *McHardy*, 17 Chy. 342.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighbourhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Haly* v. *Gordon*, 17 Chy. 599.

J. W. B., a widower, was locatee of the crown, and agreed with his son, J. B., to assign his interest in the land on condition of his son's making certain payments, and performing certain services for the father, which were all duly made and performed; and afterwards the patent was issued in the name of J. B., by which name the father was known to the officers of the land granting department. Meanwhile, before the issuing of the patent, the father married again. The son, during all the father's life, continued to occupy the premises, making valuable improvements, without any claim by the father except for his support under the agreement made between the father and son. After the father's death, the widow filed a bill for dower in the premises, but the court held, that even admitting that the grant of the land was to, and was by the government meant to be to, the father, that he could be treated only as a trustee for the son, and dismissed the bill with costs. *Burns* v. *Burns*, 21 Chy. 7.

III. Exchange of Lands.

A wife cannot be endowed of land given and taken in exchange, but she has her election to have one or the other. *McLellan et ux.* v. *Meggatt*, 7 Q. B. 554; *White* v. *Laing*, 2 C. P. 186.

Dower. Plea, that the husband exchanged other lands with one F. for the lands in question, and that the demandant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain and sale of the other lands was produced, executed by demandant's husband, for an expressed consideration of £600; and it was shewn clearly by parol evidence that the transaction between F. and the husband was in fact an exchange:—Held, that such evidence could not avail: that the exchange must be proved in proper technical form, and by deed: and that the demandant was therefore entitled to succeed. *Townley* v. *Smith*, 12 Q. B. 555.

Where the defence in dower rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only evidence for the defence consisted of parol statements that the husband had "traded" certain lands:—Held, not sufficient evidence to warrant a verdict for defendant. *Stafford* v. *Trueman*, 7 C. P. 41.

Plea, that during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof, they by deeds "conveyed" the lands to each other, D.'s wife barring her dower: that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C.:—Held, plea bad, as not shewing strictly an "exchange" of the lands, for the word *convey* has not the same effect; and, semble, no other word can be substituted. *Leach* v. *Dennis*, 24 Q. B. 129.

IV. Assignment of Dower.

Held, that upon the evidence in this case, the jury were justified in finding that the tenant had assigned dower before action. *Humphries* v. *Burton*, 16 Q. B. 511.

A right to dower, although not an estate, is an interest in land within C. S. U. C. c. 90; and therefore, Semble, that under that statute a woman may before assignment of dower convey her right to any person. *Miller* v. *Wiley*, 16 C. P. 529. But see *McAnnany* v. *Turnbull*, 10 Chy. 298, infra.

An assignment of dower by the sheriff must be by metes and bounds. Where two lots fronted on a river, and were therefore irregular in shape, and the sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient. *Fisher* v. *Grace*, 28 Q. B. 312.

But neither livery of seisin nor writing are necessary to an assignment: and where the tenant of the freehold, after such assignment, gave notice to demandant to make her share of the fence between those portions which had been assigned by the sheriff as her dower in the said lots and the defendant's portion:—Held, that this was evidence of an assent by him to the assignment as made, which was therefore sufficient. *Ib.*

A widow's title to dower before assignment, although not transferrable at common law, may be the subject of sale and conveyance in equity. *Rose* v. *Simmerman*, 3 Chy. 598.

A widow having married, she and her husband verbally agreed with the devisees of her first husband, that she and her husband should enjoy a certain portion of the estate during her life, in respect of her interest therein:—Held, that this was binding on all parties interested, as being an agreement not within the Statute of Frauds, and the court restrained a purchaser of portions of the estate from disturbing the dowress and her husband during her lifetime. *Leach* v. *Shaw*, 8 Chy. 494.

[See next sub-head.]

V. Sale of under Executions.

A right to dower is not salable under execution against the lands of a dowress. Till dower is assigned she has no estate in the land, nor even a right of entry; neither does her interest come within the meaning of the words, in C. S. U. C. c. 90, s. 5,) "a contingent, or executory, or a future interest, or a possibility coupled with an interest." *McAnnany* v. *Turnbull*, 10 Chy. 298.

The Court of Chancery has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower. *Cassey* v. *Cassey*, 10 Chy. 399.

The inchoate right of a married woman to dower is not salable under execution against her. *Allen* v. *The Edinburgh Life Assurance Co.*, 19 Chy. 247

VI. Actions and Suits for.

1. *Who may be Defendants.*

Semble, that where the evidence shews that the tenants in an action of dower could have assigned dower, which would be binding upon themselves, the demandants are entitled to succeed upon the issue of non tenuerunt, without any reference to the comparative goodness of the tenant's title. *McClellan et ux.* v. *Meggott et al.*, 6 Q. B. 551.

W. C. died seised in fee of the land in question, having devised the same to his wife for life, and after her death, to his son the demandant's husband, in fee. The testator's widow, the devisee for life, died before the demandant's husband, and during her life his interest was sold under a fi. fa. against lands, and conveyed to one J., who having recovered possession, sold to the tenant, who mortgaged back again to J., but continued in possession. It was not shewn whether all the mortgage money had been paid or not; but the time for payment of several of the instalments had not arrived:—Held, that the demandant could not succeed, for the tenant was not tenant of the freehold, but the mortgagee. *Cumming* v. *Ally*[illegible]e, 12 Q. B. 330.

The 13 & 14 Vict. c. 58, made no change in the persons liable to an action of dower. *Harris* v. *Stratton*, 17 Q. B. 320.

In action for dower in three lots of land, to prove that defendant was tenant of the freehold, a witness stated that he had occupied one of the lots as tenant to defendant, and about ten years ago conveyed all three lots to one H., who swore that he conveyed to defendant after having occupied as owner, and built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to defendant:—Held, sufficient evidence to go to the jury. *Fisher* v. *Harty*, 23 Q. B. 408.

Held, that the defendants, executors under the will of N. S., devising "all and every the messuages and tenements whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent," &c., took such an estate as to make them liable in an action for dower. *Low* v. *Sparks et al.*, 14 C. P. 25.

Semble, under C. S. U. C. c. 28, the tenant of the freehold can be sued only when within the jurisdiction, if out of it, then a mere occupier may be sued, but a recovery against him will not bind the right of the tenant of the freehold. *Gourlay* v. *Gourlay*, 27 Q. B. 178.

To a bill for equitable dower, the tenant in actual possession of the premises may be a proper, though not a necessary party. *McIntosh* v. *Wood*, 15 Chy. 92.

A widow entitled to dower commenced an action therefor against a tenant to whom, without express authority, the property had been leased by a receiver in a suit in this court:—Held, that she was not at liberty to proceed in such action without the leave of the court. *Coleman* v. *Glanville*, 18 Chy. 42.

2. *Pleading.*

As to the plea of alien ne and the form of the replication thereto. See *Robinet* v. *Lewis*, Dra. 44.

Where a plea states that the husband devised certain lands to the demandant in bar and satisfaction of dower, and that she agreed to the devise, it is sufficient without setting out the words of the devise. Aliter, where the devise is not in express terms in bar of dower. *Breakenridge* v. *King*, 4 O. S. 180

A plea of non tenure is not necessarily a plea in abatement, and it may be pleaded either to part or the whole of the lands demanded. *Ib.*

Non tenure to the whole cannot be pleaded with other pleas in bar. *Nolan* v. *Reid*, 1 P. R. 266.—P. C.—Draper.

A wife cannot be endowed of land given and taken in exchange, but she has her election to take one or the other. *McLellan et ux.* v. *Meggatt*, 7 Q. B. 554; *White* v. *Laing*, 2 C. P. 186.

And such election must be pleaded by a party defending in an action for dower. *White* v. *Laing*, 2 C. P. 186.

As to the form of such a plea, See *Leach* v. *Dennis*, 24 Q. B. 129.

A denial of the seisin and marriage were allowed together, but a third plea, that demandant had assigned her right, was struck out. *Street* v. *Dolsen*, 2 P. R. 306.—C. L. Chamb.—Burns.

The tenant pleaded a reference to arbitrators and an assignment by them of certain specified land, of which demandant had notice, and averred that he had always been and still was ready to abide by such assignment:—Held, on demurrer, plea bad, for not shewing that the assignment had been actually made. *McLean* v. *Horton*, 9 Q. B. 685.

Replication to a plea of ne unques accouple, that the demandant, on the 1st of May, 1790, and before suit, was accoupled to A. B. deceased, in lawful matrimony:—Held, good, without alleging when, or by whom, or by what form of religious rite the demandant was married. *Williams* v. *Lee, and Williams* v. *Vansittart*, 2 C. P. 175.

As to the form of replication to a plea of the Statute of Limitations, and to a plea of ne unques seizie, and the proper conclusion of such pleas. *Ib.*

Where in dower, after declaration filed and notice to plead served upon infant tenants, the latter neglect to plead, an order nisi may be made that unless the infants plead within a given time the demandant may assign John Doe for their guardian; which order nisi afterwards, upon an affidavit of service and affidavit that no plea filed, will be made absolute. *Robinson* v. *Blandshard et al.*, 9 L. J. 23.—C. L. Chamb.—Draper.

Defendant having allowed judgment to go by default, the court, under the circumstances of

this case, refused to allow him to plead a release by demandant, or a denial that the husband died seized as alleged in the plaint:—Held, however, that such allegation was not admitted by defendant not pleading, for it was an averment not material to the right of action, and must be proved if required to establish a claim to damages. *Scratch* v. *Jackson*, 25 Q. B. 598.

Semble, under C. S. U. C. c. 28, that averments of the service of demand, and that the husband died seized, should not be inserted in the declaration, but suggested afterwards; and being irrelevant to the right of action, if so alleged, they are not admitted by not being traversed. *S. C.* 26 Q. B. 189.

Dower. Plea, that demandant never was accoupled to the husband during the time he was seized of the said land:—Held, that the plea admitted the seisin, and denied the coverture only. *Losee* v. *Murray*, 24 Q. B. 586.

The provisions of the C. L. P. Act as to pleading double, applies to actions of dower. *Street* v. *Dolson*, 2 L. J. 208.—C. L. Chamb.—Burns.

Dower. Plea, on equitable grounds, that the land was part of the partnership property and stock in trade of the husband and S., trading together as merchants, and was purchased by them as such partners, and paid for out of their partnership moneys, and used in the said partnership business, and that the husband was never seized thereof, otherwise than as such partner:—Held, that the plea sufficiently shewed the land to have been purchased for partnership purposes, and formed a good defence.—*Conger* v. *Platt*, 25 Q. B. 277.

In a bill for dower, the plaintiff alleged that her husband was in his lifetime, at the time of his death, and also at the time of making his last will, *seised or entitled* in fee in possession; and in another part of the bill, that the husband had in his lifetime contracted for the sale of the premises, out of which the dower was sought:—Held, bad, on demurrer, it nowhere appearing that the husband had been seised during coverture, or that the contract of sale had not been entered into before marriage. *Gordon* v. *Gordon*, 10 Chy. 466.

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3. *Practice.*

(a) *Writs.*

The form of writ of summons to commence an action of dower, is now provided for by 32 Vict. c. 7, s. 4, O. For decisions as to the writ and proceedings connected therewith, under the old practice, see *Phelan* v. *Phelan*, Dra. 386; *Frazer et ux.* v. *Richardson*, 4 O. S. 391; *Bissonet et ux.* v. *Radenhurst*, M. T. 1 Vict., R. & H. Dig. 170; *Fullmer et ux.* v. *Dougan*, 1 Q. B. 402.

In dower, the summons, if served on the tenant, need not be served on the premises. *Honsburgh* v. *Fritz*, 5 O. S. 73.

A writ of assignment of dower is a writ of execution, within sec. 249 of the C. L. P. Act, and may therefore be tested when issued. *Fisher* v. *Grace*, 28 Q. B. 312.

(b) *Other Cases.*

An infant demandant may sue for dower. *Phelan* v. *Phelan*, Dra. 386.

If an infant be tenant, the parol is not allowed to demur. *Ib.*

It is irregular in dower to style the parties demandant and *respondent*, and affidavits so intituled cannot be read. *Ferguson* v. *Malone*, 1 Q. B. 519.

As to the practice and pleadings in dower, under 13 & 14 Vict. c. 58, see *Bishoprick* v. *Pearce*, 12 Q. B. 306; *Williams* v. *Rider*, 1 P. R. 41.

Particulars of the premises cannot be obtained by the tenant. *Nolan* v. *Cherry*, 1 P. R. 277.—P. C.—Draper.

In an action of dower, judgment was given in favour of the tenant in June, 1856. In August, the tenant died, and the entry of judgment was delayed by the difficulty in procuring the affidavit of disbursements, &c. The demandant brought another action against the heirs of the tenant for dower in the same land, and in April, 1857, an application was made to allow the judgment given in June to be entered nunc pro tunc:—Held, too late. *Stafford* v. *Trueman*, 2 P. R. 154; 3 L. J. 114.—C. L. Chamb.—Robinson.

Quære, as to the right to sign judgment by default on a suggestion of demand and refusal of dower. Under 24 Vict. c. 40, c. 18, a notice of action was necessary in all cases, but the want of it must be specially pleaded. *White* v. *Grimshawe*, 23 Q. B. 75.

The plaintiff in dower having served a demand on defendant, the tenant of the freehold residing in Scotland, served the declaration and notice to plead on the tenants in possession of the land, and on this entered judgment by nil dicit against the defendant for seisin and costs, and issued execution. The sheriff delivered possession according to the report of the commissioners appointed, under 24 Vict. c. 40; and their fees, including the charge of the surveyor employed by them, amounted to $266. An order was afterwards made to refer this charge to taxation, on a summons calling on the sheriff and the commissioners and surveyor, but not on the plaintiff:—Held, that the judgment was irregular, and must be set aside; for service of the declaration on the tenants of the land could not enure as a service on the defendant, the tenant of the freehold. *Gourlay* v. *Gourlay*, 27 Q. B. 178.

Quære, as to the defendant's right to sign judgment by default for the costs; but assuming such judgment to be valid:—Held, that the costs of the commissioners, under 24 Vict. c. 40, would be recoverable against defendant. Held, also, that the order to refer such costs could not be sustained, for defendant should have been a party to the summons. *Ib.*

For other cases under the practice before 13 & 14 Vict. c. 58, see *Robinet* v. *Lewis*, Dra. 44; *Henderson* v. *Stephens*, 2 Q. B. 64; *Amiot* v. *Woodcock*, 2 Q. B. 119; *Cox* v. *Hand*, 4 Q. B. 281.

The plaintiff claimed dower. A decree was made less extensive than she claimed. The master made his report in pursuance of the decree. The solicitor on the same day signed a consent to a decree on further directions being made in certain terms stated in the consent. These terms were in accordance with the decree

and report. They provided, also, that in lieu of dower the plaintiff should be paid a certain annual sum named. The decree was not drawn up, but the agreement which it embodied was acted on for eight years:—Held, that the plaintiff was bound by it, and that she could obtain no relief on the ground that the original decree should have been more favourable to her. *Sills* v. *Lang*, 17 Chy. 691.

A widow entitled to dower commenced an action therefor against a tenant, to whom, without express authority, the property had been leased by a receiver in a suit in this court:—Held, that she was not at liberty to proceed in such action without the leave of the court. *Coleman* v. *Glanville*, 18 Chy. 42.

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4. *Evidence.*

(a) *Of Marriage.*

Evidence of cohabitation and reputation of marriage will be sufficient in dower; it is not necessary to prove the marriage by persons who were present at the ceremony. *Stoner* v. *Walton*, 6 O. S. 190; *Phipps* v. *Moore*, 5 Q. B. 16; *Graham et ux.* v. *Law*, 6 C. P. 310; *Beatty* v. *Beatty*, 17 C. P. 484; *Losee* v. *Murray*, 24 Q. B. 586.

But where the demandant relied upon such evidence of a marriage said to have taken place in the United States, and failed, the court, under the circumstances of this case, refused a new trial. *Street* v. *Dolsen*, 14 Q. B. 537.

And where the demandant relied upon such evidence of an alleged marriage in Ireland many years previous, and there was a second verdict for the defendant, the court refused to interfere. *Lynch* v. *O'Hara*, 6 C. P. 259, 268–9.

In this case, irrespective of general reputation, there was evidence that defendant had told a third party he was to give demandant's husband (his brother), $100 to bring out his wife and children from Scotland, who was to execute to him in return a deed of the land in question. Defendant afterwards said he had received the deed, and that the wife would bar her dower on her arrival here. On her arrival, defendant received her into his house as his brother's wife, and recognized her as such until his brother's death:—Held, good primâ facie evidence of marriage. Semble, that the recognition of demandant as his brother's wife would alone have been sufficient primâ facie evidence of their marriage, as against defendant in this action. *Beatty* v. *Beatty*, 17 C. P. 484.

A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of registry of marriage from the parish registry in Ireland:—Held, sufficient evidence of marriage against infant defendants; the adult infants by their answer admitting the marriage. *Craig* v. *Templeton*, 8 Chy. 483.

(b) *Of Seizin.*

Under the plea of ne unques seizie, possession by the husband is primâ facie evidence of a seizin in fee. *Lockman* v. *Nease*, 5 O. S. 505.

But in this case it was held that merely giving evidence that the husband had been in possession of the estate, without proving his title, was insufficient. *Johnson* v. *McGill*, 6 Q. B. 194.

Held, that the evidence stated in this case was insufficient to establish the husband's seisin; but on the affidavit filed the court granted a new trial on payment of costs. *Wannarott* v. *Fillater*, 11 Q. B. 49.

It was proved that the tenant held under a conveyance made to the husband, and by the husband to another party. He admitted that he had both these deeds in his possession, and declined to produce them on notice:—Held, ample evidence of seisin. *Matheson* v. *Mulloch*, 13 Q. B. 354.

In dower, by the widow of M., it appeared that a patent for the land issued to one K., and a witness proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents given. It was proved, however, that B., from whom defendants purchased, derived title through P., who had held a bond for a deed from the patentee, and that P., before he sold to B., took a quit claim from M. of all his interest in the land, executed by M. only, in which it was stated that the land was devised by will to the said M. by K., the original grantee of the crown:—Held, that no estoppel arose upon this deed, and that there was no proof of seizin in M. *Minaker* v. *Hawkins*, *Minaker* v. *Ashe*, 20 Q. B. 20.

Dower. Pleas, 1. Ne unques seizie; 2. Ne unques accouple; 3. That demandant and her husband were both aliens born, and not naturalized before he sold. The loss of most of the deeds affecting the title was proved, (or rather presumed) from the burning of the house of the owner in fee, and a deed was proved to the demandant's husband and brother as joint tenants by production of a memorial from the registry office and the death of the demandant's husband before his brother, and co-joint tenant, was also proved. Upon a motion to enter a nonsuit:—Held, that the demandant could not, without specially replying it, rely upon the tenant being estopped, by taking a conveyance from her husband after marriage, from shewing that the seisin of the demandant's husband was as joint tenant with his brother, and that he died first; 2. That secondary evidence of the loss of the deeds was admissible. *Haskill* v. *Fraser*, 12 C. P. 383.

In an action for dower in the west half of a lot, the husband's seisin being denied, it was proved that upwards of sixty years ago his father, whose title was not shewn, died in possession, leaving the husband, his eldest son and heir-at-law. He married demandant forty-five years ago, and moved on to the east half about 1814. His brother, who had always lived with him and the mother on the west half, remained there, but knew that the husband claimed it until his death, eight years before the trial:—Held, sufficient to support a verdict for demandant, for the husband's seisin by descent from his father was in full force when he married, and if afterwards his brother had obtained a title by possession, that could not affect demandant's right. *McDonald* v. *McMillan*, 23 Q. B. 302.

The evidence of seisin was defendant's declaration to a third party that the husband was to convey the land in question to him, and his

subsequent declaration that he had conveyed to him in fee, together with a memorial of this conveyance executed by the defendant. The husband had been also on and off the land before the conveyance :—Held, sufficient. *Beatty* v. *Beatty*, 17 C. P. 484.

(c) *Other Cases.*

Semble, that where the evidence shews that the tenants in an action of dower could have assigned dower, which would be binding upon themselves, the demandants are entitled to succeed upon the issue of non tenuerunt, without any reference to the comparative goodness of their title. *McClellan et ux.* v. *Meggott et al.*, 6 Q. B. 551.

In an action for dower by husband and wife, the wife is a competent witness. *Cadman et ux.* v. *Strong*, 10 Q. B. 591.

A tenant in dower is not compellable to give evidence of the contents of the title deeds, &c., under which he claims. *Lynch* v. *O'Hara*, 6 C. P. 259.

Held, in an action of dower, that the production of an abstract of the registries upon a lot, shewing the granting by the crown of a patent, was not sufficient evidence of the patent without the production of an exemplification. Quære, is an abstract receivable in evidence at all if objected to? But under the facts stated in the case, the court refused to set aside a verdict for demandant. *Reed et ux.* v. *Ranks*, 10 C. P. 202.

In an action of dower, the tenant relied upon a release by the demandant and her husband to C., from whom the tenant had afterwards purchased the land. This release was executed by the demandant by mark, her name being written by some one else, and the tenant was the only subscribing witness :—Held, that proof of the tenant's signature was not rendered admissible to prove the deed by the fact of his being a party to the record ; and that as he could not be examined on his own behalf, and offered no other evidence that the demandant executed the release, the demandant must succeed. Hagarty, J., dissenting. *Clark* v. *Stevenson*, 23 Q. B. 525.

5. *Damages and Costs.*

(a) *When Recoverable.*

A suggestion might be entered after final judgment that the husband died seised, and an inquiry had concerning the damages since the death, although the tenant was the alienee of the heir. *Robinet* v. *Lewis*, Dra. 228.

In dower neither damages nor costs can be recovered when the husband did not die seised. *Dayton* v. *Auldjo*, 6 O. S. 143 ; *Lockman* v. *Nesse*, 5 O. S. 505 : *Walker* v. *Boulton*, 6 O. S. 553.

The rule is the same in equity. *Losee* v. *Armstrong*, 11 Chy. 517.

A writ of execution for damages and costs was set aside, damages being neither claimed on the record nor awarded in the judgment. *Davis* v. *M'Nab*, 6 O. S. 157.

Where the husband dies seised, unless the tenant pleads tout temps prist the demandant may recover damages without setting forth or shewing a demand. *Empey* v. *Loucks*, 8 Q. B. 374.

Action for dower—no suggestion on the record that the husband died seised. Pleas, 1. That the tenant is, and always has been, ready to render dower ; 2. Tout temps prist, and a tender of dower and refusal before action brought. Replication to first plea, praying judgment of demandant's dower to be assigned to her ; to second plea, a demand and refusal by tenant—the rejoinder to which was demurred to :—Held, that upon this record there could be no assessment of damages. *Hawkshaw* v. *Hodgins*, 11 Q. B. 71.

In dower, where a demand is averred in the declaration, and judgment allowed to go by default, costs may be recovered. *Harris* v. *Morden*, 17 Q. B. 278 ; *Street* v. *Rowe*, 8 C. P. 213.

A judgment for seisin of dower, under sec. 16 of 32 Vict. c. 7, O., is final, and there is no provision in such a case entitling a demandant to any damages, nor any proceeding provided for ascertaining any such damages. The Statute of Merton remarked upon and distinguished. *Linfoot* v. *Duncombe*, 21 C. P. 484.

If the bill is simply for dower, and the title is admitted, no costs will be given, but when the defendant makes an unreasonable defence and fails, he will be made to pay costs. *Craig* v. *Templeton*, 8 Chy. 483.

Where a widow insisted on her right to dower as well as to the bequests made by the will, the court allowed her her costs, although unsuccessful in such contention ; the question having arisen from the terms of the will, and dower not having been in terms excluded, but having been held to be excluded on extrinsic evidence. *Becker* v. *Hammond*, 12 Chy. 485.

Where the annual value of a widow's dower was not large, and she made no demand for it, but resided on the property with her son, the heir, during his life, having no intention of claiming dower, a claim for arrears against his estate after his death was refused. *Phillips* v. *Zimmerman*, 18 Chy. 224.

The mere fact, that at the death of, or alienation by, the husband his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages, if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or vendee ; as in such a case a portion of the rent is attributable to the land. *Wallace* v. *Moore*, 18 Chy. 560.

Plea, tout temps prist. There was no averment that the husband died seised and no damages claimed, but the jury found for the plaintiff and 1s. damages :—Held, that the damages must be struck out. *Humphries* v. *Barnett*, 16 Q. B. 463.

See *Gourlay* v. *Gourlay*, 27 Q. B. 178, p. 114.

(b) *Demand and offer to assign under 13 & 14 Vict. c. 58, and C. S. U. C. c. 28.*

The tenant pleaded tout temps prist. The demandant replied, denying the tenant's readiness to assign, and averring a demand under 13 & 14 Vict. c. 58, and a refusal. The tenant traversed

the refusal. It appeared that after receiving the demand the tenant gave a written notice to demandant that he was willing to assign her dower. In pursuance of this notice, the tenant and the demandant's second husband met on the ground, and the tenant then offered what he considered a third, and put up pickets to mark the boundary. The husband, however, refused this, and would not say what particular portion the demandant wanted or would take. The parties then separated, and the action was brought:—Held, that the offer proved was sufficient, and that a verdict was rightly found for the tenant. *Bishoprick et ux.* v. *Pearce*, 12 Q. B. 306.

Draper, J., considered that the 13 & 14 Vict. c. 58, was not intended to interfere with any right to costs existing under the old practice, or to require a demand where demandant would before have been entitled to costs without it: that the plea of tout temps prist admitted a right to damages from the commencement of the suit to the issuing, if not to the execution, of the writ of enquiry, without any suggestion that the husband died seised; and that on the pleadings, therefore, in the sale, the demandant might strictly have recovered such damage and consequently the costs; but as this was not insisted on at the trial, and the verdict was just, he concurred in refusing to interfere. *Ib.* See *White* v. *Grimshawe*, 23 Q. B. 75.

There was no suggestion in the declaration that the husband died seised, and no claim for damages. The tenant pleaded tout temps prist. Replication, a demand and refusal. Rejoinder, taking issue on the refusal. It was proved that after demand served on the tenant, under 13 & 14 Vict. c. 58, s. 5, he went to demandant's attorney, and said that he was ready and willing to assign dower whenever she would come for it, to which the attorney replied that the tenant must take his own course. The jury found for demandant and 1s. damages; and a rule having been obtained for a new trial, Held, per Draper, J., and Burns, J., that such rule should be discharged. Per Draper, J., that by pleading tout temps prist the tenant had admitted a right to damages, at least from bringing the action, which would carry costs. Per Burns, J., that the offer proved was insufficient, and in effect amounted to a refusal, and the demandant should therefore have costs; but that there could be no damages, as the husband was not proved to have died seised. Robinson, C. J., dissenting, on the ground that the evidence shewed no such refusal as could do away with the effect of the offer proved, and that the offer was sufficient under the statute to exempt the tenant from costs. *Quin* v. *McKibbin*, 12 Q. B. 323.

The tenant having allowed judgment to go by default, demandant entered a suggestion of demand made before action brought, to which the tenant made no answer, and a venire was awarded, on which the jury found that such demand was made:—Held, that this was a trial, within sec. 5, of 13 & 14 Vict. c. 58, and therefore that demandant was entitled to costs. *Anderson* v. *Morriott*, 14 Q. B. 161.

Plea, tout temps prist. Replication, a demand and refusal. Rejoinder, denying the refusal. There was no suggestion that the husband died seised. The evidence shewed that the tenant had frequently offered the demandant her dower, and to leave it to two persons to stake out the land, but she declined, saying that she could not work the land, and would rather have compensation, and no portion was in fact marked out:—Held, that the issue must be found for the tenant. As the husband did in fact die seised, Semble, per Burns, J., that that should have been suggested on the record, and the tenant would then have been entitled to damages from the suing out of the writ, and consequently to costs. *Ryckman* v. *Ryckman*, 15 Q. B. 266.

Where nothing appears on the record to shew that a demand of dower was served, Semble, that the master cannot tax costs; and, Quære, as to the proper mode of shewing that a service of demand was "made appear on the trial" so as to entitle demandant to costs under 13 & 14 Vict. c. 58, s. 5. *Humphries* v. *Barnett*, 16 Q. B. 463.

In dower, where a demand is averred in the declaration, and judgment allowed to go by default, costs may be recovered. *Harris* v. *Morden*, 17 Q. B. 278; *Street* v. *Rowe*, 8 C. P. 213.

To an action of dower, alleging a demand made pursuant to the statute, C. S. U. C. c. 28, the tenants pleaded tout temps prist. Demandant replied that she requested her dower more than one month and less than one year before action, but that the tenants did not endow her; and that the judgment for the said damages and endowment shall wait till the said issue is tried. The tenants joined issue. The evidence proved a demand, and that the tenants said demandant might have her dower, but did nothing:—Held, that an issue was sufficiently formed upon the record, and that upon the evidence demandant was entitled to a verdict, and to costs. *Reid* v. *Foster et al.*, 19 Q. B. 298.

Demandant sued for dower as widow of J., alleging in her declaration that J., died seised, claiming damages from his death, and averring service of a demand of dower. There was no plea, and the demandant went down to assess damages:—Held, that the tenant had clearly a right to shew that J., had parted with his estate, and therefore did not die seised, though he could not dispute his seisin during coverture. The tenant proved a deed made in 1831, of the land in question, by J, to the tenant; and in reply the demandant proved another deed made in 1834, by J. to his father, to which the tenant was a subscribing witness:—Held, that as either deed shewed the estate out of J. during his lifetime, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event, as J. could not set up the second deed to avoid the first, having made both, neither could the demandant, who claimed through him. As J. therefore did not die seised, it was held that demandant could have only nominal damages, from the time of the demand; but that she was entitled to such damages, and the tenant was not entitled to the costs of the assessment. Semble, that a demandant failing in the action is liable to costs. *Scratch* v. *Jackson*, 26 Q. B. 189.

Quære, when the tenant does not plead, so that there is no trial, whether the right to costs cannot be shewn by producing the demand and

affidavit of service before the master on taxation. *Scratch* v. *Jackson*, 26 Q. B. 189.

Semble, under C. S. U. C. c. 28, that averments of the service of demand, and that the husband died seised, should not be inserted in the declaration, but suggested afterwards; and being irrelevant to the right of action, if so alleged, they are not admitted by not being traversed. *Ib.*

Judgment was signed in default of plea to a declaration which averred a demand of dower one month before action, and that the action was brought in less than one year from such demand: but no affidavit of service of the demand was produced to the master on taxation. An offer to assign dower was made before action brought: Held, that the demandant was entitled to costs, and that the judgment was regular. *Gilleland* v. *Reid*, 5 P. R. 96.—C. L. Chamb.—Gwynne.

Semble, The declaration is a proper, though perhaps not the necessary place, for averring the necessary demand of dower, under C. S. U. C. c. 28, and where it does contain it the averment is admitted by a judgment by default. *Ib.*

Demandant averred that her husband did not die seised, and a demand pursuant to the act, and that the tenant had been during six years next before the action in occupation and receipt of the rents and profits, of the yearly value of £15: and she claimed her dower, with the profits accrued since her husband's death, and damages for the detention. The tenant pleaded that he had always been ready and willing to render dower, and before this suit, and within a month after the demand, offered it to demandant, which she refused; to which the demandant replied that he had not always been ready and willing, &c., for he did not render to demandant her dower as alleged, but refused so to do. At the trial it appeared that the tenant served a written notice, naming a day and hour to meet demandant on the land and assign her dower, and attended accordingly, but demandant having mistaken the day appointed did not attend, and the tenant in consequence refused to do anything more:—Held, that on this evidence the tenant was clearly not entitled to succeed on the issue, and a verdict having been found in his favour a new trial was granted. Semble, that the demandant, having treated the plea as offered in bar of damages and costs only, should have signed judgment at once to recover seisin. Quære, as to the propriety and effect of an averment that the husband did not die seised, added to a claim of damages, the right to which, since the C. S. U. C. c. 28, well as before, depends on such seisin. *Cook* v. *Philips*, 23 Q. B. 69.

Dower. Plea, tout temps prist, on which demandant signed judgment for her dower. She then entered a suggestion of demand and refusal, praying damages for the detention, on which she signed judgment by default, and assessed damages at the assizes:—Held, that such assessment was irregular, for there being no averment that the husband died seised, no damages could be recovered, notwithstanding the plea. Bishoprick *v.* Pearce, 12 Q. B. 316, commented upon. *White* v. *Grimshawe*, 23 Q. B. 75.

The offer to assign dower required by C. S. U. C. c. 28, s. 7, to deprive demandant of costs, is proved by a bonâ fide offer, shewing a concession of demandant's right, and a readiness to do what is requisite to render it; it is not necessary that the land should be staked out or assigned. The issue being upon such offer, it appeared that a demand having been made under the statute, the tenant served a notice on demandant admitting her right, and appointing a day on which he would be upon the land to assign her dower. On that day no one appeared, but on the next day demandant's son and another person sent by her came, and the tenant pointed out to them a cleared field, which he said he would give, with one-third of the bush land. This was not accepted, nor did they tell the tenant what they required:—Held, that the evidence was sufficient to go to the jury, and the court refused to disturb a verdict for tenant. Remarks upon the uncertainty of the present law as to dower. *Bigger* v. *Howie*, 23 Q. B. 399.

(c) *How Estimated.*

The mode of estimating damages for the detention of dower is now provided for by 32 Vict. c. 7, s. 21, O. See *Norton* v. *Smith*, 20 Q. B. 213, affirmed in appeal, 7 L. J. 263; *Buck* v. *McCallum*, 13 C. P. 163.

Demandant's residence on the premises, in the family and at the expense of the heir-at-law, for part of the time between the death of her husband and her recovering judgment, is not admissible in evidence as a set-off to her damages for the detention, though proper to go to the jury in mitigation. *Robinet* v. *Lewis*, Dra. 260.

In case of a sale of land, a widow is not entitled, as compensation for her dower, to the present value of one-third of the interest in the purchase money; the value is to be computed with reference to the nature of the property. *Stewart* v. *Hunter*, 2 Chy. Chamb. 336.—Mowat.

In case of land of which a widow is dowable, but in which her dower has not been set out, if the timber is cut down she is entitled to the income arising from one-third of the amount produced. *Farley* v. *Starling*, 18 Chy. 378.

In such a case the widow had reason to apprehend that the owner intended to fell the whole of the wood; it was shewn that in fact he had no such intention; but he had an opportunity of undeceiving her, and did not avail himself of it:—Held, that proof that he had not the intention imputed to him did not exempt him from liability to the costs. *Ib.*

The mere fact, that at the death of or alienation by the husband his lands were of no rentable value, is not alone sufficient to disentitle the widow to damages, if the land has been subsequently made rentable by reason of improvements or otherwise, either by the heir or vendee: as in such a case a portion of the rent is attributable to the land. *Wallace* v. *Moore*, 18 Chy. 360.

(d) *Other Cases.*

Motion to increase damages refused where not made until the second term after the trial. *Watson* v. *Terwilleger*, 1 Q. B. 21.

Security for costs may be obtained in dower. *Nolan* v. *Reid*, 1 P. R. 264.—C. L. Chamb.—Burns.

VII. Rights of Purchasers where there is Outstanding Dower.

Where a party agrees to convey property, he is bound to do so free from dower; or if the wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money. *Kendrew* v. *Shewan*, 4 Chy. 578.

Although at law the right to dower is, during the life of the vendor, a nominal incumbrance only, the purchaser has a right in equity to compel its removal, or to have specific performance of the contract, with an abatement in the amount of the purchase money in respect of such incumbrance. *Van Norman* v. *Beaupre*, 5 Chy. 599.

The court refused to enforce a contract for the sale of land, which was subject to an outstanding claim for dower, until the title to dower was removed. Chantler *v.* Ince, 7 Chy. 432, observed upon, Thompson *v.* Brunskill, *Ib.* 542, approved of. *Gamble* v. *Gummerson*, 9 Chy. 193.

An application by a purchaser in a suit for specific performance for abatement of purchase money, on the ground of outstanding dower, should be made in court and not in chambers. *Jones* v. *Graham*, 1 Chy. Chamb. 212.—Spragge.

VIII. Miscellaneous Cases.

The Dower Act 32 Vict. c. 7, s. 3, O., is retrospective. *Re Tate*, 5 L. J. N. S. 260.—Chy.

The defendant in an action of dower pleaded ne unques seizie que dower, and after trial and verdict against him remembered that a bond had been executed by himself and the demandant several years before, providing for the release of the dower in question, which bond had remained in the hands of a third party, and had not been produced at the trial. The court granted a new trial on payment of costs, with leave to add a plea. *Germain et ux* v. *Shuart*, 7 C. P. 86.

A widow's title to dower before assignment, although not transferable at common law, may be the subject of sale and conveyance in equity. *Rose* v. *Simmerman*, 3 Chy. 598.

In an administration suit, the testator's widow agreed that the real estate should be sold free from her dower, and the master by his report approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price. The widow therefore petitioned for payment of a small sum towards the allowance that might be made to her in lieu of dower. The creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed. *In re Thompson, Bigger* v. *Dickson*, 1 Chy. Chamb. 323.—Mowat.

Where a widow is made a defendant as being entitled to dower, it is not sufficient for the bill to allege that the husband died leaving her his widow; the bill should further expressly aver that she is entitled to dower, and that she claims to be so entitled. *Martin* v. *McGlashan*, 15 Chy. 485.

The Court of Chancery has jurisdiction in a suit, as well as on petition, to decree a sale of an inchoate right of dower. *Cassey* v. *Cassey*, 15 Chy. 399.

The defendants, executors of Z., gave the Bank of Upper Canada, on the 20th April, 1858, a confession of judgment for £217,637 9s., in which sum the estate of Z. was at that time indebted, and judgment thereon was entered on the following day. This action was brought to test the validity of the judgment, the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared that defendants being trustees of the real estate of Z. as well as his executors, had allowed out of the personalty to the widow of Z. $60,000, to obtain a release of her right to dower in his, Z.'s, lands. The plaintiffs contended that under the plea of plene administravit vel non, they were entitled to judgment to this amount:—Held, that the application of the personalty of the estate to obtain a release of dower in lands was a devastavit and a misapplication of the money, of which the Bank of Upper Canada being interested in the estate had the right to complain. This amount however, was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts:—Held, that the verdict should be entered for the defendants, the plaintiffs being allowed to take judgment of assets quando. *The Commercial Bank* v. *Woodruff et al.*, 13 C. P. 621; 14 C. P. 22.

DRAIN.

See Water and Water-Courses.

DRIVING.

1. Negligent Driving—*See* Negligence.

DRUNKENNESS

1. Undue Influence with Inebriates—*See* Fraud and Misrepresentation.

[*See 27 & 28 Vict. c. 18 s. 40, et seq.*]

When a waggon is left standing in the highway, the owner cannot exempt himself from liability by shewing that the person injured thereby was drunk at the time of the accident. *Ridley* v. *Lamb*, 10 Q. B. 354.

Held, that a regulation in a municipal by-law to the effect that no innkeeper shall sell intoxicating drink to any habitual drunkard, after being forbidden so to do by any relation or friend of such drunkard, was beyond the jurisdiction of the municipality. *In re Barclay* v. *The Municipality of the Township of Darlington*, 12 Q. B. 86.

But an enactment that tavern keepers should not give or sell liquors to any person in a state of intoxication, was held good. *In re Greystock* v. *The Municipality of Otonabee*, 12 Q. B. 468.

Death by "accident caused by intoxication," meaning of. See *Bobier* v. *Clay*, 27 Q. B. 438.

A person was convicted of being drunk on a public street, contrary to law, and adjudged to pay a fine of $50 and costs, or to be imprisoned for six months at hard labour. There was power given by by-law 478 of the city of Toronto, to imprison an offender for the above offence, but in the warrant of commitment no reference whatever was made to the by-law:—Held, that there is no common law right to imprison any one for being drunk on a public street, and that the by-law not having been referred to, the conviction was bad. *In re Livingstone*, 6 P. R. 17.—C. L. Chamb.—Hagarty.

A person cannot legally be arrested for drunkenness in his own house, even at the request of his own family, unless he is creating a disturbance of the peace. *Regina* v. *Blakeley*, 6 P. R. 244.—C. L. Chamb.—Galt.

DUPLICITY.

See PLEADING AT LAW.

Duplicity in an indictment on a summary trial before the county judge, under 32 & 33 Vict. c. 35, is not a ground of error. *Cornwall* v. *Regina*, 33 Q. B. 105.

DURESS.

Where in trover it was apparent that the goods for which the action was brought, were transferred by the plaintiff to defendant when under duress, and the jury found a verdict for defendant against the justice of the case, the court granted a new trial. *Stewart* v. *Byrne*, 6 O. S. 146.

A party having been arrested on a charge of obtaining money under false pretenses, agreed, in presence of the magistrates who had issued the warrant, to execute a mortgage on his farm to secure the amount, whereupon he was discharged, and he, with the complainant, went and gave instructions for the conveyance, which he subsequently executed. The court, under the circumstances, refused to set aside the mortgage as obtained by duress, but as the conduct of the defendant had been harsh and oppressive, dismissed the bill without costs. *Boddy* v. *Finley*, 9 Chy. 162.

DUTIES.

See REVENUE.

DYING DECLARATION.

See CRIMINAL LAW.

EASEMENT.

I. AIR—*See* AIR.

II. LIGHTS AND WINDOWS—*See* LIGHTS.

III. WATER—*See* WATER AND WATER COURSES.

IV. RIGHT OF WAY—*See* WAY.

V. DEDICATION OF—*See* DEDICATION.

An easement can only be granted by deed, and if given by parol, may be revoked at any time. *Cryder* v. *Creighton*, E. T. 2 Vict.

Held, that twenty years user will legitimate an easement affecting private property, but not a nuisance. *Regina* v. *Brewster et al.*, 8 C. P. 208.

The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the front room having a chimney, but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stovepipe through a hole in the partition between his and the south part, and thence into the chimney in that part. The owner subsequently leased the south part to defendant, who at the time he became tenant was aware of the existence of the stovepipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff on coming in put up a pipe of his own, with the consent of, or at least without any objection by, defendant. The defendant having afterwards taken down the pipe and stopped up the hole:—Held, that he was a wrong-doer in so doing, for that he only held the south part subject to the user or easement of the plaintiff of the stovepipe and hole. *Culverwell* v. *Lockington*, 24 C. P. 611.

The nature of the enjoyment of an easement, at the time of the grant, is the proper measure of enjoyment during the continuance of the grant. *Heward* v. *Jackson*, 21 Chy. 263.

ECCLESIASTICAL CORPORATIONS

See CHURCHES.

EJECTMENT.

I. FOR WHAT IT LIES.

1. *Generally*, 1158.
2. *Trial of Questions of Boundary*—*See* BOUNDARY.

II. PLAINTIFF'S TITLE.

1. *Possessory Title*, 1159.
2. *Outstanding Mortgages, or Title in Strangers*, 1160.
3. *Demand of Possession and Notice to Quit.*
   (a) *Vendor and Purchaser*, 1162.
   (b) *Landlord and Tenant*, 1164.
   (c) *Mortgagor and Mortgagee*—*See p.* 1174.
   (d) *Sufficiency of*, 1166.
   (e) *Other Cases*, 1166.
4. *Other Cases*, 1167.
5. *Evidence of Title.*
   (a) *Claiming by Different Titles*, 1170.
   (b) *Setting up Different Defences*, 1171.
   (c) *Offer by Defendant to Purchase*, 1171.

(d) *Other Cases*, 1172.
(e) *Of Pedigree—See* EVIDENCE.
(f) *By Claimant under Sheriff's Deed —See* EXECUTION.

III. BY PARTICULAR PERSONS.
1. *Joint Tenants and Tenants in Common*, 1173.
2. *Husband and Wife*, 1174.
3. *Mortgagor and Mortgagee*, 1174.
4. *By and Against Infants—See* INFANTS.
5. *Landlord and Tenant—See* LANDLORD AND TENANT.

IV. PRACTICAL PROCEDURE.
1. *Parties*,
(a) *Generally*, 1177.
(b) *Adding and Striking out Parties—See p.* 1199.
2. *Writ of Summons.*
(a) *Service of*, 1179.
(b) *Other Cases*, 1180.
3. *Notice of Title.*
(a) *Form of, and Practice*, 1180.
(b) *By Plaintiff*, 1180.
(c) *By Defendant*, 1182.
(d) *Particulars of Title*, 1184.
(e) *Amendment of—See p.* 1200.
4. *Notice Limiting Defence*, 1184.
5. *Equitable Defences*, 1185.
6. *Notice to Defendant to shew Title*, 1186.
7. *Declaration.*
(a) *Form and Service of*, 1187.
(b) *Affidavit of Service*, 1187.
(c) *Venue*, 1188.
8. *Notice to appear*, 1188.
9. *Appearance and Defence.*
(a) *Within what Time*, 1189.
(b) *By Landlord*, 1189.
(c) *By other Persons not named in the Writ*, 1191.
(d) *Other Cases*, 1192.
10. *Consent Rule*, 1193.
11. *Nonsuit for not Confessing Lease, Entry, and Ouster*, 1193.
12. *Rule for Judgment*, 1193.
13. *Judgment for Default of Appearance or Defence*, 1193.
14. *Interrogating Plaintiff or Defendant*, 1194.
15. *Death of Plaintiff or Defendant*, 1194.
16. *Trial, Verdict, and Judgment*, 1195.
17. *Execution.*
(a) *Generally*, 1197.
(b) *Restitution, and Attachment for Resuming Possession*, 1198.
18. *Amendment of Proceedings.*
(a) *By Adding and Striking out Parties*, 1199.
(b) *Of Notice of Title*, 1200.
(c) *Of Record at Nisi Prius*, 1201.
(d) *Of Consent Rule—See p.* 1193.
(e) *Other Cases*, 1202.
19. *Other Cases relating to Practice*, 1202.

V. STAYING PROCEEDINGS.
1. *By Injunction*, 1203.
2. *In Ejectment by Mortgagees under 7 Geo. II. c. 20, now C. S. U. C. c. 27, s. 74*, 1204.
3. *Other Cases*, 1205.

VI. COSTS.
1. *On Judgment by Default*, 1205.
2. *Security for Costs*, 1206.
3. *Staying Proceedings until Costs of Previous Actions are Paid*, 1206.
4. *Attachment for Non-payment of Costs*, 1207.
5. *Other Cases*, 1208.

VII. EFFECT OF JUDGMENT IN EJECTMENT, 1208.

VIII. MESNE PROFITS.
1. *Pleading*, 1212.
2. *Evidence*, 1213.
3. *Damages*, 1213.
4. *Other Cases*, 1213.

IX. MISCELLANEOUS CASES, 1214.

X. BY LAND OWNERS AGAINST RAILWAY COMPANIES—*See* RAILWAYS AND RAILWAY COMPANIES.

XI. OVERHOLDING TENANTS—*See* LANDLORD AND TENANT.

XII. RIGHT OF POSSESSION UNDER CONTRACT TO PURCHASE—*See* SALE OF LAND.

XIII. NEW TRIAL IN—*See* NEW TRIAL.

I. FOR WHAT IT LIES.

1. *Generally.*

Plaintiff brought ejectment against defendant after he had quitted possession. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial:—Held, that the bringing an action under the circumstances was unnecessary, but that defendant should have applied to the court to set aside the writ, instead of appearing to it; and both parties being wrong, the proceedings were set aside without costs. *Harper* v. *Lowndes*, 15 Q. B. 430.

Held, that the sale of a road owned by a company under the Road Company's Act, C. S. U. C. c. 49, by a sheriff under a fi. fa. lands, is a valid sale, and a conveyance made by him to the purchaser is sufficient to enable the vendee to bring ejectment. *Totten* v. *Halligan*, 13 C. P. 567.

Held, that the plaintiff, a member of the church of England, could not maintain ejectment for pews in St. James's church held by him, because he was not entitled to the exclusive possession of them, his possession being limited to the special purpose of attending divine service, at which time alone he had the right to enter; and because such right was of an incorporeal

nature, and possession of it could not be given by the sheriff. *Ridout* v. *Harris*, 17 C. P. 88.

In ejectment it appeared that the land in question had been surveyed by the government, and laid out as streets in 1852, in their plan filed in the registry office; and that the plaintiffs had afterwards been incorporated as a town including these streets within their limits. Per McLean, J.—The land was vested in the plaintiffs. Per Burns, J.—The freehold remained in the crown; but, Held, that the plaintiffs at all events could not maintain ejectment, the land being a public highway. *The Corporation of the Town of Sarnia* v. *The Great Western R Co.*, 21 Q. B. 59.

II. PLAINTIFF'S TITLE.

1. *Possessory Title.*

Possession from which seisin may be inferred must be actual or visible, not constructive. *Doe* d. *Morgan* v. *Simpson*, 5 O. S. 555.

A. in 1842 conveyed to B.'s son, then a minor. The deed was never registered. B. swore that he bought the land from A., but being in difficulty had the deed made to his son, and that he had always continued in possession; but on this point the evidence was contradictory. A.'s heir in 1849, made a deed of release to B., and B. conveyed to the lessors of the plaintiff; both these deeds were registered:—Held, that the mere fact of B. being in possession when he conveyed to the lessors of the plaintiff could not be relied on as primâ facie evidence of seisin, after A. had been shewn to have been in possession previously, and to have conveyed to B.'s son. *Doe* d. *Prince et al.* v. *Girty*, 9 Q. B. 41.

Where a plaintiff in ejectment recovers land of which he has been for twenty years dispossessed, and is put into possession by the sheriff, the defendant is not precluded from trying the right again, and relying in an action brought by him upon his title acquired by the twenty years' possession. *Moran* v. *Jessup*, 15 Q. B. 612.

In ejectment against two, the plaintiffs proved a mortgage in fee made by one while in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how:—Held, sufficient, primâ facie, to entitle the plaintiffs to a verdict against both. *Eccles et al.* v. *Paterson et al.*, 22 Q. B. 167.

In ejectment for 100 acres, the east half of lot 23, the plaintiff claimed under a mortgage executed by F. in 1847, and assigned by the executors of the mortgagee to the plaintiff in 1856, and a release of the equity of redemption from F. to the plaintiff in 1863. Neither the land nor the mortgage debt were mentioned in F.'s will. It was proved that in 1847 F. owned 100 acres of lot 22 adjoining, and had cleared four or five acres of the half lot in question, of which he was reputed to be the owner. Defendant had occupied about twelve acres of it for nearly fourteen years. Quære, whether this was sufficient primâ facie evidence of F. being owner in fee. *Hunter* v. *Farr et al.*, 23 Q. B. 324.

The plaintiff proved a mortgage to him in fee from one B., and called a witness who swore that he purchased from one P. the east half of the lot, of which this land was part, excepting nine acres: that P. had been in possession of the east half since 1850, and gave B. possession of the land sued for before witness purchased the remainder from P. and that defendant told him he had bought from B. When defendant entered, or under what right, did not appear:—Held, sufficient primâ facie evidence as against defendant. *Covert* v. *Robinson*, 24 Q. B. 282.

In ejectment for the east half of a lot, the plaintiff proved a deed to him from S. of the whole lot executed in 1865, and that persons claiming under S. had lived from 1837 to 1850 on part of the west half, building a log house and clearing four or five acres. It was not shewn that S. had been dispossessed by any one; and the defendant, with those through whom he claimed, had been in possession since about 1850:—Held, that this evidence was not sufficient to go to the jury. *Sharer* v. *Jamieson et al.*, 25 Q. B. 156.

Evidence that plaintiff had been in possession and had been intruded upon by defendant:—Held, insufficient, it appearing that the fee was still in the crown, the plaintiff being in possession as a free grant settler, but without patent or license of occupation. *Henderson* v. *Morrison*, 18 C. P. 221.

Held, upon the facts stated in this case, that, irrespective of the objections raised to the proof of their paper title, the plaintiffs had sufficient title as against the defendants, who had entered upon the peaceable possession of the plaintiffs or their grantors. *Thompson* v. *Bennett*, 22 C. P. 393.

It appeared that the plaintiff's grantor had cut timber on the land, and had the lines run by a surveyor, and then conveyed, claiming as owner: that defendant then entered, the lot being unoccupied and wild; but that there had been a prior occupation by defendant, at least as actual as that of the plaintiff, but no occupation by any one for any period approaching twenty years:—Held, that any presumption in plaintiff's favour from any possession proved by him, was rebutted. *Wallbridge* v. *Gilmour*, 22 C. P. 135.

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2. *Outstanding Mortgages or Title in Strangers.*

A. mortgaged lands in fee to B., and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No re-conveyance from B. to A. was proved. C. went into possession and continually held for about 13 years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage:—Held, that D. was not entitled to recover in ejectment, and that if necessary a re-conveyance from B. to A. might be presumed. *Doe* d. *McLean* v. *Whitesides*, 5 O. S. 92.

Ejectment cannot be sustained by a mortgagor against a stranger where the mortgage is overdue and unsatisfied, the fee and right of possession being in the mortgagee. *Doe* d. *McBernie* v. *Lundy*, 1 Q. B. 186.

A satisfied mortgage in fee to a third party cannot be set up by a stranger as a subsisting title, to defeat the true owner. *Doe* d. *McKenny et ux.* v. *Johnson*, 4 Q. B. 508.

Semble, that a widow cannot be allowed to set up a mortgage to a third party against the heir of the husband. *Ib.*

Where the estate is in the crown, and neither party shews any title beyond a short possession, the tenant in possession, if he entered peaceably and under colour of a claiming right, may set up the jus tertii as a defence. *Doe* d. *Wilkes* v. *Babcock*, 1 C. P. 388.

Defendant produced a mortgage in fee given by the plaintiff to one C., to secure the payment of £230 by instalments. By the mortgage the mortgagor was to remain in possession until three months' notice in writing, after default, demanding payment. The mortgage had been discharged by certificate registered a week after the commencement of the action, and it was therefore contended that the plaintiff had no legal title when he began his suit:—Held, that he might nevertheless recover, for no notice was proved to have been given as required by the mortgage, and he was therefore entitled to possession against the mortgage. *Sidey* v. *Hardcastle*, 11 Q. B. 162.

It was admitted that the plaintiff had mortgaged the premises to a building society, the condition of the mortgage being to pay 10s. on the first day of every month until the objects of the society, as stated in it, should be fulfilled. No default had been made, and it was proved that since action brought the society had released to the plaintiff their claim on the land in question: Held, that the plaintiff could not recover, for the expiration of the mortgage being uncertain, he was only a tenant at will when the suit was brought, and therefore not entitled to the possession: Robinson, C. J., diss., on the ground that a stranger to a mortgage cannot in any case defeat a recovery by the mortgagee by setting up the mortgage where there has been no default, and the mortgagee by the terms of the deed is entitled to possession till default. *Ashford* v. *McNaughten*, 11 Q. B. 171. See, also, *Dundas* v. *Arthur*, 14 Q. B. 521.

Plaintiff purchased at sheriff's sale defendant's interest in certain lands, and, on ejectment brought in 1856, defendant produced a mortgage executed by one B., under whom he had gone into possession, to secure repayment of £28 in October, 1846. This mortgage had been satisfied, as was proved by the mortgagee, but no discharge had been registered:—Held, that the jury should have been directed, as a matter of course, to presume a re-conveyance, and plaintiff should recover. *Collins* v. *Dempsey*, 14 Q. B. 393.

Upon the trial it appeared that the plaintiff, by a mortgage dated 1st October, 1861, had conveyed the premises to one L. to secure him for endorsing certain notes, the said mortgage to be void on payment of the notes; and it contained a recital that the notes might be renewed, but only three times or for a year, which the mortgagee consented to. It appeared that the notes had been renewed for longer than the period allowed, and were afloat at the commencement of this suit:—Held, that the notes not having been paid within the year, the condition of the mortgage was broken, and the right to possession vested in the mortgagee; and a nonsuit was therefore ordered. *McMahon* v. *McFaul*, 14 C. P. 433.

A party possessed of premises is not estopped from setting up as an outstanding title against a claimant a conveyance to a third party, although that third person could not set up the conveyance as a bar to a recovery. *Phillips et al.* v. *Long et al.*, 9 C. P. 341.

M., owning land, executed a bond to defendant, reciting that defendant was to reside with him and work the farm for their mutual advantage; that it had been agreed that after M.'s death it should become defendant's, and to secure this, M. had that day made his will leaving it to him;—and the condition was, that if the defendant should work the farm properly, &c., M. would not execute any other will, nor dispose of or encumber the land. Afterwards they disagreed, and M. conveyed to the plaintiff, who brought ejectment after having demanded possession:—Held, that an unsatisfied mortgage executed by M. before the bond, and put in by defendant, was clearly no defence. *McDonald* v. *Murphy*, 20 Q. B. 355.

One F. mortgaged land in fee to the Trust and Loan Company, with a proviso for possession until default. Upon his death his heirs at law brought ejectment to recover possession from a tenant, no default having been made in the mortgage:—Held, that the proviso would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not to the heirs. *Ford et al.* v. *Jones*, 12 C. P. 358.

Semble, that the wife of an attainted traitor, remaining in possession of her husband's lands, cannot defeat the recovery of a plaintiff in ejectment (the purchaser at sheriff's sale, in an action brought against the traitor upon a bond entered into before his attainder) by setting up under the attainder a title by forfeiture to the crown, which the crown had forborne to assert. *Doe* d. *Gillespie* v. *Wixon*, 5 Q. B. 132.

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3. *Demand of Possession and Notice to Quit.*

(a) *Vendor and Purchaser.*

When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. But where the defendant went to the heir and offered to pay him the money due on the bond, and to take a deed from him as heir, it was held that by such conduct he had waived his right to a demand. *Doe* d. *Lemoine* v. *Vancott*, 5 O. S. 486.

Where defendant entered under an agreement to purchase, and that he should enjoy until default in payment:—Held, that on default he might be ejected without any notice or demand. *Doe* d. *Sheriff* v. *McGilliveray*, 6 O. S. 294.

Where defendant contracted for the purchase of land, and gave his bond and notes for payment of the money by instalments, but did not pay any of them, and his vendors afterwards sold to the lessor of the plaintiff, who demanded possession at defendant's dwelling house in his absence, in the presence of several members of the family:—Held, that if a demand were necessary, that was sufficient, as it did not appear that defendant was not aware that it had been made. *Doe* d. *Sherwood* v. *Stevens*, 6 O. S. 432.

The mere fact of a vendor continuing in possession of land after conveying it, without more

being shewn, does not entitle him to a demand of possession. *Doe* d. *Richardson* v. *Dafoe*, 4 Q. B. 484.

Where a person takes possession of land under an agreement to purchase it, he is a tenant at will to the seller, and at the seller's death his heir-at-law can maintain ejectment without any notice to quit, or demand of possession. *Doe* d. *Kemp* v. *Garner*, 1 Q. B. 39.

Where a defendant was in possession under an agreement to purchase and pay by instalments, and after payment of the first instalment failed to pay any of the others, but remained in possession for many years, until the lessor of the plaintiff offered to give him a deed on certain terms, which were not complied with, and told him he might remain for the summer if he would leave in the autumn, which defendant refused:—Held, the jury having found that the lessor of the plaintiff had at this time determined the holding at will, that defendant was not entitled to a demand. *Doe* d. *Stodders* v. *Trotter*, 1 Q. B. 310.

A. contracted to sell to B. for a sum, to be paid by instalments, and defendant went in under B., upon some understanding not explained. Default was made in the payments to A.:—Held, that A. could eject defendant without notice or demand. *Doe* d. *Phillpotts* v. *Crouch*, 5 Q. B. 453.

Held, that under the evidence in this case, the defendant having been in possession as a purchaser, and failed in making the payments, the plaintiff might eject without a demand. *Robertson* v. *Slattery*, 10 Q. B. 498.

Plaintiff's devisor gave a bond to the defendant conditioned to convey to him upon payment of £175 on the 1st March, 1856, when the obligor was to give the deed, and defendant to secure the balance of the purchase money by mortgage on the premises. Then followed these words: "The said I. A. (the defendant) is to have possession of the said land and premises, with the exception of the house and barn, from the sealing and delivery of these presents:"—Held, that on default in payment of the £175, plaintiff might eject defendant. A demand of possession was made, but, Semble, it was unnecessary. *Stringham* v. *Ammerman*, 14 Q. B. 548.

The defendant had been let into possession under a contract to purchase, payable by instalments, with a stipulation for forfeiture if payment were not made on a particular day, and the vendor had subsequent to such day received payment on account:—Held, that defendant was tenant at will, and not by sufferance, and that a demand of possession was necessary. *Lundy* v. *Dovey*, 7 C. P. 38.

Plaintiff sold to defendant, and gave a bond for a deed, receiving defendant's bond for the purchase money. Nothing was said about possession in either instrument. Defendant having made default in payment, after having been for some time in possession:—Held, that the plaintiff could eject without either notice or demand. *Robinson* v. *Smith*, 17 Q. B. 218.

Plaintiff being in possession as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for $500: $200 down, and $300 on the 1st April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of $200 defendant was let into possession. He made default in payment of the $300. Plaintiff gave him notice that he was ready to assign the mortgage on payment of the amount due, and that if not paid defendant would be ejected. Defendant refused payment, and said he would stand a suit, and claimed a deed in fee:—Held, that by default in payment the tenancy at will was converted into a tenancy at sufferance, and that therefore, as well as on account of his disclaimer of the plaintiff's title, defendant was not entitled to a demand of possession before action; and also that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant, and the default of the defendant to pay. *Prince* v. *Moore*, 14 C. P. 349.

(b) *Landlord and Tenant.*

In ejectment by a mortgagee the tenant claimed possession under a lease from the mortgagor, and refused to attorn to the mortgagee (who demanded possession) and shewed no lease, nor any certain holding:—Held, that he was not entitled to notice to quit. *Doe* d. *Samson* v. *Paver*, 4 O. S. 36.

Where the lessor of the plaintiff conveyed in fee to defendant and took back a lease for life at a nominal rent, and defendant continued in possession for several years with the lessor's knowledge, but without his express consent:—Held, that he was entitled to a demand of possession. *Doe* d. *Mann* v. *Keith*, 4 O. S. 86.

The assertion of title by a tenant before, coupled with a refusal to pay rent after action brought, is sufficient evidence of a disclaimer to obviate the necessity of proof of a notice to quit, especially where the tenant attempts to rely on such title at the trial. *Doe* d. *Cuthbertson* v. *Sager*, 6 O. S. 134.

A tenant endeavouring to defend his possession by a title adverse to the lessor of the plaintiff, is not entitled to a notice to quit. *Doe* d. *Graham* v. *Edmondson*, 1 Q. B. 265.

Where possession is demanded from defendant in ejectment, and he, instead of claiming to be a tenant, asserts his right to the fee, he has no claim to a notice to quit as a tenant. *Doe* d. *McKenzie* v. *Fairman*, 7 Q. B. 411.

Defendant had been tenant to the plaintiff at a yearly rent, payable quarterly, for a term which expired on the 1st of June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due, the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th of September, 1860, the plaintiffs' attorney served a written demand of possession on defendant, who told him that was just what he wished, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant, besides denying their title

claimed to hold as their tenant:—Held, that the plaintiffs were entitled to recover, for, 1. The defendant having denied their title could not insist upon notice to quit; and, 2. He was estopped by his offer to leave the place. Semble, that defendant, though he had not accepted the lease tendered, was, under the circumstances, the plaintiffs' tenant, Burns, J., diss. on the ground that defendant being in as yearly tenant, what took place on the 17th of September did not alter his position, and that his notice was only a denial of the plaintiffs' right to possession, not of their title. *Cartwright et al.* v. *McPherson*, 20 Q. B. 251.

A person taking a farm on shares for a specific term is a lessee, and entitled to six months' notice to quit. *Doe* d. *Tunnill* v. *Lin*, E. T. 7 Will. IV.

Where a tenancy from year to year exists, and during its continuance the parties agree for a lease for a certain term, with a power to the tenant to purchase, which is never executed, the tenant stands in his original situation after the agreement fails, and cannot be ejected without a regular notice to quit. *Doe* d. *Crookshank* v. *Crookshank*, M. T. 5 Vict.

Where defendant had gone into possession of land under a demise for four years, which was void under the Statute of Frauds, and before the expiration of the first year the lessor of the plaintiff told him that he should want the land in the spring, and defendant agreed to give it up then:—Held, that there was no necessity for proving a formal notice to quit. *Doe* d. *Lynde* v. *Merritt*, 2 Q. B. 410.

Where a tenant overholds for a considerable time, and refuses to pay rent, he may be ejected without a notice to quit or a demand of possession. *Doe* d. *Burritt* v. *Dunham*, 4 Q. B. 99.

Where a tenant takes a lease from a stranger, and undertakes to pay him rent, his original landlord need not serve him with a notice to quit, or demand possession, before ejectment. *Doe* d. *Daniels* v. *Weese*, 5 Q. B. 589.

A. had a lease from the government of a clergy reserve for twenty-one years, ending in 1837. A. sub-let to B. In 1843, after the term had expired, A. obtained a patent in fee from the crown, and finding B. still in possession, he brought ejectment:—Held, that B. was not entitled to notice to quit, or demand of possession. *Doe* d. *Wismer* v. *Hearnes*, 6 Q. B. 193.

Defendant held under lease for five years, containing a covenant by the lessor to grant him a renewal for five years at a rent named, if requested. The first term having expired, and no request made:—Held, that the lessor might eject without any demand. *Dawson* v. *St. Clair*, 14 Q. B. 97.

No notice or demand is necessary before action upon a forfeiture, where there is a power of entry in the lease upon breach of a covenant to repair or not to under-let. *Connell* v. *Power*, 13 C. P. 91.

M. conveyed the land in question to J., the wife of R.—R. alone executed a lease to the defendant, and died during the term, before his wife:—Held, that on R.'s death the term expired, and that the plaintiff claiming under a conveyance from R. and his wife could eject defendant without notice to quit or demand of possession. *Burns* v. *McAdam*, 24 Q. B. 449.

A demand of possession is not necessary where the estate of the defendant terminated by the death of his grantor, the husband of the lessee for life. *Nolan* v. *Fox*, 15 C. P. 565.

In ejectment the plaintiff claimed under a deed from the church society, the patentees, to himself, in 1864, habendum to him and his successors, incumbents of the church of St. John, in the parish of Mono, for ever, with a proviso that the land should not be leased without the consent in writing of the churchwardens. The defendant proved that he took possession in 1853, with the assent of the then incumbent, V., and the churchwardens, and that he was to have a lease for sixteen years, and to clear so many acres each year, and pay taxes, &c., but no lease was ever executed. He had remained ever since, having cleared forty acres, and put up buildings. V. was succeeded as incumbent by the plaintiff, and F., a successor of the plaintiff, was incumbent when this action was brought. Neither the plaintiff nor F. had ever recognized defendant as tenant, though F. had offered him $70 to go off quietly, and F. had demanded possession of him, but the plaintiff had not, but: Held, that on the evidence the plaintiff might recover as the grantee of the society, and that the demand of possession, if necessary, made by F. would enure to plaintiff's benefit. *Henderson et al.* v. *White*, 23 C. P. 78; but

Semble, that no demand of possession or notice was necessary, for as against the plaintiff, the grantee of the society, the defendant could have no right, not having entered under or been recognized by him. *Ib.*

(d) *Sufficiency of.*

A demand of possession by a person whose authority is afterwards recognized by the person having title, is sufficient. *Doe* d. *Green* v. *Friesman*, 1 Q. B. 420.

A demand of possession made by a person who afterwards assigned his interest to the lessor of the plaintiff, cannot be available by the lessor so as to make the tenant's holding tortious as to him. *S. C.* E. T. 2 Vict.

The plaintiff demanded possession at defendant's dwelling house in his absence, in the presence of several members of the family:—Held, sufficient, as it did not appear that the defendant was not aware that it had been made. *Doe* d. *Sherwood* v. *Stephens*, 6 O. S. 432.

The demand must be particular in pointing the defendant to the precise parcel of land sued for. See *Doe* d. *Jeffrey* v. *Williams*, 6 Q. B. 160.

Ejectment for a house and small lot of land adjoining. It appeared that as to the house notice to quit had been given too late, but that the plaintiff was entitled to the land. It was ordered that unless the plaintiff would confine his judgment to the land, defendant should have a new trial. *Conley* v. *Lee*, 12 Q. B. 456.

(e) *Other Cases.*

Where defendant, who went into possession under the lessor of the plaintiff, afterwards re-

fused to acknowledge his title :—Held, that he was neither entitled to a notice to quit nor a demand of possession. *Doe* d. *Bonter* v. *Frazer et al.*, 4 O. S. 80.

A person holding under a license of occupation from the crown, is entitled to a demand of possession before ejectment by a grantee of the crown. *Doe* d. *Green* v. *Friesman*, 5 O. S. 661.

A demand of possession made by a person who afterwards assigned his interest to the lessor of the plaintiff, cannot be available by the lessor so as to make the tenant's holding tortious as to him. *S. C.* E. T. 2 Vict.

Where a person has been in possession for many years and made valuable improvements under the eye of the owner, his consent to the occupation may be presumed, and the possessor cannot be ejected without a demand of possession. *Doe* d. *Sheriff* v. *McGillivray*, 6 O. S. 189.

An heir need not demand possession from a person claiming the land as the grantee of the ancestor, who was a feme covert, and executed the deed under which defendant claims with her husband without the acknowledgment required by 59 Geo. III. c. 3, such deed being as to her absolutely void. *Doe* d. *Vansickler* v. *Fairwell*, M. T. 4 Vict.

Though a surviving partner may have an equitable title, yet the heir of the deceased partner suing in ejectment upon his ancestor's legal title, need not demand possession. *Doe* d. *Atkinson* v. *McLeod*, 8 Q. B. 344.

The plaintiffs claimed as tenants for life under a will, and defendant did not hold under them, and by his notice denied their title :—Held, that no notice or demand was necessary. *Scouler et al.* v. *Scouler*, 19 Q. B. 106.

Two persons agree to exchange land; that each shall have possession from a day named, and that they shall exchange deeds in one year; and each gives the other a bond to perform these conditions. The year elapses without either giving a deed. Upon ejectment for the lot which the plaintiff was to convey to the defendant :—Held, that a demand of possession was necessary, and probably also that the plaintiff should offer, if not actually give up, possession of the defendant's lot, which he (plaintiff) occupied under the agreement. *Perritt* v. *Arnold*, 11 C. P. 413.

Defendants being in default under a demise from plaintiff, he and the plaintiff referred all differences, and the arbitrators postponed the date of payment. Quære, whether the reference and postponement would not constitute defendant a tenant at will, and so entitle him to a demand of possession before action. *Black* v. *Allan*, 17 C. P. 240.

A. having given to B. his bond in £2,500, conditioned, among other things, that C. and D. should reside on a certain lot of land so long as they conducted themselves in a manner agreeable to A. :—Held, that no notice or demand was necessary before bringing ejectment. *Tisdale* v. *Tisdale*, 10 C. P. 106.

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4. *Other Cases.*

Where there is an adverse possession of land, an heir-at-law who has never entered cannot make a conveyance so as to enable his vendee to recover in ejectment. *Doe* d. *Dixon* v. *Grant*, 3 O. S. 511.

A lessor who had the title at the time of action brought, but not at the trial, is entitled to damages, although he cannot recover his term. *Doe* d. *Meyers* v. *Blakier*, E. T. 2 Vict.

Ejectment cannot be maintained on a written assignment, not under seal, of all the tenant's right, title, and interest in the premises, it not being shewn that he had any, or if so what his interest was. *Doe* d. *Pringle* v. *Hodgson*, E. T. 3 Vict.

Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son that he should occupy the house, except certain rooms in it, and take the rents and profits upon certain conditions, on breach of any of which he was to go out of possession, but his mother did not release her right under the statute : Semble, that the mother could not, after the father's death, on the ground that she had not barred her dower under the life lease, maintain ejectment for the whole of the premises, without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe* d. *Peck* v. *Peck*, 1 Q. B. 42.

A., purchasing land at sheriff's sale, having reason to believe that he cannot get possession without legal proceedings against the execution debtor, B., to avoid this, contrives, by collusion with C., B.'s tenant, to get into possession without the consent of B. :—Held, per cur., in an action of ejectment brought by B. against A., that A., thus acquiring possession collusively through B.'s tenant, cannot set up any title in himself adverse to B. : that before he can do this, however good his title may be, he must abandon the possession obtained through C., and bring an action against B. *Doe* d. *Miller* v. *Tifany*, 3 Q. B. 79.

A lessee may maintain ejectment before entry. The plaintiff claimed under a lease from one of the defendants, H., dated 5th February, 1862, for a term to commence upon the 1st of March following. Defendant B. claimed also under a lease from H., dated the 19th of February, 1862, and it was admitted that he had entered before the 1st of March, and still held possession :—Held, that the plaintiff was entitled to a verdict, though he had not entered under his lease. *Cleveland* v. *Boice*, 21 Q. B. 609.

The plaintiff owned part of lot 7, and agreed verbally, in 1859, to buy from one M. two acres more adjoining on the north, of which he went into possession. In 1860 M. gave to defendant a bond to convey to him thirty acres of the lot more or less, describing it as "all that part of the said lot lying north of the land owned by D.," the plaintiff, "and south of the road through the said lot to Cramahe Hill." He afterwards conveyed the two acres to the plaintiff, who then brought ejectment. M. swore upon the trial that these two acres were not intended to be included in the bond to defendant, but were looked

upon as part of the plaintiff's land referred to in it, and that defendant had without them his full thirty acres:—Held, that the plaintiff must recover, for, 1. The bond, under the circumstances, should be construed as referring to all the land in the plaintiff's visible possession as owner, thus excluding the two acres; and, 2. The deed at all events vested the legal title in the plaintiff, and defendant's equitable right under the bond could afford no defence. *Dusenbury* v. *Palmatier*, 21 Q. B. 462.

A. is let into possession by B., upon an agreement to purchase, with the understanding that he is to remain until default. A. afterwards, though not in default, let B. into possession, on the express condition that B. is to restore to him (A.) the possession in a certain event. This event happens, but B. retains the possession:—Held, that A., being entitled to the possession, could maintain ejectment against B., though he had the legal title. *Doe* d. *Barker* v. *Crosby*, 7 Q. B. 292.

A testator seized in fee of land devised the same to his son on condition that he should support the plaintiff during her life, and that she should be mistress, and have control of the dwelling house on the land:—Held, that the son took the land conditioned for the maintenance of the plaintiff during her life, but that no title was conferred upon her under which she could bring ejectment, the control which the testator meant being merely the domestic management, not the ownership of the house. *Grant* v. *McLennan*, 16 C. P. 395

In ejectment, the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, *and of the sum* of £25 already paid and advanced by plaintiff to him, &c., he, M., covenanted, granted, and agreed that he would *stand seized and possessed of the land in question, to the use of* plaintiff, his heirs and assigns, *by the way of charge, security, and mortgage* on the land for said moneys and costs, and when plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a *charge, mortgage*, and security upon the land *for the amount so to be ascertained*, or M. would, and he covenanted that he, or his heirs, would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c.:—Held, that it could only operate under the Statue of Uses, as being granted on a money consideration which appeared from the express recitals contained in it; and, Semble, that full effect would be given to the whole instrument, and the real intent of the parties carried out, by holding that it was to operate as a charge, security, and mortgage in equity on the land, until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge, unless plaintiff desired a legal mortgage, which in that case M. covenanted to execute. Quære, whether the plaintiff took the legal estate so as to enable him to maintain ejectment. *Miller* v. *Scott et al.*, 17 C. P. 559.

Held, that trustees under C. S. U. C. c. 69, may maintain ejectment in their individual names, with the description, "as trustees," &c., stating the name of the congregation or religious body for whom they are trustees, according to the description in the deed of conveyance. *Humphreys* v. *Hunter*, 20 C. P. 456.

A. McD., in 1864, describing himself as of the north half of lot 27, 5th concession, Nottawasaga, bequeathed "the above mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years; and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said term of 20 years, his son Ronald, the defendant, was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the crown of the land devised to him, habendum, "subject, nevertheless, to the terms and conditions of the last will and testament" of the testator, A. McD.:—Held, that the words "I bequeath," &c., *in the following manner*, "&c.," to my wife and family," carried the estate direct to them, nothwithstanding the direction of the executors:—Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him. *McDonald* v. *McDonald*, 34 Q. B. 369.

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5. *Evidence of Title.*

(a) *Claiming by different Titles.*

Where the lessor of the plaintiff endeavours at the trial to establish his title as devisee, and fails, he is not thereby precluded from insisting on his right as heir-at-law, or as a purchaser from the person last seized in possession. *Doe* d. *Hussey* v. *Gray*, M. T. 6 Vict.

The lessor of the plaintiff supported his title by a deed, in consideration of love and affection. Defendant proved a subsequent deed from the same party for a valuable consideration, and impeached the first deed as voluntary. The plaintiff then offered to prove a real consideration for the first deed beyond what was expressed in it. This evidence was rejected as going into a new case; but Held, that it might have been received, the principle that the plaintiff should go into his whole case at once not admitting of such a strict application in ejectment. *Doe* d. *Lawrence et ux* v. *Stalker*, 5 Q. B. 346.

Semble, that a plaintiff in ejectment, relying in the opening of his case upon a primâ facie title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew the possession of defendant that of a tenant to him, the plaintiff, as landlord; he should go into his case fully in the first instance. Robinson, C. J., diss. *Doe* d. *Osborne* v. *McDougall et al.*, 6 Q. B. 135.

A plaintiff having opened his case as heir-at-law of the patentee, relying upon the assumed limited effect of his own deed to the defendant, was not allowed to change his ground and shew himself entitled under the statute of limitations. *McKinley* v. *Bowbeer*, 11 Q. B. 86.

The plaintiff in ejectment claimed title by deed from M., the defendant by length of possession. At the trial the plaintiff failed to prove his paper title, but shewed that defendant went in under him, and it was then objected that a demand of possession was necessary, on which defendant had leave to move for a nonsuit. In term this point was not urged, but defendant objected that the plaintiff could not rely on a different title from that in his notice:—Held, that as this objection had not been taken at the trial, and defendant's case was not one to be favoured, he should not be allowed to raise it afterwards; and the plaintiff's verdict was upheld. *Kennedy* v. *Freeth*, 23 Q. B. 92.

(b) *Setting up Different Defences.*

Where at the trial a defendant endeavours to make title in himself as the owner of the fee, and fails, he is precluded from relying upon want of notice to quit or demand of possession. *Doe* d. *King's College* v. *Graham*, 1 Q. B. 158.

A defendant cannot first put the plaintiff to proof of his title, and, failing in his defence, claim a right to notice or a demand, as if he were in possession under him. He must decide whether he will claim adversely to or in privity with the title; he cannot do both. *Doe* d. *Maitland* v. *Dillabough*, 5 Q. B. 214.

Where the plaintiff claimed as grantee of B. and defendant, besides denying the plaintiff's title, claimed under a demise from B.:—Held, that defendant by refusing to admit B.'s title at the trial must be taken to have disclaimed, and was precluded from setting up the tenancy. *Houghton* v. *Thompson*, 25 Q. B. 557.

Defendant having put plaintiff to proof of title, and taken exceptions thereto, cannot then set up a tenancy under him from year to year. *Wilson* v. *Baird*, 19 C. P. 98.

Defendant not admitting plaintiff's title, but allowing him to prove it at the trial, without, however, cross-examining his witnesses, or otherwise taking objection to the title as proved, is at liberty to shew title under the plaintiff as a tenant for years. *Hartshorn* v. *Earley*, 19 C. P. 139.

(c) *Offer by Defendant to Purchase.*

Defendant, being an occupant of land, went to the lessor of the plaintiff of his own accord, made an offer to purchase the land, and made a payment on account:—Held, that he was thereby prevented from maintaining an adverse possession, or putting plaintiff to further proof of title. *Doe* d. *Boulton* v. *Walker*, 8 Q. B. 571.

Where defendant, having obtained possession without any privity with M., the plaintiff's assignor, went to him and offered to purchase, but no bargain was made, and he told M. he might sell to whoever he chose:—Held, that the plaintiff could maintain ejectment without further proof of his title. *Drake* v. *North*, 14 Q. B. 476.

Where the plaintiff proved that he had leased to one B., and that after he had left defendant went in: that defendant offered to purchase at the valuation of a person named, and after the commencement of this action offered $800 for the place:—Held, sufficient evidence to go to the jury, without further proof of plaintiff's title. *Penlington* v. *Brownlee*, 28 Q. B. 189.

There was some evidence in this case of an offer by defendant to purchase plaintiff's claim, but,—Held, that this could avail only if defendant had no title, not to defeat a good title to possession, which defendant had shewn. *McGregor* v. *La Rush*, 30 Q. B. 299.

See, also, *Doe* d. *Lemoine* v. *Vancott*, 5 O. S. 486, p. 1162.

(d) *Other Cases.*

The admissions of the plaintiff in ejectment, being a real person, (the lessor being an infant), are not evidence to prevent the recovery of the premises. *Nicholson* d. *Spafford* v. *Re*, 3 O. S. 84.

Where in ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shewn in whose custody it was or what its terms were, and it was proved the defendant had written a letter to the plaintiff's agent, stating that he was to give up the premises on a certain day—it was held that the lessor of the plaintiff could not be required to produce the agreement, as it was not sufficiently shewn to be in his custody or power. *Doe* d. *Mitchell* v. *McLeod*, 5 O. S. 553.

Evidence will not be received to shew that a grant from the crown was improperly issued, so as to enable a subsequent grantee to recover in ejectment. *Doe* d. *McKay* v. *Rykert*, T. T. 3 & 4 Vict.

Where the plaintiff's counsel in opening his case stated it as a question of legitimacy, and that defendant claimed under a will, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary:—Held, that it ought to have been produced. *Doe* d. *Brakey* v. *Breakey*, 2 Q. B. 349.

Where defendant defended as the landlord of the tenant in possession, and the lessor of the plaintiff proved a mortgage in fee from the tenant himself, but did not further shew defendant's title to the land, and established no privity between defendant and himself, and the defendant shewed title paramount in himself to the land:—Held, that defendant was entitled to recover. *Doe* d. *Matherson* v. *Ault*, 2 Q. B. 31.

The provincial statute 1 Will. IV. c. 26, vesting in a trustee certain lands belonging to the estate of the late St. G., has not the effect of raising a presumption of title in the particular lands enumerated in the schedule so as to relieve his trustee from the necessity of shewing title in the first instance. *Doe* d. *Baldwin* v. *Stone*, 5 Q. B. 388.

The plaintiffs claimed under a will, by which testator devised to his widow 1,000 acres of land in Walsingham; and if he had less than 1,000 acres there, then that quantity to be made up to her out of his Zora lands:—Held, that to succeed, the plaintiffs must prove that the testator died seised of 1,000 acres more than the land in question in Walsingham. *Miller et al.* v. *Anger*, 8 C. P. 80.

Plaintiff brought ejectment against the defendant after he had quitted possession. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff nevertheless took the record down to trial:—Held, that the notice given with the appearance did not oblige the plaintiff to prove at the trial that the defendant was in possession when the writ issued. *Harper* v. *Lowndes*, 15 Q. B. 430.

The plaintiff was entitled to succeed, under the registry law, if a patent had issued for the land, and at the trial no objection was taken for want of proof of that fact:—Held, that such objection could not be taken in term; and, Quære, whether a deed from defendant covenanting for title, subject to the reservations, &c., contained in the original patent, was not some evidence against him. *Garrett* v. *Blakely*, 9 C. P. 46.

Ejectment having been brought against A., B. was allowed to defend in his place. The plaintiffs claimed under a mortgage from A., whose title B. denied; and, Semble, that upon the evidence set out in the case, the verdict for the plaintiffs could not be supported. *Peebles et al.* v. *Lottridge et al.*, 19 Q. B. 628.

Defendant being in possession under one M., agreed, under seal, to give up peaceable possession to plaintiffs, together with certain furniture specified, within one week from the date, upon receipt of $30. On the following day the plaintiffs tendered to him $30, which he refused, and they then brought ejectment:—Held, that in the absence of any explanation it was properly left to the jury as importing an admission by defendant that the plaintiffs were entitled to possession on paying or tendering the $30. *Stewart et al.* v. *Cameron*, 20 Q. B. 193.

III. By Particular Persons.

1. *Joint Tenants and Tenants in Common.*

Tenants in common cannot make a joint demise in an ejectment. *Doe* d. *McNab et al.* v. *Sieker*, 5 O. S. 323; *Doe* d. *Shuter* v. *Carter*, H. T. 2 Vict.

Joint tenants, in bringing ejectment, may sever in their demise. *Doe* d. *Barwick* v. *Clemens*, 7 Q. B. 549.

Under the old practice, in ejectment by one tenant in common against another, where the common consent rule had been entered into, proof of an actual ouster was dispensed with. *Doe* d. *Clarkson* v. *Haskins*, 2 Q. B. 775.

One tenant in common under a will conveyed the whole estate, claiming it as heir-at-law. In ejectment by the other tenants in common against his grantee:—Held, that proof of actual ouster was unnecessary. *Scott et al* v. *McLeod*, 14 Q. B. 574.

Several plaintiffs claiming each an undivided interest need not prove a joint title, or any privity, but may maintain a joint action upon separate titles. *Bradley et al* v. *Ferry*, 20 Q. B. 563.

The defendant defended for the whole, giving no notice of defence as tenant in common, under sec. 29 of the Ejectment Act, C. S. U. C. c. 27. The evidence shewed that she was entitled to an undivided moiety; but, Held, that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech* v. *Leech et al.*, 24 Q. B. 321.

The plaintiff was held entitled to recover two undivided third parts. It was urged, on the authority of Leech *v.* Leech, 24 Q. B. 321, that the plaintiff being held so entitled, the postea should be awarded to him generally; but, Held, not, the proceedings on both sides in that and other cases having been directed to try the title to the whole. *Lyster* v. *Ramage*, 26 Q. B. 233.

Where the action was against three, and two claimed only under the infant, admitting the plaintiff's right to two undivided thirds, but denying ouster:—Held, that as the infant's right to one third was established, the plaintiff without proof of ouster could not recover against the others. *Gilchrist* v. *Ramsay et al.*, 27 Q. B. 500.

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2. *Husband and Wife.*

Though the wife own the fee, the husband may maintain ejectment on his own demise alone, but he must prove his marriage. *Doe* d. *Peterson* v. *Cronk*, 5 Q. B. 135.

A husband entitled to land in the right of his wife, may bring ejectment without her being joined in the action. *Doe* d. *Eberts* v. *Montreuil*, 6 Q. B. 515.

Under 59 Geo. III. c. 3, a deed executed by husband and wife, but without an examination of the wife and a certificate thereof, is void; so that, notwithstanding the deed, the husband may maintain ejectment during the coverture. *Doe* d. *McDonald* v. *Twigg*, 5 Q. B. 167.

Semble, however, that under the more recent act, 1 Will. IV. c. 2, the grantee's possession cannot be disturbed during the lifetime of the husband. *Ib.*

One of the plaintiffs having married since the devise to her of the land in question, under which they claimed:—Held, that she was not entitled by 22 Vict. c. 34, to sue alone in ejectment, but that her husband must join. Quære, as to the effect of that statute upon the husband's right to possession of his wife's land where he is not tenant by the curtesy. *Scouler* v. *Scouler*, 19 Q. B. 106.

Sec. 1 of 35 Vict. c. 16, so far as regards the real estate of any married woman which is owned by her at the time of her marriage, applies only to marriages which take place after the passing of the act. When, therefore, the plaintiff, who married in 1851, had lived upon the land in question, which was his wife's property, from 1852 until 1861, and had then joined with his wife in a lease to defendant for ten years:—Held, that on the expiration of such lease the plaintiff alone might maintain ejectment. *Dingman* v. *Austin*, 32 Q. B. 190.

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3. *Mortgagor and Mortgagee.*

Necessity for notice or demand.]—Where A. mortgaged his property to two persons at different times, and died after default in the first mortgage, without having redeemed either, and the first mortgagee having taken possession sold

to A.'s heir for a valuable consideration, who entered into possession and died, leaving B. his heir, who was also A.'s heir:—Held, that the second mortgagee, having a mortgage of the equity of redemption only, could not eject B., who was in by purchase, and not by descent, and was therefore not estopped by A.'s deed. *Doe* d. *Gillespie* v. *Macaulay*, H. T. 7 Will. IV.

Where a mortgagor in possession after default received a letter from the mortgagee, who was in a foreign country, directing him to put in a spring crop, unless he came back in time for the mortgagor to remove in the spring, and he did not come until the summer:—Held, that notwithstanding the relation of mortgagor and mortgagee, defendant, under the circumstances, could not be ejected while the crops were growing, nor without a demand of possession. *Doe* d. *Patterson* v. *Brown*, H. T. 6 Vict.

A mortgage contained the usual covenant to pay, and that in case of default the mortgagee might enter into possession; also, a declaration that if the mortgagor should make default, and the mortgagee should, after the time of payment, have given a month's notice, demanding payment, the mortgagee might take possession, &c. The mortgagor also covenanted that no means should be taken for recovering possession until after such notice:—Held, that ejectment would not lie until such month's notice had been given after default made. *Copp* v. *Holmes*, 6 C. P. 373.

A mortgage provided that no means should be taken to obtain possession until after a month's notice in writing, after default, demanding payment:—Held, in ejectment by the mortgagee, that a notice signed by the plaintiff's attorney, who was also his attorney in a suit brought upon the covenant more than a month before this action, was sufficient, without any proof of authority. *Keyworth* v. *Thompson*, 16 Q. B. 178.

D. mortgaged to the Trust and Loan Company, and afterwards to A., who assigned to the plaintiff. D. then conveyed to the defendant, who took possession, and was recognized by the Trust and Loan Company as holding under them. The plaintiff brought ejectment, there having been no default under the mortgage to the Trust and Loan Company, which contained a proviso for possession by D. until default:—Held, that the plaintiff was entitled to recover, for D. could not in the face of his mortgage, deny A.'s right of possession, (though A. might be ejected by the company,) or that of the plaintiff as his assignee. *Reed* v. *McBean*, 8 C. P. 246.

In ejectment brought upon a mortgage, it appeared that before the mortgage was given defendant became a tenant of the mortgagor for a year:—Held, that at the end of that time his right ceased, and that the mortgagees could eject him without notice. *Canada Permanent Building and Savings Society* v. *Rowell*, 19 Q. B. 124.

The plaintiff (mortgagee) covenanted with defendant (mortgagor), that no sale of the land and premises or any lease should be made until one month's notice in writing should be given:—Held, that defendant was not entitled to a month's notice before bringing ejectment. *Stevenson* v. *Culbertson et al.*, 12 C. P. 79.

In April, 1861, R. mortgaged the land to defendant for $1000, payable on the 23rd of April, 1863, with interest in the meantime half-yearly, covenanting that after default defendant might enter; that if he should make default, and defendant should after the time for payment have given written notice demanding payment, and a calendar month should have elapsed without payment, defendant might enter and lease or sell; and defendant covenanted that no sale or lease should be made, nor any steps taken by him to obtain possession, until such notice should have been given. There was a proviso that until default after such notice R. might hold possession. In May, 1861, defendant assigned this mortgage to the plaintiff. R. in November, 1862, being in possession, leased to defendant for two years, and in December following he conveyed his equity of redemption to the plaintiff. Nothing had been paid on the mortgage. In July, 1863, the plaintiff brought ejectment:—Held, that the plaintiff might recover without having given the month's notice, for having accepted the land and lost his claim to the debt, there was no one on whom a demand of payment could be made. *Conkle* v. *Maybee*, 23 Q. B. 274.

By a mortgage in fee to secure payment of $1,490.42, by monthly instalments, it was provided that the mortgagor should become tenant to the mortgagees thenceforth at will, at the rent of one pepper-corn monthly until default, and after default at the yearly rent of $149.04c. payable monthly. There was also a proviso that in case of default the mortgagees, without any previous demand of possession, might enter and sell. On ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit nor demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees at their option either to distrain or at any time to elect the mortgagor himself without demand; but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply tenant at will; Semble, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent Building and Savings Society* v. *Byers*, 19 C. P. 473.

Other Cases.]—Where a mortgagee has neither taken possession of the land after default, or received interest within twenty years, the title is in the mortgagor; and the mortgagee, if suing in ejectment a third party in possession, may be nonsuited. *Doe* d. *McLean* v. *Fish*, 5 Q. B. 265.

Held, that a receipt of 1s. in full of damages and costs, in an action in debt, founded upon the covenant in a mortgage, did not operate as a reconveyance of the estate so as to defeat an ejectment brought subsequently upon the same security. *Carter et al.* v. *McLaurin*, 8 C. P. 460.

Defendants mortgaged land to the plaintiffs for £875, payable on the 23rd June, 1864, and interest half-yearly, on the 23rd June and December, with a proviso for entry by the mortgagees after and possession by the mortgagors until default. The interest due on the 23rd of June, 1863, being in arrear, on the 11th of December following the plaintiffs brought ejectment. Defendants' attorney paid the interest up to the 23rd of that month, and on the 29th of July following, the principal not having been paid, judg-

ment was entered for want of appearance, and a writ of hab. fac. poss. issued. Defendants' attorney swore that this payment was accepted in satisfaction of the suit, which the plaintiffs' attorney denied :—Held, (rescinding an order made in chambers), that the judgment was regular, for the admitted default in the interest vested the land absolutely in the plaintiffs, and the subsequent payment could not divest it; defendants' only remedy being an application for relief under the 7 Geo. II., c. 20, or under the last proviso in the mortgage. *Goodeve et al.* v. *Wallace et al.*, 24 Q. B. 31.

The plaintiff brought ejectment on the 6th of September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McI. assigned to him. The mortgage to McI. was given on the 9th November, 1861, and that to the plaintiff on the 21st of March, 1864. On the 21st of September, 1865, McI. by deed, reciting an interlocutory decree in chancery, in respect of the foreclosure of W.'s mortgage to him, conveyed to M. as W.'s appointee, and on the 9th of November, 1865, by a decree in the same suit, this mortgage was finally foreclosed. It was contended that the mortgage to McI. had merged in the inheritance, and could not be set up against the plaintiff; but, Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards. *McKay* v. *McKay*, 25 Q. B. 133.

A mortgage of land given by an infant is voidable only, not void, but it may be avoided during infancy, and defending by a guardian an action of ejectment brought by the mortgagee, is a sufficient act of avoidance. *Gilchrist* v. *Ramsay et al.*, 27 Q. B. 500.

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IV. Practical Procedure.

1. *Parties.*

(a) *Generally.*

Plaintiffs.]—Quære, as to the effect of a misjoinder of plaintiffs in ejectment under 14 & 15 Vic. c. 114. *Young et al.* v. *Scobie*, 10 Q. B. 372.

Defendants.]—Where several tenants occupied separate tenements in one house as several tenements, held that a single action might be brought for the premises, serving each tenant with a copy and notice. *Doe d. Bell* v. *Roe*, 3 U. C. R. 64.

Under the old practice, the fact of defendant being tenant in possession in an action of ejectment, could not be contested by affidavits on a motion to set aside the service of the declaration and notice. Semble, that all the tenant could do was to ask the court to excuse him from confessing possession, and to require the plaintiff to prove it. *Doe* d. *Vancott et al.* v. *Roe*, 5 U. C. R. 272.—P. C.—Macaulay.

An ejectment summons having been served on A. and B., A only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict, and issued a hab. fac. and ca. sa. for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings :—Held, that the plaintiff was right, for as to the hab. fac. if B. claimed no interest in the land, and was not in possession, he should have applied on receiving the summons to have his name struck out. *D'Arcy* v. *White*, 24 Q. B. 570.

In an action against a landlord and his tenant, the latter being in actual possession :—Held, though with much doubt, that the name of the tenant might be struck out of the proceedings. *Kerr* v. *Wahlie et al.*, 4 P. R. 138.—C. L. Chamb.—A. Wilson.

Doubts as to the propriety of the practice laid down in D'Arcy v. White, 24 Q. B. 570. *Ib.*

Quære, whether when A. is in possession as a hired servant of B., a writ of ejectment should not be directed to the latter. *Parsons* v. *Ferriby*, 26 Q. B. 380.

A writ of ejectment was issued against defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land. The possession was vacant, and it was not shewn that defendant was last in possession :—Held, that defendant was entitled to have the writ set aside without disclaiming title. *Wallace* v. *Acre*, 5 P. R. 142.—C. L. Chamb.—Richards.

The Ejectment Act, C. S. U. C. c. 27, changed the procedure rather than the law for the recovery of land; and therefore the right under the old practice, to make all persons found in possession of land defendants, without reference to whether their possession was joint or several, still exists. *Bannerman* v. *Dewson*, 17 C. P. 257.

The disclosure by one defendant that he occupies a part of the land claimed not jointly with another defendant, does not entitle him to have his name struck out of the writ, and oblige the plaintiff to proceed against the other alone; but the act provides a mode by which every one may defend, by limiting his defence to the particular part claimed. *Ib.*

Under the Married Woman's Act, 1872, a wife may be the sole defendant in ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the province. *Warren* v. *Cotterell*, 8 L. J. N. S. 245.—C. L. Chamb.—Dalton, *C. C. & P.*

Where a wife, living apart from her husband, is in possession of land, under such circumstances as precludes the presumption of her being agent of her husband, she must be made a defendant in ejectment for the land. *Woodward* v. *Cummings*, 6 P. R. 110.—C. L. Chamb.—Dalton, *C. C. & P.*

One defendant in ejectment is not entitled to have his name struck out at the trial, on disclaiming all right to possession, in order to be called as a witness for his co-defendants. *Grogan* v. *Adair et al.*, 14 Q. B. 479.

Where a person made defendant is not in possession, and claims no right to the land, he is entitled to have his name struck out. *Hall* v. *Yuill*, 2 P. R. 242.—C. P.

The name of a defendant who disclaimed all interest in the land except as dowress, struck out. *Weaver* v. *Burgess*, 5 P. R. 307.—C. L. Chamb.—Dalton, *C. C. & P.*

See *Harper* v. *Lowndes*, 15 Q. B. 430, p. 1158; *Burnham* v. *Jones*, 32 Q. B. 83, p. 1179.

2. *Writ of Summons.*

(a) *Service of.*

On Absent Defendant.]—The writ having been served on defendant's wife, being in possession, and stating that her husband was in the United States; under the particular circumstances of the case an order was made allowing the service as of the date of the order. *Cottle et al.* v. *Morris*, 7 L. J. 19.—C. L. Chamb.—Burns.

Vacant Possession.]—Ejectment as on a vacant possession. It was shewn that there was a house on the premises and some articles of furniture thereon, and that the tenant lived near. The court set aside the proceedings on condition that the applicant, who claimed title as landlord, should appear and defend. *Popplewell* d. *Capreol* v. *Abbott*, 5 O. S. 61.

Held, upon the facts disclosed in the affidavits filed in this cause, that the premises for which the action of ejectment was brought were vacant when the action was commenced, and that judgment as on a vacant possession was duly obtained and entered. *Hooper* v. *Burley*, 1 L. J. N. S. 273.—C. L. Chamb.—Draper.

The summons was sued out against defendant, J., on the 20th January, 1871, and served: 1. By nailing a copy upon the land, which was a wild lot; 2. By serving a copy on defendant's brother, who was not shewn to be defendant's agent or authorized to accept service for him; 3. By serving a copy on one E. at defendant's late residence. Upon these affidavits an order was made authorizing the plaintiff to proceed by signing judgment for want of appearance, which was done on the 27th of April. Defendant had been in England since December, 1870, and having returned in July, he moved in the next term to set aside the order and judgment signed under it, on affidavit denying that he had ever had possession of the land either by himself or others:—Held, that the rule must be absolute: that it was a case of vacant possession, but no reason was shewn for making J. a defendant, and no service binding upon him. *Burnham et al.* v. *Jones*, 32 Q. B. 83.

Other Cases.]—It is not necessary, under 14 & 15 Vict. c. 114, to read and explain the purport of the summons to the party served. *Riddell* v. *Brian*, 2 C. L. Chamb. 198.—Burns.

Service on a tenant of part of the premises, who was not named in the writ:—Held, bad. *Regina* v. *Benson*, 1 P. R. 221.—C. L. Chamb.—Burns.

The affidavit of service need not state that the copy served was endorsed with the name and residence of the attorney, nor that such endorsement was made on the writ within three days, nor that the service was effected upon the person or tenant in possession. Where such writ is tendered to defendant, and placed within his reach, and its character explained; Semble, that this is a personal service, though he refuse to take it up. *Martin* v. *McCharles*, 25 Q. B. 279.

The person serving need not make the endorsement of service within three days, as required by C. L. P. Act, s. 19, that provision not applying to ejectment. *Leeson* v *Higgins*, 4 P. R. 340.—C. L. Chamb.—Draper.

[See, also, IV. 7 (a), p. 1187.]

(b) *Other Cases.*

Semble, that in ejectment it is irregular to issue a writ out of the office of the deputy clerk of the crown of an outer county, calling upon defendant to enter his appearance in that county, when the lands are situate in another outer county. In this case, however, the defendant having appeared and allowed issue to be joined, the court refused to interfere, leaving him to his writ of error after judgment. *Trust and Loan Company* v. *Stevens*, 2 P. R. 60.—P. C.—Richards.

The county marked in the margin is to be taken as the county where the writ was issued, and not as the venue laid in the cause. *Riddell* v. *Brian*, 2 C. L. Chamb. 198.—Burns.

The fact that a writ of summons in ejectment in some respects varies from the præcipe on which it issued, is no ground for setting aside the writ, for the præcipe is no step or proceeding in the cause. *Grimshawe* v. *White*, 3 P. R. 329.—C. L. Chamb.—Draper; *Cotton* v. *McCulley*, 7 L. J. 272.

A writ should be endorsed with the name and abode of the attorney actually suing out the same, whether he acts as agent for the attorney, or is himself the attorney for the plaintiff. *Webster* v. *Gore*, 4 P. R. 169.—C. L. Chamb.—Draper.

3. *Notice of Title.*

[*By 36 Vict. c. 8, s. 62, the notice may now contain any number of modes in which title is set up.*]

(a) *Form of, and Practice.*

In ejectment for breach of covenant in a lease, the notice of claimant's title should set out the particular covenant which has been broken, and the particulars of the breach in general terms. *Kenney* v. *Shaughnessy*, 3 L. J. 29.—C. L. Chamb.—Burns.

It is only necessary to state how the party claims, as by conveyance, descent, &c., and from whom, without exhibiting the whole chain of title. *Coltman* v. *Brown*, 16 Q. B. 133.

Where a landlord is allowed to appear instead of the persons named in the writ, notice of title need not be served. *Heron* v. *Elliott*, 1 L. J. N. S. 156.—C. L. Chamb.—A. Wilson.

In ejectment it is not necessary to annex the notices of title on either side to the issue book. *Campbell* v. *Pettit*, 26 Q. B. 507.

An objection that the title relied on is not the same as that mentioned in the notice, cannot be taken advantage of after the trial. *Pechingey* v. *Brownlee*, 28 Q. B. 189.

(b) *By Plaintiff.*

In ejectment for part of 22 in the 8th con. of Hamilton, described as extending to the edge of Rice Lake, it was proved that there was a concession in the original survey of the township, (called the 9th,) between the 8th (to the north thereof) and Rice Lake. The plaintiff proved that the patent under which he traced title described the 8th concession as extending to the bank of Rice Lake, but the deed to himself only stated the lot without giving mete

and bounds :—Held, that although the specific description in the patent, and not the general description of the lot, would probably govern, yet the plaintiff having in his notice of title only claimed lot 22 in the 8th concession, whereas the part contended for was in the 9th concession, the defendant was entitled to a verdict. *Henderson* v. *Harris*, 10 C. P. 374.

A line run without legal authority between lots 5 and 6 acquiesced in for years, was subsequently found to be erroneous, and a new line was run according to law, which took away land from the supposed lot 5, and added to 6. Plaintiff sought to recover the land so taken, which was clearly a part of lot 6, claiming right by possession, though his grantor never pretended to have any right thereto, and he did not claim by possession in his notice :—Held, that the plaintiff not having set up a possessory title in his notice, was debarred from doing so at the trial. *Smith* v. *Clurton*, 10 C. P. 538.

The claimant is entitled to set up any number of conveyances from the grantee of the crown of respective portions of the land claimed, such being but one mode of title set up. *Grimshaw* v. *White*, 12 C. P. 521.

The plaintiff, describing herself as executrix of S., claimed title by virtue of "a mortgage made by the defendant :"—Held, that she was not restricted to proof of a mortgage made to herself, but might shew one to the testator, and her own right as devisee ; and that omitting to name the mortgagee was at most only want of "reasonable certainty," for which defendant might have applied under sec. 13 of the Ejectment Act, C. S. U. C. c. 27. The addition of "executrix of," &c., to the plaintiff's name :—Held, mere matter of description. *Skeaton* v. *Whelan*, 24 Q. B. 174.

Quære, whether in this country, owing to the provisions as to notice of title, a plaintiff must give notice of his claim being only for a moiety, before he can insist upon defendant admitting his claim and denying actual ouster. *Lyster* v. *Rooney*, 26 Q. B. 233.

The plaintiff, by his notice, claimed as devisee of F., defendant, under a sheriff's deed to one M., upon a fi. fa. against F.'s land. Defendant having proved such deed :—Held, that the plaintiff could not in answer, under his notice, rely upon twenty years' possession held by him subsequently ; and defendant having been in possession eighteen years, the court refused to allow an amendment of plaintiff's notice. *Fields* v. *Livingston et al.*, 17 C. P. 15.

Held, affirming the judgment of the Court of Common Pleas, 17 C. P. 34—Draper, C. J., Van Koughnet, C., and Hagarty, J., diss.,—that a plaintiff having by his notice claimed under his paper title, could not, in answer to a lease of the premises from him to defendant set up by the latter, rely upon the forfeiture of such lease by reason of condition broken, but that, to entitle him to take advantage of such forfeiture, he should have alleged it in his notice. *Pettigrew* v. *Doyle*, 17 C. P. 459, in appeal.

The doctrine established in the last case, when the plaintiff claims by reason of forfeiture of a term, applies also to a plaintiff claiming to avoid his lease on the ground of infancy. *Hartshorn* v. *Earley*, 19 C. P. 139.

A. entered into possession under B., who verbally promised him a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died. In ejectment by B. against A.'s heirs :—Held, that B. having entered under M. originally, notice of title "under M., who claimed title from the crown," was sufficient to enable B. to recover. Pettigrew *v.* Doyle, 17 C. P. 32, 459, distinguished. *Armstrong* v. *Armstrong*, 21 C. P. 4.

See *Puertell* v. *Boilan*, 23 C. P. 175, p. 1201.

(c) *By Defendant.*

Defendant will be allowed in the notice required by the C. L. P. Act of 1856, s. 224, to set up a paper title, and also title by possession, upon affidavit that he can establish both titles ; and that he wishes to establish his paper title, but least he should fail in doing so from being unable to procure the necessary witnesses, he desires also to set up title by possession. Leave will be granted ex parte in first instance. *Todd* v. *Cain*, 2 L. J. 232.—C. L. Chamb.—Burns.

Where defendant's notice described the land for which he intended to defend as *a part of the lot mentioned in the writ*, he was not allowed to contend at the trial that what he defended for was not included in such lot, and therefore not plaintiff's property. *Darling* v. *Wallace*, 9 Q. B. 611.

A notice of claim under the statute, may at the same time deny the title of the plaintiffs and shew in what respect it is defective. *Commercial Permanent Building Society* v. *Rowell*, 5 L. J. 230.—C. L. Chamb.—Richards.

Where defendant in his notice claimed the whole premises under a conveyance from B., he was not allowed at the trial to set up that he was tenant in common with the plaintiff, and insist upon proof of ouster. *McCallum* v. *Boswell*, 15 Q. B. 343.

Quære, per Robinson, C. J., whether, if defendant appears, but omits to give notice of the nature of his title, the plaintiff may sign judgment as for want of appearance. *Harper* v. *Lowndes*, 15 Q. B. 430.

Where defendant, by his notice, besides denying the plaintiff's title, claimed to hold under a lease : Semble, that he was entitled to shew an adverse possession by himself for twenty years in order to defeat the plaintiff's claim, although the effect might be to establish a title in himself of which he had given no notice. *Hill* v. *McKinnon*, 16 Q. B. 216.

Where defendant, in his notice of title, claimed as purchaser through one M., and the plaintiff, in proving his title, put in a lease from one M. to himself :—Held, that it was unnecessary for the plaintiff to shew M.'s title. *Brandon* v. *Cawthorne*, 19 Q. B. 368. See, also, *Cartwright* v. *McPherson*, 20 Q. B. 251.

The notice of title confines the claimant to proof of the title therein stated, but allows him to defeat by any means the title set up by the defendant ; and in like manner the defendant is confined to proof of the title claimed by his notice, but may equally defeat (and that without going into his own title) the title set up by plain-

tiff. When, therefore, the plaintiffs, claiming by their notice under a grant from the crown, had put in such grant, it was competent for defendant, though his notice claimed title in himself, as derived from one A., under a lease from the plaintiffs, to rely upon proof of such lease alone as defeating the plaintiffs' title, without proving an assignment to himself. *The Canada Company* v *Weir*, 7 C. P. 341.

Ejectment for lots 15, 13, & N. ½ 12, in 2nd con. of Sandwich. The defendant in his notice of title, *besides denying the claimant's title*, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debared from disputing their title as landlord, and proved a receipt for rent in full to 31st of March, 1861. The defendant in reply proved his tenancy:—Held, that the case of Cartwright *v.* McPherson, 20 Q. B. 251, upon which the plaintiffs relied, did not relieve the plaintiffs from the proof of the determination of defendant's tenancy, although it was evidence to estop defendant from denying that he was plaintiffs' tenant. *Colby et al.* v. *Wall*, 12 C. P. 95.

Held, that the omission of the words, "besides denying the title of the plaintiff" in the defendant's notice of defence, did not entitle the plaintiff to recover without proving the title stated in his notice:—Held, also, that the appearing of defendant at the trial, he having filed an appearance without any notice of defence, would equally [illegible] the plaintiff on proof of his title; but having proved his title, defendant would be debarred from giving rebuttal evidence. *Shore et al.* v. *McCabe et al.*, 10 C. P. 26.

Defendant entered an appearance without filing any notice of title:—Held, that he could not at the trial set up a title in himself by possession, the effect of his appearance being merely to deny the title of the claimant, and allow him to make any answer to it which did not assert title in himself or in any one under whom he claimed. In such a case, the plaintiff must prove a strict title, and, defendant may shew that this title has not been perfectly proved, or, being proved, he may shew a better title in some one else, but not in himself, or in any one under whom he claims. *Burke* v. *Battle*, 17 C. P. 478.

Where the plaintiff claimed as assignee of a mortgage made by defendant, and defendant by his notice claimed under a deed from the mortgagee:—Held, that defendant might shew that he was an infant when he executed the mortgage. *Grace* v. *Whitehead*, 16 Q. B. 50.

The defendant, in his notice of defence, besides denying the claimant's title, claimed title as tenant or by permission of the tenants in fee of the land. On the trial the plaintiffs, having proved their title, objected to the defendant being permitted to go into his defence because he had denied and put the plaintiffs to proof of their title. The learned judge, under the authority of Cartwright *v.* McPherson, 20 Q. B. 251, refused to receive the evidence. A new trial was granted without costs, the court adhearing to their opinions in Canada Company *v.* Weir, and Shore *v.* McCabe, both of which were delivered before the case of Cartwright *v.* McPherson came before the Queen's Bench. *Thompson et al.* v. *Falconer*, 13 C. P. 78.

Where defendant, besides denying the plaintiff's title, claimed title under deed from the plaintiff to M., and under M.:—Held, that such notice did not relieve the plaintiff from proof of title. Brandon *v.* Cawthorne, 19 Q. B. 368, and Cartwright *v.* McPherson, 20 Q. B. 251, overruled; Canada Company *v.* Weir, 7 C. P. 341; Shore *v.* McCabe, 10 C. P. 26; Colby *v.* Wall, 12 C. P. 95, and Thompson *v.* Falconer, 13 C. P. 78, followed. *McGee* v. *McLaughlin*, 23 Q. B. 90.

A defendant appearing cannot be compelled to file a notice of his title; but if he does not, he is precluded from setting up title in himself, and the plaintiff will recover on proving his own title. *Fairman* v. *White*, 24 Q. B. 123.

Ejectment on mortgage. Defendant appeared; but on examination under Ad. J. Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time:—Held, that the appearance and defence could not be struck out on the authority of McMaster *v.* Beattie, 10 L. J. N. S. 103, as defendant was entitled to possession until plaintiff should prove his case. *Metropolitan Building and Saving Society* v. *Reeden*, 12 L. J. 50.—C. L. Chamb.—Dalton, *C. C. & P.*

See *Duffill* v. *Lawder*, 4 L. J. 137, p. 1192; *Heron* v. *Elliott*, 1 L. J. N. S. 156, p. 1190; *Harper* v. *Lowndes*, 15 Q. B. 430, p. 1192.

(d) *Particulars of Title.*

Defendant is entitled to particulars of a plaintiff's claim in ejectment after appearance, or at any other stage if it appear proper to a judge that he should have them. *Watson* v. *Brown*, 4 P. R. 202.—C. L. Chamb.—A. Wilson.

Held, that an order for better particulars of plaintiff's title may, in ejectment, be made before appearance is entered. *Fralick* v. *Dorman*, 6 P. R. 101.—C. L. Chamb.—Dalton, *C. C. & P.*

4. *Notice Limiting Defence.*

Where immediately after appearance, the plaintiff served the issue book, together with notice of trial, and subsequently, *within four days after appearance*, defendant gave notice limiting his defence, which notice did not appear upon the issue book or record:—Held, that the notice of trial was irregular, as the notice limiting the defence was regular, and should appear on the issue book, and be served with notice of trial. *Grimshaw* v. *White et al.*, 12 C. P. 321.

Where defendant limits his defence under C. S. U. C. c. 27, s. 12, to part of the lands sought to be recovered, he is entitled to the four days allowed him by the statute, even though this may have the effect of throwing the plaintiff over an assize; and an order will not be granted to plaintiff to amend the issue which has been served by him before the four days have elapsed, without prejudice to his notice of trial. *Phillips et al.* v. *Winters*, 3 P. R. 312.—C. L. Chamb.—Draper; followed in *Buchanan* v. *Bettes*, 2 L. J. N. S. 71.—C. L. Chamb.—A. Wilson. But see next case.

Where a defendant files his appearance, the cause is at issue, and the plaintiff may serve issue book and notice of trial. Defendant may,

however, within four days after appearance give notice limiting his defence; and if he do so, he may, under the powers of amendment in the Administration of Justice Act, have the issue book amended in accordance with the limitation, but he is not entitled to have the notice of trial set aside. *Casey* v. *McGrath*, 6 P. R. 274.—C. L. Chamb.—Dalton, *C. C. & P.*

Defendant filed a notice claiming title to the land "mentioned and described in the writ of ejectment summons herein," and after service of issue book and notice of trial, and within four days after appearance, served a notice limiting her defence to all said land, except a strip on one side thereof, describing it by metes and bounds, two chains in length by *one link* in width. It being too late to serve a fresh notice of trial, the plaintiff obtained a judge's order to amend the issue book without prejudice to the notice of trial, by adding the usual statement as to a limited defence, and went on and took a verdict. On motion to set aside this order, &c.:—Held, as it was shewn that there was no question of boundary between the parties, and the notice limiting the defence could not be bonâ fide, that after expressly claiming title to the whole of the premises, the court would not set aside the order, as the effect of the amendment was to permit defendant to set up her defence if it was bonâ fide, and if it was not the court would not assist her. The court declined to decide whether a judge has power so to amend, where a bonâ fide notice limiting the defence is regularly served after notice of trial. *Vrooman* v. *Vrooman*, 17 C. P. 523.

In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855, by deed gave to his son James his interest in one half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give his father one half of the produce, if demanded. In 1863, L. conveyed to two other sons the east half, the consideration expressed in the deed being £500, and their vendee brought ejectment against the widow and devisee for life of James. She defended for the whole, giving no notice of defence as tenant in common, under sec. 29 of the Ejectment Act, C. S. U. C. c. 27:—Held, that the effect of the deed of 1855, was to give an undivided moiety of the half lot to James, but that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech* v. *Leech et al.*, 24 Q. B. 321.

See *Regina* v. *Adams*, 3 C. P. 404, p. 1192; *Bannerman* v. *Dewson*, 17 C. P. 257, p. 1178.

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5. *Equitable Defences.*

Held, that there is no authority under 36 Vict. c. 8, ss. 4, 7, O., for carrying the pleadings in ejectment further than replication. *Cascanette* v. *Chatrand*, 6 P. R. 211.—C. L. Chamb.—Dalton, *C. C. & P.*

Per A. Wilson, J., that the equitable defence in ejectment in this cause, setting up the right of a widow and dowress, who had paid off a mortgage made by her husband, to the possession of the land as against the plaintiffs, her children, until she should be repaid, and afterwards as dowress; and setting up also a lien for improvements under a lease from her, fully set out in the report, and filed under "The Administration of Justice Act of 1873," ss. 3 and 4, though probably not affording a good equitable defence, should be allowed. *Carrick et al* v. *Smith*, 34 Q. B. 389.

Held, that a plaintiff may reply and demur to such an equitable defence. *Ib.*

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6. *Notice to Defendant to shew Title.*

When in ejectment it is necessary to leave the question of adverse possession in the defendant for twenty years as a doubtful point to the jury, it is not a case in which a plaintiff can avail himself of the provisions of 4 Will. IV. c. 1, s. 52, and give notice to defendant as an intruder. *Doe* d. *Lyons* v. *Crawford*, 6 O. S. 334.

The plaintiff proved a paper title, but the grant from the crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence, shewed it to have been an ordinary conveyance in fee, but did not shew what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title:—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little et al.*, 20 Q. B. 425.

The plaintiffs in ejectment, executors and trustees of S., claimed title by a sale under execution against C. It appeared that the patent for the land issued to one Y., of the township of Fredericksburgh, in 1810. There was no deed proved from Y., but in 1834, one D., of the same township, conveyed to C. the whole lot, and it was shewn that the patent had been in D.'s possession, and in that of C., whose papers had been burned. No claim had been made by or under Y., but no possession had been taken of the land until 1847, when the lot was sold for taxes and purchased by C., who paid the taxes and exercised acts of ownership until the defendant entered as a trespasser:—Held, a case within secs. 17 & 18 of the Ejectment Act, C. S. U. C. c. 27: that the plaintiff, under sec. 18, was a person entitled in justice to be regarded as the proprietor of the land, but unable to shew a perfect legal title from a cause not within his power to remedy by due diligence; and that the defendant being a mere intruder and stranger to the title, and having received a notice to shew what legal right he had, under sec. 17, was not at liberty to take objections to the plaintiffs' title. *Davis et al.* v. *VanNorman*, 30 Q. B. 437.

Held, that under the circumstances of this case, the plaintiffs, by serving a notice under C. S. U. C. c. 27, s. 17, might have compelled the defendant to shew title. *Thompson et al.* v. *Hall et al.*, 31 Q. B. 367.

Land sold for taxes under C. S. U. C. c. 55, was described in the assessment roll, advertisements, and treasurer's warrant, as the south part of the west half of lot 17, in the 9th concession of Rawdon 75 acres; and in the sheriff's deed by metes and bounds. The plaintiff in ejectment claiming through this sale, and being a bonâ fide purchaser, gave defendant a notice, under sec. 17 of the Ejectment Act, C. S. U. C. c. 27, requiring him to prove his title:—Held,

that the defendant, upon the evidence set out in this case, was a mere intruder; that the case was within the statute; and that defendant could not take advantage of the defective description. *Booth* v. *Girdwood*, 32 Q. B. 23.

Semble, that an objection to the absence of proof of an order in Chancery, recited in a deed executed under the order, but which order is not otherwise proved, may be met by a notice under sec. 17 of the Ejectment Act. *Thompson* v. *Bennett*, 22 C. P. 393.

7. *Declaration.*

(a) *Form and Service of.*

[*There is now no declaration in ejectment. By C. S. U. C. c. 27, s. 6, the writ is to be served in the same manner as the declaration in ejectment was formerly served.*]

Service upon one of several tenants in common in possession of the same parcel, is sufficient. *Doe* d. *Davidson* v. *Roe*, Tay. 491.

Where several tenants occupied different apartments in one house, as several tenements:—Held, that a single action might be brought for the premises, serving each tenant with a copy and notice. *Doe* d. *Bell* v. *Roe*, 3 O. S. 64.

The declaration cannot be served by the lessor of the plaintiff. *Doe* d. *Armstrong* v. *Roe*, 4 O. S. 302.

Service on a person (not shewn to be a servant of the tenant) on the premises claimed, explaining the meaning and intent thereof,—Held, insufficient, without shewing that the tenant had received it. *Doe* d. *Smith* v. *Roe*, 5 O. S. 306.

A declaration designating the property by the lot and concession, without mentioning the quality or description of land, is sufficient. *Doe* d. *O'Reilly* v. *Pickle*, 1 Q. B. 282.

Service upon any person but the tenant or his wife is insufficient, unless it can be shewn that the declaration came to the tenant's knowledge before the first day of the term. *Doe* d. *Gray* v. *Roe*, 5 O. S. 483; *Doe* d. *Hunter* v. *Roe*, 3 Q. B. 127.

The declaration in ejectment is not included in the proviso to sec. 26 of 12 Vict. c. 63, but may be served between the 1st of July and 21st August. *Doe* d. *Shortts* v. *Roe*, 2 C. L. Chamb. 106.

(b) *Affidavit of Service.*

Where service upon the tenant in possession was sworn to, the court refused to set it aside upon an affidavit stating it to have been served upon a stranger or servant on the premises. *Doe* d. *Dunlop* v. *Roe*, Tay. 350.

Where the affidavit stated a service on the tenant in possession of part of the premises, a rule for judgment against the casual ejector was granted as to such part. *Doe* d. *Davidson* v. *Roe*, M. T. 1 Vict.

Service on a person stated in the affidavit to have admitted himself to be tenant in possession, is not sufficient; he must be sworn to be tenant in possession. *Doe* d. *Dunn* v. *Roe*, E. T. 2 Vict.

An affidavit of service on a person who represented herself to be the wife of the tenant is insufficient, unless it state deponent's belief that she is so. *Doe* d. *Sanderson* v. *Roe*, T. T. 2 & 3 Vict.

An affidavit of service cannot be sworn before the attorney in the cause. *Doe* d. *Walker* v. *Roe*, T. T. 2 & 3 Vict.

The affidavit must shew the time of service. *Doe* d. *Sherwood* v. *Roe*, 5 Q. B. 319.

(c) *Venue.*

The venue in ejectment is local. 14 & 15 Vict. c. 114, made no change in that respect. *McKimsey* v. *Johnston*, 14 Q. B. 209.

In a local action, if the plaintiff desire to try the cause in another district, he should apply to enter a suggestion on the roll to try the cause there, not for an order to change the venue. *Doe* d. *Crooks* v. *Cumming*, 3 Q. B. 65.

Under 14 & 15 Vict. c. 114, it was not necessary that the action should be brought, or papers filed, in the county where the premises were situate and the venue laid. *Passmore* v. *Speed*, 1 P. R. 318.—C. L. Chamb.—Robinson.

[Now it is otherwise by C. S. U. C. c. 27, s. 3.]

In ejectment commenced after 24 Vict. c. 53, for land in the city of Toronto, the venue was laid in and the trial took place at the Assizes for the united counties of York and Peel. Per Robinson, C. J.—The second section of the act clearly allowed that course. Per Burns, J.—If the venue was wrong, the defect would be cured by the statutes of Jeofails. *Patton* v. *Cameron et al.*, 21 Q. B. 364.

Held, 1. Where under 24 Vict. c. 53, s. 2, the venue in ejectment is laid in the county of York when the lands lie in the city of Toronto, the venue may be changed, on the plaintiff's application, to the city, by virtue and in exercise of the common law power; 2. In such a case, the proper motion is to change the venue, and not to enter a suggestion; 3. Section 4 of that statute does not apply to actions of ejectment; 4. The plaintiff having lost a trial by irregularity on his part, the venue will not be changed, on his application, in order to expedite the trial; 5. In ejectment the case must be at issue as to all the defendants before such motion is made. *Anderson* v. *Brown*, 2 L. J. N. S. 161.—C. L. Chamb.—A. Wilson.

Held, that the fact of a defendant being a county judge, where the plaintiff might otherwise have proceeded under the Overholding Tenant's Act of 1868, and thereby have obtained a more summary remedy, is sufficient reason to change the place of trial in ejectment. *Anon.*, 4 P. R. 310.—C. L. Chamb.—Draper.

8. *Notice to Appear.*

[*Not now given, except by the writ.*]]

Where such notice was addressed to the tenant by the christian name of James instead of William, an amendment was allowed. *Doe* d. *Crumback* v. *Roe*, 1 Q. B. 518.

Where the notice was for a wrong term, but the right term was inserted in pencil, and pointed out to the tenant at the time of service, the co

refused to set aside the service. *Doe* d. *Mills* v. *Roe*, 2 P. R. 181.—P. C.—Jones. See, also, *Doe* d. *Kemp* v. *Roe*, 1 Q. B. 406.

Plaintiff's attorney having served his declaration in ejectment with notice to appear in a term not issuable in accordance with a modern rule of the Court of King's Bench in ejectment not introduced into this country, nor appearing in Tidd's edition of 1817, the judgment was set aside. The English rule is now adopted. *Doe* d. *Griffin* v. *Roe*, Tay. 203. See, also, *Doe* d. *Burger* v. ——, Tay. 363.

9. *Appearance and Defence.*

(a) *Within what Time.*

The writ of summons under the Ejectment Act requires the defendant to appear "within sixteen days after the service hereof." A summons was served on the 12th, and judgment signed on the 28th:—Held, too soon. *Scott* v. *Dickson*, 1 P. R. 366.—C. L. Chamb.—Robinson; followed in *Montgomery* v. *Brown*, 2 L. J. N. S. 72.—C. L. Chamb.—A. Wilson.

Summons served on 15th February (not being leap year.) Judgment signed in default of appearance on the 4th March, the 3rd March, the last of the sixteen days within which defendant had to appear, being Sunday:—Held, regular. *Cline* v. *Cawley*, 4 P. R. 87.—C. L. Chamb.—Morrison.

(b) *By Landlord.*

A landlord may be admitted to defend without an affidavit stating that he is so. *Doe* d. *Griffin* v. *Lee*, Tay. 235.

Where judgment is obtained against the casual ejector in consequence of the tenant in possession having neglected to give notice to his landlord, the court will set the judgment and writ of possession aside, and compel the tenant to pay the costs. *Doe* d. v. *Robertson* v. *Metcalf*, Tay. 377.

In ejectment on a vacant possession, after the usual rule had been obtained by the plaintiff, the court set the proceedings aside, on affidavits stating that there was a house on the premises, with several articles of furniture in it, and that a tenant lived near, on condition that the applicant, who claimed as landlord, should appear and defend. *Popplewell* d. *Capreol* v. *Abbott*, 5 O. S. 61.

A mortgagee will not be admitted to defend as landlord, unless he can shew that the tenant in possession holds under his mortgagor. *Doe* d. *Mallock* v. *Roe*, M. T. 1 Vict.

In ejectment against two tenants, the landlord obtained leave to join in a defence as a third party, but not availing himself of the order the plaintiff made up his record against the two defendants alone. He gave notice of trial, however, as a cause as against the three: and the two not appearing, &c., the plaintiff was nonsuited. On application in term,—Held, that under these circumstances there was no necessity to set aside the nonsuit, but it was set aside on terms. *Doe* d. *Murphy* v. *McGuire et al.*, 7 Q. B. 405.

A judgment regularly obtained will not be set aside for the purpose of allowing a third party (landlord) to come in and defend. *Mercer* v. *Bond*, 3 L. J. 150.—C. L. Chamb.—Robinson.

The tenant in possession having neglected to notify his landlord, the defendant, of the action, the plaintiff obtained judgment, and having issued execution thereupon, got possession. A judge in chambers set aside the judgment and writ of possession, and let defendant in to defend on terms. On motion to rescind the order for want of jurisdiction:—Held, that it was in the discretion of the judge, and he had power to make the order. *Turley* v. *Williamson*. 13 C. P. 581.

Defendant being tenant was served with the writ, which he handed to H., his landlord, and H. took it to his attorney, who, instead of getting leave for H. to defend, entered an appearance in defendant's name without his authority. A verdict having been obtained against defendant, the judge refused to interfere, but left him to his remedy against his landlord and the attorney. *Moran* v. *Schermerhorn*, 2 P. R. 261.—C. L. Chamb.—Burns.

In ejectment against A. and B., both were served with the summons, and before the time for appearance had expired one L. was allowed to come in and defend as landlord, by judge's order, which did not express whether he was to defend in place of A. and B. or with them, nor did this appear from his appearance or notice. They did not appear, and judgment was signed against them by default. The issue with L. was carried down and tried, and a verdict rendered for the plaintiff, on which judgment was entered, and costs taxed against L. only, and a writ of possession issued against the three:—Held, that the plaintiff was entitled to enter the judgment against A. and B., and that his proceedings were regular. *Huskins* v. *Cannon et al.*, 2 P. R. 334.—Q. B.

Where leave is given to a landlord to appear and defend, the appearance must be entitled in the cause against the defendants named in the writ. Notice of appearance and notice of title, if so entitled (i. e. in the cause against the original defendants), are correctly entitled. A summons obtained to set aside the appearance and subsequent proceedings for irregularity, styled in the cause against the new defendants, was correctly entitled. *Heron* v. *Elliott et al.*, 1 L. J. N. S. 156.—C. L. Chamb.—A. Wilson.

In ejectment against A. and B., by consent of the plaintiff's attorney an appearance was entered for S. as landlord, A. and B. not appearing. The notice of trial was entitled as against A. and B., and notice was served on the plaintiff's attorney warning him that this would be objected to. The nisi prius record contained no appearance, but annexed to it was an appearance by S. as landlord. The plaintiff was allowed to enter this on the record, and took a verdict, defendant not appearing. On application to set aside the verdict, the plaintiff objected that the affidavits filed by defendant, entitled as against S. alone, were wrongly entitled, and that no judge's order was shewn allowing S. to defend: Held, 1. That the plaintiff was precluded from the last objection, for he had consented to S. appearing, and obtained leave to enter his appearance on the record; 2. That the plaintiff's own proceedings warranted S. in assuming that he was to appear alone, and that the affidavits

objected to were therefore rightly entitled; 3. That the notice of trial was wrongly entitled. The verdict therefore was set aside, the costs to be paid by plaintiff. *Jones* v. *Scaton*, 26 Q. B. 166.

Where in ejectment a landlord is allowed to come in and defend, the order not saying whether it is instead of, or in addition to, the original defendant, it is irregular to omit the name of the latter in the style of the cause. *Yeoman* v. *Steiner*, 5 P. R. 466.—C. L. Chamb.—Dalton.—*C. C. & P.*

One Casselman, claiming under sheriff's sale, recovered possession by ejectment against defendant, who had been his tenant at will since the purchase at sheriff's sale, and on the 20th of July, 1866, turned him out of possession; but the premises were left vacant. On the 29th of March, 1866, plaintiff commenced this action of ejectment against defendant, and on the 8th of June, 1867, was put in possession under a writ in this suit. Casselman then applied to set aside this judgment, and to be let in to defend as landlord, but,—Held, that he must be left to his ordinary remedy by ejectment. *Cameron* v. *Murphy*, 4 P. R. 132.—C. L. Chamb.—Hagarty.

See *Lutz* v. *Beadle*, 5 P. R. 418, p. 1208.

(c) *By Other Persons not named in the Writ.*

On an affidavit shewing that the defendant sued in ejectment was merely the agent of one R., an order was made to substitute R.'s name as defendant, and that he be allowed three days to enter an appearance. *Morris* v. *Smythe*, 2 L. J. 112.—C. L. Chamb.—Burns.

A person in possession and not named in the writ will be allowed to appear and defend, even though defendant has confessed judgment, and a writ of hab. fac. has been issued thereon. *Harrington* v. *Harrington*, 3 L. J. 30.—C. L. Chamb.—Burns.

Leave to appear and defend will be granted to a person not named in the writ, pursuant to sec. 225 of C. L. P. Act, 1856, upon affidavit of the applicant that he is in possession, and disclosing his title. *Webster* v. *Horsburgh*, 3 L. J. 32.—C. L. Chamb.—Richards.

In general an application for a third party to be allowed to defend, will not be entertained after judgment. *Mercer* v. *Bond*, 3 L. J. 150.—C. L. Chamb.—Robinson.

A mortgagee out of possession is entitled, under sec. 9 of C. S. U. C. c. 27, to be admitted to defend an action against his mortgagor. *McDermott* v. *Keeling*, 7 L. J. 150.—C. L. Chamb.—Draper.

Ejectment having been brought against A., B. was by judge's order allowed to defend in his place, and the issue book and notice of trial were served as against B. alone, but A.'s name was inserted in the record as a co-defendant. A verdict having been found for the plaintiff, on motion in term an affidavit was filed that B.'s attorney was not aware of A.'s name being on the record until after the trial had commenced, and that B. had been prejudiced in his defence by being deprived of A.'s evidence. The court set aside the record and verdict for irregularity. *Peebles* v. *Lottridge*, 19 Q. B. 628.

(d) *Other Cases.*

Where, in styling the lessors of the plaintiff "The chancellor, president, and scholars King's college at York, in the province of Upper Canada," in the consent rule, appearance and plea in ejectment—the words "in the province of Upper Canada," were omitted, the omission was held not material, or at all events not a nullity, and might be cured by laches. *In re Chancellor, &c., of King's College* v. *Roe*, 1 Chamb. 111.—Macaulay.

The court refused to disturb a verdict for plaintiff, on the ground that the record did not contain the appearance filed, where it set out a notice by defendants limiting their defence and a plea in the form given by 14 & 15 Vict. c. 114. *Regina* v. *Adams*, 3 C. P. 404.

Where the notice of defendant's title was not addressed to the plaintiff as required by C. L. P. Act, 1856, s. 224, the defendant, on motion to set aside the appearance and enter judgment, was allowed to amend his notice on payment of costs. *Thompson* v. *Welch*, 3 L. J. 133.—C. L. Chamb.—Hagarty.

Plaintiff brought ejectment against the defendant after he had quitted possession. Defendant appeared, not limiting his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, but had given up possession before action brought. The plaintiff, nevertheless, took the record down to trial:—Held, that upon such notice the plaintiff could not have signed judgment. *Hoe* v. *Lowndes*, 15 Q. B. 430.

Quære, per Robinson, C. J., whether if defendant appears, but omits to give notice of the nature of his title, the plaintiff may sign judgment as for want of appearance. *Ib.*

Defendant will be admitted to amend his appearance on payment of costs, where he has omitted to file the requisite notice of title, but he must avail himself of leave to amend within a reasonable time, and if plaintiff refuse to sign or receive the amount of costs of amendment the amendment may be made before payment of costs. *Duffill* v. *Lowder*, 4 L. J. 137.—C. L. Chamb.—Robinson.

Defendant in his appearance wrote the plaintiff's name Samuel instead of Thomas. Judgment signed thereupon, was, under the circumstances of the case, set aside on payment of costs. *Shaw* v. *McDonell*, 2 P. R. 65.—P. C.—Richards.

The time for appearance expired on the 2nd May. On that day plaintiff searched for appearance, but found none. The next day an appearance was entered with a notice of title, which notice was served on plaintiff on the 7th May; on the 14th of May plaintiff made affidavit of search of 2nd May, but suppressed part of the facts, upon which an ex parte order under rule 92 was made:—Held, that this order must be set aside, as the appearance could not be treated as a nullity, and as the order was made ex parte without all the facts having been known or considered. *VanNorman* v. *McLennan*, 2 L. J. N. S. 207.

Ejectment on mortgage. Defendant appeared but on examination under Ad. J. Act, 1873, admitted the execution of the mortgage, and that the defence was merely for time:—H

...ce appearance and defence could not be ...ruck out on the authority of McMaster v. Beat... 10 L. J. N. S. 103, as defendant was entitled ... possession until plaintiff should prove his ... *Metropolitan Building and Saving Society* ... *Robben*, 12 L. J. 50.—C. L. Chamb.—Dalton, ... *C. & P.*

10. *Consent Rule.*

[*The consent rule is not now used, and the decisions with regard to it are only referred to.*]

As to the form of consent rule, see *Doe* d. *Canada Co.* v. *Roe*, 2 O. S. 209; *Doe* d. *Thompson* v. *Putnam*, 3 O. S. 312; *Doe* d. *West* v. *Howard et al.*, 4 O. S. 135; *Doe* d. *Ross* v. *Roe*, M. T. 1 Vict., R. & H. Dig. p. 178; *Doe* d. *Gilkison* v. *Money*, 1 Q. B. 341.

As to amendment of it, *Doe* d. *West* v. *Howard*, 4 O. S. 135; *Doe* d. *McQueen* v. *Vansburgh*, 1 Q. B. 349; *Doe* d. *Sheldon* v. *Ramsay*, 7 Q. B. 446.

As to other points, *Doe* d. *Lount* v. *Roe*, 1 C. L. Chamb. 105; *Doe* d. *Sutton* v. *Ball*, 1 Q. B. 709; *Doe* d. *King's College* v. *Roe*, 1 C. L. Chamb. 111; *Doe* d. *Hall* v. *Shannon*, 8 Q. B. 528; *Doe* d. *Kerr et al.* v. *Shoff*, 9 Q. B. 180; *Doe* d. *Fuller* v. *Huffman*, 8 Q. B. 325.

Nonsuit for not Confessing Lease, Entry, and Ouster.

Nonsuit for not confessing lease, entry, and ouster, under the old practice. Applications to ...nsuit. See *Doe* d. *Clark* v. *McQueen*, 3 O. S. ...; *Doe Lake* v. *Davis*, 3 O. S. 311; *Doe* d. *Lasher* v. *Edgar*, 4 O. S. 339; *Doe* d. *Leonard* v. *Myers*, 6 Q. B. 299; *Doe* d. *Ferguson* v. *McCarthy*, 2 Q. B. 141; *Doe* d. *Ketchum* v. *Roe*, 3 C. P. 259.

Plaintiffs were nonsuited for not confessing ...e, entry, and ouster. Subsequent to the ...l defendant executed a cognovit:—Held, on ...on for a new trial, that this was a waiver of ... formal exception. *Doe* d. *Kerr et al.* v. ...*off*, 9 Q. B. 180.

12. *Rule for Judgment.*

[*The rule for judgment against the casual ejector ...o longer used.*]

...for the decisions regarding it, see *Doe* d. *Har...* v. *Roe*, 2 O. S. 113, *Doe* d. *McFarlane* v. *Roe*, ... 7 Will. IV. R. & H. Dig. p. 177; *Goodtitle* ...*Garton* v. *Roe*, M. T. 1 Vict., R. & H. Dig. ...176; *Doe* d. *Bond* v. *Roe*, H. T. 1 Vict., R. ... Dig. p. 176; *Doe McDonald* v. *Roe*, H. T. ...ict., R. & H. Dig. p. 176; *Doe* d. *Street* v. ...M. T. 2 Vict., R. & H. Dig. p. 176; *Doe* d. ...*ph* v. *Roe*, 3 Q. B. 377.

...s to the rule for judgment nisi under 13 & 14 ... c. 57, see *Elliott* v. *Roe*, 1 P. R. 11.—P. C. ...raper.

Judgment for Default of Appearance or Defence.

... to judgment against the casual ejector, ...r the old practice. See *Doe* d. *Robinson* v. ... E. T. 3 Vict., R. & H. Dig. 253; *Doe Hen...* v. *Roe*, 4 Q. B. 366.

Where a landlord applies to be allowed to enter judgment in ejectment for want of appearance against a tenant who has absconded and cannot be personally served; the action being on a power to re-enter for non-payment of rent, he must, if possible, produce the lease and shew that he is entitled to re-enter. *Levisconpte* v. *Pencel*, 3 L. J. 185.—C. L. Chamb.—Robinson.

Quære, per Robinson, C. J., whether, if defendant appear, but omit to give notice of the nature of his title, the plaintiff may sign judgment as for want of appearance. *Harper* v. *Lowndes*, 15 Q. B. 430.

14. *Interrogating Plaintiff or Defendant.*

Interrogatories referring to the defence will not in general be allowed in ejectment. *West* v. *Holmes*, 3 L. J. 72.—C. L. Chamb.—Robinson.

Defendant may administer interrogatories to the plaintiff under sec. 176 of the C. L. P. Act, 1856, touching the nature of his title, but not as to his evidence. One party may interrogate the other as to facts necessary for his own case, although the answers may shew the weakness of the case of the party answering. *Phillpotts* v. *Harrison*, 4 L. J. 86.—C. L. Chamb.—Richards. See also *Horsman* v. *Horsman*, 2 L. J. 211.

The provisions of the C. L. P. Act as to interrogatories are applicable in ejectment. *Weaver* v. *Burgess*, 5 P. R. 345.—C. L. Chamb.—Dalton, *C. C. & P.*

An order will not be made under C. S. U. C. c. 24, s. 41, as amended by 27 & 28 Vict. c. 25, for the examination of a defendant in ejectment against whom there has been a judgment for costs. *Walker* v. *Fairbairn*, 6 P. R. 251.—C. L. Chamb.—Dalton, *C. C. & P.*

One of two defendants allowed judgment to go by default:—Held, that he was nevertheless liable to be examined under the Administration of Justice Act, 1873, sec. 24. *Bacon* v. *Campbell*, 6 P. R. 275.—C. L. Chamb.—Dalton, *C. C. & P.*

15. *Death of Plaintiff or Defendant.*

In ejectment under the old form, where the lessor of the plaintiff died before the trial, no sci. fa. was necessary, but judgment might be entered, and writ of possession obtained. *Doe* d. *Hay* v. *Hunt*, 12 Q. B. 625.

The 25th section of the C. L. P. Act, 1856, is applicable to judgments entered after the C. L. P. Act came into force, even when proceedings commenced and verdict had under the old practice. *McCallum* v. *McCallum*, 2 L. J. 211.—C. L. Chamb.—Burns.

The trial took place in May, 1854, and a verdict was rendered for the plaintiff. In Easter Term following, a rule nisi was obtained for a new trial, but no cause was shewn until Easter Term, 1856, and in the meantime plaintiff died. Semble, per Robinson, C. J., that judgment could not be entered nunc pro tunc, and at all events no writ of possession could issue. Per McLean, and Burns, JJ., that judgment might be so entered. *Davy* v. *Cameron*, 14 Q. B. 483.

The court, on a subsequent application, allowed judgment to be entered nunc pro tunc, and a

suggestion to be entered of the death, leaving it to be afterwards determined whether the C. L. P. Act, s. 248, would apply retrospectively. *S. C.* 15 Q. B. 175.

The death of one of two plaintiffs, after judgment (where for all that appears the recovery is joint, and survives), does not render necessary a suggestion of the death on the roll in order to support a writ of hab. fac. poss. *Johnston et al.* v. *McKenna*, 3 P. R. 229.—C. L. Chamb.—A. Wilson.

16. *Trial, Verdict, and Judgment.*

When the term in the declaration has expired, the plaintiff is entitled to recover nominal damages and costs, although he cannot recover possession. *Doe* d. *Lick* v. *Ausman*, H. T. 6 Vict.

A judge at chambers has power to set aside a judgment in ejectment, and the hab. fac. poss. issued thereon. *Popplewell* d. *Capreol* v. *Abbott*, 5 O. S. 245.

Where a tenant moved to set aside a judgment against the casual ejector, on the ground of collusion between the lessor of the plaintiff and the tenant's wife, in accepting service of the declaration—the court refused to interfere, more than a year having elapsed since the execution of the writ of possession. *Doe* d. *Gray* v. *Roe*, H. T. 4 Vict.—P. C.—Jones.

Where a verdict was rendered for the plaintiff in ejectment, subject to points reserved, and without any argument of the points, the plaintiff entered and took possession, the court refused to interpose and set the judgment aside after a lapse of more than two years. *Doe* d. *Myers* v. *Tolman*, 1 Q. B. 520.—P. C.—Hagerman.

Where the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff, the court will set aside the judgment against the casual ejector. *Doe* d. *Henderson* v. *Roe*, 4 Q. B. 366.

The court, though they will set aside a judgment obtained by collusion between the lessor of the plaintiff and the tenant in possession, will not order the tenant in possession to pay the costs, but will leave the landlord to his remedy under the statute 11 Geo. II. *Ib.*

Where defendant was a few minutes too late in entering his appearance, and afterwards promptly applied to set aside the judgment upon an affidavit of merits, shewing the merits in detail, the application was allowed, upon the terms of entry of appearance, and payment of costs within a month, otherwise summons to be discharged. *Watts* v. *Little et al. and Watts* v. *Loney et al.*, 6 L. J. 233.—C. L. Chamb.—Robinson.

Held, that the action of ejectment is within sec. 18 of the Law Reform Act, 1868; and Semble, that such action must be tried without the intervention of a jury, subject only to the judge's discretion to direct one. *Humphreys* v. *Hunter*, 20 C. P. 456.

[See, now, 35 Vict. c. 19, O., which enacts that the claimant or defendant may require the issue to be tried, and the damages, if any, to be assessed by a jury.]

Where the plaintiff declared generally, stating neither the concession nor lot, and defendant defended for lot 23, and at the trial the plaintiff proved title to lot 22, which in the description appeared to include lot 23:—Held, that the plaintiff was entitled to a general judgment, and that he must take possession of the right lot at his peril. *Doe* d. *Owen* v. *Curtis*, M. T. 4 V.

In ejectment, where the plaintiff proves title to possession of any part of the premises sued for, he must obtain a verdict. *Doe* d. *Addison* v. *Ramsay*, 7 Q. B. 446.

The jury having found a general verdict for the plaintiff, though the defendant was in part entitled to the part he had cleared:—Held, no ground for a new trial, but for an application to restrain the plaintiff from taking possession of such part. *Ferrier* v. *Mondi* P. 359.

In ejectment under 14 & 15 . c. 114, one or more of several plaintiffs might recover. Draper, J., suggested, that under sec. 5 there might be a distinction between the claim and the title, so as to render it incumbent on claimants, where there is more than one, to point out in the writ on what or whose title they rely as giving them a right to the possession, and to prove such title, which may be either in one of themselves, or possibly in a third party, *Butler et al.* v. *Maddison*, 10 Q. B. 643.

Where several plaintiffs claim jointly, but title is not proved in all of them, there will be a verdict for those who prove title, and for defendant against the others. *Wilson* v. *Baird*, 19 C. P.

Ejectment upon mortgage. Defendant appeared, and notice of trial was served on the 18th of September for the 30th of October. On the evening of the 29th defendant served a notice of confession on the plaintiff is resident thirty miles from the assi where attorney had gone; and on a was taken, defendant not appearing, and the plaintiff's attorney being ignorant of the confession. The court refused to set aside the verdict. *Rowe* v. *Quinlan*, 21 Q. B. 452.

In ejectment it appeared that the plaintiff had recovered judgment in dower against defendant's landlord, who had submitted to the claim and defendant after this action had attorned to the plaintiff and paid rent to her attorney. There had been also a demand of possession. Held, that the plaintiff was entitled to a verdict and judgment for costs, but not to a writ of possession, for she had accepted defendant as tenant. *Fisher* v. *Johnston*, 25 Q. B. 616.

The court has power to grant a new trial as to half of a lot of land, allowing the verdict to stand as to the other half, where the granting of such new trial is in the discretion of the court, and this in an action of ejectment. Where a new trial is ordered ex debito justitiæ, the whole record is thrown open; and this will be done in ejectment, unless the defendant consent to the verdict standing for such portion of the land as the plaintiff has failed to prove title to. The statute governing the action of ejectment makes it divisible both as to the lands and the parties claiming them. *McNab* v. *Stewart*, 15 C. P.

The old practice of allowing a plaintiff, who succeeded as to part of the land, to take a verdict for the whole, and to proceed there

his peril, has long since ceased to be the rule and the action of ejectment, as held in the last case, is divisible, under C. S. U. C. c. 27, both as to land and parties:—Held, therefore, that an order made by the judge who tried the cause amending the postea, by confining the verdict of the plaintiff to that portion for which he had succeeded, and recording a verdict for defendant as to the residue, thus entitling the latter to the costs of defence for that residue, and directing the nisi prius record to be delivered to defendant for the purpose of such amendment, had been properly made. *McBride* v. *Lee*, 16 C. P. 315.

The defendant defended for the whole, giving no notice of defence as tenant in common, under sec. 29 of the Ejectment Act, C. S. U. C. c. 27. The evidence shewed that she was entitled to an undivided moiety; but, Held, that defendant not having limited her defence, the plaintiff was entitled to the postea. *Leech* v. *Leech et al.*, 24 Q. B. 321.

The plaintiff was held entitled to recover two undivided third parts. It was urged, on the authority of the last case that the plaintiff being held so entitled, the postea should be awarded to him generally; but, Held, not, the proceedings on both sides in that and other cases having been directed to try the title to the whole. *Lister* v. *Ramage*, 26 Q. B. 233.

Plaintiff brought ejectment against the defendant after he had quitted possession of the premises in question. Defendant appeared, not stating his defence, nor stating the nature of his own claim, but at the same time he served a notice on the plaintiff's attorney that he did not deny the plaintiff's title, and had given up possession before action brought. The plaintiff, nevertheless, took the record down to trial:—Held, that upon such notice the plaintiff could not have signed judgment. *Harper* v. *Lowndes*, 3 Q. B. 430.

Quære, per Robinson, C. J., whether, if defendant appear, but omit to give notice of the grounds of his title, the plaintiff may sign judgment as for want of an appearance. *Ib.*

Where there is a limited defence, it is irregular for the plaintiff to enter judgment without first obtaining a judge's order, or a rule of court, authorizing the signing of judgment, which rule or order, or a duplicate thereof, must, under Sch. 92, be filed together with the writ. *Harold* [illegible] v. *Stewart et al.*, 3 P. R. 335.—C. L. Chamb.—A. Wilson.

17. *Execution.*

(a) *Generally.*

Where, after the execution of a writ of hab. fac. poss., the tenant who had been in possession moved to set aside the proceedings for irregularity, and his rule having been discharged, immediately forcibly dispossessed the lessor of the plaintiff, the court granted a new writ, the first not having been returned by the sheriff, and ordered that the defendant should pay the costs of the application within a month. *Doe* d. [illegible] v. *Roe*, 2 Q. B. 27.

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. poss., and the plaintiff afterwards quietly relinquishes that possession in consequence of hearing that an injunction had issued from the Court of Chancery:—Held, that upon the injunction being dissolved, they could not grant the plaintiff an alias writ of possession. *Doe* d. *Deane* v. *Henderson*, 5 Q. B. 208.

Upon the facts of this case it was Held that the court had no authority, under the 12th clause of 59 Geo. III. c. 10, to stay proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe* d. *Short* v. *Bass*, 8 Q. B. 147.

Where a rule has been taken out and served for the landlord to defend, the lessor of the plaintiff, though he may sign judgment against the casual ejector, has no right to take out a hab. fac. poss. without leave of court. *Doe* d. *Mathews* v. *Roe*, 1 C. L. Chamb. 160.—Robinson.

Where the writ was issued within one year after entry of judgment an alias writ issued more than six years thereafter is regular without reviving the judgment. *Johnston* v. *McKenna*, 3 P. R. 229.—C. L. Chamb.—A. Wilson.

Where the sheriff returned to the first writ of habeas, that "none came to receive possession," the presumption of release of the judgment did not arise in the same manner as if nothing had been done upon the judgment. *Ib.*

The writ may be executed by the removal from possession of a person who was the widow of a person that claimed under a judgment defendant. *Ib.*

Under the circumstances set out in this case, a new writ of hab. fac. pos. (the first having been executed and returned,) was refused: Wilson *v.* Chanton, 6 L. T. N. S. 255, followed. *Edwards* v. *Bennett*, 5 P. R. 161.—P. C.—Gwynne.

No such relief will be given to a plaintiff when the parties against whom the application is made do not assert title through the defendant, but in some other way, and where no forcible taking possession or expulsion of the plaintiff, or interference with the plaintiff's officer in the execution of the writ, is shewn. *Ib.*

Semble, the writ of execution should, as in other actions, follow the judgment; and where, by reason of a limited defence, the plaintiff is entitled to recover less than he claims in his writ of summons, there should be some entry on the roll to authorize the deviation. *Harold* v. *Stewart*, 3 P. R. 335.—C. L. Chamb.—A. Wilson.

Staying the execution of writ of possession.—See V. 1, 3, p. 1205.

(b) *Restitution, and Attachment for Resuming Possession.*

In ejectment an attachment was refused against the original tenant, who resumed possession more than a year after execution executed. *Doe* d. *Myers* v. *Roe*, T. T. 3 & 4 Vict.

A writ of hab. fac. poss. was completely executed, and possession given to plaintiff. Three weeks after, defendant (claiming to be equitably entitled, and who was informed and found that the

premises were vacant, and the door of the house unfastened, and who denied knowledge of who opened it,) retook possession. A rule to redeliver possession to plaintiff or to attach defendant as for contempt, was refused. *McDermott* v. *McDermott*, 4 P. R. 252.—P. C.—Morrison.

Where a writ of hab. fac. poss. was executed before an injunction restraining such proceeding could be served, but the plaintiffs in ejectment had been informed of the intention to apply for the injunction, the court, under the circumstances, granted a mandatory injunction requiring the possession to be redelivered to the defendants in that suit, pending an appeal to the Court of Error and Appeal against a decree dismissing a bill filed by them to redeem. *Campbell* v. *The Royal Canadian Bank*, 19 Chy. 477.

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18. *Amendment of Proceedings.*

(a) *By Adding and Striking out Parties.*

Quære, as to the effect of a misjoinder of plaintiffs in ejectment under the 14 & 15 Vict. c. 114. *Young et al.* v. *Scobie*, 10 Q. B. 372.

A judge's order was obtained to amend the proceedings after the consent rule and plea had been filed, (by adding three new demises,) and no proceedings had been taken under the order until the commission day of the Assizes—some months after the granting of the order—when the nisi prius record was passed with additional demises. The record was entered for trial, and after the jury had been sworn, and the plaintiffs had given evidence, defendants objected to the amendment, and refused to confess lease, entry and ouster, except to the original demises, and a verdict was entered for the plaintiffs on the original demises only:—Held, on an application to set aside the verdict on the original demises, that the new demises added to the nisi prius record did not violate the nisi prius record or verdict; and that the lessors of the plaintiff could abandon the order to amend. *Doe* d. *Duff et al.* v. *Dougall et al.*, 2 C. P. 169.

Held, also, that after defendants appearing and confessing the lease, &c., it was too late to object to the regularity of the notice of trial. *Ib.*

Application to add to a declaration in ejectment a demise by A. B., after issue joined, was refused under the circumstances of the case. *Doe* d. *Nichols* v. *Heron et al.*, 1 C. L. Chamb. 99.—Macaulay.

Held, that the C. L. P. Act does not authorize the striking out of all the plaintiffs' names in a summons in ejectment, and substituting a new set therefor, after the entry of the record for trial. *Robinson* v. *Bell, and Vasbinder* v. *Bell*, 9 C. P. 21.

Held, on the authority of Blake *v.* Done, 7 H. & N. 465, that a judge at Nisi Prius has power, under s. 222 of C. L. P. Act, to amend by adding parties, where such amendment is necessary for the purpose of determining the real question in controversy:—Held, also, that the guardian of an infant, appointed under C. S. U. C. c. 74, can under sec. 5 consent to the name of the infant being so added as plaintiff in an action of ejectment which seems to be for the latter's benefit. *Ogilvie* v. *McRory*, 15 C. P. 557.

Quære, whether such consent should be in writing; but the point not having been raised at the trial, the court refused to entertain the objection. *Ib.*

On the argument in term, it was objected that as F., who had been joined as a plaintiff at the trial, was not present when the amendment was made, his consent in writing should have been filed:—Held, that though this objection was raised at the time the amendment was made, yet as F. afterwards appeared and was examined as a witness, and no question was then raised as to his assenting or non-assenting, and the judge reported that there really was no question about it, the court would not entertain the objection. *Henderson* v. *White*, 23 C. P. 78.

The plaintiffs claimed under a deed from B., and defendants under a lease from T. and his wife, trustees of the plaintiffs. The plaintiffs proved a deed under which the judge held that T. and his wife took the legal estate as trustees for the plaintiffs. The plaintiffs then applied to make T. and wife plaintiffs, and to add a claim by them for an alleged forfeiture of their lease to defendant under which defendant claimed:—Held, that such application was properly refused. *Mitchell et al.* v. *Smellie*, 20 C. P. 389.

See IV. 1 (a), p. 1177.

(b) *Of Notice of Title.*

Where the notice of defendant's title was not addressed to the plaintiff as required by C. L. P. Act, 1856, s. 224, the defendant, on motion to set aside the appearance and enter judgment, was allowed to amend his notice on payment of costs. *Thompson* v. *Welch*, 3 L. J. 133.—C. L. Chamb.—Hagarty.

Held, that a judge at Nisi Prius had no power to amend a notice of title. *Morgan* v. *Cook*, 19 Q. B. 599; but see the cases following.

Leave was given to plaintiff in ejectment to amend his notice of title by setting up a double claim, notwithstanding delay on his part in making the application. *Turley* v. *Williamson*, 10 L. J. 188.—C. L. Chamb.—Draper.

In ejectment the judge at Nisi Prius granted a summons to amend the plaintiff's notice of title, returnable before himself in chambers in half an hour, and upon it made an order for the amendment. The case then proceeded, and the plaintiff had a verdict. *Parsons* v. *Ferriby*, 2 Q. B. 380.

Under sec. 222 C. L. P. Act, a judge at Nisi Prius has the same power of amendment in ejectment as in any other action; and a Nisi Prius amendment of a plaintiff's notice of title was therefore held properly made. *Chadsey* v. *Ransom*, 17 C. P. 629.

The plaintiffs claimed under a deed from B., and defendants under a lease from T. and his wife, trustees of the plaintiffs. The plaintiffs proved a deed, under which the judge held that T. and his wife took the legal estate, as trustees for the plaintiffs. The plaintiffs then applied to make T. and wife plaintiffs, and to add a claim by them for an alleged forfeiture of their lease to defendant, under which defendant claimed:—Held, that such application was properly refused. *Mitchell et al.* v. *Smellie*, 20 C. P. 389.

In ejectment the plaintiff claimed under a mortgage made by defendant, and defendant under a deed from the plaintiff, the mortgage having been given to secure part of the purchase money. Defendant proved a judgment in an action of covenant brought by the plaintiff against the defendant on this mortgage to recover the money secured thereby, in which defendant pleaded that the mortgage had been obtained by fraud, and judgment was given in his favour on that issue:—Held, that the defendant could not set up the judgment as a defence to this action, not having placed the plaintiff in statu quo by restoring to him possession of the premises. Semble, that the plaintiff's notice of claim was sufficient, and that, if necessary, an amendment of it would have been allowed nunc pro tunc. *Puertell* v. *Boilau*, 23 C. P. 175.

See *Fields* v. *Livingston*, 17 C. P. 15, p. 1181.

(c) *Of Record at Nisi Prius.*

Amendment allowed by correcting date of demise. *Doe* d. *Sinclair* v. *Arnold*, 1 Q. B. 42.

In ejectment by tenants in common on a joint demise, an amendment to separate demises not allowed. *Doe* d. *Anderson et al.* v. *Errington*, 1 Q. B. 159.

Of demise in a declaration of ejectment, from joint tenancy to a tenancy in common, refused. *Doe* d. *Cuvillier et al.* v. *James*, 4 Q. B. 490.

In the name of the lessor of plaintiffs in ejectment: Quære, whether allowable. *Doe* d. *Auston* v. *Monro*, 1 Q. B. 160.

Allowed at Nisi Prius, to a plaintiff in ejectment, to amend the record, but not made at the time, refused afterwards. *S. C. Ib.* 277.

Where ejectment was brought by the heir-at-law against his ancestor's widow, and the demise was improperly laid before the 40 days of quarantine had expired:—Held, that the demise might be amended at Nisi Prius, and that evidence of the ancestor's possession was rightly received. *Doe* d. *Callaghan* v. *Callaghan*, 1 C. P. 348.

Quære, whether the 40th rule of H. T. 13 Vict., giving the form of Nisi Prius record, does not apply to ejectments, and whether, therefore, where was any ground for the exception taken, as to errors in the placita? An award of venire is not necessary. *Doe* d. *Springer* v. *Miller*, 10 Q. B. 57.

See, also, as to objections to and amendment of the placita and continuances. *Doe* d. *Sherrard* v. *Lowry*, 2 C. P. 165.

In ejectment a judge at Nisi Prius has power to amend the record by adding a venire, and inserting the dates in the notices annexed thereto. *Warrington* v. *Fall*, 15 C. P. 541.

The want of an appearance on the record may be amended after trial; but the objection is waived, and the amendment unnecessary, if defendant appear and go into his defence. *Johnson et al.* v. *McKenna*, 10 Q. B. 520.

The record may be amended at the trial by adding the plea required under 14 & 15 Vict. c. 14. *Dewson* v. *St. Clair*, 14 Q. B. 97.

It is no objection to the record, on the part of a defendant, that it omits the entry of judgment as to the undefended part of the land, provided it contain the issue raised by him. *Ib.*

The court in banc after verdict and exception taken, amended the record by adding the words "lands and premises" to the property sued for. *Ridout* v. *Harris*, 17 C. P. 88.

(e) *Other Cases.*

An amendment was refused in a declaration in ejectment by altering the name of the township in which the lands lay. *Doe* v. *Roe*, Dra. 170.

Where upon two separate demises in a declaration a verdict passes for the plaintiff on one and for defendant on the other, the court will not, upon defendant's application, strike out the demise to the successful plaintiff on the ground of want of authority for suing in his name, except in very clear cases. *Doe* d. *Simpson et al.* v. *Molloy et al.*, 6 Q. B. 302.

In ejectment, defendant may amend his appearance if filed without the notice required by C. L. P. Act, 1856, s. 224. *Trust and Loan Co.* v. *Elison*, 3 L. J. 69.—C. L. Chamb.—McLean.

Defendant will be admitted to amend his appearance on payment of costs, where he has omitted to file the requisite notice of title, but he must avail himself of leave to amend within a reasonable time, and if plaintiff refuse to state or receive the amount of costs of amendment, the amendment may be made before payment of costs. *Duffill* v. *Lawder*, 4 L. J. 137.—C. L. Chamb.—Robinson.

Where ejectment, brought under the old practice in 1848, had been stayed for security for costs, and the demise had expired nine years since, the court refused an amendment by enlarging the term, which would have deprived defendant of a title acquired under the Statute of Limitations. *Doe* d. *Day* v. *Bennett*, 21 Q. B. 405.

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19. *Other Cases relating to Practice.*

The order of this court which authorizes rules to be taken out in the deputy's office, in the country, does not include rules nisi in ejectment. *Doe* d. *Clarke* v. *Roe*, Tay. 247.

A lessor in ejectment will not be allowed to release the action. *Doe* d. *Boyer* v. *Claus*, 3 O. S. 146.

The Court has power to grant a new trial as to half of a lot of land, allowing the verdict to stand as to the other half when the granting of such new trial is in the discretion of the court; and this in an action of ejectment. When a new trial is ordered ex debito justitiæ, the whole record is thrown open; and this will be done in ejectment unless the defendant consents to a verdict standing for such part of the land as the plaintiff has failed to prove title to. *McNab* v. *Stewart*, 15 C. P. 189.

The C. S. U. C. c. 27, governing the action of ejectment, makes it divisible both as to the lands and the parties claiming them. *Ib.*

In an ejectment on the several demises of the lessor in different representative characters, and

also in his individual right, an affidavit to set aside proceedings intituled in the demises on his representative character alone, was held insufficient. *Doe d. Street et al.* v. *Roy*, E. T. 3 Vict.

As to the necessity for the placita, continuances, jurata, &c., in the record in ejectment under the old practice. *Doe* d. *Burnham* v. *Simmonds*, 7 Q. B. 598; *Doe* d. *Mills* v. *Kelly*, 2 C. P. 1; *Doe* d. *Connors* v. *Roe*, 9 Q. B. 82; *Doe* d. *Springer* v. *Miller*, 10 Q. B. 57.

One month's notice of intention to proceed is necessary in ejectment as in other actions, when four terms have passed without any proceedings. *The Bishop of Toronto* v. *Cantwell*, 11 C. P. 371.

Semble, that the Ejectment Act, C. S. U. C. c. 27, as it stands, is intended to contain all provisions necessary to carry out proceedings in ejectment. *Leeson* v. *Higgins*, 4 P. R. 340.—C. L. Chamb.—Draper.

Where a defendant files his appearance the cause is at issue, and the plaintiff may serve issue book and notice of trial. *Casey* v. *McGrath*, 11 L. J. 330.—C. L. Chamb.—Dalton, *C. C. & P.*

V. Staying Proceedings.

1. *By Injunction.*

An injunction may be granted in actions of ejectment. *Robins* v. *Porter*, 2 L. J. 230; *Bell* v. *White*, 3 L. J. 107; *Fraser* v. *Robins et al.*, 2 P. R. 162, 3 L. J. 112.

The above decisions are not now to be followed; Burns, J., having decided, on the authority of Baylis *v.* Le Gros, 2 C. B. N. S. 318, that the C. L. P. Act does not authorize the issuing of injunctions in actions of ejectment. The other judges concurred in the above decision. *Land* v. *Gilkinson et al.*, 7 L. J. 151.

But now, under the Administration of Justice Act, 1873, sec. 8, an ex parte injunction may be granted. *Kidd* v. *Clatworth.*—Q. B.—Per A. Wilson, 14th Dec. 1875. Not yet reported.

The owner of lands agreed to sell a portion, and admitted the party into possession, who improved the premises, and afterwards offered to sell his improvements back to his vendor. For the purpose of ascertaining the amount to be paid, it was referred to arbitrators, who made an award, the terms of which were never complied with, and the vendor afterwards brought ejectment against the party in possession. The court granted an interim injunction, restraining the plaintiff from executing a writ of possession. *Cook* v. *Smith*, 4 Chy. 441.

Upon a contract for sale of land, the purchaser was let into possession; the vendor, instead of complying with his vendee's demand for an abstract of title, brought ejectment, so as to compel payment of the purchase money; and the purchaser defended that action, and did not proceed in this court until the vendor had recovered judgment. On investigating the title it was found to be bad. The court, although it gave the purchaser relief so far as restraining the proceedings in ejectment, refused him his costs of his defence at law, but gave him his costs in this court. *Winters* v. *Sutton*, 12 Chy. 113.

Where ejectment had been brought by the purchaser of lands alleged to have been illegally sold for taxes, the court declined to interfere by injunction to restrain the action. The proper course in such a case, in the event of the sale being found invalid, is for the owner to tender a deed to the purchaser for execution, and on his refusal to execute such a deed, to apply to this court for relief. *Bamberger* v. *McKay*, 15 Chy. 328.

The equity of redemption in mortgaged premises, was sold under execution at law, and a conveyance thereof executed by the sheriff purporting to convey the same to the purchaser, who subsequently paid off the mortgage, obtained from the mortgagee a statutory discharge thereof, which he caused to be registered, and went into possession of the mortgaged property. In a proceeding at law, the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he had assumed to sell:—Held, that the purchaser was entitled to restrain ejectment brought by the mortgagor. *Howes* v. *Lee*, 17 Chy. 459.

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2. *In Ejectment. Mortgagees under 7 Geo. II. c. 20, now R. S. U. C. c. 27, s. 74.*

A judgment and execution in ejectment on a mortgage will be set aside in favour of an innocent purchaser without notice, so as to enable him to redeem on payment of costs, under 7 Geo. II. c. 20. *Doe* d. *Milburne* v. *Sibbald*, 4 O. S. 330.

A. having purchased land, and paid several instalments, but received no deed, assigned his right to B., taking a bond from him that if he should obtain the deed, on the payment by A. to him of £100, in two years, he would convey to A.:—Held, on ejectment by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem under the act. *Doe* d. *Shannon* v. *Roe*, 5 O. S. 484.

In ejectment on a mortgage, the court will not order the proceedings to be stayed, and a reconveyance under 7 Geo. II. c. 20, on payment into court by defendant of the money due upon the bond and mortgage, together with the costs of the action, where the whole amount secured by the mortgage is not admitted to be due; nor will a reference to the master be ordered to ascertain the amount actually due. *Doe* d. *McKenzie et al.* v. *Rutherford*, 1 Q. B. 172.

A defendant in ejectment applying to stay proceedings on payment of the mortgage money must be the person who has the right to redeem, and therefore a motion by the tenant of the assignee of a lease for years from the heir of the mortgagor, was refused. But independently of this ground, the facts, as set out, would prevent the court from interfering summarily. *McDonald* v. *Doray*, 11 Q. B. 318.

Held, that this case could not, upon the contradictory affidavits, be considered as within the act. *Cory* v. *Vale*, 1 P. R. 210.—P. C.—Draper.

A mortgagor is not, under 7 Geo. II. c. 20, entitled as of course to redeem, because the plaintiff has given no notice denying the right, but the plaintiff may still shew that the case is not one within the statute. *Ib.*

See *Goodeve* v. *Wallace*, 24 Q. B. 31, p. 1177.

3. *Other Cases.*

Upon the facts of this case it was:—Held, that the court had no authority under the 12th clause of 59 Geo. III. c. 14, to stay proceedings until the defendant received the value of his improvements, or until the plaintiff conveyed the land in dispute. *Doe* d. *Short* v. *Bass*, 8 Q. B. 147.

This court will not interpose summarily to deprive a plaintiff in ejectment of the full benefit of his writ, by restraining him from taking possession of part of the premises recovered, except in a very plain case. Where, therefore, the defence urged was one under the Statute of Limitations, and unjust under the circumstances, and there had been contradictory evidence, and no misdirection, they refused to interfere. *Hemmingway* v. *Hemmingway*, 11 Q. B. 317.

The jury having found a general verdict for the plaintiff, though defendant was in fact entitled to the part he had cleared:—Held, not ground for a new trial, but for an application to restrain the plaintiff from taking possession of such part. *Ferrier* v. *Moodie*, 12 Q. B. 379.

The recovery on a judgment roll for the whole of a lot, when in fact the plaintiff proved title to the east half only, is not such an irregularity as to cause defendant to move against the judgment. The court or a judge will in such a case restrain plaintiff from taking possession of more than he in fact recovered. *Johnston* v. *McKenna*, 3 P. R. 229.—C. L. Chamb.—A. Wilson.

The plaintiff in this cause having endorsed his writ for the recovery of the east half only, to which he proved title, there was no ground for the interference of either court or judge. *Ib.*

Where a defendant after judgment, but before writ of possession executed, acquires the title to the land, the court will stay the execution of the writ of possession. *Helm* v. *Crosson*, 17 C. P. 156.

VI. Costs.

1. *On Judgment by Default.*

Held, by the Queen's Bench, that a plaintiff in ejectment is not entitled to costs on a judgment obtained by default. *White* v. *Cochlin*, 2 P. R. 93.—Q. B. The decisions on this point had been conflicting; see *Roots* v. *Farniscott*, 2 P. R. 239.—C. L. Chamb.—Richards; *Hall* v. *Yuill*, 2 P. R. 242.—C. P.; *Bleecker* v. *Campbell*, 4 L. J. N. S.—C. L. Chamb.—Draper.

An ejectment summons having been served on A. and B., A. only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict and issued a hab. fac. poss. and fi. fa. for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings:—Held, as to the fi. fa. for costs, that he was liable, for although if sole defendant he would not have been, and when there are two persons in possession, and one appears, the judgment is suspended till the trial of the issue; if the latter succeed, it enures for the benefit of the other, and if he fail, both are liable for the whole costs, (as in actions for damages) of which there can only be one taxation. *D'Arcy* v. *White et al.*, 24 Q. B. 570.

[See 36 Vict. c. 14, O.]

2. *Security for Costs.*

In ejectment, security for costs cannot be obtained before appearance is entered, as in other actions; and the entering an appearance does not put the cause at issue, so as to prevent the defendant applying for security for costs. *Crowe et al.* v. *McGuire*, 3 L. J. 205.—C. L. Chamb.—Draper.

The action was commenced 26th February, 1861, and appearance entered 18th March, following. Defendant on 19th of the same month, demanded security for costs, because plaintiff resided in Great Britain, but no proceedings were afterwards taken, either by plaintiff or defendant, till 28th January, 1864, when the plaintiff gave defendant a term's notice of his intention to proceed by serving notice of trial:—Held, that an application by defendant for security after service of the notice of trial was too late. *Fogo* v. *Pypher*, 3 P. R. 309.—C. L. Chamb.—J. Wilson.

The mere fact of a second action of ejectment being brought between the same parties, and for the same land, is no reason for ordering security if the costs of the first action have been paid, and the second action brought in good faith. *Armstrong* v. *Montgomery*, 5 P. R. 461.—C. L. Chamb.—Dalton, *C. C. & P.*

But the fact of the costs of the former unsuccessful actions having been paid, is not necessarily a ground for refusing to make an order. *Chambers* v. *Unger*, 6 P. R. 101.—C. L. Chamb. —Dalton, *C. C. & P.*

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3. *Staying Proceedings until Costs of Previous Action are paid.*

In a second ejectment for the same premises, between the same parties, proceedings will be stayed for non-payment of the costs of the first. *Doe* d. *Hussey* v. *Roe*, E. T. 3 Vict.

The plaintiff proceeded, notwithstanding the order to stay, and was nonsuited for not confessing lease, entry, and ouster. The affidavit on which defendant moved to set aside the proceedings was so worded as to be evidently made in the first cause, but the court overruled this exception and set aside the proceedings. *Doe* d. *Lake* v. *Davis*, 3 O. S. 311.

Where the lessor of the plaintiff had been attached and was on the limits for non-payment of the costs of the former ejectment for the same premises, a rule to stay proceedings was refused. *Doe* d. *Stewart* v. *Roe*, M. T. 1 Vict.

In ejectment by an heir, the court refused to stay proceedings until the costs of a former action, brought for the same premises by the ancestor, had been paid, the ancestor having died before any legal determination of that suit. *Doe* d. *McKay* v. *Roe*, 1 Q. B. 400.—P. C.—Jones.

Where a party fails in his first action and then brings a second, defendant cannot apply for payment of costs of the first till he has appeared. *Doe* d. *Flanders et al*, v. *Roe*, 3 Q. B. 127.—P. C.—Hagerman.

Where the plaintiff had abandoned the first action, and commenced a second for the same land, he was ordered to stay proceedings in the second unless he paid the costs of the first. He

might, it seems, under this, elect to proceed with the first, in which case the order would have no effect as to the costs. *Doe* d. *McLeod* v. *Johnson*, 1 C. L. Chamb. 133.—Robinson.

Where in ejectment under the old practice the lessor of the plaintiff never signed the consent tendered by defendant, conceiving that it was defective, but abandoned that action and brought a second:—Held, that the second suit must be stayed until payment of costs in the first. *Ferrier* v. *Moodie*, 1 P. R. 151.—C. L. Chamb.—Burns; *Doe* d. *Anderson* v. *Anderson*, 1 Q. B. 275.

Where plaintiff recovered against three defendants, and afterwards, without discontinuing his action, commenced a second action against two of the defendants for the same premises, an order was made that unless the plaintiff elected to discontinue one or other of the two suits, and pay the costs of the suit discontinued, the second action should be stayed. *Grimshawe* v. *White*, 3 P. R. 320.—C. L. Chamb.—Draper.

Plaintiff claimed to recover in a second action the same land sued for in a former action, and under a forfeiture in the same lease, but a different forfeiture incurred long after the obtaining judgment in the prior action:—Held, that as the second action was not brought for the same cause as the first, it should not be stayed. *Bell* v. *Cuff*, 4 P. R. 155.—C. L. Chamb.—A. Wilson.

Quære, if it were shewn that the question in the second suit had been involved in and could have been tried by the first, and that the second suit was brought vexatiously. *Ib.*

Where a former action of ejectment involving the question at issue in this suit had been brought and decided on the merits, and no real or probable cause of suit was sworn to in this suit moved in, an order was granted to stay proceedings until the costs of the action of ejectment were paid. *Ostrander* v. *Ostrander*, 3 Chy. Chamb. 50.—C. L. Chamb.—Taylor, *Secretary*.

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4. *Attachment for Non-payment of Costs.*

Where the lessors sued in a corporate name to which they were not entitled, and so entered into the consent rule and were nonsuited:—Held, that an attachment could not issue against them for non-payment of costs demanded of them individually. *Doe* d. *Methodist Trustees* v. *Carwin*, E. T. 3 Vict.

It is not necessary that a fi. fa. or ca. sa. should issue against the nominal plaintiff on a judgment for defendant, before an attachment against the lessor of the plaintiff for non-payment of costs under the consent rule. *Doe* d. *Impey* v. *Gray*, H. T. 4 Vict.—P. C.—Jones.

An attachment is not a writ of execution, and a party taken under it is not entitled to be discharged from custody as having been illegally arrested for costs only, under 5 Will. IV. c. 3, s. 2. *Regina* v. *Kelly*, 6 O. S. 152. See, also, *Wilson* v. *Dillingham*, 6 O. S. 537.

An attachment might issue under a consent rule, notwithstanding the act abolishing imprisonment for debt. *Doe* d. *Dunmer* v. *Benton*, 1 Q. B. 157.

Attachment on the demise of several lessors was granted against one without proof of demand or service upon the others. *Doe* d. *Cubitt et al.* v. *McLeod*, 1 Q. B. 394.—P. C.—Macaulay.

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5. *Other Cases.*

When the term in a declaration in ejectment has expired, the plaintiff is entitled to recover nominal damages and his costs, although he cannot recover possession. *Doe* d. *Lick* v. *Ausman*, H. T. 6 Vict.

Effect of disclaimer by defendant under sec. 15 of 14 & 15 Vict. c. 114—Plaintiff's right to costs thereupon. *Howden* v. *McIntyre*, 1 P. R. 110.—C. L. Chamb.—McLean.

A defendant in an ejectment suit, entitled to relief in equity, on the ground of mistake, defended the action, in which he was unsuccessful, instead of coming at once to this court for relief. Subsequently he filed a bill and obtained a decree with costs; but the plaintiff at law was held entitled to set off against such costs his costs of the ejectment subsequent to the writ. *Haynes* v. *Gillen*, 21 Chy. 15.

Defendant appeared and claimed title as tenant of one R. Two days before appearance, R. had disposed of his interest in the lands to S., who, after notice of trial, applied on affidavits setting out the conveyance and the subsequent attornment to him of defendant (now his lessee) to be admitted as landlord to defend the action; but the application, being opposed by the plaintiff, was refused. Plaintiff having succeeded, applied for a rule ordering S. to pay the costs of the action, on the ground that the defendant was insolvent, and the conduct of S., both in making the above application and at the trial and subsequently thereto, proved him to be the real defendant:—Held, that plaintiff was not estopped from making such an application by having opposed the prior application of S., and the rule was made absolute. *Lutz* v. *Beadle*, 5 P. R. 418.—P. C.—Gwynne.

VII. Effect of Judgment in Ejectment.

Held, that a judgment in ejectment, recovered after twenty years had expired, would not save the statute; aliter, if recovered within twenty years, and the occupant within the twenty years had been dispossessed upon such judgment. *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486.

One F. rented the locus in quo from the plaintiff previous to May, 1851, when he went out and defendant obtained possession. The plaintiff recovered in ejectment, in which the demise was laid on the 14th of June, 1851, and entered his judgment in March, 1852; he then brought trespass q. c. f., alleging the trespass to have been committed on the 5th of July, 1851. The trespass proved was in May, 1851, while F. was in possession; but Held, that the action was maintainable, for the recovery in ejectment entitled the plaintiff to treat the defendant as a trespasser from the day of the demise. *Foster* v. *Foster*, 10 Q. B. 607.

At the trial of an ejectment, under 14 & 15 Vict. c. 114, recovery was proved in favour of John Doe, on the demise of the now defendant

against the now plaintiff; and it appeared that the question there decided, being one of boundary, was precisely the same as that again brought up in this case:—Held, clearly no estoppel, for that judgment was between different parties, and under the old practice. Quære, whether this Act has altered the effect of a recovery in ejectment, as regards estoppel. Semble, per Burns, J., that, under the 8th sec., it has not, *when the finding is for the claimants.* *Clubine* v. *McMullen*, 11 Q. B. 250.

Case for libel in publishing a printed notice denying the plaintiff's title to certain land, of which the declaration alleged that he was seised in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in Chancery to establish her undoubted right. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seised in fee: that the said indenture was given to secure usurious interest; that the said K. died intestate, and his heir gave to the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c. The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious. Semble, that the replication shewed an estoppel. *Mair* v. *Culy*, 12 Q. B. 71.

First count, debt on the statute for double value, claiming £40; second count, for use and occupation, claiming £20. Pleas: 1, that after the passing of 14 & 15 Vict., c. 114, the plaintiff impleaded the defendant in an action of ejectment for the same premises in the declaration mentioned, &c., in which action the jury were sworn as well to try the issue joined as to assess the damages to which the plaintiff might be entitled for the use and occupation of said premises, and a verdict was rendered for the plaintiff, as and for damages for the use and occupation of said premises, &c.; 2, to the whole declaration, as to £20, parcel, &c., the same plea:—Held, on demurrer, both pleas bad, as being no answer to the first count, and for not shewing that notice of claim to substantial damages was given, or that judgment had been entered, or that the recovery was for the same claim; and that the second plea was bad also, for not shewing to what £20 it was pleaded. *Hosier* v. *Laing*, 13 Q. B. 233.

Quære, as to the effect of the issue in ejectment now being only as to the right of possession. *Robinson* v. *Smith*, 17 Q. B. 218.

Upon an action by N. against W. for mesne profits:—Held, that judgment in ejectment recovered by N. against a third party, who was proved to have been acknowledged by W. as his tenant, was evidence against W., he being looked upon as landlord of the party against whom the ejectment was brought, with notice of the action, which he might have defended. *Neale* v. *Winter*, 9 C. P. 394.

Declaration, upon a writ issued on the 21st of December, 1858, for entering plaintiff's close, and keeping him out of possession thereof for six years. Plea, that the land was not the plaintiff's. Replication, that defendant ought not to be allowed so to plead, because by writ issued on the 11th of August, 1858, the plaintiff sued defendant in ejectment to recover possession of the same land, and after trial obtained judgment therein:—Held, on demurrer, replication bad, as being pleaded to the whole plea, and containing no answer to the defence as to any time previous to the 11th of August, 1858. *Green* v. *Kain*, 18 Q. B. 626.

The plaintiff being tenant in common with defendant (her mother) and a sister, lived on the place with them until March, 1859 when she left of her own accord. The mother invited her to return, which she refused to do, and in April, 1860, she brought ejectment as tenant in common against both of her co-tenants, in which she obtained judgment for default of appearance in October, but never took possession. In March, 1864, she sued for mesne profits, and defendant pleaded not guilty:—Held, that the judgment in ejectment was not conclusive proof of ouster: that the plaintiff had never in fact been so kept out of possession as to make defendant liable in trespass; and that she could therefore recover only the costs of the ejectment. *Steen* v. *Steen*, 21 Q. B. 454.

A judgment in ejectment against the casual ejector does not estop a defendant, in an action for mesne profits, from disputing the title of the plaintiff from the time of the demise laid in the action of ejectment. *Ponton* v. *Daly*, 1 Q. B. 187.

A judgment in ejectment for part of the premises is an estoppel against defendant's denial of the plaintiff's interest in such portion. *Doe* v. *Langs*, 9 Q. B. 676.

Held, in ejectment, that a record in ejectment in a former trial substantially between the same parties, was properly admitted as evidence, and that all that could be inferred against the plaintiff's right to recover at that time, and the defendant's right to possession, were proper inferences from the production of the record. *Orser* v. *Vernon*, 14 C. P. 573.

Trespass to plaintiff's land in the township of Saltfleet, digging and making drains, &c., converting same into a road or highway, and expelling plaintiff therefrom. Second plea—land not plaintiff's. Fourth plea—as to the digging and making drains for six years next before action brought, and maintaining the land during that period as a highway, and keeping plaintiff out of exclusive possession—that before and during the period of six years before action brought, there was a highway over the whole of the said land, upon which statute labour had before and since been annually performed; that during said six years defendants, as such municipal corporation, had jurisdiction over said highway; that the *soil and freehold* of said land, being such highway, were during that period vested in the crown, or in defendants, under the statute in that behalf, and defendants were thereby bound during said period to keep said highway in repair. The plea went on to deny the reservation of any rights in the soil by any individual, or the exclusive possession during said period by plaintiff, or any other person, but averred that the same had been used as a highway, and that the trespasses complained of were committed for the purpose of repairing the said highway.

Replications, to so much of the pleas as related to that portion of the trespasses committed since the commencement of an action of ejectment, brought by plaintiff against defendants *for the same* land, that defendants were estopped by the recovery of judgment by default in that action and possession taken thereunder, from pleading said pleas:—Held, on demurrer, replications good, the exceptions thereto being sustained neither in fact nor law; in fact, because plaintiff did not bring ejectment for a *highway*; and in law, because, suing as plaintiff did sue, he rightly brought his action for so much land, though there was a right of way over it for the public, in accordance with the law as laid down in Goodtitle *v.* Alker, 1 Burr, 133:—Held, also, that the writ in ejectment not having described the property sued for as a *highway*, the recovery in that action would not have estopped the defendants from setting up, under a proper plea, that the land was a highway, and that they entered upon it for the purpose of repair; for that the recovery was not absolutely irreconcilable with the fact of the land having been all along a highway, the plaintiff, and not the defendants, being the owner of the soil, the public having the right of way over it, and therefore the right to enter and make repairs; but that defendants could not, after the recovery in ejectment, set up the pleas they had pleaded; the second, denying that the land was plaintiff's property, and the fourth not being confined to a mere assertion that the land was a highway, but distinctly alleging the soil and freehold of the land to be in the crown, or in defendants; besides other averments quite opposed to plaintiff's having any right in the property, and therefore to his right to recover in ejectment, as he had recovered. *Carscallen* v. *The Corporation of the Municipality of Saltfleet*, 17 C. P. 219.

Plaintiff claimed under a deed from E., M., and T. Defendants shewed no title. It appeared that E., on the 26th June, 1856, recovered judgment in ejectment for the land, against defendant, in an action commenced on the 3rd September, 1855, and the hab. fac. was returned executed on the 21st July, 1856, possession having been delivered to the plaintiff's agent, who held it for two or three years. It also appeared that on the 17th of March, 1858, the defendant brought ejectment against E. and the other two plaintiffs herein, and was nonsuited. How he afterwards obtained possession did not appear:—Held that the defendant could not dispute the plaintiffs' title further back than the 3rd September, 1855, the judgment in ejectment being evidence of their title at that time as against this defendant, who shewed no title in himself. *Thompson et al.* v. *Hall et al.*, 31 Q. B. 367.

In trespass for mesne profits, &c., defendants justified under a demise from a tenant in common for one year from May, 1871. The plaintiff replied estoppel by a judgment in ejectment, recovered in 1870, against a tenant of defendants then in possession, of which suit defendants had notice. On demurrer to the replication, on the ground of want of privity between the tenant in common and the defendant in ejectment, and because it did not appear that the title under which the plaintiff recovered in ejectment continued up to the demise to defendant:—Held, that the replication was good, the presumption being that the title continued until the contrary was shewn. *Herr* v. *Weston et al.*, 32 Q. B. 402.

The plaintiff on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff, on the 31st March, 1864, which was the plaintiff's only title to the land: that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same transaction: that the plaintiff by the mortgage covenanted that he was seised in fee, and had good right to convey, and that the eviction complained of was an action of ejectment brought by the heirs of L. on the ground that L. was of unsound mind when he executed the deed on the 31st March, 1864, which was proved at the trial, and the jury thereupon found for the heirs:—Held, that the plea was bad; for the avoidance of the deed for insanity did not necessarily involve the avoidance of the mortgage; nor did the estoppel, applicable to the deed, extend to the mortgage: that defendant should have pleaded L.'s insanity directly to the mortgage if he wished to test its validity; and moreover the parties here were not the same as in the ejectment suit, nor was it certain from the record in ejectment that the recovery therein was on the ground alleged. *Eccles* v. *Lowry*, 32 Q. B. 635.

A judgment in ejectment is evidence of the title of the party in whose favour it was given; but whether it is conclusive, and may be pleaded by way of estoppel, has not been determined. *Wightman* v. *Fields*, 19 Chy. 559.

Where a vendor brought ejectment and turned the heirs of the purchaser out of possession, he was held to have disabled himself from coming to the Court for specific performance, and could only do so in order to bind their interest in such a manner as to render the property salable. *Hawn* v. *Cashion*, 20 Chy. 518.

VIII. Mesne Profits.

1. *Pleading.*

A declaration in trespass for mesne profits must state that the land was the plaintiff's; such omission is not cured by stating their expulsion. *Grant* v. *Fanning*, Tay. 470.

In trespass for mesne profits against the executrix of a sheriff, a plea justifying the entrance on and seizure of the property under an attachment directed to the testator under the Absconding Debtors' Act against the estate, real and personal, of a stranger, was held bad on special demurrer, as amounting to the general issue. *Green* v. *Hamilton*, 6 O. S. 79.

In an action for mesne profits:—Held, that if the declaration or replication is objectionable from vagueness, defendant should demur for want of a sufficient description, or a new assignment, and not raise an issue to the country on the fact of identity of the premises mentioned in the declaration and those mentioned in the pleas. *McKenzie* v. *Fairman*, 1 C. P. 50.

2. *Evidence.*

Where after a recovery in ejectment an action is brought for the mesne profits, and evidence of title is given, it is not necessary to shew the judgment in ejectment. *Stephenson* v. *McCombs*, M. T. 4 Vict.

As to the effect of the judgment in ejectment as evidence, see VII. p. 1208.

3. *Damages.*

In trespass for mesne profits defendant may shew in mitigation of damages the value of buildings erected on the premises by him. *Lindsay* v. *McFarling*, Dra. 6.

In an action for mesne profits, after judgment by default in ejectment, it is not necessary that the costs of the ejectment should be taxed before they can be recovered. *Bank of U. C.* v. *Armstrong*, H. T. 6 Vict.

In an action for mesne profits the jury gave a verdict for nominal damages. Evidence was given that the defendant had made substantial improvements on the lot from which he had been ejected, and evidence of the costs of the ejectment suits:—Held, that the damages were in the discretion of the jury, and that the damages and costs of the ejectment might be considered as paid for by the improvements, and a new trial was refused. *Patterson* v. *Reardon*, 7 Q. B. 326.

Where a mortgagee brought ejectment after foreclosure, and defendants appeared to be mere trespassers having no privity with the mortgagor, the plaintiff was held clearly entitled to mesne profits from the date of the foreclosure. *Moir* v. *Caly et al.*, 11 Q. B. 308.

The plaintiffs having recovered in ejectment against one W. for lands occupied by W. as tenant to defendant, brought an action against defendant for mesne profits, and succeeded, the costs of the ejectment being allowed as part of the damages. These costs were subsequently reduced on revision in Toronto by £120 15s. 2d.: Held, that the amount taxed was the amount plaintiffs were entitled to, and the verdict was reduced accordingly. *Neale et ux* v. *Winter*, 10 C. P. 199.

4. *Other Cases.*

An action for mesne profits may be maintained against an executrix under 7 Will. IV. c. 3; and where the action is founded on the judgment against the casual ejector in ejectment, it is no ground of defence that although the writ of possession is tested in the tenant's lifetime, it was issued and executed after his death without a sci. fa. *Green* v. *Hamilton*, E. T. 3 Vict.

A plaintiff in ejectment claiming substantial damages under 14 & 15 Vict. c. 114, must give notice as the act directs, and proceed for such damages at the trial of the ejectment, otherwise he waived his claim, and could maintain no action afterwards. *Curtis* v. *Jarvis*, 10 Q. B. 466.

Semble, per Burns, J., that a plaintiff in ejectment, under 14 & 15 Vict. c. 114, not having proceeded for substantial damages, is precluded from recovering them in a subsequent action. *Hamer* v. *Laing*, 13 Q. B. 233.

A landlord proceeding against an overholding tenant under 4 Will. IV. c. 1, s. 53, cannot, under 14 & 15 Vict. c. 114, s. 12, recover mesne profits, the latter act applying only to actions of ejectment. *Allan* v. *Rogers*, 13 Q. B. 166.

IX. Miscellaneous Cases.

A lessor in ejectment will not be allowed to release the action. *Doe* d. *Boyer et al.* v. *Claus*, 3 O. S. 146.

The court will not compel a vendee of land, who has recovered from the vendor the purchase money and interest for defect of title, to stay proceedings on his judgment until he gives up possession. The vendor must proceed by ejectment; and Quære, as to his right to recover. *McKinnon* v. *Burrows*, 4 O. S. 71.

36 Vict. c. 22, as to improvements on land in mistake before notice, and the lien therefor discussed. *Carrick* v. *Smith*, 34 Q. B. 389.

In an action for trespass to land, the plaintiff proved a good paper title derived through a sale for taxes, but he had never been in actual possession, and it was shewn that after the plaintiff obtained his deed the defendant had cut timber on the land and built a shanty for the lumbermen, although the plaintiff went there and forbad him; and it appeared that the plaintiff had brought ejectment against him, but had not proceeded with it after defendant appeared. The defendant claimed under a deed from the heirs of the patentee, and it was sworn that before defendant purchased the plaintiff also wished to buy from them, saying that he thought his own title not good: Held, that the plaintiff was sufficiently in possession to maintain trespass, and that he was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck* v. *Knapp*, 20 Q. B. 360.

ELECTION.

I. Proceeding in Law or Equity—*See* Practice in Equity.

II. Widow's Election—*See* Dower—Will.

III. Of Members of Parliament—*See* Parliament.

IV. Of Members of Municipal Councils—*See* Municipal Corporations.

V. Of School Trustees—*See* Public Schools.

VI. Criminal Offences connected with—*See* Criminal Law.

VII. Closing Taverns on Days of—*See* Taverns and Shops.

VIII. Under Wills—*See* Will.

A condition endorsed on an insurance policy provided that if for any cause the company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the company should refund a ratable proportion of the premium:—

Held, not essential that the notice should precede the termination of the insurance, but that they might be co-temporaneous, and that the company could terminate the risk by giving notice that they did so, and refunding the unearned premium. Held, also, that in this case, on the facts set out in the report, there was evidence for the jury to shew a termination of the risk under the condition. *Cain* v. *The Lancashire Ins. Co.*, 27 Q. B. 453.

It was provided by an insurance policy, that whenever defendants should pay any loss to the insured, he agreed to assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants if requested. Semble, per Wilson, J., that defendants had not the right under such agreement to elect whether the plaintiff should assign or prosecute. *Reesor* v. *Provincial Ins. Co.*, 33 Q. B. 357.

Held, under the facts stated in the report of this case, Wilson. J., diss., that the defendant, although the attaching creditor in insolvency, was not put to his election, but might proceed in insolvency as well as upon his fi. fa. *Thorne* v. *Torrance*, 16 C. P. 445; affirmed in appeal, 18 C. P. 29, Hagarty, C. J., Wilson, J., and Mowat, V. C., diss.

Plaintiff, on the 20th January, 1866, agreed under seal with defendants to sell to them certain land for $5000; $2500 to be paid on 1st April, 1866, and $2500 on the 1st May, 1866, with interest, and to convey on these payments being made. Defendants covenanted to pay, and that if they made default, "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff," and that time should be of the essence of the contract. To an action on this covenant, alleging non-payment by defendants, and their neglect to complete the purchase, defendants pleaded on equitable grounds, that defendants went into possession and paid $1000, but having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void. At the trial it appeared that the whole purchase money was $6000, of which $1000 was paid down, and $1000 more on the 7th April, 1866, when, by an endorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease in May, 1865, and expended about $4000 boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th of May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their payments, and that the property was his, and they were trespassers. He brought several men with him who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea:—Held, 1. That under the agreement defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff; 2. That there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged; and the verdict was upheld. *Marcus* v. *Smith et al.*, 17 C. P. 416.

ELEEMOSYNARY INSTITUTIONS.

See CHARITY.

ELEGIT.

A judgment is not a lien upon lands for the purpose of an elegit, so as to avoid the effect of a fi. fa. against lands, issued on a subsequent judgment, but placed in the sheriff's hands prior to the elegit. *Doe* d. *Henderson* v. *Butch.* 2 O. S. 514.

Quære, can an elegit be issued regularly in this province. *Ib.*

EMBEZZLEMENT.

See CRIMINAL LAW.

EMBLEMENTS.

See CROPS—LANDLORD AND TENANT.

EMBRACERY.

See CHAMPERTY AND MAINTENANCE.

ENDORSEMENT.

I. OF BILLS OR NOTES—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. OF BILLS OF LADING—*See* BILLS OF LADING AND WAREHOUSE RECEIPTS.

III. OF PAPERS—*See* PRACTICE IN EQUITY.

IV. OF WRITS.

1. *Writs of Summons*—*See* PRACTICE AT LAW.
2. *Writs of Execution*—*See* EXECUTION.

ENLISTMENT.

See CRIMINAL LAW.

ENQUIRY, WRIT OF.

See TRIAL.

ENROLLING DECREE.

See PRACTICE IN EQUITY

ENROLLMENT.

See REGISTRY LAWS.

ENTAIL.

See ESTATE.

ENTRIES.

See EVIDENCE.

EQUITABLE ASSIGNMENTS.

See CHOSE IN ACTION.

EQUITABLE EXECUTION.

See EXECUTION.

EQUITABLE MORTGAGE.

See MORTGAGE.

EQUITABLE PLEAS.

See PLEADING AT LAW.

ERROR AND APPEAL.

I. ERROR, 1218.

II. APPEAL FROM SUPERIOR COURTS.

1. *When Appeal will lie*, 1219.
2. *Leave to Appeal and Notice*, 1220.
3. *Staying Proceedings*, 1221.
4. *Costs*, 1223.
5. *Bond and Allowance* 1223.
6. *Other Cases*, 1225.

III. OTHER APPEALS.

1. *From Assessment*—*See* ASSESSMENT AND TAXES.
2. *In Insolvency*—*See* BANKRUPTCY AND INSOLVENCY.
3. *From County Court*—*See* COUNTY COURTS.
4. *From Practice Court*—*See* PRACTICE COURT.
5. *From Magistrates*—*See* SESSIONS.
6. *From Master*—*See* PRACTICE IN EQUITY.
7. *From Orders*—*See* PRACTICE IN EQUITY—PRACTICE AT LAW.
8. *Removal of Causes*—*See* CERTIORARI.
9. *Second Application*—*See* PRACTICE AT LAW.

IV. IN CRIMINAL CASES—*See* CRIMINAL LAW.

V. MISCELLANEOUS CASES RELATING TO APPEAL—*See* APPEAL.

I. ERROR.

The court refused to set aside upon motion, a ca. sa. issued upon a judgment more than a year old without a sci. fa. to revive it. The ca. sa. was clearly irregular, yet not void, but voidable, and the proper remedy would seem to be a writ of error. *McNalley* v. *Stephens*, Tay. 263.

Where either party can appeal from a District Court, under 8 Vict. c. 13, s. 57, the appellant must take that course, and not by writ of error. *Thomas* v. *Hilmer*, 4 Q. B. 527.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions on an indictment, is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 Q. B. 215.

The plaintiffs demurred to one plea pleaded, and took issue on another; and the demurrer, on argument, having been overruled, the plaintiffs entered judgment against the demurrer, and before the issue in fact was tried brought error:—Held, that until the issue in fact was disposed of, error could not be sustained. *Dickson* v. *Ward*, 2 E. & A. 275.

Error will only lie upon a final judgment. Therefore where the entry on the roll was, that the plea was held bad, and the declaration good, and that the plaintiff ought to recover his damages, &c., but because it was unknown, &c., judgment was stayed till damages ascertained, &c.:—Held, that error would not lie on this record. *Grand Trunk R. Co.* v. *Amey*, 20 C. P. 6.

An application made in the County Court after the removal of the cause to the C. P., to set aside the final judgment entered, because the claim was unliquidated, had been refused, because, having complied with the certiorari, the judge had no longer jurisdiction in the cause:—Held, that the subject matter of the suit being within the jurisdiction of the judge below, his judgment could not be reviewed on the proceeding before this court; but, semble, that if it appeared on the face of the record that the judgment was final when it ought to have been interlocutory, a writ of error would lie. Semble, that any proceedings in the court below after removal of the cause into this court, could not be sustained:—Held, also, that after the return of the record, &c., under the procedendo, to the court below, the judge there had power to set aside the judgment and let defendant in, upon terms, to plead. *Barnes et al.* v. *Cox*, 16 C. P. 236.

The plaintiff having commenced an action in the County Court, at the trial a bill of exceptions was tendered, and it was then agreed that the pleadings and evidence should be stated as a special case for the Queen's Bench, on which the court might order a verdict for plaintiff or defendants, or, at the election of the plaintiff, a nonsuit or new trial, the court to draw inferences as a jury. This was argued as a special case in the Queen's Bench, and judgment given for the plaintiff, whereupon the defendants brought error. In the copy of the judgment roll transmitted, immediately after the pleadings and venire, the evidence was set out, and then a statement of the contention on either side, and a formal entry of judgment for the plaintiff. The Court of Appeal refused to entertain the case, holding that if it was to be looked upon as an informal appeal from the County Court to the Queen's Bench, it was not a special

case within secs. 150 or 157 of the C. L. P. Act, upon which error could be brought: that if it was to be treated as a cause in the Queen's Bench, then the agreement of the parties to the special case, and a judge's order allowing it, should have appeared on the roll, the facts and not the evidence only should have been stated, and the agreement of the parties should have been absolute, not giving the plaintiff an option to take a nonsuit or new trial instead of being bound by the judgment. *Holmes* v. *The Grand Trunk Railway Co.*, 29 Q. B. 294.

The proceedings here with regard to writs of error to County Courts must be governed by the old practice in England. The plaintiff, in the County Court, recovered $5 on a declaration containing counts on the warranty of a horse, for deceit, and the common counts. No certificate was granted, and judgment was entered for defendant for his costs of defence as between attorney and client, less the $5 damages. The plaintiff removed the judgment by writ of error, contending that under the statute of Ontario, 31 Vict. c. 24, s. 2, sub-s. 4, he was entitled to Division Court costs. The defendant obtained a rule calling upon the plaintiff to assign errors:—Held, not his proper course; but that he should have sued out a scire facias quare executionem non:- Held, also, that this writ could not be said to have been sued out merely for delay, in which case the court will not stay execution, for there was fair ground for contending that the plaintiff was entitled to Division Court costs, and that the defendant should have deducted his own costs in such court from his own County Court costs. *Pope* v. *Reilly*, 29 Q. B. 478.

The 33 Vict. c. 7, s. 12, O., provides that "the law and practice as to writs of error, and the proceedings thereon, shall hereafter be the same as the law and practice now in force in England;" and there error cannot be brought for any error in a judgment with respect to costs:—Held, that the statute was not retrospective, so as to affect a writ of error in respect of costs issued before its passing; for such a writ is a new action, and there is nothing in the statute shewing that it was intended to take away a vested right. *Pope* v. *Reilly*, 29 Q. B. 495.

Held, that the court will not arrest judgment after verdict, or reverse judgment in error, for any defect patent on the face of the indictment, as by 32 & 33 Vict. c. 29, s. 32, objection to such defect must be taken by demurrer, or by motion to quash the indictment. *Regina* v. *Mason*, 22 C. P. 246.

Whether the Police Court is a court of justice within 32 & 33 Vict. c. 21, s. 18, or not, is a question of law which may be reserved by the judge at the trial, under C. S. U. C. c. 112, s. 1, and where it does not appear by the record in error that the judge refused to reserve such question it cannot be considered upon a writ of error. *Ib.*

II. Appeal from Superior Courts.

1. *When Appeal will lie.*

Where the verdict had been taken subject to the opinion of the court, and the respondents attended before a judge to settle the case for appeal:—Held, that they were precluded from objecting that the case was not appealable. Held, however, that in this case the court below must be taken to have decided as upon a motion to enter a nonsuit, and that the right of appeal was clear. *Boulton et al.* v. *Smith*, 18 Q. B. 458, on appeal.

An appeal will lie from an interpleader issue. *Wilson* v. *Kerr*, 18 Q. B. 470.

Appeal dismissed at the hearing on the ground that an appeal will not lie from a decision resting only upon the discretion of the court below, and not upon matters of law. *Cinq Mars* v. *Moody*, 15 Q. B. 601, 610, note.

Under C. S. U. C. c. 13, s. 26, there is no appeal to the Court of Error and Appeal, where a new trial is granted in the court below on a matter of discretion only; and an appeal in such case was, under sec. 10, quashed with costs. *Hall* v. *Hamilton*, 24 C. P. 302.

On a reference at Nisi Prius the order required the arbitrator, at the request of either party, to state any special facts for the court, which was thereupon empowered to alter or amend the verdict as it might think proper. The arbitrator having stated a case, the court made a rule thereon:—Held, that no appeal would lie, and that as judgment had not been entered, error could not be brought. *Mills* v. *King*, 14 C. P. 223; *S. C.* 3 E. & A. 120.

The right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties. An appeal from an order directing the taxation of a solicitor's bill against his client in a particular mode, was therefore dismissed with costs. *In re Freeman et al.*, 2 E. & A. 109.

The respondent, although he may, is not bound in such a case to move at an earlier stage to quash the proceedings. *Ib.*

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2. *Leave to Appeal and Notice.*

[*Leave to appeal in cases of motion for new trial is now unnecessary: 34 Vict. c. 11, O.*]

Where evidence offered at a trial and rejected affected only the amount of damages, which were small, the court refused leave to appeal. *Myers* v. *Currie*, 9 L. J. 152.—Q. B.

Judgment was given against defendant in H. T., 1861, on demurrer and special case. On granting leave to appeal the chief justice intimated that defendant's remedy, if any, would be in Chancery. Defendant then sued there and having failed applied in this term for leave to give notice of appeal, notwithstanding the lapse of three years. The application was refused. Such leave may be given under C. S. U. C. c. 13, s. 25, after fourteen days' from the decision complained of have elapsed. *Regina* v. *Miller*, 23 Q. B. 206.

A rule nisi for new trial was moved, among other grounds, for misdirection, and refused upon that ground. The plaintiff having taken and argued it upon other grounds, the court would not grant leave to appeal from the refusal. *Bricker* v. *Ancell*. 23 Q. B. 481.

Where a defendant delayed to proceed in appeal for an unreasonable time, the court ordered the leave to be rescinded, unless he should within a month settle a case for appeal. *Clissold* v. *Machell*, 25 Q. B. 546.

Where time to appeal to the Court of Error and Appeal from an order made in chambers would expire before such appeal could be heard, a judge in chambers cannot extend the time. *Wiman* v. *Braidstreet*, 3 L. J. N. S. 102.—Chy. Chamb.—Taylor, *Secretary*.

Where a cause had been reheard and the original decree affirmed, an appeal must be brought within a year from the original decree, or a special application for leave to appeal made. *Macfarlane* v. *Dickson*, 1 Chy. Chamb. 377; *S. C.* 2 Chy. Chamb. 38.—Mowat.

The fact of an application to extend the time for appealing being made before the expiry of a year from the decree on rehearing, was looked on as a cogent reason for extending the time. *Tyler* v. *Webb*, 3 Chy. Chamb. 33. Strong. See, also, *Duff* v. *Barrett*, 3 Chy. Chamb. 318.—Mowat.

A party seeking leave to appeal after the time limited for appeal has expired, must account satisfactorily for the delay, and shew some reasonable grounds why such an indulgence should be granted. A party will not be aided by the court in setting up a technical defence to defeat a claim just in itself. Where leave to appeal, after the usual time, was asked under circumstances which, in an ordinary case, would have been sufficient to sustain the application, but the case sought to be made by the appellant was strictissimi juris, and with the view of defeating an equitable claim, the motion was refused with costs. *Gilbert* v. *Jarvis*, 2 Chy. Chamb. 259.—VanKoughnet.

On an application for leave to appeal from the Court of Chancery, the proceedings were held to be rightly styled as in the Court of Chancery, although security for appealing had been perfected. *Tyler* v. *Webb*, 3 Chy. Chamb. 33.—Strong.

Leave to appeal given under special circumstances, after the time had elapsed. *Bank of Upper Canada* v. *Wallace*, 2 Chy. Chamb. 169.—VanKoughnet; *Box* v. *Provincial Insurance Co.*, 3 Chy. Chamb. 397.—Taylor, *Secretary*; *Butler* v. *Church*, 3 Chy. Chamb. 91.—Mowat.

Such leave, after the time has elapsed, will not be granted if the delay is not properly accounted for. *Bullen* v. *Renwick*, 1 Chy. Chamb. 4—Spragge; *Denison* v. *Denison*, 2 Chy. Chamb. 333.—VanKoughnet; *Duff* v. *Barrett*, 3 Chy. Chamb. 318.—Mowat.

The court, although reluctant to shut out a party from the privilege of appealing, will not give leave to appeal after a long lapse of time, and where numerous sittings of the Court of Appeal have been held since the judgment. *Gordon* v. *Boomer*, 3 Chy. Chamb. 375.—Spragge.

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3. *Staying Proceedings.*

Where a fi. fa. has been acted upon before the writ of appeal has been allowed, there can be no stay of execution. The sheriff must sell and pay the money into court to abide the event of the appeal. *Gilmour* v. *Hall et al.*, 10 Q. B. 508.

The court refused to rescind the stay of proceedings on the execution, although no notice of the grounds of appeal had been served or formal leave to appeal asked, all parties having understood that the case would be appealed. *Grant* v. *Great Western R. W. Co.*, 8 C. P. 348.

Defendants having succeeded in replevin for a schooner, the plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, so that defendants might not in the meantime obtain a return of the vessel. The court, however, refused to interfere. *Scott* v. *Carveth et al.*, 20 Q. B. 435.

A rule nisi for a new trial having been discharged, defendant gave notice of appeal, and obtained an order to stay proceedings until the appeal bond should be entered into by the defendant, or until there should be a rule or order allowing the plaintiff to proceed. The appeal bond was marked "allowed" by a judge in chambers, after which the plaintiff entered judgment on his verdict. On motion to set aside this judgment:—Held, that the order ceased to stay proceedings after the appeal bond had been allowed; that such allowance was a supersedeas of execution only; and that the judgment, therefore, should be allowed to stand, subject to the decision in appeal. *Robinson* v. *Gordon et al.*, 24 Q. B. 285.

The court has full power, notwithstanding the Error and Appeal Act, 1857, to suspend the operation of its decree, so as to allow an appeal. *Cotton* v. *Corby*, 5 L. J. 67. Chy.

A defendant in equity having appealed from an order directing his committal for breach of an injunction, a stay of proceedings under the order pending the appeal was refused. *Gamble* v. *Howland*, 3 Chy. 281.

It is not usual to stay proceedings under a decree pending an appeal, and under the facts of this case it was refused. *Heward* v. *Heward*, 2 Chy. Chamb. 242.—Taylor, *Secretary*.

Security for the costs in appeal, as well as below, will be required before proceedings below will be stayed pending an appeal. *S. C. Ib.* 245.—VanKoughnet.

On a motion for a stay of execution pending an appeal it is not necessary to give fourteen days notice. The ordinary notice is sufficient. *Heenan* v. *Dewar*, 3 Chy. Chamb. 199.—Taylor, *Referee*.

By an order of the Court of Error and Appeal, the Hamilton and Milton road company were ordered to remove a bridge constructed by them which impeded the navigation of the Desjardins canal, against which the road company appealed to the Queen in council:—Held, that under the statute, the circumstance of the road company having perfected the security required by the orders of the privy council, was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge; and the road company having applied to this court for a stay of proceedings under the order, pending their appeal to the privy council, both motions were refused, but under the circumstances without costs to either party. *Dundas* v. *Hamilton and Milton Road Co.*, 19 Chy. 455.

On motion to stay proceedings pending rehearing, the court will follow the practice laid down in the Error and Appeal Act with reference to staying proceedings pending an appeal to the Court of Error and Appeal. *Campbell* v. *Edwards*, 6 P. R. 159.—Chy. Chamb.—Spragge.

4. Costs.

Where the Court of Queen's Bench and Common Pleas had given opposing judgments on the same question, this court, on affirming one of these judgments, dismissed the appeal without costs. *Sexton* v. *Parton*, 2 E. & A. 219.

Three persons entered into several contracts in the name of one of the three, for the construction of portions of a railroad, without any written agreement as to the share of each in the contracts, and a bill was filed by one to have an account taken, claiming a larger share in the profits than the master allowed him by his report, from which all parties appealed; and by arrangement the court below affirmed the finding of the master with a view to appeal. The court, on affirming the order below, refused the costs of the appeal to either party. *Nichols* v. *McDonald*, 8 Chy. 106, in appeal.

A decree had been made in a cause giving the plaintiffs relief, and ordering defendants to pay the costs, which, however, were not paid. The plaintiffs appealed from a portion of the decree with which they were dissatisfied, which appeal was dismissed with costs, to be paid to one of the respondents; and thereupon the plaintiffs applied to set off the amount so ordered to be paid against the costs directed to be paid by the defendants in the court below to the plaintiffs, which was ordered accordingly. *Bank of Upper Canada* v. *Thomas*, 10 Chy. 356.

When the court refused to hear an appeal, and ordered it to be struck out, because it had not been set down for argument within the time allowed by 34 Vict. c. 11, s. 4, O.:—Held, that the respondent, who had appeared to answer the appeal, was entitled to his costs, for the appellant should have applied earlier for an extension of the time; and that the court had jurisdiction to grant costs, though the appeal had not been heard. Semble, that the respondent should have stated the lapse of time as one of his reasons against the appeal. *Royal Canadian Bank* v. *Stevenson*, 22 C. P. 562.

The court on allowing an appeal gave the costs of it to the appellant. *Herbert* v. *Park*, 25 C. P. 57.

The Court of Error and Appeal reversed an order of the Court of Chancery, and directed a petition to be dismissed with costs:—Held, that this did not entitle the appellants to costs of proceedings in the court below, subsequent to the order which was reversed. *Re Goodhue*, 6 P. R. 87.—Chy. Chamb.—Holmested, *Referee*.

5. Bond and Allowance.

Where security has been allowed under C. S. U. C. c. 13, s. 35, without objection, the court will not rescind the allowance for want of the proceedings required by secs. 33 and 34. The neglect by appellant to take the proceedings mentioned in secs. 36 and 37, is no ground for rescinding the allowance. *Rowe* v. *Jarvis*, 14 C. P. 244.

Judgment having been given for the plaintiff, on motion to allow an appeal bond in a penalty of £100, it was objected that no appeal would lie, and that the bond should be not merely for costs, but to secure the judgment:—Held, that these objections must be decided by the court above. Semble, however, that it was sufficient in amount, the case being one in which, under C. S. U. C. c. 13, s. 16, sub-s. 4, there was no stay of execution. *Gossage* v. *The Canadian Land and Emigration Co.*, 24 Q. B. 452.

It is irregular for a solicitor to become security for costs of appeal for his client. *Beckitt* v. *Wragg*, 1 Chy. Chamb. 5.—Spragge.

An appeal bond and the affidavit of execution thereof are separate documents, and must be stamped as such when filed. The recent act respecting law stamps has made no alteration in the practice of the court as to the mode of computing the proper amount of fees. *Macbeth* v. *Smart*, 1 Chy. Chamb. 269.—VanKoughnet.

Where a bond for security for costs, or for the due prosecution of an appeal, is filed in an outer county, all objections to it or to the solvency of the sureties should be decided by the master in that county. *Brigham* v. *Smith*, 1 Chy. Chamb. 334.—VanKoughnet.

The bond and the affidavits of execution and justification were all entitled in the name of the original plaintiffs, one of whom had died, and both were named as obligees in the bond:—Held, irregular. *McFarlane* v. *Dickson*, 1 Chy. Chamb. 377.—Mowat.

A party opposing the allowance of a surety's bond for security for costs of an appeal, may read affidavits in opposition to the surety's affidavit of justification. *Campbell* v. *Royal Canadian Bank*, 6 P. R. 43.—Holmested, *Referee*.

An appeal bond is properly entitled in the cause in the court below. *Ib.*

The bond should be styled in the Court of Error and Appeal. The style of the cause in the court below, if adopted, should be the style in full, and the parties should be described as they become appellants and respondents, but they may be given in the same order as in the style of the original cause. *Weir* v. *Matheson*, 2 Chy. Chamb. 73.—VanKoughnet. See *Harvey* v. *Smith*, 2 L. & A. 480.

There should be two sufficient sureties, and if one die or become insolvent, another will be ordered to be substituted. *Brigham* v. *Smith*, 1 Chy. Chamb. 334, overruled on this point by *Saunders* v. *Furnivall*, 2 Chy. Chamb. 159.—VanKoughnet.

Security for costs of appeal, as well as those of court below, will be required to be given before proceedings in the court below will be stayed pending an appeal. *Heward* v. *Heward*, 2 Chy. Chamb. 245.—VanKoughnet.

It is not necessary to move for the allowance of the bond. If not moved against within fourteen days from notice of filing given, it is allowed. *Read* v. *Smith*, 1 Chy. Chamb. 325.—Taylor, *Secretary*.

The practice in the perfecting of security to stay execution on appealing from this court is different from the practice on appeals at law. No motion is necessary here to allow the security; the onus of moving against the security being on the party objecting to it. *Heenan* v. *Dewar*, 3 Chy. Chamb. 199.—Taylor, *Referee*.

An application for leave to pay into court $400 as security for costs of an appeal from a certificate of title under the Quieting Titles Act having

been granted by the referee ex parte, and it not having been brought to his notice that the appeal was as to two separate parcels of land, one claimed by a husband and wife, and the other by the husband alone, it was held that the order was bad, as these facts should have been made known to the referee, and the order under such circumstances made upon notice. *Re Howland*, 4 Chy. Chamb. 16.—Strong.

In the case of bonds for carrying a case to the Court of Appeal, an affidavit of justification is necessary under the order of the Court of Error and Appeal No. 8. *Donelly* v. *Jones*, 4 Chy. Chamb. 48. Taylor, *Referee*.

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6. *Other Cases.*

An administrator will not be allowed to revive a judgment in favour of his intestate, pending an appeal to the court of the governor in council, or the King and privy council, in the original action, although it be proved by affidavit that the plaintiff, in whose favour judgment was given in the court below, died after judgment, and before the allowance of the appeal to the King in council, though after the allowance of that to the governor and council. *Washburn* v. *Powell*, 2 O. S. 463.

Held, per Esten, V. C., and Hagarty, J., that the court sits as a court of law or equity according as the case comes from common law or chancery. *Smith* v. *Norton*, 7 L. J. 263, in appeal.

The appellants in their notice under the 27th appeal rule, merely stated that the judgment was erroneous as being against law and evidence, and because the jury were misdirected. The court held this insufficient, and ordered that execution might issue:—Quære, however, whether the order was necessary, as such notice could not take effect as a supersedeas. *Torrance* v. *McPherson*, 11 Q. B. 200.

At the trial the plaintiff put in two chattel mortgages, and the first being objected to for want of refiling, he relied upon the second only, both at the trial and on the argument in term. That mortgage was held to be invalid; and the Court of Appeal concurring in the decision, and thinking the plaintiffs' case not one to be favoured, refused to allow them to rely upon the first mortgage. *Boulton* v. *Smith*, 18 Q. B. 458, in appeal.

Quære, whether, on the argument, exceptions can be taken of which no notice has been given. *Smith* v. *Muirhead*, 13 Q. B. 9, in appeal.

No writ of error or appeal is required. Sec. 32 of C. S. U. C. c. 13, abolishes it notwithstanding sec. 64, affirming the orders of the court until altered. Where judgment of non pros. is authorized by sec. 39, it is not necessary to obtain leave of the court to sign it. The statute and orders enable the respondent to press the case ot a hearing. *Rowe* v. *Jarvis*, 14 C. P. 244.

The general rule is, that the judgment of the court appealed against stands, unless the appellate court can say that it is clearly wrong. *Keena* v. *O'Hara*, 16 C. P. 435.

The appeal in this case was dismissed without any decision on the merits, there being a misunderstanding as to what took place at the trial. *Holliday* v. *Ontario Farmer's Mutual Fire Insurance Co.*, 33 Q. B. 558.

Where leave was reserved at the trial to move to set aside the verdict, and to enter a verdict for the plaintiff: Held, that the Court of Appeal could order such verdict to be entered. *Herbert* v. *Park*, 25 C. P. 57.

Per Robinson, C. J., although a person affected by a decree does not appeal from it, the court upon the appeal of another party may give such relief as the court may think the parties entitled to. *Sampson* v. *McArthur*, 8 Chy. 72, in appeal. See, also, *Topping* v. *Joseph*, 1 E. & A. 292.

Where defendants appealed jointly, and the court thought that all except one were entitled to be relieved from the decree, they reversed it, notwithstanding that as to one appellant the evidence was sufficient to establish the will under which the plaintiff claimed. *Black* v. *Black*, 2 E. & A. 419.

Semble, a motion to make a decree of the Court of Appeal an order of the Court of Chancery may be made in chambers if the order is to be in the terms of the decree, but if further directions or new terms are necessary to carry out the decree in appeal, the motion should be to the court. *Weir* v. *Matheson*, 2 Chy. Chamb. 10.—Sprague.

Where a married woman defended a suit in Chancery without a next friend, it was held that the husband and wife could appeal to this court without any next friend. *Butler* v. *Church*, 18 Chy. 190, in appeal.

Where the Court of Appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Court of Chancery; at all events, in cases in which, though interest is usually given, it is not a matter of strict legal right, but of discretion. *Box* v. *Provincial Ins. Co.*, 19 Chy. 48.

Appellate courts will not, except under special circumstances, interfere with the finding as to questions of fact depending on the veracity and credit of witnesses. *Halton Election.*—*Harris* v. *Barber*, 11 L. J. 273.—E. & A.

ESCAPE.

See CONSTABLE—CRIMINAL LAW—SHERIFF.

ESCAPE WARRANT.

The English statutes 1 Anne st. 2, c. 6, and 5 Anne c. 9, relating to escape warrants, are not in force in this province. A. Wilson, J., diss. *Hesketh* v. *Ward*, 17 C. P. 667.

See, also, *Evans* v. *Shaw*, Dra. 35.

ESCHEAT.

See ATTAINDER.

Whether trust estates escheat, considered. *Re Adams*, 4 Chy. Chamb. 29.—Taylor, *Referee*.

ESCROW.

See DEED.

ESTATE.

I. Estate at Will, 1228.

II. For Years — *See* Landlord and Tenant.

III. For Life.

1. *Generally*, 1230.
2. *Tenant by Curtesy*, 1232.
3. *Dower*—*See* Dower.
4. *Right to cut Timber and Trees*—*See* Waste.

IV. Estate Tail, 1232.

V. Estate in Fee, 1233.

VI. Coparceners, Joint Tenants, and Tenants in Common.

1. *Generally*, 1234.
2. *Right to Crops*, 1235.
3. *Right to Maintain Trover for Crops* —*See* Trover.
4. *Other Cases*, 1236.
5. *Ejectment by*—*See* Ejectment.

VII. Reversioners and Reversionary Estates.

1. *Generally*, 1237.
2. *Sale of Reversionary Interest under Execution*—*See* Execution.
3. *Action for Damages by Reversioners*—*See* Damages.

VIII. Legal and Equitable Estate, 1238.

IX. Construction of Deeds as regards the Estate Created.

1. *Effect and Operation of Particular Words*, 1240.
2. *Other Cases*, 1240.
3. *Deeds of Release and Quit Claim*—*See* Release.

X. Estate by Estoppel—*See* Estoppel.

XI. Trust Estates and Uses—*See* Trusts and Trustees—Use.

XII. Descent, 1241.

XIII. Heir.

1. *Actions and Proceedings by and Against*, 1242.
2. *Other Cases*, 1243.
3. *Of Aliens*—*See* Aliens.
4. *Evidence of Pedigree* — *See* Evidence.
5. *Parties to Suits in Equity.*
   (a) *Generally* — *See* Pleading in Equity.
   (b) *Of Foreclosure* — *See* Mortgage.
6. *Rights of, to Redeem* — *See* Mortgage.
7. *Heir and Devisee Commission*—*See* Heir and Devisee Commission.

XIV. Covenant to Stand Seized, 1244.

XV. Exchange of Lands.

1. *Generally*, 1244.
2. *Right of Dower in Lands Exchanged* —*See* Dower.

XVI. Miscellaneous Cases, 1246.

XVII. Of Particular Persons.

1. *Of Aliens and their Descendants*—*See* Alien.
2. *Of Infants*—*See* Infants.
3. *Of Lunatics*—*See* Lunatic.
4. *Of Married Women*—*See* Dower —Husband and Wife.
5. *Of Religious Institutions* — *See* Churches.
6. *Of Trustees and Cestui que Trust* —*See* Trusts and Trustees.
7. *Of Tenants* — *See* Landlord and Tenant.

XVIII. Administration of — *See* Administration Suit — Executors and Administrators.

XIX. Conversion of Realty by Statute —*See* Conversion of Realty by Statute.

XX. Conveyance of—*See* Deed.

XXI. Distribution of—*See* Distribution of Estates.

XXII. Merger of—*See* Merger.

XXIII. Partition of—*See* Partition.

XXIV. Release of—*See* Release.

XXV. Forfeiture of—*See* Attainder.

XXVI. Operation of Judgments and Executions — *See* Execution — Executors and Administrators — Mortgage.

XXVII. By Devise—*See* Will.

XXVIII. Title Deeds—*See* Title.

I. Estate at Will.

If on the death of a tenant at will his heir enter, such entry is tortious; and if the heir die, and his heir enter, the original owner or his heir will be put to his action. *Doe* d. *Mouk* v. *Empey*, 3 O. S. 488.

Where a person enters into possession of land under an agreement to purchase, he is tenant at will to the seller, and at the seller's death his heir-at-law can maintain ejectment against him without any notice to quit or demand of possession. *Doe* d. *Kemp* v. *Garner*, 1 Q. B. 39.

The defendant had been let into possession under a contract to purchase payable by instalments, with a stipulation for forfeiture if payment not made on a particular day, and the vendor had subsequent to such day received payment on account:—Held, that defendant was tenant at will and not by sufferance, and that a demand of possession was necessary. *Lundy* v. *Dovey*, 7 C. P. 38.

A. and B. being partners, A. alone verbally leased certain premises for a place of business for a term of five years, at a given rent, and both went into possession. A memorandum for a lease was prepared by A. but never signed by

the lessor:—Held, that A. was tenant at will. *Brougham* v. *Balfour*, 3 C. P. 72.

On the 26th of October, 1852, the Buffalo and Brantford Joint Stock Railroad Co., took a deed from the plaintiff's father, by which, in consideration of the benefits which would result to him from the construction of the road, and of £27 10s., he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title to the land, but had merely been allowed by his father to occupy it; that he had admitted in presence of his father that it was with his father, and not with him, that the company must settle; and that he had worked under the defendant, a contractor with the company, in making the fence along the line through this land. After the deed, the plaintiff and his father forbade the defendant from entering. The defendant entered in December, 1852, for the purpose of making the railway, and the fences along the line being insufficient, the plaintiff's wheat was injured by cattle getting in. For these injuries, he sued in this action trespass quære clausum fregit:—Held, that the plaintiff could not maintain trespass against any one claiming under the company; for he was not at any time more than a tenant at will, and the deed determined the will and left him tenant at sufferance only, with a right to enter and remove the crop. *Nelson* v. *Cook*, 12 Q. B. 22.

The plaintiff, by indenture dated 6th April, 1854, did "lease let and to farm let," the land in question to defendant upon the terms that he should pay all rates, levies, and assessments upon the said property, inclose the same with a good fence, and farm the same in a husband-like manner, and not transfer without the lessor's consent, and the plaintiff for himself, his heirs and assigns, did thereby rent unto the defendant (the premises) at the rate of six pence per acre per annum, payable half yearly in advance. There was no livery of seisin, nor any time mentioned; but the defendant entered into possession:—Held, that an estate at will only passed. *Wilmot* v. *Larabee*, 7 C. P. 407.

Defendant being in default under a demise from plaintiff, he and the plaintiff referred all differences, and the arbitrators postponed the date of payment. Quære, whether the reference and postponement would not constitute defendant a tenant at will. *Black* v. *Allan*, 17 C. P. 240.

Plaintiff being in posession as assignee of a mortgagee, under a mortgage upon which default had been made, contracted to sell the mortgage to defendant for $500; $200 down, and $300 on the 1st April following; at which time the plaintiff agreed to have the mortgage assigned to defendant. On payment of $200 defendant was put into possession. He made default in payment of $300. Plaintiff gave him notice that he was ready to assign the mortgage on payment of the amount due, and if not paid, defendant would be ejected:—Held, that by default in payment, the tenancy at will was converted into a tenancy at sufferance; and, so, that the tenancy at will would have been determined by the demand of payment under the threat of ejecting the defendant, and the default of the defendant to pay. *Prince* v. *Moore*, 14 C. P. 349.

By a mortgage in fee to secure the payment of $1490.42, by monthly instalments of $12.42 it was provided that the mortgagor should become tenant to the mortgagees thenceforth, during their will, at the rent of one pepper corn monthly until default, and after default at the yearly rent of $149.04, payable monthly. There was also, a proviso that in case of default the mortgagees without any previous demand of possession might enter and sell. On ejectment by the mortgagees, upon default, against a lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit or demand of possession was necessary: that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees at their option either to distrain, or at any time to eject the mortgagor himself without demand; but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply a tenant at will, Semble, that the mortgagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent Building and Savings Society* v. *Byers*, 19 C. P. 473.

[See the cases under "Limitations of Actions and Suits," in which the operation of the Statutes of Limitations in the case of a tenancy at will is considered.]

See, also, Ejectment II. 3 (*a*) p. 1162.

III. For Life.

1. *Generally.*

Under a conveyance to "B. and her children for ever," there being no children at the time of the deed:—Held, that the grantee took only a life estate. *Shank* v. *Cates*, 11 Q. B. 207.

A. died leaving his widow, the plaintiff, and defendant, his heir-at-law. The plaintiff being in possession of part of the property, defendant executed the following instrument under seal: "Know ye, all men, that I, J. G. H., do bind myself, my heirs, executors, and assigns, in the sum of £300 to let my mother, L. H., retain quiet and peaceable possession of the lot of land now in her possession, the same being fifty acres, more or less, for the term of her natural life:"—Held, a lease for life, and that the plaintiff might maintain ejectment. Semble, per Burns, J., that the writing might also be supported as a release. *Hall* v. *Hall*, 15 Q. B. 637.

Defendant on the 13th of October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants, the lease and the term thereby granted should cease and be utterly null and void. The lessee entered, and on the 1st of April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant; and the sheriff afterwards, under executions which had been in his hands since Novem-

ber, 1858, sold the unexpired term of S. in the premises, describing it as a term with fifteen years yet to run, at a rent of $100 a year. The plaintiff became the purchaser, and brought ejectment against defendant on the sheriff's deed:—Held, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the fi. fa. against goods. Per McLean, J., the plaintiff's title also failed, on the ground that the lease being void by the non-payment of rent, and S. having given up possession by arrangement with defendant, his interest was gone. *Dalye* v. *Robertson*, 19 Q. B. 411.

Though a man has been in possession for 20 years of land granted to his wife for life, he does not thereby acquire an absolute title to the land: for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, *if his wife should so long live*, and if he predecease her, the right to possession will revert to her, and entitle her to maintain ejectment against his grantee. *Nolan* v. *Fox*, 15 C. P. 565.

Under a deed of land to a married woman, dated 27th March, 1824, to hold from the 30th *day of the same month*, until her decease, and after that to her husband for his life:—Held, that though it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good; but, Semble, that the jury might properly have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

A grant to a married woman of a life estate in land does not require the assent of her husband to pass the title to her; and unless he repudiate it in some way, both will be seised in her right. *Ib.*

Semble, a tenant for life of the whole estate of the testator, consisting of an improved farm, and of wild lands, is bound to keep down the taxes on the whole. *Biscoe* v. *VanBearle*, 6 Chy. 438.

The devisee of a life estate in all a testator's property, is bound to keep down the annual taxes on the land, and they form a first charge on the testator's interest. *Gray* v. *Hatch*, 18 Chy. 72.

A testator devised certain lands to his wife for life, remainder to such of his children as she should appoint, and, failing issue, to such child or children of J. C. as she should appoint. The property, it was alleged, was incumbered to its full value, which incumbrance the widow directed to be paid out of her own funds, and appointed the estate to the defendant M. C. Upon a bill filed to have the sums so paid by the widow declared a charge on the estate, evidence was directed to be given as to whether the estate was of considerably greater value than the claims so paid off, in which case it would be declared that the widow had a lien thereon for the amount advanced by her; but if otherwise, it would be intended that the appointment of the estate had been made freed and discharged of such claim. *Macklem* v. *Cummings*, 7 Chy. 318.

2. *Tenant by Curtesy.*

[See 35 Vict. c. 16, s. 1, O.]

Held, that the husband of a deceased wife cannot be tenant by the curtesy, except of lands of which his wife was seised of such an estate as that her issue by him would inherit, as heir to her; and that as between the reversioner and tenant by curtesy, a conveyance from the tenant by the curtesy operates as a surrender of the life estate, and the freehold in law vests in the assignee before entry; and the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died. Richards, J., diss. *Wigle* v. *Merrick et al.*, 8 C. P. 307.

Where a married woman claims under letters patent from the crown, her husband need not have entered upon the land in order to entitle him to tenancy by the curtesy, the letters patent, suo vigore, constituting seisin in fact. *Weaver* v. *Burgess et al.*, 22 C. P. 104.

IV. Estate Tail.

A testator seised in fee of land, having devised to one of three sons, "to be by him entailed to any of his issue he may think proper," with the further provision that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment," died before the 6th March, 1834. In November, 1837, two of the sons, D. & R., by deed conveyed their estates in the land to the third son, C. This deed was never registered. C. had a child which pre-deceased him. By several deeds, executed respectively in February and March, 1865, D. and his assignee in insolvency conveyed to plaintiff. Both these conveyances were duly registered:—Held, that the three sons took estates tail in the land; that D. & R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as heir at law of the testator, had the reversion in fee. *Dumble* v. *Johnson et al.*, 17 C. P. 9.

Held, also, that although the deed of November, 1851, might not for want of registration under C. S. U. C. c. 83, s. 31, have barred the entail as against their issue, it did pass the individual rights of the grantors during their lives; and that as D., under whom alone the plaintiff claimed, was still alive and could not impeach this deed, no more could the plaintiff, who took no higher interest than D. had it then in his power to transfer. *Ib.*

Held, also, that if the title had been registered before 1851, of which there was no evidence, and if the plaintiff had relied on the non-registration of this deed under the general Registry Act, he would, upon proof that he was a purchaser for valuable consideration, (as to which, however, the evidence was otherwise) have been entitled to succeed as to that portion of the land which D. himself could have claimed, just as if the deed of 1851 had never been executed. *Ib.*

Sec. 44 of C. S. U. C. c. 83, "An Act respecting the assurance of estates tail," applies only to cases arising under that statute, and does not authorize the court, in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her. *In re McElroy*, 32 Q. B. 95.

A decree for specific performance will be made against a tenant in tail. *Graham* v. *Graham*. 6 Chy. 372.

Before the passing of the Act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser:—Held, that the Statute of Limitations did not begin to run against the heir of the tenant in tail until the death of the grantor. *Re Shaver*, 3 Chy. Chamb. 379.—Mowat.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting assurance of estates tail; the purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. *Ib.*

In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief. *Ib.*

Quære, whether a mortgage in the short form under 27 & 28 Vict. c. 31, executed by the tenant in tail, has the effect of barring the entail. *Re Dolsen*, 4 Chy. Chamb. 36.—Taylor, *Referee.*

V. Estate in Fee.

Land was granted by letters patent to A. G., her heirs and assigns for ever, "to have and to hold the said parcel or tract of land hereby given and granted to her the said A. G., in trust for herself and her children, M. G. and F. G.":—Held, that A. G. took the fee, and that no real estate passed to the children. *Goldie* v. *Taylor*, 13 Q. B. 603.

The plaintiff in ejectment claimed under a deed from one S., who was proved to be the owner in fee, expressed to be made in pursuance of the Act to facilitate the conveyance of real property, by which S., in consideration of £75, did quit claim to one G., his heirs and assigns for ever, all his right and title to the land in question. It was added that G. might take possession, that S. would execute such further assurances as might be requisite, that he had done no act to encumber; and he released and quitted claim to G. all his claim upon said lands:—Held, sufficient to pass the title in fee. *Nicholson* v. *Wadabough*, 21 Q. B. 591.

A., by indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let unto M., his heirs and assigns," certain land, "to hold and unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of 21 years," yielding and paying yearly during said term to M., his heirs and assigns, 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A.:—Held, that without livery of seisin the fee simple granted in the premises could not take effect, and the habendum for 21 years would stand; but a new trial was granted to determine the fact of livery. *McDonald* v. *McGillis*, 26 Q. B. 458.

Semble, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership. *Ib.*

A deed conveying land in fee simple, "reserving, nevertheless, to my" the grantor's "own use, benefit and behoof, the occupation, rents, issues, and profits of the said above granted premises, for and during the term of my natural life:"—Held, a conveyance of the fee simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. Quære, whether the reservation was void, or whether only the reversion passed subject to the life estate. *Simpson* v. *Hartman*, 27 Q. B. 460.

Under a conveyance of land to M., to hold "during her natural life, then to go to her heirs equally alike, and their heirs and assigns for ever:"—Held, that the rule in Shelley's case applied, and that M. took a fee. *Brown* v. *O'Dwyer*, 35 Q. B. 354.

A deed executed in Lower Canada conveyed certain lands situate in Upper Canada to parties "and their successors," which words it was proved would convey the fee simple according to the law of Lower Canada, and it was shewn that the grantor's intention was to convey the lands absolutely. The court ordered the devisee of the grantor to execute a release of the lands according to the law of Upper Canada. *Allan* v. *Thorne*, 3 Chy. 645.

See also the cases under "Release," relating to estates in land.

VI. Coparceners, Joint Tenants, and Tenants in Common.

1. *Generally.*

Tenants in common cannot make a joint demise in ejectment. *Doe* d. *McNab* v. *Sieker*, 5 O. S. 323.

Mortgagees are not trustees under 4 Will. IV. c. 1, s. 48, so as to take jointly when the deed is silent as to the tenancy created. *Doe* d. *Shuter et al.* v. *Carter*, H. T. 2 Vict.

A release by one joint tenant to another conveys a fee, without words of inheritance. *Ruttan* v. *Ruttan*, M. T. 4 Vict.

A conveyance in fee to A. by B., the survivor of two joint tenants, "of his undivided half of the lot," puts an end to the joint tenancy and makes the joint tenant B. till he die a tenant in common with A.; and B. by his will may devise the moiety he has not by his deed conveyed to A. *Doe* d. *Eberts* v. *Montreuil*, 6 Q. B. 515.

The effect of C. S. U. C. c. 82, s. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint

tenancy. *In re Shaver et al., and Hart et al.*, 31 Q. B. 603.

One tenant in common may commit trespass by expelling his co-tenant and taking the whole enjoyment of the estate wrongfully to himself. *Petrie* v. *Taylor*, 3 Q. B. 457.

At common law there can be no action of account by one tenant in common or joint tenant, unless there has been an appointment of one by the other as bailiff. *Gregory et ux.* v. *Connolly*, 7 Q. B. 500.

Under the statute 5 Anne, c. 16, however, one tenant in common, or joint tenant, may be sued as bailiff in an action of account, whenever he has entered and taken more than his just share of the profits, whether by appointment of his co-tenant or not. *Ib.*

Semble, that coparceners, not coming within that statute, cannot sue each other in an action of account. The point, however, was not expressly decided, as the court held that in this case the facts shewed that the defendant entered into possession of the land not as a coparcener, claiming through his wife and in privity with the plaintiff, but as an executor claiming adversely to the plaintiff without his consent; and that on that ground the action of account would not lie. *Ib.*

Where a husband is seised as tenant in common, his wife may be endowed. *Ham* v. *Ham*, 14 Q. B. 497.

The death of one joint tenant during their joint seisin, passes the title to the co-joint tenant free from dower of the deceased joint tenant's widow. *Haskill* v. *Fraser*, 12 C. P. 383.

In ejectment for part of the east half of a lot, it appeared that L., the patentee, in 1855, executed an agreement under seal, whereby he gave to his son J. his right, title, and interest of one half of the east half, with certain portions of the house, stipulating that he was to till the farm as usual, and give the father one-half of the produce, if demanded:—Held, that the effect of the deed was to give an undivided moiety of the half lot to J. *Leech* v. *Leech et al.*, 24 Q. B. 321.

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2. *Right to Crops.*

Where the plaintiff and defendant, being each possessed of a farm, agreed to work them together and divide the profits arising from them at the end of the season; and before the harvest defendant was dispossessed of his farm by ejectment, and the plaintiff thereupon gave him notice that he would not divide his crops with him, notwithstanding which the defendant entered the plaintiff's farm and took away his share of the crop:—Held, that the plaintiff could not maintain trespass against him. *Wemp* v. *Mormon*, 2 Q. B. 146.

A., of whom the plaintiff was administratrix, and defendant having worked and stocked a farm in partnership:—Held, that on the death of one, the survivor did not take the whole of the chattels, but that the maxim "Jus accrescendi inter mercatores locum non habet," applied. *Rathwell* v. *Rathwell*, 26 Q. B. 179.

H., by agreement with defendant, planted sixteen and a half acres of defendant's land with Indian corn and other crops, the agreement being that H. was to do all the work, and defendant to receive for his share as much Indian corn as should represent the portion of the land sown with sugar corn and potatoes, and one-third of the Indian corn, and that H. was to have the remainder. Subsequently, H., being indebted to the plaintiff on a note, sold his interest in the growing crop to the plaintiff, the price being allowed on the note. At a later period H. executed a bill of sale of the crop to the defendant, who afterwards claimed the entire crop as his own, and harvested it:—Held, that H. and defendant were tenants in common of the crop of Indian corn: that one tenant, in common cannot maintain trespass or trover against his co-tenant for merely reaping and harvesting the crop; but he may, if his co-tenant has consumed the crop, or dealt with it so that he cannot retake it or pursue his remedies against the persons who have possession of it; and that under the circumstances of the case the court might assume, after verdict for the plaintiff, in the absence of any question raised on the point, that such events had happened as entitled the plaintiff to maintain his action against the defendant for conversion. *Brady* v. *Arnold*, 19 C. P. 42. See, also, *Carver* v. *Macklem*, 11 Q. B. 513.

Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property; still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years, although as to such previous years the mother might have been accountable to her infant children as trustee for them. *Bate* v. *Martin*, 12 Chy. 490.

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4. *Other Cases.*

One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property. *Dougall* v. *Foster*, 4 Chy. 319.

Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining the committing of waste on the joint property by a stranger, it was Held, that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit. *Gage* v. *Mullholland*, 15 Chy. 145.

The plaintiff and L. were tenants in common of an oil well. They filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,6 belonged to the plaintiff and 800 to defendant, and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L. without authority, contracted for the sale of the oil in the tank at $1.25 a barrel:—Held, in a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil, and that the defendant's removal of it would be wrongful

but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L. the plaintiff was not entitled to an injunction; and that his only remedy was an action at law. *Mason* v. *Norris*, 18 Chy. 500.

One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. On a bill filed by the co-tenant against the lessor and lessee, alleging that the lessee had quarried stone outside the limits as well as within the limits of the lands demised, the lessee by his answer insisted on his right to quarry where he had, the limits of the acre really agreed to be demised being different from those mentioned in the lease, but did not submit to account for the stone quarried. At the hearing the court made a decree for an account with costs against the lessee. *Goodenow* v. *Farquhar*, 19 Chy. 614.

One of several devisees claimed to be solely entitled, and mortgaged the property; and the mortgagees entered into the receipt of the rents:—Held, that they must account to the other devisees for their shares of the rents. *McIntosh* v. *The Ontario Bank*, 19 Chy. 155.

One of several tenants in common, being in sole possession of the premises and claiming to be solely entitled, insured the buildings on the property; the buildings having been destroyed by fire the insurance moneys were paid to the party insuring, and new buildings were erected by a person to whom he had contracted to sell the property:—Held, on rehearing, varying the decree pronounced, Spragge, C., dubitante, (19 Chy. 155,) that the party insuring was entitled to appropriate the insurance money to his own benefit. *McIntosh* v. *Ontario Bank*, 20 Chy. 24.

Held, also, varying the original decree, that he was not entitled to any allowance in respect of the new buildings. *Ib.*

A tenant in common being in actual occupation of the joint estate forms no ground for charging him with rent. It would be otherwise, however, if he had been in the actual receipt of rent from third parties. *Rice* v. *George*, 20 Chy. 221.

One of several tenants in common, or joint tenants, making improvements on the joint estate, is not entitled to be paid therefor, unless, on the other hand, he consents to be charged with occupation rent. Semble, that one tenant in common selling timber off the joint property is not chargeable with sums realized therefrom. *Ib.*

Joint tenants in tail executed articles of agreement for a division of the property; and each went into possession, and for thirty-six years continued to enjoy the portion allotted to him, when a bill was filed to enforce the agreement:—Held, that the defendant could not set up as a defence to such bill that the plaintiff had by possession acquired a perfect title at law. *Graham* v. *Graham*, 6 Chy. 372.

VII. Reversioners and Reversionary Estates.

1. *Generally.*

Held, that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest in such reversioner. *Wilkinson* v. *Conklin*, 10 C. P. 211.

The mortgagee of a term of years, being in possession of the mortgaged estate, will at the suit of the mortgagor be restrained by injunction from felling timber on the mortgaged premises; although the mortgagee may have obtained the consent of the reversioner to what he is doing. *Chisholm* v. *Sheldon*, 1 Chy. 318.

Quere, whether the doctrine applicable in England between termor and reversioner in respect to felling timber, can prevail as to an estate in this country; the beneficial enjoyment of which is ordinarily attained, and can be generally obtained only through the destruction of the growing timber; and whether the doctrines of the common law as to growing timber can be applied in all their extent to forest land in this country. *Ib.*

Although the number of persons in this country in the position of expectant heirs and reversioners is but small, still the same rule applies here as in England, the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men. *Morey* v. *Totten*, 6 Chy. 176.

Where the tenant for life was the father of the reversioner, but the son was not dependent upon him, and had no expectation from him, and both were illiterate persons:—Held, that the father's knowledge of the sale of the reversion by the son did not render such sale unimpeachable. *Ib.*

VIII. Legal and Equitable Estate.

Where defendant in November, 1858, conveyed the real estate which formed his qualification to his father, for a consideration of £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes; though the father did not reconvey the property to the son till 3rd October, 1860, yet the son was held to have had at the time of the assessment, "an equitable estate" within the meaning of sec. 70 of the Municipal Institutions Act. *Regina ex rel. Tilt* v. *Cheyne*, 7 L. J. 99.—C. L. Chamb.—Draper.

Though a surviving partner may have an equitable title, yet the heir of the deceased partner suing in ejectment upon his ancestor's legal title need not demand possession. *Doe* d. *Atkinson* v. *McLeod*, 8 Q. B. 344.

On the 19th of January, 1824, the crown granted to O. S., G. M., and J. M., in fee, certain lands which had formerly been set apart for a rectory, and on which a church had been erected, in trust to confirm all existing leases, and to grant new leases, and apply the rent first to the payment of any money borrowed for erecting a new church, and then to pay the rent to the clergyman of such church; with a proviso for the appointment of new trustees by the three grantees, or the survivors or survivor of them, and a further proviso, that whenever the governor should erect a parsonage or rectory in Kingston, and duly present an incumbent thereto, the trustees should by instrument under their hands and seals, attested by two credible witnesses, convey the land to such incumbent and

his successors forever, upon the same trusts thereinbefore expressed. On the 21st of January, 1836, letters patent issued erecting a rectory in Kingston. Before the 10th of May, 1837, the trusts of the patent of 1824 had been fulfilled, and on that day by deed poll, after reciting the two patents above mentioned, and the induction of the said O. S. into the said rectory, the said G. M. and J. M., the two other grantees in the first patent mentioned, in fulfilment of the trust conveyed the land to the said O. S., as rector and incumbent, to hold to him and to his successors, subject to and under the uses and trusts set forth in the letters patent to them. To this was appended another deed poll of the same date, executed by O. S., and declaring, for himself and his heirs, that as one of the trustees named in the patent of 1824 he agreed to this assignment, and held the same in his capacity of rector and incumbent of Kingston, and not otherwise. In 1842, O. S. leased the land for twenty-one years, with certain covenants for building and renewal. In this lease he was described as rector, and it recited the two patents of 1824 and 1836. The successor of O. S. brought ejectment against defendants, claiming under this lease:—Held, on the authority of Denne d. Bowyer *v.* Judge, 11 East 288, that the conveyance of 1837 passed two-thirds to the plaintiff, and that he was entitled to recover for that; for, Semble, in a court of law the ground that the trust to convey being joint was incapable of severance could not arise, the legal estate only being in question. *Lyster* v. *Kirkpatrick et al.*, 26 Q. B. 217.

But for that decision. Semble, that if the appointment of O. S. as rector rendered him ipso facto incapable of acting in the trusts of the patent of 1824, it could not divest him of the estate, or prevent him from joining in a conveyance to any new trustee substituted for him; nor could the deed poll of 1837, executed by him, pass the estate vested in him in trust in his natural capacity, to himself as a rector and corporation sole; that whether the grantees in the patent were to be treated as taking a power or as trustees owning the fee, the conveyance by two only of the three was inoperative; and, Semble, that they were trustees. *Ib.*

Defendant being seized in fee of certain land in trust for his son, at the request of the son, mortgaged it to B. & V. for $400, the son receiving the money and agreeing to pay it off. Afterwards the defendant conveyed to his son, the consideration stated being $4,000, but in reality it was a gift, and the deed by inadvertence and mistake contained a covenant for the right to convey, notwithstanding defendant's acts, and that he had done no act to encumber the land. On the 21st October, 1866, the son mortgaged the land to the plaintiff for $400, and this mortgage was foreclosed by the plaintiff, who was compelled to pay off the mortgage to B. & V. It did not appear that the plaintiff had any knowledge of the trust between the father and son, or of the arrangement between them as to the mortgage to B. & V., or that he knew of this mortgage until after the foreclosure, but it appeared that it, together with the other conveyances, had been duly registered, and that the land was worth both the mortgages. The plaintiff having sued the defendant on the covenant contained in defendant's deed to the son, to recover the amount paid to B. & V.:—Held, affirming the judgment of the court below, that the plaintiff could not recover, for that the facts would constitute a good defence on equitable grounds to an action brought against defendant by the son; and the title of the covenantor and covenantee being equitable only, the plaintiff, as assignee of the covenant, could stand in no better position than his assignor. *Claxton* v. *Gilbert*, 24 C. P. 500.

A wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance. *Adams* v. *Loomis*, 22 Chy. 99.

See "Covenants for Title," III. 4, p. 885.

IX. Construction of Deeds as regards the Estate Created.

1. *Effect and Operation of Particular Words.*

In an instrument under seal the words, "and for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land," &c., pass no interest; they only shew an intention to create a charge or lien. *Doe* d. *Ross* v. *Pupel*, 8 Q. B. 574.

By a conveyance of land, together with the houses and easements, profits, privileges, hereditaments, &c., to said parcel of land belonging or in anywise appertaining, and all the rents, issues and profits thereof, growing crops in the ground at the execution of the deed will pass to the grantee. *Wood* v. *Lang*, 5 C. P. 204.

Held, that the words "all my right, interest, and estate of, in and to the estate of G. M. and M. M." in a conveyance, passed all the estate of the grantor in G. M.'s estate. *O'Neil* v. *Cary*, 8 C. P. 339.

"Assign" is a good operative word to pass the fee. *Fraser* v. *Fraser*, 14 C. P. 70.

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2. *Other Cases.*

A. received from B. a power of attorney to sell lands. Under this power A. delivered to C. a deed professing to be made as follows: "Between A., by and under power of attorney, bearing date, &c., by and from one B., &c., yeoman, of the first part, and C. of the other part." Throughout the deed, A., the said party of the first part, was made the grantor, and the deed was thus executed: "By power of attorney bearing date 14th April, 1849.

(Signed) A. [L.S.]
(Signed) C. [L.S.]"

Held, that A. being the granting party in the deed, and not B., B.'s interest did not pass by the deed. *Dackstader* v. *Baird*, 5 Q. B. 591.

Semble, that even if B. had been made the granting party, the deed would have been inoperative from the informal mode of execution. *Ib.*

If a party convey land and all his estate therein as *heir-at-law* of another person deceased, though he claim as devisee and not as *heir-at-law*, still the land passes. *Doe* d. *Clark* v. *McInnis*, 6 Q. B. 28.

In January, 1841, B. devised to his daughter, the wife of defendant, the land in question in fee. In July following B. and the defendant and his wife executed a deed, reciting the will, and stating that the parties had mutually agreed that the defendant and his wife should come upon the land and possess and enjoy it without the interruption of said B., his heirs or assigns, as long as defendant and his wife should support the said B. and his wife in the manner described. The deed then set out, that in consideration of the will, and that B. did put defendant and his wife in possession, they had agreed to maintain the said B. and his wife during their natural lives; and that if defendant and his wife should keep their agreement, then the land was to become the property of the said defendant and his wife, their heirs and assigns forever. B. lived with and was supported by defendant and his wife until his wife died in 1847. He afterwards married again, and in July, 1850, a few days before his death, made another will revoking all former wills, and directing his executors to sell all his land, and divide the proceeds equally among his four daughters. Defendant had made considerable improvements on the farm during his occupation:—Held, in ejectment brought by one of the four daughters, that the deed passed no estate of inheritance, and that nothing contained in it could operate as an estoppel on the devisees under the second will; that it gave only a right to occupy until testator's death, with the assurance that if the agreement were kept by defendant and his wife, he would make no alteration in his first will. *Throop et ux* v. *Edmonds*, 12 Q. B. 33.

Quære, whether defendant, having kept the condition on his part, would have any remedy against B.'s representative for breach of the agreement. *Ib.*

Sampson *v.* McArthur, 8 Chy. 72, remarked upon, and overruled so far as the same decided that the right to purchase contained in a lease of land was personalty. *Henrihan* v. *Gallagher*, 2 E. & A. 338.

By a deed of trust certain lands were conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining twenty-one:—Held, that the infant took a vested interest; and the court directed an enquiry as to her past and future maintenance. *Stewart* v. *Glasgow*, 15 Chy. 653.

One of the devisees of an estate sold her interest therein to her brother, and executed with her husband an instrument in the form of a power of attorney, authorizing the assignee for his own benefit to demand and receive of and from the executor, &c., all moneys which might become due and payable to her and her husband, or either of them, by virtue of all devises and bequests under the last will and testament of her father. In fact she was then entitled to a share of another brother's portion of the estate by assignment from him:—Held, that the instrument had not the effect of transferring the share of the wife in the portion of the brother so assigned. *Pherrill* v. *Pherrill*, 10 Chy. 580.

XII. Descent.

Both plaintiff and defendant claimed by deed from T.'s sister, the plaintiff having the first conveyance. It was not distinctly proved at the trial when T. died, nor was it left to the jury to find whether he died before or after the 1st January, 1852, when the 14 & 15 Vict. c. 6, came into force, this point having escaped attention. If he died before, then the defendant would be entitled, as claiming under his sister, who would be T.'s heiress; if after, the defendant would be entitled as his mother, in preference to his sister. A new trial was therefore ordered, with costs to abide the event, in order to give the plaintiff an opportunity of establishing his case on this point. *Beckett* v. *Foy*, 12 Q. B. 361.

Where a party claims as one of the heirs of the half-blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from his ancestor; or if he did so obtain it, the claimant must shew that he is of the blood of such ancestor. *Tryon* v. *Peer*, 13 Chy. 311.

A testator, who owned lands in England and Ontario in fee simple, devised the same to his wife for life, and after her decease gave and devised them unto his "right heirs for ever:"—Held, that the 14 & 15 Vict. c. 6, C. S. U. C. c. 82, under which defendants claimed to share in the property, did not apply, and therefore the eldest son took the estates here as in England. *Tylee* v. *Deal*, 19 Chy. 601.

Held, also, that even if the Act did apply, the common law heir was the party to take the estates under the words of this devise. *Ib.*

XIII. Heir.

1. *Actions and Proceedings By and Against.*

An action does not lie against an heir on the simple contract debt of his ancestor. *Forsyth et al.* v. *Hall*, Dra. 304.

The heir-at-law is entitled to recover from a sheriff the surplus of moneys arising from a sale of his ancestor's land, on a fi. fa. against those lands in the hands of the executors. *Ruggles* v. *Beikie*, 3 O. S. 347.

Where there is an adverse possession of land, an heir-at-law who has never entered, cannot make a conveyance so as to enable his vendee to recover in ejectment. *Doe* d. *Dixon* v. *Grant*, 3 O. S. 511.

Held, that an heir could not sue on a covenant entered into with the ancestor, to convey land to him, his heirs and assigns, within a certain time, the heir not being mentioned in the covenant, and the breach having taken place in the ancestor's lifetime. *Goodall* v. *Elmsley*, E. T., 4. Vict.

In this province (though not in England), the heir is only liable for the debts of his ancestor on descent of lands. He is not liable for unliquidated damages—as, for instance, upon his ancestor's covenant for good title. *VanKoughnett* v. *Ross*, 7 Q. B. 248.

Declaration, against defendants as heirs-at-law of J. A., who died seised of lands, on a covenant of J. A. to pay money, averring that there is no personal representative of J. A. The defendants pleaded riens per descent. The plaintiffs replied

that the equity of redemption in fee of the said lands, subject to a certain mortgage to A. B., descended on defendants. On demurrer:—Held, insufficient, for not shewing legal assets in defendants. *Rymal* v. *Ashberry et al.*, 12 C. P. 339.

The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. He, or his heir or devisee after his death, may sell or convey to a bonâ fide purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it; and such purchaser will have a good title as against creditors—Levisconte *v.* Dorland, 17 Q. B. 437, remarked upon. *Reid* v. *Miller*, 24 Q. B. 610.

For the purposes of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issues tried over again, still it is open to them to shew not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Chy. 280.

Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his partner, were held precluded from objecting to payment by the estate of the losses incurred in continuing the business. *Ib.*

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2. *Other Cases.*

If on the death of a tenant at will his heir enter, such entry is tortious; and if the heir die, and his heir enter, the original owner or his heir will be put to his action. *Doe* d. *Moak* v. *Empey*, 3 O. S. 488.

The heir-at-law can convey land descended to him, before he enters. *Doe* d. *Spafford* v. *Breakenridge*, 1 C. P. 492.

Although the number of persons in this country in the position of expectant heirs and reversioners is but small, still the same rule applies here as in England; the principle of the doctrine being, that such persons need to be protected against the consequences of their own improvidence in dealing with designing men. *Morey* v. *Totten*, 6 Chy. 176.

The eldest son and heir-at-law of a person who had in his lifetime agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and Canada Company, it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers without requiring any administration of the estate of the heir-at-law, the Canada Company not objecting thereto. *Burns* v. *The Canada Company*, 7 Chy. 587.

Simpson *v.* McArthur, 8 Chy. 72, remarked upon, and overruled so far as the same decided that the right to purchase contained in a lease was personalty. Such right goes to the heir-at-law, not to the personal representative, on the death of the lessee. *Henrihan* v. *Gallagher*, 2 E. & A. 338.

A patent was issued purporting to grant land to B. as a daughter of a U. E. Loyalist, but B. had died six months previously:—Held, the patent being absolutely void, that the heir could not file a bill to set aside a conveyance executed under a power of attorney from B. alleged to have been forged. *Prouse* v. *Cram*, 14 Chy. 677.

XIV. Covenant to Stand Seized.

In ejectment, the plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure the plaintiff for future services of the same kind, *and of the sum* of £25 already paid and advanced by plaintiff to him, &c., he, M., covenanted, granted, and agreed that he would *stand seised and possessed of the land in question to the use of* the plaintiff, his heirs and assigns, *by way of charge, security, and mortgage* on the land for said moneys and costs; and when the plaintiff's costs were taxed, he was to be at liberty to hold the instrument as and by way of a *charge, mortgage*, and security upon the land *for the amount so to be ascertained*, or M. would; and he covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower if necessary, and usual covenants, &c.:—Held, that the instrument could only operate under the Statute of Uses, as being granted on a money consideration, which appeared from the express recitals contained in it; and, Semble, that full effect would be given to the whole instrument, and the real intent of the parties carried out by holding that it was to operate as a charge, security, and mortgage in equity on the land, until plaintiff's claim was ascertained by taxation, and so continue as an equitable charge unless the plaintiff desired a legal mortgage, which in that case, M. covenanted to execute. Quære, whether the plaintiff took the legal estate so as to enable him to maintain ejectment. *Miller* v. *Stitt et al.*, 17 C. P. 559.

XV. Exchange of Lands.

1. *Generally.*

Dower. Plea, that the husband exchanged other lands with one F. for the lands in question, and that the demandant elected to be endowed of such other lands. To prove this exchange, an ordinary deed of bargain and sale of the other lands was produced, executed by demandant's husband, for an expressed consideration of £600; and it was shewn clearly by parol evidence that the transaction between F. and the husband was in fact an exchange:—Held, that such evidence could not avail: that the exchage must be proved in proper technical form, and by deed, and that the demandant was therefore entitled to succeed. *Towsley* v. *Smith*, 12 Q. B. 555.

Where in dower the defence rested upon an alleged exchange by the husband for other lands out of which the widow had been satisfied her dower, and no deeds were produced, and the only

evidence for the defence consisted of parol statements that the husband had "traded" certain lands:—Held, there was not evidence to warrant a jury in finding for the defendant. *Stafford* v. *Trueman*, 7 C. P. 41.

Dower. Second plea, that during the marriage, the husband agreed with one D. to exchange the lands in question with other lands, and in pursuance thereof, they by deeds conveyed the lands to each other, D.'s wife barring her dower: that the demandant afterwards elected to take her dower in the other land, and by deed released the same to one C.:—Held, plea bad, as not shewing strictly an exchange of the lands, for the word *convey* has not the same effect; and, Semble, no other word can be substituted. *Leach* v. *Dennis*, 24 Q. B. 129.

Two persons, each possessed of a lot of land, agreed to exchange lots; that each should have possession of the other's lot from a day named, and that they should exchange good and sufficient deeds in one year from the date of the bond, and each gave the other a bond with a penalty conditioned to perform the conditions above. The year elapsed without either giving a deed. Upon ejectment brought for the lot which the plaintiff was to convey to the defendant:—Held, that a demand of possession of the premises was necessary, and probably also that the plaintiff should offer, if not actually give up, possession of defendant's lot, which he (plaintiff) occupied under the agreement. *Perritt* v. *Arnold*, 11 C. P. 413.

An exchange of lands by an infant is not void, but voidable only, and as such may be rendered valid by acts of confirmation. Where, therefore, a party said to have been under age and intoxicated when he made an exchange of lands, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered such a confirmation as barred those claiming under him from impeaching the transaction. *Miller* v. *Ostrander*, 12 Chy. 349.

J. and S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage, which he agreed to pay off, but did not; and J. was compelled to redeem the same:—Held, that J. was entitled to a lien on the land conveyed by him to S., as for unpaid purchase money, for the amount paid to redeem the mortgage. *Seney* v. *Porter*, 12 Chy. 546.

The plaintiff and defendant agreed to an exchange of lands, the plaintiff conveying 100 acres in E., upon which there was a mortgage for $1,300, and the defendant agreeing to convey to the plaintiff whichever of two lots—one in T. the other in S.—he should select; in the event of his selecting the latter, it was to be assigned to him, subject to the payment of $150 in four equal annual instalments, with interest at seven per cent. The plaintiff selected the latter, but it appeared that the defendant had not yet obtained a title thereto, although he was in a position to call for a patent from the crown on making certain payments, and which he procured the day the cause was heard. The court, as the defendant had all along had a title to the lot, and was at the time in a position to carry out his part of the agreement, and submitted to do so, directed that the contract should be completed by conveyance of the lot in S., and that the time for payment of the $150 should date from the hearing, from which time also the interest should be computed, but refused to give to either party the costs of the litigation. *Gray* v. *Reesor*, 15 Chy. 205; 16 Chy. 614.

The Settled Estates Acts do not authorize the court in sanctioning an exchange of the lands of an infant cestui que trust; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the court may order the same to be carried out under the provisions of sec. 50 of ch. 12 C. S. U. C. *Re Bishoprick*, 21 Chy. 589.

XVI. Miscellaneous Cases.

A., the owner of certain lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds; the defendant, A.'s son and heir-at-law, subsequently released to S., which was also recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff sued defendant for the penalty under 32 Hen. VIII. c. 9, for selling a pretended right:—Held, that the 14 & 15 Vict. c. 7, would not apply in defendant's favour, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right. *Baby* q. t. v. *Watson*, 13 Q. B. 531.

In ejectment, it appeared that C. died in 1851, seized of an unexpired term of years in the land, intestate, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle J. D. for life, and thence to the plaintiff, testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards in 1860, J. D. administered to C.'s estate, and as such administrator, assigned his interest to F., under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff, and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamy*, 21 Q. B. 216.

In an action for distraining when no rent was due, it appeared that one of the defendants assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice:—Held, that such an assignment conferred an estate, and that under 4 Anne c. 16, ss. 9 and 10, the assignee was entitled to distrain for the rent in question, whether the tenant attorned or not. *Hope* v. *White*, 17 C. P. 52.

A bill was filed in respect of certain timber limits by two of the devisees and legatees of the original licensee thereof:—Held, that the suit ought to be by the personal representative, and

a demurrer to the bill, on the ground that it was not so constituted, was allowed. *Bennet* v. *O'Meara*, 15 Chy. 396.

One of several heirs of an intestate being lunatic, an Act of Parliament was procured authorizing the sale of the intestate's lands, and the investment of the lunatic's share in Government securities or mortgages for the benefit of the lunatic "and his representatives." The lunatic afterwards died; and in a proceeding to distribute his share, it was Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Chy. 254.

ESTOPPEL.

I. By Deed.
1. *By Execution or Acceptance of Deeds or Conveyances*, 1248.
2. *Estate by Estoppel.*
(a) *Conveyance before Issue of Patent*, 1254.
(b) *Other Cases*, 1255.
3. *Recitals*, 1255.
4. *Receipts under Seal*, 1256.
5. *Parties and Privies*, 1257.

II. In Pais.
1. *Title to Property.*
(a) *Goods*, 1259.
(b) *Lands*, 1264.
2. *Receiving or Giving a Receipt for Goods*, 1268.
3. *Bills of Exchange and Promissory Notes*, 1270.
4. *Corporations*, 1271.
5. *In relation to Municipal Elections*, 1272.
6. *Patents*, 1273.
7. *Validity of Official Acts or Appointments*, 1273.
8. *Against denying Liability*, 1273.
9. *In Actions against Sheriff for False Return, &c.*, 1275.
10. *Other Cases*, 1276.
11. *By Award—See* Arbitration and Award.

III. By Record.
1. *By Verdict or Judgment.*
(a) *Generally—See* Judgment.
(b) *In Ejectment—See* Ejectment.

IV. Exceptions, 1279.

V. Pleading, 1281.

VI. Estoppel and Waiver in Matters of Practice—*See* Practice at Law—Waiver.

VII. Against Disputing Title by Offer to Purchase—*See* Ejectment.

VIII. As Between Landlord and Tenant—*See* Landlord and Tenant.

I. By Deed.

1. *By Execution or Acceptance of Deeds or Conveyances.*

Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying £125 for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family; and the father then for a nominal consideration, conveyed to the son the land received in exchange:—Held, that the executors of the father might maintain an action against the son for the £125 as money paid to his use; and that they were not estopped by the consideration stated in the deed. *McBride et al.* v. *Parnell*, 4 O. S. 152.

Where A., having only a bond for a deed, and not having paid all the purchase money, conveyed in fee to B. and died, and B. went into possession and continued for several years, when A.'s administrator obtained a conveyance in fee to himself from the obligor:—Held, that the administrator by making use of the deed was guilty of a fraud, and that his title under it could not prevail against B. Macaulay, J., diss. *Doe* d. *Dobie* v. *Vanderlip*, 5 O. S. 85.

A covenant in a deed professing to be made jointly by husband and wife, but executed only by the husband, is not sufficient to work an estoppel. *Doe* d. *Tiffany* v. *McCreen*, M. T. 1 Vict.

Where a father had conveyed a house and premises to his son in fee, and the son afterwards made a lease to his father and mother for their joint lives, at a nominal rent, and on the same day the father and mother executed an agreement under seal to the son that he should occupy the house, except certain rooms in it, and take the rents and profits of the land upon certain conditions, on breach of any of which he was to go out of possession, but the mother did not release her right under the statute:—Semble, that the mother could not, after the father's death, on the ground that she had not barred her freehold interest under the life lease, maintain ejectment for the whole of the premises without shewing a forfeiture of the agreement by breach of the conditions, although she was entitled to recover the rooms which were excepted from the son's occupation under the agreement. *Doe* d. *Peck* v. *Peck*, 1 Q. B. 42.

Construction of a deed in peculiar terms, set out in this case, as to its operation by estoppel. *Doe* d. *Piquotte* v. *Piquotte*, 4 Q. B. 101.

A sheriff's deed, being but a completion of the sale, is only good for land actually sold; a party therefore is not estopped by such a deed from proving by parol that portions of the land therein described as sold were not in fact included in the sale. *Doe* d. *Miller* v. *Tiffany*, 5 Q. B. 79.

The grantee, by taking a title from the grantor, does not estop himself from denying that his grantor was legally seised. *Dittrick* v. *O'Connor*, 7 Q. B. 448.

Held, that the acceptance of a deed of land from the reversioner in fee did not of itself acknowledge any present right or interest of such reversioner. *Wilkinson et al.* v. *Conklin*, 10 C. P. 211.

Held, under the special facts of this case, that the plaintiff was not estopped by his assignment to the Bank of Upper Canada, from treating these defendants as guilty of a conversion of his property. *Cayley* v *McDonell et al.*, 8 Q. B. 454.

A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to the defendants the tolls authorized by law to be received upon a certain turnpike road, for the term of one year; that defendants covenanted to pay a certain rent therefor; and that, by virtue of said demise the defendants entered and were possessed for said term. Breach, non-payment of the rent:—Held, on demurrer, that defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent; and that the non-execution by the lessors was no defence. *Municipal Council of Frontenac, Lennox and Addington* v. *Chestnut*, 9 Q. B. 365.

A., the patentee of lot 12, in the second concession of Reach, died intestate before 1843, leaving defendant B. his heir-at-law. By indenture bearing date 12th September, 1843, defendant B. without having entered on said lot, in consideration that the lessor of the plaintiff had sworn that the intestate (the original locatee of the lot) had bargained and sold to him the said lot, and also in consideration of 5s., conveyed to the said lessor of the plaintiff the said lot in fee. This indenture was registered on the 3rd of June, 1850. By indenture, made 21st January, 1850, between the defendant B. and one Brown, then in possession of the north half of the said lot, the said Brown, for the considerations mentioned, had surrendered and assigned the said north half to defendant B. This indenture was registered on the 26th February, 1850. Also, by two several indentures bearing date 21st of January, 1850, between defendant B. and defendants C. and D., respectively, it was witnessed, that the defendant B. conveyed to defendants C. and D., respectively, the south half of the lot, viz., 50 acres of the said south half to each of the said defendants C. and D.; and said defendants C. and D. severally mortgaged the property conveyed to them severally by said defendant B. These indentures were registered on the 26th February, 1850. It appeared that twelve years since, a man named W. was in possession of this lot, claiming under one Gideon Bullis: that a deed of bargain and sale of the lot existed (but was not produced or proved), as from the patentee to Bullis: that on the 11th of October, 1838., Bullis executed a conveyance in fee of the lot to W. which was registered on the 24th February, 1850: that on the 18th of March, 1841, W. executed a conveyance to G. Brown, which was registered the same day; that Brown continued in possession of the north half ever since, and that defendants C. and D. entered into possession of the south half under him:—Held, that defendant B. was estopped from disputing the title of his own bargainee against his own deed; and as to the south half, the defendants C. and D. being estopped from disputing his title as mortgagee, were also estopped from disputing the title of the lessor of the plaintiff claiming under a deed from him *Doe* d. *Spafford* v. *Breakenridge et al.*, 8 C. P. 492.

In January, 1841, B. made his will, devising to his daughter, the wife of the defendant, the land in question in fee. In July following, B. and the defendant and his wife, executed a deed reciting the will, and stating that the parties had mutually agreed that the defendant and his wife should come upon the land, and hold, and enjoy it, without the interruption or denial of him the said B., his heirs or assigns, as long as the defendant and his wife should support the said B. and his wife in the manner described. The deed then set out, that in consideration of the will, and that the said B. did put the defendant and his wife in possession, they had agreed to maintain the said B. and his wife during their natural lives; and that if the defendant and his wife should keep their agreement, then the land was to become the property of the said defendant and his wife, their heirs and assigns forever. B. lived with and was supported by the defendant and his wife until his wife died in 1847. He afterwards married again, and in July, 1850, a few days before his death, made another will, revoking all former wills, and directing his executors to sell all his land, and divide the proceeds equally among his four daughters. Defendant had made considerable improvements on the farm during his occupation:—Held, in ejectment brought by one of the four daughters, that the deed passed no estate of inheritance, and that nothing contained in it could operate as an estoppel on the devisees under the second will; that it gave only a right to occupy until the testator's death, with the assurance that if the agreement were kept by defendant and his wife, he would make no alteration in his first will. *Throop et ux.* v. *Edmonds*, 12 Q. B. 33.

D. mortgaged to the Trust and Loan Company, and afterwards to A., who assigned to the plaintiff. D. then conveyed to the defendant, who took possession, and was recognized by the Trust and Loan Company as holding under them. The plaintiff brought ejectment, there having been no default under the mortgage to the Trust and Loan Company, which contained a proviso for possession by D. until default:—Held, that the plaintiff was entitled to recover, for D. could not in the face of his mortgage deny A.'s right to possession, (though A. might be ejected by the Trust and Loan company), or that of the plaintiff as his assignee. *Reid* v. *McBean*, 8 C. P. 246.

The firm of C. G. & Co. being indebted to the plaintiffs, mortgaged to them in fee certain land and premises, on which was erected an iron foundry with the machinery and fittings used in the business. Previous to this mortgage a prior owner of the land had already mortgaged it in fee to one G., which mortgage was still outstanding. The defendant, assignee of C. G. & Co., removed certain portions of the machinery, and a dispute arose with the plaintiff as to what part of the property so removed consisted of fixtures:—Held, that the defendant being assignee of C. G. & Co., could not set up the prior mortgage to G. as disabling them from mortgaging to the plaintiffs what they assumed to mortgage, and that the only question therefore was what portion of the articles mentioned formed part of the land. *Gooderham et al.* v. *Denholm*, 18 Q. B. 203.

Declaration, that before the 16 Vict. c. 43, the plaintiffs, with others, promoters of the Grand Junction Railway Co., incorporated thereby, had caused certain preliminary plans and surveys of

the said railway to be prepared: that the line of said railway passed through plaintiffs' territory, and the plaintiffs under that Act defrayed their fair proportion of the expense of such plans, &c., which sum the said company, by force of said statute, s. 5, became liable to refund to the plaintiffs: that while so liable, the said company and the defendants were, under the 16 Vict. c. 76, and a certain deed of amalgamation, formed into one company, and became amalgamated; and the Grand Junction Railway Co. did intersect the main line, and said surveys have been appropriated by defendants to their own use, and by force of said acts defendants have become liable to pay to plaintiffs the said proportion so paid by them as aforesaid. Plea, that the capital stock in said Grand Junction Railway Co. was not taken by the persons in said Act named, or any others, nor was any money ever paid upon it, and defendants never became stockholders in said company. Replication, that defendants should not be allowed so to plead, because, by the deed of amalgamation mentioned in the declaration, they united themselves with the Grand Junction Railway Co., and recognised it as an existing company, and the same thereby became and has since existed as a part of defendants. Rejoinder, that defendants should not be precluded from their plea, because said deed was only made by authority of the provisional directors in the 16 Vict. c. 42, named, but there never were any shareholders in said company, nor was said deed ever duly ratified by them, as required by the statute:—Held, on demurrer, rejoinder good; and that there was no such estoppel as relied on by the plaintiffs. *Municipal Council of the United Counties of Peterborough and Victoria* v. *Grand Trunk R. W. Co. of Canada* 18 Q. B. 220.

Defendant owning a vessel mortgaged her to C., and C. assigned the mortgage, with his other property, to the plaintiff in trust for creditors. The plaintiff having brought replevin to obtain possession:—Held, that defendant could not dispute the plaintiff's title, or set up that he was trustee for a foreign corporation, who by law could not hold ships. *Paton* v. *Browne*, 19 Q. B. 337.

In dower, by the widow of M., it appeared that a patent for the land issued to one K., and a witness proved that he was one of the subscribing witnesses to K.'s will, but the will was not produced, and no evidence of its contents given. It was proved, however, that B., from whom defendants purchased, derived title through P., who held a bond for a deed from the patentee, and that P., before he sold to B., took a quit claim from M. of all his interest in the land, executed by M. only, in which it was stated that the land was devised by will to the said M. by K., the original grantee of the crown:—Held, that no estoppel arose upon this deed, and that there was no proof of seisin in M. *Minaker* v. *Hawkins*, *Minaker* v. *Ashe*, 20 Q. B. 20.

Defendant being indebted to plaintiff, by an indenture reciting his indebtedness, and that he had agreed with plaintiff for the re-payment of the said sum due within six months from date, with interest, conveyed to plaintiff certain lands habendum in fee: Proviso, that the plaintiff, if the debt was duly paid, would re-convey. In an action to recover the money:—Held, that defendant could not deny that he was at the date of said indenture indebted to the plaintiff. *Allsatt* v. *Ryland*, 11 C. P. 300.

Action on a bond reciting that the plaintiff as sheriff had seized goods under a fi. fa. at the suit of G. v. C., and conditioned to be void if the obligor should deliver the same to the sheriff at such time and place as he should appoint. Plea, that at the time pointed out for delivery the sheriff had no writ at the suit of G. under which he could have sold said goods. At the trial the only writ produced was one tested the 21st of May, 1859, and spent. Issue having been taken, and a verdict rendered for defendant on this plea:—Held, that there must be judgment non obstante, for as the bond expressly admitted a levy under this writ, defendant could not object to the plaintiff's right to sell, and the plea therefore formed no defence. *Fortune* v. *Cockings*, 22 Q. B. 359.

Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff; and on ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default:—Held, that the plaintiff was not estopped; for, 1. The second mortgage might take effect by passing an interest; 2. If the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large: but, 3. Semble, that the re-demise in a mortgage cannot operate, by estoppel or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. *James* v. *McGibney*, 24 Q. B. 155.

The plaintiff brought ejectment on the 6th September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McI. assigned to him. The mortgage to McI. was given on the 9th November, 1861, and that to the plaintiff on the 21st March, 1864. On the 21st September, 1865, McJ. by deed reciting an interlocutory decree in Chancery in respect to the foreclosure of W.'s mortgage to him conveyed to M. as W.'s appointee, and on the 9th November, 1865, by a decree in the same suit, this mortgage was foreclosed. It was contended that the mortgage to McI. had merged in the inheritance, and could not be set up against the plaintiff, but—Held, that if it were so, the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards. It was proved that the defendant, in April or May, 1865, asserted that he had got a deed of the equity of redemption from W.:—Held, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864. *McKay* v. *McKay*, 25 Q. B. 133.

A person who has executed a deed cannot be bound by an alteration made in his absence by

as verbal direction. Quære, whether, upon the evidence stated in the report of this case, defendant could be held estopped by his acts from disputing the bond so altered. *Martin* v. *Hansing*, 26 Q. B. 80.

On the 9th of January, 1844, one J. W. took possession of the land in question under an indenture of lease for four years executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument and the balance in four instalments of £50 each, on the 9th of January in each year, the first payment to be made on the 9th of January, 1845, and if the purchase was carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing the instrument, and deposited £50 in the bank to meet the second, but the person in whom the legal estate was vested having died it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared that he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since:—Held, that as the entry of J. W., under whom the son and the defendants claimed, was under C., defendants could not object to C.'s title at the time of J. W.'s entry. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 531.

On the 15th December, 1848, O. conveyed to P. part of lot 33, and he conveyed by the same deed "as appurtenant to the land, a full, free and unrestricted right of way in, over, upon and along, and to use as a public highway or street a certain strip of land of twenty feet in breadth adjoining the westerly side of the said parcel of land, extending from the highway aforesaid to the water's edge of the river St. Lawrence, at all times and seasons for ever hereafter." In an action for obstructing the right of way by a boat-house:—Held, that it would be no defence that the boat-house was below high-water mark, though O.'s right only extended so far, for O. and the defendant claiming under him were estopped by O.'s deed to P., which granted to the water's edge. *Plumb* v. *McGannon*, 32 Q. B. 8.

In ejectment the plaintiff claimed through a deed from J. M. to J.; defendant claimed through a purchase at sheriff's sale under execution against J. M. After the sheriff's sale, J. entered into an agreement with D., the purchaser at such sale, by which D. covenanted to convey the land to J. on payment of $743 within five weeks; the agreement to be void on non-payment. The money was not paid. D. conveyed to M., with whom J. made an agreement, that on his paying M. $1,200 within a year M. should convey to him: that J. might sell within the year, and should have all he could get above $1,200; and that M. should have possession, which J. accordingly gave to him. After this D. conveyed to the plaintiff:—Held, that neither agreement estopped the plaintiff from objecting to the title derived under the sheriff's sale or from setting up his legal title. *Morrison* v. *Steer*, 22 Q. B. 182.

In trespass, q. c. f., it appeared that defendant conveyed to the plaintiff 19 acres of lot 2, described by metes and bounds, commencing at the N. E. angle of the lot. This starting point upon the ground was undisputed, and it was admitted that the description given enclosed the land claimed by the plaintiff:—Held, that defendant was estopped by his deed, and could not set up any question as to the boundary between lots 1 and 2. *Crosswaite* v. *Gage*, 32 Q. B. 196.

Declaration, for entering plaintiff's land, and also plaintiff's dwelling house thereon, and removing the house therefrom, and converting it to defendant's use. Plea to so much of the count as refers to the dwelling-house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling-house thereon, so that it might thereafter be removed by them, not affixing it to the land; and defendants afterwards, and while the land was unenclosed and used as a common, and the house open and unoccupied, in the day time, peacefully entered the lot and removed the dwelling-house, the same being their property, and placed it on their own land, which are part of the trespasses complained of. Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land, and built the house on the land, and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiffs:—Held, replication good, by way of estoppel. *Cameron* v. *Hunter*, 34 Q. B. 121.

2. *Estate by Estoppel.*

(a) *Conveyance before Issue of Patent.*

Where a nominee of the crown before the issuing of letters patent, conveys in fee to one person, either by indenture or deed poll, and he afterwards obtains the patent to himself, and then conveys to another, who again conveys, the patentee of the crown, and his assigns as privies in estate, are estopped by the first conveyance, and the patent feeds the estoppel and makes it a vested interest and estate. *Doe* d. *Hennessy* v. *Myers*, 2 O. S. 424, affirmed in *Doe* d. *Tiffany* v. *McEwen*, 5 O. S. 598; *Doe* d. *Irvine* v. *Webster*, 2 Q. B. 224; *Boulter* v. *Hamilton*, 15 C. P. 125.

Where a nominee of land before patent issued conveyed it away, being unmarried, and afterwards, having obtained the patent, made a new conveyance to the same party, being then married:—Held, that his wife could not claim dower, as she was estopped by the deed made before the patent issued. *McLean* v. *Laidlaw*, 2 Q. B. 222.

Where the nominee of the crown gave a bond for a deed of the land to be made when the patent should issue, and in the same bond conveyed and covenanted to guarantie the title:—Held, on ejectment by a grantee of the nominee under a deed executed after the patent issued, that this bond gave to the obligee no title by estoppel. *Doe* d. *McGill* v. *Shea*, 2 Q. B. 483, followed in *Todd* v. *Cain*, 16 Q. B. 516.

The plaintiff in ejectment proved a paper title, but the grant from the crown did not issue until 1826, and the deed from the grantee was executed in 1824. This deed was lost, and the memorial of it produced as secondary evidence shewed it to be an ordinary conveyance in fee, but did not

shew what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, sec. 17, and defendant shewed no title :—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel. *Armstrong* v. *Little*, 20 Q. B. 425.

(b) *Other Cases.*

S. having mortgaged certain land in fee, afterwards leased it for 21 years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery, the land was sold expressly subject to the lease to J., who received a conveyance from S. & P. and the plaintiff, each using apt words (bargain, sell, and release,) to convey a legal estate in fee. On the same day, J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action by certificate duly registered, and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage :—Held, that though S., when he leased, had only an equity of redemption, yet as this fact did not appear in the lease, he had a legal reversion by estoppel as against the tenant. *Cameron* v. *Todd*, 22 Q. B. 390, affirmed in appeal, 2 E. & A. 434.

Held, that the deed in question in this case, which granted the land and not merely defendant's interest therein, though without covenants, operated by way of estoppel, and that the title subsequently acquired by defendant passed at once to the plaintiff : Todd *v.* Cain, 16 Q. B. 516, and Doe McGill *v.* Shea, 2 Q. B. 483, distinguished. *Featherston* v. *McDonell*, 15 C. P. 162.

Quære, whether the deed of an infant, unless legally avoided, would operate by estoppel to pass the title to the land as soon as the fee vested in him on obtaining his majority. *McCoppin* v. *McGuire*, 34 Q. B. 157.

See, also, I. p. 1248.

3. *Recitals.*

A. conveyed to B., covenanting that at the time of making the conveyance, he was seised in fee simple. B. afterwards conveyed to C., reciting that he was then possessed in his own right of the land in question :—Held, in an action by C., the assignee, of B., against A., upon the covenant, that C. was not estopped by B.'s recital. *Gamble et al.* v. *Rees*, 6 Q. B. 396.

The sheriff, holding executions against defendant at the suit of different parties, took from him a bond reciting that he had seized his goods, and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, the wrongful execution, or non-execution of the said writ." The sheriff afterwards sold the goods contrary to defendant's wish, who informed him that they belonged to one G.—G. brought trover against the sheriff, proved a bonâ fide bill of sale, recovered the value of the goods and registered his judgment. The sheriff then sued defendant on his bond :—Held, 1, that the defendant was not estopped by the recital from denying his property in the goods; 2, that although the damage accruing to the sheriff came literally within the condition of the bond, yet that the defendant, having expressly objected to the sale, would not be liable. *Corbett* v *Hopkirk*, 9 Q. B. 479.

The demandant in dower had accepted for her claim as dower, a bond from the tenant of the land for the purpose of securing to her, as part of a family arrangement, a maintenance, which after enjoying for some time, she relinquished. She had also added her own hand and seal to the bond :—Held, that even though the recitals in the bond did not operate by way of estoppel, a jury were warranted in finding that it amounted to a satisfaction of the plaintiff's claim to dower. *Germain* v. *Shuert*, 7 C. P. 316.

Held, that the recitals in the deed poll in this case, are not binding on the grantee, they being entirely the language of the grantor ; and consequently that the grantee was not estopped from setting up the contrary in an action not founded on the instrument and wholly collateral to it. *Minaker* v. *Ash*, 10 C. P. 363.

Held, that defendants were not estopped by the lease under which they claimed from disputing the power of the lessor in this case, to lease, for the recitals professed to shew what title he had. *Lyster* v. *Kirkpatrick*, 26 Q. B. 217.

4. *Receipts under Seal.*

In an action for the purchase money of land conveyed, a receipt under seal in the conveyance is conclusive evidence under the plea of payment ; and it is unnecessary to plead the estoppel specially. *Ketchum* v. *Smith*, 20 Q. B. 313; *Casey* v. *McCall*, 19 C. P. 90.

The sheriff, in an action for the purchase money of goods sold, was held not estopped, under the facts stated in this case, from denying the payment by the acknowledgment under seal, in the bill of sale, of receipt from G., the trustee and agent of the defendants, the purchasers; for it was not specially pleaded, the action was not upon the deed nor against a party to it, and there was nothing on the face of it to connect G. with defendants. *Carvall* v. *Bank of Montreal*, 21 Q. B. 18.

Plaintiff assigned to defendant his interest in a certain lease by deed, containing a receipt for the consideration money, $350. This deed was placed in K.'s hands to hold till defendant deposited this sum. K. delivered it to defendant on his promise that he would pay, and defendant afterwards paid him $75, saying he would have him the balance as soon as he obtained it. When being asked again, he said that he had the money but that the plaintiff should pay part of the expense of a bond which he had to give respecting the title. Plaintiff then sued upon the common counts, for the purchase money of land and for an account stated :—Held, that he was estopped by the receipt under seal, and could not recover on either count. Cocking *v.* Ward, 1 C. B. 858, distinguished, as to the account stated. *Spalding* v. *Savage*, 25 Q. B. 259.

Plaintiff in August, 1867, conveyed to defendant certain land, by deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, no

question being raised as to plaintiffs's title, the defendant retained $100 of the purchase money, and in October following, gave the plaintiff the following agreement: "Harriston, October 1st, 1867. Fifteen months after date, I promise to pay to the order of W. H., or bearer, the sum of $100, providing that the title is good, on lots known as town hall, court house, and fair ground, situated on the north side of Elora street, for value received," these being the lots conveyed. Plaintiff sued defendant on this agreement, and on the common counts, to which defendant pleaded payment:—Held, that the plaintiff was estopped by the receipt in the deed, which included this $100, and that he could not recover. *Harrison* v. *Preston*, 22 C. P. 576.

Action on the common counts, and on an agreement between plaintiff and defendant, dated 8th of April, 1873, by which, in consideration that the plaintiff would deliver to defendant at Port Maitland, when requested, that portion of the rigging of the vessel R. D., then on board the said vessel, the defendant would pay the plaintiff $400. The defendant pleaded payment before action, and release by deed. At the trial this agreement was proved, and one of even date, under the plaintiff's hand and seal, by which the plaintiff sold to the defendant for $800, the receipt whereof was acknowledged, the body and hull of the R. D., and also his rights in a contract for stripping said vessel, and any payments due from the T. Insurance company for stripping said vessel, or from defendant for any work done under the contract to strip the vessel. It also appeared that the vessel having run upon a reef in lake Erie, the plaintiff had been employed by the T. Insurance company to strip her and put the outfit in a place of safety, for which he was to receive $250 and the hull. Defendant bought the outfit from the Insurance company for $930, and the hull and rights under the stripping contract from the plaintiff for $800. The defendant only paid the plaintiff $400 on the agreement signed by the plaintiff, and gave him the agreement now sued on:—Held, that the plaintiff was not estopped by the receipt in the deed from shewing that the agreement sued on was part of the consideration for said deed, and that the $400 mentioned in said agreement was unpaid. *Smith* v. *McCallum*, 34 Q. B. 479.

A certificate of discharge of a mortgage, not being under seal,—Held, no estoppel against the recovery of the debt if not in truth paid. *Bigelow* v. *Staley*, 14 C. P. 276.

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5. *Parties and Privies.*

A nominee of the crown before the issuing of letters patent made a conveyance in fee to one person, after which the patent was issued to him, and he then conveyed to another, who also conveyed:—Held, that the patentee of the crown, and his assigns as privies in estate, were estopped by the first conveyance, and that the patent fed the estoppel and made it a vested interest, confirming the case of Doe d. Hennesy v. Myers, 2 O. S. 424. *Doe* d. *Tiffany* v. *McCoun*, 5 O. S. 598.

Where A. made a mortgage of his property to two persons at different times, and died after the time for payment in the first mortgage, without having redeemed either, and the first mortgagee having taken possession sold to A.'s heir for a valuable consideration, who entered into possession and died, leaving B. his heir, who was also A.'s heir:—Held, that the second mortgagee, having a mortgage of the equity of redemption only, could not bring ejectment against B., who was in by purchase, and not by descent, and was therefore not estopped by A.'s deed. *Doe* d. *Gillespie* v. *Macaulay*, H. T. 7 Will. IV.

Where in an interpleader issue (the execution creditor being defendant) it appeared that the plaintiff had taken a bill of sale of the goods in question from the execution debtor while the fi. fa. was in the sheriff's hands:—Held, that he was not thereby estopped from denying the debtor's title, this action not being upon the deed, and between other parties. *Macaulay* v. *Marshall*, 20 Q. B. 273.

In dower, it appeared that after recovery in ejectment against the husband by the purchaser at sheriff's sale of the husband's estate in the land in question, but before judgment entered, and while the husband was in actual possession, his wife joined with him to release her dower in a conveyance in fee of the land, by way of bargain and sale, to a third party. No money consideration passed, the grantee executing a mortgage back for the whole purchase money mentioned in the deed to him, and the husband remained in possession until dispossessed by the sheriff under process in the ejectment suit. The defendants, the tenants of the land, claimed under the purchaser at sheriff's sale:—Held, that the demandant was entitled to her dower: that though the bargainee acquired an estate as against the husband, and perhaps against the wife also, by estoppel, the defendants, being no parties to the deed, but claiming adversely to it, could not conclude the demandant from saying she had not released her dower to a purchaser. *Miller* v. *Wiley et al.*, 17 C. P. 368.

In dower the tenant proved a deed made in 1831 of the land in question by J., the deceased husband, to the tenant; and in reply the demandant proved another deed made in 1834 by J. to his father, to which the tenant was a subscribing witness:—Held, that as either deed shewed the estate out of J. during his lifetime, it was unnecessary to consider the effect of the tenant being a subscribing witness to the second deed; and in any event as J. could not set up the second deed to avoid the first, having made both, neither could the demandant who claimed through him. *Scratch* v. *Jackson*, 26 Q. B. 189.

The defendant in ejectment, under the facts stated in the report, was held not estopped from setting up the alienage of S., for he claimed under H., whose title he supported against that of S. *Iler* v. *Elliott et al.*, 32 Q. B. 434.

To a declaration on a covenant for quiet enjoyment in a mortgage to the plaintiffs executed by T., the defendants' grantee, one defendant pleaded that T. did not after the making of the deed convey to the plaintiff. The deed from defendants to T. was dated 22nd June, and the mortgage from T. to the plaintiffs was dated 10th April, 1855. Both were registered on the 28th July, the deed first. It appeared that there were two mortgages from T. to the plaintiffs on

another lot when this mortgage was made, and instead of which it was given. After executing this mortgage, T. found that a deed from the defendants to him was necessary to give him the legal title, and he got the deed in question. The two mortgages were not discharged until the 16th August:—Held, that if the mortgage had been delivered before the deed (which the facts did not shew), the defendants would not have been liable on the ground of estoppel, for the estoppel would apply to T. only, not to defendants. *The Trust and Loan Co.* v. *Covert et al.* 32 Q. B. 222.

II. In Pais.

1. *Title to Property.*

(a) *Goods.*

In trover, where the plaintiff sued by his mother as his next friend, the court held that the latter, by allowing herself to be made guardian for bringing this suit, did not waive any right she might have had to the goods sued for, and that the consent of the mother to become prochein ami was no legal estoppel on her. *Barker* v. *Tabor*, 5 O. S. 570.

A landlord, when sued in trespass for an illegal distress, is precluded by the distress from claiming the goods as his own under a prior bill of sale. *Gibbs* v. *Crawford*, 8 Q. B. 155.

A. by artifice obtained an order from B., directed to his agent, to deliver wheat to A., which order A. presented, not to the agent, but to the defendant, a wharfinger in whose warehouse B. had wheat. The defendant thereupon gave him his certificate or bon for the wheat deliverable on demand, and A., after notice by defendant that he would not deliver, transferred his right to the wheat, but not the certificate, to the plaintiffs:—Held, that defendant was not estopped by his certificate from denying plaintiffs' title. *Davis et al.* v. *Browne*, 9 Q. B. 193.

Where the sheriff under a fi. fa. seized and sold certain goods claimed by plaintiffs:—Held, that the fact of one of the plaintiffs having attended and bid at the sale, did not estop them from complaining of the seizure of the goods as their own. *Lines et al.* v. *Grange*, 12 Q. B. 209.

The owner of goods may, to prevent them being sacrificed, buy them in at the sheriff's sale, which does not debar him from setting up his title against the sheriff for selling. *Haight et al.* v. *Munro*, 9 C. P. 462.

In trespass against the sheriff for seizing an engine and boiler under a fi. fa., it was held that the plaintiffs, having purchased them as chattels by verbal sale, were estopped from asserting that the execution did not attach because they were part of the realty. *Walton* v. *Jarvis*, 13 Q. B. 616; 14 Q. B. 640.

One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to pay the interest and produce thereof to his widow during her life, for herself and his children. The widow after W.'s death remained on his farm, and in possession of the stock and personal property, some of which she sold, and the stock had been added to by breeding. An execution came into the sheriff's hands against her, and while it was there the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale; but it went on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure: Held, that they were not estopped by having purchased at the sale, but that having taken the mortgage from the widow while the writ was in the sheriff's hands, they could not allege that the goods were not then hers; and therefore that they could not recover:—Held, also, that the increase of the stock must be subject to the same rule as the stock. *Peers et al.* v. *Carrall*, 9 Q. B. 229.

A bailee of goods held not estopped from disputing the bailor's title. *White et al.* v. *Brown*, 12 Q. B. 477. See *McMahon* v. *Gracey*, 3 C. P. 53[illegible]

Plaintiff had sold certain goods to M., who were at the time lying at defendants' railway station, and defendants were fully aware of the sale, but notwithstanding they contracted with the plaintiff to carry and deliver them as required, and gave him a shipping bill accordingly. In an action by plaintiff against defendants for non-delivery:—Held, that defendants could not set up M.'s title to the goods as against the plaintiff, for a bailee setting up the right of third person against his bailor, must be able to defending on the right and title of such third person. *Brill* v. *The Grand Trunk R. W. Co.*, 20 C. P. 440.

The sheriff having seized goods under a fi. fa. received a written notice from the plaintiff that there was then due to him "one-half year's rent for the premises, not stating when the rent fell due, nor for what period it was claimed. The plaintiff afterwards went to the sheriff, and being asked when his rent fell due, said that he thought it would be *on the following Monday or Tuesday*. The sheriff thereupon ordered the goods to be removed and sold:—Held, that the plaintiff was bound by his own declaration, and could recover no damages from the sheriff, although it appeared that the rent was in fact payable quarterly, and that one quarter was due at the time of seizure. *Tomlinson* v. *Jarvis*, 11 Q. B. 69.

R. being indebted to L. gave him a chattel mortgage and confession of judgment, and when the mortgage became due made an assignment for the benefit of creditors to W. and S., who took possession of the goods. L. then put a writ of fi. fa. in the sheriff's hands, directing him to levy and make the amount of his debt out of the goods of R.:- Held, that the fact of L. having put an execution in the sheriff's hands at his suit, directing to levy of the goods mortgaged to him as the goods of R., did not estop him from setting up his title under the chattel mortgage. *Wakefield* v. *Lyon*, 5 C. P. 410.

Assumpsit for goods bargained and sold by the plaintiff, as sheriff, to the defendant:—Held, that the defendant could not set up as a defence that the goods purchased by him as belonging to the execution debtor, were in fact his own. *Ruttan* v. *Weller*, 14 Q. B. 44.

The plaintiff insured with defendants a [illegible] as appurtenant to his freehold. After it was burned, he made a claim under the policy, treating it as appurtenant to the freehold, [illegible]

having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him:—Held, affirming the judgment below, 30 Q. B. 472, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel. *Sherbourneau* v. *The Beaver Mutual Fire Insurance Co.*, 33 Q. B. 1.

Assumpsit, on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff and repudiated the sale. At the trial, the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged, was contained in it. Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 Q. B. 345.

Defendant went to England, leaving A., an agent, on his farm, who purchased corn from the plaintiff to feed defendant's cattle. Executions were issued against defendant, and A., to protect the cattle, assigned them to the plaintiff: if to pay the sum due to him for corn, but gave at the same time an undertaking that he would pay pasturage for them at the usual rates; and when the bailiff came to seize, the plaintiff claimed the cattle as his own:—Held, that he could not afterwards sue defendant for the pasturage for having concurred in the fraud by holding out the cattle as his own, he was estopped. *Bibi* v. *Peel*, 15 Q. B. 594.

In an action against the sheriff for goods seized and sold, the jury having twice found in plaintiff's favour:—Held, that although it seemed clear on the evidence that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co., the execution plaintiffs and the real defendants in this action, had concurred in holding him out in false character, the court should not interfere. *Cinq-Mars* v. *Moodie*, 15 Q. B. 601. The court on appeal intimated that they fully concurred in the view which the court below had been taken: 15 Q. B. 610, note (*a*).

Action against the sheriff for seizing and selling goods. Plea, not guilty, and not possessed. It appeared that the plaintiff had mortgaged the property to one M., and executions came into the sheriff's hands both against the plaintiff, who was in possession of the goods, and the mortgagee. The plaintiff told the sheriff that the goods were not his, but were under mortgage to M., and the sheriff seized and sold under the execution against M.:—Held, that the plaintiff was clearly not estopped from recovering, by having told the sheriff that the goods were not his, that is, not his absolute property—but mortgaged to M., for he told only the truth, and the sheriff knew what M.'s interest really was. *Henderson* v. *Fortune*, 18 Q. B. 520.

In trespass against the sheriff for taking goods, the plaintiff called the bailiff who made the seizure and sale. He swore that the plaintiff, after giving notice of his claim to the goods, withdrew it, and that the sale then went on. The plaintiff offered to disprove the withdrawal. Semble, that if the plaintiff in fact withdrew his claim, and thus induced defendant to proceed with the sale, which was for the jury to decide, he would be estopped from recovering. *Robinson* v. *Reynolds*, 23 Q. B. 560.

The execution of defendant in an interpleader issue (the execution plaintiff) being in the sheriff's hands, the father of the execution debtor claimed the goods, whereupon the sheriff by direction of defendant's attorney withdrew. The plaintiff (the claimant in the issue) subsequently placed an execution in the sheriff's hands against both father and son, when the former gave him a mortgage on the goods, which the son had assigned to him, and the plaintiff thereupon withdrew his writ, and several months afterwards the sheriff again seized under defendant's writ. There was no evidence that defendant knowingly either did or said anything to induce plaintiff to alter his position. The jury were told that if defendant abandoned the seizure, and in consequence the plaintiff withdrew his writ and took the mortgage, defendant was estopped from disputing the validity of the mortgage:—Held, a misdirection, and that there was no estoppel. *Morse* v. *Thompson*, 19 C. P. 94.

The plaintiff being in possession of a stock of goods, was assessed therefor in his own name, against which he appealed to the Court of Revision, and to the County Court judge, when an indenture of assignment of the goods to one R. M. upon trusts for creditors was produced, and the plaintiff's name was erased and that of R. M. substituted therefor. The plaintiff alleged, however, that his name was not struck out on his application, for that his ground of appeal was that the goods were not equal to the debts due upon them, and so were exempt. Defendants having distrained upon the goods, the plaintiff replevied, and defendants avowed as for taxes due to them by the plaintiff, whose name did not appear on the collector's roll. It was contended that the plaintiff having denied his title, and his name being erased from the roll, he was debarred from replevying the goods distrained; but—Held, that he was not estopped. *Sargant* v. *The City of Toronto*, 12 C. P. 185.

Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the Division Court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use. Quære, per Hagarty, J., whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 Q. B. 348.

In an action for seizing goods under Division Court attachments, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the

vendee, witnessed by the auctioneer:—Held, that this plaintiff could not afterwards set up that the sale was void because fraudulent as against the plaintiffs' creditors, and maintain trespass for seizing the goods as if they were his own. *McPhatter et al.* v. *Leslie et al.*, 23 Q. B. 573.

Two mill stones were seized and sold for taxes, the tenant of the mill, who was assessed as occupant, being present at the sale and making no objection. In replevin by the owner of the mill against the purchaser:—Held, that the tenant's acquiescence was immaterial; for his possession, when proved to be merely as occupant, was no proof of property, and the plaintiff therefore was not prevented from disputing the sale, which was clearly illegal, the stones being part of the mill. *Grimshawe* v. *Burnham*, 25 Q. B. 147.

The plaintiff went to British Columbia nine years before this action, leaving his wife here to whom he wrote and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house, (which she subsequently carried on with the plaintiff's knowledge,) and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money over due, the landlord distrained, and the defendant enforced his mortgage, and the plaintiff's wife not dissenting but rather assenting, the goods were sold and the balance, after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued the defendant in trespass and trover:—Held, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage, which formed part of the whole arrangement. Semble, that the wife standing by and permitting the sale of the property under the mortgage, was some evidence under the plea of leave and license. *Halpenny* v. *Pennock*, 33 Q. B. 229.

Declaration, that defendants being in possession of certain premises (described), as tenants of the plaintiff, wrongfully pulled down and carried away certain fixtures. Plea, that the premises were occupied by defendants as scale makers, having long before been let to defendants and others for carrying on their trade: that defendants and others, for such purpose, during their tenancies, put up the fixtures (describing the fixtures put up by each), and the others, during their tenancies, sold and conveyed their part of the fixtures to defendants, who took possession thereof and used them on said premises in their trade; and being so possessed, they, during their tenancy, pulled down and carried away said fixtures, doing no unnecessary damage. The third replication set up, by way of estoppel, a surrender in law by defendants of the premises to one C., the then owner in fee, and an acceptance of a new lease from C., and that C. afterwards conveyed in fee to the plaintiff, who then saw the new lease, and was informed and believed that the said fixtures formed part of the freehold; and that defendants afterwards became plaintiff's tenants. Equitable rejoinder, that before the conveyance by C. to the plaintiff, the plaintiff knew that defendants were in actual occupation, claiming and using all said fixtures as their own, and was told by C. that he did not own or claim them, and only sold to the plaintiff the premises without them; and that the plaintiff by reasonable care could have obtained full information from defendants, but negligently omitted to do so:—Held, that the replication was good, and the rejoinder bad. *Prangley* v. *Gurney et al.*, 36 Q. B. 53.

If the true owner of goods so conduct himself as to enable another, who has the possession but not the property, of such goods, to hold himself out to the world as the real owner, the true owner is estopped from denying the title of an innocent purchaser for value. The possession of property attached to the realty, which thereby becomes realty, is a sufficient indication of ownership to estop the real owner as against an innocent purchaser for value. *McDonald* v. *Wells*, 8 Chy. 297.

An insolvent person sold his land to his brother; a creditor filed a bill impeaching the sale as fraudulent; part of the consideration was said by the defendants to be a pair of horses and a waggon of the value of $200; but the parties had fraudulently given out after the sale that the horses were still the horses of the brother who had bought the land, and in this way had misled the plaintiff and other creditors:—Held, that this brother was estopped from afterwards setting up against the creditor that the $200 had been paid in that way, and the plaintiff's debt being less than that amount, he was held entitled to a decree for payment, or in default a sale of the land. *McCarty* v. *McMurray*, 18 Chy. 604.

(b) *Lands.*

Assumpsit for money lent and money had and received. On the 6th of September, 1842, the wife of the plaintiff, with his assent, in consideration of £70 paid (the money being the proceeds of the sale of her lands), obtained from the defendant a lease of certain premises to hold to her own use, during her natural life, the defendant covenanting at the expiration of the lease to pay *Hannah Healy, heirs, or assigns*, the sum of £50:—Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant, and that having assented to the demise to his wife, he could not now sue during the consideration money paid, on money had and received to his use. *Healy* v. *Bongard*, 1 C. P. 212.

On the 26th of October, 1852, the Buffalo and Brantford Joint Stock Railroad Co. took a deed from the plaintiff's father, by which, in consideration of the benefit which would result to him from the construction of the road, and of £27 10s., he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title to the land, but had merely been allowed by his father to occupy it; that he had admitted in presence of his father that it was with his father, and not with him, that the company must settle; and that he had worked under the defendant, a contractor with the company, in making the fence along the line through this land. After the deed the plaintiff and his father forbade the defendant from entering. The defendant entered in December, 1852, for the purpose of making the railway, and the fences along the line being insuff

cient, the plaintiff's wheat was injured by cattle getting in. For those injuries he sued in this action of trespass quære clausum fregit :—Held, that on legal grounds, independently of his own conduct, which in justice should estop him, the plaintiff could not maintain trespass against any one claiming under the company; for he was not at any time more than a tenant a will, and the deed determined the will and left him tenant at sufferance only, with a right to enter and remove the crop. *Nelson* v. *Cook*, 12 Q. B. 22.

The Grand Trunk Railway Co. passed through certain land of which C. was owner and the plaintiff a tenant for years. In 1853 an arbitration was held to determine the sum to be paid to C., and the plaintiff being appointed arbitrator on his behalf concurred in making an award, saying nothing then of any claim on his own part; but in 1855, more than six months after the company had taken possession of the land, he brought trespass against them. Semble, that the plaintiff, by his conduct, had estopped himself from making any claim against the company. *Detlor* v. *Grand Trunk R. Co.*, 15 Q. B. 595.

Defendant had been tenant to the plaintiffs at a yearly rent, payable quarterly, for a term which expired on the 1st June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due, the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th September, 1860, the plaintiffs' attorney served a written demand of possession on defendant, who told him that was just what he wished, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and gave it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant, besides denying their title, claimed to hold as their tenant :—Held, that the plaintiffs were entitled to recover, for, 1. The defendant, having denied their title, could not insist upon notice to quit; and 2. He was estopped by his order to leave the place. *Cartwright* v. *McPherson*, 20 Q. B. 251.

In ejectment by the sons-in-law and daughters of an intestate, to recover possession of lands sold under an invalid fi. fa., it having appeared that the former, being tenants for life, had suggested and urged the sale in question for their own benefit; and that the party, (a creditor of the estate of the intestate,) for whose benefit the intended conveyance on such sale was made, had changed his position, and had assigned the judgment under which the sale took place, for the benefit of one of the male plaintiffs, and at his request :—Held, an estoppel in pais which barred the male plaintiffs, particularly after the lapse of nearly, if not quite, twenty years, from disputing the validity of said conveyance; and that the bar was not removed by their having joined their wives with them in the action, in which the validity of such conveyance was questioned. Semble, that there was no evidence of conduct on the part of the female plaintiffs to establish an estoppel against them, and that on the death of their husbands the only estoppel created would cease to operate against them. *Ingalls et al.* v. *Peid*, 15 C. P. 490.

In an action of trespass to land :—Held, that the plaintiff, having sufficient possession to maintain trespass, was not estopped by having brought ejectment, as being an admission of defendant's possession. *Heck* v. *Knapp*, 20 Q. B. 360.

A. entered into possession of land under the authority of and by permission of B. who made him a verbal promise for a deed to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died :—Held, that A. having entered under B., his heirs were estopped from disputing B.'s title, and that they could be ejected by B. *Armstrong* v. *Asmstrong et al.*, 21 C. P. 4.

D.'s father died in 1847, having first made his will, purporting to devise all his real estate to his wife in fee, but this will was not executed in the proper form, and therefore D. became entitled to the land as heir-at-law. Three months before D. became of age, he agreed with P. for the sale to him of the real estate for valuable consideration. A conveyance to P. was prepared by D., and executed by his mother, the devisee under his father's will, D. being the witness to it. P. afterwards sold and conveyed his interest, and D. brought ejectment against the purchaser. On a bill filed to restrain this action, it was shewn that D. had, at various times acquiesced in the sale after he became of age :—Held, that D.'s conduct with reference to the sale to P., was fraudulent, and was to be considered as an assertion that his mother was entitled as devisee in fee, although he was then not of age; and that such conduct, and his subsequent acquiescence after his attaining majority, estopped him from denying the validity of the sale; and he was enjoined from proceeding with the ejectment, and ordered to execute a conveyance to the plaintiff, the vendee of P. *Leary* v. *Rose*, 10 Chy. 346.

A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the act respecting assurance of estates tail. The purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase without giving any notice of his title or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor :—Held, that he was entitled to hold the property in equity against the issue in tail. *Re Shaver*, 3 Chy. Chamb. 379. —Mowat.

An intending purchaser of devised lands, doubting whether a provision made by the testator was in lieu of dower, asked the widow whether she had or claimed dower :—Held, that even if her answer was in the negative, it afforded no ground for the purchaser applying to this court to restrain her action for dower, brought on her being advised that under the will she was not put to her election. *Fairweather* v. *Archibald*, 15 Chy. 255.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife under an assumed name, the real wife living in the neighbourhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Hoig* v. *Gordon*, 17 Chy. 599.

A married woman, owner of real estate, representing herself to be, and selling it as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyances of land by married women. *Graham* v. *Meneilly*, 16 Chy. 661.

Where the owner of an estate stands by and allows a third person to appear as the owner, and to enter into a contract as such, the owner will be decreed specifically to perform such contract. *Davis* v. *Snyder*, 1 Chy. 134.

Where the owner of an estate was present and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, who made improvements, and being afterwards ejected by the owner of the property filed a bill for payment of the value of those improvements, the court allowed a demurrer for want of equity. *Ib.*

A. took a conveyance as trustee for B.—B., in answer to a bill by a person claiming the property against both, was induced by A. to swear that he (B.) had not any interest in the property: Held, in a subsequent suit by B. against A., that he (B.) was not precluded from shewing the trust. *Washburn* v. *Ferris*, in appeal, 16 Chy. 76; *S. C.* in chancery, 14 Chy. 516.

Divers lands having been devised to three sisters, P., A., and L., they in 1840 agreed to a partition, by which, amongst other things, P. was to have a certain lot 45, with the privilege of overflowing 46, and A. was to have 46, subject to that privilege. Conveyances were signed carrying out the partition, but the matter being transacted without professional advice, A. and L., who were married women, did not execute so as to pass any estate. All entered into possession of their several lands, and in 1841 P. executed to her son a voluntary conveyance of 45, with the privilege, and A. and her husband conveyed 46 to their son. The error in regard to the execution of the partition deed having been afterwards discovered, P., with A. and her husband and L.'s heir, (L. being dead,) in 1849, joined in a conveyance of all the lands to a trustee in order to carry into effect the previous partition; but by an oversight this new deed omitted to mention P.'s right of overflowing 46. A.'s son and P.'s son were active in getting this new deed executed, but were not parties to it. Immediately after its execution, A. and her husband executed to their son a new deed of 46; no new deed was executed to P.'s son. He thereafter, with the knowledge and acquiescence of A.'s son, built a mill in 1845, and placed his dam where it necessarily caused the overflowing of 46; he afterwards mortgaged 45, with his supposed privilege of overflowing 46; and the mortgaged property was sold at the mortgagee's suit, the two cousins alleging for the first time that the mortgagor had no right in respect of 46; the right was considered doubtful at the time, but the purchaser completed his purchase:—Held, in a subsequent suit by the purchaser against the mortgagor and his cousin, who owned 46, that the plaintiff had a right to overflow 46. *Boyle* v. *Arnold*, 16 Chy. 501.

By a deed duly executed and registered, lands with a water frontage were vested in a man for life, remainder to his son in fee. The deed contained an agreement or stipulation that neither party should be at liberty to dispose of or encumber the property in any way without the consent of the other. The father, with the knowledge but without the consent of his son, sold portions of the water frontage, and the purchaser, with the knowledge of the son, improved thereon. After the death of the father, the son sold and conveyed the lands, including the water frontage, to W., whereupon a bill was filed by the vendee under the father against the son and W., claiming absolutely the part of the water frontage which had been conveyed by the father, on the ground of acquiescence by the son, and that W. had notice of the plaintiff's interest:—Held, that the registration of the deed under which the father and son claimed was actual notice of the son's title, and that his acquiescence or lying by could not affect his interest, but at most could only be construed into a consent by him to the sale by the father of his own interest; and Semble, that under the circumstances, if even registration were not actual notice, the acquiescence would not bind his reversionary interest; and that even if the plaintiff had acquired any equitable interest arising out of such acquiescence, he could not enforce it against W. without proving actual notice to him of such equitable interest. *Lee* v. *Walker*, 20 Chy. 558.

2. *Receiving or Giving a Receipt for Goods.*

The plaintiff agreed verbally with defendant to sell and deliver wheat to him, and on delivery he received a receipt, signed by defendant's miller, as follows:—"Received in store from Joseph McBride for Mr. do. do., 51 bushels fall wheat, at —, S. D.," &c.:—Held, that the words of the receipt expressing the wheat to have been received "in store," did not preclude the plaintiff from proving an absolute sale on the terms above set forth. *McBride* v. *Silverthorne*, 11 Q. B. 545.

Defendants gave a receipt to C. H. & Co., stating that they had received and held on their (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff relying upon this receipt, and the representations made by C. H & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiff. In fact, however, the defendants at the date of the receipt had only received some 270 bushels on account of C. H. & Co.:—Held, that defendants having given their receipt for 500 bushels of wheat, were estopped from setting up that they had not at the date thereof the quantity of wheat mentioned therein in store for C. H. & Co. *Holton* v. *Sanson et al.*, 11 C. P. 606.

Defendants gave receipts to one B. for 7500 barrels of flour as in store for them at Brantford, subject to his order. B. drew on the plaintiffs at Montreal, through the Bank of Montreal at Brantford, to whom he handed these receipts, and the bank agent there forwarded the bills, with a certificate that he held such receipts, to the head office in Montreal, where the plaintiffs accepted and paid them. Plaintiffs having received from defendants only 7308 barrels, sued them as for false and fraudulent representations to B. that they had received in store for him 7500 barrels, which representations they alleged defendants knew by the course of trade would be relied upon by persons dealing with B., and on the faith of which the plaintiffs made advances to the full value of that quantity. The jury were directed that as between themselves and the plaintiffs, defendants were bound by their receipts, and liable in this action, though the error arose from mistake only:—Held, a misdirection: that their attention should have been drawn to the nature of the defendants' business, and the object of these receipts, and they should have been asked to say whether the error in this case arose from mistake or a design to deceive, or from such negligence as might lead to the conclusion of fraud. *McLean et al.* v. *The Buffalo and Lake Huron R. Co.*, 23 Q. B. 448. See, also, *S. C.* 24 Q. P. 270, where a verdict for the plaintiffs was upheld.

Semble, that the Bills of Lading Act, 33 Vict. c. 19, O., creates no estoppel as to the *condition* in which goods are when shipped. *Chapman* v. *Zoland*, 24 C. P. 421.

Declaration for breach of defendants' contract to carry 3244 pounds of Canadian wool from T. to P. by rail, and thence to B. by steamboat or rail, and deliver there to plaintiff, certain perils and causalties excepted; with a count in trover for the goods. The evidence was, that on the 8th of September, 1864, plaintiff delivered to defendants thirteen sacks of wool, weighing 3244 pounds, addressed to the consignees in B., to be sent subject to defendants' tariff and to the conditions contained in the plaintiff's written request to defendants to receive same, defendants giving a receipt with similar conditions thereon. The wool was put into a car with wool from Michigan, consigned to one R., together with certain dutiable goods, and all arrived at Island Pond on the 18th September following, where they were detained by the customs authorities. The car subsequently took fire, and the sacks containing the wool were burnt. Some of the wool was also burnt, and some of it singed. In endeavouring to save it, the wool became mixed, and was carried in this state to P., where new sacks were obtained and the wool conveyed in them to B., and the thirteen sacks delivered to the consignees on 22nd October, but containing only 2498 pounds, instead of 3240, which the bill of lading shewed. On the delivery of four additional sacks, the weight being still short by twenty-nine pounds, an examination of the wool was made, when it was found to consist of 873 pounds of Canada fleece, 1160 scorched Canada, and 1168 pounds American fleece damaged by fire. This was sold on plaintiff's account, but did not realize as much, it was proved, as it would have brought had it arrived about a month earlier. It further appeared that 962 pounds Canada fleece had been delivered to R. The judge charged the jury that defendants were not liable for the damage by fire, or for the delay at Island Pond, as they had not contracted to guard against this; and that the plaintiff was entitled to such damages as arose from defendants' neglect in delivering mixed instead of all Canadian fleece, and for the amount of short weight. The jury having found for the plaintiff, Held, on motion for a new trial, that the plaintiff was not estopped by the taking of the American wool from shewing a conversion by defendants of the Canadian wool; but that had defendants pleaded that he took the latter in lieu of the former, or of so much thereof as was deficient, there was evidence to go to the jury to warrant a verdict for defendants to a certain extent, if not for all that really ought to have been delivered:—Held, also, that the proper direction to the jury would be, that defendants were not liable for the delay, or loss by fire; that they were liable for the wool belonging to plaintiff, which they carried to B. and did not deliver; but that if the plaintiff, with knowledge of all the circumstances, took the one kind for the other and sold it, when he might have had his own, and the damaged Canadian wool was delivered to the consignee of the American wool with plaintiff's consent, in consideration of his getting the American in lieu of it, then the plaintiff could not claim substantial damages either for breach of contract or for the wrongful conversion. *Milligan* v. *Grand Trunk R. W. Co.*, 17 C. P. 115.

Certain bars and bundles of iron came by ship from Glasgow to Montreal, consigned to the plaintiff. His agent gave to defendants' agent an order to get them from the ship, and afterwards received from the latter a receipt, specifying the number of bars and bundles and the gross weight, but with a printed notice at the top of it, that "rates and weight entered in receipts or shipping bills will not be acknowledged." All the iron received by defendants for the plaintiff was delivered at Guelph, but there was a very considerable deficiency in the weight. So far as appeared, the iron had not been weighed either on being taken from the ship, or afterwards:—Held, that defendants were not estopped by their statement of weight in the receipt, and were not liable to the plaintiffs. *Horseman* v. *Grand Trunk R. W. Co.*, 31 Q. B. 535, in appeal. *S. C.* in Q. B., 30 Q. B. 130.

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3. *Bills of Exchange and Promissory Notes.*

The indorser of a bill is estopped by the fact of his indorsement, from denying either the signature of the drawer or her competence, (being a feme covert in this case), to draw the bill. *Rossett et al.* v. *Dixie*, 7 Q. B. 414.

A., being indebted to the plaintiffs, offered them a note with an endorser. The plaintiffs agreed to accept one, and A. made a note payable to the plaintiffs, procured the defendant to endorse it in blank, and delivered it to the plaintiffs. The plaintiffs discounted the note, having endorsed it under the defendant's endorsement. The note having been dishonoured, the plaintiffs took it up, struck out their endorsement, and again endorsed it above defendant's name, adding to their own name "without recourse," and then sued defendant:—Held, that though the plaintiffs had not endorsed the note when defen-

dant endorsed it, and though their endorsement, making them stand as first endorsers on the note, was not written on it until after action brought, yet that such endorsement was sufficient. Semble, also, that the defendant was estopped from denying that the plaintiffs' name was endorsed when it ought to have been. *Peck et al.* v. *Phippon*, 9 Q. B. 73.

Plaintiff declared against L. and A. as endorsers of a promissory note, payable to the order of L., averring that the defendants duly endorsed the said note, and that A. delivered the said note so endorsed to the plaintiff:—Held, on demurrer, that A. must be taken to be the immediate endorsee of L., and could not deny L.'s endorsement. *Griffin* v. *Latimer et al.*, 13 Q. B. 187.

Quære, as to how far an endorser is estopped from denying the maker's signature. *Hanscome* v. *Cotton*, 16 Q. B. 98.

Defendants and one M. were in partnership in the lumber business. M. took to the plaintiffs a note for $808, filled up in his writing and purporting to be made by the firm, payable to himself and endorsed by him, which the plaintiffs took from him for value. This note was made for his own private purposes in fraud of the partnership. The plaintiffs' manager swore that he relied on M.'s security, and did not enquire about the firm. Per Burton and Patterson, JJ., M., as between himself and his co-partners, was not authorized to sign the note in their name; and the plaintiffs having avowedly accepted it on the security of M., not of the firm, about whom they knew nothing and made no enquiries, the defendants were not estopped from setting up M.'s want of authority to bind them. *Canadian Bank of Commerce* v. *Wilson et al.*, 36 Q. B. 9., in appeal.

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4. *Corporations.*

Debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made:—Held, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson* v. *Municipal Council of the town of Port Hope*, 10 Q. B. 405.

A debenture issued by a municipal council under their corporate seal, and signed by the head of such corporation, for payment of a debt due or loan contracted under a by-law which does not provide by special rate for the payment of such debt or loan, does not estop such municipal council from setting up as a defence to an action on the debenture the invalidity and nullity of such by-law. *Mellish* v. *The Town Council of the Town of Brantford*, 2 C. P. 35. See, also, *Anglin* v. *The Municipality of the Township of Kingston*, 16 Q. B. 121; *Crawford* v. *Corporation of the Town of Cobourg*, 21 Q. B. 113; *Scott* v. *Corporation of the Town of Peterborough*, 19 Q. B. 469; *Wright* v. *Corporation of the County of Grey*, 12 C. P. 479; *Cross* v. *Corporation of the City of Ottawa*, 23 Q. B. 288.

Declaration on a county by-law to levy money for the general purposes of the year, alleging non-payment by defendants of the proportion to be raised by them. Plea, that in capitalizing the real property not actually rented, but held and occupied by the owners in the towns of N. (the defendants) and C. and the village of D., and in capitalizing the ratable personal property there for the year, the plaintiffs capitalized at ten instead of six per cent., as directed by law, and apportioned thereon among the several municipalities, whereby $1,000,000 was omitted from the capitalization, and the aggregate value of the ratable property in N., and the amount directed to be raised there, was erroneously and illegally made up:—Held, on demurrer, a good defence, for such capitalization was contrary to the statute, and though it lessened the defendants' assessment they were not precluded from objecting, for the plaintiffs could only create a debt by complying with the Act. *The Corporation of the County of Lincoln* v. *The Corporation of the Town of Niagara*, 25 Q. B. 578.

In an action by a municipal corporation against their treasurer on his bond, alleging non-payment of moneys received, it appeared that in an account rendered to the council by defendant a sum of money which was in question was charged as paid to one E., and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew this to be the case, but Semble, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited. *The Corporation of the Village of Ingersoll* v. *Chadwick*, 19 Q. B. 278.

Quære, this action being by the council of the year after that in which the payment pleaded was made, whether the facts would have afforded any defence against the council who thus sanctioned the payment. *S. C., Ib.* 286. See, also, *Municipality of East Nissouri* v. *Horseman*, 16 Q. B. 576, 583.

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5. *In Relation to Municipal Elections.*

The Court will not set aside an election on the relation of a party who concurred in the election, and voted for the person whose election he afterwards attemps to set aside. *Regina ex rel. Rosebush* v. *Parker*, 2 C. P. 15.

A party cannot complain of the election of a candidate whom he has himself voted for, unless he can shew that he was, at the time of voting, ignorant of the objections which he desires to urge. *Regina ex rel Coleman* v. *O'Harel et al.*, 2 P. R. 18.—C. L. Chamb.—Burns.

A. had his dwelling-house at Bowmanville, where his wife and family resided, but he had a saw-mill and store, and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. After voting at Bowmanville he went down to Cartwright, and voted there also at the election for the township councillor, which was being held at the same time. It appeared that the relator, one of the candidates for Cartwright, objected to A.'s vote there, but said that it should be accepted if he would swear that he was a resident; and that A. took such oath, and his vote was thereupon recorded.—Held, that the relator's conduct could not estop him from afterwards objecting to the vote. *Regina ex rel. Taylor* v. *Cæsar*, 11 Q. B. 401.

Acquiescence of a candidate in an irregular election—how far it disqualifies him from afterwards becoming a relator. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Chamb. 203.—Burns.

See also *In re Charles* v. *Lewis*, 2 C. L. Chamb. 171; *Regina ex rel. Preston* v. *Preston*, *Ib.* 179.

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6. *Patents.*

During the existence of a license the licensor cannot dispute the validity of a patent obtained by him, and afterwards assigned by him for value to another. *Whiting* v. *Tuttle*, 17 Chy. 454.

The holder of patents for improvements in certain agricultural implements agreed to assign to defendant the exclusive right to sell these implements, but not to manufacture them; and in certain contingencies he also agreed to assign the patents themselves. In fact the patents were invalid for want of novelty, and the defendant having reassigned any interest he had in the patents, claimed the right to manufacture the implements for his own benefit:—Held, that owing to the agreement between the parties, and their dealings with each other thereunder, the defendant was estopped from questioning the validity of the patents. *Gillies* v. *Colton*, 22 Chy. 123.

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7. *Validity of Official Acts or Appointments.*

Defendants, who had gone before one A. who was bonâ fide supposed to be a commissioner for the county of Lennox, and acknowledged a recognizance, were—Held, not estopped from disputing the authority of A. as commissioner. *Macfarlane* v. *Allan*, 6 C. P. 496.

In a case for a malicious prosecution before a magistrate:—Held, that defendant, by having caused the application to the magistrate as such, was not precluded from objecting that he had no jurisdiction, there being nothing to shew that defendant did not really believe him to have authority. *Hunt* v. *McArthur*, 24 Q. B. 254.

Held, that the plaintiff having proved his claim before the assignee in insolvency, and having obtained an order in this court to set aside the insolvent's discharge in the insolvent court, with costs to be paid to him out of their estate, was precluded from objecting that the assignee was not duly appointed. *Allan* v. *Garrett et al.*, 30 Q. B. 165.

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8. *Against Denying Liability.*

Defendant, sued as maker of a note by the indorsee, had before the endorsement admitted the making to the plaintiff, and induced the plaintiff to take it:—Held, that the subscribing witness need not be called, as defendant was estopped. *Perry* v. *Lawless*, 5 Q. B. 514.

Where an agreement under seal, but of a nature not requiring a seal, was executed by one of two partners in the name of the firm, and the partner not executing afterwards acted under and received the benefit of it, such agreement was sustained as his deed; and it was held that he could not be allowed to dispute the authority by which it was executed in his name. *Bloomley* v. *Grinton et al.*, 9 Q. B. 455.

In an action against the endorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority; but it was proved that defendant had before and afterwards endorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded of him, he had asked for time, and had not denied his endorsement until some months afterwards, when the maker had absconded. His excuse was, that he kept no memorandum of his endorsements, and supposed it was right:—Held, that the defendant had precluded himself by his conduct from disputing his liability. *Pratt et al.* v. *Drake*, 17 Q. B. 27.

In an action on a guarantee to secure payment for goods furnished by plaintiffs to one W., alleged to have been made by defendant and one G., but afterwards proved to be a forgery, it appeared that the plaintiffs had had no communication whatever with defendant during the currency of the account sued for; but that W. afterwards becoming insolvent, one F. was sent to Kincardine, where W. lived, to represent certain creditors, amongst whom were plaintiffs, and at a meeting at which defendant was present, F. asked W. what claims were guaranteed, and by whom, to which W. answered that plaintiffs' note, with certain others, was endorsed by defendant and G., and although defendant heard this, he said nothing. F., however, did not then appear to have been aware of the guarantee. After this W. absconded, and some time afterwards defendant and G. went to plaintiffs' office and tried to make a settlement, for a less amount, of W.'s liability. This the plaintiffs refused to do, alleging that they were fully secured, and produced the guarantee. G. at once said that he did not believe it to be his signature; but defendant said nothing:—Held, that defendant was not estopped by his conduct from denying his liability. *Turner et al.* v. *Wilson*, 23 C. P. 87.

A gas company incorporated under 16 Vict. c. 173, by resolution of the directors made certain calls, to be paid on particular days named, but by the notice published they were made payable on different days. Defendant had written to the company, enclosing his note for four of the calls, saying that for the balance he would send his note soon, and requesting them to accept this offer, as he had been absent in Europe, and had no knowledge of any of the calls. The company, however, declined:—Held, that the calls were illegal, being unauthorized by the resolution, and that defendant was not estopped from disputing them. *London Gas Company* v. *Campbell*, 14 Q. B. 143.

Defendant being employed by plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiff's service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labour:—Held, that defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs under their charter could not sue on such a cause of action. *Northern R. Co.* v. *Lister*, 27 Q. B. 57.

Heirs, being also next of kin, who had been parties to the continuing of the business of the deceased with his assets and those of his partner, were—Held precluded from objecting to payment by the estate of the losses incurred in continuing the business. *Lovell* v. *Gibson*, 19 Chy. 280.

9. *In Actions against Sheriff for False Return, &c.*

To an action against a sheriff for a false return of nulla bona to a writ of fi. fa., the bare fact that the plaintiff after such return sued out a ca sa. will be no defence, unless it be further averred in the plea that the plaintiff accepted the return of nulla bona with a knowledge at the time that it was false. *Bays* v. *Rattan*, 6 Q. B. 263.

To an action against a sheriff for falsely returning to a fi. fa. goods in hand to the value of 5s. and nulla bona as to the residue, when enough had in fact been seized to satisfy the writ, the defendant pleaded by way of estoppel, that the plaintiff requested him to return nulla bona, and accepted and acted on that return, and took out a ven. ex. with a full knowledge of the facts:—Held, on demurrer, plea good. *Miller* v. *Thomas*, 11 Q. B. 302.

Case for false return of nulla bona to a fi. fa. Plea, that the plaintiff accepted such return knowing it to be untrue, and issued a fi. fa. lands upon it:—Held, no defence. *Markle* v. *Thomas*, 13 Q. B. 363.

A sheriff having sold shares in a steamship company under execution, and received the money, can not return nulla bona on the ground that they were not properly saleable under the writ. *Hewitt* v. *Corbett*, 15 Q. B. 39.

The sheriff cannot admit a debtor to the limits except by statute. Where he does so on a bond not in accordance with the act he is liable as for a voluntary escape, and a creditor by having required and taken an assignment of such a bond, is not estopped from looking to the sheriff. *Kingan* v. *Hall*, 23 Q. B. 503.

At the suit of one H. under a fi. fa. dated 28th April, 1859, the defendant (sheriff) seized the lands of W., deceased, and made his return "lands on hand to the value of £10." A ven. ex. was sued out, under which defendant sold and realized a portion of the amount: and under the same writ other lands were offered for sale, but there being no bidders, the sheriff, on the 1st of May, 1860, endorsed a return on the writ, that he had made £238, *lands on hand for want of buyers to value of £5 and "no lands" for residue*, which writ, with the return thereon, was retained by the sheriff till 1st July, 1862. On the 28th of January, 1862, a fi. fa. lands was sued out by the present plaintiffs, and endorsed for £221, &c., and on the same day the defendant gave his certificate that he had no execution or extents in his hands against the lands of said W. (deceased). On the 2nd February, 1862, a ven. ex. and fi. fa. residue was sued out and delivered to the defendant at the suit of H. above mentioned for £346, &c. Under this writ defendant advertized, and the attorney of plaintiffs notified defendant that the plaintiffs claimed priority over H.'s execution. Defendant, notwithstanding such notice, duly sold under and applied the proceeds of sale upon H.'s execution. The plaintiffs' execution expired on 20th January, 1863, and was returned "no lands." B., the attorney for the plaintiffs, was the assignee of plaintiff's judgment, and beneficially interested therein. In an action against the defendant, the sheriff, for a false return:—Held, that the defendant was not estopped by his certificate of 28th January, 1862, from setting up H.'s writ as an answer to this action. *Mein et al.* v. *Hall*, 13 C. P. 581.

In an action against the sheriff for a false return, it appeared that on the day before the plaintiffs' writ came in, he received a fi. fa. at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiffs' writ he did nothing. The plaintiffs' attorney wrote twice, urging him to act, and ruled him, and in February, 1866, he returned that writ nulla bona, K.'s writ having been previously renewed. The court being left to draw inferences of fact:—Held, that as a matter of fact the sheriff never seized, or that as a matter of law, he abandoned it; and that, though his acts might not affect K. in an action between K. and the plaintiffs, yet they prevented him from setting up the first writ as a justification for his return to the second. The plaintiffs were, therefore, held entitled to recover. *Foster* v. *Glass*, 26 Q. B. 277.

10. *Other Cases.*

The assignees of a bankrupt in suing the sheriff represent the interest of creditors, and not merely the person or estate of the bankrupt. They, therefore, will not be estopped, as the bankrupt might be, from disputing the validity of a cognovit given by the bankrupt in fraud of the bankrupt law, on the ground of fraud. *Ponton* v. *Moodie*, 7 Q. B. 301.

The plaintiffs held estopped from denying payment of certain notes sued on, when they had taken a mortgage as security for their payment, and under a power of sale therein had sold to third parties for the amount of the notes. *Bank of B. N. A.* v. *Jones et al.*, 8 Q. B. 86.

Debt on award made by arbitrators appointed to value the plaintiff's property, through which the defendants had by their by-law directed a road to be made:—Held, that the defendants having gone to arbitration, were estopped from objecting that the by-law was not averred in the declaration to have been under seal. *Wilson* v. *The Municipal Council of the Town of Port Hope*, 10 Q. B. 405.

To an action of indebitatus assumpsit, defendant pleaded, 1. As to all but £166 1s. 11d., non assumpsit; 2. As to £28 12s. 6d. parcel, &c., payment—as to £77 9s. 5d. residue, &c., payment into court. Plaintiff took issue on the first plea; traversed the payment alleged in the second; and as to the third plea, took out the money paid into court:—Held, that it was open to the plaintiff on the general issue to prove a charge not covered by the other pleas; and that the defendant, having sworn that he had paid in nothing on account of that charge, was precluded from shewing that the other items which

the plaintiff was entitled to would not cover the money paid into court. *Taylor* v. *Flood*, 10 Q. B. 458.

The plaintiff having put in a will in which the testator spoke of H. as his wife, was held not estopped from denying the marriage. *George* v. *Thomas*, 10 Q. B. 604.

Where a party, by his own conduct and admission, has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer. *Browne et al.* v. *Smith*, 1 P. R. 347.—C. L. Chamb.—Richards.

Held, that a person having come to live within the scope of a nuisance after the same had been created, did not prevent his complaining of it as a public nuisance. *Regina* v. *Brewster*, 8 C. P. 208.

In 1861, while defendant was building a tannery on land adjoining the plaintiff's, the plaintiff encouraged defendant to proceed. The business was commenced the same year; in 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint until 1868, though all this time the business had been carried on, and the plaintiff had resided on the premises adjoining:—Held, that he had debarred himself from relief in equity, on the ground of a tannery being a nuisance. *Heenan* v. *Dewar*, 17 Chy. 638; affirmed in appeal, 18 Chy. 438.

To an action brought for two calls on stock, one made on the 9th December, 1858, and the other on the 17th June, 1859, defendant paid into court the first call, and pleaded never indebted to the second. At the trial he admitted having held the stock, but alleged that on the 5th of February, 1858, he had transferred it to M., and he accounted for having subsequently paid the first call sued for, by stating that he had given a bond to the plaintiffs to pay that call, and therefore did so notwithstanding the transfer. To prove the transfer, the plaintiffs' transfer book was produced, in which it was entered, the transfer and acceptance being signed by D., who was then the plaintiffs' manager, as attorney for both parties, and their stock book was also produced in which the stock appeared in M.'s name since the 5th of February, 1858. The powers of attorney were not produced, but the plaintiffs' secretary, who produced the books, said he believed they existed, and that all the papers were in the hands of the plaintiffs' attorney:—Held, that the transfer was sufficiently proved for the purposes of this action, being signed by the plaintiffs' officer as agent for both parties, and recognized in their books; that it was unnecessary to produce the bond given by defendant; and that defendant was not estopped by having paid the call made in December, 1858, from asserting that he had transferred the stock before the other call was made. *Provincial Insurance Co. of Canada* v. *Shaw*, 19 Q. B. 533.

A discharge of a mortgage, not being under seal, held no estoppel against the recovery of the debt, if not in truth paid. *Bigelow* v. *Stanley*, 14 C. P. 276.

Where there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering. Quære, whether, when sued, he can dispute the liability of the covenantee to the damages so recovered. *Spence* v. *Hector*, 24 Q. B. 277.

The plaintiff sued defendant for $150, money lent, to which defendant pleaded a set-off against L., one of the plaintiffs, accepted by L. in satisfaction. It appeared that defendant having built a house for L., cross demands arose out of the contract, and their solicitors negotiated for a settlement: that the $150 was mentioned, and L.'s solicitor offered to pay $650 in full of all matters, taking this $150 into account as a credit to L. Defendant refused to take less than $700, and sued L., whose solicitor, before he was aware of the suit, paid $650, and afterwards paid $50 into court, which was taken out. The jury were asked whether L. or his attorney agreed absolutely to allow the $150 as a payment on the contract, or only for the sake of a settlement, which was not arrived at; to which defendant objected, that if the negotiations proceeded on the supposition that the $150 was to be so allowed, and L. afterwards paid the $700 on a different understanding, he was bound so to state at the time:—Held, that the direction was right, and a verdict for the plaintiffs was upheld. *Young et al* v. *Taylor*, 25 Q. B. 583.

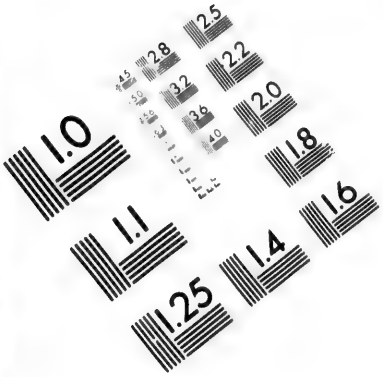
In an action against a justice of the peace for a penalty for not returning a conviction to the Quarter Sessions:—Held, that the defendants having actually convicted and imposed a fine, could not except to the declaration, on the ground that it did not shew that he had jurisdiction to convict. *Bagley* q. t. v. *Curtis*, 15 C. P. 366.

The plaintiff was at Indianapolis when the goods which he had given to defendants to carry, (except the missing box sued for) arrived there, and remained until some time in the month following:—Held, that he was resident there within the condition in the defendants' contract relating to residents beyond their line, and that having named himself as the consignee at that place he was estopped from denying such residence. *La Pointe* v. *Grand Trunk R. W. Co.*, 26 Q. B. 479.

Suing on an award will estop a party from denying the authority of the arbitrators. *Black* v. *Allan*, 17 C. P. 240.

Certain debtors executed a deed of assignment for payment of creditors, but not in accordance with the Insolvent Act of 1864. The defendant, subsequently to this deed, issued a writ of execution against the debtors, and then took proceedings in insolvency, under the Act of 1864, against their estate, for the general benefit of creditors:—Held, affirming the judgment of the C. P., 16 C. P. 445, that the assignment was an act of bankruptcy and void, and could not be set up, on the issue joined, for any purpose; and that, therefore, the defendant, the execution plaintiff, though petitioner in insolvency, could, notwithstanding his proceedings in insolvency, founded on his judgment at law and the assignment, enforce his execution against the debtor's estate, to the postponement of the rest of the creditors. Hagarty, J., A. Wilson, J., and Mowat, V.C., diss. *Thorne* v. *Torrance*, 18 C. P. 20, in appeal.

Semble, that on application to the proper court, defendant might have been restrained from asserting any right under the execution at law. *Ib.*



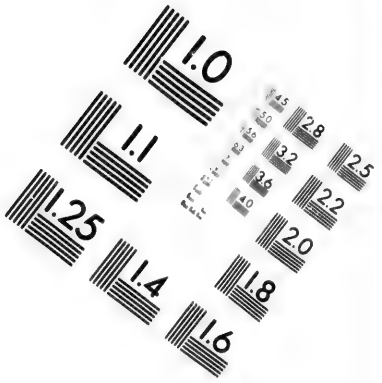
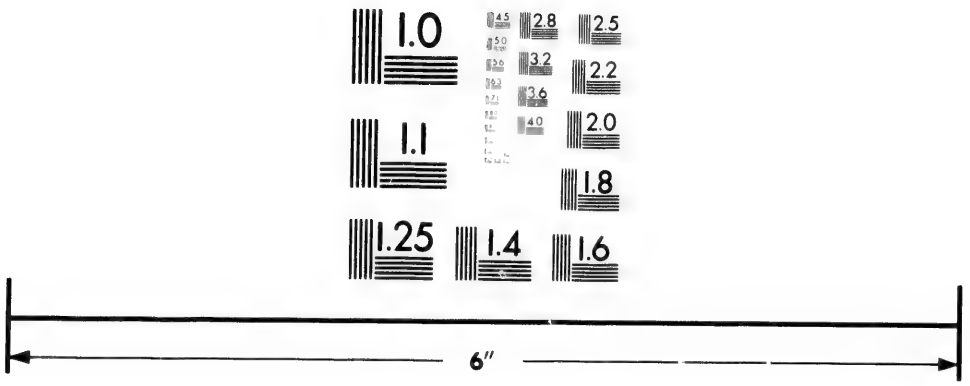
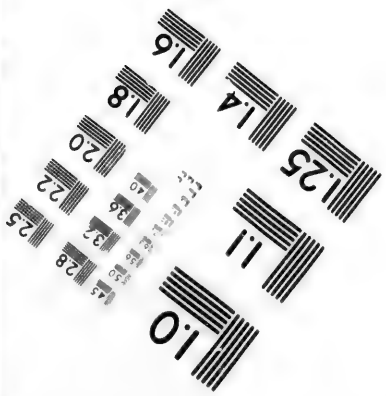
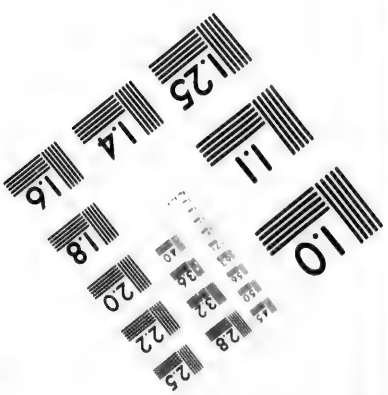


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Held, affirming the judgment of the Court of C. P., 20 C. P. 490, Gwynne, J., diss., that the Law Society were not released, under the facts and circumstances there set forth, from their covenant to repair and maintain the building known as "Osgoode Hall" for the accommodation of the superior courts of common law and equity; and that no estoppel arose in favour of the society against the crown in consequence of the several acts of the legislature that had been passed in relation thereto. *Regina* v. *The Law Society*, 21 C. P. 229.

To prove a judgment recovered in Lower Canada, an instrument was produced headed "Province of Quebec, District of Montreal, Superior Court of Lower Canada," and setting out the judgment of the court, and certified to be a true copy under the hand of the prothonotary and the seal of the court. It was objected that the judgment was not sufficient, as the defendant had not been personally served with process in the action in the foreign court, but—Held, that as defendant had procured bail to be put in, and so obtained his freight which had been attached, the objection could not be raised. *Tilton* v. *McKay*, 24 C. P. 94.

Quære, whether a married woman consenting to a breach of trust can afterwards complain of it; and, Semble, if she make a representation and encourage another to act upon it, she will be compelled to make it good. *Hope* v. *Beard*, 8 Chy. 380.

Two years after a mortgage had been in part paid off, the mortgagor applied to the mortgagee to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so re-borrowed should be considered as of the original charge created by the mortgage. Some but not all of the receipts were returned to the mortgagee, and the money re-advanced by him upon the terms proposed by the mortgagor. Under this state of facts, the master in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage. On an appeal from the master's report:—Held, that the principle upon which he had taken the account was correct; and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced.—VanKoughnet, C., dubitante. *Inglis* v. *Gilchrist*, 10 Chy. 301.

A debtor being a vendee of the crown of land, and in default in paying the purchase money, a creditor obtained execution against his lands, and purchased his debtor's interest for a sum equal to the debt and costs, and took the sheriff's deed accordingly:—Held, that he could not afterwards repudiate the purchase and claim his debt, on the ground that the debtor's interest was not salable by the sheriff. *Ferguson* v. *Ferguson*, 16 Chy. 309.

IV. Exceptions.

The assignees of a bankrupt in suing the sheriff represent the interest of creditors, and not merely the person or estate of the bankrupt; they therefore will not be estopped, as the bankrupt might be, from disputing the validity of a cognovit given by the bankrupt in fraud of the bankrupt law, on the ground of fraud. *Ponton* v. *Moodie*, 7 Q. B. 301.

Replevin for horses. Plea, justifying the taking under a warrant for school taxes. Replication, setting out facts to shew the rate illegal, and averring that the plaintiff, after seizure of the goods, at the request of the collector and trustees, gave his note for a sum named (not saying that it was the amount due by him), payable to bearer, which was accepted in satisfaction of the taxes:—Held, on demurrer, replication bad; for, the debt being due to the public, even if the note had been alleged to be for a sufficient amount to pay the rate, yet the improper acceptance of it by the trustees would not prevent them from afterwards distraining. *Spry* v. *McKenzie*, 18 Q. B. 161.

Quære, whether a tenant or licensee of land, is estopped from disputing his landlord's or licensor's title as being void on a statutable objection. *Hallock* v. *Wilson*, 7 C. P. 28.

There can be no estoppel on a sheriff, when sued as an individual, by reason of a deed executed by him exclusively as a public officer. *Kissock* v. *Jarvis*, 9 C. P. 156.

As to how far the municipal council of one year can be estopped by the acts in pais of the council of a preceding year: See *Corporation of Ingersoll* v. *Chadwick*, 19 Q. B. 286; *Municipality of East Nissouri* v. *Horseman*, 16 Q. B. 583.

On an indictment for false pretences, it appeared that defendant held the title of certain land belonging to one A., who lived in the United States. A. exchanged it with H. (the prosecutor,) for other land, and gave an order on defendant to convey to H. When H. presented this order, defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and defendant, that a certain sum should be paid over to H. to defendant on receiving the deed, as for the purchase money and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, where the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance $1,150. Defendant instead of returning the money and notes ran away with them:—Held, the public interest being concerned, that the principle of estoppel would not apply, so as to prevent H. from asserting that the payment which he professed to make in good faith was in fact only a pretence. *Regina* v. *Ewing*, 21 Q. B. 523.

B. acted for the plaintiff, who owned a mare which was matched to trot a race with another mare for $200 a side; and the match was made and the paper, stating the terms of it, signed by B., and by one C., who had no interest in the other mare. B. deposited $200 of the plaintiff's money with defendant as a stakeholder, for which the plaintiff sued:—Held, that the transaction was illegal, under 13 Geo. II., c. 19, C. not owning the horse to be run by him; and that the plaintiff was not estopped from shewing the other horse and the money to be his, for there could be no estoppel against shewing the illegality created by statute; and that he was entitled to recover. *Battersby* v. *Odell*, 23 Q. B. 482.

V. Pleading.

When necessary.]—In an action against the sheriff and his sureties for not arresting a party at the plaintiff's suit:—Held, that defendants were not concluded with regard to the fact of the arrest being made, by the decision in that suit in the County Court, no estoppel being pleaded, nor could such decision act as an estopped, being res inter alios acta. *McIntosh* v. *Jarvis et al.*, 8 Q. B. 535.

In an action for the purchase money of land conveyed, a receipt under seal in the conveyance is conclusive evidence under a plea of payment, and it is unnecessary to plead the estoppel specially. *Ketchum* v. *Smith*, 20 Q. B. 313; *Sparling* v. *Savage*, 25 Q. B. 259.

Plaintiff sold and conveyed to defendant certain land, the deed containing a receipt for the purchase money, $800, with a receipt for the purchase money also endorsed. Plaintiff then sued defendant upon the common counts for the purchase money of the land, and on an account stated. The defendant pleaded, among other pleas, payment. After the sale defendant told one M. that he had only paid plaintiff $41, and offered to pay him (M.) whatever plaintiff was willing he should. It also appeared, though not very clearly, that the plaintiff was present at this conversation:—Held, following the two last cases, that the plaintiff was concluded by the receipt in the deed, and that he could not recover on either count. *Casey* v. *McCall*, 19 C. P. 90.

In an action of dower:—Held, that the demandant could not, without specially replying it, rely upon the tenant being estopped, by taking a conveyance from her husband after marriage, from shewing that the seisin of the demandant's husband was as joint tenant with his brother, and that he died first. *Haskill* v. *Fraser*, 12 C. P. 333.

Certain goods of H. were seized under an execution at the suit of defendant, and claimed by the plaintiff. The issue was decided in the plaintiff's favour, who then sued defendant for the seizure, which he had directed:—Held, that the action would lie, and that by the Interpleader Act (C. S. U. C. c. 30, s. 5) the result of the issue was conclusive as to the plaintiff's right to the goods, though not replied as an estoppel to defendant's plea that the goods were not the plaintiff's. *Harmer* v. *Gouinlock*, 21 Q. B. 260.

Other Cases.]—Held, that defendant having pleaded to the declaration as containing two separate counts, could not afterwards object that there was but one. *May et al.* v. *Howland et al.* 19 Q. B. 66.

Held, that defendants were clearly not estopped from denying that the instrument sued on was a note by having, in addition to the plea of non fecerunt, pleaded other pleas in which they denied their liability to pay "the said promissory note." *Boulton* v. *Jones et al.*, 19 Q. B. 517.

An action at law having been brought upon a promissory note, and the defendant having pleaded that it had been given as collateral security for another debt, which had been paid, but adduced no evidence to establish this fact, was Held precluded, in a suit afterwards instituted in the Court of Chancery to enforce the charge of the judgment against lands, from shewing any payments prior to the time of plea pleaded.—Esten, V.C., diss. *Carpenter* v. *The Commercial Bank of Canada*, 8 L. J. 268, in appeal.

A defendant at law pleading a plea of payment, and either failing or neglecting to establish the plea, cannot afterwards set up the same facts as a defence to a bill in equity to enforce payment of the judgment at law. *Ib.*

Action on a judgment recovered against an executor. The declaration set out the judgment, alleging the issuing of a fi. fa. and a return of nulla bona, and suggested a devastavit. Plea, that in the action on which this action is founded, the defendant pleaded plene administravit, and that the plaintiff replied lands, on which judgment was given: that the lands were assets in the hands of the defendant as executor:—Held, that the replication of lands was a full admission of the truth of the plea of plene administravit; and that the plaintiff by his replication in a former action being estopped from setting up a devastavit now, the defendant was at liberty to shew the true state of the case to save himself from personal liability. *Hogan* v. *Morrissy*, 14 C. P. 441.

Held, under the facts appearing on the pleadings, that the denial by defendants, in their answer in Chancery, that the agreement sued on in this action was illegal, could not estop them from asserting such illegality here. *Carr et al.* v. *Tannahill, et al.*, 30 Q. B. 217; 31 Q. B. 201.

In ejectment,—Held, that it was no admission of the title of the party through whom defendant claimed, that the party through whom plaintiff derived title had, long after his title by possession had matured, filed a bill in Chancery against the former for specific performance of an agreement for sale of the land in question to him. *Mulholland* v. *Conklin*, 22 C. P. 372.

Where a party alleges the legal effect and operation of an instrument, he is bound by such allegation. *Foster* v. *Beall*, 15 Chy. 244.

A. took a conveyance as trustee for B. B., in answer to a bill by a person claiming the property against both, was induced by A. to swear that he (B.) had not any interest in the property:—Held, in a subsequent suit by B. against A., that he (B.) was not precluded from shewing the trust. *Washburn* v. *Ferris*, 16 Chy. 76, in appeal; *S. C.* 14 Chy. 516.

ESTREAT.

I. Of Recognizance—*See* Recognizance.

By a liberal construction of the Estreat Act, 7 Will. IV. c. 10, the court will, in certain cases, relieve jurors from fines imposed on them at Nisi Prius, after the fine has been levied by the sheriff. *In re Cole*, 6 O. S. 425.

EVICTION.

See Landlord and Tenant.

EVIDENCE.

I. Matters Judicially Noticed, 1288.

II. Admissions.

1. *By Pleadings and Practice*, 1289.
2. *Admissions without Prejudice*, 1291.
3. *By and against Principals and Sureties*, 1292.
4. *Admissions by Parties*, 1292.
5. *Accounts Rendered*, 1296.
6. *Admission of Deeds or Title*, 1297.
7. *Other Cases*, 1298.
8. *By Attorneys — See* Attorney and Solicitor.
9. *By Particulars of Demand — See* Practice at Law.
10. *In Criminal Cases — See* Criminal Law.

III. Presumptions.

1. *As to Deeds.*
   (a) *Generally*, 1300.
   (b) *As to Married Women's Certificates on Deeds—See* Husband and Wife.
2. *As to Erasures and Interlineations.*
   (a) *In Deeds—See* Deed.
   (b) *In Wills—See* Will.
3. *From non-production of Books or Accounts*, 1304.
4. *As to Death*, 1305.
5. *Arising from Official Appointments and Acts*, 1305.
6. *Other Cases*, 1305.
7. *Of Legitimacy—See* Bastard.
8. *Of Marriage.*
   (a) *Generally — See* Husband and Wife.
   (b) *In Actions of Dower—See* Dower.

IV. Privileged Communications.

1. *Attorneys and Solicitors*, 1307.
2. *Withholding Documents on ground of Privilege or Privacy—See p.* 1340.

V. Attendance of Witnesses.

1. *Notice to parties to Suit to attend Trial as witnesses for the opposite party, under 16 Vict. c. 19, s. 2, (C. S. U. C. c. 32, s. 15,)* 1309.
2. *Process.*
   (a) *For Service out of Ontario*, 1309.
   (b) *Other Cases*, 1310.
3. *Fees of Witnesses.*
   (a) *At Trials or Enquiries*, 1311.
   (b) *At Inquests—See* Coroner.
   (c) *Taxation of—See* Costs.
4. *Remedy for Non-attendance.*
   (a) *Attachment*, 1311.
   (b) *Other Cases*, 1312.
5. *Recognizance—See* Recognizance.
6. *Before Arbitrators — See* Arbitration and Award.

VI. Competency of Witnesses.

1. *Parties to Suits or Proceedings.*
   (a) *Before 12 Vict. c. 70*, 1313.
   (b) *Under 14 & 15 Vict. c. 66*, 1313.
   (c) *Under 16 Vict. c. 19, (C. S. U. C. c. 32,)* 1314.
2. *Husband and Wife*, 1314.
3. *Parties Interested.*
   (a) *Before 12 Vict. c. 70*, 1315.
   (b) *Under 12 Vict. c. 70, and 16 Vict. c. 19, (C. S. U. C. c. 32,)* 1316.
   (c) *Other Cases*, 1316.
4. *Religious Belief*, 1317.
5. *Other Cases*, 1317.
6. *In Criminal Matters—See* Criminal Law.

VII. Examination under Commission.

1. *Application for, and Issue of Commission*, 1317.
2. *Publication*, 1319.
3. *Irregularities in, and Return of.*
   (a) *Affidavit of due taking*, 1319.
   (b) *Return*, 1321.
   (c) *Other Cases*, 1322.
4. *Costs*, 1323.
5. *Other Cases*, 1323.
6. *De bene esse—See* p. 1330.

VIII. Letters Rogatory, 1325.

IX. Examination of Parties and Witnesses out of Court.

1. *At Common Law.*
   (a) *Under Interrogatories*, 1325.
   (b) *Under the Administration of Justice Act*, 1326.
2. *In Chancery,*
   (a) *Order and Notice*, 1326.
   (b) *Time of Examination*, 1327.
   (c) *Where Taken*, 1328.
   (d) *Cross-examination*, 1328.
   (e) *Further, or Re-examination*, 1329.
   (f) *Pro interesse suo*, 1330.
   (g) *De bene esse*, 1330.
   (h) *Publication*, 1330.
   (i) *Other Cases*, 1332.
3. *Under Commission—See p.* 1317.

X. Inspection, Discovery, and Production of Documents.

1. *At Common Law.*
   (a) *Application for*, 1334.
   (b) *What Documents*, 1334.
2. *In Chancery.*
   (a) *Order to Produce*, 1335.
   (b) *What Documents*, 1336.
   (c) *Withholding because Documents sought are not material*, 1338.
   (d) *Withholding on the grounds of Privilege or Privacy*, 1339.
   (e) *Other Cases relating to Practice*, 1340.

XI. Evidence, and Examination of Witnesses, at Trial or Hearing.

1. *Parties to Suit*, 1341.
2. *At Hearing and Re-hearing*, 1342.
3. *After Hearing*, 1342.
4. *Refusing to Answer*, 1343.
5. *Refreshing Memory*, 1344.
6. *Contradicting Witnesses.*
   (a) *On Collateral Issue*, 1345.
   (b) *Other Cases*, 1345.
7. *Other Cases*, 1346.

XII. Judicial, Official, and other Public Documents.

1. *Judgments, Orders, and Decrees of Foreign Courts.*
   (a) *Proof of*, 1347.
   (b) *Effect of, and how far Conclusive —See* Judgment.
2. *Other Judgments and Decrees*, 1348.
   (a) *Effect of Judgment in Ejectment —See* Ejectment.
   (b) *Effect of Judgments in other Actions—See* Judgment.
3. *Proof by Copies and Extracts*, 1349.
4. *Other Cases*, 1351.
5. *Probate and Letters of Administration —See* Executors and Administrators.
6. *Proof of By-laws — See* Municipal Corporations.

XIII. Private Documents.

1. *Plans*, 1353.
2. *Ancient Documents*, 1353.
3. *Deeds.*
   (a) *Generally*, 1355.
   (b) *Proof by Secondary Evidence—See p.* 1379.
   (c) *Memorials—See p.* 1385.
   (d) *By Corporations—See* Corporations.
4. *Other Documents*, 1359.
5. *Award — See* Arbitration and Award.
6. *Wills—See* Will.

XIV. Parol Explanation of Documents.

1. *To Vary or Explain Deeds.*
   (a) *Deeds absolute in form, but intended to be held as Security or in Trust*, 1359.
   (b) *To Explain Description of Land —See* Deed.
   (c) *Proof of Trust—See* Trusts and Trustees.
   (d) *Other Cases*, 1363.
2. *To Vary or Explain other Writings*, 1367.
3. *Ambiguity Generally*, 1368.
4. *Explanation of Words*, 1369.
5. *Parties to Contracts*, 1370.
6. *Subject Matter of Contracts*, 1371.
7. *Terms and Incidents of Contracts*, 1372.
8. *Other Cases*, 1377.
9. *Custom and Usage—See* Custom and Usage.
10. *To connect Writings forming Contract under Statute of Frauds — See —*Sale of Land.
11. *To Vary or Explain Wills—See* Will.

XV. Proof of Handwriting, 1377.

XVI. Proof by Subscribing Witness, 1379.

XVII. Proof by Secondary Evidence.

1. *When Documents must be produced*, 1379.
2. *Proof that Document Existed*, 1381.
3. *Proof of Loss and Search*, 1382.
4. *Proof of Deeds by Memorials*, 1385.
5. *Of Evidence previously given*, 1387.
6. *Other Cases*, 1387.

XVIII. Proof after Notice to Produce.

1. *When Notice Necessary*, 1390.
2. *Service of Notice*, 1391.
3. *Form of Notice*, 1391.
4. *Other Cases*, 1392.

XIX. Proof by Entries and Declarations, 1393.

XX. Hearsay Evidence.

1. *In Questions of Pedigree*, 1395.
2. *Res gestæ*, 1398.
3. *Proof of Marriage by Reputation— See* Dower—Husband and Wife.
4. *Dying Declarations — See* Criminal Law.

XXI. Evidence of Character, 1399.

1. *In Actions for Defamation—See* Defamation.

XXII. Production and Admission of Evidence.

1. *Onus Probandi*, 1399.
   (a) *In Actions on Covenants for Title —See* Covenants for Title.
   (b) *Attachment for Non-production of Documents—See* Attachment of the Person.
2. *Relevancy*, 1402.
3. *Duty of Judges as to Receiving or Rejecting Evidence*, 1404.
4. *In Reply*, 1405.
5. *Other Cases*, 1405.
6. *Secondary Evidence—See p.* 1379.
7. *Addresses of Counsel—See* Barrister at Law.

XXIII. Contradictory Evidence, 1406.

XXIV. Miscellaneous Cases, 1409.

XXV. Right to begin and Reply—*See* Trial.

XXVI. In Criminal Matters—*See* Criminal Law.

XXVII. Evidence in Particular Actions, Suits, or Proceedings.

1. *Account Stated — See* Money Counts.

2. *Administrators — See* EXECUTORS AND ADMINISTRATORS.
3. *Affidavits—See* AFFIDAVIT.
4. *Variance between Evidence and Allegations in Pleadings — See* AMENDMENT AT LAW.
5. *Assault—See* TRESPASS.
6. *Awards — See* ARBITRATION AND AWARD.
7. *Bankruptcy — See* BANKRUPTCY AND INSOLVENCY.
8. *Bills of Exchange and Promissory Notes—See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
9. *Bonds—See* BOND.
10. *Controverted Elections.*
    (a) *In Municipal Elections — See* MUNICIPAL CORPORATIONS.
    (b) *In Parliamentary Elections — See* PARLIAMENT.
11. *Covenants — See* COVENANT—COVENANTS FOR TITLE.
12. *Criminal Cases—See* CRIMINAL LAW.
13. *Criminal Conversation—See* HUSBAND AND WIFE.
14. *Custom—See* CUSTOM AND USAGE.
15. *Damages, Aggravation and Mitigation of—See* DAMAGES.
16. *Defamation—See* DEFAMATION.
17. *Detinue—See* DETINUE.
18. *Discovery, Bills of—See* DISCOVERY.
19. *Dower—See* DOWER.
20. *Ejectment—See* EJECTMENT.
21. *Executors and Administrators—See* EXECUTORS AND ADMINISTRATORS.
22. *Extradition—See* EXTRADITION.
23. *Foreign Law—See* FOREIGN LAW.
24. *Guarantee—See* GUARANTEE AND INDEMNITY.
25. *Husband and Wife—See* HUSBAND AND WIFE.
26. *Identity of Persons and Property—See* IDENTITY.
27. *Interpleader—See* INTERPLEADER.
28. *Intrusion—See* INTRUSION.
29. *Leases — See* LANDLORD AND TENANT.
30. *Libel—See* DEFAMATION.
31. *Legitimacy—See* BASTARD.
32. *Limitations — See* LIMITATION OF ACTIONS AND SUITS.
33. *Malicious Arrest and Prosecution—See* MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.
34. *Marriage—See* DOWER—HUSBAND AND WIFE.
35. *Mesne Profits—See* EJECTMENT.
36. *Money Counts—See* MONEY COUNTS.
37. *New Trial, Applications for—See* NEW TRIAL.
38. *Notice of Action, Proof of — See* ACTION AND SUIT.
39. *Notice of Dishonour, Proof of—See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
40. *Policies of Insurance — See* INSURANCE.
41. *Payment—See* PAYMENT-RECEIPT.
42. *Protest—See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
43. *Profert—See* PLEADING AT LAW.
44. *Quieting Titles — See* QUIETING TITLES ACT.
45. *Quo Warranto — See* MUNICIPAL CORPORATIONS.
46. *Registration of Deeds — See* REGISTRY LAWS.
47. *Replevin — See* REPLEVIN.
48. *Seduction — See* SEDUCTION.
49. *Set-off—See* SET-OFF.
50. *Sheriff and his Sureties, Actions against — See* SHERIFF.
51. *Slander—See* DEFAMATION.
52. *Ships, Ownership of—See* SHIP.
53. *Of Taxes in Arrear — See* ASSESSMENT AND TAXES.
54. *Title — See* EJECTMENT—TITLE.
55. *Trespass—See* TRESPASS.
56. *Trover—See* TROVER.
57. *Use and Occupation — See* USE AND OCCUPATION.
58. *Wills—See* WILL.
59. *Work and Labour—See* WORK AND LABOUR.

I. MATTERS JUDICIALLY NOTICED.

Where a defendant pleads over and takes no exception to the declaration, the court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity. *Bank of B. N. A.* v. *Sherwood*, 6 Q. B. 213.

In trespass for false imprisonment, where the defendant justified under a writ of ca. sa., and the plaintiff replied that it had been set aside before action brought:—Semble, that the judge at the trial—before whom the ca. sa. in this case had been set aside, after argument in chambers with consent of the parties, as if by the full court in term, and to whom the facts upon which the writ had been set aside had become judicially known—had a right to comment to the jury upon some of those facts, which had been left uncontradicted as well upon the trial as upon the application in chambers, although such facts had not been again expressly brought out by the plaintiff in his evidence before the jury in this case. The facts thus stated by the judge were, however, afterwards withdrawn by him from the consideration of the jury. *Robertson* v. *Meyers*, 7 Q. B. 423.

Upon a covenant to pay interest at ten per cent., made while 16 Vict. c. 80, was in force and before the 22 Vict. c. 85:—Held, that the court was bound to notice that by the statute no more than six per cent. could be recovered, though non est factum only had been pleaded. *Girdlestone* v. *O'Reilly*, 21 Q. B. 409.

In an action on a replevin bond given to B. one of the coroners of the county, the defendant

having moved in arrest of judgment on the ground that the bond was made to and assigned by one coroner, not the coroners, of the county: —Held, that the bond being properly set out in the declaration, and no issue or point being raised on the record, the court were not bound to take judicial notice that there were more coroners than one in the county; and the declaration was therefore sustained. *Johnson et al.* v. *Parke et al.*, 12 C. P. 179.

The courts are bound to take judicial notice of every public act of the provincial legislature, though its operation may be locally limited. *Darling* v. *Hitchcock*, 25 Q. B. 463.

The offence alleged in a conviction for selling spirituous liquors without license, was selling "a certain quantity, to wit, one pint":—Held, sufficient, without negativing that it was a sale in the original packages within the exemption in 29 & 30 Vict. c. 51, s. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain. *Reid* v. *Mc Whinnie et al.*, 27 Q. B. 289.

A judge is bound to take notice of the territorial divisions of the province. *McDonald* v. *Dicaire*, 1 Chy. Chamb. 34.—Blake.

II. Admissions.

1. *By Pleadings and Practice.*

In trespass for taking goods:—Held, that a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record. *McCrae* v. *Osborne et al.*, 6 O. S. 500.

In indebitatus assumpsit the defendant, except as to £33 14s., pleaded the general issue, and as to that sum payment of £1 1s. 8d. into court, and no damages ultra; and the plaintiff replied, that he had sustained greater damages:—Held, that the plaintiff was not entitled to a verdict for the difference between £33 14s. and £1 1s. 8d., paid into court, as a sum admitted on the record, without giving any evidence, but that he must prove damages, no specific sum being admitted on the record in this form of action. *Ross* v. *Garrison*, 6 O. S. 626.

In trespass q. c. f. defendant pleaded in one plea title in A., and license from A. to enter, and in the other pleas pleaded title specially in A., giving color to the plaintiff; and the plaintiff denied the license and took issue on the other pleas:—Held, that the admission by plaintiff of the title in A. by the replication to the plea of license, did not extend beyond that line of pleading, and could not be used by defendant in support of his other pleas of title in A. *Wilkinson* v. *Walker*, 2 Q. B. 162.

A jury cannot be called upon to infer from anything on the record that an issue contained in such record, and which is to be tried, is to be found either for plaintiff or defendant. Such issue must be supported by testimony other than that to be gathered from the record. Held, that in this case it could not be taken as admitted by the pleadings that the defendant had given her consent before a judge to be barred of her dower. *Huffman* v. *Askin*, 2 C. P. 423.

In an action on a merchant's account, the writ was specially endorsed claiming interest, and defendant did not appear:—Held, that his non-appearance was an admission of the charge for interest. *Standing* v. *Torrance*, 4 L. J. 235. —C. L. Chamb.—Burns.

Plaintiff declared on a bond of submission, alleging that the arbitrators heard the matters in difference, amongst others, the costs of an action in the Common Pleas between the parties, and awarded that defendant should convey certain specified land to the plaintiff in fee, and should pay him all the costs of the reference and of the said action, and that they should execute mutual releases. Breach, non-payment of the costs. Defendant pleaded, 1. Non est factum; 2. That the arbitrators did not make any such award:—Held, that on these pleadings the suit and the fact of its reference might be taken to be admitted. *Hibbert* v. *Scott*, 24 Q. B. 581.

Dower. Plea, that the demandant never was accoupled to the said J. L. (the husband), during the time the said J. L. was seized of the said land:—Held, that the plea admitted the seizin and denied the coverture only. *Losee* v. *Murray*, 24 Q. B. 586.

Plaintiff sued upon a policy of insurance on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendant pleaded that he was not, at the time of the loss, interested as alleged:—Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest, he would be entitled only to nominal damages. *Clark* v. *The Western Assurance Co.*, 25 Q. B. 209.

In an action for wages earned as a lumberman, the dispute being whether the person hiring the plaintiff was defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that no inference could be drawn from this as an admission by defendant's of his liability for plaintiff's wages. *Stewart* v. *Scott*, 27 Q. B. 27.

Defendant made a note payable to T. or bearer, and T. died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife, to recover the assets. A bill was filed by defendants to restrain this action, and in his answer the plaintiff swore that in consequence of the difficulties with the administrator, he had returned the note to G. before this action; that he had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit; and the plaintiff had recognized it, saying he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder:—Held, on motion for a new trial, that the plaintiff's answer in chancery, though very strong evidence, was not conclusive; and that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the per-

son on whose immediate behalf the action was brought. *Coates* v. *Kelly et al.*, 27 Q. B. 284.

A defendant, by his answer, admitted that he was devisee as alleged in the bill; but added that his right to deal with the property had been taken away by a suit for administration in England:—Held, that the latter statement was not an explanation of the former; and that the admission as to the will might be read by the plaintiff as evidence without making evidence of what followed. *Stickney* v. *Tylee*, 13 Chy. 193.

On a motion for decree the plaintiff was assumed, for the purposes of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term. *Wilson* v. *Cossey*, 14 Chy. 80.

A bill for redemption alleged that an absolute conveyance by the plaintiff was intended as a security for a debt then due. The defendants admitted that the conveyance was intended as a security, but alleged that it was to secure future advances, as well as the existing debt, and interest at twelve per cent. The plaintiff moved for a decree on the answer:—Held, that the defendant was entitled to a declaration that the security was to cover future advances, and twelve per cent. interest, as well as the existing debt; but the court gave leave to the plaintiff to abandon his motion, and to file a replication and proceed to a hearing in term, if he chose. *Ib.*

Defendants by their answer specified a certain sum as due when the conveyance was executed, and certain other amounts as admitted by the plaintiff to be due at subsequent periods:—Held, that on a motion for decree these allegations were not binding on the plaintiff, and must be established before the master. *Ib.*

Action on a note made by M. and endorsed by C. Pleas, by M., general issue and set-off, and by C., general issue, set-off, and release. The plaintiffs took issue on M.'s pleas, and entered a nolle prosequi as to C.:—Held, per Robinson, C. J., and Macaulay, J., that inasmuch as the plaintiffs confessed, by their nolle prosequi, that C. had a set-off sufficient to meet the note, they could not recover the amount against the other defendant; and by Jones and Hagerman, JJ., that they were not precluded from doing so. *Robertson et al.* v. *Moore et al.*, 6 O. S. 646.

One of two endorsers, who at the time of endorsing were partners, pleaded that neither he nor his partner had due notice of non-payment:—Held, that the other partner having suffered judgment by default, did not operate as an admission of notice as against the defendant pleading. *Pengnet* v. *McKenzie et al.*, 6 C. P. 308.

A defendant having endorsed an admission of service on the bill of costs produced:—Held, to have admitted that the copy received was signed by the attorney. *Berry* v. *Andruss*, 3 O. S. 645.

The admission pro confesso by non-attendance of a party to the suit as witness when notified under 14 & 15 Vict. c. 66, was to be taken only as to the cause of action, and not the amount of damages. *Robertson* v. *Ross*, 2 C. P. 193.

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2. *Admissions without Prejudice.*

In trespass for an assault, the act was proved, but not that defendant committed it. To supply this, letters were put in which had passed between the attorneys on either side with a view to settlement, the first written expressly "without prejudice." The plaintiff's attorney, who produced the letters, also swore that defendant admitted it was he who struck the plaintiff. The jury found for the plaintiff: Semble, that the letters should not have been received, even for the purpose of proving the identity; but as the other testimony was sufficient to warrant the verdict, the court refused to interfere. *Burn* v. *Kerr*, 13 Q. B. 468.

Where defendant had rendered an account to plaintiff, with a letter stating that the letter and account were sent "without prejudice," in case certain proposals therein contained were not accepted:—Held, not admissible for the plaintiff. *Ritchey* v. *Howard*, 6 C. P. 437.

Where a letter making an offer was expressed in the beginning to be without prejudice, but the defendants afterwards declared in it their intention to use it, if required, as evidence to shew the plaintiff's want of good faith, the plaintiff was—Held, entitled to shew it and the subsequent agreement to repel any such imputation. *Clark* v. *Grand Trunk R. W. Co.*, 29 Q. B. 136.

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3. *By and against Principals and Sureties.*

An admission by a debtor on the limits that he had gone beyond them, is not admissible to charge his sureties. *Freeland* v. *Jones*, 6 O. S. 44.

Held, Robinson, C. J., diss., that the books of the agent or clerk of a public company during his lifetime are not good evidence against his surety, when sued on his bond for a deficiency in the agent's accounts. *Ferrie* v. *Jones et al.*, 8 Q. B. 192.

In an action against principal and sureties as co-obligors on a collector's bond:—Held, that the admissions of the principal were clearly evidence against himself; and per Draper, C. J., it might be strongly argued that whatever is evidence against the principal will also be receivable against his co-defendant in an action on their joint obligation. *The Municipal Council of South Easthope* v. *Helmer et al.*, 7 C. P. 506.

See *Mutual Fire Ins. Co. of Prescott* v. *Palmer et al.*, 20 Q. B. 441, p. 1314; *Middlefield* v. *Gould*, 10 C. P. 9, p. 1393.

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4. *Admissions by Parties.*

The recognition of a bond in a letter from defendant to plaintiff, with proof that a document purporting to be a copy or draft of such instrument was shewn by defendant with the title deeds of an estate to which it related, is evidence to go to a jury in proof thereof, after notice by defendant to produce. *Rochleau* v. *Bidwell*, Dra. 345.

The admissions of the plaintiff in ejectment, being a real person (the lessor being an infant), are not evidence to prevent the recovery of the premises. *Nicholson* d. *Spafford* v. *Rea*, 3 O. S. 84.

In an action against a member of a joint stock company, his admissions that he was a partner are sufficient to prove his liability without producing the partnership deed. *Lee* v. *Macdonald*, 6 O. S. 130.

Where in ejectment the plaintiff's counsel in opening his case stated it as a question of legitimacy, and the defence was conducted without the production of the will, as if the statement of the counsel had rendered that unnecessary :—Held, that it ought to have been produced. *Doe* d. *Breakey* v. *Breakey*, 2 Q. B. 349.

Plaintiff is not bound by the inadvertent statement or admission of his counsel in opening his case, such statement being promptly retracted. *Jannette* v. *Great Western R. W. Co.*, 4 C. P. 488.

The plaintiff declares on two counts, 1. On a note; and, 2. On an account stated. To the defendant's plea to the first count, the plaintiff replies, to which replication the defendant demurs. The plaintiff then, to avoid the risk of the demurrer, enters a simple nolle prosequi to the first count :—Held, that the plaintiff might give the note in evidence under the second count, on the account stated ; Semble, such evidence would have been inadmissible if the nolle prosequi had involved an express admission, as it sometimes does, that the plaintiff had no right of action on the note. *Leslie* v. *Davidson*, 3 Q. B. 459.

Letters written by the parties to a suit, like receipts and other admissions, are always open to explanation, unless they may have led to acts by third parties involving loss to them. *Cuvillier* v. *Browne*, 4 Q. B. 105.

The plaintiff, as administrator, sues defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. Defendant denied the promise :—Held, upon the facts set out, Jones, J., diss., that if the admissions proved could be construed into an absolute promise to pay, still, being made before the plaintiff had received his letters of administration, they could not support the issue raised. *Beard* v. *Ketchum*, 5 Q. B. 114.

Quere, whether the admissions in evidence would support an absolute promise to pay, if made to the administrator himself ; and if so, whether the fact of their being made to a third party instead of to the administrator, made any difference. *Ib.*

In trespass for seizing plaintiff's goods under an execution against A., it was held that a letter written by A. to the plaintiff before any third party had an interest in questioning the right to the goods, was evidence to shew the footing on which the plaintiff and A. then stood with respect to the goods. *Robinson* v. *Rapelje*, 4 Q. B. 289.

A mere verbal bargain for the sale of land would not subject a person to the penalty under 32 Hen. VIII. c. 9, for buying a pretended title. A person could not be convicted merely on his own admission that he had taken a deed from a party out of possession ; some evidence aliunde must be adduced of the existence of such a deed. *Aubrey* q. t. v. *Smith*, 7 Q. B. 213.

In an action for the price of certain fruit trees, —Held, that defendant having put in a letter from the plaintiff to establish that he had received the trees for sale, was not bound by a statement in the same letter of the amount due for such trees. *Leslie* v. *Morrison*, 16 Q. B. 130.

Held, that sworn entries in the custom house, of the quantity and value of goods imported by the party claiming the damages (occasioned by fire) under a policy of insurance, who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages. *Lazare* v. *Phœnix Insurance Co.*, 8 C. P. 136.

One F. transferred a schooner to defendant, as trustee, to sell and pay certain creditors (himself among the number) debts due by him to them. A memorandum of defendant was proved on the trial, admitting the receipt of certain moneys on this account, and appropriating it proportionately to the creditors :—Held, that an action at law would lie to recover the amount so admitted. *Park* v. *Berzey*, 8 C. P. 173.

M. by letter admitted that the property in dispute was in the hands of a third party, and afterwards sued defendant for it :—Held, that such letter was evidence, and the jury having found upon it for defendant, the court would not interfere. *Macdonald* v. *Wood*, 8 C. P. 426.

The Great Western railway shareholders resolved, in 1857, to advance £150,000 sterling to the Detroit & Milwaukee railway company ; and again, in 1858, a further sum of £100,000 sterling, the two sums to be expended by the managing and finacial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western railway company, to advance money under these resolutions. Large advances were made and exchange drawn ; the business was carried on for two years, and money advanced by the Great Western railway to the Detrait & Milwaukee company beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. Difficulties arose, defendants insisting that credit was not given to them, but either to the Detroit & Milwaukee company, or to the individual directors negotiating the arrangement ; and the plaintiffs sued for the balance overdrawn, amounting to about $1,000,000:—Held, under the circumstances fully set out in the case, that a book containing a report of certain charges made by defendants' shareholders against the directors, and the reply to the latter which had been sent out by the English to the Canadian board, and circulated by the latter here, was admissible, though of little importance to the case. *Commercial Bank of Canada* v. *Great Western R. W. Co.*, 22 Q. B. 233.

The action being for goods sold, the question was the authority of one McA. to bind defendants, as their agent :—Held, that an affidavit made by McA., describing the nature of his agency, and filed by defendants on motion for a new trial in another suit brought by this plaintiff against them, was clearly admissible against defendants. *Thayer* v. *Street et al.*, 23 Q. B. 189.

Action upon a fire policy by A., the person insured, averring an assignment to B. & C., notified to defendants and endorsed on the policy, and an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. & C. of the goods insured was proved. An assignment was endorsed on the policy, purporting to be made by A. to B. and C., but signed by D., the agent of A., in his own name, and witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office in Montreal : that the secretary

there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that afterwards B. & C. paid an additional premium to M. to cover an increase of the risk:—Held, that this evidence was sufficient to sustain the issue for the plaintiffs:—Held, also, that the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants. *Ross et al.* v. *The Commercial Union Assurance Co.*, 26 Q. B. 559.

After one trial, on which the jury failed to agree, defendants' solicitor wrote to the plaintiff to make them a proposition, "of course without prejudice, further than I will state in this letter." The defendants, he said, believed that the plaintiff was not injured at all; but if he would put himself under the care of three medical men named, at Montreal, for six months, of which they would pay all expenses, and if these gentlemen, or any two of them, would say they believed he was hurt, defendants would waive every other defence, although they thought they had good grounds for further defence, and would settle with him on such terms as might be agreed on, or as the three medical men would name. This offer, he added, was made by defendants intending to use it if refused, to shew their sincerity and the plaintiff's reluctance to submit to a fair test. This was declined, but a few days after, and after a jury had been sworn in the case, an agreement was entered into of substantially the same character. By it the the plaintiff, at defendants' expense, was to be placed for six months at Toronto under four medical men, and the defendants agreed that if they, or a majority of them, should agree that the plaintiff was injured at the time, by the means, and in the manner alleged by him, they would pay damages to be estimated as provided for. The medical men, however, failed to agree, and the case was again brought to trial. The defence was that the injury was either simulated or caused by the plaintiff's own negligence. The letter and agreement were admitted in evidence for the plaintiff, and the jury were told, that if in doubt as to the plaintiff having contributed to his own injury, they might consider the letter as evidence against defendants on that point. They found for the plaintiff, saying that they did not think him guilty of any neglect:—Held, that the letter and agreement were admissible, to shew, on the plaintiff's part, that he was claiming in good faith as he had proved by submitting to the test proposed; and that the defendants might have used them to shew under what circumstances and at whose expense the plaintiff had been under treatment:—Held, also, that it was no objection to their admission that they were matters arising since the action:—Held, also, that though the letter was expressed in the beginning to be without prejudice, yet as the defendants afterwards declared in it their intention to use it as evidence to shew the plaintiff's want of good faith, the plaintiff was entitled to shew it and the subsequent agreement to repel any such imputation:—Held, also, that the direction as to the effect of the letter was wrong, and was equivalent to admitting it as evidence of defendants' negligence; and that the verdict must therefore be set aside. Wilson, J., dissented, on the ground that the letter, under the circumstances, was admissible to shew either that the defendants had not good grounds of defence, notwithstanding what they asserted, otherwise they would not have waived them, or to shew that they had agreed not to waive them if the plaintiff would submit to the proposed test as he had done. *Clark* v. *Grand Trunk R. W. Co.*, 29 Q. B. 136.

The plaintiff produced a warrant issued for his arrest for not finding sureties to the peace, in pursuance of an order to that effect recited in the warrant:—Held, that such warrant was primâ facie evidence of the order. *Spring* v. *Anderson*, 23 C. P. 152.

Where in trover for goods, with a count for refusing to convey them, it appeared that the contract was made between the plaintiff and defendant for the sale by the latter to the former, but the land on which the works and machinery were was conveyed to the plaintiff's wife, whose property was conveyed to the defendant as part consideration:—Held, that the plaintiff, and not his wife, was the proper person to sue. Held also, that the acts or admissions of the plaintiff were clearly admissible in evidence. *Fiselin* v. *Hogg*, 35 Q. B. 94.

5. *Accounts Rendered.*

The plaintiff is not bound by credits given by him in account on the mere statement of the defendant, but may reject such credits unless defendant can shew that they ought to be allowed. *Gordon* v. *Fuller*, 5 O. S. 576.

The rendering of an account by the plaintiff's attorney in this province, (the plaintiffs residing abroad) is not binding finally on the plaintiffs as to the mode of calculation; and even the plaintiffs themselves incorrectly stating an account may have it legally adjusted at any time before a final settlement. *McGregor et al.* v. *Gault et al.*, 4 Q. B. 378.

In an action for not delivering the proper quality of oil agreed for:—Held, that defendants' account rendered to the plaintiffs after the delivery, for 6,000 gallons of rock oil, was clearly evidence, as an admission by them of what it was they professed to sell. *Edgar et al.* v. *The Canadian Oil Co.*, 23 Q. B. 333.

Plaintiffs, being commission merchants in N. Y., received from defendants a quantity of wheat with instructions to ship it to L. for sale there, not limiting them as to price, nor directing the employment of any particular agent; and they made advances upon it, which as they alleged exceeded the net proceeds of the sales, one cargo having realized more than the advances, the other two cargoes much less. In an action for the excess thus advanced, the plaintiffs proved that they had mailed to defendant the account sales received by them from their L. agents, with an account between plaintiffs and defendants founded upon them, and that these account sales were afterwards seen in his possession; and evidence was given that the wheat was in a bad condition when shipped, as defendant knew; that the prices realized were what might have been expected, and the charges such as were usual. It appeared, also, that part of the wheat belonged to one J., and that on receiving the first account sales shewing a profit

the defendant had settled with him. This cargo, however, had not been consigned to the same agents as the other two. The jury having found for the plaintiffs:—Held, that the evidence was not sufficient to shew the price for which the wheat was sold, nor the amount of charges connected with the sales; and a new trial was therefore granted, with costs to abide the event. *Craig* v. *Corcoran*, 23 Q. B. 441.

6. *Admission of Deeds or Title.*

The defendants' attorney being the subscribing witness to certain deeds, was asked before the trial by the plaintiff's attorney to admit their execution. He said that he would do so in the box, but insisted on being called. While the jury were being called for the trial he went out of court, and did not return:—Held, that the deeds could not be received as proved on evidence of such agreement to admit; and, Quære, whether it would have been sufficient to warrant the reception of proof of the witness's handwriting. *Doe* d. *Wilkins* v. *Moore et al.*, 9 Q. B. 445.

Where defendant's attorney had agreed, in ejectment, to admit deeds by the production of memorials without accounting for the deeds, and to admit the execution of such deeds as the plaintiff might produce, without proof by a subscribing witness:—Held, that it could not be objected that a memorial signed by the grantee was no evidence of the deed. *Rutledge* v. *McLean*, 12 Q. B. 205.

In ejectment, the point in dispute being whether T. R., one of the plaintiffs, had ever conveyed the land to one J. R., deceased, (under whom defendant derived title,) evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., or that the title was vested in J. R., and a letter from T. R. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—Held, that such evidence, under the circumstances, was admissible on the part of defendants, as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Rogers et al.* v. *Card*, 7 C. P. 89.

The third trial of an action of ejectment was put off upon payment of costs, "also on the condition of the defendant admitting on any future trial of this cause the title of the lessor of the plaintiff to the premises mentioned in the declaration, and the right to recover primâ facie, unless he shew a superior title to hers on the trial thereof, or any title or defence to defeat the same at law," &c. At the next trial the plaintiff refused to produce the patent, or admit the issuing or date of it, so that defendant was unable to go into his defence under the Statute of Limitations:—Held, that the plaintiff was entitled to take this course, for the effect of the order was to dispense with any proof or production of title on his part, not merely to oblige the defendant to admit such title when produced. McLean, J., diss. *Doe* d. *Shepherd* v. *Bayley*, 25 Q. B. 460.

The evidence shewed that A. B., the ancestor of the female plaintiff, through whom the title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., to son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B., before his death, told a witness examined at the trial he had got this deed, which he shewed to witness:—Held, sufficient evidence of a deed in fee to A. B. *Steinhoff* v. *Burtch*, 17 C. P. 160.

An admission of the execution of the mortgage was held clearly to include the signature to the receipt, and the receipt of the money as there stated. *McDonald* v. *Clarke*, 30 Q. B. 307.

7. *Other Cases.*

The admissions of the holder of an overdue note are admissible, without calling him, against a person suing upon the note, to whom he has subsequently transferred it. *Myers* v. *Cornell*, 2 Q. B. 279.

A., defendant's attorney, accepting his instructions from B. as defendant's agent, and defending under them, is bound by the admissions B. has agreed to make. *Doe* d. *McDonald* v. *Long*, 4 Q. B. 146.

Though the making or endorsing a note may be put in issue by the pleadings, the plaintiff, to entitle himself to the costs of proof, must serve the defendant under our rule of court with a summons to admit. *Wakefield* v. *Lane*, 1 C. L. Chamb. 181.—Macaulay.

On a motion to admit, no summons can be taken out until the expiration of forty-eight hours from the time specified in the notice for an inspection of the documents. *Cary* v. *Cumberland*, 1 P. R. 140.—C. L. Chamb.—Burns.

Before a party can tax the costs of obtaining an exemplification of judgment, he must serve the other side with a notice to admit under the rule of court, 28 E. T. 1842. The master, however, though he cannot allow such costs without notice, &c., may allow the costs of procuring a copy of the roll. *Conger* v. *McKechnie*, 1 C. L. Chamb. 220.—Burns.

Summons calling on defendants to admit documents discharged, as the C. L. P. Act, does away with summonses to admit and orders upon them. *Da Costa* v. *The Jordan Estate*, 2 L. J. 211.—C. L. Chamb.—Burns.

The proof by the plaintiff of an admission by a constable, sued in trespass with two justices, that a paper produced at the trial was a copy of the warrant under which he acted, is not sufficient evidence as against the justices to entitle the constable to an acquittal under 24 Geo. II. c. 44, s. 6. *Kalar* v. *Cornwall*, 8 Q. B. 168.

On the 9th January plaintiff's attorney sent a fi. fa., in Robinson *v.* Banks, to the sheriff, with a letter saying that they wished to get at two shares of certain building society stock standing in the name of B. and his wife, and which, though standing in their name in a representative capacity, were nevertheless the property of the wife, and therefore of the defendant. In an action against him for false return of nulla bona to this writ: Per McLean, J., evidence that B.

and his wife spoke of these shares as their own was inadmissible in this action against the sheriff, even as prima facie evidence of ownership, and so also were answers on oath by B. to interrogatories. *Robinson* v. *Grange*, 18 Q. B. 260.

On the trial of an interpleader issue, defendants offered in evidence a letter from the judgment debtor to them, which was rejected: Held, that as it appeared from the evidence that the plaintiff allowed the judgment debtor to make other declarations with respect to the property, it might be presumed that he permitted him to make those contained in the letter, which was offered in evidence and rejected; and that there being such a foundation laid at the trial as shewed prima facie a joint interest, or an interest of some kind, between the plaintiff and the judgment debtor with regard to the goods in question, the letter was admissible as evidence. *Harmden* v. *Bank of Toronto*, 14 C. P. 496.

Held, in an action for collision, that evidence of declarations made by the captain of defendants' vessel, as to the cause of the accident, on the day after it had happened, were inadmissible for the plaintiff; but that the verdict should not be interfered with for their reception, as they appeared to have been only repetitions of what was said by him at the time of the accident. *Shaw* v. *DeSalaberry Navigation Co.*, 18 Q. B. 541.

Quære, whether the admission of one joint tenant or tenant in common, as to the extent of the interest held by him and his co-tenants, is admissible as evidence against his co-tenants. *Bernard* v. *Walker*, 2 E. & A. 121.

In an action by plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was defendant's agent:—Held, that the statements made by L. & M., under the circumstances set out in this case, were properly received. Held, also, that a memorandum in defendant's writing, unsigned, and attached to a bill of sale relating to the lumber, was admissible. *Stewart* v. *Scott*, 27 Q. B. 27.

Letters are admissible as evidence of the case of the party producing them, though they are not mentioned in the pleadings. *Wilmott* v. *Boulton*, 1 Chy. 479.

The admission of one partner, that a third person was jointly interested with himself and his co-partners, is not evidence against the latter to prove such joint interest. *Carfrae* v. *Vanbuskirk*, 1 Chy. 539.

Where to let in secondary evidence of a bond the attorney of the obligor was called, and upon being shewn letters written by himself in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of these instruments, although he had no doubt from reading the letters that such bond existed, the court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the res gestæ. *Clarke* v. *Little*, 5 Chy. 363.

There may, in a proper case, be an appeal from the master's ruling as to the inadmissibility of evidence, before the master makes his report. A bill was filed by A. and B. to enforce certain registered judgments. B.'s interest was as assignee of A. The assignment was for the [illegible] of creditors, but it did not appear that [illegible] creditor was party or privy to the [illegible] and the assignee had sworn in one of the affidavits filed, that his only interest was [illegible] for A.:—Held, that any evidence [illegible] against A. was admissible against both plaintiffs. *M[illegible] Wright*, 12 Chy. 552.

In an administration suit the only [illegible] receipt of certain moneys by the wife during life of her husband, was her own evidence, who at the same time she stated that the money had been given to her by her husband. The [illegible] considered her entitled to retain the amount and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Chy. [illegible]

III. Presumptions.

1. *As to Deeds.*

(a) *Generally.*

Of Conveyance.]—A lessee of the crown verbally assigned his lease to B., who paid him for it and went into possession, and after some years died in possession, having received the original lease from A. A. afterwards died, and his administrator brought ejectment against B.'s administrator. At the trial the lessor of the plaintiff put in an exemplification of the original lease and letters of administration. The defendant proved as above, and that after B.'s death the lease and other papers had been taken out of B.'s trunk, and the lessor of the plaintiff had since stated it was in his possession. The lease was not produced on notice, but the lessor of the plaintiff produced it after defendant's case closed.

Held, that the jury were justified in presuming a legal assignment of the lease under the circumstances. *Doe* d. *Murphy* v. *Mulholland*, 2 O. S. 115.

When the husband of a woman seized of land in her own right, during the coverture signed a writing (not sealed) acknowledging that he had bargained and sold certain lands, and been paid in full for them, and afterwards by letter directed his name to be signed to a deed of the same land, which was done, the wife not complying with the requisites of the statute to depart with her estate, and the vendee entered and continued in possession as owner upwards of twenty years:—Held, that a jury, in ejectment brought by such husband, might presume a conveyance from him; and that, during his life at least, no ejectment could be sustained to dispossess the vendee or those claiming under him. *Doe* [illegible] *Wilson et ux.* v. *Wessells*, 5 O. S. 282.

In ejectment the plaintiff proved a patent to himself, which had been in his possession since 1803. Defendant claimed under a deed from A. to B., executed in 1806. A. was not shewn to have been in possession, and no deed from the plaintiff to A. was produced, nor any evidence given that he had ever executed such a deed; the facts proved only went to shew a bare probability that he might have done so:—Held, that there was no legal evidence for the jury, on the facts stated, to shew an alienation by the patentee. *Doe* d. *Petit* v. *Renard*, 6 Q. B. 501.

The plaintiff claimed under deeds from A. to S. in 1834, and from S. to plaintiff in 1843. [illegible]

1829 A. had made a deed to his step-mother, intended to be in lieu of dower in his father's lands. It was clear that his intention was to convey by this last deed the west part of the lot, but the deed was of the east part. It was proved however, that S. had been in possession of the west part in 1829, and that he and the plaintiff had held it ever since:—Held, that a conveyance from A. to the plaintiff, in confirmation of this long possession, could not be presumed, for such a conveyance would be inconsistent with what was done in 1834. *White* v. *Myers*, 10 Q. B. 574.

A., being the nominee of the crown, transferred his certificate to B. in 1796, who soon after, by writing not under seal, contracted to sell to C. It was not shewn whether C. had made the payments specified by his agreement, but he went into possession, and he and his descendants had held uninterruptedly for more than fifty years. The defendant claimed under them. In 1837, a patent first issued to A., whose heir brought ejectment. It was left to the jury to presume a grant made by A. before the patent, but they found for the plaintiff, and the court refused to set aside the verdict. *McDonald* v. *Prentiss*, 14 Q. B. 79.

Ejectment. The plaintiff claimed under the grandson and heir-at-law of the patentee, F. D.; defendant under his second son, D., to whom it was alleged that he had conveyed. The patent was for 1,200 acres, including the land in question. The heir-at-law, who conveyed to the plaintiffs, was living in the state of Michigan, and appeared to have believed he had no title when the plaintiffs purchased his right from him for a small consideration. For the defendant it was proved that it was always understood in the family of the patentee that D. owned this land; that D. had lent his father money, who had been heard to say that he had given him this land for the debt, if he could not pay; that he afterwards said he could not; and he and D. went together to the land, that his father might put him in possession; and on their return, the father was relieved from the debt, he having given D. the land. This was before 1812. The eldest son of the patentee had never set up any claim, knowing, as his brother swore, that D. owned the land. D. devised this, with other land, among his children, who by partition conveyed it to one of them, J., who afterwards conveyed to his brother R., R. died, and his land was sold under a judgment, obtained against C., his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to the defendant; C. and her second husband, M., first went to the land in 1836, and defendant and his father had held it since. The plaintiffs had also taken a conveyance from the heirs of D.:—Held, Burns, J., dissenting, that there was sufficient evidence for the jury to presume a conveyance by the patentee, and that having found for the defendant, their verdict should not be disturbed. *Doyles et al.* v. *Maxwell*, 17 Q. B. 173.

In ejectment it appeared that the patent issued to one G. in 1802. No conveyance from the patentee to H., through whom defendant claimed title, was produced or proved; but one of the patentee's grandchildren proved that shortly before 1812 H. came to his father's and informed him that the patentee had executed such a deed, and it had always been so understood in the family. It was also proved that until the present suit, the patentee's family, though living close to the lot, had never made any claim to it: that in 1813 H. had assumed to deal with the property as his own by conveying a portion of it to one S., which deed was registered in 1816, who subsequently conveyed with full covenants for title: that in 1835 H.'s son and heir-at-law conveyed the land in question with full covenants, under which possession has ever since followed; and that the patent was found among H.'s papers:—Held, that this was sufficient evidence from which a deed from the patentee to H. might be presumed. *Hill* v. *Long et al.*, 25 C. P. 265.

The eldest son and heir at-law of a person who had in his lifetime agreed for the purchase of land from the Canada Company, left this country without in any manner attempting to complete the purchase. The other children of the purchaser paid the balance of the purchase money due on the land, and sold it in portions to three several purchasers. In a suit brought in the name of the several purchasers against their vendors and the Canada Company, it appeared that the heir-at-law had not been heard of for upwards of twenty-five years. The court, under the circumstances, ordered the conveyance of the several portions to the purchasers, without requiring any administration of the estate of the heir-at-law, the Canada Company not objecting thereto. *Burns* v. *The Canada Company*, 7 Chy. 587.

Quære, as to whether the presumption that a man is innocent of fraud until proved guilty, is sufficient to rebut the presumption of the execution of a fraudulent deed raised by the proof of the handwriting of an attesting witness. *Rogers* v. *Shortis*, 10 Chy. 243.

Of Re-conveyance.]—A. mortgaged lands in fee to B., and before the time for redemption expired, on an arrangement with B., A. conveyed these same lands in fee to C., in full satisfaction of the debt secured by mortgage. No re-conveyance from B. to A. was proved. C. went into possession and continually held for about thirteen years, when B. made a conveyance in fee of the same premises to D., claiming the title through this mortgage:—Held, that D. was not entitled to recover in ejectment, and that if necessary a re-conveyance from B. to A. might be presumed. *Doe* d. *McLean* v. *Whitesides*, 5 O. S. 92.

When a mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time of the payment of the mortgage money. *Doe* d. *McGregor* v. *Hawke*, 5 O. S. 496.

Semble, that a certificate of a registrar of the discharge of a mortgage, endorsed on the mortgage, is sufficient evidence of a re-conveyance, without proof of the execution of the discharge itself. *Doe* d. *Crookshank* v. *Humberstone*, 6 O. S. 103.

Where interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently that the mortgagee has no subsisting title. *Doe* d. *Dunlop* v. *McNab*, 5 Q. B. 289.

Plaintiff purchased at sheriff's sale defendant's interest in certain lands, and, on ejectment brought in 1856, defendant produced a mortgage executed by one B., under whom he had gone into possession, to secure repayment of £28 in October, 1846. This mortgage had been satisfied, as was proved by the mortgagee, but no discharge had been registered :—Held, that the jury should have been directed, as a matter of course, to presume a reconveyance, and the plaintiff should recover. *Collins* v. *Dempsey*, 14 Q. B. 393.

In ejectment, it appeared that A. in 1839, conveyed to his son N., who devised to the plaintiff. For the defendant, it was proved that in 1823 A. had made a deed to another son, I., which was produced with the seals torn off, and had been found among A.'s papers after his death. A few years after this deed was given, I. had removed from that part of the country, leaving A. in possession. He, I., died in 1830, never having made any claim, and A., in 1838, and his son N., in 1841, both died in possession. In 1847, I.'s son brought ejectment against N.'s widow, this plaintiff being then an infant, but the suit was compromised. The jury were directed that if the deed to I. was voluntary, or, being made for good consideration, was cancelled by his consent before the conveyance to N., the plaintiff should recover; and they found in his favour :—Held, that the mere cancelling of the deed by I., or with his consent, would not divest him of the estate, but that if I. gave up and cancelled the deed intending to surrender the estate, and his father afterwards entered and conveyed to N., and that possession was held consistently with these facts till 1847, the jury might presume a re-conveyance by I., in pursuance of his intention. *Fraser* v. *Fralick and Fraser*, 21 Q. B. 343.

Other Cases.]—In ejectment the plaintiff proved a paper title, but the patent did not issue until 1826, and the deed from the patentee was executed in 1824. This deed was lost, and the memorial of it shewed it to have been an ordinary conveyance in fee, but not what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title :—Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little et al.*, 20 Q. B. 425.

Possession is evidence of livery of seisin of land; and where possession goes with a deed for upwards of thirty years, seisin may well be presumed. *Nolan* v. *Fox*, 15 C. P. 565.

By a deed dated 27th March, 1824, one J. S. leased land to H. T. to hold from the *thirtieth day of the same month*, until her decease :—Held, that though under the authorities, it might, if executed and livery of seisin given on the day it bore date, be void, yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good. *Ib.*

Semble, that the jury might properly have been asked under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

Held, that the word "signed" before the lessor's name to a lease raised no presumption that the instrument was a copy, not the original. *Becher* v. *Woods*, 16 C. P. 29.

Defendant produced a deed, upwards of thirty-one years old, with such certificate thereon, from plaintiff and her husband to the devisor of defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period :—Held, following *Osser* v. *Vernon*, 14 C. P. 573, that the deed with the certificate upon it, coming from the proper custody, proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed produced had been properly executed, and that every thing done by the justices, as public officers, had been rightly done until the contrary was shewn. *Monk* v. *Farlinger*, 17 C. P. 41.

A witness testified that A. B. leased the land to B. for five years: that both parties had informed him of this: that B. went into possession and told him he was a tenant to A. B., and that he remained on the land until the fall of 1843: that W. B. moved on and lived there with B.; and that both said the former had bought out the balance of the latter's term: that he heard of both having gone to one L. to have the lease signed, and W. B. said they had been there to get the "writings" signed. Another witness, the second wife of A. B., stated that he had a lease for five years from March, 1843, at a certain rental, and that B. and her husband had both told her the terms of it. A third witness, the wife of B., said that her husband and she moved on to the land in 1843, under a lease from A. B. her father, for five years, and that her husband lived there for several months when he sold out to W. B. :—Held, sufficient evidence to warrant a jury in presuming a written lease for five years from March, 1843. *Shuttleworth et ux.* v. *Burtch*, 17 C. P. 160.

A deed is presumed to have been delivered on the day it bears date. *Hayward* v. *Thacker et al.*, 31 Q. B. 427.

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3. *From Non-production of Books or Accounts.*

If a party withhold from inspection a book containing entries relating to the matters in question in the cause, on the ground that it is private, it will be taken to contain evidence unfavourable to himself. *Lowell* v. *Todd et al.*, 16 C. P. 306.

Where all the accounts and records of an election are intentionally destroyed by the respondent's agent, even if the cause be stripped of all other circumstances, the strongest conclusions will be drawn against the respondent, and every presumption will be made against the legality of the acts concealed by such conduct. *County of Grey, South Riding Election, Hunter* v. *Lauder*, 8 L. J. N. S. 17.—E. C.—Mowat.

On an information under 27 & 28 Vict. c. against defendant as a distiller for the non-payment of duty on spirits manufactured by him: Held, that the jury were rightly told that defendant's non-production, upon notice, of books, which he was proved to have kept, furnished ground for strong presumption against him. *Attorney-General* v. *Halliday*, 26 Q. 397.

4. *As to Death.*

It was proved at the trial in 1847, that A. was last seen in the province in December, 1827, and was never afterwards heard of. A fi. fa. against A.'s lands was placed in the sheriff's hands on the 13th July, 1833, tested the 29th June, 1833. The heir of A. brought ejectment against the purchaser at the sheriff's sale, under an execution against A., and attempted to recover upon the ground that, after 22 years had elapsed since A. was last heard of, the presumption that he did not die till the expiration of the seventh year was at an end: that defendant must shew that he did not die till after the seventh year; and that the jury should be directed to find whether he did or did not die within the seven years; but, Held, the proper direction was that at the end of seven years the fact of death was to be presumed, and not sooner, unless there was some evidence affecting the probability of life continuing so long, and also that the plaintiff, not the defendant, must shew when A. died. *Doe* d. *Hagerman* v. *Strong et al.*, 4 Q. B. 510; affirmed in 8 Q. B. 291.

See *Doe* d. *Arnold* v. *Auldjo*, 5 Q. B. 171, p. 197.

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5. *Arising from Official Appointments and Acts.*

In an action against a sheriff for seizing and taking goods, it is sufficient to prove that the deputy sheriff seized them colore officii, without proving the writ of execution, or giving other evidence of his being deputy sheriff than that of general reputation. *Holt* v. *Jarvis*, Dra. 190.

To prove payment of taxes it is not necessary to shew that the collector was duly appointed; it is sufficient to shew that he acted and was acknowledged as such. *Smith* v. *Redford*, 12 Chy. 316.

On an application for a mandamus to open a highway alleged to have been established by the sessions in 1839, under 50 Geo. III. c. 1, a surveyor's report, dated 5th July, 1839, that he had laid out the road, was produced from the clerk of the peace, on which was an endorsement not dated, "Allowed, I. F., Chairman Quarter Sessions, M.D." but that report bore no date of filing or entry, and there was no entry in the minutes of the July or October sessions of any order referring to this report:—Held, that the application must fail for want of proof that the report was filed or presented to the sessions next after its date or the road ordered to be opened. Semble, that if there had been a minute in the proceedings of the next sessions that the report was presented, and the road ordered to be opened, the court would presume that the sessions had done all that was necessary to warrant such an entry or minute. Semble, also, that a minute of the allowance of the report, omitting to shew that the road was ordered to be opened, would not be sufficient. *In re Lawrence and the Corporation of the Township of Thurlow*, 33 Q. B. 223.

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6. *Other Cases.*

Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an expired crown lease, sold as belonging to B. by assignment:—Held, that after proof of the exemplification of the lease, the judgment, fi. fa. and sheriff's deed, a notice to produce the original lease and assignment, without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B.; and that as A. shewed no title, nor that he had ever been in possession, the same presumption should be made in favour of the purchaser as if he had been left to contend with the debtor himself. *Doe* d. *McGuire* v. *Dennis*, 2 O. S. 589.

A foreign post mark on a letter, is primâ facie evidence of the time when the letter was mailed. *O'Neill* v. *Perrin*, M. T. 3 Vict.

The principle that the later items of an account draw the others after them, and thus save all from the Statute of Limitations, does not apply when quarterly payments, (e. g. for rent or tuition), are made and received as for a late specific and independent quarter, due at the time of payment, unmixed with items for any earlier quarter. The presumption in such a case is, unless the contrary be shewn to be the fact, that the earlier quarters have been all paid and satisfied. *King's College* v. *McDougall*, 5 Q. B. 315.

The Provincial Statute, 1 Will. IV. c. 26, vesting in a trustee certain lands as belonging to the estate of the late St. G., has not the effect of raising a presumption of title in the particular lands enumerated in the schedule, so as to relieve his trustee from the necessity of shewing title in the first instance. *Doe* d. *Baldwin* v. *Stone*, 5 Q. B. 388.

There is no presumption that goods sold in one year continue the property of the vendee when afterwards found in the possession of a third party as owner; and the sheriff may shew that they belonged to such third party. *Kissock* v. *Jarvis*, 9 C. P. 156.

On an indictment against defendant, as a citizen of the United States, for entering this province with intent to levy war against Her Majesty:—Held, that the fact of the invaders coming from the United States, would be primâ facie evidence of their being citizens or subjects thereof. *Regina* v. *Lynch*, 26 Q. B. 208.

The word "signed," before the lessor's name, raises no presumption that the instrument is a copy, not the original. *Becher* v. *Woods*, 16 C. P. 29.

In an action against defendant, who was a married man, for persuading the plaintiff to go through a pretended marriage ceremony, and afterwards to cohabit with him:—Held, that the presumption of innocence, that the defendant had not been guilty of a crime, was an answer to any presumption of a marriage ceremony to be drawn from the cohabitation proved. *Wright* v. *Skinner*, 17 C. P. 317.

Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge. *Sweeney* v. *President, &c., of Port Burwell Harbour*, 17 C. P. 574. See, also, *London Election Case*, 24 C. P. 434.

Ejectment. In 1821 J. S., with his son S., and his daughter H., (who afterwards married M., a British subject,) came from the United States, and settled in Canada, all being aliens. On the 20th March, 1821, the crown granted the

land in question to J. S. Neither J. S. nor his children ever took the oath of allegiance. J. S. died on the 17th May, 1828, and S. about the 6th November, 1842:—Held, that under the Alien Act of 1828, assented to on 10th May, 1828, J. S. was a British subject, for it might be presumed that he took the oath when he got the patent. *Iler* v. *Elliott et al.*, 32 Q. B. 434.

If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes personally at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court, holding that the presumption in case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Cameron* v. *Barnhart*, 14 Chy. 661.

The customer of a bank created a mortgage in its favour by the deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid off; the officer of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum endorsed at the time of the deposit on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Chy. 627.

IV. Privileged Communications.

1. *Attorneys and Solicitors.*

A communication made to an attorney in his professional character is privileged, although no suit concerning the subject matter be pending or contemplated. *Battersby* v. *Haycock*, E. T. 2 Vict.

An attorney is an admissible witness to prove by whom he was employed to sue out a bailable writ. *Beamer* v. *Darling*, 4 Q. B. 249.

An attorney is not obliged to answer as to the contents of deeds, &c., placed in his hands by a defendant for the purposes of his defence. *Lynch* v. *O'Hara*, 6 C. P. 259.

The defendant's counsel at the trial desired to ask the plaintiff's attorney what his client told him about the note sued upon when he gave instructions for the suit:—Held, that such evidence was rightly rejected. *Harris* v. *McLeod et al.*, 14 Q. B. 164.

A solicitor, when questioned as a witness with regard to matters involving his client's interests, should decline to answer unless directed or at least permitted by the court; and where a different course was taken:—Held, on motion for new trial, that it might be deemed a surprise upon the client, and a new trial was granted with costs to abide the event. *Livingstone et al.* v. *Gartshore*, 23 Q. B. 166.

Where a defendant desired her attorney to adopt a certain course in reference to a writ in the hands of the sheriff, which course was accordingly pursued:—Held, that this was not a privileged communication. *Walton* v. *Bernard*, 2 Chy. 344.

The communications from a debtor to his solicitor as to a compromise, which the debtor desired his solicitor to effect with his creditors, and on which communications the solicitor acted, and at length effected the compromise, are not privileged, and the solicitor's evidence of them is admissible. *Fraser* v. *Sutherland*, 2 Chy. 442.

In a case between vendor and purchaser, where a defendant refused to produce a certain letter on the grounds, "that the same is and contains an opinion from the said M., who was then acting as my counsel and solicitor in the matter of the purchase of the lands and premises, upon my title to the said lands and premisses, and because the same is a communication between myself and my solicitor, relative to my said title:"—Held, to be a privileged communication. *Wilson* v. *Brunskill*, 2 Chy. Chamb. 137.—Taylor, Secretary.

A defendant, one of the members of the firm of G. & C., when proving a claim in the master's office, was called on to produce "all the letters to or from Mr. L. (his solicitor), in reference to the questions involved in the proceeding, in proving the claim of G. & C., excepting such as passed in contemplation of G. & C. proving their claim in the present suit:"—Held, that he was bound to do so. *Macdonald* v. *Putman*, 11 Chy. 258.

The distinction between the protection afforded to solicitors and clients, respectively, with regard to communications made pending or in anticipation of litigation, pointed out. *Ib.*

Communications between solicitor and client are privileged, no matter at what time made, so long as they are professional and made in a professional character. Macdonald *v.* Putman, 11 Chy. 258, not followed. *Hamelyn* v. *White*, 5 P. R. 143.—Chy. Chamb.—Strong.

The following clause, in an affidavit on production, was held a sufficient statement of the nature of the document produced:—"I object to produce the documents set forth in the second part of the first schedule, on the ground that being communications between solicitor and client, they are privileged." *Ib.*

A County Court judge being served with a subpœna duces tecum to produce a deed, did not attend, and, on motion for an attachment, excused his absence on the ground, amongst others, that he obtained the deed and became possessed of the information as an attorney:—Held, that he should have attended; and the rule was made absolute, but the writ of attachment was directed not to issue for a month, and then only in case he should not have paid the costs of the application. *Deadman* v. *Ewen*, 27 Q. B. 176.

V. Attendance of Witnesses.

1. *Notice to parties to suit to attend trial as witnesses for the opposite party, under 16 Vict. c. 19, s. 2, (C. S. U. C. c. 32, s. 15.)*

[*This is superseded by the 33 Vict. c. 13, O., by which the parties to a suit are made competent witnesses on their own behalf.*]

Held, no ground for setting aside a verdict for plaintiffs that one of the plaintiffs notified to attend by defendant failed to attend, as he was not called for at the trial—defendant's counsel being also absent. *Pegg et al.* v. *Plank*, 3 C. P. 296.

A defendant notified failed to attend, and a verdict pro confesso was taken against him, the judge declining to hear evidence in support of the plea. Quære, whether the evidence should not have been received; and whether the court have power under this statute to review the decision of the judge at Nisi Prius. *McGann* v. *Jones*, 12 Q. B. 429.

The defendant having failed to attend on notice:—Held, that no attention should be given to his affidavit impeaching the correctness of the verdict. *Manning* v. *Mills*, 12 Q. B. 515.

A proper sum for his expenses should be tendered to the party with the notice. *Street* v. *Faulkner*, 15 Q. B. 116.

Parties resident out of the jurisdiction could not be compelled to attend on notice. *Patchin* v. *Jones*, 10 Q. B. 639; *Tyre* v. *Wilkes*, 18 Q. B. 46.

A notice to attend served on the 25th of October for the 1st of November, was too late, not being "at least eight days." *Young* v. *O'Reilly*, 10 Q. B. 172.

A corporation aggregate was not bound to appear at the trial as witness under a notice served on their attorney under 16 Vict. c. 19, s. 2. *School Trustees of School Section No. 2 of Township of Dunwich* v. *McBeath*, 4 C. P. 228.

Held, that under the facts stated in this case, a whole case might have been taken pro confesso for defendant's non-appearance, and a verdict entered for the plaintiff, which the learned judge had declined to do. *McWhinney* v. *McQuaid*, 5 C. P. 161.

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2. *Process.*

(a) *For Service out of Ontario.*

Quære, whether s. 4 of C. S. C. c. 79, authorizing the issue of a subpœna to Lower Canada, applies to a party to the suit. Semble, not as 16 V. C. c. 32, s. 16, apparently contemplates examination in such case. *Young* v. *O'Reilly*, 10 Q. B. 172. But

Held, that looking at the object of the act and the propriety of its application to the examination of parties, the term "witness" in sec. 4 could be used in its widest sense, and should include parties to the cause as well as witnesses in the ordinary sense of the word. *Moffatt* v. *Police*, 9 L. J. N. S. 159.—Spragge, on appeal from Holmested, *Referee*.

The plaintiff in a bill of discovery was out of the jurisdiction, and defendant having answered had obtained the usual order for payment of his costs, but in consequence of the plaintiff's neglect to comply with it the defendant was obliged to take out a subpœna, and apply to the court for leave to serve the plaintiff out of the jurisdiction; the court gave defendant such leave, and directed the plaintiff to pay the costs of the motion. *Peel* v. *Kingsmill*, 2 Chy. 272.

Where, between the time of obtaining an order for service out of the jurisdiction and the service, the name of a town (before the mayor of which the affidavit of service was directed to be made) had been changed, a certificate of the town clerk sealed with the corporate seal of the town, under its new name, was received as proof of the fact of such change having taken place. *Rolph* v. *Cahoon*, 2 Chy. 623.

The court has authority to grant an order for a subpœna to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause. *McKerchie* v. *Montgomery*, 1 Chy. Chamb. 225.—Spragge.

A *defendant* asking for an order for a subpœna to examine a *plaintiff* resident in Lower Canada, need not shew that there is no cause of action for the same matter pending in Lower Canada. *Daly* v. *Robinson*, 1 Chy. Chamb. 271.—Van-Koughnet.

Before a subpœna will be issued to the province of Quebec, it is necessary to shew that no suit is pending in that province for the same cause of action. *McPherson* v. *McPherson*, 3 Chy. Chamb. 58.—Taylor, *Secretary*.

A plaintiff desirous of obtaining the evidence of a defendant who resided out of the jurisdiction and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpœna on the solicitor, and that if default was made in attending, the bill might be taken pro confesso. The application was refused with costs. *Sefton* v. *Lundy*, 4 Chy. Chamb. 33.—Taylor, *Referee*.

(b) *Other Cases.*

It is not necessary that there should be fifteen days between the teste and return of a subpœna on a criminal information, where the venue is laid in the home district. *Regina* v. *Crooks*, E. T. 3 Vict.

B. having been served at Niagara with a subpœna tested 22nd May, issued by the clerk of Assize, to attend on the 6th of the same month, at the Assizes then sitting at Toronto:—Held, 1. That the subpœna was invalid on its face; and, 2. That a subpœna issued by the court of Nisi Prius, which is of local jurisdiction, is not binding out of the county where such court is then sitting. *Grantham* v. *Bishop*, 1 C. P. 237.

An ex parte order under rule 31 T. T., 1856, will be granted in the first instance, for a subpœna to the registrar of a surrogate court for the production of an original will, upon affidavit that said will is necessary to establish the case of a party applying, and that no notice has been given of his intention to use the probate or letters of administration cum test. annex. of same, and shewing good reason for not having

given or giving such notice. *Sladden* v. *Smith*, 2 L. J. 233.—C. L. Chamb.—Hagarty.

Held, that service of subpœnas made by one of the defendants could not be allowed on taxation, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion. *Ham et ux.* v. *Lasher et al.*, 24 Q. B. 357.

A subpœna should be under the seal of the court, and if under that of a deputy registrar, the witness is not bound to obey it. *Waddell* v. *McGinty*, 2 Chy. Chamb. 445.—Taylor, *Secretary*.

A subpœna should not be dated prior to the time at which the party taking out such subpœna, is entitled to examine the party or witness served. *McMurray* v. *Grand Trunk Railway Co.*, 3 Chy. Chamb. 130.—Mowat.

See V. 4, infra.

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3. *Fees of Witnesses.*

(a) *At Trials or Enquiries.*

Semble, that a returning officer whose conduct has been impeached is not entitled to his expenses as a witness before a committee of the house of assembly. *Blacklock* v. *McMartin*, Tay. 320.

Notice by plaintiff to revise taxation. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vict., and the master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries. *Ham et ux.* v. *Lasher et al.*, 24 Q. B. 357.

All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay. *Ib.*

Plaintiff having attended under defendant's notice without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendant's costs. *Ib.*

A witness appearing upon an order granted by the judge under sec. 10, sub-s. 4, of the Insolvent Act of 1864, is not bound to be sworn until his expenses are paid. *Worthington* v. *Taylor*, 10 L. J. 304.—C. C.—Logie.

The insolvent who appears by virtue of the same order, is not entitled to claim his expenses before being sworn, and he may be examined before as well as at or after the meeting mentioned in sub-s. 1 of s. 10. *Ib.*

A public officer in charge of documents for which he is responsible, and attending as a witness in his public capacity, and in relation to matters connected with his office, will be allowed professional witness fees of $4 a day. *In re Nelson*, 2 Chy. Chamb. 252.

See *Deadman* v. *Ewen*, 27 Q. B. 176, p. 1312.

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4. *Remedy for Non-attendance.*

See V. 2, p. 1309.

(a) *Attachment.*

An attachment for not obeying a subpœna was refused against a witness who resided twenty-five miles from the assize town, and had been subpœnaed only the day before the trial. *Fairclaim* d. *Thompson* v. *Putman*, M. T. 6 Will. IV.

When a witness is subpœnaed to attend on a particular day, and not from day to day, he cannot be attached if he were present on that day, but went away afterwards. *Rainville* v. *Powell*, 3 Q. B. 128.—P. C.—Hagerman.

The court in banc. cannot attach a witness disobeying a subpœna issued at Nisi Prius by the clerk of Assize. *Regina* v. *Kerr*, 3 Q. B. 247.

Quære, can the court at Nisi Prius punish a witness for contempt of its authority in disobeying a subpœna. *Ib.*

Where the affidavit of service did not state that the original subpœna had been shewn to the witness:—Held, that attachment would not lie, though the witness attended several days before the trial, and was paid. *The Corporation of East Nissouri* v. *Cogswell et al.*, 2 P. R. 385.—P. C.—Burns.

A County Court judge being served with a subpœna duces tecum to produce a deed, did not attend; and on motion for an attachment excused his absence on the ground of important private business, urging also that he obtained the deed and become possessed of the information as an attorney; that he had a lien on the deed, and that he was entitled to witness fees as an attorney:—Held, that he was not so entitled, and should have attended; and the rule was made absolute. *Deadman* v. *Ewen*, 27 Q. B. 176.

Where a party, plaintiff in a cause, had been served with a subpœna, dated before he was regularly liable to examination, a motion to commit him or dismiss his bill was refused, but without costs. *McMurray* v. *The Grand Trunk R. Co.*, 3 Chy. Chamb. 130.—Mowat.

(b) *Other Cases.*

On an application that a witness be ordered to attend before a master or examiner at his own expense, the evidence of his default should shew that he was duly subpœnaed; the certificate of the master or examiner that evidence of the service of the subpœna had been produced before him, will not be sufficient. *Waddle* v. *McGinty*, 2 Chy. Chamb. 442.—Taylor, *Secretary*.

The engagements of a witness, who was a senator of the Dominion and a member of the executive council, at his duties at Ottawa, where the senate was in session, was deemed sufficient excuse for not procuring his attendance, and good grounds for putting off the hearing. *Rees* v. *Attorney-General*, 2 Chy. Chamb. 385.—Taylor, *Secretary*.

A witness or a party is not obliged to attend and give evidence, or submit to cross-examination, except he be duly notified or subpœnaed, even if he happen to be present when the proceedings are going on. Where, therefore, a party to a suit who had made an affidavit was present in the master's office, and the solicitor for the opposite party proposed to cross-examine him on his affidavit, and he refused to answer, a motion ex parte to compel him to attend and be examined was refused. *Robins* v. *Carson*, 2 Chy. Chamb. 343.—Taylor, *Secretary*.

To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to an examination. *McMurray* v. *The Grand Trunk R. Co.*, 3 Chy. Chamb. 130.—Mowat.

The term "witness," in C. S. C. c. 79, s. 4, includes parties to the cause, as well as witnesses in the ordinary sense of the word. *Moffatt* v. *Prentice*, 6 P. R. 33.—Spragge, on appeal from Holmested, *Referee*.

Examination of a defendant after answer, under Order 138, is an examination of witnesses within this Act. *Ib.*

Application for an order under s. 4 of the Act is properly made to the referee in chambers. *Ib.*

VI. Competency of Witnesses.

1. *Parties to Suits or Proceedings.*

[*By 12 Vict. c. 70, all incapacity by reason of crime or interest was abolished; but parties to the suit were expressly excepted.*]

[*By 14 & 15 Vict. c. 66, they were rendered admissible as witnesses on their own behalf.*]

[*By 16 Vict. c. 19, this was repealed, and they were allowed to be called only as witnesses for the opposite party. This act was incorporated in C. S. U. C. c.* 32.]

[*By 33 Vict. c. 13, O., the law was again changed, and they are now competent witnesses on their own behalf.*]

(a) *Before 12 Vict. c. 70.*

The clerk of the commissioners of a turnpike trust, empowered to sue for tolls under 3 Vict. c. 36, is not a competent witness in the action. *Cummings* v. *Glassup et al.*, 1 Q. B. 364.

One defendant having deposed to a fact, which if proved by proper testimony would have tended to defeat the suit against all the defendants: Quære, whether his evidence is admissible on behalf of his co-defendants. *Simpson* v. *Smyth*, 1 E. & A. 9.

(b) *Under 14 & 15 Vict. c. 66.*

Held, that by the 14 & 15 Vict. c. 66, the parties to a suit are admissible on their own behalf. *Brennan* v. *Prentiss*, 9 Q. B. 372, dissenting from *Fuller* v. *Richmond*, 2 Chy. 509, in which it was held that they were not.

Notice had been given on a previous day of the Assizes, that parties to the record wishing to give evidence must not remain in court during the examination of the other witnesses; the judge rejected the evidence of a defendant for disobedience of such notice:—Held, that he had authority to do so. *Winter* v. *Mixer*, 10 Q. B. 110. But it was held otherwise in *Strachan* v. *Jones*, 3 C. P. 253, and in *Macfarlane* v. *Martin*, 3 C. P. 64.

[See now 34 Vict. c. 12, s. 9, O.]

In an action for dower by husband and wife,—Held, that the wife was a competent witness. *Cadman et ux.* v. *Strong*, 10 Q. B. 591.

(c) *Under 16 Vict. c. 19, (C. S. U. C. c. 32.)*

When a party to a suit calls the opposite party, he is not necessarily concluded by his answers. *Mair* v. *Culy et al.*, 10 Q. B. 321.

Where in an action for goods sold and delivered, plaintiff made out a primâ facie case through his clerk, who proved a delivery of the goods; and the promise to pay on request implied therefrom was repelled by defendant, who stated a special contract varying from that implied:—Held, that the plaintiff was admissible as a witness to reply to the new case set up by defendant, and Semble, he could not be excluded as a witness by reason of his presence in court during the examination of his clerk. *McFarlane* v. *Martin*, 3 C. P. 64.

A plaintiff or defendant called as a witness under 16 Vict. c. 19, is not entitled to any other notice or to be subpœnaed differently from any other witness. *Nash* v. *Bush*, 5 C. P. 300.

On the trial of a contested municipal election:—Held, that the evidence of the defendant and of the returning officer, was properly rejected. *Regina ex rel. Acheson* v. *Donoghue*, 15 Q. B. 454; *Regina et rel. McGregor* v. *Ker*, 7 L. J. 67.—C. L. Chamb.—Draper.

The affidavit of a relator in support of objections to an election may be sufficient to obtain the writ, but he is incompetent as a witness under 16 Vict. c. 19, s. 1; and therefore to establish the case at the trial, some other evidence is required. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—C. L. Chamb.—Robinson.

Action against three members of a municipal corporation:—Held, that one defendant who had suffered judgment by default could not be called on behalf of the others. *Municipality of East Nissouri* v. *Horseman*, 18 Q. B. 31. See, also, *Kerr* v. *Hereford et al.*, 17 Q. B. 158.

In an action on a bond against principal and sureties for the due performance by the principal of his duties as agent to the plaintiffs, alleging the non-payment of moneys received:—Held, that the principal was clearly a competent witness for the plaintiffs to prove the amount of his defalcation; and that on the authority of Lamb *v.* Ward, 18 Q. B. 304, his evidence for defendants on other points was rightly rejected. *The Mutual Fire Ins. Co. of Prescott* v. *Palmer et al.*, 20 Q. B. 441.

In dower the tenant was the only subscribing witness to a deed essential to his defence:—Held, that proof of the tenant's signature was not thereby rendered admissible to prove the deed. Hagarty, J., diss. *Clark* v. *Stevenson*, 23 Q. B. 525.

At the hearing of the cause evidence is not admissible by one defendant against another. *The Attorney-General* v. *The Toronto Street R. Co.*, 15 Chy. 187.

See also, *St. John* v. *Hisertt*, 5 L. J. 118.—C. C.—Campbell.

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2. *Husband and Wife.*

[*By the present law, 36 Vict. c. 10, O., the husbands and wives of the parties to any suit, &c.,*

and of the persons in whose behalf any such suit may be brought or defended, shall, except as in that Act excepted, be competent and compellable to give evidence on behalf of either or any of the parties to said suit, &c. But no husband or wife shall be compellable to disclose any communication made by either to the other during the marriage; and no husband or wife shall be competent or compellable to give evidence for or against the other in any proceeding instituted in consequence of adultery.]

For decisions under the previous law and statutes, see, *Lindsay* v. *The Bank of Montreal*, 13 Chy. 63; *Peterborough* v. *Conger*, 1 Chy. Chamb. 35; *VanNorman et ux.* v. *Hamilton*, 25 Q. B. 149; *Storey* v. *Veach et ux.*, *Anderson et ux.* v. *Walker*, *Thackeray et ux.* v. *Askin et al.*, 22 C. P. 164; *Toms et ux.* v. *The Corporation of the Township of Whitby*, 32 Q. B. 249.

In an action of dower by husband and wife:—Held, that the wife was a competent witness. *Cadman et ux.* v. *Strong*, 10 Q. B. 591.

Held, that under 35 Vict. c. 16, s. 1, O., a married woman can maintain an action for her wages earned whilst living with her husband, who as agent for the defendants employed her; and that her husband is a competent witness on her behalf. *McCaudy* v. *Tyer*, 24 C. P. 101.

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3. *Parties Interested.*

[*By 12 Vict. c. 70, all incompetency from interest was abolished. Provided that the act should not render competent the parties to the suit, &c., "or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part." The 14 & 15 Vict. c. 66, repealed this proviso, but that Act was repealed, and the proviso re-enacted, by 16 Vict. c. 19, which last Act was consolidated in the C. S. U. C. c. 32.*]

[*By the 33 Vict. c. 13, O., the provisions of the last Act are repealed, subject to the exceptions in sec. 5; and "no person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence."*]

(a) *Before 12 Vict. c. 70.*

[*It is thought unnecessary to do more than refer to these decisions, as they depend upon the common law, which the subsequent statutes have entirely changed.*]

See *Moffatt* v. *Loucks*, Tay. 305; *Bank of U. C.* v. *Widmer*, 2 O. S. 222; *Boyce* v. *Park*, 5 O. S. 508; *Doe* d. *Springsted* v. *Hopkins*, 5 O. S. 579; *Wilson* v. *Stevens*, 5 O. S. 321; *Hall* v. *Shannon*, E. T. 2 Vict. R. & H. Dig. p. 452; *Buffalo Bank* v. *Truscott*, M. T. 2 Vict. R. & H. Dig. p. 452; *Roy* v. *Hamilton*, 6 O. S. 285; *Bank of B. N. A.* v. *Holman*, 1 Q. B. 309; *Bank of Michigan* v. *Gray*, 1 Q. B. 422; *Robinson* v. *Rapelje*, 4 Q. B. 289; *Doe* d. *Park* v. *Henderson*, 7 Q. B. 182.

If a witness be objected to as interested, and on voir dire denies any interest, other witnesses may be called to prove that he is incompetent. *Thrasher* v. *Tulloch*, 5 O. S. 326.

If a witness be called for the plaintiff who is incompetent from interest, and be afterwards called for the defendant, the incompetency is cured. *Hall* v. *Shannon*, E. T. 2 Vict.

When a counsel upon stating to the jury the facts he himself could prove, was reminded by the judge that he could not act both as an advocate and a witness, and then immediately sat down, ceased to act as counsel, and gave evidence in the cause, the court would not sat aside the verdict. *Cameron* v. *Forsyth et al.*, 4 Q. B. 189.

(b) *Under 12 Vict c. 70, and 16 Vict. c. 19, (C. S. U. C. c. 32.)*

[*These decisions, chiefly turning upon the effect of the proviso before mentioned, are now obsolete, and it is sufficient to refer to the cases.*]

See *Doe* d. *McDonell* v. *Rattray*, 7 Q. B. 321; *White* v. *Wycott*, 1 C. P. 320; *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29; *Hitchcock* v. *Cronkite*, 15 Q. B. 157; *Bonner* v. *Moderwell*, 9 C. P. 504; *The Municipality of King* v. *Hughes*, 17 Q. B. 253; *McMullin* v. *Murdoff*, 19 Q. B. 506; *Regina ex rel. McGregor* v. *Ker*, 7 L. J. 67; *Johnstone* v. *Smith*, 10 C. P. 220; *Hutcheson* v. *Allen*, 9 L. J. 24; *Phelps* v. *Wilson*, 13 C. P. 38; *The Northern R. Co. of Canada* v. *Patton, et al.*, 15 C. P. 332; *German* v. *Elliott*, 2 L. J. N. S. 267; *Lalor* v. *Burrows*, 18 C. P. 321; *The Corporation of Burleigh* v. *Hales*, 27 Q. B. 72; *Coates* v. *Kelly*, 27 Q. B. 284; *Goold* v. *Smith*, 19 C. P. 427; *McDonald* v. *Jarvis*, 5 Chy. 568; *Proctor* v. *Grant*, 9 Chy. 26; *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Chy. 59; *City Bank* v. *McConkey*, 12 Chy. 385; *Vannatto* v. *Mitchell*, 13 Chy. 665; *Scott* v. *Hunter*, 14 Chy. 376; *Hancock* v. *McIlroy*, 18 Chy. 209; *Sanderson* v. *Burdett*, *(in appeal,)* 18 Chy. 417.

(c) *Other Cases.*

As to competency of witnesses in ejectment, See *Doe* d. *Mason* v. *Ballard*, 1 Q. B. 2; *Doe* d. *Vernon* v. *Wetherall*, 5 Q. B. 342; *Doe* d. *McDonell* v. *Rattray*, 7 Q. B. 321; *Dundas* v. *Johnston et al.*, 24 Q. B. 547; *Heany* v. *Parker*, 27 Q. B. 509; *Bannerman* v. *Dewson et al.*, 17 C. P. 257.

In an action on a bond the attorney for the plaintiff, who was the subscribing witness to the bond, was called to prove its execution. His evidence was objected to by the defendant on the ground that he had become answerable for costs. To obviate this difficulty the defendant paid into court a sufficient sum to cover the costs, and was then allowed to be examined:—Held, that the evidence of the attorney after paying the money into court was properly received. *Cuvillier et al.* v. *Thibodo*, 5 Q. B. 328.

Under the Imperial Act, 8 & 9 Vict. c. 93, s. 89, the surveyor of customs, not being the party either "seizing or informing," is not entitled to a share of the penalty. He, therefore, cannot be rejected as an incompetent witness upon a case of information *for a penalty*, for harbouring smuggled goods. *Attorney-General* v. *Warner*, 5 Q. B. 485.

It is too late to object to the competency of a witness as being interested after his examination, upon grounds known before he entered the box. *Powell* v. *Jarvis*, 5 Q. B. 489.

The solicitor of the husband, being city recorder, was held not to be disqualified to take as a

magistrate the examination of a married woman for the conveyance of her land. Spragge, C., dubitante. *Romanes* v. *Fraser*, 17 Chy. 267.

Magistrates interested in the transactions, are not competent to take the examination of a married woman for the conveyance of her land. *Ib.*

The solicitor of the husband is not as such disqualified. *Ib.*

A devise by a testator, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution to the will:—Held, void, notwithstanding the provisions of the Evidence Act of 1852, (16 Vict. c. 19.) *Crawford* v. *Boyd*, 22 Chy. 398.

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4. *Religious Belief.*

On a trial for murder an Indian witness was offered, and on his examination by the judge it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe [illegible]ng a person to speak the truth. It appeared, however, that he had a full sense of [illegible]ligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way:—Held, that his evidence was admissible. *Regina* v. *Pah-Mah-Gay*, 20 Q. B. 195.

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5. *Other Cases.*

A person not being a licensed surveyor is a competent witness on a question of boundary. *Potter* v. *Campbell*, 16 Q. B. 109.

An equitable plea must be proved by such witnesses as a court of law can receive. *Perley* v. *Loney et al.*, 18 Q. B. 429.

Where at the hearing the competency of a witness was objected to, and the court received the evidence subject to the objection, but afterwards held the witness incompetent, a reference was directed as to the material points to which his evidence applied, and further directions were reserved. *Lindsay* v. *The Bank of Montreal*, 13 Chy. 63.

VII. Examination under Commission.

1. *Application for, and Issue of Commission.*

The court will not, under the provision of the provincial statute for issuing commissions to examine witnesses about to leave the province, order such commission before declaration filed. *Saunders* v. *Playter*, Tay. 37.

The motion for a commission must be supported by affidavit. *McNair* v. *Sheldon*, Tay. 451.

A party may have a commission upon his undertaking not to act under it until after issue joined. *Dougall* v. *Moodie*, 1 Q. B. 257.

An order for the examination of witnesses out of the jurisdiction, will not be made before issue joined, merely to expedite proceedings. *Allan* v. *Andrews*, 5 P. R. 32.

It is not imperative upon the court to grant a commission to examine witnesses out of their jurisdiction; and where a suit was pending in Lower Canada for a claim arising there, and the plaintiff having found one of the defendants here served him with process, and desired the evidence of a witness in Montreal, the application was refused. *Muir* v. *Anderson*, 11 Q. B. 160.

A material witness for plaintiff stated during the Assizes that he was obliged to go to the States on business; and a commission was granted and the witness examined. Defendant's counsel objected to the issuing of the commission, and refused to cross-examine, as he could not consult his client, but he attended at the trial, and made the best defence he could. It being very important, under the circumstances of the case, that this witness should be subjected to cross-examination, the court granted a new trial on payment of costs. *Arnold* v. *Higgins*, 11 Q. B. 191.

The rules of practice which allow evidence to be taken under commission are not to be extended where the object is to procure mere scientific testimony: that is to say, the testimony of experts. *Russell* v. *Great Western R. Co.*, 3 L. J. 116.—C. L. Chamb.—Hagarty.

After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained to establish the fact that the party applying for the order is one of the next of kin. *Farrell* v. *Cruickshank*, 1 Chy. Chamb. 12.—Spragge.

A demurrer had been argued, and the court instead of allowing the demurrer, gave the plaintiff liberty to amend on payment of costs. An application by the plaintiff for a commission to examine the defendant in Lower Canada before amendment, was refused with costs. *Chance* v. *Henderson*, 1 Chy. Chamb. 30.—Blake.

Where it was considered conducive to the ends of justice, publication was opened and leave given to examine further witnesses, and to issue a foreign commission upon payment of costs, and upon the terms of examining the witnesses in Canada at the next examination term, and the witnesses residing out of Canada at the same term, or by foreign commission in the meantime; if the latter, the commission to be returned and depositions disclosed two weeks before the examination term, it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before. *Blain* v. *Terryberry*, 1 Chy. Chamb. 104.—Spragge.

A commission to examine a witness abroad to use his evidence in a pending reference to a master, should be moved for on the master's certificate, and not on an affidavit as to the facts. *Stephens* v. *Mears*, 1 Chy. Chamb. 200.—Esten.

A commission cannot regularly be issued until after replication filed. *Royal Canadian Bank* v. *Cummer*, 2 Chy. Chamb. 388.—Taylor, *Secretary*.

The master cannot ex parte issue a certificate for a foreign commission. *McLennan* v. *Helps*, 3 Chy. Chamb. 193.—Chy.

C. S. C. c. 79, s. 4, which authorizes the issue of a subpœna to the province of Quebec requiring the attendance of a witness for examination in this province, does not deprive a party of the right to have witnesses in Quebec examined by commission. *Stratford* v. *Great Western R. Co.*, 6 P. R. 91.—Holmested, *Referee*.

A commission for the examination of a party to the cause on his own application will not be granted unless it is clearly shewn that the commission would, under the circumstances, be conducive to the ends of justice. *Price* v. *Bailey*, 6 P. R. 256.—Chy. Chamb.—Blake, on appeal from Holmested, *Referee*.

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2. *Publication.*

If a commission to examine witnesses abroad, issued at the instance of one party and executed at his expense, be returned by the commissioners into court according to the statute, the opposite party has a right to call for and make use of the evidence at the trial of the cause. Semble, that an order for the publication of the evidence may be obtained before trial. *Gordon* v. *Fuller*, 5 O. S. 174.

When a commission has been executed and returned into court, an order ex parte will be granted for opening it and publication of the evidence, notice to the opposite party being required of the time of opening. *Neale* v. *Withrow*, 4 L. J. 88.—C. L. Chamb.—Burns.

No order is necessary for leave to open a foreign commission duly returned. The proper practice is to open it without order, in the presence of all parties. *Chalmers* v. *Pigott*, 1 Chy. Chamb. 282.—Spragge.

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3. *Irregularities in, and Return of.*

(a) *Affidavit of due taking.*

Where the execution of a commission to examine witnesses in the United States was proved by the affidavit of the commissioner named therein, and the return thereof made under his hand (without his seal):—Held, that under the provincial statute 2 Geo. IV. c. 1, the execution was sufficiently authenticated. *Beach* v. *Odell*, 4 O. S. 8.

The return of a commission under the hand, but not the seal, of the commissioner, is sufficient; and the affidavit of the execution may be sworn by the commissioner himself. *Ib.*

The signature and seal of a person affixing the same as chief magistrate to an affidavit proving the due execution of a commission issued from this court, will be presumed genuine until the contrary is proved. Quære, whether the witnesses should not sign their deposition, and whether it should expressly appear on the face of the answer that they were sworn. *Doe* d. *Lemoine* v. *Raymond*, 5 O. S. 337.

Where the mayor or chief magistrate of a place to which a commission is sent is the plaintiff, the due taking of the commission may be sworn before and certified by the person next in rank. *Thompson* v. *Cummings*, 6 O. S. 106.

Semble, that an affidavit stating that the examination of the witnesses was duly taken, and not that the commission was duly taken, in accordance with the literal wording of the statute, is sufficient. *McLeod* v. *Torrance*, 3 Q. B. 146.

Semble, also, the affidavit need not be intituled in the cause. *Ib.*

The affidavit, though not intituled in the court or in the cause, is sufficient, when annexed to the commission under the seal of the commissioners and referring to it. *Doe* d. *Park et al.* v. *Henderson*, 7 Q. B. 182.

Where the due taking of the evidence was sworn to by A. before B., who certified at the foot of the affidavit that he was "police judge" of a certain town in the state of Kentucky; that A. was a person well known to him; and that he deposed before him the truth of the matters stated above, and who signed the certificate with a scroll, O, in the place of a seal, adding that he had no corporate seal:—Held,—upon an objection because the affidavit was not subscribed by the deponent, and there was no proof of the authority of B., and no seal attached to his name,—that the commission was duly executed, and might be read. *Passmore* v. *Harris*, 4 Q. B. 344.

The affidavit of the due taking of the commission need not be signed by the deponent. *Wilmot* v. *Wadsworth*, 10 Q. B. 594.

Where a commission to a foreign country has been executed and returned, and remains unopened, and it is supposed that there is no proper affidavit of the execution attached, the court will order it to be returned to the commissioners. *Doe* d. *Hay* v. *Hunt*, 1 P. R. 44.—P. C.—Burns.

The affidavit need not state in so many words that the evidence was duly taken. It may describe the proceedings and thus shew it. *Bunnel* v. *Whitlaw*, 14 Q. B. 241.

A commission issued to one G., of the city of H., in the United States, to take evidence of one S. of the said city. It was returned with an affidavit by the commissioner of due execution, sworn at H. before the mayor, but the affidavit did not shew that the witness was examined there:—Held, sufficient. *Stebbins* v. *Anderson*, 20 Q. B. 239.

Quære, whether the affidavit must be sworn before the mayor, &c., of the place where the evidence is taken. *Ib.*

At the commencement of the trial, the counsel for defendant not being present, the counsel for the plaintiff opened his case, and while he was reading evidence taken under a commission at Montreal, the counsel for defendant appeared and objected to the commission, as the envelope enclosing it was not under the hand and seal of the commissioner, and there was no affidavit of the due taking:—Held, that the objection was fatal, and taken in time. *Reford* v. *McDonald*, 14 C. P. 150.

It is no objection to an affidavit of execution of a commission to take evidence abroad, that the contractions, *Plff.* and *Deft.* were used in the intituling of it. *Frank* v. *Carson*, 15 C. P. 135.

Nor that such affidavit was intituled in the Common Pleas instead of the Queen's Bench. *Comstock* v. *Burrowes*, 13 Q. B. 439.

The affidavit stated that "the examination of B., the witness named in the said commission, was taken before me and the said W. at, &c., according to the directions of the said commission:"—Held, that the examination annexed to the commission was not proved, for the affidavit

did not in any way identify it with that which it stated to have been duly taken. *Milligan* v. *Grand Trunk R. Co.*, 16 C. P. 191.

Held, under 34 Vict. c. 14, O., that the due taking of a commission, executed in Montreal, was sufficiently proved by an affidavit made before a notary public there, and not before the mayor or chief magistrate as required by C. S. U. C. c. 32, s. 21. *Beard* v. *Steele*, 34 Q. B. 43.

(b) *Return.*

Where the execution of a commission to examine witnesses in the United States was proved by the affidavit of the commissioner named therein, and the return thereof made under his hand (without his seal) :—Held, that under the provincial statute 2 Geo. IV. c. 1, the execution was sufficiently authenticated. *Beach* v. *Odell*, 4 O. S. 8.

The return of a commission under the hand, but not the seal, of the commissioner, is sufficient; and the affidavit of the execution may be sworn by the commissioner himself. *Ib.*

Where at the trial an objection was taken as to the form of the return, the court would not on argument allow another objection, which would have been fatal if urged at the trial. *Hibbert* v. *Johnston*, 6 O. S. 635.

Held, that the commission not having been returned to the office of the deputy clerk of the crown pursuant to the judge's order, was no objection at Nisi Prius to the admission of the evidence. *Stevenson* v. *Rae*, 2 C. P. 406.

A commission enclosed in an envelope, which came to hand with an opening not large enough to allow of the escape of the papers contained therein, is sufficiently close to render it admissible. *Frank* v. *Carson*, 15 C. P. 135.

Effect of the word "close" considered. *Ib.*

Such commission need not be endorsed with the style of the cause in which it is issued. *Ib.*

Nor need the evidence be annexed to the commission. *Ib.*

A commission should be so framed as to bind all parties to be examined under it, particularly as to the mode of administering the requisite oaths, as, for instance, to Jews. *Ib.*

Semble, 1. An objection to a return, which states that the execution thereof will appear "by the schedules and papers annexed," while the examination and affidavit of due taking are not annexed, if such objection be either that the return is defective, or that it is no return at all, may be fatal; but if the objection be merely that the return is separate from the schedule, it must fail; 2. That in all cases a return should be endorsed on the commission. *Ib.*

A party who joins in acting under a commission, which contains specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted. *Ib.* See, also, *Heyland* v. *Scott*, 19 C. P. 165.

A commission produced at the trial in an envelope open at both ends, though otherwise well secured, and under the hand and seal of the commissioner, is properly admitted in evidence, it appearing that it arrived at the Toronto post office in that state, and there being no suspicion of its having been tampered with by either of the parties interested. *Graham* v. *Stewart*, 15 C. P. 169.

It is always open to a party to explain to the satisfaction of the presiding judge how the enclosure became open, and the reception of it being a matter resting very much with the judge, the court will not be disposed to interfere with the exercise of his discretion. *Ib.*

The affidavit of the commissioner stated that "the examination of A. M., the witness named in the said commission, was duly taken before me at, &c., as above certified, under and according to the directions of the said commission." Preceding this affidavit was a certificate stating that "the foregoing are the depositions of A. M., in the annexed commission named, upon the interrogatories taken before me at, &c., under the commission hereto annexed; and I certify that the same were taken according to the directions in said commission contained, and that annexed hereto and to said commission are the said interrogatories and the documents therein respectively referred to." On the commission was endorsed the following return: "The return of the within written commission will appear by the depositions, affidavits, and papers thereunto annexed :"—Held, that the examination or depositions, which were in effect held to be synonymous terms, was, or were, fully identified as the examination of the witness under and annexed to the commission. *Muckle* v. *Ludlow*, 16 C. P. 420.

Observations on the inconvenience of the present rigid statutory provisions respecting the admissibility of evidence taken under a commission. *Ib.*

See *Reford* v. *McDonald*, 14 C. P. 150, p. 1320.

(c) *Other Cases.*

It is no objection that one of the witnesses affirmed instead of swearing. *Bunnel* v. *Whitlaw*, 14 Q. B. 241.

Held, that upon the affidavits it sufficiently appeared that defendant had waived filing cross interrogatories, more especially as the evidence had been taken more than six months before the trial, and he had never moved against the proceedings. *Ib.*

Held, that a mistake in the entitling of the cause in the commission, (the defendant having been styled William instead of Samuel,) was fatal to it; and that the taking of the evidence under it was a void proceeding. *Graham* v. *Stewart*, 15 C. P. 169.

A commission was addressed to S. B. *Henry*. and G., of Philadelphia, jointly and severally. G. took no part in executing it, but all was done by one S. B. *Huey*, and an affidavit of the plaintiff's counsel at Philadelphia, taken before G., explained that Huey was the name forwarded by him to the plaintiffs' attorney here, but through some clerical error it was directed to *Henry*; that he knew no such person as S. B. *Henry* in Philadelphia, but that the Huey before whom the depositions were taken, was the person intended. This objection was not taken to the commission at the trial, though others were, and

the evidence of witnesses on both sides taken under it was read :—Held, Hagarty, J., diss., that nevertheless the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity. Per Draper, C. J. It will be very desirable to adopt the suggestion in Grill *v.* General Iron Screw Collier Company, L. R. 1 C. P. 600, and to leave all merely technical objections to be taken advantage of by motion in chambers, giving effect at Nisi Prius only to the absence of what our statute makes conditions precedent to the use of the depositions. *Lodge* v. *Thompson*, 26 Q. B. 588.

Defendant having made one objection to the evidence which was overruled, allowed it to be read, and commented upon it :—Held, that he was precluded from taking any further exceptions. *Farrel* v. *Stephens*, 17 Q. B. 250.

Where the commission prescribes a particular time and place for taking the evidence : Quære as to the effect of neglecting this direction. *Ib.*

It is no ground at the trial for excluding evidence, that the day first named for the examination was changed by the plaintiff and another appointed. Such an objection, if available at all, must be taken by motion before the trial. *Comstock et al.* v. *Galbraith*, 21 Q. B. 297.

It is not essential that an examination should take place upon the first day appointed therefor, but a notice annulling the first one, and appointing a subsequent day for such examination :—Held, sufficient. *Comstock et al.* v. *Tyrrell et al.*, 12 C. P. 173.

Upon a commission, the name of one witness was stated to be William Lansing Flynn, and in the return of the commissioners, they stated they had reduced to writing the answers of William L. Flynn :—Held, not to vitiate the commission. *Ib.*

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4. *Costs.*

Notice of trial was given and duly countermanded. Defendant obtained a judgment as in case of nonsuit, the plaintiff not having proceeded to trial according to the practice, and claimed costs of a commission to examine witnesses in the United States, also, a counsel fee, and a fee for preparing a brief. These were refused by the master; and upon motion for revision, it was held that under the circumstances of the case the master ought to have allowed the commission, notwithstanding the countermand. *Pegg* v. *Pegg*, 7 Q. B. 220; See *S. C.* 1 C. L. Chamb. 190.

An action in which it will be necessary to issue such commission, may be brought in a superior court, although the amount sued for may be within the jurisdiction of an inferior court. *Comstock* v. *Leaney*, 3 L. J. 13.—C. L. Chamb.—Burns. See, now, C. S. U. C. c. 32, s. 19.

The costs of a commission to take evidence in a foreign country form part of the costs of the cause. *Colborne* v. *Thomas*, 4 Chy. 169.

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5. *Other Cases.*

If a witness be examined under a commission in a foreign country, it is not necessary at the trial to prove that he is still without the jurisdiction. *Watson* v. *Lee*, H. T. 5 Vict.

C. S. U. C. c. 32, ss. 19, 21, authorizes the examination of aged or infirm persons under commission within, or any person out of Upper Canada, but provides for the proof and reception of such latter examination only :—Held, that an examination within Upper Canada was clearly, by necessary intendment, made receivable under C. S. U. C. c. 32, when duly taken, which in this case was proved by the commissioner. *Ryan* v. *Devereux*, 26 Q. B. 100.

The note, the subject of the action, which was commenced on the 27th June, 1865, was dated 6th March, 1857. To an interrogatory, referring to the note as marked "A," but as dated the 9th March, 1857, the witness answered, "I was the holder of the pro. note marked 'A.' hereunto annexed, up to and until March 6th, '65; I was such holder from March 6th, '57, to March, '65." To a subsequent interrogatory, as to any payment made by defendant on the note, he stated that he had received, besides several previous amounts, the sum of $15 on 26th November, 1859 :—Held, that the note sued upon had been sufficiently identified as that upon which the payment had been made to take it out of the Statute of Limitations : that the mere mistake in the question as to the date had been set right by the answer; and that the maxim "falsa demonstratio non nocet" applied. *Muckle* v. *Ludlow*, 16 C. P. 420.

A commission directed to two persons, provided as follows : "and we give to each of you full power and authority to administer such oath or affirmation to the other." The sole acting commissioner was not sworn before his fellow commissioner, but before an ordinary commissioner of the court :—Held, that the commission was admissible. *Heyland* v. *Scott*, 19 C. P. 165.

The plaintiff by his counsel attended before the commissioner so sworn, and took part in the examination of the witness produced, without further objection than refusing to consent to the mode of administering the oath. Quære, whether he could afterwards object. *Ib.*

The 53rd general order of May, 1850, does not apply to a foreign commission for taking depositions. *Anon.*, 2 Chy. 122.

Where a defendant in a suit refused to attend before commissioners appointed for the purpose of taking his evidence in a foreign country, the usual order to set the cause down, to be taken pro confesso, was made. *Prentiss* v. *Bunker*, 4 Chy. 147.

Held, that where one defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examine such co-defendant, he is thereby made a good witness in the cause. *Grimshawe* v. *Parks*, 6 L. J. 142.—Chy.

Where a commission to take evidence abroad could not be executed in time by reason of the illness of the commissioner, the plaintiff was allowed further time to set the cause down for examination and hearing. *McIntyre* v. *Canada Company*, 2 Chy. Chamb. 464.—Taylor, *Secretary.*

All examinations under foreign commission must be by interrogatories, unless otherwise

arranged by consent. *Gordon* v. *Elliot*, 2 Chy. Chamb. 471.

C. S. C. c. 79, ss. 4 et seq., which authorize the issue of subpœnas to the province of Quebec, does not take away the power of the court, nor deprive the plaintiff of the right to examine witnesses there by commission. *McIntyre* v. *Fair*, 6 P. R. 110.—C. L. Chamb.—Dalton, *C. C. & P.*; *Shalford* v. *Great Western R. W. Co.*, 9 L. J. N. S. 312.—Chy. Chamb.—Taylor, *Secretary*.

VIII. Letters Rogatory.

Letters rogatory, such as are provided for by an act of the Congress of the United States as issuable from any foreign court, will be issued by the court here, although in the present state of our law no reciprocal accommodation can be afforded here to suitors in the United States. In letters rogatory so issued here, the usual offer to render similar service when required was necessarily omitted. Such letters need not necessarily be in the name of the sovereign, but were issued as from the judges of the Court of Chancery. *United States* v. *Denison*, 2 Chy. Chamb. 176.—Taylor, *Secretary*.

IX. Examination of Parties and Witnesses out of Court.

1. *At Common Law.*

(a) *Under Interrogatories.*

[*The examination of the opposite party upon interrogatories, under secs. 190-195 of the C. L. P. Act, has been superseded in practice by the oral examination provided for by the Administration of Justice Act, 1873, secs. 24-30.*]

Interrogatories for the discovery of the nature of defendant's title under C. L. P. Act, 1856, s. 176, allowed upon summons to shew cause. *Horsman* v. *Horsman*, 2 L. J. 211.—C. L. Chamb.—Burns.

Application for leave to deliver interrogatories under secs. 176 and 177 of the C. L. P. Act, 1856, must be supported by a positive affidavit of merits. *McLaren* v. *Hutchison*, 4 L. J. 85.—C. L. Chamb.—Richards.

Under the C. L. P. Act, sec. 190, the leave of the court or a judge is necessary to authorize interrogatories either with the declaration or pleas, or at any other time. *Bank of U. C.* v. *Rutan*, 3 P. R. 46.—Q. B.

Interrogatories will not be allowed to be put for the discovery of matters on which to found a plea, but must be in support of pleas already pleaded. *Street* v. *Proudfoot*, 2 L. J. 213.—C. L. Chamb.—Burns.

Interrogatories will not be allowed before declaration without special facts being shewn. *McKenzie* v. *Clark*, 4 P. R.—C. L. Chamb.—Draper.

Nor where the application is of a fishing character, to ascertain whether the plaintiff has in fact any cause of action, or to fish out information of a penal character. *Ib.*

Nor where the interrogatories are such that the answers would, as in case of libel, tend to criminate the person interrogated. *Ib.*

Leave was granted to administer interrogatories before plea pleaded, leave to plead several matters being asked for in the same summons, and the interrogatories having particular reference to the pleas sought to be pleaded. *Street* v. *Cuthbert*, 3 L. J. 9.—C. L. Chamb.—Burns.

Action by executors for death of testator, caused by defendants' negligence. Measure of damages. Interrogatories proposed by defendants to plaintiffs after issue joined, as bearing upon the question of damages—how far allowable, and when they should be proposed. Form and nature of such interrogatories. When and how objections should be taken. *Ferrie et al.* v. *Great Western R. Co.*, 15 Q. B. 513.

On an examination of a witness under C. L. P. Act, secs. 184, 188, his evidence will not be read if the right of cross-examination has been denied. *Colville* v. *Johnston*, 5 P. R. 462.—C. L. Chamb.—Dalton, *C. C. & P.*

See *Pleas* v. *Mattou*, 9 L. J. N. S. 259, p. 1334.

(b) *Under the Administration of Justice Act.*

The affidavit in support of a motion under sec. 29 of the Ad. of J. Act of 1873, for an order for the examination of the defendant, was made by the partner of the plaintiff's attorney:—Held, sufficient. *Lloyd* v. *Henderson*, 6 P. R. 254.—C. L. Chamb.—Dalton, *C. C. & P.*

In the case of Hamilton *v.* Great Western R. Co., the affidavit in support of a similar application was made by the managing clerk, and Mr. Dalton held it to be sufficient. *Ib.*

On an application for an order to examine the chief engineer of defendants:—Held, that he was an officer of the company, within the meaning of sec. 24. *Oakley* v. *Toronto, Grey, & Bruce R. Co.*, 6 P. R. 253.—C. L. Chamb.—Dalton, *C. C. & P.*

The words, "action at law," in the 24th sec., include an interpleader proceeding, and defendant therein may be examined. *Canada Permanent Building Society* v. *Forest*, 6 P. R. 254.—C. L. Chamb.—Dalton, *C. C. & P.*

One of two defendants in an action of ejectment allowed judgment to go by default:—Held, that he was nevertheless liable to be examined under sec. 24. *Bacon* v. *Campbell et al.*, 12 L. J. 17.—C. L. Chamb.—Dalton, *C. C. & P.*

2. *In Chancery.*

(a) *Order and Notice.*

The 55th order of May, 1850, renders it no longer necessary to obtain a special order for the examination of witnesses in a cause before an examiner. *Fuller* v. *Richmond*, 2 Chy. 509.

Service on the solicitor of a copy of the examiner's appointment for the examination of a party is a sufficient notice to the solicitor; and it is not necessary that the appointment should name the parties at length. *Fowler* v. *Bolton*, 12 Chy. 437.

Where a plaintiff, though duly served with a subpœna and the examiner's appointment, does not appear to be examined under 22nd order of

the 3rd of June, 1853, the defendant's motion that he do attend or stand committed is made ex parte, unless the court see fit to direct notice to be given. *Ib.*

A defendant has a right to examine the plaintiff as soon as his answer is filed, though there may be other defendants who have not answered; and it is not necessary to serve them with notice of the examination. *Ib.*

An application for an order that a party to a suit do submit to be examined at his own expense, or in default be committed, will not be granted ex parte; notice must be served. The right to examine a party to the cause is not affected by No. 2 of the Orders of 10th January, 1863. *Weir* v. *Matheson*, 1 Chy. Chamb. 224. Spragge.

An application for an order for the defendant to attend at his own expense, and be examined on his answer, may be made ex parte. *Harrison* v. *Greer*, 2 Chy. Chamb. 438.—Taylor, *Secretary.*

Where a party to a suit, having no solicitor, is required to attend before a master to be examined, it would seem that forty-eight hours' notice thereof should be given to him. *Watson* v. *Ham*, 1 Chy. Chamb. 293.—Spragge.

The defendant is entitled to examine the plaintiff before a special examiner under order 22 of the 3rd of June, 1853, notwithstanding that the cause has been set down, and notice of examination and hearing served. *Clarke* v. *Hawke*, 1 Chy. Chamb. 346.—Mowat.

To compel the attendance of a witness, or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to an examination. *McMurray* v. *The Grand Trunk R. W. Co.*, 3 Chy. Chamb. 130.—Mowat.

Application for an order under sec. 4 of C. S. C. c. 79, is properly made to the referee in chambers. *Moffatt* v. *Prentice*, 6 P. R. 33.—Spragge on appeal from Holmested, *Referee.*

(b) *Time of Examination.*

A defendant may be examined vivâ voce in support of a motion, notice of which has been given, although the time for answering has not elapsed. *McClennaghan* v. *Buchanan*, 7 Chy. 92.

The examination of defendant after answer, or after the time for answering has expired, is a substitute for the discovery by answer, and a plaintiff can at the hearing read such examination, or parts of it, in the same manner as a defendant's answer, or passages from it, could be used against him at the hearing. For this purpose it is not necessary to examine the defendant at the examination of witnesses. *Proctor* v. *Grant*, 9 Chy. 26.

Where the plaintiff examines several defendants before answer, the examination of one cannot be read against the other at the hearing. *Douglass* v. *Ward*, 11 Chy. 39.

The plaintiff by amending his bill does not postpone his liability to be examined until after the time for answering the amendments expires. *Fowler* v. *Boulton*, 12 Chy. 437.

The plaintiff has a right to examine the defendant at the examination and hearing of the cause, although the plaintiff may have already cross-examined him on his answer, and on an affidavit which he has made in the cause. *Thompson* v. *Hind*, 1 Chy. Chamb. 247.—Spragge.

(c) *Where Taken.*

Since the orders of February, 1858, the court will not direct the examination of witnesses to take place before an examiner in a county where no resident master has been appointed, although consented to by the parties. *Phelan* v. *Phelan*, 6 Chy. 384.

Where a defendant lived at Hamilton, and the bill was filed at Toronto, plaintiff took out an appointment to cross-examine the defendant before the Deputy-Master at Goderich—the appointment was set aside with costs. *McDermid* v. *McDermid*, 2 Chy. Chamb. 372.—Taylor, *Secretary.*

As a rule, a suitor has not a right to bring his opponent to Toronto, or elsewhere from his residence, for the purpose of interlocutory examination, except upon special grounds. Where, therefore, an order had been made by the secretary for a plaintiff to attend before a special examiner at Toronto—the venue in the cause being laid at Goderich, and the parties residing there, and the plaintiff's solicitor residing there also, the solicitor for the examining defendant residing in Toronto—such order was rescinded upon the plaintiff refunding the conduct money paid him without costs, defendant being held to have acted in accordance with what appeared to have been very generally understood in Toronto as to the right of examining parties. The proper practice in a case where special grounds exist, is an application on notice in Chambers shewing such special grounds. *Gallagher* v. *Gairdner*, 2 Chy. Chamb. 480.—Spragge.

The court will take into consideration the fact that parties can be more efficiently examined in Toronto than in some outer counties, and will not consider alone the balance of convenience of the parties or solicitors attending. An application to change the examination from Stratford to Toronto was granted, although no great difference was shewn as to the convenience of the parties interested, on the suggestion, without affidavits, that the examination could be more efficiently and expeditiously conducted in Toronto. *Kahn* v. *Redford*, 3 Chy. Chamb. 55.

[In *Cooper's Digest*, 1873, p. 111, it is stated that,—"This case is mis-reported. The application under the circumstances was refused; but it is understood that the fact that a witness or party can be more efficiently examined in Toronto, will weigh with the court of judges on a motion to change the place of examination."]

(d) *Cross-examination.*

A *defendant* is liable to cross-examination on his answer to a bill filed by a wife and co-plaintiffs against her husband. *Patterson* v. *Kennedy*, 2 Chy. Chamb. 372.—Mowat.

The right of cross-examination upon an affidavit under order 268 applies to cases where the affidavit has not yet been, but is about to

be, used. Where, therefore, an appointment had been taken to examine a defendant on an affidavit which had been already used, on a motion for injunction, the appointment was, on motion, set aside. *Felan* v. *McGill*, 3 Chy. Chamb. 56.—Taylor, *Secretary*.

A party making affidavit for the purpose of moving to change the venue, and stating that certain parties are material and necessary witnesses is not bound on cross-examination to state what evidence he expects from such witnesses, or to state facts tending to test the materiality of the proposed evidence. *Crombie* v. *Bell*, 3 Chy. Chamb. 195.—Mowat.

The master is bound equally with the court to allow a witness to be cross-examined in the whole case without regard to his examination in chief. But in some cases, the master may exercise a discretion as to who should pay the fees of the examination. *Crandall* v. *Moon*, 6 L. J. 143.—Chy.—Esten.

In the absence of authority to the contrary, it was held that cross-examinations upon affidavits in reply should be allowed, as in the case of other affidavits, more especially as affidavits in reply could not otherwise be answered. *Re Foster*, 9 L. J. N. S. 313; *Re Foster*, 6 P. R. 95.—Chy. Chamb.—Blake.

An affidavit on production is not within the provisions of order 268, and therefore a party making one does not become liable to cross-examination upon it, except so far as this can be had by examination for discovery under order 138. *Paxton* v. *Jones*, 6 P. R. 135.—C. L. Chamb. —Holmested, *Referee*.

(e) *Further, or Re-examination.*

Where a reference back to the master to review his report is directed, the master is at liberty to receive further evidence. *Morley* v. *Matthews*, 3 L. J. N. S. 21.—Chy.

Where the court, on a reference back to the master, does not mean that he shall take further evidence, the order contains a direction to that effect; unless the reference back is expressed to be for a purpose on which further evidence could not be material. *Ib.*

Where a party upon whom the onus of proof lies produces a receipt before the master, or other proof of a nature generally conclusive, and closes his evidence; and the other side produces testimony tending to shake this evidence, further evidence in support should be allowed to be produced, though in strictness it may be such as might have been produced in the first instance. *Moody* v. *McCann*, 1 Chy. Chamb. 88.—Esten.

Where defendant's solicitor had omitted to ask a witness what had become of the deed mentioned by the witness in his examination, which omission would have precluded defendant from giving secondary evidence of the contents, permission to exhibit an interrogatory, to be settled by the examiner, to prove where the deed was, was given to defendants after the cause had been put in the papers for hearing. *Covert* v. *Bank of U. C.*, 1 Chy. 566.

In a creditor's suit a witness had been examined in the master's office, touching the claim of the alleged creditor, with a view to the claim being disallowed. After his examination had been concluded, plaintiff stated on affidavit that since the examination he had learned that the witness could have deposed to the fact of the alleged creditor having admitted that his claim had been settled, and moved to be allowed to re-examine the witness on this point. The motion was refused with costs. *Patterson* v. *Scott*, 1 Chy. 582.

Where the master refused to open a case where the evidence was closed, on the ground that the applicant had not made such a case as entitled him to a new trial at law; the court sustained his ruling. *Waddell* v. *Smyth*, 3 Chy. Chamb. 412. —Chy.

(f) *Pro interesse suo.*

The effect of a claimant's examination pro interesse suo considered. *Prentiss* v. *Brennan*, 2 Chy. 382.

(g) *De bene esse.*

The court ordered a commission for examination of an aged witness to issue without requiring bill to be served in the first instance: the object of the suit being to perpetuate testimony, and it having been sworn that there was danger of testimony being lost. *Hunt* v. *Prentiss*, 4 Chy. 487.

An application for an order to examine a witness de bene esse on account of ill health may be made ex parte. *Oliver* v. *Dickey*, 2 Chy. Chamb. 87.—Spragge; *Crippen* v. *Ogilvy*, *Ib.* 304.

But not on the ground that he is about to leave the jurisdiction. *Early* v. *McGill*, 1 Chy. Chamb. 257.—Spragge.

Nor on the ground of illness, unless there is immediate danger. *Anderson* v. *Anderson*, 1 Chy. Chamb. 291.—Spragge.

Orders to examine witnesses de bene esse, are only granted where it is shewn that the evidence is to be used for some definite purpose; yet, the court will make such an order when it considers that practice requires it. *Whitehead* v. *Buffalo and Lake Huron Railway Co.*, 5 L. J. 232.—Chy. Chamb.—Esten.

On applying for such order it should be clearly shewn that the witness is the only witness as to the fact sought to be proved by him. An affidavit of the solicitor as to his belief is insufficient. *Jameson* v. *Jones*, 3 Chy. Chamb. 98.—Taylor, *Secretary*.

In examinations de bene esse if the evidence is not used, and the witnesses are within reach of subpœna, the costs of the examination should not be allowed. Where the evidence is material and is used, the costs become costs in the cause. *McMillan* v. *McMillan*, 8 L. J. N. S. 285.—Chy. Chamb.—Boyd, *Master*.

(h) *Publication.*

Enlarging.]—Quere, whether upon an application by the plaintiff for a stay of proceedings, to which the court considered him not entitled, an enlargement of publication can be ordered when an order in that form would partially accomplish what the plaintiff desired by his motion. *Howcutt* v. *Rees*, 2 Chy. 437.

Quære, whether the court would enlarge publication so as to enable a plaintiff to be present at the viva voce examination of the defendant, where such examination had been postponed by an accident, of which the defendant or his solicitor was the unintentional cause, till after the plaintiff's departure from the province on pressing business, and the plaintiff swore that it was necessary for his interests that he should be present. *Ib.*

Opening.]—Where on the examination of a witness, on the 24th of January, a person's name was mentioned as having been resident on a lot adjoining the premises in question in the cause, and on the 28th of March, after publication had passed, the cause set down for hearing, and a subpœna to hear judgment served, the defendant moved for leave to open publication and examine as a witness the person whose name had been mentioned, and who, he had sworn, could give material evidence, the motion was refused with costs. *Waters* v. *Shade*, 2 Chy. 218.

The principles laid down by the court in Waters *v.* Shade, 2 Chy. 218, in respect of opening publication, apply as well to suits for alimony as other cases. *McKay* v. *McKay*, 6 Chy. 279.

Where a defendant had applied to open publication, and an order was made for that purpose on payment of costs, it was subsequently discovered that the plaintiff had proceeded to set the cause down for hearing, without taking out the rules to produce and pass publication; and the defendant thereupon moved to strike the cause out of the paper of causes for hearing; the motion was refused with costs. *Hamilton* v. *Street*, 3 Chy. 122.

Where a publication had passed shortly before a motion to open was made by the plaintiff, and it appeared on the motion that the defendant had examined witnesses, but the plaintiff had not examined any; and the plaintiff and others swore that his evidence was material, and that the delay had arisen from the poverty of the plaintiff, publication was opened on payment of costs. *Taylor* v. *Shoff*, 3 Chy. 153.

Where it was considered conducive to the ends of justice, publication was opened, and leave given to examine further witnesses, and to issue a foreign commission on payment of costs, and upon the terms of examining the witnesses in Canada at the next examination term; and the witnesses residing out of Canada, at the same term, or by foreign commission in the meantime; if the latter, the commission to be returned, and depositions disclosed two weeks before the examination term; it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before. *Blain* v. *Terryberry*, 1 Chy. Chamb. 104—Spragge.

The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants. *Malloch* v. *Pinhey*, 1 Chy. Chamb. 105.—VanKoughnet.

An order made on motion to dismiss, giving leave to go to examination, has the effect of opening publication. *Weir* v. *Weir*, 1 Chy. Chamb. 194.—VanKoughnet.

After judgment had been given in a cause, an application was made to open publication, on the ground that since the decree had been pronounced it was discovered that a material witness in the cause was beneficially interested in the setting aside a will which it was the object of the suit to have declared void, and had entered into an agreement to indemnify the plaintiffs from the costs; but as the result would have been the same had that witness's testimony been out of the case, the court refused the motion; but offered the defendant, who applied, liberty to give evidence to establish the fact of interest in the witness, in order that in the event of the cause going to appeal, his evidence should not appear there as the evidence of an unbiassed witness. *Waterhouse* v. *Lee*, 10 Chy. 176.

It is incumbent on the court to take care that the same subject should not be put in a course of repeated litigation; and that, with a view to the termination of a suit, the necessity of using reasonably active diligence in the first instance should be imposed upon parties. Where, therefore, a defendant did not appear at the hearing of the cause, and a decree was pronounced in favour of the plaintiff, and three months afterwards defendant applied to open publication, so as to let in proof of a document of the existence of which he was aware, and a copy of which he had in his possession, the court refused the application with costs. *Colonial Trusts* v. *Cameron*, 21 Chy. 70; affirmed on re-hearing. *Ib.* 76.

Passing.]—When a cause is set down for the examination of witnesses, publication passes at the end of the ensuing examination term, although issue may have been joined less than three weeks before the commencement of that term. *Wallace* v. *McKay*, 1 Chy. Chamb. 67.—Blake.

(i) *Other Cases.*

Where plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day; his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into evidence unless by leave of the court. *Wallace* v. *McKay*, 1 Chy. Chamb. 67.—Blake.

A cause was set down for the examination of witnesses, and when called on the plaintiff was not prepared to proceed:—Held, overruling the last case, that the defendant was entitled to have the case struck out of the paper with costs of the day. *Cobourg and Peterborough R. W. Co.* v. *Covert*, 7 Chy. 411.

Where a defendant has been examined on his answer, the answer and examination may be read in connection and used as an affidavit in support of a motion for decree. *Mathers* v. *Short*, 14 Chy. 254.

Where one of the defendants was a corporation, for whom the plaintiff had entered an appearance under the 75th of Vice-Chancellor Jameson's orders:—Held, no objection to a motion for an order to examine witnesses against the other defendants. *Beckett* v. *Rees*, 2 Chy. 13[illegible]

On appeal from the master's report, setting out certain grounds of appeal:—Held, that when

...ne defendant obtains an order and examines one of his co-defendants, and the other parties to the suit cross-examines such co-defendant he is thereby made a good witness in the cause. *Grimshaw* v. *Parks*, 6 L. J. 142.—Chy.

The examination of a defendant under general order 138, is the substitute for discovery by interrogatories, and to entitle a plaintiff to examine on any particular subject he must make a case for it in his bill. *Dickson* v. *Covert*, 2 Chy. Chamb. 342.—Taylor, *Secretary*.

Where a defendant refused to answer questions not founded on any case or charge or allegation made in the bill, an application to compel him to attend and answer was refused with costs. *Ib.*

Where a subpœna had been sued out under Order 266, and an appointment thereunder given by a special examiner at a time when no motion or other proceeding was pending, it was held to be irregular, and that the depositions taken could not be read. The attending under such subpœna was held not to be a waiver of the irregularity, the objection being to the jurisdiction, which no waiver could confer. *Storel* v. *Dobs*, 3 Chy. Chamb. 362.—Taylor, *Referee*.

Masters should be careful not to attach too much weight to oral testimony in opposition to evidence of facts and circumstances. *Day* v. *Croom*, 18 Chy. 681.

The court will not interfere with the discretion of the master in deciding on the relative veracity of witnesses, where evidence has been taken viva voce before him. *Waddell* v. *Smyth*, 3 Chy. Chamb. 412.—Chy.

Where on a reference to the master the plaintiff swore that he never received the amount of legacy to which he was entitled, and the defendant swore that he had paid all but $80, and a witness called by the plaintiff proved an admission by the defendant that the whole legacy was paid, but the master reported that this witness was not to be relied on, the court, in view of all the circumstances, refused to disturb the master's finding. *Cotter* v. *Cotter*, 21 Chy. 159.

Where a defendant has been cross-examined to his answer, he has a right in all future proceedings in the case to make the same use thereof as, under the former practice, could be made of his answer to the interrogatories in a bill; and where a defendant after having been so cross-examined died, and the cause was revived against his real representatives, the defendants were allowed at the hearing to read such cross-examination in answer to the statements of the bill; as rendering it necessary that such statements should be proved by two witnesses, or, if by one witness only, corroborated by attendant circumstances. *Powell* v. *Lea*, 20 Chy. 621.

The term "witness," in C. S. C. c. 79, s. 4, includes parties to the cause as well as witnesses in the ordinary sense of the word. *Moffatt* v. *Police*, 6 P. R. 33.—Spragge, on appeal from Holmested, *Referee*.

An examination of a defendant after answer under order 138, is an examination of witnesses within the act. *Ib.*

Only one examination of a party under order can be had. *Paxton* v. *Jones*, 6 P. R. 135. Chy. Chamb.—Holmested, *Referee*.

X. Inspection, Discovery, and Production of Documents.

1. *At Common Law.*

(a) *Application for.*

Interrogatories for the discovery of the nature of defendant's title, under C. L. P. Act, 1856, sec. 176, allowed upon summons to shew cause. *Horsman* v. *Horsman*, 2 L. J. 211.—C. L. Chamb. —Burns.

Plaintiff, as judgment creditor of H. & Co., had obtained a writ calling on defendant as garnishee to shew cause why he should not pay to the plaintiff a debt which he owed them, the allegation being that he had sold certain goods of H. & Co., under a chattel mortgage which they had given him, and received more than the mortgage money:—Held, that upon the affidavits set out in the case enough was stated to call upon defendant to shew what books he had in his possession relating to the matters in dispute. The plaintiff also swore that he believed the defendant had received certain notes and securities in connection with the sale, some of which remained in his possession:—Held, insufficient, the documents asked for not being identified or shewn to exist. *Small* v. *Eccles*, 3 P. R. 189.—Q. B.

If defendant admits the possession of certain documents, but states positively, or even says he is advised and believes, that they will not support the plaintiffs' case:—Semble, that production will not be ordered. *Ib.*

Held, following Christopherson *v.* Lotinga, 15 C. B. N. S. 809, that on an application for inspection, and to take copies of documents in possession of the adverse party, the plaintiff, and to deliver interrogatories, the affidavit of the party to the cause cannot be dispensed with, even though such party is not beneficially interested, and the application is made on behalf of, and supported by the affidavit of, the interested party (who in this case had paid the debt and taken an assignment of the judgment) and of his attorney. *Barwick* v. *De Blaquiere*, 4 P. R. 267.—C. L. Chamb.—Draper.

Held, that on an application for leave to administer interrogatories, when a party desires to ascertain what documents his opponent has in his possession relating to the suit, he must proceed under sec. 189 of C. L. P. Act; and cannot administer an interrogatory to that effect under sec. 190. *Plews* v. *Mutton*, 9 L. J. N. S. 259.—C. L. Chamb.—Dalton, *C. C. & P.*

(b) *What Documents.*

When a judge in chambers has ordered the inspection and discovery of documents, the court will not interfere unless it appear that such order has not been made with due discretion with reference to the facts before him; and in this case they refused to interfere. The plaintiffs sued defendants upon a banking account kept as they alleged upon the credit of the defendants, while defendants asserted that it was upon the credit either of the Detroit & Milwaukee R. W. Co., for whose benefit the money went, or on the credit of Messrs. B. & R., two of defendants' directors, who acted also for that company. Inspection and discovery was granted to the plaintiffs, 1. Of a statement or report of trans-

actions between defendants and the D. & M. Co., made by accountants for a committee appointed by the defendants; 2. Of letters written by Messrs. B. & R. to the chairman or secretary of the defendants' company respecting such transactions, and referred to in such report; 3. Of all letters in the defendants' custody, written or received before the controversy leading to this suit by Messrs. B. & R. as the defendants' managing and financial directors, to or from the defendants' chairman, and all the defendants' books of account relating to the matters in question. The defendants were also allowed inspection and discovery of letters written by the plaintiffs' cashier to a bank in New York, explaining the plaintiffs' position with the defendants, and on the subject of notes of the Detroit & Milwaukee R. W. Co. *The Commercial Bank of Canada* v. *The Great Western R. W. Co.*, 25 Q. B. 335. See, also, *S. C.* 2 L. J. N. S. 99.

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2. *In Chancery.*

(a) *Order to Produce.*

When it is required to produce any of the original pleadings filed in this court before any other court, the party desiring their production must obtain an order of this court for the purpose. *Cottle* v. *Cummings*, 2 Chy. 580.

When a defendant neglects to put in an answer, and the plaintiff files a traversing note under the 32nd order, the plaintiff was entitled to an order for production of documents pursuant to the terms of the 31st order. *Wilson* v. *Thompson*, 3 Chy. 557.

Where a bill is filed in an outer office, the order for production and other orders of course are properly obtainable at such office and not from the registrar. *Dougall* v. *Wilburn*, 1 Chy. Chamb. 155.—VanKoughnet.

Held, following a former decision of the chancellor, that the filing a disputing note was not an answer, it merely put in issue the amount claimed; and that an order to produce obtained on præcipe must be set aside, but plaintiff could obtain such order on an ex parte motion on proper grounds. *Richardson* v. *Beaupre*, 2 Chy. Chamb. 54.—VanKoughnet.

Where documents are in the custody of the deputy registrar in another cause, and are required at the hearing, an order for their production will be granted ex parte. *Gainer* v. *Doyle*, 2 Chy. Chamb. 279.—Taylor, *Secretary.*

An order to produce cannot regularly be taken out after decree. An order so taken out on præcipe was on motion set aside with costs. *Cottle* v. *Vansittart*, 2 Chy. Chamb. 396.—Taylor, *Secretary.*

The deputy registrar will be ordered to attend at a trial with papers in his custody. But to obtain such an order it should be shewn that the papers required are the original documents, and that the production of office copies will not be sufficient. *Chadwick* v. *Thompson*, 2 Chy. Chamb. 389.—Taylor, *Secretary.* See, also, *Jay* v. *Macdonell*, 2 Chy. Chamb. 71.—VanKoughnet.

Where an affidavit was a printed copy of the form in schedule K. to the orders, and referred to documents in the various schedules annexed, but no documents were set out in the schedules, the affidavit was directed to be taken off the files with costs. *Rogers* v. *Crookshank*, 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary.*

(b) *What Documents.*

The mere fact of the plaintiff, during the viva voce examination of a defendant, producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit. *Howatt* v. *Rees*, 2 Chy. 553.

When a party admits documents in his possession, he is primâ facie bound to produce them or assign a sufficient reason why he should not. But where a party refers in his bill to documents which otherwise he would not be liable to produce, he does not by so doing create a liability to produce them. *Green* v. *Amey*, 2 Chy. Chamb. 138.—Esten.

As a general rule a plaintiff in equity is entitled to a discovery, not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant; and as a part of that discovery, to a production of such documents as are material to the same purpose. Where, therefore, a bill was filed by a person claiming under a devisee, and in opposition to a motion to compel the production of deeds, the defendant swore that the alleged testator had not made any valid will, being sworn that he was not of sound mind when the supposed will was executed, the court ordered the deed to be produced. *Lawlor* v. *Murchison*, 3 Chy. 553.

Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original proprietor against the heirs-at-law of the original purchaser, it was Held, that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shewn. *Crew* v. *Glenn*, 8 Chy. 239.

A plaintiff filed a bill against his assignee representative for an account, charging that certain mortgages then in his possession, and apparently belonging to the assignee's estate, in reality were part of his estate. On being served with the usual order for the production of documents, the plaintiff filed an affidavit, objecting to produce the mortgages, on the grounds that they were held by the assignee the plaintiff's trustee, and that he had a *lien* on them for moneys expended by him on account of the properties covered by them. The affidavit also described certain other documents in the plaintiff's possession generally. The answer denied, on information and belief, that the mortgages had ever been the property of the plaintiff. Upon the application of the defendant, an order was granted requiring production of the mortgages, and for a more particular affidavit. *Fyfe* v. *Neild*, 1 Chy. Chamb. 131.—Spragge.

Three members of a vestry being appointed a building committee, and by it, one of the number treasurer thereof, the treasurer, being a mere agent, cannot be compelled, in a suit by a

...er of the vestry on behalf of himself and all other members except such treasurer, who was the defendant, to produce papers in his hands as treasurer—the other members of the committee being necessary parties. *Manning* v. *Cubitt*, 1 Chy. Chamb. 177.—Esten.

Where books were in actual use by defendant, the court refused to order him to make verified copies of entries relative to matters in question for plaintiff's use; but where it was sworn on the part of the plaintiff, and not denied by defendant, that the latter had documents so relating, which were not mentioned in his affidavit, he was ordered to produce them. *McDonell* v. *McKay*, 2 Chy. Chamb. 141.—Mowat.

Where a bank agent refused to produce on the ground that he had no documents in his possession but as such bank agent, it was held that he ought to set out in his affidavit what documents were so in his possession; and it appearing from his answer that he had taken a conveyance to himself as trustee for the bank, and that he had certain documents not mentioned in his affidavit, he was ordered to produce them, although the bank was not a party to the cause. *Ib.*

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute. *Bell* v. *Chamberlen*, 3 Chy. Chamb. 429.—Taylor, *Referee.*

A party is not obliged to produce deeds or documents which relate to his own title, and do not tend to establish the case of the party calling for the production. *Stovel* v. *Coles*, 4 Chy. Chamb. 9.—Strong.

Where a party having joint interest in documents with a stranger to the suit, has the sole actual possession thereof, production will not be ordered unless the suit be of such a nature that the court can say that the party having the legal custody sufficiently represents the other party interested. But in such case the party in whose possession the documents are, will be required to give discovery of their contents, and to furnish the information in his affidavit, on production, with as much particularity as was required in answering the interrogatories as to documents, under the former practice. *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.—Chy. Chamb.—Holmested, *Referee.*

A defendant was ordered to permit the inspection by the plaintiff of the books in daily use in defendant's business, which he objected to produce on that account, but which he was willing to produce at the hearing of the cause. *Boulton* v. *Whyte*, 6 P. R. 143.—Chy. Chamb. Strong.

Documents formerly in the possession of the defendant, and filed by him in a master's office in another suit, were directed to be produced by the defendant upon his being indemnified by the plaintiff against the expense of obtaining them out of court. *Ib.*

Upon an arrangement made by one P. with his creditors, by way of composition, the defendant M. held the estate of P. in trust to secure the reimbursement or indemnity of the plaintiffs and one H., who became sureties for the payment of the composition. Some time afterwards P. became again insolvent, and defendant, M., was appointed his assignee. A bill being filed to enforce the arrangement for indemnity, charging that M., in breach of the arrangement, had suffered the estate to remain in the hands of P., documents held by M. as assignee were held liable to production. *Wagner* v. *Mason*, 6 P. R. 187.—Holmested, *Referee.*

The plaintiff's case, for the purpose of discovery, consists of every thing necessary to obtain a decree, including what may be required to answer the defence set up. An affidavit on production, made by defendant, in which he objected to produce certain books of account, was held insufficient to protect them from discovery, because it did not state that the books did not contain evidence substantiating the plaintiffs' case, or that they only related to the defendant's case. *The Western of Canada Oil Co.* v. *Walker*, 6 P. R. 191.—Chy. Chamb.—Proudfoot, on appeal from Holmested, *Referee.*

A suit was brought by a married woman to which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. The defendant applied to compel further production, viz., of documents which, it appeared, the defendant, the plaintiff's husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing:—Held, that a better affidavit will only be ordered upon proof of admission under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced; that a feme covert plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants; and that the rule respecting the obtaining of discovery from a co-defendant, protected the plaintiff's husband from liability to examination by his co-defendants. *Brown* v. *Capron*, 6 P. R. 203.—Chy. Chamb.—Holmested, *Referee.*

(c) *Withholding because Documents sought are not Material.*

The plaintiff had given a mortgage on a steamboat, and the mortgagee afterwards sold the vessel, and the question was, whether he was to be charged with the amount of the purchase money, or merely with certain securities received on the sale in lieu of such amount. The defendant (the mortgagee's executor) admitted the possession of a copy of a letter from the mortgagee, refusing to join in the sale, and an opinion of counsel relating to the same matter, but alleged that these documents did "*not relate to the plaintiff's title or the case made by the bill*:"—Held, that the plaintiff was entitled to production, as the plaintiff's case and that of the defendant were, under the circumstances stated, so interwoven and inseparably connected, that nothing could relate to the one without also relating to the other. *Hamilton* v. *Street*, 1 Chy. 327.

A party to the suit admitting the possession of documents relating to the matters in question in the cause, the opposite party is prima facie entitled to their production, and the party in whose custody they are, must assign some ground for exempting them from the general rule. The defendant having obtained an order

of course for the production of documents in the plaintiff's possession relating to the matters in question in the cause, the plaintiff, without producing any, lodged an affidavit stating that he had no such documents except the title deeds of the property in question in the suit, and certain letters addressed by the defendant to one K., who had purchased the property from the defendant, and who afterwards sold the same property to the plaintiff; that the suit was for the specific performance of a parol agreement partly performed and not admitted by the defendant, and that the letters did not relate to the matters in question otherwise than by affording evidence of the agreement and its part performance. The affidavit filed in support of the motion, merely said that defendant was desirous of inspecting the letters in order to correct his intended testimony:—Held, that he was not entitled to their production. *Howcutt* v. *Rees*, 2 Chy. 268.

Whatever discovery a defendant would have been bound to give by answer with respect to documents in his possession, must now be furnished by the affidavit in answer to a motion to compel production under the 31st order of May, 1850; and the ground upon which he relies to excuse production, must be stated with the same particularity. When, therefore, a party filed a bill claiming title as heir-at-law of an intestate and called upon the defendant to produce deeds, &c., and in answer to a motion to compel production, the defendant put in an affidavit stating that the deeds in his possession did not prove the plaintiff's title, without furnishing any description so as to enable the court to judge of the effect proper to be given to this general allegation, such affidavit was held not to be sufficient, and production of the documents ordered. *Nicholl* v. *Elliott*, 3 Chy. 536.

A plaintiff seeking to establish a partnership, is not bound by the defendant's view of the relevancy or otherwise of papers which he seeks; and although the defendant swears positively that the papers have no bearing upon the case made by the bill, the court will order their production. *Saunders* v. *Furnivall*, 2 Chy. Chamb. 49.—Mowat.

The court will not act merely upon an allegation, by a party seeking to protect documents from production, that they are not material, if it appear from their nature, or otherwise, that they may afford material assistance to the party seeking production in establishing his case. *Fraser* v. *Home Ins. Co.*, 6 P. R. 45.—Chy. Chamb.—Holmested, *Referee*.

(d) *Withholding on the Ground of Privilege or Privacy.*

A party called on to produce documents must state distinctly in his affidavit on production, what are the documents he seeks to protect, and the grounds on which he claims them to be privileged. *Wright* v. *Western Insurance Co.*, 2 Chy. Chamb. 403.—Taylor, *Secretary*.

Letters passing between agents of a party to the cause, although written as between themselves in confidence, are not privileged communications or protected from discovery. Such letters are considered in the custody or power of the party in whose interest they are written, and must be produced. Such party cannot withh part of their contents by cutting out portions the letters. *Wiman* v. *Bradstreet*, 2 Chy. Chamb 77.—Taylor, *Secretary*.

Communications between solicitor and clie are privileged, no matter at what time made, long as they are professional, and made in a pro fessional character: McDonald *v.* Putnam, Chy. 258, not followed. *Hamelyn* v. *Wright*, 6 P R. 143.—Chy. Chamb.—Strong.

The following clause in an affidavit on produc tion was held a sufficient statement of the natur of the documents produced; "I object to pro duce the documents set forth in the second p of the first schedule, on the ground that th communications between solicitor and client they are privileged." *Ib.*

In a suit to restrain the infringement o patent, the plaintiffs objected to produce doc ments described as "professional opinions of th writers of them," (who were engineers, "as t the validity of the patent, the subject matter this suit," claiming that they were privile communications:—Held, that documents of th description are only protected where they ha been obtained in view of or in anticipation litigation which has actually taken place, and which the discovery is sought. *Toronto Gra Road Co.* v. *Taylor*, 6 P. R. 227.—Chy. Cham —Holmested, *Referee*.

(e) *Other Cases relating to Practice.*

A party to the suit, having received notice being examined by the opposite party, is entitled to call for the production of papers the possession of his adversary, in order better to enable him to give his testimon *Howcutt* v. *Rees*, 2 Chy. 268.

Where a party neglects to comply with terms of an order for the production of b and papers, the proper mode of proceeding, serve personally notice of motion to commi *Paterson* v. *Bowes*, 4 Chy. 44.

Semble, where a defendant admits in his swer the possession of documents, and in answer to an order to produce files an affida excusing production, the answer and affida must be read together. *Manning* v. *Cobu* Chy. Chamb. 177.—Esten.

In moving for an order nisi for non-produc in the master's office, the master's certificat to non-production must bear the latest post date. *Sommerville* v. *Joyce*, 1 Chy. Chamb. —Esten.

The notice of motion to take the affidavi production off the files, and to commit for c tempt, should be served on defendant's solic and not on defendant personally. *Ross* v. *Rob son*, 2 Chy. Chamb. 66.—Taylor, *Secretary*.

Motions for orders to commit for non-pro tion, are properly made in chambers. *Ib.*

A party parting with papers after servic him of an order to produce, was ordered to duce them, to file a better affidavit, and costs. *Ib.*

Under an order to produce, taken out by defendant, other defendants have no right compel production or inspection. A motio

a further affidavit by defendant, was under such circumstances refused with costs. *Seymour* v. *Longworth*, 3 Chy. Chamb. 112.—Taylor, *Secretary.*

The affidavit on production is a substitute for discovery on interrogatories, and a party is entitled to such discovery up to the latest possible date. Where an affidavit had been sworn before the service of an order to produce, it was held to be irregular and insufficient, and a new and better affidavit ordered to be filed. *Kennedy* v. *Royal Insurance Co.*, 3 Chy. Chamb. 489.—Boyd, *Master.*

The proper mode of contradicting an affidavit on production is by cross-examination of the deponent, and not by counter-affidavit. *Stratford* v. *Great Western Railway Co.*, 9 L. J. N. S. 313. Chy. Chamb.—Holmested, *Referee.*

An affidavit on production is not within the provisions of order 268, and therefore the party making it, does not thereby become liable to cross-examination upon it, except so far as this can be had by examination for discovery under order 138. Only one examination of a party under order 138 can be had. *Parton* v. *Jones*, 2 P. R. 135.—Chy. Chamb.—Holmested, *Referee.*

Before decree, no discovery will be ordered which appears to the Court to be immaterial to the question to be tried at the hearing. *Merchants Bank* v. *Tisdale*, 6 P. R. 51.—Chy. Chamb.—Holmested, *Referee.*

A motion for a better affidavit on production, in the alternative is that the party be committed upon failing to file the better affidavit, is substantially a motion to commit, and therefore requires four days' notice. *Abel* v. *Hills*, 6 P. R. 122.—Chy. Chamb.—Holmested, *Referee.*

See XVII. 1, p. 1379.

I. Evidence, and Examination of Witnesses, at Trial or Hearing.

1. *Parties to Suit.*

When a party to a suit calls the opposite party, he is not necessarily concluded by his answers. *Mair* v. *Culy*, 10 Q. B. 321.

Where after close of the plaintiff's case he is allowed to examine the defendant, this does not open the matter, so as to entitle him to call other witnesses. *Wilkes* v. *Heaton*, 17 Q. B. 95.

Held, Burns, J., diss., that where a party to a suit is called by the opposite party, he is not thereby made a witness for all purposes, but can be cross-examined by his own counsel, or the counsel of his co-plaintiff or defendant, only as to those matters upon which he has been examined by the party calling him. *Lamb* v. *Ward*, 9 Q. B. 304; followed in *Mutual Fire Ins. Co. Prescott* v. *Palmer et al.*, 20 Q. B. 441; but dissented from in *Dickson* v. *Pinch*, 11 C. P. 146, where the Common Pleas decided that a party called was made a general witness, and his capacity by reason of interest wholly removed.

Held, Blake, C., diss., that where a plaintiff examines a defendant, whose interest in the suit is such that a decree for the plaintiff must necessarily operate for the benefit of such defendant, the examination does not disentitle the plaintiff to relief against the other defendants. *McLean* v. *Maitland*, 1 Chy. 268.

The plaintiff has a right to examine the defendant at the examination and hearing of the cause, although the plaintiff may have already cross-examined him on his answer, and on an affidavit which he has made in the cause. *Thompson* v. *Hind*, 1 Chy. Chamb. 247.—Spragge.

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2. *At Hearing and Re-hearing.*

When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit. *Killaly* v. *Graham*, 2 Chy. 81.

Documents used on the examination of witnesses before an examiner, must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing. *Hollywood* v. *Waters*, 6 Chy. 329.

An objection to evidence for insufficiency must be taken at the hearing, and cannot be taken on a motion to vary the minutes. *McDonald* v. *Garrett*, 8 Chy. 290.

Where a party to a suit examines a witness at the hearing, the party calling him cannot afterwards exclude his testimony from the consideration of the court. *Vannatto* v. *Mitchell*, 13 Chy. 665.

A party is entitled to have an order upon præcipe, to prove vivâ voce at the re-hearing of a cause depositions which had not been used at the original hearing. *Cotton* v. *Corby*, 1 Chy. Chamb. 10.—Spragge.

Where a plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day; his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into evidence unless by leave of the court. *Wallace* v. *McKay*, 1 Chy. Chamb. 67.—Blake.

The fact that a defendant in a cause has, since the filing of the bill, temporarily left the jurisdiction of the court, is no ground for postponing the examination of witnesses and the hearing of the cause. *Galbraith* v. *Gurney*, 1 Chy. Chamb. 279.—VanKoughnet.

On a motion for decree, the plaintiff was assumed, for the purpose of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term. *Wilson* v. *Cossey*, 14 Chy. 80.

At the hearing of a cause, evidence is not admissible by one defendant against another. *The Attorney-General* v. *The Toronto Street Railway Co.*, 15 Chy. 187.

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3. *After Hearing.*

The particulars stated, that are necessary to be shewn in support of a petition to be allowed after the hearing of a cause to put in newly discovered evidence. *Mason* v. *Seney*, 12 Chy. 143.

Where after the evidence at the hearing of a cause was closed on both sides, the court ordered the cause to stand over to add a party, further evidence between the original parties was held to be inadmissible at the adjourned hearing. *The Attorney-General* v. *The Toronto Street Railway Co.*, 15 Chy. 187.

The court will not refuse to admit evidence recently discovered even after a cause has been set down for hearing on a petition of review. Where a cause is against the representatives of a deceased trustee, who had been defendant, the court in its discretion will exercise a greater degree of indulgence in the reception of new evidence than if the original defendant himself, who should have known all the circumstances, was alive. *Small* v. *Eccles*, 2 Chy. Chamb. 97.—VanKoughnet.

An application to take evidence after hearing, should be by petition and in court, and an application made in chambers was dismissed with costs. *Nicholls* v. *Moore*, 2 Chy. Chamb. 474.—Taylor, *Secretary*.

Application to let in evidence after the hearing of a cause, refused under the circumstances. *Carradice* v. *Currie*, 19 Chy. 108.

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4. *Refusing to Answer.*

It is in the discretion of a judge at nisi prius to refrain from committing a witness for contempt in not answering, if it be sought by the questions put to elicit an admission of facts importing scandal upon himself; and especially so if the witness be intoxicated and not able to give evidence at all. *Doe* d. *Marr* v. *Marr*, 3 C. P. 36.

A defendant, tenant in dower, is not compellable to give evidence of the contents of the title deeds, &c., under which he claims. *Lynch* v. *O'Hara*, 6 C. P. 259.

An attorney is not obliged to answer as to contents of deeds, &c., placed in his hands by defendant for the purposes of his defence. *Ib.*

A person summoned as a witness in insolvency proceedings, cannot refuse to give evidence respecting his own dealings with the insolvents by alleging that he is a creditor. *Re Hamilton and Davis*, 1 L. J. N. S. 52.—C. C.—Logie.

On an application made by the plaintiffs in an administration suit for an order directing the personal representative to institute proceedings to impeach the validity of a judgment and execution recovered by a third party against a debtor to the estate, as being fraudulent and collusive, the debtor was subpœnaed as a witness in support of the motion, and on his examination touching the bona fides of a judgment in question, he thus stated his objection: "I object to answer, on the ground that in this suit I cannot be examined in respect of matters arising in another suit, in which I am a party; and also that I cannot be examined in this suit for the purpose of fishing out evidence upon which to found a suit against me, and to be used on an application in which fraud and collusion are charged against me:"—Held, that this objection was not tenable, and the witness was ordered to attend again, at his own expense, and answer, and pay all costs occasioned to the plaintiffs and the personal representative by his refusal:—Held, also, that to entitle the witness to privilege, on the ground that his answer would expose him to a "penalty or forfeiture," he must state explicitly that he believes his answer would have that effect, and not merely leave it to be inferred that his answer would have that effect. *Grainger* v. *Latham*, 2 Chy. Chamb. 313.—Spragge.

In a proceeding charging that the mother, in concert with the other two defendants, had abducted and kept in concealment the children of the plaintiff, the two defendants refused to answer certain questions put to them respecting the children on the ground that their answers would tend to render them liable to criminal prosecution under the "Act respecting offences against the person," 32 & 33 Vict. c. 20:—Held, that, under these circumstances, the defendants were not bound to answer. *Keith* v. *Lynch*, 19 Chy. 497.

Plaintiff filed a bill for specific performance of a contract alleged to be made with defendant at an auction sale of lands, at which the plaintiff was a bidder. The defendant set up that plaintiff bought as his agent; that the plaintiff was a puffer, and the sale illegal. Plaintiff moved to strike out the allegations as to the sale being illegal on the grounds stated, as scandal and impertinence: and defendant moved that the plaintiff submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction:—Held, that the matter being material, was not scandalous, and that the plaintiff must answer all proper questions. *Jones* v. *Huntingdon*, 3 Chy. Chamb. 117.—Strong. See *Dickson* v. *Covert*, Chy. Chamb. 342.

Privileged communications, as between attorney and client. See p. 1307.

Refusal to produce privileged documents. See p. 1339.

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5. *Refreshing Memory.*

A witness may, to refresh his memory, refer to a memorandum made near the time when the event occurred, when the fact was fresh in his mind. *Fraser et al.* v. *Fraser et al.*, 14 C. P.

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6. *Contradicting Witnesses.*

(a) *On Collateral Issue.*

A question cannot be put by a witness on cross-examination, for the mere purpose of contradicting, unless such question be relevant to the issue; and if such question be put, the answer is conclusive. *Gilbert* v. *Gooderham*, 6 C. P.

A witness for the crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel. He admitted such statement when shewn to him, but said it was all untrue, and made to save himself. Per Wilson, J., the prosecutor's counsel was properly admitted to disprove the witness' assertion as to how the statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. *Regina* v. *Jerrett et al.*, 22 Q. B.

Defendants called the plaintiff, and after having him some questions, produced a deposition made by him before a magistrate, which was at variance with his answers. He admitted the contradiction, but said his present evidence was correct, and gave as an explanation that he

much confused at the time, being without papers which he wished to refer to, and that all he said was not in the deposition :—Held, that this explanation was a collateral matter, and defendants therefore could not call the magistrate to disprove it. *Beemer* v. *Kerr et al.*, 23 Q. B. 557.

In trespass against the sheriff for taking goods, the plaintiff called the bailiff who made the seizure and sale. He swore that the plaintiff, after giving notice of his claim to the goods, withdrew it, and that the sale went on. The plaintiff offered to disprove the withdrawal :—Held, that such evidence was admissible under C. L. P. Act, sec. 214, as relevant to the issue, though contradicting the plaintiff's own witness. *Robinson* v. *Reynolds*, 23 Q. B. 560.

Action on a fire policy. Plaintiff was called as a witness, and said : "I did not tell E., defendants' agent, I had not been burned out before. I was not asked by him." E. was called, and it was proposed to ask him questions to contradict the plaintiff on this point :—Held, that such evidence was properly rejected, as raising a collateral issue. *McCulloch* v. *The Gore District Mutual Fire Insurance Co.*, 34 Q. B. 384, affirming *S. C.* 32 Q. B. 619.

A person having a paper title to land of which he was not the actual owner, created a mortgage thereon, to a person not a party to a suit, by the party beneficially interested, to get rid of another mortgage created by him on the estate, was asked if he had given notice of the claim of the real owner when creating the first mortgage, which he asserted he had given, and also denied having made such mortgage :—Held, not a collateral issue, and that evidence was admissible to contradict him. *Gray* v. *Coucher*, 15 Chy. 419.

(b) *Other Cases.*

Where the plaintiff, in trespass for cutting and carrying away timber, issue being joined on a revocation of license, called the agent of defendant to prove that he had revoked the license to him, and the witness denied such revocation :—Held, that the plaintiff might call other witnesses to prove that they had heard his witness admit that the license had been revoked to him, and that the witnesses knew that he had still gone on and cut the timber after he had made the admission. *McNab* v. *Nixon*, 6 O. S. 445.

Plaintiff sued as endorsee of a note. A witness for defence said he thought the signature of the indorser not genuine. On cross-examination he was asked whether two signatures on a paper shown to him were the indorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case : Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been so left to the jury. *Royal Canadian Bank* v. *Brown et al.*, 27 Q. B. 41.

The rule that a distinct denial in an answer of statements made in the bill, must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, considered and acted upon. *Boulton* v. *Robinson*, 4 Chy. 109.

The plaintiff claimed as belonging to him a mortgage, which was in defendant's name, and had been given for the purchase money of the mortgaged land. The plaintiff had been in the Insolvent Court at one time after the transaction, and had sworn that he had parted with his interest in the property to the defendant in satisfaction of a debt :—Held, that though there was some (not satisfactory) evidence in favour of the plaintiff's present claim, it was not sufficient against this sworn statement of his own. *Ross* v. *Ross*, 16 Chy. 647.

Where witnesses directly contradict each other, the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts directly repel such an assumption. In investigating a charge instituted by the court against a solicitor, and which if established would have proved of a very grave nature, the court acted on the above principle, and accepted the solicitor's explanation of the facts, although distinctly contradicted by the client. *In re Toms, in the matter of M. C. Cameron*, 3 Chy. Chamb. 204.—Spragge.

7. *Other Cases.*

Semble, that the precise time at which, upon a trial particular evidence may be introduced, is for the judge exclusively to determine. *Robinson* v. *Rapelje*, 4 Q. B. 289.

It is not admissible to ask medical witnesses on cross-examination what books they consider the best upon the subject in question, and then to read such books to the jury ; but they may be asked whether such books have influenced their opinion. *Brown* v. *Sheppard*, 13 Q. B. 178.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions,—Held, that a medical witness previously examined for the crown, was properly allowed to be recalled to state that in his opinion the injuries found on the body could not have been so occasioned. *Regina* v. *Gagan*, 17 C. P. 530.

On the trial of an action on a promissory note, brought by the plaintiffs, a banking corporation, and to which defendants pleaded usury, consisting in the plaintiffs making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest, in the shape of commission, than they were legally entitled to, the plaintiffs' agent was asked by the defendants, in cross-examination, whether during the time he was in P. (the place of discount) he had directed or caused any other note to be made payable at any other place than P. :—Held, that the question was admissible. *The Bank of Montreal* v. *Scott et al.*, 17 C. P. 358.

The theory of the defence in an indictment for murder, was, that the death was caused by the communication of small pox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject :—Held, that he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. *Regina* v. *Sparham and Greaves*, 25 C. P. 143.

Where the evidence was not sufficiently clear to entitle the plaintiff to a decree, though it was such as rendered his equity probable, the court gave him the option of an issue, or to have his bill dismissed without costs. *Carfrae* v. *Vanbuskirk*, 1 Chy. 539.

An affidavit, in answer to affidavits filed in reply, filed after an enlargement of the motion, was held regularly filed, and allowed to be read, the court offering to give the other party time to reply to it, if he required to do so. *Dewar* v. *Orr*, *Dewar* v. *Sparling*, 3 Chy. Chamb. 224.—Strong.

A plaintiff desirous of obtaining the evidence of a defendant who resided out of the jurisdiction, and could not be served personally, paid a sufficient sum to the defendant's solicitor for conduct money, and moved for substitutional service of a subpœna on the solicitor, and that if default was made in attending, the bill might be taken pro confesso. The application was refused with costs. *Sefton* v. *Landy*, 4 Chy. Chamb. 33.—Taylor, *Referee*.

XII. Judicial, Official, and other Public Documents.

1. *Judgments, Orders, and Decrees of Foreign Courts.*

(a) *Proof of.*

The judge's private seal is not evidence of the proceedings of a foreign court of justice. *Brown* v. *Hudson*, Tay. 272.

Evidence of one witness that he had seen the seal of a foreign court, and believed the seal affixed to the document produced to be the seal of that court, and of another witness, that he had been to the office of the foreign court, and compared the seal, which was shewn him by an officer of the court, with that produced in evidence :—Held, sufficient primâ facie evidence of the judgment. *Hall* v. *Armour*, 5 O. S. 3.

A foreign judgment cannot be proved by a certificate from the clerk of the foreign court that judgment has been entered for a certain sum in favour of the plaintiff. *Norton* v. *Post*, 5 O. S. 137.

The mere exemplification of such judgment, if properly proved to be under the seal of the court, is sufficient proof. *Warener* v. *Kingsmill*, 7 Q. B. 409.

To prove a judgment of the supreme court of the state of New York, held at Watertown, in the county of Jefferson, a copy of the roll was produced, certified by the county clerk under the seal of the county :—Held, insufficient. *Woodruff* v. *Walling*, 12 Q. B. 501.

Debt on a judgment rendered in an inferior court in the United States. It was proved that the court had no seal, and the judge's book was produced containing the judgment, and his handwriting and signature proved :—Held, sufficient. *Kerby* v. *Elliott*, 12 Q. B. 367.

In an action on a judgment recovered in the *tenth* judicial district of the state of California, the plaintiff put in evidence an exemplification under a seal which purported by the impression to be that of the *fourteenth* district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court :—Held, that the proof was insufficient. *Junkin* v. *Davis*, 22 Q. B. 369, affirming *S. C.* 6 C. P. 408.

Plaintiff produced as evidence of a judgment against defendant in the court of the Exchequer of Pleas in England, *a certified copy* thereof under the hand of one of the masters of that court :—Held, insufficient ; and that the plaintiff should at least have produced an exemplification under the seal of the court. *Hesketh* v. *Ward*, 17 C. P. 190.

Plaintiffs offered no proof of identity of defendant with the person named in the judgment. Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of the name, was some evidence. *Ib.*

Held, that a vesting order of the Court of Chancery of England proves itself on production, by the Imperial Act 14 & 15 Vict. c. 99, and was therefore properly received in evidence. *Cahuac* v. *Scott*, *Cahuac* v. *Erle*, 22 C. P. 551.

To prove a judgment recovered in Lower Canada an instrument was produced, headed, "Province of Quebec, district of Montreal, superior court of Lower Canada," and setting out the judgment of the court, and certified to be a true copy under the hand of the prothonotary and the seal of the court :—Held, sufficient, under C. S. U. C. c. 80, s. 1. It was also objected that judgment was not sufficient, as the defendant had not been personally served with the process in the action in the foreign court ; but—Held, that as defendant had procured bail to be put in, and so obtained his freight, which had been attached, the objection could not be raised. *Tilton* v. *McKay*, 24 C. P. 94.

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2. *Other Judgments and Decrees.*

A judgment in an inferior court for a specific sum, is primâ facie evidence in a superior court against a less sum only being due, and as respects the merits it is conclusive till repelled by proof sufficient to destroy the effect of a foreign judgment as evidence of a debt. *Page* v. *Phelan*, 1 Q. B. 254.

A defendant in assumpsit pleaded in abatement a former action pending, and the plaintiff replied nul tiel record. The declaration in the first action contained only a count for money had and received ; in the second a count on an account stated was added :—Held, that the replication was not supported, and that defendant was entitled to judgment. *Bain* v. *Bain*, 1 Q. B. 572.

The production of the original indictment is not sufficient to prove an indictment for felony ; but a record must be made up with a proper caption. *Henry* v. *Little et al.*, 11 Q. B. 296.

Judgments may be proved at nisi prius by producing the original roll, as well as by exemplification, but the clerk should not produce such roll without proper authority. *Paterson* v. *Tod*, 24 Q. B. 296 ; *Sloan* v. *Whalen*, 15 C. P. 319.

In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plain-

had received goods from the store at the shanty :—Held, that it was allowable to prove by persons working with the plaintiff, that they had been paid by the defendant on application to him, and that in suits brought by them against him he had paid money into court ; and that the judgments in such suits were also admissible, though unnecessary. *Stewart* v. *Scott*, 27 Q. B. 27.

Action by a stakeholder, alleging that he had paid over the wager to defendant, one of the parties, on his agreeing to indemnify him ; and that R., the other party to the wager, sued and recovered judgment against the plaintiff, but that defendant did not indemnify. Defendant pleaded that the plaintiff falsely represented to him that R. had not demanded the wager from him, and that on the faith of such statement he promised to indemnify. The plaintiff produced an exemplification of the judgment recovered against him by R., the pleadings and issues in which shewed that the jury must have found a demand by R. This, it was contended, was evidence of such demand in this action ; but, Held, that at all events it would not prove defendant's plea, which was not supported by the other evidence. *Mayhew* v. *Turley*, 27 Q. B. 444.

Proof of Judgment on issue of nul tiel record, see "JUDGMENT."

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3. *Proof by Copies and Extracts.*

Sworn copies of exhibits filed in the crown office cannot be received in evidence ; the originals should be produced. *Molson* v. *McDonell*, 10 U. S. 441.

Papers filed in court should not be sent away to be used as evidence at Nisi Prius, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interest of public justice require their transmission ; and in that case the officers sending should take a voucher from the officer receiving them. *Gaynor* v. *Salt*, 24 Q. B. 180.

In an action for a malicious arrest, an examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant. *Spafford* v. *Buchanan et al.*, 3 O. S. 94 ; *Fitzgerald* v. *Webster*, T. T., 2 & 3 Vict.

Held, affirming Spafford *v.* Buchanan, 3 O. S. 90, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the crown office ; and that the identity of defendant with deponent may be presumed primâ facie from the name. *Dixon* v. *Thorpe*, 18 Q. B. 443.

On an application for the discharge of a person in custody under the Ashburton treaty, certified copies of depositions sworn in the United States after proceedings had been initiated in Canada, but after the arrest in Canada, were held admissible evidence before the police magistrate. *Ex parte Martin*, 4 L. J. N. S. 198.—C. L. Chamb. Morrison.

Any public document filed in a public office of the government, may be proved by an examined copy. *McLean* v. *McDonell*, 1 Q. B. 13.

The production of the registrar's book in which a memorial is recorded, is good evidence of the title being a registered title. And Semble, that the registrar producing an examined copy from his book, without either his book or the memorial, would be good evidence. *Doe* d. *Prince* v. *Girty*, 9 Q. B. 41.

A certificate purporting to shew the registered conveyances of land, from the county registrar's office, under the hand of the deputy registrar :—Held, not admissible evidence of the title, under the 13 & 14 Vict. c. 19, s. 4, so as to shew an incumbrance on the land. *Gamble* v. *McKay*, 7 C. P. 319.

Held, that an abstract of the registries upon a lot, shewing a patent, was clearly not sufficient evidence of the patent without an exemplification. Quære, is an abstract receivable in evidence at all, if objected to. *Reed* v. *Ranks*, 10 C. P. 202.

Copies of memorials certified by the registrar are evidence of the contents of the deeds. *Lynch* v. *O'Hara*, 6 C. P. 259.

A certified copy of a power of attorney to convey lands, from the depository of notarial records in Lower Canada, under the corporate seal of the board of notaries of Montreal, is admissible, it being presumed that such power, although not in itself an official document, came officially into the hands of the notary among whose records it was found. *Gray* v. *McMillan*, 5 C. P. 400.

A certified copy of a patent taken from the books in the provincial registrar's office, and signed by the deputy registrar, is not sufficient as primary evidence instead of an exemplification. *Prince* v. *McLean*, 17 Q. B. 463.

Semble, that an admitted copy of the field notes from the Crown Lands office, may be received in evidence. *Doe* d. *Strong* v. *Jones*, 7 Q. B. 385.

A certified copy of part of the field notes of the original survey is admissible in evidence. *Carrick* v. *Johnston*, 26 Q. B. 69.

An assignment of a squatter's right in the crown lands office is not "an original record" or "original memorial" requiring a judge's order to the commissioner of crown lands to produce it. *McGuire* v. *Sneath*, 2 L. J. 184.—C. L. Chamb.—Richards.

The 32nd rule means records of the court and memorials in the hands of the registrars. *Ib.*

Defendants' secretary, called by the plaintiffs, produced copies of the proceedings of defendants' London Board, which he said had been sent by them to the board here as such copies, but which he could not prove otherwise to be so :—Held, clearly sufficient. *Commercial Bank* v. *Great Western Railway Co.*, 22 Q. B. 233.

Semble, that a conviction returned under the statute to the Quarter Sessions, and filed by the clerk of the peace, becomes a record of the court, and may be proved by a certified copy. *Graham* v. *McArthur*, 25 Q. B. 478.

A plan was produced from the registry office, sworn to be that furnished by the commissioner of crown lands. It was headed "Cardiff," (the name of the township, (and at the bottom was written "Department of crown lands, Ottawa,

November, 1866, A. Russell, assistant commissioner," whose signature was proved;—Held, sufficiently certified, and receivable in evidence. *Nicholson* v. *Page*, 27 Q. B. 318.

A copy of a petition to the administrator of the government certified by the clerk of the executive council, purporting to be signed by petitioners, one being a marksman, the endorsement shewing that it was received on the 15th May, 1797, was held admissible as evidence, without proof of the signature. *Montgomery* v. *Graham*, 31 Q. B. 57.

In trespass to land, defendant justified under an award of fence-viewers. The township clerk produced a copy, which he swore was a true copy of the award, the original being in his custody:—Held, that such copy was admissible in evidence under C. S. U. C. c. 32, s. 6, these awards being made by a statuable public officer acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities. Semble, per Wilson, J., that if the copy had been one delivered by the fence-viewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Deslippes*, 33 Q. B. 59.

When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit. *Killaly* v. *Graham*, 2 Chy. 281.

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4. *Other Cases.*

The certificate of a commissioner for administering the oath of allegiance, is evidence (after his death and that of the party taking the oath) that such oath was administered. *Doe* d. *McFarlane* v. *Lindsay*, Dra. 123.

A continuance roll found in the proper office and entered and filed there by the proper officer, is a record of the court, although not compared with the papers filed in the cause. Parol testimony cannot be received to contradict the roll. *Prentice* v. *Hamilton*, Dra. 398.

Semble, that a certificate of a registrar of the discharge of a mortgage endorsed on the mortgage, is sufficient evidence of a reconveyance, without proof of the execution of the discharge itself. *Doe* d. *Cookshank* v. *Humberstone*, 6 O. S. 103.

The commencement of an action may be proved by the writ of ca. re. The minutes of the clerk of the crown or his deputy on the writ, marking the time of issuing, is primâ facie proof of the fact. *Upper* v. *McFarland et al.*, 5 Q. B. 101.

A party who had lost his patent for land, will not be allowed to give parol evidence of its contents; he must produce an exemplification of the patent. *McCollum* v. *Davis*, 8 Q. B. 150.

The production of the original indictment is insufficient to prove an indictment for felony. A record must be made up, with a proper caption. *Henry* v. *Little*, 11 Q. B. 296.

In an action for maliciously and without probable cause, arresting the plaintiff:—Held, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *Aston* v. *Wright*, 13 C. P. 14.

Held, that upon a question of the age of a voter, the written return of the clergyman who married his father and mother, made under 4 Geo. IV. c. 36, was better evidence than the memory of individuals unaccompanied by any memoranda. *Reg. ex. rel. Forward* v. *Burtch*, 7 C. P. 533.

In an action for the maintenance of an illegitimate child, the affidavit was produced from the office of the city clerk, and purported to be sworn before the police magistrate of Toronto, where the deponent resided:—Held, sufficient evidence to go to the jury that it was deposited by her in the proper office. *Jackson* v. *Kissock*, 26 Q. B. 341.

Upon a question as to the boundaries of a school section:—Held that the map prepared by the township clerk, under sec. 49 of the School Act, C. S. U. C. c. 64, shewing the division of the township into sections, was admissible as evidence. *The Chief Superintendent of Education* v. *Shorey and Thrasher et al.*, 30 Q. B. 504.

A book was produced, dated 24th June, 182[illegible] signed by the surveyor general, containing a list of grantees and the lots granted, with the number of acres in each lot, in which this lot appeared, with the name of E. H. opposite to it and the letter D. opposite her name; and it was shewn that the lot was granted to her in 181[illegible]—Held, sufficient evidence that the lot had been returned as described for patent, though there was no heading to the book describing its subject or object. *Jones* v. *Cowden*, 34 Q. B. 3[illegible] affirmed in appeal, 36 Q. B. 495.

Land marked out in the original plan of a township as an allowance for a road, does not lose that character because it has never been used as a road for forty years; and a copy of the plan certified by the surveyor-general is admissible to prove such allowance, although it does not appear by whom, nor from what materials the plan was compiled. Macaulay, J., dissenting. *Badgeley* v. *Bender*, 3 O. S. 221.

Defendant put in a sworn and examined copy of the original map from the crown lands department of recent date, and containing defendant's name as entitled to the timber limits, to prove that the creek was within such limits. Held, that this, coupled with the fact that he had been for many years in possession of the timber limits, cutting timber thereon and approving the same, was some evidence to go to the jury that he was not a mere intruder on the rights of the crown. *Whelan* v. *McLachlan*, 16 C. P. 102.

Papers filed in court should not be sent away to be used as evidence at Nisi Prius, unless when the originals are essentials, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission, and in that case the officer sending should take a voucher from the officer receiving them. *Gaynor et al.* v. *Sall*[illegible] Q. B. 180.

Where a probate is used as evidence, under C. S. U. C. c. 16, it is evidence of the testator's death, as well as of the will. *Davis et al.* v. *Van Norman*, 30 Q. B. 437.

A certificate of a deputy clerk of the crown of the date of the filing a paper, in the shape

postal card, is no evidence. *Johnson* v. *Loney*, 6 P. R. 70.—C. L. Chamb.—Dalton, *C. C. & P.*

Documents used on the examination of witnesses before an examiner, must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing. *Hollywood* v. *Waters*, 6 Chy. 329.

XIII. Private Documents.

1. *Plans.*

The question being as to the limits of defendants' road, which run from Sandwich to Windsor,—Held, that as no limits had been assigned to the town of Windsor when the defendants were incorporated, the court would look to what the proprietor of the land on which a part of what was commonly called Windsor stood, had designated Windsor on a plan which he had filed in the registry office, and referred to in giving deeds; and to the popular understanding as to what constituted Windsor; and that, taking these facts as guides, it was quite clear that the road had been extended into the town, and a toll-gate placed within the limits. *Dougall* v. *The Sandwich and Windsor Plank and Gravel Road Co.*, 12 Q. P. 59.

A map produced from the custody of the son of the original owner of the lot, and sworn to be the map upon which the township was originally sold:—Held, to be properly admitted in evidence. *Van Every* v. *Drake*, 9 C. P. 478.

See, also, XII. 4, p. 1351.

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2. *Ancient Documents.*

A memorial more than thirty years old of a lost deed, is good evidence upon its bare production, without calling or accounting for the subscribing witness. *Doe* d. *Maclem* v. *Turnbull*, 5 U. C. B. 129.

Semble, that this principle extends to any written document, even to letters. *Ib.*

In ejectment, the plaintiffs claimed through two deeds, over thirty years old, in proof of which they shewed one to have come from the custody of the former owner's agent, and the other to have been produced under a written order from the agent;—Held, sufficient proof of deeds having come from the proper custody, without calling the agent who had had charge of them. *Cook et al.* v. *Christie*, 12 C. P. 517.

Ejectment. The plaintiff claimed from the patentee under a deed executed in 1843. Defendant relied on a former deed executed in 1833 by the patentee, (a married woman), on which was endorsed a certificate of her separate examination by chief justice Scott. This deed was produced by the son of the executor of the patentee of the patentee, and proved to have been found among the testator's papers:—Held, proper custody in point of law, so as to render mere production evidence. Held, also, that the deed under which plaintiff claimed, rather than the ancient deed, carried with it the imputation of fraud, and the production and proof that did not necessitate the calling of the subscribing witnesses to the old deed if living, or proving their signatures if dead. Held, also, that the objection that possession of the land did not accompany the ancient deed was not sustained by the evidence set out in the case. *Orser* v. *Vernon*, 14 C. P. 573.

The production of a deed thirty years old, purporting to be executed under a power of attorney, does not prove the power. In this case the only proof of authority was the production of a paper professing to be a copy of an unsealed power of attorney, dated in 1824, and received by the plaintiff's attorney from the son of the person appointed by it, since dead:—Held, clearly insufficient. *Jones et al.* v. *McMullen*, 25 Q. B. 542.

A copy of a petition to the administrator of the government certified by the clerk of the executive council, purporting to be signed by three petitioners, one being a marksman, the endorsement shewing that it was received on the 15th May, 1797, was held admissible as evidence, without proof of the signatures. *Montgomery* v. *Graham*, 31 Q. B. 57.

Deeds purporting to be upwards of thirty years old were produced from the custody of the solicitors of the plaintiffs, who claimed as trustees, and one of which solicitors was a plaintiff in the action. The plaintiffs claimed under these deeds, through several mesne conveyances. The solicitor-plaintiff had once recovered judgment in ejectment for the land in question, as one of the three trustees:—Held, that the deeds were produced from the proper custody, to entitle them to be received in evidence as ancient documents. *Thompson* v. *Bennett*, 22 C. P. 393.

Per Gwynne, J., a deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved. *Ib.*

J. McK., having an order in council for 100 acres, executed in February, 1827, to Shore, a bond for a deed. The petition for a location and the bond were executed by mark, and in the bond the obligor was described as of York, labourer. In May, the patent issued to McK., and was in the possession of Shore shortly after its date. Shore went into possession in 1828, cleared about seven acres, and after three years left it in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of Shore in 1849. The plaintiffs, claiming as heirs at law of Shore, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants, Shortis and McCabe, produced a conveyance purporting to have been made by, and signed "James McKenny," now of the township of Niagara, &c., yeoman, to James Smith, dated 7th September, 1833; and a conveyance from Smith to Shortis, dated in May, 1849; both registered. No oral testimony was given of the identity of the grantor in the deed to Smith, with the locatee of the crown, and *no evidence of its custody* during the thirty years:—Held, that the deed from McK. to Smith did not come within the rule that an ancient document proves itself. *Rogers* v. *Shortis*, 10 Chy. 243.

Although an ancient deed produced from the proper custody proves itself, this does not preclude a party interested from proving the deed a forgery, or invalid on any other ground. *Chamberlain* v. *Torrance*, 14 Chy. 181.

3. *Deeds.*

(a) *Generally.*

A. B. & C. are witnesses to a deed. A. having been shewn to be dead, his handwriting is proved; the handwriting of B., who is also lessor of the plaintiff in an action of ejectment is also proved. D., the defendant in the action of ejectment, having proved B.'s handwriting, rests his proof of the deed there, without attempting to account in any way for the absence of C., the third witness. Semble, per Jones, J., that the deed, without accounting for the absence of the witness C., was not legally proved. *Doe* d. *McDonald* v. *Twigg et al.*, 5 Q. B. 167.

In ejectment by a son against his father, the plaintiff claimed under a deed from defendant. There was evidence to shew that since this deed defendant had been more than twenty years in possession without any recognition of the plaintiff's right. The plaintiff attempted to shew that, during a part of that period, defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which defendant claimed to have held adversely. At the foot, but not in defendant's writing, was written the plaintiff's name, and the word "copy." No proof was offered respecting this paper, except that it was in defendant's handwriting:—Held, that such paper should have been received. Draper, J., diss. *McQueen* v. *McQueen*, 10 Q. B. 193.

In ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the land to one J. R., deceased, (under whom defendant derived title,) evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., or that the title was vested in J. R., and a letter from T. R. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—Held, that such evidence, under the circumstances, was admissible on the part of defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Rogers et al.* v. *Card*, 7 C. P. 89.

In an action for dower in three lots of land, to prove that defendant was tenant of the freehold, a witness was called, who stated that he had occupied one of the lots as tenant to defendant; and about ten years ago conveyed all three lots to one H., who swore that he had conveyed to defendant after having occupied as owner and built upon the land. A certified copy of the memorial of this deed was put in, notice to produce having been given to defendant:—Held, sufficient evidence to go to the jury. *Fisher* v. *Harty*, 23 Q. B. 408.

The covenant in question had no seal on it when produced at the trial, but there was a mark of where the seal had been, and the witness to its execution swore he had put a seal on it before execution. The jury having found that it was sealed when executed, the finding was accepted. *Stewart* v. *Clark*, 13 C. P. 203.

In an action of dower, the tenant relied upon a release by the demandant and her husband to C., from whom the tenant had afterwards purchased the land. This release was executed by the demandant by mark, her name being written by some one else, and the tenant was the only subscribing witness:—Held, that proof of the tenant's signature was not rendered admissible to prove the deed by the fact of his being a party to the record; and that, as he could not be examined on his own behalf, and offered no other evidence that the demandant executed the release, the demandant must succeed. Hagarty, J., diss. *Clark* v. *Stevenson*, 23 Q. B. 523.

Dower. Plea, that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1850, the demandant, by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd of April was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: See Clark *v.* Stevenson, 22 Q. B. 575. The defendant therefore proved the execution of the deed of the 21st of August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was endorsed, dated 2nd of March, 1850, that the demandant had appeared before them and duly barred her dower; and one of them proved that she was examined, executed the deed, and received $10. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release of the 23rd of April, 1850, prepared, and sent it to her by defendant, with a note for $40 which he held against her husband, to be kept if the release was executed, otherwise returned; and that defendant brought back to him the release apparently executed, but not the note. This evidence was received (though objected to), as tending to strengthen the probability that the release really was executed; it being also sworn, in confirmation, that the demandant's name to the release was written by her husband: that in May following the demandant told a witness that defendant had been to her to sign a paper for T. C. which she had signed; and that the next day she told defendant she had no rights there. The jury found for defendant. Draper, C. J., doubted whether there was sufficient to go to the jury as evidence of the execution of the release; but Held, Morrison, J., concurring, that defendant being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding his adverse interest; and that the verdict must therefore be set aside. Morrison, J., thought the evidence inadmissible as being irrelevant to the issue. Hagarty, J., diss., holding that the evidence was properly received as forming part of the history of the whole transaction, and tending to shew why the release was for a nominal consideration only, and in a form implying a previous conveyance of the fee, which might otherwise have given rise to suspicion; and that defendant was not bound to call the demandant. *Clark* v. *Stevenson*, 24 Q. B. 200.

The seal of a corporation having been proved —Held, that the production of a document with

the powers of the corporation, with the seal attached, is sufficient prima facie evidence of its proper execution. *Woodhill* v. *Sullivan*, 14 C. P. 263.

When collateral issues arise out of comparison of handwriting, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it. *Royal Canadian Bank* v. *Brown et al.*, 27 Q. B. 41.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the res gestæ, and as shewing that P. had sworn to the execution. *Rose* v. *Cuyler*, 27 Q. B. 270.

Defendant produced a deed upwards of thirty years old, with a married woman's certificate thereon, from the plaintiff and her husband to the devisor of the defendant's wife, and it was admitted that defendant and those under whom he claimed had been in possession during all this period:—Held, following Osser *v.* Vernon, 14 C. P. 573, that the deed with the certificate upon it, coming from the proper custody proved itself; and that from the fact that the possession of the land had gone in accordance with it for more than thirty-one years, it would be presumed that the deed as produced had been properly executed, and that everything done by the justices as public officers had been rightly done, until the contrary was shewn. *Monk* v. *Farlinger*, 17 C. P. 41.

The evidence shewed that A. B., the ancestor of the female plaintiff, through whom the title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., the son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B., before his death, told a witness examined at the trial that he had got this deed which he shewed to witness:—Held, sufficient evidence of a deed in fee to A.B. *Steinhoff et ux.* v. *Burtch*, 17 C. P. 160.

In covenant against two defendants, the indenture of apprenticeship sued upon was produced from the custody of defendants, with whom the apprentice had served until his dismissal. It had four seals, and was signed by the plaintiff, his son the apprentice, and one of the defendants, but not by the other defendant:—Held, that there was evidence of execution by both defendants. *Judge* v. *Thomson et al.*, 29 U. C. R. 523.

Signing is not essential to a deed, though it should never be dispensed with. *Ib.*

Where a conveyance is produced upon notice to an adverse party who claims an interest in the cause under the deed so produced, the party calling for its production is not bound to prove its execution. *Chisholm* v. *Sheldon*, 2 Chy. 178.

The defendants produced a conveyance purporting to have been made by and signed "J. McK.," now of the township of Niagara, &c., yeoman, who was the patentee, to J. S. No oral testimony was given of the identity of the grantor with the locatee of the crown, but the signature and death of one of the attesting witnesses was proved, and the absence of the other witness was accounted for:—Held, 1. That there was sufficient prima facie proof of its execution; 2. That such proof must be taken to include that the party by whom the deed purported to be executed, was not only a person of that name, but the identical person in whom was vested the estate which the deed purported to convey. *Rogers* v. *Shortis*, 10 Chy. 243.

Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due execution, the other party may give evidence of the character of such deceased witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him. *Chamberlain* v. *Torrance*, 14 Chy. 181.

The court, upon the conflicting evidence in this case, upon a petition under the act for quieting titles, decided that a power of attorney and bond relied upon were forgeries. *Brouse* v. *Stayner*, 16 Chy. 553.

In a suit against a widow by the assignee of a mortgage purporting to be executed by her late husband and herself, the plaintiff proved their signatures and that of the subscribing witness, who also was dead. The judge by whom the defendant had been examined verified his certificate, though he did not recollect the circumstances. The document was a patched instrument, and the parts were not referred to in the attesting clause or otherwise authenticated:—Held, on rehearing, [reversing the decree of Mowat, V. C.,] that the unsupported evidence of the defendant, though believed by the vice-chancellor, was not sufficient to disprove the execution of the instrument by her, nor to throw on the plaintiff the onus of proving that the patching of the instrument had been before execution. Mowat, V.C., diss. *Northwood* v. *Keating*, 18 Chy. 643.—*S. C.*, on the original hearing, 17 Chy. 347.

To complete the chain of the paper title to the land in respect to which a certificate of title was prayed, production or proof of a power of attorney from the patentee to one J. was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioner, and the only evidence of it was an affidavit of one P., who did not swear that he had ever seen it, and did not state his means of knowledge of its existence. There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power. The only evidence as to possession was a statement in the petitioner's affidavit that one H., to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title. No notice appeared to have been given to the person who was in possession. No affidavit was put in as to adverse claims served upon the person directed to receive them. The evidence as to possession and the existence of the power of attorney was—Held insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed, said to be executed in pursuance of

the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee. Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be furnished. *Re Street*, 2 L. J. N. S. 197.—Taylor, *Referee*.

4. *Other Documents.*

If a party rely on a patent from the crown to make out his title, he should, in the event of its being mutilated or injured so as to render it impossible to ascertain its contents satisfactorily, obtain an exemplication. *Goodtitle ex dem. Snyder* v. *Barker*, 5 O. S. 333.

The defendants were sued on a by-law, alleged to have been made by them, enacting that all persons who at the time of subscribing should pay up their stock in full, should be entitled to interest on the amount of their investment. The defendants' book of by-laws was produced, in which this by-law was written out, but not sealed, and in the margin was written "expunged," signed with the president's initials :—Held, that such proof, even without the entry in the margin, would have been insufficient to shew a by-law. *McDonell* v. *The Ontario, Simcoe and Huron Union R. W. Co.*, 11 Q. B. 267.

XIV. Parol Explanation of Documents.

1. *To Vary or Explain Deeds.*

(a) *Deeds absolute in form, but intended to be held as a Security or in Trust.*

Parol evidence cannot be received that a deed absolute in its terms was intended only as a security. *Gilmour* v. *Hayes*, 6 O. S. 631.

The plaintiff, who was the owner of land about to be sold at sheriff's sale, agreed with defendant that defendant should buy the property at the sale for him, and pay out of defendant's own funds, and give the plaintiff two years to repay him. The property was then sold for about one fifth or one-eighth of its value to defendant, who paid for it, and the plaintiff remained in possession for two years, under the agreement, and made valuable improvements :—Held, that parol evidence was admissible to prove the agreement. *Papineau* v *Gurd*, 2 Chy. 512.

Where an absolute conveyance is executed with a parol agreement for redemption, and the grantor continues in possession, if the parties so deal with one another as to render such possession clearly referable to the parol agreement, as by demand and payment of the debt or interest, or some part thereof, such parol agreement will be enforced in equity. Semble, where it is clear from written evidence that the agreement really made between the parties to a deed is not that stated in the deed, but the written evidence does not shew what it was, parol evidence of it is admissible. Semble, a grantor continuing for years in possession of property after execution of an absolute conveyance, is alone sufficient to let in evidence of the parol agreement for redemption, in pursuance of which such possession took place. *LeTarge* v. *DeTuyll*, 1 Chy. 227.

A decree was subsequently made to let plaintiff in to redeem. *Ib.* 3 Chy. 369.

Where a party assigned his estate by way of mortgage, but the instrument purported to be absolute, and no change of possession took place, the tenant of the mortgagor continuing to hold possession :—Held, on appeal from Chancery, that this was not such a possession by the mortgagor as would affect a purchaser from the mortgagee with notice of the interest of the mortgagor, Esten, V. C., diss : LeTarge *v.* DeTuyll, approved of. *Greenshields* v. *Barnhart*, 3 Chy. 1 ; affirmed on appeal to the Privy Council, 5 Chy. 99.

Where an absolute deed of real estate had been executed, and the grantor, by his bill, alleged that the deed so executed was intended as a security only, and that it had been verbally agreed to execute a defeasance at some future time, but it did not appear that any acts of the grantee were inconsistent with his supposition that the conveyance was intended to be absolute, and not by way of security, parol evidence of the alleged agreement was held inadmissible : LeTarge *v.* DeTuyll remarked upon. *Howland* v. *Stewart*, 2 Chy. 61.

Where a party assigned his interest by way of security, but the assignment purported to be absolute, and he remained in possession from the execution till the time of the hearing, parol evidence was admitted to shew the real nature of the transaction. *Barnhart* v. *Patterson*, 1 Chy. 459.

Where a party, being in close custody at the suit of another, agreed to execute a conveyance to him as a security for his debt and costs, and executed an assignment accordingly, but the instrument was deemed in law an absolute assignment giving the assignee a right of re-purchase, and after the day of payment had elapsed this deed was set up as a bar to the party's right to redeem, parol evidence was admitted on the ground of fraud. *Stewart* v. *Horton*, 2 Chy. 45.

One test by which a conditional sale is distinguished from a mortgage is, the adequacy of the consideration. Where, therefore, it was shewn that the plaintiff had conveyed an estate for less than one-fourth of its value, with a clause giving him a right of re-purchase, the conveyance was declared to be a security only. *Ib.*

In a suit by the representatives of B. against the representatives of C., parol evidence clearly proved that A. and B. had agreed to exchange properties, B. paying A. £74 for difference of value : that B. had conveyed his property to A., and after the arrangement was completed, A.'s property had been conveyed to C. by B. as security for the £74, which C. undertook to pay B. in goods, and it appeared from C.'s books that he had charged the £74 to B., and credited and afterwards satisfied that amount to A., and had credited the rents to B., and charged him with the repairs of the premises ; and letters written by C. were also in proof, which indicated the existence of some agreement respecting the property :—Held, that the parol evidence was admissible ; and it appearing that the debt had been paid, the defendants were declared trustees of the property in question for the plaintiff. *Willard* v. *McNab*, 2 Chy. 601.

Upon the question whether a deed, absolute in its terms, was really intended as a security

merely, an unsigned memorandum of the transaction, made at the time for the use of the parties by the attorney's clerk who drew the deed for them, was held sufficient to let in parol evidence. Parol evidence does not become admissible in this class of cases, because of a note in writing sufficient to take the case out of the Statute of Frauds, but because of the existence of some fact which evinces the real intention of the parties to have been different from that expressed in the deed. Where an absolute deed appeared from parol evidence (which, under the circumstances, was admissible) to have been intended as a security only, and the defendant, the devisee and executrix of the grantee, swore that she believed the equity of redemption, if any, was put an end to by a subsequent parol agreement between the parties, casual conversations by the mortgagor with third persons, from which such an agreement was attempted to be inferred, were held insufficient proof of it, though it was said the mortgagor had claimed no interest in the property from the time of the alleged agreement until after the death of the mortgagee, a period of about ten years. *Holmes* v. *Matthews*, 3 Chy. 379.

The decree in the above case was reversed on appeal, and the plaintiff's bill dismissed with costs. *Matthews* v. *Holmes*, 5 Chy. 1; and on appeal to the Privy Council the judgment was affirmed. See *Holmes* v. *Matthews*, 5 Chy. 108.

The circumstances under which parol evidence should be admitted to give an absolute deed the operation of a mortgage between the parties, considered and discussed. *Matthews* v. *Holmes*, 5 Chy. 1.

A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment. An execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and the mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations, and the mill and mill-premises to an infant on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and that he should hold the same for the several owners. Accordingly he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there, and preventing competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and mill-premises, which the purchaser retained, occupied, and improved during the minority of the devisee, who on his attaining his full age, demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court, under the circumstances, held the plaintiff entitled to redeem the mill-premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol. *McGill* v. *McGlashan*, 6 Chy. 324.

The principle upon which parol evidence will be received to cut down a deed absolute on its face to a mere security considered and acted on: LeTarge *v.* DeTuyll, 1 Chy. 277, commented on and approved of. *Bernard* v. *Walker*, 2 E. & A. 121.

Parol evidence to vary a written instrument rejected, although it was doubtful if it contained all the agreement between the parties. *McAlpine* v. *How*, 9 Chy. 372.

An assignment of a bond for the conveyance of land was made from a debtor to his creditor, by a writing absolute in form, but the creditor at the same time executed a memorandum shewing such assignment to be by way of security only. Subsequently the debtor executed another absolute assignment without receiving back any such memorandum. The court refused to act upon parol evidence that the assignor was to be interested in the proceeds of the land over and above his indebtedness to the assignee. *Ib.*

A mortgagee purchasing a prior mortgage was advised by his solicitor to take the assignment to another person as trustee, and took it accordingly in the name of his son, not intending it as an advancement to the son:—Held, that parol evidence was admissible to prove the trust. *Barr* v. *Barr*, 15 Chy. 27.

Having afterwards foreclosed all other incumbrancers, the father was advised to release his interest to his son, so that the whole title might be in him as trustee. The deed did not mention any trust, but was retained by the father, and the son knew nothing of it for more than five years, during all which time the father received payments from the mortgagor to his, the father's, own use, with the knowledge of the son, and without any claim by him:—Held, that parol evidence was admissible to prove these facts, and a conveyance to the father was decreed. *Barr* v. *Barr*, 15 Chy. 27.

A deed was made by one joint owner of property at the instance of the other to a third person, under a parol agreement that the grantee should hold the property to secure money which he was to advance to pay interest on a mortgage on the property, and subject thereto in trust for the wife of such other joint owner, who remained in possession:—Held, that parol evidence of the agreement was admissible. *Campbell* v. *Durkin*, 17 Chy. 80.

A man conveyed land solely on a parol trust, and the trustee made large advances on account of the grantor and his family. They afterwards settled accounts, and it was agreed that the grantee should retain a portion of the land at a specified price in satisfaction of the balance due to him; mutual releases were executed, and the relation of the parties terminated. After the death of the grantee the grantor's wife and children filed a bill alleging that the land so retained was held in trust for them; but the court, being satisfied that this was not so, dismissed the bill. *Mervey* v. *Boomer*, 17 Chy. 558.

The plaintiff agreed with J. to purchase a mining lease for their joint benefit, the consideration for which was to be the testing of the ore at

the crushing mill of the plaintiff, and at his expense. In pursuance of this arrangement, J. did arrange for the lease, but took the agreement therefor in his own name. The ore was, as agreed upon, tested at the crushing mill of the plaintiff, and at his expense, but J. attempted to exclude the plaintiff from any participation in the lease, asserting that he had obtained the same for his own benefit solely:—Held, that the true agreement could be shewn by parol; and that the plaintiff was entitled to the benefit of the agreement. *Williams* v. *Jenkins*, 18 Chy. 536.

R. and S. became the purchasers of the estate real and personal, of an insolvent debtor (D.), S. asserting in the presence of R. that he was purchasing for the benefit of D. The property was duly conveyed to the purchasers by an absolute deed of transfer, and D. was retained to manage the business, and continued to occupy the property, S. assuming the exclusive control of the financial part thereof and making all payments on account of the purchase: and after the liabilities of the estate had all been discharged, R. filed a bill claiming to have the surplus of the estate realized, and the proceeds divided between himself and S. and D.:—Held, that the transaction was one in which, owing to D.'s possession, notwithstanding the Statute of Frauds, parol evidence was receivable to shew that the purchase was intended for the benefit of D.; but Blake, V. C., being of opinion that the evidence was not of that clear and positive nature required in such cases, made a decree in favour of R., which, on re-hearing, was affirmed by the full Court. *Robertson* v. *Smith*, *Ogden* v. *Robertson*, 21 Chy. 303.

[See, also, the cases under "MORTGAGE," as to whether a contract is to be treated as one of mortgage or sale.]

(d) *Other Cases.*

To an action on a bond defendant cannot set up as a defence a separate agreement not under seal, varying the condition from that which the bond itself imports, and alleged to have been entered into at the same time with the making of the bond. *Cramer* v. *Hodgson*, 3 Q. B. 174.

Defendant agreed by bond that upon the plaintiffs assigning to him a life policy for £5,000, he would pay them £6,000; and in suing defendant for the £6,000, the plaintiffs averred that the policy defendant was to receive was one for £3,000 only, and not for £5,000, as defendant well knew:—Held, declaration bad, for the written contract could not be varied by parol. *Bank of U. C.* v. *Boulton*, 7 Q. B. 235.

A conversation prior to a written agreement under seal cannot be received to alter its terms. *Gilpin* v. *Greene*, 7 Q. B. 586.

Parol evidence held inadmissible, under the facts stated, to vary or add to a contract of conveyance. *Cayley* v. *McDonell et al.*, 8 Q. B. 454.

A. covenants that he will repay B. on the 1st September, 1847, any advances of cash and goods made by B. to C., (a lumberer on the Ottawa), provided the timber should not before then be sold and disposed of at Quebec. B. after the 1st of September, 1847, sues A. upon this absolute covenant for the moneys advanced to C. A. pleads that after this covenant was made, and the moneys were advanced it was agreed between B. and C., that if C. would make the arrangement described in the plea, then B. would discharge A. from his covenant; and that C. did make the arrangement, whereby A. became wholly discharged from his agreement:—Held, that this plea being taken either to set up in effect a parol agreement to discharge A. from his agreement under seal (which the court seemed to think that it must be), or, to assert that such a consequence resulted from the facts stated, independent of the alleged agreement, was not in either case a legal defence. *McPherson et al.* v. *Dickson* 8 Q. B. 29.

Action to recover back the purchase money paid by plaintiff for two years' profits of certain mining shares under a sealed agreement, on the allegation that before the two years had expired the defendant had sold the shares, and that the consideration had failed. Plea, that such shares had become valueless and unproductive of profit, and that the act of selling was in fact at the plaintiff's parol request, and for his benefit:—Held, that the sale not being a breach of the sealed agreement, the plea was not objectionable as setting up a parol discharge from such agreement. *Sanders* v. *Baby*, 7 C. P. 252.

Assumpsit, on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial, the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged, was contained in it. Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 Q. B. 345.

Action by the sheriff upon a mortgage made by defendant to one L. seized by the sheriff under an execution against L. An equitable plea, admitting the making of a mortgage for a certain amount, but claiming that an agreement that certain sums (when paid as therein mentioned,) were to have been allowed on the first instalment, for which this action was brought, was Held not to amount to a variance of a covenant by a parol agreement, and therefore good. *Smith* v. *Bernie*, 10 C. P. 243.

Declaration on a note made by defendants P., W., & D., jointly and severally, payable to plaintiff. Equitable pleas, 1. By defendant D., that he made the note as surety for defendant P., of which the plaintiff was aware when he took it, and that after it became due the plaintiff, without his knowledge, by deed released P. therefrom. 2. By defendant W., that he and defendant D. made the note for the accommodation of P., as his surety, to secure a debt due to the plaintiff solely from P.: that it was delivered to and accepted by the plaintiff from the defendants upon an express agreement that W. & D. should be liable only as sureties; and that the plaintiff, without W.'s consent, by deed re-

leased P. Equitable replications, 1. That the pleas each refer to the same deed; that at the time of making it P. was indebted to the plaintiff in $250 on an account stated, as well as for the amount of the note; that it was intended and agreed only to release the $250, and not the note; that for the purpose of so confining the deed the plaintiff added after his signature thereto, "$250, not any sureties on this;" and that the note was not included, or intended by defendant P. or by the plaintiff to be included, in the debts released by the deed. 2. That the release was drawn and executed by mistake, the intention of the parties thereto being to execute a consent only to a discharge of P. under the Insolvent Act of 1864, and it should have been drawn so as to operate in that way only, and not as a discharge of any sureties:—Held, on demurrer, that at law the first replication would be bad, for the words added formed no part of the release, and it therefore set up oral matter to qualify the deed; but that on equitable grounds it was sufficient. Held, also, that the second replication was bad. *Fowler* v. *Perrin et al.*, 25 Q. B. 227.

To an action on certain notes and bills, and on the common counts, against defendant and H., defendant pleaded satisfaction and discharge before action, by an assignment under seal of defendant's effects to the plaintiff and another for the benefit of creditors:—Held, that parol testimony was properly admitted of the agreement to accept the assignment in satisfaction and discharge, the effect of it being not to vary the writing, but merely to prove a collateral fact. *Whitney* v. *Wall*, 17 C. P. 474.

The description of a lot by metes and bounds from the crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number and concession. *Hagarty* v. *Britton*, 30 Q. B. 321.

Remarks as to the nature of the evidence admissible,—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent. *Jason* v. *Reynolds*, 34 Q. B. 174. See, also, *Clark* v. *Bonnycastle*, 3 O. S. 528.

Declaration, that defendant leased certain land to plaintiff for a year, and covenanted to [illegible] within the term, or to pay the interest for a year on a mortgage given by the plaintiff on the land, but did neither. Plea, that [illegible] leased by the same deed, that if the plaintiff should, during the term, sell the land to another, defendant should not pay the interest, and that the plaintiff sold and defendant gave up possession to the purchaser. Replication, that before the term expired defendant notified the plaintiff that he would not purchase, and requested him to sell, and that the plaintiff in consequence sold, but subject to the defendant's term, which is the sale alleged in the plea:—Held, after verdict for the plaintiff, that the replication was bad, as attempting to vary the deed by a parol agreement; and a verdict was entered for defendant. *Malott* v. *Carscadden*, 31 Q. B. 363.

The defendant gave a bond to the plaintiff in $1000, reciting that he had that day purchased certain land known as the mill property, in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over 2½ acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included four acres, part of which at the eastern end was covered with water:—Held, that the defendant clearly was not entitled to retain 2½ acres of dry land, in addition to that covered with water, but only 2½ acres of the whole:—Held, also, that parol evidence of the expressions and declarations of the parties as to the land intended, was inadmissible to support the defendant's construction of the bond. *Greer et ux.* v. *Johnston*, 32 Q. B. 77.

In an action for illegal distress before the rent was due, evidence was tendered that the instructions to draw the lease and the agreement of both parties was, that the rent should be paid in advance:—Held, there being no equitable plea, that such evidence was properly rejected, and that an equitable defence was not admissible under the general issue by statute. *Brown* v. *Blackwell*, 35 Q. B. 239.

Where parol evidence is admissible to control the legal operation of a deed, no effect can be given to such evidence if contradictory, or its accuracy is involved in doubt. *Re Browne*, 2 Chy. 590.

Parol evidence is not admissible to shew that by mistake the written bond did not express the true agreement, unless mistake is expressly charged. *McDonald* v. *Rose*, 17 Chy. 657.

An instrument under seal may be varied in equity by an agreement for valuable consideration, not under seal. *Brown* v. *Deacon*, 12 Chy. 198.

An alleged parol agreement said to have been entered into contemporaneously with a covenant under seal, was not permitted to control the covenant, the parol agreement having been proved by one witness only, whose intention to speak the truth was admitted, but whose recollection was not confirmed by other evidence. *Lewis* v. *Robson*, 18 Chy. 395.

Parol evidence is admissible to reform a mortgage which omitted land shewn by the mortgagor to the mortgagee as part of the property to be mortgaged. *Merchants' Bank of Canada* v. *Morrison*, 19 Chy. 1.

The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favour of the vendor, on a bill filed by him impeaching the transaction, on the ground of inadequacy of price. *Shank* v. *Coulthard*, 19 Chy. 324.

A man by an informal instrument assigned to a trustee all his estate and effects on the condition of the trustee paying to each of the children of the assignor $400. Subsequently the grantor conveyed to one of his sons a house and premises valued at $200:—Held, that the trustee could not set this up as part satisfaction of the $400 mentioned in the first deed; and that declarations of the father, made subsequently to the assignment in trust, and the conveyance to, and in the absence of, the son, were inadmissible to shew that the conveyance was made, and intended to be in part satisfaction of the sum so secured to the son. The decree in this case, reported 19 Chy. 288, affirmed on rehearing. *Mulholland* v. *Merriam*, 20 Chy. 152.

2. *To Vary or Explain other Writings.*

The court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was the intention and agreement of the parties. *Merritt* v. *Ives*, 2 O. S. 25.—Chy.

Endorsee *v.* Endorser of a note. Upon the issue as to whether the claim upon this note was or was not included in a certain composition alleged to have been entered into between the defendant and his creditors, the following memorandum in writing, given by the agent of the creditors to the defendant, was put in evidence: "I hereby acknowledge to have received as agent for the creditors of R., whose names are specified in the foregoing schedule of creditors, the promissory notes as stated in the foregoing schedule, to be applied, &c. And I hereby discharge the said R. from any further liability for or on account of the said claims, save and except the claim of T. & Co. and G., the same not yet having been ascertained by reason of an equitable security on certain real property of said R., but I have taken security on said notes for 7s. 6d. per pound on the whole of said claims of T. & Co., which is to be applied in liquidation of the same, leaving any balance to be stated in connection with the property, and [illegible]nce that may be coming to R. after paying the said composition, to be returned to him from the proceeds of the said notes." And he added these words: "I have received the within notes on account of the within mentioned claims, and I do hereby discharge R. in full of all the Montreal claims excepting T. & Co. and G.'s collateral claims, and in accordance with my letter to H. of August last." This was signed Oct. 23, 1845:—Held, that the above memorandum so clearly excepted the plaintiff's claim upon this note from the composition, that parol evidence with respect to its meaning was inadmissible. *Geddes* v. *Rogers*, 4 Q. B. 235.

Parol evidence is admissible to deny the receipt of value for a bill or note, but not to vary the engagement to pay the amount at the time specified. *Davis* v. *McSherry*, 7 Q. B. 490.

Where the defendant, however, at the trial, disclaiming any wish to succeed against the justice of the case, assents to the reception of parol evidence to prove the understanding on which a note was given, and a verdict is given against him, he cannot be allowed afterwards to argue in banc. the technical objection he had waived at the trial. *Ib.*

"For value received, I promise to pay James McQueen and Jacob McQueen, or their order, the sum of £102 15s. cy., to be paid in yearly proportions:"—Held, that no parol evidence could be admitted of an agreement that the money should not be payable for four years, or until after the death of the plaintiff's father. *McQueen et al.* v. *McQueen*, 9 Q. B. 536.

Action for wrongful distress. The plaintiff produced a receipt dated 3rd March, 1860, for rent to date:—Held, that parol evidence was admissible to explain the circumstances under which the receipt was given, but not to vary or control it. *Baskerville* v. *Doan*, 12 C. P. 127.

Declaration on defendant's bond for the performance by one H. of he covenants in a lease of land to H. from the plaintiff, alleging that H. thereby covenanted that he would by the 1st of March, 1873, divide a certain field on the premises by a rail fence into four fields of equal dimensions: breach, non-performance by H. Equitable plea, that in the spring of 1872, H., in part performance of his covenant, erected a fence across the field, so as to divide it into two parts, and thereafter, while there was time for him wholly to perform his covenant, H. requested the plaintiff to extend the time for erecting the other fence until the 1st of March, 1874, which the plaintiff did verbally, before the time for performing the contract had elapsed, without the knowledge or consent of the defendant, and such extension remained unrevoked until after the time for performing the covenant had elapsed:—Held, on demurrer, plea bad, as shewing no binding agreement to give time, and setting up a new contract, not founded on any consideration, to contradict the written one. *Fair* v. *Pengelly*, 34 Q. B. 611.

3. *Ambiguity Generally.*

In trespass for cutting timber the question was in which of two townships there was an allowance for road, and the grants from the Crown not being very explicit, parol evidence was admitted on both sides. *Miller* v. *Palmer et al.*, 3 O. S. 425.

In actions in which the king is a party, in the construction of grants from the crown, where there is an ambiguity in respect of the premises, as, for instance, what is to be considered the bank of a river, other grants from the crown are admissible to assist in the construction. *Clark et al.* v. *Bonnycastle*, 3 O. S. 528.

Remarks as to the nature of the evidence admissible—documentary evidence, plans, conduct of the parties, &c.,—in order to ascertain what land was intended to pass by a patent. *Jason* v. *Reynolds*, 34 Q. B. 174.

The following draft or order directed to defendant in favour of plaintiff, and signed by W.: "A. Ker, Esq., treasurer, town of Galt,—Please pay to E. S. Cutten or order the sum of 819l. and charge same to my account. C. A. Wilber," was accepted by defendant in these terms: "Accepted, payable from the first moneys to be paid Mr. Wilber. A. Ker." The evidence shewed that W., being a sub-contractor for certain work about the town hall of Galt, and having an unsettled claim against the corporation for extras, gave this order, and that it was understood at the time, and in plaintiff's presence, that it was accepted only with reference to the moneys expected for such extra work. After the acceptance, defendant, as treasurer, and on the order of the committee, of whom the plaintiff was one, paid W. certain moneys for work done upon a bridge, the contract for which, however, had not been entered into, or even contemplated, until after the acceptance of the order in question. Subsequently it was ascertained that nothing was due to W. for extra work on the town hall. It did not appear that the plaintiff had ever applied to defendant to be paid the amount of the order out of the moneys due to W. on the bridge:—Held, in an action by plaintiff against defendant on his acceptance; that the evidence failed to shew that defendant had ever as an individual received any moneys

to be paid to W., but that the only moneys that came to his hands were moneys belonging to the corporation, and which, as treasurer of the corporation, he was bound to pay out as directed by the latter, and that the moneys which he had paid to W. had been paid to him under such direction:—Held, also, that even rejecting the express evidence of the understanding, such of the surrounding facts as might indisputably have been given in evidence fully warranted the conclusion that the first moneys to be paid to W., meant the first moneys that might be ordered to be paid to him on his claim for work on the town hall. Semble, that the instrument sued on contained a latent ambiguity, and that in that case the view contended for by defendant, that the acceptance must be construed as referring to the claim for extra work, would be aided by averment and proof, and that the latter would fully sustain such a defence. *Cutten* v. *Ker*, 16 C. P. 227.

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4. *Explanation of Words.*

By a policy of insurance on a "general stock of iron and hardware," it was provided that if gunpowder were kept on the premises without written consent, the policy should be void. To a plea setting up a breach of this condition, the plaintiff replied that it was well understood by the parties that the words "general stock of iron and hardware," included gunpowder in tins and canisters to the extent of 25lbs., which was the gunpowder mentioned in the plea:—Held, that the replication was bad, for the condition, which wholly excluded gunpowder, could not be thus qualified by parol evidence. *Mason* v. *The Hartford Fire Ins. Co.*, 29 Q. B. 585.

Defendants contracted in writing to purchase from plaintiff 1000 "prime" saw logs, at so much per 1000 cubic feet, which defendants sent their agent to cull and measure. Plaintiff charged the agent not to select any that did not conform to the contract, but notwithstanding this the agent, without complaint or comment, marked the logs with defendants' mark, designating them as of two qualities, and defendants, instead of refusing them, accepted and used them, without informing plaintiff of the mode adopted by their agent, or giving him the opportunity of shewing that the logs did in fact conform to the contract, and at the same time refused to pay for the second quality more than half the price agreed to be paid for "prime" logs. On the trial of an action brought to recover the full contract price of the logs (for which the jury gave a verdict), a witness called by plaintiff was asked to explain the meaning of the word "prime," and as he stated that the word had no technical meaning, and was not used in the trade, his evidence was objected to by defendants' counsel:—Held, that the evidence under the circumstances was admissible. *Spring* v. *Cockburn et al.* 19 C. P. 63.

In an action on an agreement, by which—in consideration of the plaintiff giving defendant his promissory note for $438, payable four months after date, as the purchase money for a note for $730 made by T. & Son, having then ten months to run, payable to defendant's order—defendant agreed to keep the plaintiff's note renewed until the maturing of T. & Son's note; and at the maturity of T. & Son's note, "to procure the said T. & Son to renew their said $730 note, by giving their seven promissory notes for equal amounts payable to *my order*, and payable in one, two, and three months," &c.:—Held, that the words "payable to my order" did not necessarily import an unconditional endorsement by defendant of the seven notes, but might mean only such an endorsement as would pass the property in them to the plaintiff: that evidence of conversations between the parties before making the agreement, and of the surrounding circumstances, was therefore admissible to shew its true meaning; and it appearing that the note for $730, also payable to defendant's order, was endorsed by defendant "without recourse," and that the plaintiff designedly left the agreement doubtful, so as to insist upon an unconditional endorsement as to the others:—Held, that he could claim only that these notes should be endorsed as the first one was. *McCarthy* v. *Vine*, 22 C. P. 458.

In an action on a policy of insurance,—Held, that the term "machine and repair shop," did not necessarily mean a shop in which iron work alone is to be done: that it was properly left to the jury to say whether the business carried on there, of making shingles, was that of a machine and repair shop; and that the evidence set out warranted their finding that it was. *Chaplin* v. *Provincial Insurance Co.*, 23 C. P. 278.

In an action on the following agreement: "Due W. M. $100, payable in lumber":—Held, that "lumber" being the general term used for different kinds of lumber, parol evidence was admissible to shew what kind of lumber the parties intended, namely, "culls and joists." *McAdie* v. *Sills*, 24 C. P. 606.

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5. *Parties to Contracts.*

Plaintiff sued defendant for lumber furnished on the occasion of the Provincial Agricultural Society's meeting at Hamilton. The defence was, that the society, an incorporated body, was liable, and not defendant. The learned judge left it to the jury to find whether defendant had contracted personally, or as one of a committee who undertook to superintend—in either of which events, he held him to be personally liable; but the jury were told, that if he contracted only as representing, or on behalf of the corporation, he would not be liable:—Held, that the direction was correct. *Simpson* v. *Carr*, 5 Q. B. 326.

In an action for work and labour against A. and B. the plaintiff put in an agreement headed, "An estimate for the carpenter and joiner work of a brick cottage, to be done for William Walker," (defendants' father.) Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were endorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was not to find materials, and no time was mentioned for completion of the work:—Held, that parol evidence was admissible to shew that defendants were liable on the contract. *Hubbard* v. *Walker et al.*, 13 Q. B. 205.

Assumpsit on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner sold by plain-

tiff to A. and B. defendant being their surety: that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her. Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 Q. B. 345.

A marine policy was in this form: The Ætna Insurance company of, &c., on account of C., loss, if any, payable to M. in gold, do make insurance, &c.:—Held, that the contract on this policy was entered into with C., and that making the loss payable to M. did not make him the party insured. Semble, that the insertion in the policy after M.'s name of the words "for, or in the name of all persons interested," &c., or "for whom it may concern," would have enabled M., on shewing interest, to recover; also, that the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to shew the interest and right of an undisclosed principal who could have sued on the policy. *McCollum* v. *Ætna Insurance Co.*, 20 C. P. 289. See, also, *Every* v. *Provincial Insurance Co.*, 10 C. P. 20.

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6. *Subject-Matter of Contracts.*

By an agreement under seal between the plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to the plaintiff at Goderich harbor 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm; the plaintiff to draw it from the bush, and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which the defendant claimed under a purchase from B:—Held, that the agreement clearly did not prevent the plaintiff from shewing that the timber to be delivered belonged to him, and not to B. *Little* v. *Foley*, 24 Q. B. 177.

Defendant and one H. agreed to purchase from plaintiffs all their claims against an incorporated company, and their interest in the same, and, as far as they could sell it, their control over the charter of the company, for $3,000. Defendant and H. subsequently gave plaintiffs a written promise to pay the price agreed upon "for the charter," as expressed in writing:—Held, that evidence was admissible to shew that the subject of the sale was not the franchise itself, but a mere claim against or right in the company, capable of being legally sold. *Miller et al.* v. *Thompson*, 16 C. P. 513.

Defendant was a shareholder in a company, of which some of the capital stock subscribed for had not been taken up, and these shares being offered to the stockholders at 60c. on the dollar, defendant took some of them. On the 23rd March the plaintiff agreed to purchase the defendant's shares at 67½c. in the dollar, and on the 25th March the following transfer was executed: "For value received, W. E. S. transfers and assigns to J. C. fourteen shares, on each of which has been paid $500, amounting to the sum of $7000, in the capital stock of the Lake Superior Navigation Company," &c.:—Held, that evidence was admissible to shew that at the time of the sale on the 23rd, the plaintiff was told that these shares had been issued at 60c., so that they were paid up in full only as between the directors and the shareholders; for this was evidence to shew what was the subject matter of the contract; and the transfer was not the concluded bargain between the parties. The plaintiff having sued defendant to recover the difference:—Held, therefore, that he could not recover. *Clark* v. *Sanford*, 25 C. P. 256.

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7. *Terms and Incidents of Contracts.*

Contracts relating to Leases.]—A., by memorandum of agreement, leased to B. a farm for four years, which B. agreed to work, &c.; and if A. sold the farm, he (B) would give it up in three months after notice. A., before his death, sold to C., from whom B. leased, and B. sued the administratrix of A. for repairs done on the farm during A.'s life, alleging that there was a verbal agreement that such improvements should be paid for by A.:—Held, that the action was not maintainable, there being no stipulation in the lease as to improvements; and that the plaintiff could not qualify or add to the written instrument. *Losee* v. *Kezar*, 5 C. P. 234.

In an action on an agreement under seal to accept a lease:—Held, that parol evidence was not, under the circumstances, admissible to shew that the plaintiff was bound to complete certain repairs before calling on defendant to accept, for this would be to add to the sealed agreement. *O'Neil* v. *Lingham*, 9 C. P. 14.

Action by lessee against lessor on a covenant to deliver possession of the demised premises to plaintiff on the 20th of March, 1864, assigning as a breach that defendant had not delivered possession to plaintiff, and had deprived him of the use of the land and premises. Defendant pleaded, on equitable grounds, that the plaintiff by an agreement in writing executed contemporaneously with the lease, in consideration that defendant *had leased* to him the premises mentioned in the declaration, which were then in the possession of one Y., who had agreed to surrender possession by the said 20th March, agreed not to bring any claim or damage against defendant, if possession could not be obtained on the day as provided in the deed; averring that on 20th March Y. was and continued in possession of the premises, and refused to deliver them up to defendant, who, consequently, could not obtain possession thereof on the said day, and could not by reason thereof deliver possession on 20th March to plaintiff. Plaintiff new assigned that he brought his action as well for the causes attempted to be justified as for not giving possession of the premises on the 21st March:—Held, on demurrer to both plea and new assignment, that the plea was bad as a legal defence, for attempting to alter an instrument under seal by one merely in writing not under seal; as a legal and equitable defence, for want of a good consideration; alleging,

as it did, a past consideration as that on which the agreement was based. That if it was intended to be urged that the agreement was part of the instrument under seal, and executed contemporaneously with it, it was not so stated; if executed before the lease, and as part of the consideration for making the lease, it was not so pleaded. *Wilson* v. *Keys*, 15 C. P. 32.

Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was verbally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent verbal agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by the 4th sec. of the Statute of Frauds, might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 Q. B. 93.

On a treaty for the lease of a mill property between the executors and the trustees of a deceased owner, and an intending lessee, the executors and trustees expressly agreed that they would rebuild the dam upon the premises, and without this agreement the lease would not have existed:—Held, that such agreement could be established by parol, and was binding on the estate of the testator. *In re Mason and Scott*, 21 Chy. 166; affirmed on rehearing, *Ib.* 629.

On appeal the above decision was reversed. Such an agreement, to be provable by parol, must not only be collateral to and independent of the written one, but it must be consistent with it. Here the lease bound the lessee to do what by the agreement was to be done by the lessors, and there was one agreement only, founded on one consideration, not two distinct independent agreements. The alleged parol agreement, too, was one concerning an interest in land, and was required, therefore, to be in writing under the Statute of Frauds.—22 Chy. Not yet reported.

Contracts of sale.]—Plaintiff wrote to defendants, proposing to sell them a vessel for a certain sum, the proportion of premium on the insurance then effected, during the time the policy had yet to run, to be paid by the purchaser in cash. The proposition was accepted verbally, and a regular assignment of the vessel executed to defendant, in which no mention of the insurance was made:—Held, that the plaintiff might nevertheless recover the premium from defendants. *Mason* v. *Brunskill et al.*, 15 Q. B. 300.

The plaintiff agreed verbally to sell timber to defendant, to be got out by him upon certain timber limits held by her from the Crown, for 20s. per thousand feet, payable on its arrival at Quebec. These limits had formerly belonged to her husband, of whom she was administratrix, and it was agreed, defendant being a party to the arrangement, that half of the money should be applied towards payment of debts due by the intestate. A written agreement was then signed by plaintiff, intended to relate to the payment of her share only, by which she agreed to sell to defendant the right to cut the timber at 10s. per thousand feet:—Held, Robinson, C. J., doubting, that evidence of the verbal agreement was admissible, as the writing did not contain, and was not intended to contain, the whole agreement between the parties; and that the plaintiff therefore might recover the 20s. per thousand feet. *Chamberlain* v. *Smith*, 21 Q. B. 103.

The plaintiff sued defendants upon a contract by them to purchase from him 4000 barrels of crude petroleum, claiming damages for the loss of a large quantity destroyed by an accidental fire, and which he alleged should have been previously taken by them under the agreement, which bound them to take it as fast as their barrels could be received, emptied and returned. The defendants refused to accept, on the ground that the oil was not of the quality contracted for:—Held, that evidence was inadmissible that, in conversation shortly before the written agreement, the defendant spoke of agreeing to receive six or seven car loads per week; and such evidence having been received a new trial was granted without costs. *Noble* v. *Spencer et al*, 27 Q. B. 210.

Declaration q. c. f. for cutting and removing trees, with a count in trover and the common counts. Pleas, leave and license; and a special equitable plea, setting up that the defendant, being owner of the land, contracted by parol to sell it to the plaintiff, and that at the time of such contract and of the conveyance of the land to defendant, it was expressly agreed that defendant should have certain trees thereon, and be at liberty to cut and remove them, but that such reservation should not be, and it accordingly was not, inserted in the conveyance; and that the defendant entered and cut the trees, &c., which are the trespasses, &c. The defendant, as a witness at trial, having proved the sale of the land, it was proposed to shew by him the agreement as set up in the equitable plea:—Held, that such evidence was improperly rejected, for that it was admissible both under the equitable plea and the plea of leave and license. Semble, that the equitable plea shewed a good defence; and that at all events, the plaintiff having taken issue upon it, the defendant was entitled to have the issue tried. *Walter* v. *Dexter*, 34 Q. B. 426.

A vendor executed an agreement to convey certain premises and receive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be payable with interest. In a suit brought to enforce specific performance of the agreement, and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding was that the interest should be payable. *Gould* v. *Hamilton*, 5 Chy. 192.

A woman sold her real estate, her husband joining in the conveyance, and receiving to his

own use the purchase money; in consideration of which he agreed to settle on his wife certain other property which he held under lease with the right of purchase, and the lease was accordingly assigned to a trustee for the use of the wife, the husband at the same time promising to pay the amount agreed to be paid for the purpose of obtaining the conveyance of the fee. The husband having died and his estate being in the course of administration in this court, and his widow having brought a claim into the master's office for the amount necessary to procure the fee:—Held, that the master had properly received parol evidence to establish such claim of of the widow. *Ross* v. *Mason*, 9 Chy. 568.

Other Cases.]—Defendant obtained an advance from plaintiffs on wheat which he had shipped from Oakville to Oswego, consigned to them, to the care of C. & B. The plaintiffs were to sell the wheat for defendant, and pay him the proceeds, deducting the advance and charges, &c. The wheat having been lost on the passage:—Held, that defendant was bound to refund the sum advanced, as the wheat still continued his property. Defendant at the trial desired to prove that when the advance was made the plaintiffs were spoken to about insuring the wheat, and replied that they were their own insurers, and took the risk of wheat shipped on their account:—Held, that such evidence was rightly rejected; and that if admitted it would not have affected defendant's liability. *Gooderham et al.* v. *Marlatt*, 14 Q. B. 228.

Defendants, two directors of the Canada Powder Company, placed in the hands of C., their secretary, their promissory note for $8000, made in November, 1858, payable to the plaintiffs on demand, which C. deposited with the plaintiffs, having a receipt written under it and signed by their agent, which expressed that the note was to be held by the plaintiffs as collateral security for any unretired paper they might at any time hold of the company. In an action on this note the plaintiffs' agent swore that he took it upon the understanding expressed in the receipt, which was in C.'s handwriting, and he believed was signed at the same time; and that he made the arrangement wholly with C., never having any communication with the defendants regarding it. Defendants had pleaded as an equitable defence, and desired to prove, that the note was given in consequence of a doubt as to the power of the Powder Company to become parties to a note, and as security only against the want of such power, and until it should be conferred upon them by the legislature, which was done in May, 1859, without loss in the meantime to the plaintiffs:—Held, that such evidence was rightly rejected, for that the defendants having entrusted C. with their note were bound by his agreement, on which the plaintiffs had advanced their money, and which could not be varied by parol testimony. *The Commercial Bank of Canada* v. *Merritt et al.* 21 Q. B. 358.

Upon an indictment for stealing money, the property of certain persons, (composing the firm of the American Express Company) it appeared in evidence that the agent of the express company in St. M. delivered two parcels, containing $888.22, which had been sent by one K., addressed to E. & S., at St. M., to the prisoner to deliver, and that he appropriated them to his own use. On the trial in the County Court, the counsel for the crown asked the agent of the company when their (the company's) liability ceased, which was objected to by the prisoner's counsel. Upon appeal to this court:—Held, that the enquiry aimed at was material to shew how far the company had undertaken to deliver, and therefore when their duty as carriers ceased; but that the question as put was objectionable. 2. That it was a question for the jury whether the contract of the company was to deliver to E. & S., and the property in the money was therefore properly laid in the indictment; 3. That if the undertaking was to deliver the money to E. & S., the prisoner was the agent of the company for that purpose. *Regina* v. *Massey*, 13 C. P. 484.

By an agreement under seal between the plaintiff and B., B., in consideration of seven cents per foot, agreed to deliver to plaintiff at Goderich harbour, 14,000 cubic feet of good elm timber, to be of specified dimensions, and nothing but good sound rock elm. The plaintiff to draw it from the bush and leave it on the bank of the river Maitland, and to pay at certain periods named. In trover for such timber, which the defendant claimed under a purchase from B.:—Held, that the agreement clearly did not prevent the plaintiff from shewing that the timber to be delivered belonged to him and not to B. *Little* v. *Foley*, 24 Q. B. 177.

In a declaration for not editing a magazine in accordance with agreement, the plaintiff alleged that, although defendant was allowed by mutual agreement to absent himself until the 27th of January, 1864, yet he did not after that date return to his duties as editor. To this defendant pleaded that before any breach, by a memorandum under seal between him and the plaintiff, it was agreed that defendant should go to Europe to try and sell the magazine, and that during his absence the editorial department should be provided for by the plaintiff: that it was no where stipulated in such agreement that the defendant should return by the 27th of January, or any other day: that he was necessarily absent on such journey until March following, and on his return was ready to resume his duties, but before his services were required the plaintiff discontinued the publication:—Held, on demurrer, a bad plea, for it was not averred that the agreement pleaded contained the whole contract as to the defendant's absence, and there might have been a collateral independent agreement that he should return by a specified day. *Elmore* v. *Hind*, 24 Q. B. 136.

The declaration charged defendants, in the first count, on a contract to carry certain wool from Cobourg to Boston within a reasonable time, subject to certain conditions endorsed on a receipt given by defendants—amongst others that defendants should not be responsible for damages occasioned by delays from storms, accidents, or unavoidable causes—and alleging as a breach the neglect to carry. In the second count the contract was stated to be to carry within a reasonable time, and so that the wool should be imported into the United States before the 17th of March, when the Reciprocity Treaty would expire. Breach, that defendants did not so carry, by which the plaintiffs were disabled from importing the wool into the States unless upon payment of duties. As to the first

count, it appeared by the defendants' receipt, put in by the plaintiffs, that there was an additional condition, that as to goods addressed to consignees resident beyond the places where defendants had stations (as these goods were,) defendants' responsibility should cease upon their giving notice to the carriers onward, that they were prepared to deliver the goods to them for further transport:—Held, a substantial qualification of the contract declared on, which therefore was not proved as alleged. As to the second count, the same receipt applied, which named no day for carriage into the United States, but there was verbal evidence of an agreement to forward by the 17th March:—Held, that though this term might thus be added to the written contract, it would not dispense with the condition above mentioned, which shewed a substantial variance from the contract declared on. The plaintiffs, therefore, were held not entitled to recover on either count. *Fraser* v. *The Grand Trunk R. W. Co.*, 26 Q. B. 488.

Held, that a mortgagee of a vessel who was alone named in a policy as the assured, without any general words, or other indication of interest in any other person, but who had in fact insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured, on parol evidence of that fact. *Richardson* v. *The Home Ins. Co.*, 21 C. P. 291.

On a division of real estate, a written agreement was signed providing for the payment of $1100 to D. P., one of the parties interested, to make his share equal to the others:—Held, that evidence was inadmissible of a contemporaneous verbal agreement that the amount agreed to be paid was $1800, part of the difference depending on a contingency. *Pherrill* v. *Pherrill*, 13 Chy. 476.

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3. *Other Cases.*

In an action for services rendered to a vessel:—Held, that oral evidence of ownership of a vessel was admissible, and that it was not necessary to produce the certificate of registration; for assuming that in actions by or against owners of a registered vessel as owners the ownership must be proved by certificate, yet the mere ownership may not create a liability, and defendants may be liable apart from it under a contract made by their agent, as in this case by the purser. Semble, that the objection was not open to the defendants after their proof, without production of the certificate, that W. B. had ceased to be owner. *Lake Superior Navigation Co.* v. *Beatty et al.*, 34 Q. B. 201.

Where the purchase was made by a person in his own name, but in reality for the benefit of another, parol evidence of the agency was held admissible, and the purchaser who entered into the contract in his own name, and who was a defendant, was held a good witness on behalf of the plaintiff against his co-purchaser, the other defendant. *Sanderson* v. *Burdett, (in appeal)* 18 Chy. 417.

Parol evidence was held admissible to identify a mortgage as the instrument enclosed in a letter mentioning it. *Ward* v. *Hayes*, 19 Chy. 239.

XV. Proof of Handwriting.

[*See C. L. P. A. s. 213, 32 & 33 Vict. c. 20, s. 4, D.*]

A document executed by an agent in the name of his principal, the subscribing witnesses to which are dead or out of the province, can be proved by proving the handwriting, i. e., by the same evidence which would be sufficient to prove its execution by the principal. *Dickson* v. *Jarvis*, 5 O. S. 694.

Although one of two witnesses to an agreement may deny his signature, and a person well acquainted with the handwriting of the other may refuse to say that the signature is genuine, it may still be left to the jury to say, under the circumstances of the case, whether the agreement has not in fact been signed by the parties. *Barber* v. *Armstrong*, 6 O. S. 543.

A defendant's counsel, to get from a witness an opinion as to the handwriting of the plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to have been signed by the plaintiff, but in no way connected with the cause:—Held, that the learned judge rightly refused to allow the witness to be examined as to the other writings till he had first, from his own recollection of the plaintiff's handwriting, given an opinion upon the signature of the receipt. *Gleeson* v. *Wallace*, 4 Q. B. 245.

When collateral issues arise out of comparison of handwriting, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it. *Royal Canadian Bank* v. *Brown et al.* 27 Q. B. 41.

Plaintiff sued as endorsee of a note. A witness for defence said he thought the signature of the endorser not genuine. On cross-examination he was asked whether two signatures on a paper shewn to him were the endorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case:—Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been left to the jury. *Ib.*

Action upon a note. Plea, non fecit. The plaintiff put in a bond admitted to have been signed by defendant, and called no witnesses, contending that the jury might compare the two writings, and find their verdict thereon. Galt, J., at the trial held that this could not be done, and nonsuited the plaintiff. Per Morrison, J., the nonsuit was right. Per Wilson, J., it was wrong. *King* v. *King*, 30 Q. B. 26.

Where, in an action against the maker of a promissory note, the plaintiff produced several witnesses who swore to the defendant's signature, which two of them said he had admitted, but the jury found for the defendant on his own evidence alone, the court granted a new trial, with costs to abide the event. *Canadian Bank of Commerce* v. *McMillan*, 31 Q. B. 596.

Per Wilson, J., the evidence stated in this case was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited. *Hand* v. *Agnew*, 32 Q. B. 559.

For the purpose of proving the execution of deeds, a witness, who was not the witness to the deeds, went to the persons by whom the deeds purported to have been executed, who admitted to him that the signatures were theirs, and who wrote their names in the presence of the witness, who had no previous acquaintance with them or with their handwriting:—Held, that evidence of these admissions and of the belief of the witness, from the knowledge of the handwriting thus acquired, that the signatures to the deeds were genuine, was good evidence to go to a jury; and, in the absence of any contradictory evidence, sufficient to warrant a finding that the deeds had been duly executed upon the respective days upon which they purported to have been executed. *Thompson* v. *Bennett*, 22 C. P. 393.

Per Gwynne, J., a deed may be proved by comparison of the handwriting of the signature with the signature of another deed which is produced and received in evidence as an ancient document, but the handwriting of which is not otherwise proved. *Ib.*

In an action on a promissory note against the maker, the defendant swore that the signature was not his, but an expert, comparing it with admitted signatures, said that it was written by the same person. The jury having found for the plaintiff:—Held, on appeal from the County Court, no ground for a new trial that the jury had not been directed that the evidence of experts was entitled to little weight when contradicted by direct testimony; and the learned judge below having been satisfied with the verdict, this court would not interfere. *Luce* v. *Coyne*, 36 Q. B. 305.

XVI. Proof by Subscribing Witness.

[*See C. L. P. A. s. 212, 32 & 33 Vict. c. 20, s. 66, D.*]

Where the subscribing witness to a bond is out of the country, and his handwriting cannot be proved, evidence of the handwriting of the obligor is sufficient. *Bennett* v. *McDonald*, E. T. 3 Vict.

Every reasonable enquiry must be made for the subscribing witness in the most likely place. *Tylden* v. *Bullen*, 3 Q. B. 10.

Per Jones, J., all the witnesses must be accounted for, though the plaintiff is one of them, and his handwriting proved. *Doe* d. *McDonald* v. *Twigg et al.*, 5 Q. B. 167.

See, also, XIII. 3 (a) p. 1355.

XVII. Proof by Secondary Evidence.

1. *When Documents must be Produced.*

In assumpsit for not delivering goods after the plaintiff had proved a verbal agreement, defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce:—Held, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their affidavit of debt; and that as the writing was the best evidence, it should have been produced. *Gilbert et al.* v. *Sharp*, 3 O. S. 135.

Where a sealed instrument was pleaded with a profert and produced at the trial, and subsequently in term, but was afterwards mislaid, and when secondary evidence was gone into, defendant objected to *that* secondary evidence, but not to *any* secondary evidence, the court refused to allow a nonsuit to be entered for the non-production of the instrument. *Rowland* v. *Tyler*, 4 O. S. 257.

In assumpsit for work and labour, where there is a written agreement fixing the price, such agreement must be produced on the trial of the cause, unless it has been rescinded. *Wallen* v. *Mapes*, 5 O. S. 96.

Assumpsit for work and labour. The plaintiff's witness swore that the work was done upon a written agreement, which he had in court, but refused to produce. He had not been subpœnaed:—Held, that he was as much bound to produce the writing as if in attendance under a subpœna duces tecum. But, semble, that if the witness had been required by the court to produce the agreement, and had still refused, this would not have been sufficient to warrant the reception of secondary evidence. *Farley et al.* v. *Graham*, 9 Q. B. 438.

Where a bond is pleaded with a profert, the admission of its execution, under a judge's summons for that purpose, does not dispense with the necessity for its production at trial, but only with the necessity of proof of execution. *Leslie* v. *Leahy*, 5 O. S. 482.

In ejectment against a person let into possession of land, a witness stated he had seen a written agreement about the land between the parties, but it was not shewn in whose custody it was or what its terms were, and it was proved the defendant had written a letter to the plaintiff's agent, stating that he was to give up the premises on a certain day:—Held, that the plaintiff need not produce the agreement, as it was not sufficiently shewn to be in his custody or power. *Doe* d. *Mitchell* v. *McLeod*, 6 O. S. 53[illegible]

Where in ejectment the plaintiff's counsel in opening stated it as a question of legitimacy and that the defendant claimed under a will and the defence did not produce the will, as the statement had rendered it unnecessary:—Held, that it ought to have been produced. *Doe* d. *Breakey* v. *Breakey*, 2 Q. B. 349.

Where goods have been transferred to the vendee by writing, the vendor remaining in possession, the vendee suing in trespass for taking the goods, must produce the writing to prove his title. *Caldwell* v. *Green et al.*, 8 Q. B. 327. See also, *Bratt* v. *Lee*, 7 C. P. 280.

One of plaintiff's witnesses proved that defendant took possession of the land under a verbal agreement with the plaintiff to purchase it for him; and on cross-examination, he swore that several days afterwards he heard the plaintiff say that there was some writing between him and the defendant:—Held, not sufficient evidence of a written agreement to render its production by the plaintiff necessary. *Taggart* v. *Ross*, [illegible] Q. B. 611.

An executor sued for money received for his testator on a note payable to him. The maker swore that he had paid defendant, who handed him the note, which he still had, though with the name torn off:—Held, not necessary to produce the note. *Van Allen* v. *Frymere*, 14 Q. B. 579.

Upon an action against a sheriff for a false return upon a fi. fa. goods, his defence was a chattel mortgage on part of the goods, and a distress for rent to cover the remainder:—Held, that parol evidence was admissible to prove a demise by the landlord, so as to sustain a distress, although a memorandum had been drawn up as to the terms of the lease, but signed only by the tenant. *Valentine* v. *Smith*, 9 C. P. 59.

Where to an action on a note against the makers, defendants pleaded fraud:—Held, that the note must be proved, and that, as defendants had given no notice to produce, and it was not shewn that the plaintiffs or their attorney had the note in court, the defence could not be gone into. *Bank of Montreal* v. *Snyder et al.*, 18 Q. B. 492.

In ejectment, the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shewn to be in defendant's possession, who declined to produce it on notice:—Held, that defendant was not compellable to produce the will. *Haybatt* v. *Shephard*, 25 Q. B. 536.

To an action on a bond, the plea was the discharge of the defendant as surety by time given to the principal debtor:—Held, that it was necessary for defendant to prove the bond, in order to identify it with the arrangement mentioned in the plea. *Kerr* v. *Boulton*, 25 Q. B. 282.

In January, 1872, the plaintiff, a musical instrument maker, at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff and the plaintiff brought trover. Semble, that the plaintiff was not bound to produce the contract, for his title to the piano, which he had not acquired by the contract, was alone in issue; and, moreover, the plaintiff's original bailment to J. being by verbal bargain, it was for defendant to shew that a different disposition was afterwards made. *Williams* v. *Grey*, 23 C. P. 561.

The defendants objected to produce certain documents, on the ground that they were in the possession of a third party, to whom the defendants had assigned all their estate for the benefit of their creditors. The assignee had realized the estate and distributed the proceeds amongst the creditors:—Held, no excuse for the non-production, and a better affidavit was ordered. *British America Insurance Co.* v. *Wilkinson*, 6 L. R. 268.—Chy. Chamb.—Holmested, *Referee*.

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2. *Proof that Documents existed.*

Before secondary evidence can be let in, proof must be adduced that such deed once existed, and that it has been destroyed or lost, and diligent search made therefor. *Ansley* v. *Breo* al. 14 C. P. 371.

Held, that upon the evidence in this case there was no sufficient proof of the execution of the lease under which defendants claimed to let in secondary evidence of it. *Dickson* v. *McFarlane et al*, 22 Q. B. 539.

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3. *Proof of Loss and Search.*

Where a promissory note had been endorsed to an attorney's clerk in the course of business, and mislaid:—Held, that secondary evidence of it could not be given, without calling the clerk, although the attorney was called and sworn to his belief of its loss. *Grover* v. *Clark et al.*, 5 O. S. 208.

After secondary evidence of a document has been received, it is too late to object to the sufficiency of the search. *Doe* d. *Maclem* v. *Turnbull*, 5 Q. B. 129.

At the trial a witness stated that as agent for plaintiff he gave defendant certain parcels to deliver, with a memorandum of charges on each to collect, and that defendant owed a balance to the plaintiff, for which this action was brought; that witness had entered in a memorandum book all the parcels given to defendant, with the charges against them, and had credited defendant with the amounts paid; that he had given this book to plaintiff, and had since searched among papers left by him with plaintiff's agent for it, but without success. The witness produced a statement made from the memorandum book, and said he recollected the delivery of the parcel, his recollection not depending on the book, but that he could not speak of the sums except from the memorandum book:—Held, that the non-production of the memorandum book was not sufficiently accounted for to admit secondary evidence of its contents. *Stovel* v. *Allen*, 1 C. P. 300.

The loss of a bond being alleged and not traversed, evidence may be given of its contents without proving the loss. *Commercial Bank of the Midland District* v. *Muirhead*, 4 C. P. 434.

The plaintiff, claiming under a bill of sale which had been lost, offered evidence to shew that he (the plaintiff), and his wife (who were then inadmissible as witnesses), had made search in the presence of witnesses, who did not make any search themselves, and had declared they could not find it:—Held, insufficient, as being merely his own declaration and that of his wife, which were not evidence. *Bratt* v. *Lee*, 7 C. P. 280.

In ejectment it was proved that the deed in question was about 1824 in the possession of one W., who had bought the property, but who stated that he was an alien and therefore could not hold it, and that before he conveyed to C. he had mislaid this deed, but that if found he would deliver it to C. C., who conveyed to the plaintiff, proved that he had never had this deed; there was no ground for surmising that it had ever come to the plaintiff; and it had not been seen for thirty years. No enquiry after W. or his papers was proved, but no objection on this ground was taken at the trial. Secondary evidence of the deed having been admitted, the court after verdict refused to interfere. *Tiffany* v. *McCumber*, 13 Q. B. 159.

The degree of diligence required in a search must depend on the circumstances of each case,

and after a long lapse of time the same amount of search ought not to be required. *Ib.*

Held, that the secondary evidence of the search for and contents of a lost bond, as given on the trial of this cause, was clearly admissible and sufficient. *Arnold* v. *Butler et al.*, 15 Q. B. 255.

Certain letters put in at the first trial in the County Court were filed in the Court of C. P. on appeal from the decision, and at the second trial a witness proved that he had applied to the clerk of the court, who searched in his office, and told the witness that he had also enquired of the judge, but that the papers could not be found:—Held, sufficient to let in secondary evidence. *Sutor* v. *McLean*, 18 Q. B. 490.

Ejectment on a sheriff's deed. To prove a deed from the sheriff, the memorial was put in, it having been shewn by B. (a partner of W. D., the said W. D. having formerly been partner of J. D., then attorney for the plaintiffs), that the deed had come into the office of J. D. (J. D. not being called), and could not be found there on diligent search by B. It being objected that the the plaintiff's attorney, to whose hands the sheriff's deed was traced, should have been called:—Held, that diligent search by B., who was partner with W. D., the former partner of J. D., with whom the deed had been left, the said B. having succeeded J. D. in the business, and having access to all his papers, and having seen the deed in his office lately, was sufficient search to admit of secondary evidence without calling J. D. *Nesbitt* v. *Rice*, 14 C. P. 409.

In ejectment on a sheriff's deed, secondary evidence of the fi. fa. lands having been rejected:—Held, that every place should have been searched where there was reasonable ground to suppose that the fi. fa. might be found, and that some of the sheriff's papers having been left in the court house, search should have been made among them before secondary evidence was admissible; but affidavits having been filed that diligent search had since been made in the court house, a new trial was granted on payment of costs. *Soules* v. *Donovan*, 14 C. P. 510.

B. was absent from the country, and the plaintiff proved a search with several of his relatives for a deed from P. to him, but it was not shewn that B. had lived or left the charge of his papers with any of them. Secondary evidence being then admitted, subject to objection, he proved the existence of this deed, and the execution by P. of a memorial of it, which the deputy registrar produced:—Held, that the search was not sufficient to let in secondary evidence. *Covert* v. *Robinson*, 24 Q. B. 282.

In the case of lost deeds, it is always a question for the presiding judge whether sufficient search has been made to justify the admission of secondary evidence as to their contents. In this case the witness, who was the son of the late agent of one of the grantors, stated that his father had possession of all the papers of the grantor relating to lands in Upper Canada; that he had searched through his father's papers and the papers of the grantor, all of which were then in possession of himself and mother; that at the suggestion of the executors of the said grantor, another person had searched among those of his papers deposited in a certain bank, as well as elsewhere amongst his private papers, but that he had not applied to the heirs or devisees of the grantor, though he had made every other inquiry where there was a probability of his finding the deeds in question; nor had he searched among the papers of the other grantor, because he was a bankrupt, and the grantee amongst whose papers he had already searched was his assignee:—Held, sufficient to admit secondary evidence of the deeds. *Russell* v. *Fenn*, 15 C. P. 375.

The plaintiff in ejectment claimed under a mortgage from C. to O., executed in 1856, being called proved his execution of such mortgage, and the memorial of it signed by him was produced from the registry office. He had last seen the mortgage with O., the mortgagee, in 1857. O. in 1859 became insolvent, and made an assignment of all his estate to F. He absconded to the U. S. shortly [illegible] and was followed by F. It was not shewn [illegible] F. had ever had the mortgage, though the land was assigned to him; and it appeared that in a suit against him and O., in Chancery, on behalf of the creditors, commenced many years after the assignment, and which resulted in the appointment of the plaintiff as receiver, F. produced the papers in the suit under an order of the Court, and this mortgage was not among them. A search was proved to have been made in the master's office, with the plaintiff's solicitor in that suit, and among the receiver's papers, but not with O., who was still living in Michigan, nor with any solicitor in the suit:—Held, that the proof of search was sufficient to let in the secondary evidence; for under the circumstances of the case there was no presumption that O. retained the mortgage or took it to the United States with him. *Gordon* v. *McPhail*, 32 Q. B. 480.

In ejectment by trustees of a Wesleyan Methodist congregation for the p[illegible]ge property, it was proved that a searc[illegible]made for the deed from the patentee to [illegible]tees at the parsonage house, its proper and usual place of deposit, and that an enquiry had been made of the minister who officiated there when the deed was supposed to have gone astray. None of the ministers formerly officiating there had any interest in the deed or the possession of it, and it was of no use to any one unconnected with the present enjoyment of the property:—Held, sufficient proof of the loss to let in secondary evidence. *The Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450; and several months afterwards, when J. had paid three months' rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for $75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 extra in settlement with him, making $200 in all. In September or October following, the plaintiff's agent [illegible] passing through Woodstock heard of the sale and telegraphed to the plaintiff to send up the contract, which on the same day the plaintiff mailed to him at Woodstock, but it never reached him. Search was made at the post-office and

the hotel where he was staying, and also at the plaintiff's place at Toronto. A witness from the post-office stated that unless registered they could not tell if any letter had come for the plaintiff, and that letters after being advertised were sent, two months after receipt, to the dead letter office at Ottawa, but what was done with them there was not shewn: Held, that secondary evidence of the contract was properly admitted, without proof of a search at the dead letter office. *Williams* v. *Grey*, 23 C. P. 561.

See, also, *Marvin* v. *Curtis*, 6 C. P. 212.

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4. *Proof of Deeds by Memorials.*

[*See now* 32 *Vict. c.* 29, *O.*]

On a traverse of office a memorial of a mortgage for years from an alien to the original grantee of the crown, under whose heir the traverser claims, is not conclusive evidence of a seizin in fee in the alien at the time of the mortgage. *Per* v. *Thrale*, Dra. 331.

A memorial is good secondary evidence of such parts of the deed as are transcribed in it, without calling the subscribing witness. And it is no objection for this purpose that the additions of the subscribing witnesses to the deed are not inserted in it. *Doe* d. *England* v. *Crysdale*, 6 O. S. 254.

Memorials of registered deeds are secondary evidence only, if produced and proved, or if thirty years old without proof, coming from the registry office. *Marvin* v. *Hales*, 6 C. P. 208; *Marvin* v. *Curtis*, *Ib.* 212.

Copies of memorials certified by the registrar are evidence of the contents of the deeds. *Lynch* v. *O'Hara*, 6 C. P. 259.

A memorial signed by the grantor is not sufficient evidence of a deed against a person not claiming under him, without first accounting for the original. *Smith* v. *Neville*, 18 Q. B. 473.

In ejectment the plaintiff proved a paper title, but the patent did not issue until 1826, and the deed from the patentee was executed in 1824. This deed was lost, and the memorial of it shewed it to have been an ordinary conveyance in fee, but not what covenants it contained. The plaintiff gave a notice under C. S. U. C. c. 27, s. 17, and defendants shewed no title: Held, that the deed by the patentee should be presumed to have been one which would operate by estoppel, and that the statute applied. *Armstrong* v. *Little et al.*, 20 Q. B. 425.

Proof by a witness that he saw a deed apparently answering the description contained in the memorial, and its loss, without further proof of handwriting or genuineness, is not sufficient to make a memorial in the county registry executed by the grantee only, and proved by an affidavit, endorsed, of a witness who swore that he saw the conveyance duly signed by the grantor, good secondary evidence of the original conveyance, in the absence of any act done or possession taken for a long series of years. *Gough* v. *McBride*, 10 C. P. 166; followed in *Ansley* v. *Breo*, 14 C. P. 371.

In ejectment, the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shewn to be in defendant's possession, who declined to produce it on notice. Two memorials were then offered as secondary evidence, but rejected on the ground that they were not shewn to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848 between the four sons of B., by which the land in question went to L., under whom defendant claimed; and the memorial of the will purported to be executed by S., another of the four sons, as a devisee: Held, that the memorials *when tendered*, were rightly rejected, for the reason given, though they would have been admissible after the subsequent evidence; but as they were not then again offered, and the plaintiff's case was not one to be favoured, the court refused to interfere: Held, also, that defendant was not compellable to produce the will. *Hagball* v. *Shepherd*, 25 Q. B. 536.

Held, that a memorial twenty-five years old, which a witness stated he believed to be signed by the deceased grantor in the deed, basing his belief on the fact that the signature closely resembled his handwriting, which he had seen in the books and papers belonging to him in his (the witness's) charge, though he had never seen him write, and the signatures of the witnesses to which memorial, one of whom was dead and the other out of the jurisdiction, he knew; or a memorial upwards of thirty years old, produced by the deputy registrar from the registry office, and signed by the grantor in the deed, reciting the deed and its contents; is good evidence of the execution of the deed; in the latter case either as affording secondary evidence of its contents, which would be good against all the world, or as a declaration or admission under seal by the owner of the fee, when in possession, that he had sold and conveyed to the grantee. Semble, that in the former case proof of handwriting of the grantor alone would have been sufficient evidence. Held, also, that a memorial signed by the grantor is evidence not merely against the grantor and all claiming under or in privity with him, but against third parties also, as being a statement and act by the party in possession against his own interest as the reputed owner of the land in question. Quere, whether this would be so if it appeared that the land was at the time in actual possession of some one other than the grantor, and not holding in privity with him. *Russell* v. *Fraser*, 15 C. P. 375.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the res gestæ, and as shewing that P. had sworn to the execution. *Rose* v. *Cuyler*, 27 Q. B. 270.

In ejectment by trustees of a Wesleyan Methodist congregation for the parsonage property, a search for and the loss of the deed from the patentee to the trustees at the parsonage house having been proved:—Held, that the evidence of the subscribing witness as to the execution of the deed and memorial, with a copy of the memorial certified by the registrar, was clearly sufficient secondary evidence. *The Trustees of the Ainleyville Congregation of the Wesleyan Methodist Church in Canada* v. *Grewer*, 23 C. P. 533.

In examining a title under the act for quieting titles, a memorial executed by the grantee, is

good secondary evidence where the possession has been in accordance with the title so claimed. The weight of authority appears to be also that such evidence is admissible in ordinary suits. *Re Higgins*, 19 Chy. 303.

A conveyance executed by a married woman and her husband in the year 1825, was lost:—Held, that the registration of the memorial was no evidence of the wife having been examined, or a certificate of the examination having been endorsed on the deed. *Ib.*

See *Fields* v. *Livingstone*, 17 C. P. 15, p. 1389.

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5. *Of Evidence previously given.*

Where on a second trial it appears that a witness who was examined at the first trial is absent from the country, his evidence then given may be received. *Sutor* v. *McLean*, 18 Q. B. 490.

At a trial for murder the prisoner's counsel proposed to prove by a witness his own deposition at the inquest, and to shew by other witnesses that it contained a true statement of his evidence, although the witness alleged it to be incorrect. The learned judge ruled that the coroner must be called to prove the deposition. He was afterwards called to prove them, and the evidence before offered was not again tendered. Semble, that the ruling as to proof of the depositions was right, they having been taken before a coroner; but, Held, that the point became immaterial when they were afterwards proved in accordance with it; and that it must be assumed that it was not intended to adduce the other evidence. *Regina* v. *Hamilton*, 16 C. P. 340.

The object of taking depositions is not to afford information to the prisoner, but to secure the testimony. *Ib.*

Held, that under s. 23 of 32 Vict. c. 32, it is irregular for the judge who tries the case to call a jury or to receive depositions of witnesses as evidence; but this is not ground for prohibition. *In re Brown and Wallace*, 8 L. J. N. S. 81.—C. L. Chamb.—Galt.

On an examination of a witness under C. L. P. Act, secs. 184, 188, his evidence will not be read if the right of cross-examination has been denied. *Colville* v. *Johnston*, 5 P. R. 462.—C. L. Chamb.—Dalton, *C. C. & P.*

Where a person who had given evidence in an action at law between substantially the same persons as were the parties to this suit, was afterwards committed to the provincial penitentiary, and refused to be examined in this cause, the court ordered his evidence to be read from the notes of the judge who had tried the action at law. *Switzer* v. *Boulton*, 2 Chy. 693.

See *Powell* v. *Lea*. 20 Chy. 621, p. 1333; *Manary* v. *Dash*, 23 Q. B. 580, p. 1394.

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6. *Other Cases.*

The recognition of a bond in a letter from defendant to plaintiff, with proof that a document purporting to be a copy or draft of such instrument was shewn by defendant with the title deeds of an estate to which it related, is evidence to go to a jury in proof thereof, after notice to defendant to produce. *Rochleau* v. *Bidwell*, Dra. 357.

Where a sealed instrument was pleaded with a profert and produced at the trial, and subsequently in term, but was afterwards mislaid, and on a second trial defendant agreed to admit the execution, knowing that it had been mislaid, and when secondary evidence was gone into, defendant objected to *that* secondary evidence, but not to *any* secondary evidence, the court refused to allow a nonsuit to be entered for the non-production of the instrument. *Rowand* v. *Tyler*, 4 O. S. 257.

Parol evidence of a lost patent for land is not admissible; an exemplification must be produced. *McCollum* v. *Davis*, 8 Q. B. 150.

To connect a defendant sued for malicious arrest with the writ, the writ itself should be produced, or, to let in secondary evidence, its loss must be shewn or notice to produce it, unless defendant has adopted the arrest, as by filing affidavits in justification. *Thorne* v. *Mason*, 8 Q. B. 236.

Trover for promissory notes. The plaintiff's counsel, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly, before any demand on the defendant or refusal on his part to return them:—Held, that no notice to the defendant to produce was necessary; and (Draper, J., diss.) that the plaintiff was entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilly* v. *Fisher*, 10 Q. B. 32.

Semble, that under the circumstances of this case, secondary evidence of a deed in the chain of title was properly received, some evidence of its loss, and of a search having been given; and the court refused to interfere, as the sufficiency of such evidence was not objected to at the trial. *Tiffany* v. *McCumber*, 13 Q. B 159.

In dower, the loss of most of the deeds affecting the title was proved (or rather presumed) from the burning of the house of the owner in fee, but a deed was proved to the demandant's husband and brother as joint tenants, by production of a memorial from the registry office, and the death of the demandant's husband before his brother and co-joint tenant was also proved:—Held, that secondary evidence of the deeds was admissible. *Haskill* v. *Fraser*, 12 C. P. 383.

In ejectment, a copy of an under-lease between the tenant and his under-tenant was proved in evidence upon notice given to produce it. Upon objection in term:—Held, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial. *Connell* v. *Power*, 13 C. P. 91.

Where the papers belonging to the district court and to the sheriff had been burned, and the records themselves thus destroyed:—Held, in ejectment, that the defendant, claiming under a sheriff's deed, might prove the judgment and executions by secondary evidence contained in the sheriff's books and in a fee book of the court, and by the plaintiff's attorney in the judgment, whose papers had also been burned, and by the plaintiff; and that he was not bound to obtain exemplifications. *Heany* v. *Parker*, 27 Q. B. 509.

It is not necessary that a writ of fi. fa. which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence; and if lost and unenrolled, secondary evidence may be given of it. *Soules* v. *Donovan*, 15 C. P. 121.

In ejectment, the defendant claimed under a sheriff's deed, which was not produced, and, after giving evidence of a search, which the court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment against F., and of the fi. fa. goods returned nulla bona, and he produced the fi. fa. lands found among the papers of the sheriff, since deceased, with a memorandum annexed, written and signed by the sheriff, stating that this lot had been sold at sheriff's sale on the 11th December, 1824, for £125, to M., who had paid the sheriff's fees. The *Gazette* containing the advertisement of the sale of this lot on that day under the execution was also produced. A memorial was then produced from the registrar's office, of a deed dated 16th December, 1830, by which the sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed until eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it:—Held, that the sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed. *Fields* v. *Livingston*, 17 C. P. 15.

The evidence shewed that A. B., the ancestor of the female plaintiff, through whom the title was claimed, lived on the land in question in 1832, claiming it as his own, until 1843, when he left it; and a witness deposed to having been told by A. B. and another that they had exchanged farms and made deeds to one another, the witness stating that he had read the deed to A. B., dated before 1832. Another witness, the second wife of A. B., stated she gave to W. B., son of A. B., and husband of defendant, the deed in question; and there was also evidence that W. B., before his death, told a witness examined at the trial that he had got this deed, which he shewed to witness:—Held, sufficient evidence of a deed in fee to A. B. *Steinhoff et ux.* v. *Burtch*, 17 C. P. 160.

To complete the chain of the paper title to the land in respect to which a certificate of title was prayed, production or proof of a power of attorney from the patentee to one J. was required. Search had been made for it without success. Its existence was not sworn to positively by the petitioner, and the only evidence of it was an affidavit of one P., who did not swear that he had ever seen it, and did not state his means of knowledge of its existence. There were also some suspicious circumstances with regard to a deed executed apparently in pursuance of the power. The only evidence as to possession was a statement in the petitioner's affidavit that one R., to whom the petitioner agreed to sell the land in 1866, was still in possession, and that possession had always accompanied the title. No notice appeared to have been given to the person who was in possession. No affidavit was put in as to adverse claims served upon the person directed to receive them. The evidence as to possession and the existence of the power of attorney was—Held insufficient, and a certificate of title was refused until further evidence should be given to clear up the suspicious circumstances in the deed, said to be executed in pursuance of the power of attorney, and affording positive proof of the existence of the power, or else shewing the exercise of acts of ownership, which would justify the presumption that a conveyance of the legal estate had been made by the patentee. Notice was directed to be given to the person in possession, and an affidavit as to adverse claims ordered to be furnished. *Re Street*, 8 L. J. N. S. 197.—Taylor, *Referee*.

XVIII. Proof after Notice to Produce.

1. *When Notice necessary.*

In assumpsit for not delivering goods, after the plaintiff had proved a verbal agreement, defendant gave in evidence a copy of the affidavit of debt made in the cause, and of an agreement in writing incorporated therein, sworn to by one of the plaintiffs, and then called upon the plaintiffs to produce the original agreement, not having served any notice to produce:—Held, that no notice to produce was necessary, the plaintiffs having shewn themselves in possession of the agreement by their affidavit of debt; and that as the writing was the best evidence, it should have been produced. *Gilbert et al.* v. *Sleeper*, 3 O. S. 135.

Before parol or secondary evidence can be given of a note being received by the plaintiffs in satisfaction of claim for work done, defendant must prove notice to the plaintiff to produce the note. *Heward* v. *McDougall*, 3 O. S. 647.

In trespass for taking goods:—Held, that a notice to produce a writ of execution was not dispensed with by the writ being pleaded in justification, the general issue being also on the record. *McCrae* v. *Osborne et al.*, 6 O. S. 500.

Trover for promissory notes. The plaintiff's counsel, in opening the case, stated that the notes were left by the plaintiff with the defendant as security, and that they had been given up by him to the makers improperly, before any demand on the defendant, or refusal on his part to return them:— Held, that no notice to the defendant to produce was necessary; and (Draper, J., diss.) that the plaintiff was entitled to prove the contents of the notes without shewing the originals lost or destroyed, or laying any foundation for the admission of secondary evidence. *Tilly* v. *Fisher*, 10 Q. B. 32.

In ejectment, the point in dispute was whether T. R., one of the plaintiffs, had ever conveyed the land to one J. R., deceased (under whom defendant derived title). Evidence was given of conversations in which T. R. had stated either that he had given a deed to J. R., or that the title was vested in J. R., and a letter from T. R. was also produced referring to such a deed; but no strictly legal evidence was given of the contents of such deed:—Held, that such evidence, under the circumstances, was admissible on the part of defendants as primary evidence, and that notice to the plaintiffs to produce such deed was unnecessary. *Rogers et al.* v. *Card*, 7 C. P. 89.

A letter written by defendant to plaintiff, saying that he was still willing to settle amicably,

but that if the plaintiff refused to meet him in the same spirit he would push the matter to the utmost:—Held, not provable by secondary evidence, without a notice to produce. *Hood* v. *Cronkite*, 29 Q. B. 98.

Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause under the deed so produced, the party calling for it, is not bound to prove its execution. *Chisholm* v. *Sheldon*, 2 Chy. 178.

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2. *Service of Notice.*

Where defendant, residing in the assize town, was served on Saturday with a notice to produce on the following Monday:—Held, sufficient. *Robertson* v. *Boulton*, H. T. 6 Vict.

In trespass for seizing the plaintiff's property under an illegal execution said to have been issued by defendants, a notice to produce the writ, served on defendants' attorney four days after the commencement of the assizes, defendants living more than ninety miles from the assize town, was Held insufficient. *McCrae* v. *Osborne et al.*, 6 O. S. 500.

Quære, can a notice to produce be served on the agent of the defendant's attorney. *James* v. *Mills*, 4 Q. B. 366.

The sufficiency of a notice with respect to the *time* of service, seems to rest with the judge at the trial. *Ib.*

Service on plaintiff's attorney on the day of and within one hour of the trial, is too late. *Nash* v. *Bush*, 5 C. P. 300.

In dower, the demand was served upon the tenant of the lands, who then declared that he did not own the lands:—Held, that a notice to produce served upon such tenant was unavailing to let in secondary evidence of the deeds under which demandant claimed. *Marvin* v. *Hales*, 6 C. P. 208.

An affidavit of service of notice to produce is not admissible under C. L. P. Act, s. 167, unless made by the plaintiff's attorney or his clerk. *Patterson* v. *Morrison*, 17 Q. B. 130.

Quære, whether service on a female servant at the office and residence of defendant's attorney is sufficient. *Ib.*

See *Sullivan* v. *King*, 24 Q. B. 161, p. 1393.

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3. *Form of Notice.*

Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an unexpired crown lease, sold as belonging to B. by assignment:—Held, that—after proof of an exemplification of the lease, the judgment, fi. fa., and sheriff's deed,—a notice to produce the original lease and assignment, without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B. *Doe* d. *McGuire* v. *Dennis*, 2 O. S. 589.

In an action for malicious arrest, a notice to produce the writ of ca. re. issued, &c., at the suit of A. against the *defendant* in this cause:—Held, sufficient, the mistake in using the word "defendant" for "plaintiff," being a mere clerical error, which could not mislead. *Wilson* v. *Gilmour*, 5 Q. B. 212.

Plaintiff sued defendant for the price of some fruit trees, and the defence was that they had not been purchased by defendant, but received to sell upon commission for plaintiff. Defendant had given notice to produce "the several documents hereunder specified, and all other documents, letters," &c., "relating to the matters in question in this cause." The schedule specified all letters, &c., and "particularly certain orders given by defendant to plaintiff to forward the trees which defendant was to sell for the plaintiff under the agreement between them, and which orders are dated in or about March, 1856;"—Held, sufficient to let in secondary evidence of a letter written by defendant to plaintiff in March, requiring the trees to be sent by a certain time. *Leslie* v. *Morrison*, 16 Q. B. 130.

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4. *Other Cases.*

Where in ejectment notice to produce a crown lease, under which the lessor of the plaintiff claimed, had been given, and the lease was not produced, but an exemplification of it put in, and defendant gave parol testimony that the lease had been assigned to a third party, who had given a mortgage on it to the lessor of the plaintiff, which had been paid at the day; and the jury found for the defendant:—Held, that the evidence that the lessor of the plaintiff had parted with his interest was sufficient to support the verdict. *Doe* d. *Crawford* v. *Cobbledick*, 4 O. S. 328.

Quære, has the plaintiff a right to call on defendant's attorney in court, in an action for malicious arrest, to say whether he has or has not the writ in his possession. *James* v. *Mills*, 4 Q. B. 366.

In dower, notice was given to defendant to produce his title deeds, and defendant's father, who was called, declined to swear positively whether they were in his possession or his sons':—Held, that secondary evidence of the deeds was admissible. *Graham et ux.* v. *Law*, 6 C. P. 310.

The declaration alleged that the plaintiff and defendant each became bound to the other, conditioned, after reciting certain differences that had arisen, to abide by the award of two persons named, and such third person as they might appoint, concerning the same, costs to be in their discretion: that an award was duly made that defendant should pay the plaintiff $440, and each pay their own costs of the submission, and that $60, other costs, should be paid by them equally. Breach, non-payment of the $440, and a moiety of the $60. Pleas, denying the submission and award. The plaintiff proved the execution of the defendant's bond, and gave secondary evidence of having executed a similar bond himself, which was given to defendant, and of the appointment of the third arbitrator endorsed on it, having served a notice to produce on defendant's attorney, at 11 a. m., on the day previous, the commission day, defendant living seventeen miles off, at a place to which there was a daily mail. He also proved by one of the arbitrators the execution of the award by all three:—Held, 1. That the execution of plaintiff's bond being put in issue, it might properly be presumed to

be in possession of defendant's attorney; and if it were not, that the notice under the circumstances, was sufficient. *Sullivan* v. *King*, 24 Q. B. 161.

In ejectment, a copy of an under-lease between the tenant and his under tenant, was proved in evidence upon notice given to produce it. Upon objection in term:—Held, admissible, as against the under-tenant, he having admitted it was a copy, and no objection having been taken to it at the trial. *Connell* v. *Power*, 13 C. P. 91.

Where the plaintiff claimed under a will, and the defendant under a deed from the heir-at-law, registered before the will:—Held, that the plaintiff, by calling for the deed under a notice to produce, and putting it in on another branch of the case, furnished primâ facie evidence of the consideration as mentioned in it. *Bondy* v. *Fox*, 29 Q. B. 64.

Where a conveyance is produced upon notice, by an adverse party, who claims an interest in the cause under the deed so produced, the party calling for its production is not bound to prove its execution. *Chisholm* v. *Sheldon*, 2 Chy. 178.

XIX. Proof by Entries and Declarations.

The plaintiff is not bound by credits given by him in account, on the mere statement of the defendant, but may reject such credits, unless the defendant can shew that they ought to be allowed. *Gordon* v. *Fuller*, 5 O. S. 576.

The declarations of a deceased testator respecting his age at the execution of his will are not admissible. *Doe* d. *Stephen et ux.* v. *Ford*, 3 Q. B. 352.

A declaration under the 5 Geo. II. c. 7, by a party residing in parts beyond the sea, and who could not be received to state on oath at the trial the facts therein contained, is inadmissible. *Gabriel* v *Derbishire*, 1 C. P. 422.

In support of a claim for work and labour, the plaintiffs produced declarations of witnesses, taken under the imperial acts 5 & 6 Will. IV. c. 62, purporting to be taken before a J. P. in Glasgow, but not properly authenticated or transmitted:—Held, that such evidence could not be received. The court remarked upon the great want of caution apparent in the provisions of the statute. *Smith* v. *McGowan*, 12 Q. B. 270. See also *S. C.* 11 Q. B. 399, and *Gordon* v. *Fuller*, 5 O. S. 174.

In an action against the clerk of the Division Court for moneys received for bailiff's fees, entries made by such clerk in the course of his business in books kept under the provision of an act for that purpose:—Held, evidence against the sureties. *Middlefield* v. *Gould et al.*, 10 C. P. 9.

In an action against a sheriff for the sale of goods under a fi. fa. without paying the rent due to the landlord:—Held, that the statement of the tenant in possession, made before the distress, that the first year's rent had been paid, was not evidence in the cause. *Galbraith* v. *Fortune*, 10 C. P. 109.

In an action by the executors of A., the father, against the executrix of B., the son, on an agreement said to be lost, to recover £300 alleged to have been lent by A. to B., the defence was that the money was a gift, on condition that the son should pay the father an annuity at the rate of four per cent. during his life. It was clearly proved that the £300 was advanced by A. to B., and that B. gave a note or writing of some kind for it; and it appeared that A., during his lifetime, had, in October, 1861, sued B.'s executrix for the money. B. died on the 15th of June, 1861. The plaintiff gave in evidence the following receipt, signed by A., dated April 28th, 1861, which had been found among A.'s papers, wafered to a memorandum book kept by him: "Received from my son Stephen Ganton" (above referred to as B.) "the sum of forty-eight dollars for interest of £300 at four per cent., due the 1st day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper." There was no evidence to shew at what time this was made. Defendant put in the following receipt, also signed by A., dated May 3rd, 1858: "Received from my son Stephen Ganton the sum of twelve pounds, being one year's annuity due to me according to agreement bearing date May the first, 1858:"—Held, that the first-mentioned receipt was inadmissible for the plaintiff as an entry against interest, for though it admitted the receipt of 848, yet it supported a claim for £300 by stating the existence and loss of the agreement, and describing the payment as interest instead of an annuity, as in the previous receipt; and the whole entry therefore was much more for the declarant's interest than against it. *Ganton* v. *Size et al.*, 22 Q. B. 473. Affirmed in appeal, 2 E. & A. 368.

In replevin for goods sold for taxes, the plaintiff having succeeded for want of evidence of any demand by the collector, defendants moved for a new trial on affidavits shewing the discovery, since the trial, in the collector's blank receipt book, opposite to the receipt intended to have been given for these taxes, of a minute made by the collector, "Wrote January 21st, 1864." The death of the collector was shewn, but not when he died, nor when the entry was made, nor that it was in the usual course of business to make such an entry:—Held, that it would be insufficient to establish a demand; and a new trial was therefore refused. *Barton* v. *The Corporation of the Town of Dundas et al.*, 24 Q. B. 273.

In an action against attorneys for negligence, the defendant W. having made an entry or memorandum of his instructions in presence of the plaintiff, but not, so far as appeared, with the plaintiff's knowledge, offered it as evidence of the transaction:—Held, not admissible. *Phelps* v. *Wilson et al.*, 13 C. P. 38.

The question in dispute at the trial being the boundary line between 11 and 12, in the 5th concession of Saltfleet, affidavits were offered in evidence as to the line between lots 4 and 5, and 14 and 15, in the same concession, taken by the surveyor employed by defendants to run this line in 1860, and filed with the registrar under C. S. U. C. c. 93, s. 51:—Held, that such affidavits were properly rejected. *Manary* v. *Dash*, 23 Q. B. 580.

Quære, as to the effect of the words in that section, "subject to be produced thereafter in evidence in any court of law or equity within Upper Canada." One of these affidavits went to shew that none of the side lines in this con-

cession had been run in the original survey, owing to a large swamp:—Held, not an affidavit within the statute, for evidence "concerning any boundary" does not mean evidence that no such boundary ever existed; and on this ground, also, such affidavit was rightly rejected. *Ib.*

In an interpleader to try the right to goods seized under execution against A. & B., and claimed by the plaintiff, C., a brother of B.:—Held, that B.'s statement, while in possession of the property with the plaintiff's assent, that it belonged to his sister, could not be evidence, as against the plaintiff, to disprove the plaintiff's right. *Earnshaw* v. *Tomlinson*, 26 Q. B. 610.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged the demandant's name:—Held, following Stobart *v.* Dryden, 1 M. & W. 616, that such evidence was rightly rejected. *Rose* v. *Cuyler*, 27 Q. B. 270.

In a suit by a creditor to set aside a deed on the ground (amongst other things), that it was made to defendant on a secret trust for the grantor and to defeat his creditors, it was Held, that the grantor's statements after the conveyance that it was a real transaction, were admissible evidence for the defendant, but were not entitled to much weight. *Wood* v. *Irwin*, 16 Chy. 398.

XX. Hearsay Evidence.

1. *In Questions of Pedigree.*

In ejectment, between a person claiming as heir and a stranger, slight evidence of pedigree is allowed to go to the jury. *Doe* d. *Mayher* v. *Chisholm*, Dra. 227.

In ejectment by co-heiresses it was proved that the party in possession had acknowledged the ancestor's title, and it was also shewn that the lessors of the plaintiff were his children; but the jury found for the defendant. On motion for a new trial, the court would not entertain the objection that it had not been proved that the lessors were the legitimate children of the alleged ancestor, as that point had not been raised at the trial. *Doe* d. *Morrough et al.* v. *Maybee*, 2 Q. B. 350.

When a plaintiff in ejectment capable of inheriting and primâ facie entitled to inherit, makes out a reasonable case, the court will throw *upon the defendant*, especially if he be a stranger to the title, the onus of shewing a nearer heir. Where, for instance, the plaintiff claiming by descent as the brother of an elder brother dying without issue, proved by persons connected with the family, "that they had heard of the elder brother's marriage many years ago, but knew nothing of his having any issue," the court held this evidence sufficient, in the absence of any proof to the contrary, to entitle the lessor of the plaintiff to recover. *Doe* d. *Place* v *Skae*, 4 Q. B. 369.

If the lessor of the plaintiff claim as son and heir-at-law to the deceased owner, he must shew who was his mother, and prove her marriage with his alleged father. *Doe* d. *Humberstone* v. *Thomas*, 3 O. S. 33.

Before a stranger can give evidence of declarations as to pedigree, made by a relation of the family, there must be shewn, 1. The death of that relation; and, 2. The fact of his relationship to the family, which fact cannot be proved by his own assertion. *Doe* d. *Dunlop* v. *Serrol*, 5 O. B. 284.

In ejectment the plaintiff claimed under a deed to him from one George O. Graves, the heir of the patentee, Captain Adam Graves. He gave evidence that his grantor was the heir of one Adam Graves who had been a captain in the navy, and put in the patent to him of 980 acres, with a deed to himself from the alleged heir of the same land, of which the land in dispute formed part:—Held, sufficient evidence to go to the jury of identity between the patentee and the alleged ancestor. *Brown* v. *Livingstone*, 3 Q. B. 520.

When a party claims as one of the heirs of the half-blood of an intestate, and in his bill professes to set out how his interest arises, it is necessary for him to negative the fact of the intestate having obtained the land by gift or devise from an ancestor; or, if he did so obtain it, the claimant must shew that he is of the blood of such ancestor. *Tryon* v. *Peer*, 13 Chy. 311.

Ejectment. At the trial the plaintiff put in an exemplification of a patent dated 10th March, 1797, granting certain lots in fee to A. It was then proved that A. married in this province in 1794, and had two daughters: that one of the lessors was one of those daughters: that the other lessor was the son of the other daughter: that he, A., left for New York in the fall of 1796, and was heard of as having gone from thence to the West Indies, and was at the time and when heard from at New York, in a very precarious state of health, on which account he had gone away; and it was heard in the following spring that he died in the West Indies; and it was understood and believed in his family ever since. The defence was, that he died before the 10th March, 1797, and that therefore the patent to him dated on that day was void, and that a second patent issued in consequence thereof; and a patent issued in 1801, granting these same lands to B. in fee, was put in. Defendant next offered to prove a petition from the widow of A. to the Court of Probate, praying for letters of administration, and stating the day of his death as evidence of his death on that day. This was rejected. The letters of administration were put in. It was next proposed to put in a petition, signed by some members of the family of A., to the executive government, praying that a new patent might issue, in consequence of A.'s death before 10th of March, 1797, as a declaration of that fact by relatives of the family. It did not appear who the parties were that signed the petition. This was rejected also. Defendant then offered the memorial of B., praying that a new patent might issue to him, alleging that the patent of the 10th March, 1797, was issued subsequently to the death of A., and asking the grant for the benefit of A.'s creditors, of whom B. was one, with consent of A.'s administratrix. This was also rejected. Defendant then called a surviving brother of A., who proved that the latter left this province in the fall of 1796 in very bad health, being in fact considered in a desperate condition: that he wrote from New York, stating that he was better, and

attended proceeding to the West Indies; and that in the following spring the witness was informed of his death. The learned judge refused evidence of the day on which (as the witness heard) his death took place, or of the family reputation of the day of his death, or to allow the witness to prove the statements of a person who came from the West Indies, stating himself to have been the servant of A,, or to prove the contents of certain papers (since lost) which the witness received from the servant, alleged to have been an inventory of A.'s effects at the time of his death, and an account of the sale of his effects after his death. And upon the evidence admitted the jury found that A. died after the 10th of March, 1797:—Held, Robinson, C. J., diss., that the evidence rejected at the trial was inadmissible; but as the nature and character of some parts of the evidence rejected were not known with sufficient certainty, a new trial was granted on payment of costs. The chief justice was also of opinion, that even rejecting the whole of the evidence objected to, the verdict should have been for defendant upon the evidence admitted. *Doe* d. *Arnold* v. *Auldjo*, 5 Q. B. 171.

To displace title made under a near relative capable of inheriting, it should be shewn that there is some one in existence representing the alleged elder branch of the family. *Doe* d. *Park* et al. v. *Henderson*, 7 Q. B. 182.

The circumstance of its coming out on the cross-examination of a witness of the lessor of the plaintiff claiming as heir that his ancestor left a will, does not disable the plaintiff from recovering as heir until he produces or gives evidence of the will; it is for the defendant to shew the contents of the will. *Doe* d. *Atkinson* v. *Mcleod*, 8 Q. B. 344.

Where it comes out in the course of a cause that the ancestor of one of the parties to the suit, who claims at heir-at-law, has in fact made a will, it is incumbent on the court to direct an inquiry on that point, although unnoticed in the pleadings. *Chisholm* v. *Sheldon*, 1 Chy. 108.

In ejectment, the plaintiff claimed under one D. L. C., whom he alleged to be eldest son and heir-at-law of L. C., assignee of the grantee of the crown. The patent from the crown was to F. *Weis*, and the deed to L. C. was signed by *F. Weast* as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of defendant, who claimed under the will of L. C., which he produced, and had been with the patent in the possession of the C. family since 1816. It was not known there was any other F. Weis except the person who conveyed as F. Weast. The only evidence of the heirship of D. L. C. was his own. He shewed a general knowledge of the affairs of members of the family, was brought up in the neighbourhood of a number of relatives, and had been informed of his heirship by his mother and his father's mother. Several uncles and other relatives were called, but no other witness was examined as to his heirship. The defendant claimed as devisee under the will of the same L. C., under whom the plaintiff claimed:—Held, that the identity of Weis and Weast who made the deed to L. C. was sufficiently proved. Held, also, that D. C. L.'s statements, under the circumstances, sufficiently proved his heirship; and that it was not necessary to prove the marriage of his father and mother unless it was disputed. *Wallbridge* v. *Jones*, 33 Q. B. 613.

In ejectment, the plaintiff claimed title through the heirs-at-law of P. A witness testified that in 1871 he called at the house of P., who was a retired merchant, in London, England, but did not see him, as he was unwell: that afterwards, in 1872, he was told by members of the family there, representing themselves to be P.'s only brothers and sisters, that P. had died on the 20th of May, 1872, intestate, and without children; and that he received from one of them the deeds for the lot, which were produced, four in number, including the patent. A deed to the plaintiff's grantor was put in, executed by all these parties in presence of this witness, who stated that he was satisfied they were P.'s heirs-at-law, and that he had searched at Doctor's Commons for P.'s will, but found none. It was objected that there was no sufficient evidence of heirship, but the learned judge who tried the cause without a jury, found a verdict for the plaintiff; and the defendant shewing no pretence of title, the court refused to interfere on this ground. *Gallivan* v. *O'Donnell*, 36 Q. B. 250.

There was no proof of identity of the different grantors and grantees in the deeds shewing the chain of title, except the similarity of names, and the possession of the patent and deeds:—Held, clearly sufficient. *Ib.*

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2. *Res gestæ.*

The Great Western railway shareholders resolved in 1857, to advance £150,000 stg., to the Detroit and Milwaukee railway company, and again, in 1858, a further sum of £100,000 stg. The first loan was expressly sanctioned by parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway Company, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee company to be deposited with the plaintiffs, and exchange on the Great Western Railway's London board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee railway account, Great Western Railway," and kept distinct from the Great Western railway account proper. Large advances were made, and exchange drawn; the business was carried on for two years, and moneys advanced by the G. W. R. to the D. & M. Co., beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. It was proved that of the two loans only about $700,000 was paid to the plaintiffs by exchange or traffic receipts. Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co. or to the individual directors negotiating the arrangement, and the plaintiffs sued for the balance overdrawn, amounting to about $1,000,000. B. & R. (defendants' managing and financial directors), wrote to the

plaintiffs, asking for a credit of $100.000 on their D. & M. account, which was considered on the 1st of April, 1858, at the plaintiffs' board, and was accepted by letter of their cashier on the same day:—Held, that the minutes of the board were admissible for the plaintiffs, as part of the res gestæ:—Held, also, that a bank statement sent by the plaintiffs' agent at Hamilton to their head office, shewing how the account was kept, was properly admitted. When it was proposed to open the account, the plaintiffs' cashier met R., defendants' financial director, in Toronto, to discuss the matter, and made an arrangement which it appeared R. was aware the cashier had to report to his board for approval, and which he told R. he had no doubt would be carried out:—Held, that the cashier's verbal report to the plaintiffs' board on his return, two days after, was admissible as part of the res gestæ, as a declaration accompanying an act. *Commercial Bank* v. *Great Western Railway Co.*, 22 Q. B. 233; 2 E. & A. 285.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the res gestæ, and as shewing that P. had sworn to the execution. *Rose* v. *Cuyler*, 27 Q. B. 270.

Where, to let in secondary evidence of a bond, the attorney of the obligor was called, and upon being shewn letters written by himself in which a deed and bond were referred to, and the contents of the bond stated, he swore that he had no recollection whatever of these instruments, although he had no doubt from reading the letters that such bond existed; the court refused to receive such letters as evidence of an admission by the obligor's agent of the existence of the bond, they not being part of the res gestæ. *Clarke* v. *Little*, 5 Chy. 363.

See *Shaw* v. *De Salaberry Navigation Co.*, 18 Q. B. 541, p. 1299.

XXI. Evidence of Character.

In assumpsit for breach of promise of marriage, the defendant is entitled to cross examine the plaintiff's own witness respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 493.

Where a party supporting a deed proves the handwriting of a deceased witness in order to raise the presumption of due execution, the other party may shew the character of such witness as corroborative of evidence tending to shew that the deed was a forgery concocted by him. *Chamberlain* v. *Torrance*, 14 Chy. 181. See also *Rose* v. *Cuyler*, 27 Q. B. 270.

XXII. Production and Admission of Evidence.

1. *Onus Probandi.*

Where a vessel is seized as not being British built, under the 7 & 8 Will. III., the claimant, in order to recover, must prove that the vessel was built at a British port. *Rex* v. *Nash*, Tay. 197.

In ejectment, the burden of proof to shew that the statute 4 Will. IV. c. 1, s. 17, is inapplicable is thrown upon the defendant. *Doe d. McKay* v. *Purdy*, 6 O. S. 144.

Where in an action on a promissory note the defendant pleads no consideration, upon which issue is joined, the defendant must impeach the consideration; and it is not necessary for the plaintiff to prove the consideration in the first instance. *Sutherland* v. *Patterson*, M. T. 6 Vict.

Where in debt on an indemnity bond the defendant pleaded that if the plaintiff was damnified she was damnified of her own wrong, and the plaintiff took issue on the plea, and did not assign any breach; and at the trial, the plaintiff not offering any evidence to prove that she was damnified, was nonsuited—on a motion for a new trial, on the ground that the issue was on the defendants, and that they should have begun—the nonsuit was held to be right. *Hamilton* v. *Davis et al.*, 2 Q. B. 137.

Where defendant pleaded a judgment recovered by him in a former action on the same promises, to which the plaintiff replied, that the judgment was not recovered on the same promises, it was held that the issue was on defendant, and he must prove the former recovery. *O'Neill et al.* v. *Leight*, 3 Q. B. 70.

Where an endorsee suing the endorser upon a note produces it at the trial from his own custody, with defendant's endorsement thereon cancelled, not as if by any accident, but in the most unequivocal manner, some explanation must be given to the jury for rejecting the inference that the note had been satisfied by defendant whose name is thus cancelled. *Peel* v. *Kingsmill*, 7 Q. B. 364.

In ejectment, it was proved at the trial in 1847, that A. was last seen in the province in December, 1827, and was never afterwards heard of. A fi. fa. against A.'s lands was placed in the sheriff's hands on the 13th July, 1833, tested the 29th June, 1833. The heir of A. brought ejectment against the purchaser at the sheriff's sale, and attempted to recover upon the ground that, after twenty-two years had elapsed since A. was last heard of, the presumption that he did not die till the expiration of the seventh year was at an end; and that defendant must shew that he did not die till after the seventh year; but,—Held, that the plaintiff, not the defendant, must shew when A. died. *Doe* d. *Hagerman* v. *Strong*, 4 Q. B. 510; affirmed in 8 Q. B. 291.

In an action brought upon a policy of insurance, defendants pleaded the non-fulfilment of the twelfth condition of the policy, which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiff took issue:—Held, that the proof of the plea rested upon defendants, and the plaintiff having given primâ facie proof of the fulfilment of the condition was entitled to the verdict. *Platt* v. *The Gore District Mutual Fire Ins. Co.*, 9 C. P. 405.

In an action by a creditor of a Railway Co. against a shareholder, it is not necessary that a fi. fa. (goods) should be returned nulla bona from all the counties through which the railway runs, but the onus of proof of fraud or of there being goods of the company to satisfy the judgment lies on the defendants, the plaintiff having obtained one return of nulla bona. *Jenkins* v. *Wilcock*, 11 C. P. 505.

In an action on a judgment obtained by plaintiff against defendant in the United States, defendant pleaded, 1. That the judgment had been recovered for money alleged to have been paid by plaintiff for the use of defendant; and that he was never indebted as alleged; 2. Payment before judgment:—Held, J. Wilson, J., diss., that the onus probandi was upon defendant. *Manning* v. *Thompson*, 17 C. P. 606.

To an action for work and labour, defendants pleaded a release under seal, making profert. The plaintiff replied that the release was delivered as an escrow, to be void on non-payment by defendants of £200, by a certain day; also, that defendants did not pay:—Held, that defendants must prove the execution of the agreement, and that it was not necessary for the plaintiff to shew the conditional delivery as part of his case. *Light* v. *Woodstock and Lake Erie Railway & Harbour Co.*, 13 Q. B. 216.

A statute was passed reversing the attainder of A. S., and taking away the forfeiture wrought thereby, so far as it might affect portions of this estate not already declared forfeited and sold under authority of law, and vesting such estate in those who could claim it if he had not been attainted; provided always, that nothing in the act should affect any property sold or conveyed by the commissioners of forfeited estates, &c. In the preamble, it was recited that a part of the estate had been taken upon inquisition, and seized by the crown:—Held, that the plaintiffs, claiming in ejectment as devisees of A. S., must shew, as part of their case in the first instance, that the lands claimed were not part of those forfeited and sold. *Doe* d. *Stevens et al.* v. *Clement*, 9 Q. B. 650.

Replevin for a horse. Plea, that the horse was the horse of the defendant and not of the plaintiff as alleged, and issue thereon:—Held, that the plaintiff was entitled to begin. *Neville* v. *Fox*, 28 Q. B. 231.

On an application for a certiorari to remove a conviction of one J. B. for selling liquor without a license:—Held, that on such a charge, it was for defendant to shew his license, and not for the informant to negative its existence. *In re Merritt*, 28 Q. B. 559.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners under the statutes 2 Vict. c. 15 and 12 Vict. c. 9, or by express evidence, to negative the exceptions specified in the latter of these statutes. *Regina* v. *Strong*, 1 Chy. 392.

A lessee of the crown being in arrear for rent, assigned his interest to another, taking a bond to re-convey one-half thereof, on payment of half the amount advanced, within a year, which time having been allowed to elapse without payment of this sum, the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that under these circumstances the transaction was prima facie one of mortgage, and that the onus of proving it to be a sale devolved upon the party attributing that character to the transaction. *Bostwick* v. *Phillips*, 6 Chy. 427.

In May, 1860, a purchase was made by parol of a lot of land, in addition to three other lots previously bought by the same purchaser from the same vendor, and the purchaser went into possession and erected thereon a coach-house and stable, and the other portion of it was used as a lawn to the house which he had erected on the other lots which had been duly conveyed to him. In the year 1860, and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his note for the purchase money, but which he refused to accept. A bill for specific performance was subsequently filed by the vendor:—Held, that the purchaser, by his conduct, had waived his right to compel the vendor to make out a good title, but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract; the onus of proof under the circumstances being shifted from the vendor to the purchaser. *Denison* v. *Fuller*, 10 Chy. 498.

Where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, though it may to some extent involve proof of a negative. *McIntyre* v. *The Attorney-General*, 14 Chy. 86.

The decree directed a reference to the master at Brantford to take an account of the amount due upon the mortgage in question. The only evidence before the master, besides what was used at the hearing of the cause, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the master's report finding the whole amount due was allowed. Semble, that the onus of proof under such a reference rests upon the holder of the mortgage. *Elliott* v. *Hunter*, 15 Chy. 640.

See *Northwood* v. *Keating*, 18 Chy. 643, p. 1358.

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2. *Relevancy.*

Plaintiff sued a railway company for the loss of his trunk, which he alleged contained several valuable papers, and among them the lease of a farm from his father to himself. Defendants resisted his claim as fraudulent, denying that they had ever received the trunk, and gave strong evidence to support their defence. They then offered to prove (as tending further to shew the dishonesty of the claim) that this farm had been the subject of a suit in Chancery, in which it was decreed that the plaintiff's father held the land only as agent for another, and should convey to him; and that the plaintiff was aware of the fact, having been examined as a witness in the case:—Held, that such evidence was rightly received. *Thomas* v. *Great Western R. W. Co.*, 14 Q. B. 389.

Plaintiff was son-in-law of one J. D., and lived in the same house, using half the same shop, and it was clearly shewn that the plaintiff and J. D. had made certain arrangements with the express object of putting J. D.'s property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D.'s real estate prior to plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D.'s goods, it appeared that the purchase money paid by plaintiff had been credited to him out of sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D.:—Held, 1. that evidence of the settlement was admissible as being material to the subject matter in dispute;

2. that the jury rightly found against the plaintiff's claim. *Cook* v. *Hendry*, 7 C. P. 354.

Prisoner being indicted for the murder of one H., the principal witness for the crown stated that the crime was committed on the first of December, 1859, on a bridge over the river Don, and that the prisoner and one S. (who had been previously tried and acquitted) threw H. over the parapet of the bridge into the river. The counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the learned judge rejected the evidence, saying that S. might be called, and if contradicted, might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted, D. was not examined:—Held, that the presence of S. was a fact material to the enquiry, and that D. therefore should have been admitted when tendered; and, the prisoner having been found guilty, a new trial was ordered. *Regina* v. *Brown*, 21 Q. B. 330.

Dower. Defendant pleaded that by deed of the 21st of August, 1837, the husband conveyed the land to T. C., and that on the 23rd of April, 1850, the demandant by deed jointly executed with her husband, released her dower to T. C., who conveyed to defendant; and on this issue was joined. The release of the 23rd of April, was a deed poll of release of dower, for a nominal consideration, executed by demandant by mark; and the only subscribing witness being the defendant, it had been decided that it could not be proved by evidence of his handwriting: See Clark *v.* Stevenson 22 Q. B. 575. The defendant therefore proved the execution of the deed of the 21st of August, 1837, which was executed by the demandant, though she was no party to it, and it contained no release of dower. A certificate of two justices was endorsed, dated 2nd of March, 1850, that the demandant had appeared before them, and duly barred her dower; and one of them proved that she was examined, executed the deed, and received $10. T. C., the grantee, proved that she agreed to bar her dower, and that he took her to the justices for that purpose, but finding that the proceeding before them was ineffectual, he had the release of the 23rd of April, 1850, prepared, and sent it to her by defendant, with a note for $40, which he held against her husband, to be kept if the release was executed, otherwise returned; and that defendant brought back to him the release apparently executed, but not the note. The evidence was received, (though objected to) as tending to strengthen the probability that the release was really executed; it being also sworn in confirmation, that the demandant's name to the release was written by her husband: that in May following, the demandant told witness that defendant had been to her to sign a paper for T. C., which she had signed; and that the next day she told defendant she had no right there. The jury found for defendant. Draper, C. J., doubted whether there was sufficient to go to the jury as evidence of the execution of the release; but, Held, Morrison, J., concurring, that defendant being obliged to resort in effect to secondary evidence, was bound to call the demandant, who could have given the best, notwithstanding her adverse interest; and that the verdict must therefore be set aside. Morrison, J., thought the evidence objected to inadmissible, as being irrelevant to the issue. Hagarty, J., dissented, holding that the evidence was properly received as forming part of the history of the whole transaction, and tending to shew why the release was for a nominal consideration only, and in a form implying a previous conveyance of the fee, which might otherwise have given rise to suspicion; and that defendant was not bound to call the demandant. *Clark* v. *Stevenson*, 24 Q. B. 200.

In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent or the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty:—Held, that it was allowable to prove by persons working with the plaintiff, that they had been paid by the defendant on application to him; and that in suits brought by them against him, he had paid money into court; and that the judgments in such suits were also admissible though unnecessary. *Stewart* v. *Scott*, 27 Q. B. 27.

On the trial of an action on a promissory note, brought by the plaintiffs, a banking corporation, and to which defendants pleaded usury, consisting in the plaintiffs making the note payable at a distance from the place of discount, and thereby securing a larger rate of interest, in the shape of commission, than they were legally entitled to, the plaintiffs' agent was asked by the defendants, in cross-examination, whether during the time he was in P. (the place of discount) he had directed or caused any other note to be made payable at any other place than P.:—Held, that the question was admissible. *The Bank of Montreal* v. *Scott et al.*, 17 C. P. 358.

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3. *Duty of Judges as to Receiving and Rejecting Evidence.*

When a defence is specially pleaded, the court will not, with the consent of the parties, admit evidence of such defence under the general issue. *Longworth* v. *McKay et al.*, 6 O. S. 149.

Semble, that the precise time at which, upon a trial, particular evidence may be introduced is for the judge exclusively to determine. *Robinson* v. *Rapelje*, 4 Q. B. 289.

It does not necessarily follow, that because the plaintiff's witness when recalled to rebut the plaintiff's evidence, makes statements which in fact amount to a new case for the plaintiff, the judge must therefore refuse to allow such statements to go to the jury. *Devlin* v. *Crocker*, 7 Q. B. 398.

In an action for insurance upon a vessel under the usual interim receipt, the plaintiff, at the trial, claimed as owner under a sale of an equity of redemption under execution, which the judge held to pass no interest; and he was then allowed to prove his interest as mortgagee. Upon a motion for nonsuit upon that ground:—Held, that it was a matter in the discretion of the judge at Nisi Prius, to permit such a variance in line of proof, and the defendants not shewing themselves damnified by the exercise of this discretion, a nonsuit was refused. *Scatcherd* v. *Equitable Fire Insurance Co.*, 8 C. P. 415.

In an action of libel for publication in a newspaper, the plaintiff's counsel proved the paper

containing the publication, but did not file it or read the article containing the alleged libel. Defendant's counsel opened his case, and said he would call no witnesses. The plaintiff's counsel then moved to have the paper read and filed, which the learned judge allowed, reserving leave to the defendant to move to enter a nonsuit, if, *according to strict practice*, the plaintiff was not entitled to read the paper:—Held, that the evidence offered was not admissible, except in the discretion of the judge trying the cause, and a nonsuit was therefore ordered. *Cross* v. *Richardson*, 13 C. P. 433.

4. *In Reply.*

The lessor of the plaintiff supported his title by a deed, in consideration of love and affection. Defendant proved a subsequent deed from the same party for a valuable consideration, and impeached the first deed as voluntary. The plaintiff then offered to prove a real consideration for the first deed beyond what was expressed in it. This evidence was rejected as going into a new case; but, Held, that it might have been received, the principle that the plaintiff should go into his whole case at once not admitting of such a strict application in ejectment. *Doe* d. *Lawrence et ux.* v. *Stalker*, 5 Q. B. 346.

The theory of the defence in an indictment for murder, was that the death was caused by the communication of small pox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not on his examination in chief or cross-examination been asked anything on this subject:—Held, that he was properly allowed to be called in reply, to state what precautions had been taken by him to guard against the infection. *Regina* v. *Sparham and Greaves*, 25 C. P. 143.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions:—Held, that a medical witness previously examined for the crown, was properly allowed to be recalled to state that in his opinion the injuries found on the body could not have been so occasioned. *Regina* v. *Jones*, 28 Q. B. 416.

Where a party upon whom the onus of proof lies produces a receipt before the master, or other proof of a nature generally conclusive, and closes his evidence, and the other side produces testimony tending to shake this evidence, further evidence in support should be allowed to be produced, though in strictness it may be such as might have been produced in the first instance. *Doody* v. *McCann*, 1 Chy. Chamb. 88.—Esten.

5. *Other Cases.*

At a trial for murder, the prisoner's counsel proposed to prove by witness his own deposition before the inquest, and to shew by other witnesses that it contained a true statement of his evidence, although the witness alleged it to be incorrect. The learned judge ruled that the coroner must be called to prove the deposition. He was afterwards called to prove them, and the evidence before offered was not again tendered. Semble, that the ruling as to proof of the depositions was right, they having been taken before a coroner; but,—Held, that the point became immaterial when they were afterwards proved in accordance with it; and that it must be assumed that it was not intended to adduce the other evidence. *Regina* v. *Hamilton*, 16 C. P. 340.

In ejectment upon a sheriff's deed, the plaintiff produced the original judgment, but upon its being objected that it was not stamped, he withdrew it by leave of the court, and rested his case upon the fi. fa. lands:—Held, that the judgment having been withdrawn as evidence by leave of the court, must be considered as if it had never been offered. Semble, the defendant's proper course, if he desired to shew the invalidity of the judgment, and the execution issued under it, was to have given it in evidence himself. *Ralston* v. *Hughson*, 17 C. P. 364.

Where in an action for goods sold and delivered, plaintiff made out a primâ facie case through his clerk, who proved a delivery of the goods; and the promise to pay on request implied therefrom was repelled by defendant, who stated a special contract varying from that implied:—Held, that the plaintiff was admissible as a witness to reply to the new case set up by defendant, and, Semble, he could not be excluded as a witness by reason of his presence in court during the examination of his clerk. *McFarlane* v. *Martin*, 3 C. P. 64.

In ejectment, the plaintiff claimed under the heir of B., who died in 1826, leaving a will, which was shewn to be in defendant's possession, who declined to produce on notice. Two memorials were then offered as secondary evidence, but rejected on the ground that they were not shewn to have been registered by any one connected with the suit. It was afterwards proved that a partition deed had been executed in 1848, between the four sons of B., by which the land in question went to I., under whom defendant claimed; and the memorial of the will purported to be executed by S., another of the four sons as a devisee:—Held, that the memorials *when tendered* were rightly rejected for the reason given, though they would have been admissible after the subsequent evidence; but as they were not then again offered, and the plaintiff's case was one not to be favoured, the court refused to interfere. *Hayball* v. *Shephard*, 25 Q. B. 536.

When collateral issues arise out of comparison of handwriting, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it. *Royal Canadian Bank* v. *Brown et al.*, 27 Q. B. 41.

XXIII. Contradictory Evidence.

Where a witness being called to prove the plaintiff's case, persists in making positive, though very improbable statements, disproving it, the court, in the absence of any other witness, will not allow the case to go to the jury. Macaulay, J., dubitante. *Vincent* v. *Sprague*, 3 Q. B. 283. See also *Barber* v. *Armstrong*, 6 O. S. 543; *Lane* v. *Jarvis*, 5 Q. B. 127; *Mickle* v. *Oliver*, 11 C. P. 363.

Ejectment on a mortgage. The defendants pleaded usury; and they produced two papers purporting to be copies of letters written by the

mortgagor to the plaintiff (the mortgagee), as tending to shew that they were replies made by the mortgagor to letters written by the plaintiff, which were produced; and they relied upon the whole correspondence as making out clearly a usurious bargain. The plaintiff was called and swore that he had never received the letters of which the defendants professed to produce copies, and that there was no usury in the mortgage transaction:—Held, that it should nevertheless have been left to the jury to say whether they did not believe, from the plaintiff's own letters, that such answers had been received as the defendants relied upon; and if so, whether on the whole correspondence there was sufficient proof of usury. *Mair* v. *Caly et al.*, 10 Q. B. 321.

Ejectment for lots 15, 13, and north half of 12, in the 2nd concession of Sandwich. The defendant, in his notice of title, besides denying the claimant's title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st of March, 1861. This action was commenced on the 12th of October, 1861. The defendant, in reply, proved his tenancy commenced in May, and that one of the plaintiffs, in April 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on. The jury having found for the plaintiffs, and that the defendant was their agent on the premises:—Held, on motion for a new trial, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th of March, for rent up to date. *Colby et al.* v. *Wall*, 12 C. P. 95.

Where parol evidence is admissible to control the legal operation of a deed, no effect can be given to such evidence if contradictory, or its accuracy is involved in doubt. *Re Browne*, 2 Chy. 590.

On an appeal from a decree of the court below for specific performance of a parol contract, it appeared that the defendant denied that there was any contract for sale, and alleged that the plaintiff was in possession, as tenant merely and not vendee; the contract as sworn to by the plaintiff's witnesses, was not the contract alleged by the will, and the evidence of there having been any contract was contradictory. The learned judge who pronounced the decree having intimated considerable doubt as to the evidence, the decree was reversed, and the bill in the court below ordered to be dismissed, but under the circumstances without costs. *Grant* v. *Brown*, 13 Chy. 256.

If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes personally at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court, holding that the presumption in a case of doubt must be in favour of fair dealing and not of forfeiture, gave the own... relief. *Cameron* v. *Barnhart*, 14 Chy. 661.

The customer of a bank created a mortg... in its favour by the deposit of title deeds. In a suit to realize the security, the debtor swo... that the deposit had been made to secure cert... future advances, all of which had been paid o... the officers of the bank, on the other hand, swo... that the security was required by the bank, and given by the debtor to secure all his indebt... ness, past as well as future, and a memoran... endorsed at the time of the deposit on the en... velope containing the deeds was to the same effect. The court, in the view that the depos... if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, made a decree in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Chy. 627.

Where a breach of an injunction was sworn to by a single deponent, and was denied by the defendant, and there was no corroborative evidence, the court refused a motion to commit. *Stewart* v. *Richardson*, 17 Chy. 150.

Where, after the decease of one of the justices of the peace by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate notwithstanding the evidence. *Romaine* v. *Fraser*, 17 Chy. 267.

Where witnesses directly contradict each other the presumption is, not that one speaks falsely, but that one has forgotten the circumstances, unless the facts directly repel such an assumption. In investigating a charge instituted by the court against a solicitor, and which if established would have proved of a very grave nature, the court acted on the above principle, and accepted the solicitor's explanation of the facts, although directly contradicted by the client. *In re Tom... the matter of M. C. Cameron*, 3 Chy. Chamb. 2... —Spragge.

Masters should be careful not to attach too much weight to oral testimony in opposition to evidence of facts and circumstances. *Day* v. *Brown*, 18 Chy. 681.

Although the rule is, that if the decision of question of fact depends altogether on the cre... to be given to direct testimony of conflicting witnesses, the court, as a rule, will adopt the finding of the master; still, where the evidence of the mortgagor and mortgagee as to an arrangement that a mortgage, which had been satisfied, should be allowed to continue as a collateral security for subsequent indorsements and other notes held by the mortgagee, and the mortgage deed had been allowed to remain in the hands of the mortgagee undischarged, and the mortgagee had also retained possession of the title deeds, the court considered these circumstances as strongly confirming the direct evidence of the mortgagee, and reversed the decision of the master, who had found against the fact of such an agreement having been made between the parties. *Morrison* v. *Robinson*, 19 Chy. 480.

There may be agency and its duties and liabilities without express words of appointment or acceptance; and where a party negotiating between two persons, the one desiring to sell, the ot...

to buy, certain land, gave the former to understand that he was acting in her interest, it was held, that she was entitled to the full price which he obtained for the land, though it exceeded the amount which he had obtained her consent to accept. In such a case, there being a conflict as to what had passed in the conversations, and no other witness of them being produced, it was Held, that other things being equal, the version of the deceived party should be accepted in preference to that of the other party. *Wright* v. *Rankin*, 18 Chy. 625.

Where on a reference to the master the plaintiff swore that he never received the amount of a legacy to which he was entitled, and the defendant swore that he had paid all but $80, and a witness called by the plaintiff proved an admission by the defendant, that the whole legacy was due, but the master reported that this witness was not to be relied on, the court, in view of all the circumstances, refused to disturb the master's finding. *Cotter* v. *Cotter*, 21 Chy. 159.

In 1859, a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with M., who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought, and had for years been under the impression, that the whole claim under the assignment had been paid; that the plaintiff M. was not interested in this note; and that through oversight it had not been delivered up. The attorney who had acted for M. having sworn that this note was the one in which M. was interested, and that it had never been paid, the court, in view of the fact that the mortgage and note were both found in the hands of the assignee, and that no demand during so many years had been made for their discharge, decreed in favour of the plaintiffs. *Scatcherd* v. *Kiely*, 21 Chy. 30.

To a bill for alimony, the husband alleged as a ground of defence, that the plaintiff had been guilty of adultery. The evidence of the actual commission of the crime was distinct and positive by the brother and brother-in-law of the husband, who had watched on the outside of the house on the night that the alleged act of adultery was said to have been commited. These two witnesses also proved that the language used by the parties was of an obscene and offensive character; and there was the fact that letters of an objectionable nature had been discovered as passing between the plaintiff and a young man against whom the husband had warned his wife, and had forbidden her to associate with. The court, under the circumstances, gave credence to the statements of these two witnesses, although without their evidence the case would not have been more than one of the very gravest suspicion; and this although the plaintiff and the partner in her guilt swore positively that no such act had ever been committed. *Campbell* v. *Campbell*, 22 Chy. 322.

The nature of the evidence to be accepted in such cases, and the rules to be observed in the consideration of it, discussed. *Ib.*

XXIV. Miscellaneous Cases.

In an action against a sheriff for seizing and selling goods, it is sufficient to prove that the deputy sheriff seized them colore officii, without proving the writ of execution, or giving other evidence of his being deputy sheriff than that of general reputation. *Holt* v. *Jarvis*, Dra. 190.

Where a party who had given a mortgage to secure a debt for which he had made himself liable as surety, and had received from his principal a mortgage on his own estate for the same debt, afterwards filed a bill to foreclose the latter and redeem the first mortgage; and the principal, at the hearing, objected to the bill, on the ground that it was multifarious:—Held, that evidence taken by the plaintiffs to contradict statements made in the answer, was admissible though not put in issue by the bill. *Schram* v. *Armstrong*, 2 O. S. 327.

The statute 5 Geo. II. c. 7, s. 1, respecting affidavits to be made in England for proof of debts sued for in this province, is not repealed by the provincial statutes regulating the introduction of the law of England, or of evidence. Quære, if such affidavit made before a suit is commenced, can be read at a trial subsequently had; or, if such affidavit must be entitled in the cause. *Gordon* v. *Fuller*, 5 O. S. 174.

A foreign post mark on a letter, is primâ facie evidence of the time when the letter was mailed. *O'Neill* v. *Perrin*, M. T. 3 Vict.

Semble, that a recital in a warrant by the commissioners appointed under 2 Vict. c. 15, to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *Little et al.* v. *Keating*, 6 O. S. 265.

Where a witness being called to prove the plaintiff's case, persists in making positive, though very improbable statements, disproving it, the court, in the absence of any other witness, will not allow the case to go the jury. Macaulay, J., dubitante. *Vincent* v. *Sprague*, 3 Q. B. 283. See, also, *Barber* v. *Armstrong*, 6 O. S. 543; *Lane* v. *Jarvis* 5 Q. B. 127; *Mickle* v. *Oliver*, 11 C. P. 363.

Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties:—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity of the note was to be presumed. *Reynolds* v. *O'Brien*, 4 Q. B. 221.

The plaintiff declared in assumpsit on two counts, each on an agreement, dated the 16th November, 1853, to deliver timber. Breach, non-delivery. Defendant pleaded non-assumpsit to the whole declaration, and several other pleas to the first count, and to that count a nolle prosequi was entered:—Held, that it was sufficient at the trial for the plaintiff to produce one agreement corresponding with that declared on in the second count, and that it was not necessary for him to prove one corresponding with each count. *Usborne* v. *Grover*, 13 Q. B. 164.

A plaintiff is not bound by the inadvertent statement or admission of his counsel in opening

his case, such statement being promptly retracted by the attorney and counsel. *Jannetta* v. *The Great Western Railway Co.*, 4 C. P. 488.

The master's report is prima facie evidence of what it contains, unless appealed from. *Nichols* v. *McDonald*, 4 L. J. 260.—Chy.

In an action for money had and received:—Held, that an indictment upon which the defendant had been convicted of embezzlement, but acquitted on a charge of larceny, was admissible as proof of that fact. *Macdonald* v. *Ketchum*, 7 C. P. 484.

The weight attached by the court to the evidence given by professional witnesses is diminished by efforts to sustain the views of the party who may call them; it should be given free from bias. *Stock* v. *Ward et al.*, 7 C. P. 127.

It is not necessary that a writ of fi. fa. which has not been returned, should be enrolled before it can be given in evidence, but the writ itself may, if produced, be given in evidence; and if lost and unenrolled, secondary evidence may be given of it. *Soules* v. *Donovan*, 15 C. P. 121.

The witnesses called to prove the imposition of a duty on goods in the United States after the 17th of March, derived their knowledge from printed circulars:—Held, insufficient. *Fraser et al.* v. *The Grand Trunk R. W. Co.*, 26 Q. B. 488.

Held, that under sec. 23 of 32 Vict. c. 32, it is irregular for the judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for prohibition. *In re Brown et al.*, 8 L. J. N. S. 81.—C. L. Chamb.—Galt.

Semble, that when the verdict is obtained upon the testimony of either plaintiff or defendant, the rule against granting a new trial on the weight of evidence, is less strict than it was before the parties were admissible as witnesses. *Canadian Bank of Commerce* v. *McMillan*, 31 Q. B. 596.

The attesting witness to an award may be compelled to attend and prove the award. *Taylor* v. *Bostwick*, 1 Chy. Chamb. 23.—Spragge.

On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the court, it is not usually necessary to prove the execution of deeds produced. *Brady* v. *Walls*, 17 Chy. 699.

Affidavits are admissible for some purposes on such an investigation. Where, however, an affidavit was offered to prove the loss of a will, which had been proved in a Surrogate Court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence. *Ib.*

EXAMINATION OF JUDGMENT DEBTOR.

I. To Attach Debts—*See* Attachment of Debts.

II. Under C. S. U. C. c. 24, s. 41.—*See* Bankruptcy and Insolvency.

III. Under Division Courts Act—*See* Bankruptcy and Insolvency.

EXCHANGE OF LAND.

See Estate.

EXCISE.

See Revenue.

EXECUTION.

I. Immediate Execution, 1414.

II. Fieri Facias (Goods.)

1. *Practice in Issuing*, 1414.
2. *Time of Operation*, 1416.
3. *Exemptions*, 1417.
4. *Property Taken.*
   (a) *Leasehold*, 1418.
   (b) *Equity of Redemption*, 1419.
   (c) *Stock*, 1420.
   (d) *Partnership Property*, 1421.
   (e) *Money, Book Debts, and Securities*, 1422.
   (f) *Other Property*, 1422.
   (g) *Fixtures*—*See* Fixtures.
5. *Fraudulent Removal*, 1424.
6. *Other Cases*, 1424.

III. Fieri Facias (Lands.)

1. *Practice in Issuing.*
   (a) *Death of Execution Defendant*, 1425.
   (b) *Execution against Lands and Goods*, 1425.
2. *Time of Operation*, 1427.
3. *Property Taken.*
   (a) *Term of Years and Rent Charge*, 1428.
   (b) *Trust Estates*, 1428.
   (c) *Lands in Hands of the Heir*, 1428.
   (d) *Equity of Redemption*, 1428.
   (e) *Interest of Mortgagee*, 1433.
   (f) *Reversionary Interests*, 1434.
   (g) *Other Property*, 1434.
4. *Proceeding under Expired Writs*, 1436.
5. *Other Cases*, 1438.
6. *When Execution will bind Lands in hands of Executors*—*See* Executors and Administrators.

IV. Sale of Land under Execution.

1. *Inc[illegible]*
2. *[illegible] and Deed*, 1438.
3. *[illegible]rities in other [illegible] Inadequacy of Consideration*, 1442.
   (b) *Other Matters*, 1443.
4. *Title acquired by Purchaser*, 1445.
5. *Evidence of Title in Ejectment by Purchaser*, 1446.
6. *Setting aside Sale*, 1449.
7. *Other Cases*, 1449.

V. Venditioni Exponas, 1452.

VI. Alias, Pluries, Concurrent and Duplicate Writs, 1452.

VII. Equitable Execution, 1453.

VIII. Endorsement on Executions, 1454.

IX. Renewing Writs, 1455.

X. Abandonment, 1455.

XI. Priority of Executions.

1. *Loss of Priority by Directions not to Execute*, 1457.
2. *Other Cases*, 1458.
3. *As between Attaching Creditors and Others*—*See* Absconding Debtor—Attachment of Debts—Division Courts.
4. *Operation in Bankruptcy and Insolvency*—*See* Bankruptcy and Insolvency.
5. *As to Bills of Sale*—*See* Bills of Sale and Chattel Mortgages.
6. *Registration of Judgments*—*See* Judgment.

XII. Setting Aside Executions, 1461.

XIII. Staying or Controlling Executions, 1463.

1. *By Injunctions*—*See* Injunction.
2. *By Court of Error and Appeal*—*See* Error and Appeal.

XIV. Miscellaneous Cases, 1464.

XV. In Criminal Cases—*See* Criminal Law.

XVI. Other Writs of Execution.

1. *Capias ad Satisfaciendum*—*See* Capias ad Satisfaciendum.
2. *Crown Executions*—*See* Crown.
3. *Division Court Executions*—*See* Division Courts.
4. *Elegit*—*See* Elegit.
5. *Extent*—*See* Extent.
6. *Hab. Fac. Poss.*—*See* Ejectment.
7. *Sequestration*—*See* Sequestration.

XVII. Amending Executions.

1. *Generally*—*See* Amendment at Law.
2. *Returns*—*See* Sheriff.

XVIII. Sheriff's Duty and Liability—*See* Sheriff.

XIX. Return of—*See* Sheriff.

XX. Poundage—*See* Sheriff.

XXI. Distress where Chattels are in Execution or Custody of Law—*See* Distress.

XXII. Interpleader Proceedings—*See* Interpleader.

XXIII. Malicious Execution—*See* Malicious Arrest, Prosecution, and other Proceedings.

XXIV. Issue of on Transcript of Judgment from Division Court—*See* Division Courts.

XXV. Charging in Execution—*See* Prisoner.

XXVI. Landlord's Claim for Rent—*See* Sheriff.

XXVII. Trespass for Seizing under Execution—*See* Trespass.

I. Immediate Execution.

Under 16 Vict. c. 175, a county court judge could certify for immediate execution in cases sent down to him by writ of trial, as well as in other cases. *Riach et al.* v. *Hall*, and *Patterson* v. *Hall*, 11 Q. B. 356; *McKay* v. *Hall*, 4 C. P. 145.

So also in a superior court case taken down for trial to a county court under 23 Vict. c. 42, s. 4. *Gildersleeve* v. *Hamilton*, 11 C. P. 208.

II. Fieri Facias (Goods).

1. *Practice in Issuing.*

From what office.]—It is irregular to issue execution out of the office of a deputy clerk of the crown, in which there have been no previous proceedings in the cause, or in which there is no judgment entered. *Dalrymple* v. *Mullen*, 1 P. R. 327, note.—Draper.

A rule nisi for a mandamus was discharged with costs. The rule discharging the rule nisi with costs was issued, and costs thereupon taxed in the principal office in Toronto. Afterwards the party entitled to the costs filed the rule in the office of a deputy clerk of the crown, and issued a fi. fa. goods from that office:—Held, that the writ should have been issued in Toronto. *In re the Judge of the County Court of the County of Elgin*, 8 L. J. 70.—C. L. Chamb.—Draper.

To whom directed.]—An execution against goods of a deputy sheriff may be directed to the sheriff of the county in which the deputy resides, and ought not to be directed to a coroner of that county. In such a case, the plaintiff was allowed to withdraw his writ of execution and amend by directing it to the sheriff, and not the coroner. *Gordon* v. *Bonter*, 6 L. J. 112.—C. L. Chamb.—McLean.

The plaintiff, as coroner, sued upon a note made by defendant, payable to B. or order, alleging that while it remained unpaid, one M. recovered a judgment against B., C., and D., and issued a fi. fa. directed to the plaintiff, under which he seized the note. Defendant pleaded, that after the making of the note, and before this suit, B. being the owner and holder of said note, delivered it to C. to receive the amount thereof, and pay with it a demand made by the owners of a certain vessel against B. & Co., and hand over the residue to the Commercial Bank. And further, that in the suit in which said judgment was recovered, an order was made for defendants to appear and be examined before the judge of the County Court as to the debts due them, &c., and the note was then filed in the Court of Common Pleas: that the plaintiff and M. had notice of the premises, and said note was taken out of the said court by the fraud of the plaintiff, and others in collusion with him, and the plaintiff, at the commencement of this suit was the holder of the said note by fraud:—

Held, on demurrer to the plea, declaration good, for it must be assumed that the writ was properly directed to the coroner, as it might be under 20 Vict. c. 57, s. 22. Plea bad, as shewing no defence. *Brown* v. *Gordon*, 16 Q. B. 342.

Held, that a writ of fi. fa. against a railway company, which was directed to a sheriff before he became a director in the company, was properly directed and returnable by him, and his becoming a director before the return of the writ did not invalidate it. *Smith* v. *Spencer*, 12 C. P. 277.

See *Gore Bank* v. *Gunn*, 1 P. R. 323, p. 1454.

Time for issuing.]—It is irregular to issue a fi. fa. goods after a levy on a writ against defendant's lands, which has not been returned, and a judgment creditor who is prejudiced may set such writ aside. *Stevens* v. *Sheldon*, T. T. 3 & 4. Vict.—P. C.—Macaulay.

A fi. fa. issued on a judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and if knowingly issued, an abuse of the process of the court. *Randall* v. *Bowman*, 1 L. J. N. S. 158.—C. L. Chamb.—A. Wilson.

Before the 20 Vict. c. 57, s. 10, it was sufficient to issue a writ of execution within a year from the entry of judgment, and it was unnecessary also to return and file it within that time. *Hall* v. *Boulton*, 3 P. R. 142.—C. L. Chamb.—A. Wilson.

A writ of execution may be sued out at any time within six years from judgment without a revivor, and if during the six years it is sued out, returned and filed, the same consequences follow as if, under the old practice, a writ had been sued out within a year and a day and returned and filed; that is, such writ will support a subsequent writ issued after that period without a sci. fa. or revivor. *Jenkins* v. *Kerby et al.*, 2 L. J. N. S. 164.—C. L. Chamb. —Draper.

A party who has to pay costs on a final judgment on verdict, nonsuit, or demurrer, or otherwise, in the ordinary course of a cause, is not entitled to any time to pay them after proper proceedings had to entitle the other party to collect them, nor is any demand for payment before execution required. A party entitled to costs may proceed to collect the same by execution immediately after revision, without waiting a "reasonable time" for payment. *Coolidge* v. *Bank of Montreal*, 6 P. R. 73. See *Smith* v. *Cronk*, *Ib.* 80.—P. C.—A. Wilson.

Plaintiff recovered a verdict, but delayed for some months in seeking to enforce it. He then, notwithstanding the repeated offers of defendant's attorneys to pay the debt and costs when taxed, immediately after taxation entered judgment, and without notice to defendant put a fi. fa. in the sheriff's hands to levy on his goods forthwith, which was done. Some items were subsequently struck off the bill on revision. On an application by the defendant for relief, it was Held, that the plaintiff's conduct was vexatious and oppressive, and an abuse of the process of the Court: and it was ordered that defendant should be discharged from the fi. fa. upon payment of the judgment, less the costs struck off on revision, and the costs of the fi. fa. and part of the interest. *Anon.*, 4 P. R. 242.—C. L. Chamb.—Morrison.

It is irregular to take out a fi. fa. the instant costs have been taxed, without allowing a reasonable time to the solicitor whose client has to pay them to communicate the result of the taxation. *Cullen* v. *Cullen*, 2 Chy. Chamb. 94.—Mowat.

Other Cases.]—A fi. fa. may issue against goods, although defendant may be discharged from prison for not having been regularly charged in execution. *Dorman* v. *Rawson*, Tay. 278.

The court will not order that execution shall issue on a judgment for the benefit of a stranger to the judgment. *Gamble et al.* v. *Bussell*, 5 O. S. 339.

A fi. fa. goods might be made returnable with an interval of several terms. In this case it was issued on the 18th of July, 1854, returnable on the 1st of Trinity term 1855. *Foster et al.* v. *Smith*, 13 Q. B. 243.

A fi. fa. having been issued, the plaintiff, after the return day, but before the return, took out a second writ for the full amount, directed to another sheriff. The first writ was afterwards returned, £10 levied, and goods on hand for the residue; and a ven. ex. issued upon it:—Held, that the plaintiff should have procured a return of the first before issuing the second writ, and should have issued it only for the residue; and that the fact of the endorsement on the second writ having been lessened, could not cure the irregularity. *McMurrich* v. *Thompson*, 1 P. R. 258.—P. C.—Sullivan.

Where a plaintiff in whose favour an award is, dies after the award, but before judgment, the suit does not abate, but judgment may be entered under the 17 Car. II. c. 8. No execution, however, can issue in the name of plaintiff's executor without reviving the judgment. *Proctor* v. *Jarvis*, 15 Q. B. 187.

The crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *The Desjardins Canal Co.*, 29 Q. B. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the crown not being bound by the 43 Geo. III. c. 1. *Ib.*

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2. *Time of Operation.*

Where goods are already in the custody of the law, a fi. fa. at once attaches upon them, without an actual seizure. *Beckman* v. *Jarvis*, 3 Q. B. 280.

Under an execution delivered to him on the 16th of November, the sheriff seized on the 17th the plaintiff, another creditor, was then at the debtor's shop receiving delivery of some crockery which the debtor was selling him to satisfy his claim. These goods were proved to have been set apart for the plaintiff, and to have been marked with his mark, and one of the articles had been delivered to him in the name of the whole. Part had been removed, and the re

was detained and secured by the sheriff. Plaintiff having brought replevin against the sheriff:—Held, that under a plea of not possessed, defendant was entitled to a verdict. *Calcutt* v. *Rutlan*, 13 Q. B. 146.

Held, that writs of execution only bind moneys, choses in action, or securities for money, from the time of seizure by the sheriff, and not from the time either of the issue of the writs or delivery thereof to the sheriff. *McDowell* v. *McDowell*, 10 L. J. 48; 1 Chy. Chamb. 140.—Van-Koughnet.

Where a writ of fi. fa. or sequestration is placed in the sheriff's hands, it forms a lien on defendant's equitable estate from the date of such delivery, and not merely from the date of the plaintiff's filing a bill to enforce the same. *Moore* v. *Clark*, 11 Chy. 497.

Stock in an incorporated company is only bound from the time when the notice of the writ is given to the company by the sheriff under C. S. C. c. 70, ss. 3, 4, and not from the delivery of the writ to the sheriff. *Hatch* v. *Rowland*, 5 P. R. 223.—C. L. Chamb.—Dalton.—*C. C. & P.*

Plaintiff, on 31st May, 1861, purchased and paid for a carriage from F., a carriage maker, for $175, but did not remove it. At the time of the sale, the defendant, as sheriff, held an execution against F., of which F. had notice, and he received another after the sale to the plaintiff. F. carried on business as usual with defendant's consent, and defendant did not seize till the 11th of June. Semble, per Draper, C. J., that had the plaintiff removed the property at the time of sale, the sheriff could not have followed it, for his conduct put it in the debtor's power to commit a fraud, and constituted him a quasi agent of the sheriff to sell. *Carruthers* v. *Reynolds*, 12 C. P. 596.

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3. *Exemptions.*

A boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt. *Daragh* v. *Dunn*, 7 L. J. 273.—C. C.—Wilkes.

The 23 Vict. c. 25, exempting certain articles from seizure, does not bind the crown. Semble, that the statute does not apply where the debtor has absconded, leaving the goods with his family. *Regina* v. *Davidson*, 21 Q. B. 41.

In an action against the sheriff and his sureties, for not paying over moneys levied under a fi. fa., it appeared that certain goods of one H. had been seized by the sheriff at the plaintiff's suit, and claimed by the debtor's brother under a sale, which the plaintiffs alleged to be fraudulent. The debtor also claimed exemption for $60 worth, under 23 Vict. c. 25, and these latter goods the sheriff sold under a subsequent execution, the debt for which that judgment was recovered, having been contracted before the 19th of May, 1860, as appeared by an exemplification of the judgment. The plaintiffs alleged that these goods were not subject to that writ, there being no certificate endorsed upon it under 24 Vict. c. 27, s. 2:—Held, that the plaintiffs could have no claim on account of such goods or their proceeds, for they were exempt from their writ under 23 Vict. c. 25, and even if not subject to the other execution, the sheriff was responsible to the execution debtor, not to the plaintiffs, for the proceeds. Semble, however, that the want of the certificate was immaterial, as the statute does not make it the only mode of proving when the debt was contracted, and here that was shewn by the exemplification. *Michie et al.* v. *Reynolds et al.*, 24 Q. B. 303.

A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is a "chattel" within the act, and is therefore not liable to seizure. *Davidson et al.* v. *Reynolds et al.*, 16 C. P. 140.

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4. *Property Taken.*

(a) *Leasehold.*

A., the assignee of leasehold property, assigns to B., upon the understanding that he is to hold the property only as his agent till his return from the United States. A. returns, and directs B. to assign the same to C., which he does. D. having an execution against the goods of A., purchased A.'s interest in the lease at the sheriff's sale:—Held, in ejectment by D. to recover possession from C., that A. had no estate which could be sold by the sheriff, and that a verdict should be entered for the defendant C. *Doe* d. *Simpson* v. *Privat*, 5 Q. B. 215.

A rent charge issuing out of, and chargeable upon, a freehold estate, and granted to a person for his life, cannot be seized under a fi. fa. goods. *Smith* v. *Turnbull*, 5 Q. B. 586.

The sheriff under a fi. fa. may sell what the termor continues to hold under a lease, but he cannot sell part of his interest, or a part of the premises. *Osborne* v. *Kerr*, 17 Q. B. 134.

In debt on a lease it was proved that the plaintiff held under the last of several assignments of a yearly lease from the principal officers of H. M.'s ordnance. A judgment was obtained against the plaintiff, and his interest in the lot sold under a fi. fa. against goods. Plaintiff afterwards demised the said lot to defendant; and, on non-payment of rent, brought his action on the lease:—Held, that the interest of plaintiff was a chattel interest, and might be sold under a fi. fa. against goods and chattels (see 7 Vict. c. 11, s. 7); and that the lease to defendant being made after such seizure and sale, the plaintiff was not entitled to recover. *Sparrow* v. *Champagne*, 5 C. P. 394.

A. demised to B. for a term, with a clause of forfeiture in case the term should be taken in execution, and at the same time delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease, signed by A., stating that he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family. On an interpleader between A. and C., who had seized the chattels under an execution against B.:—Held, 1. That the memorandum formed no part of the lease, but operated only as a license to use, which was revocable; 2. That even if the chattels had been included in the lease, they could not have been sold; 3. That at the most B.'s interest in the chattels was incidental to the term and to his enjoyment thereof, and that therefore neither the goods themselves, nor B.'s interest therein, could be sold separately from the term; 4. That

if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels. *Muckleston* v. *Smith*, 17 C. P. 401.

Where a sheriff had sold an unexpired term and certain trade fixtures under an execution at common law, but before any deed was executed by him a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract, but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff:—Held, that the contract must be in writing under the Statute of Frauds. *Witham* v. *Smith*, 5 Chy. 203.

The plaintiff's mortgage comprised leasehold premises held by defendant R., the mortgagor, under two distinct leases. After a decree and final order for sale the sheriff of the county in which the leaseholds were situate advertised the interest of R. in the premises comprised in one of the leases to be sold under a fi. fa. against the goods and chattels of R., and sold the interest to one W.—W. afterwards obtained from the plaintiff an assignment of his mortgage, and entered into possession of the whole of the mortgaged premises, and received the rents and profits thereof, and was subsequently made a party plaintiff in this suit by order of revivor. Upon motion by R. for a subsequent account and for re-conveyance by W. of the whole of the mortgaged premises upon payment of what was found due on taking the account:—Held, that the sale by the sheriff was invalid, and that R. was entitled to a re-conveyance of the whole premises upon payment of what should be found due to W. for what he had paid the sheriff and upon the mortgage. *Goold* v. *Rich*, 4 Chy. Chamb. 87.—Taylor, *Referee*.

[See III. 3 (a) p. 1428.]

(b) *Equity of Redemption.*

[*See C. L. P. Act, s. 260.*]

As to the sale of an equity of redemption in a ship. See *Bethune* v. *Corbett*, 18 Q. B. 498.

Where a mortgaged vessel had been sold under a fi. fa., and the purchaser brought replevin:—Held, that he acquired no right, the equity of redemption not being saleable, and that the defendant must succeed on a plea denying the plaintiff's property, though he shewed no connexion with the mortgage. *Scott* v. *Carveth*, 20 Q. B. 430.

Per Robinson, C. J., under a writ against the mortgagor of goods, the sheriff, under 20 Vict., c. 3, can only sell the equity of redemption, which will give a right to his vendee only to stand in the position of the mortgagor; he cannot sell the goods themselves and transfer the possession to the purchaser. *Squair et al.* v. *Fortune*, 18 Q. B. 547.

A mortgagee of chattel property having taken possession, as he alleged, under his mortgage, the sheriff seized it under an execution against the mortgagor, and the mortgagee then applied for an order to have it delivered up to him again:—Held, that there was no power to make such order. *Smith et al.* v. *Cobourg and Peterborough R. W. Co.* 3 P. R. 113.—C. L. Chamb.—Burns.

Semble, that under an execution against a mortgagor of chattels the sheriff may seize goods in possession of the mortgagee, so that he may expose them to view, although he can sell only the equity of redemption. *Ib.*

See as to equity of redemption in leasehold, III. 3 (d) p. 1428.

(c) *Stock.*

Stock in the Bond Head Harbour Co. was held to be personal property of the debtor, and liable to be seized and sold under an execution against him. *Brock* v. *Ruttan*, 1 C. P. 218.

On the 9th of January, the plaintiff's attorney sent a fi. fa. in Robinson *v.* Banks, to the sheriff, with the following letter: "Herewith you will receive fi. fa. We wish to get at two shares of Wellington Permanent Building Society stock, standing in the name of Banks and his wife. These shares, though standing in their names in a representative capacity, are nevertheless the property of the wife, and therefore of the defendant." The stock had belonged to one M., who died intestate, less than a year before, and Mrs. Banks being his only sister and next of kin, administration was granted to her and her husband, the defendant in the fi. fa. No evidence was given of any debts due by M., and it appeared that Banks had paid an instalment on these shares. The sheriff having returned the writ nulla bona. In an action against him for a false return:—Held, that stock in a building society may be taken in execution under 12 Vict. c. 23; but, Held, also, that under the circumstances, this was not property belonging to Banks which the sheriff was bound to seize. *Robinson* v. *Grange*, 18 Q. B. 260.

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder:—Held, that the provisions of C. S. C. c. 70, as well as the C. L. P. Act, ss. 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin* v. *The Ottawa and Prescott R. W. Co.*, 22 Q. B. 186.

Upon an application to compel a railway company by mandamus to register a transfer of stock, it appeared that the stock had been sold under an execution recovered against "the Mayor, Aldermen, and Commonalty of the city of Ottawa," and by C. S. U. C. c. 54, the name of the corporation was changed to "The Corporation of the city of Ottawa:"—Held that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given. Held, also, that a demand for the transfer upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company was sufficient, the court being of opinion that service and demand upon the president was not indispensable. *In re Goodwin* v. *The Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Stock held by a resident of Kingston in the Merchants' Bank, which has its chief place of

business in Montreal :—Held, to be personal property owned out of the province, and therefore exempt ; for it was owned by such resident, so far as the Assessment Act was concerned, at the head or chief place of business of the bank. Quære, whether the sheriff could seize and sell such stock, merely because it might, if the directors chose, be made transferrable at a branch office. *Nickle* v. *Douglas*, 35 Q. B. 126. Affirmed in appeal, 37 Q. B. 51.

(d) *Partnership Property.*

The sheriff on a fi. fa. against B., one of a firm, seized his share of the partnership property. B.'s partner and D. R. & Co. notified the sheriff not to sell, and before any sale had been made, D. R. & Co., placed in his hands an execution against the firm. Upon this last writ the sheriff sold the whole of the partnership effects, which realized only a small part of the claim, and to the first writ he returned nulla bona. B had no property except his interest in the firm ; and it was admitted that when the first writ was delivered to the sheriff, the partnership effects were insufficient to meet their debts :—Held, that the sheriff was not liable for a false return to the first writ, even for nominal damages. *Flintoff* v. *Dickson*, 10 Q. B. 428.

A plaintiff suing a partner alone upon a note made in the name of the firm, *and for a partnership debt*, cannot under his judgment and execution against such partner sell the goods of the firm, except in cases of dormant partnership. A. having a note signed W. B. & Co., and being ignorant of the existence of any other partner, sued W. B. alone, and obtained judgment and execution, under which the sheriff seized the partnership goods. B. afterwards obtained an execution against W. B. and his two partners, who it appeared in reality composed the firm. Both claims were for partnership debts, and the property of the firm was not sufficient to satisfy either in full :—Held, that B.'s execution must prevail. *Taylor* v. *Jarvis*, 14 Q. B. 128.

V. and J. D. being in partnership, J. D. went out, and his father D. D. took his place in the firm. About six months after this, V. assigned to D. D. all the stock in trade, but possession was not changed, nor the assignment filed. The plaintiffs subsequently became assignees of the firm under the Insolvent Act of 1864, and of each of the partners. In an interpleader issue, to try their right as against an execution creditor of V. alone, the execution being after the assignment to D. D., but whether before or after the plaintiffs' title accrued did not appear :—Held, that they must succeed ; that they were clearly entitled to the goods themselves, for defendant as creditor of one partner could not seize them out of the possession of the assignees of the firm, although he might have a right to V.'s share of the proceeds, if any, after paying the partnership debts. *Wilson et al.* v. *Vogt*, 24 Q. B. 635.

Where a sale is made under execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets after payment of the partnership debts, and that too even when the debt originally was due from the partnership to the execution creditors. *Partridge* v. *McIntosh*, 1 Chy. 50.

Quære, what course is the sheriff to pursue upon an execution against the goods of one of two partners, under the circumstances of one being a bankrupt and the other not. *O'Neil* v. *Hamilton*, 4 Q. B. 294.

See *Clark* v. *Corbett*, 27 Q. B. 161, p. 1460.

(e) *Money, Book Debts, and Securities.*

Semble, that books of account and open accounts cannot be seized by the sheriff, under 20 Vict. c. 57, s. 22 ; at least they cannot be sold or transferred, but, if seizable at all, must be held by the sheriff in security for the judgment debt, and collected as such in his own name. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb.—Draper.

A sale of books of account by a sheriff under an execution, does not pass the property in the debts or accounts therein charged. *Ib.*

Money paid into court is not liable to seizure under execution while in the hands of the officer of the court. *Calverly* v. *Smith*, 3 L. J. 67.—C. L. Chamb.—Robinson.

Held, that a money bond for the conveyance of land is seizable on an execution under 13 & 14 Vict. c. 53, and 20 Vict. c. 57.—Richards, J., diss. *Regina* v. *Potter*, 10 C. P. 39.

Money made under an execution at the suit of A., cannot be retained by the sheriff as seized under an execution against A., and the court will order such money to be paid over to him, notwithstanding the seizure. *Sharpe* v. *Leitch*, 2 L. J. N. S. 132.—P. C.—Hagarty.

A fire policy, after a loss has taken place, and money has become payable thereon, is a specialty or security for money seizable under execution, though the amount payable has not been ascertained. *The Bank of Montreal* v. *McTavish*, 13 Chy. 395.

(f) *Other Property.*

Goods in the hands of a division court clerk under an attachment are not protected against an execution issuing from a superior court before the attaching creditor has obtained his judgment. The sheriff, therefore, is justified in seizing such goods, but Quære, if the seizure were illegal, whether an action on the case would lie at the suit of the attaching creditor against the sheriff and the plaintiff in the execution. *Francis* v. *Brown*, 11 Q. B. 558.

One W. devised all his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and when received, to invest the same as they should think best, and pay the interest and produce thereof to his widow during her life, for the maintenance of herself and his children. The widow, after the testator's death, remained on his farm and in possession of the stock and personal property, some of which she sold, and the stock had been added to by breeding. A writ of execution came into the sheriff's hands against her, and while it was there, the two other trustees took from her a mortgage of all the personal property for advances made by them to her. The sheriff afterwards seized under the writ, and the two trustees forbade the sale ; but it went

on, and one of them bought the goods, and took a bill of sale from the sheriff, against whom they then brought an action for the seizure:—Held, that the increase of the stock must be subject to the same rule as the stock. Semble, that the property was liable in the widow's hands to the execution, which, for all that appeared, might have been for a debt contracted for the support of herself and family. *Peers et al.* v. *Carrall*, 19 Q. B. 229.

Upon an action brought by a sheriff upon a mortgage seized by him under an execution in a suit, Smith v. Lawrence, the mortgage being made by B. (the defendant) to Lawrence:—Held, that a judgment creditor may take the goods of a deceased debtor in the hands of the executor upon a fi. fa. against goods if the judgment was recovered within a year before the debtor's death; and that a plea admitting the death of a testator subsequent to the issuing of a ven. ex. and fi. fa., and while it was in force, but claiming that by the death the property seized became vested in the personal representatives of the deceased, and was not therefore liable to seizure, was bad. *Smith* v. *Bernie*, 10 C. P. 243.

Plaintiff, on 31st May, 1861, purchased and paid for a carriage from one F., a carriage maker, for $175, but did not remove it from the shop. Shortly after, plaintiff's wife saw another carriage in the course of building which she preferred, and it was agreed that the plaintiff should have it if he chose upon payment of an additional sum, the one first purchased to be his if he did not take the other. At the time of the sale, the defendant, as sheriff, held an execution against the goods of F., of which he (F.) had notice, and another one was placed in his hands subsequently to the sale to plaintiff. F. carried on business as usual, notwithstanding these executions, and an actual seizure did not take place till the 11th of June, 1861:—Held, that the plaintiff, having left the carriage in the vendor's hands more than a reasonable time for the removal thereof, the sale came within the provisions of the Chattel Mortgage Act, C. S. U. C. c. 45, and there being no delivery, followed by an actual and continued change of possession, nor any bill of sale filed, in accordance with that act, the property remained in F.'s hands, liable to seizure. Semble, per Draper, C. J., that had plaintiff removed the property at the time of sale, the sheriff could not have followed it. *Carruthers* v. *Reynolds*, 12 C. P. 596.

Though a sale of land may be fraudulent as against creditors, still where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labour and means had been contributed by the vendee alone:—Semble, J. Wilson, J., diss., that the crops were the sole property of the vendee as against the execution creditor. *Kilbride* v. *Cameron*, 17 C. P. 373.

The property of a woman married before the 4th May, 1859, without any marriage contract or settlement, is protected as against creditors of her husband whose claims were contracted *after* 4th May, 1859, and not otherwise. *Ramsay* v. *Carruthers*, 10 L. J. 299.—C. L. Chamb.—A. Wilson.

But where a seizure for debt contracted before the 4th May, 1859, was not made in the lifetime of the wife, it was held, that the property having passed by her death to the next of kin under the statute of distributions, was not liable to be seized by the creditors of her surviving husband. *Ib.*

His interest, however, under the statute as husband surviving, and that interest only, was held to be liable to the execution. *Ib.*

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5. *Fraudulent Removal.*

A declaration charging defendant with wilfully and fraudulently taking away and secreting the goods of one F., against which goods the plaintiff had placed an execution in the hands of the sheriff, so that the sheriff could not discover the same, or levy, &c., averring knowledge of the facts in the defendant, shews a good cause of action at common law, though not under 5 Will. IV. c. 3, s. 8. *Young* v. *Buchanan*, 6 C. P. 218.

A writ against one McK. having been placed in the sheriff's hands, the defendant in this action fraudulently removed and secreted money and goods liable to be seized under the execution. In an action therefor,—Held, that the fact that defendant removed the goods to prevent the seizure, was evidence for the jury, but that for such interference they would have been seized. *Turner* v. *Patterson*, 13 C. P. 412.

In estimating the damages against defendant for such fraudulent removal, the return of the sheriff as to the amount made on the plaintiff's writ will be presumed to be correct, and if the sheriff should have applied other moneys made by him to satisfy the plaintiff's execution, the defendant must shew it. *Ib.*

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6. *Other Cases.*

A party purchasing a crop of wheat at sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field. *Haydon* v. *Crawford*, 3 O. S. 583.

Semble, that in order to maintain a title as vendee at a sheriff's sale, it is not necessary to prove an actual seizure antecedent to the sale and before the return of the writ. *Ib.*

Quære, is the sale by a sheriff of a crop of wheat ready for harvest, not the sale of an interest in lands, requiring a writing under the Statute of Frauds; and if not—still, to satisfy the statute and make the sale legal, should there not be proof of the delivery of the wheat, or payment of the price. *Ib.*

When a sheriff, under a fi. fa., seized and sold certain goods claimed by the plaintiffs:—Held, that the fact of one of the plaintiffs having attended and bid at the sale did not estop them from complaining of the seizure of the goods as their own. *Lines et al.* v. *Grange*, 12 Q. B. 209.

The plaintiff, as official assignee, sued defendant, as administrator, on a promissory note payable to W. or bearer. Defendant pleaded plene administravit præter goods not sufficient to satisfy a judgment outstanding. Plaintiff replied, confessing the plea, and prayed judgment and his damages, &c., of assets quando. The pleadings were thus entered on the roll,

together with a second prayer of judgment for plaintiff's debt, &c. Then followed the judgment as for damages, and a suggestion that intestate died seised of lands, &c., and a prayer that the amount recovered might be levied of the lands. A fi. fa. against goods issued on 19th February, as for damages recovered, which was returned no goods, and on the 20th February a fi. fa. lands issued, which spoke merely of the amount recovered. There had been no order of reference to the master to ascertain the amount, nor any assessment by a jury, nor any sci fa. to enquire as to goods :—Held, on application to set aside the judgments and writs, that the judgment was a final judgment, and that no reference or assessment was requisite. *Mason* v. *Babington*, 17 C. P. 149.

Held, that the writ against goods, on a judgment of assets quando, was irregular, there having been no writ of sci. fa. or revivor; but that, notwithstanding, the writ against lands was not irregular, as the record shewed there were no goods. *Ib.*

Held, that the proceedings on the suggestion were regular, without any leave to enter such suggestion or judgment thereon; and the discrepancies between debt and damages were mere defects in form, and amendable. *Ib.*

Quære, whether any suggestion of lands at all was requisite. *Ib.*

In a fi. fa. goods and the endorsements thereon the plaintiffs were styled defendants, and vice versâ, the words being transposed throughout, and the christian names of the defendant were also transposed :—Held, clearly irregular. *Davidson* v. *Grange*, 5 P. R. 258.—C. L. Chamb.—Morrison.

Held, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a fi. fa., his personal representative and not his successor in office, is entitled to execution. *Dickenson* v. *Harvey*, 6 P. R. 170.—C. L. Chamb.—Dalton, *C. C. & P.*

As to sheriff's duty in executing the writ, see XI. p. 1457, XII. p. 1461.

III. Fieri Facias (Lands.)

1. *Practice in Issuing.*

(a) *Death of Execution Defendant.*

A fi. fa. lands tested after the death of defendant is void. *McCarthy* v. *Low*, 2 O. S. 353.

But if tested in the lifetime of the debtor it may be taken out and executed after his death. *Doe* d. *Hagerman* v. *Strong*, 4 Q. B. 510.

Held, that the death of a defendant after the placing of an execution against goods in the sheriff's hands, did not make it necessary to revive the judgment against his executors or administrators to make valid the seizure under the writ, of goods which were owned by the defendant at the time of his death. *Turner* v. *Patterson*, 13 C. P. 412.

(b) *Execution against Lands and Goods*

[*Now, by 35 Vict. c. 25, O., executions against lands and goods may issue at the same time, but the lands shall not be sold in less than twelve months after the delivery of the writ to the sheriff, nor until a return of nulla bona, in whole or in part, as to the goods.*]

A fi. fa. issued before the return of the execution against goods, is only an irregularity, and a purchaser at sheriff's sale cannot be affected by it. *Doe* d. *Spafford* v. *Brown*, 3 O. S. 92.

A judgment against an executor to recover de bonis testatoris, will warrant an execution against testator's lands, on the return of nulla bona. *Doe* d. *Jessup* v. *Bartlet*, 3 O. S. 206.

A. obtains a judgment against B. on his bond, and after this assigns the judgment to C. for valuable consideration. C. having issued a writ against B.'s lands in the name of A., the court refused to set the writ aside on the application of B. *Commercial Bank* v. *Boulton*, 6 Q. B. 627. —P. C.—Draper.

A return of a fi. fa. goods in the county where the venue is laid, is sufficient to warrant a fi. fa. lands to any other county, without a writ against goods there also; but both writs cannot run together in the same county. In this case a fi. fa. goods had issued both to Wentworth, where the venue was, and to Hastings. That to Wentworth was returned nulla bona, and the plaintiff then issued a fi. fa. lands to Hastings, where the writ against goods was still current, and a seizure had been made under it :—Held, that the fi. fa. lands was irregular, and must be set aside. *Oswald* v. *Rykert*, 22 Q. B. 306.

Held, affirming the last case, that the issuing of a fi. fa. lands and alias fi. fa. goods concurrently was objectionable; but that the latter, not having been acted on, could be abandoned, and the fi. fa. lands retained. *The Ontario Bank* v. *Kerby*, 16 C. P. 35.

Plaintiffs issued a fi. fa. goods, and on the same day placed them in the hands of sheriffs of different counties. Within three weeks the writs were at the request of the plaintiffs' attorney, and *with the consent of* H., one of the defendants, returned nulla bona, the other defendant, as it was believed, having no goods, and the goods of H. being claimed by another in privity with him. On the return of these writs, fi. fas. lands and alias fi. fas. goods were on the same day issued and placed in the sheriffs' hands. Subsequently the alias fi. fas. goods were withdrawn, the fi. fas. lands being left in the sheriffs' hands :—Held, that although the same rule applies in the case of two defendants, as in the case of one, that the goods (of both) must be exhausted before the lands are resorted to, and each has, therefore, as great an interest in the due execution of a writ against the goods of his co-defendant as against his own, before the lands are touched; yet, in this case, H. could not, by reason of his consent thereto, complain of the return nulla bona as to himself; nor could he complain of the same return as to his co-defendant, because the latter had no goods which could apply to the writs; while the latter could not object to the return as to H., because, it was alleged, the goods of H. were claimed by another under a title from him, and it was not reasonable that the plaintiffs should contest this claim, particularly as the property appeared to be small, when there was a probability of realizing their claims by a sale of the lands after the expiration of the usual time. *Ib.*

Observations on the inconvenience of the procedure here, by two writs of execution, in order to reach lands, and probable intention of 5 Geo. II. c. 7, with reference thereto. *Ib.*

A plaintiff cannot at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon. The plaintiff issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April, 1865, was returned nulla bona, with the consent of one of the defendants, and on that day fi. fas. against lands issued to the same and to other sheriffs, and an alias fi. fa. goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf the two defendants, and of the Bank of B. N. A., to whom they had given a mortgage of lands on the 17th May, 1865, the objections being that there had been no proper issue and return of the writs against goods, and that the writs against lands and goods were concurrent:—Held, that the return of nulla bona, if any of the defendants had goods, could be only an irregularity, against which the bank could not move, nor the defendant who had consented to it; but,—Held, also, that as the alias writ against goods issued on the same day as the writs against lands, and had been acted upon, the latter writs were under the circumstances illegal, and must be set aside:—Held, also, that the mortgage to the bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff. *Ontario Bank* v. *Muirhead et al.*, *Ontario Bank* v. *Kerby et al.*, 24 Q. B. 563.

Semble, that one of several defendants may insist that the goods of the others shall be exhausted before a writ issue against his lands. Quære, whether this application could have been entertained on the part of the bank. Semble, not. *Ib.*

The crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *The Desjardins Canal Co.*, 29 Q. B. 165.

Lands and goods may be included in the same writ, and it may be made returnable before the expiration of twelve months, the crown not being bound by 43 Geo. III. c. 1. *Ib.*

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2. *Time of Operation.*

Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. *Doe* d. *Auldjo* v. *Hollister* 5 O. S. 739.

Land not being bound by a judgment for the purpose of sale, under the 5 Geo. II. c. 7, but only by the delivery of fi. fa. lands to the sheriff, the time of such delivery must be proved by the purchaser under the sheriff's deed. *Doe* d. *Burnham* v. *Simmons*, 7 Q. B. 196.

A lease of lands made by the agent of an executor, after delivery to the sheriff of a fi. fa. lands against such executor, will only convey an interest subject to such fi. fa. *Sloan et al.* v. *Whalen*, 15 C. P. 319.

Where the owner of land sells the timber upon it, after a writ against his lands is placed in the sheriff's hands, and the purchaser cuts down and removes the timber before an injunction is obtained, he is accountable to the execution creditor for the timber so cut and removed. *Brown* v. *Saye*, 11 Chy. 239.

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3. *Property Taken.*

[*See the Administration of Justice Act of 1873, sec. 36, et seq.*]

(a) *Term of Years and Rent Charge.*

A term for years cannot be sold under an execution against lands. *Doe* d. *Court* v. *Tupper*, 5 O. S. 640.

Quære, does a rent charge come under the 5 Geo. II. c. 7, s. 4. *Dougall* v. *Turnbull*, 8 Q. B. 622.

A rent charge for which there is a power of distress comes under the terms lands or tenements in the fi. fa. But not a mere rent seck. *Ib.*

A rent charge upon land for the life of the grantee is seizable by the sheriff under an execution against lands. *S. C.* 10 Q. B. 121. See *Smith* v. *Turnbull*, 1 P. R. 38.

(b) *Trust Estates.*

Where real property is conveyed to trustees for sale for the satisfaction of debts, so as the sale be made within a certain period, and the sale be not made within that time, no use results back to the grantor which can be taken in execution for his debts under the Statute of Frauds. *Doe* d. *Laurason* v. *The Canada Co.*, 6 O. S. 428.

Testator, after giving certain lands to his children, C., W., & M., devised to his wife all the residue of his lands for life, and after her death the same to be equally divided among all his surviving children, except said C., W., & M., share and share alike. A patent was afterwards granted for the land in question, with other lands, to the executors of his will, to hold upon the trusts contained in it. Before any division, while the wife was alive, a fi. fa. issued against one of the residuary devisees:—Held, that the defendant in the writ had no interest which could be sold. *McLean* v. *Fisher*, 14 Q. B. 617.

Held, that land conveyed to school trustees for the purposes of a school, could not be sold under execution against them on a judgment obtained for the money due for building the school house. *Scott* v. *The Trustees of Union School Section No. 1, in Burgess, &c.*, 19 Q. B. 28.

(c) *Lands in Hands of the Heir.*

A sci. fa. will not issue against an heir under the 5 Geo. II., although an execution may have issued against the goods and chattels in the hands of the administrator, and a return of nulla bona has been made. *Paterson* v. *McKay*, Tay. 43.

A judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon awarding the sale of lands of which the deceased was seised on a specified day, previous to which he had died, will not sustain a purchase; and the sheriff's deed gives no title. *Varey* v. *Muirhead*, Dra. 486.

(d) *Equity of Redemption.*

[*See C. L. P. Act, ss. 257, 259, 27 Vict. c. 13.*]

An equity of redemption of an estate of inheritance:—Held, not saleable under comm

law process. *Simpson et al.* v. *Smyth*, 2 O. S. 129; 1 & A. 9.

A purchaser at sheriff's sale of lands sold under a judgment and execution subsequent to a mortgage in fee by the debtor, cannot recover against the mortgagee in possession. *Doe* d. *Richardson* v. *Dickson*, 2 O. S. 292.

An equity of redemption in a term of years cannot be sold on an execution. *Doe* d. *Webster* v. *Fitzgerald*, E. T. 2 Vict.

Quære, whether an equity of redemption in a leasehold interest is saleable under common law process. *McDonald* v. *Reynolds*, 14 Chy. 691.

One C. gave a mortgage, on which a covenant by one S. was endorsed as security for the interest. C. having made default, the mortgagees recovered judgment on the mortgage, and under a fi. fa. lands sold C.'s equity of redemption. S. having been called upon under his covenant, his executor sued C., the mortgagor, in this action, for indemnity :—Held, that under the facts as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, nor of defendant's liability to indemnify his surety. *Stewart* v. *Clark*, 13 C. P. 203.

A. made a mortgage of lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one-half of the principal and interest. To an action brought on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees :—Held, 1. That the plaintiffs, as devisees of Z., were assignees of the mortgage within 12 Vict. c. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime; 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., paying, shall give a release to the mortgagor; and, semble, that the defendant instead of setting out the facts, might have pleaded payment in the ordinary form; 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers; 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore that the second plea (which was demurred to) shewed a good defence. *Woodruff et al.* v. *Mills*, 20 Q. B. 51.

Defendant, being the owner of certain property, mortgaged it to a building society. The plaintiff, with two others, having recovered a judgment against the defendant, sold under a fi. fa. lands the premises in question which the plaintiff purchased. Default having been made in the mortgages to the building society, they advertised and sold. Upon ejectment brought it was contended that the mortgage and sale by the building society prevented the sale under the fi. fa. from operating :—Held, that the sale under the fi. fa. passed all the interest, both legal and equitable, of the mortgagor, and that as against him the plaintiff was entitled to recover. *Fisken* v. *McMullen*, 12 C. P. 85.

Quære, per Gwynne, J., whether an equity of redemption can be sold upon an execution issued upon a judgment recovered at the suit of the mortgagee, in an action upon the covenant contained in the mortgage for the payment of the mortgage debt. *VanNorman* v. *McCarty*, 20 C. P. 42.

A term of 1000 years was executed by way of mortgage, and subsequently the interest of the reversioner was sold under an execution against his lands. Upon a bill filed by the mortgagor to redeem :—Held, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem. *Chisholm* v. *Sheldon*, 1 Chy. 108.

Quære, whether a sale by the sheriff under a fi. fa. against lands of the reversion, after a term of 1000 years had been created by way of mortgage, carries with it the right to redeem the term. *S. C.* 2 Chy. 178.

The question was subsequently decided in the affirmative by the Court of Appeal, Blake, V.C., diss. *S. C.* 3 Chy. 655.

Upon a judgment obtained against the executors of a mortgagor, a writ against the lands of the testator was sued out, under which his interest in the mortgage premises was sold; and afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mortgagee, all which transactions took place after the passing of the 7 Will. IV. c. 2, (1837) :—Held, that the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Chy. 344.

Quære, the effect of a sheriff's sale to a subsequent incumbrancer of an equity of redemption in real estate of a partnership, where the execution was issued against all the partners; but one of the defendants had died after judgment and before execution, the judgment not having been revived, and such sale having taken place pending a suit by the first mortgagee for the foreclosure of the mortgage. *Baxter* v. *Turnbull*, 2 Chy. 521.

12 Vict. c. 73, making equities of redemption saleable under legal process, does not apply where the mortgage is created by a deed absolute in form. *McCabe* v. *Thompson*, 6 Chy. 175, followed in *McDonald* v. *McDonell*, 2 E & A. 393.

Where the interest of the debtor was a life estate, which he had conveyed away absolutely, though as a security only :—Held, that the statute for the sale of equities of redemption did not apply, the right to redeem not appearing on the face of the conveyance, and that the sale could not be supported. *Fitzgibbon* v. *Duggan*, 11 Chy. 188.

Where land mortgaged is sold by the sheriff under the 12 Vict. c. 73, the purchaser acquires only the title of the mortgagor at the time the writ was delivered to the sheriff, not at the time of registering the judgment. *Pegge* v. *Metcalfe*, 5 Chy. 628.

A judgment creditor purchasing an equity of redemption at sheriff's sale, cannot set up his registered judgment against a mortgage made before the delivery of the writ to the sheriff. *Ib.*

Quære, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts, as forming together a portion of the price of the land purchased. *Ib.*

The owner of lands created two mortgages thereon, after which his interest therein was sold under a fi. fa. issued upon a judgment registered prior to both mortgages, for the sum of 20s., all parties being under the impression that the lands were sold subject to the two mortgages. Subsequently the purchaser at sheriff's sale bought up the first mortgage, whereupon the holders of the second mortgage filed a bill against him, praying redemption or foreclosure, on the ground that the purchase of the equity of redemption at sheriff's sale bound him to discharge both mortgages. The court at the hearing refused this relief, and dismissed the bill; but, owing to the uncertain state of the authorities on the point as to the effect to be given to the registering of a judgment, without costs; and with leave to file a new bill impugning the sale under the fi. fa.; or a decree of redemption would be pronounced upon the submission to that effect contained in the answer, if the plaintiffs desired that relief. *Bank of Montreal* v. *Thompson*, 9 Chy. 51; affirmed on appeal, 3 E. & A. 239.

Held, reversing the decree of the court below, that the 12 Vict. c. 73, s. 1 (C. S. U. C. c. 22, s. 257), which authorizes the sale under execution of an equity of redemption, applies only where the execution is against the mortgagor himself, and on an execution issued against his lands.—Esten, V. C., diss. *Bank of U. C.* v. *Brough*, 2 E. & A. 95.

Held, in accordance with the last case, that an equity of redemption in lands is not saleable under an execution issued against the executor of the mortgagor. *Lowell* v. *Bank of U. C.*, 10 Chy. 57.

[But see, now, 27 Vict. c. 13, s. 1.]

The 27 Vict. c. 13, 1863, after reciting that doubts had arisen as to the meaning of ss. 257, 258, and 259 of the C. L. P. Act, enacted that "whenever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators, or assigns, or persons having the equity of redemption,' were inserted immediately after such word 'mortgagor:'"—Held, that the enactment, c. 13, was a declaratory one; and where lands subject to a mortgage were sold by the sheriff under execution in a suit against the executors of the mortgagor, and conveyed by the sheriff to the purchaser in October, 1858, the court held this sale validated by the statute, and that the heirs of the mortgagor could not impeach the same. Proudfoot, V. C., diss. Held, also, that 27 Vict. c. 15, did not affect the question. *McEvoy* v. *Clune*, 21 Chy. 515.

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process, and the purchaser paid off the prior mortgage:—Held, that the purchaser, being bound to protect the mortgagor against both the incumbrances, could not keep alive the prior as against the second mortgage. *McDonald* v. *Reynolds*, 14 Chy. 691.

In such a case the purchaser, upon the expiration of the term, obtained a new lease from the rector and created a mortgage on such new term:—Held, that such new lease was a mere graft upon the original one, and as such was subject to the mortgage which had been left outstanding; but as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority. *Ib.*

Where several lots of land are mortgaged, the equity of redemption in one or some of them only cannot be sold under common law process; and, Semble, that where lands in different counties are mortgaged, the equity of redemption cannot be sold under execution at law, and can only be reached in equity. *Heward* v. *Wolfenden*, 14 Chy. 188; followed in *VanNorman* v. *McCarty*, 20 C. P. 42.

An estate subject to mortgage was devised to several parties, and after the death of the testator the party entitled to the mortgage money procured the land to be sold under execution at law:—Held, following Heward *v.* Wolfenden, 14 Chy. 188, that the act authorizing the sale of equities of redemption did not apply: that the sale under execution was inoperative, and that the parties entitled to the equity of redemption had a right to redeem; but, that under the circumstances, the person representing the mortgagee was entitled to be allowed for improvements. *Shaw* v. *Tims*, 19 Chy. 496.

The equity of redemption in mortgaged lands was offered for sale under execution at law, and the mortgagee bid off the property at $200, but the sale proved to be inoperative:—Held, that the mortgagee could not add the amount so paid to the amount of his mortgage debt. *Paul* v. *Ferguson*, 14 Chy. 230.

A debtor executed two mortgages, which were in different hands, a portion of the land comprised in one of them being comprised in the other, and his interest in all the land was sold under execution:—Held, that the sale was invalid. *Wood* v. *Wood*, 16 Chy. 471. See also *Donovan* v. *Bacon*, 16 Chy. 472, note.

Under C. S. U. C. c. 22, the sheriff cannot sell or convey any interest, if there is a second mortgage outstanding in the hands of different parties. *Re Keenan*, 3 Chy. Chamb. 285.—Taylor, *Referee*.

Where a first mortgagee acquired, as he contended, a title through a purchaser at sheriff's sale of the equity of redemption of the mortgaged premises, there being mesne incumbrances, it was held that he did not acquire the fee in the lands, the sheriff not having power to sell. *Ib.*

The principle established by the cases of Donovan *v.* Bacon, 16 Chy. 472, and Re Keenan, 3 Chy. Chamb. 285, that the equity of redemption in mortgage premises is not saleable under execution where the same are subject to several mortgages in the hands of several mortgagees, does not apply where the mortgages are held by several owners of distinct portions of the estate, and the same are held by one and the same mortgagee, or are in the same hand. *Rathbun* v. *Culbertson*, 22 Chy. 465.

The equity of redemption in mortgaged premises was sold under execution at law, and

conveyance thereof executed by the sheriff purporting to convey the same to the purchaser, who subsequently paid off the mortgage, obtained from the mortgagee a statutory discharge thereof, which he caused to be registered, and went into possession of the mortgaged property. In a proceeding at law, the sale by the sheriff was declared void in consequence of the invalidity of the writ under which he had assumed to sell :—Held, that the purchaser was entitled to restrain ejectment brought by the mortgagor. *Howes* v. *Lee*, 17 Chy. 459. See *S. C.* at law, *Lee* v. *Howes*, 30 Q. B. 292.

A mortgage by devisees subsequent to a writ against the testator's lands in his executor's hands, being delivered to the sheriff, does not prevent the sheriff selling. *Johnston* v. *Sowden*, 19 Chy. 224.

A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding in the master's office it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency :—Held, on appeal from the ruling of the master, that it was proper to add such creditors as parties in his office. *Canada Landed Credit Co.* v. *McAllister*, 21 Chy. 593.

The principle on which an equity of redemption is founded is relief against forfeiture ; and the equity is not to be allowed where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued. *Skae* v. *Chapman*, 21 Chy. 534.

Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds ; but for seventeen years before the filing of a bill to redeem sales and re-sales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected ; some burnt down; new buildings put up ; houses built for one purpose altered to suit other purposes ; other changes and improvements thereon made ; fields and common being converted into sites for shops, hotels, a bank and other places of business, and into gardens and yards ; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties ; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim, and made defendants to the suit, numbered nearly one hundred :—Held, that redemption would be inequitable, and the bill was dismissed with costs. *Ib.*

The effect in such a case of the 36 Vict. c. 22, s. 9, giving a lien for improvements, remarked upon. *Ib.*

(e) *Interest of Mortgagee.*

After a mortgage in fee has become forfeited by non-payment of the mortgage money, the mortgagee's interest in the mortgaged premises cannot be sold under an execution against lands. *Doe* d. *Campbell* v. *Thompson*, H. T. 6 Vict. ; *Parke* v. *Riley*, 3 E. & A. 215, 231.

Held, that the statute 13 Eliz. c. 5, extends only to the assignment of such things as are liable to be taken in execution, and that a mortgagee's interest is not so liable. *Lodor* v. *Creighton*, 9 C. P. 295.

(f) *Reversionary Interests.*

The interest of a reversioner may be sold during the lifetime of the tenant, for life. *Doe* d. *Cameron* v. *Robinson*, 7 Q. B. 335.

A term of one thousand years was created by way of mortgage, and subsequently the interest of the reversioner was sold under an execution against his lands. Upon a bill filed by the mortgagor to redeem :—Held, that the sale by the sheriff did not carry the equity of redemption, and that the mortgagor was entitled to redeem. *Chisholm* v. *Sheldon*, 1 Chy. 108.

Quære, whether a sale by the sheriff, under a fi. fa. against lands of the reversion, after a term of one thousand years had been created by way of mortgage, carries with it the right to redeem the the term. *S. C.* 2 Chy. 178.

The question was subsequently decided in the affirmative by the Court of Appeal, Blake, C., diss. *S. C.* 3 Chy. 655.

Held, by Esten and Spragge, V. CC., that the purchaser at sheriff's sale of a reversion in lands mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit. *Waters* v. *Shade*, 2 Chy. 457.

Before equities of redemption were by statute made saleable under execution, a sheriff might sell a debtor's reversionary interest in the fee, subject to a lease for one thousand years. *Wightman* v. *Fields*, 19 Chy. 559.

(g) *Other Property.*

[*By C. S. U. C. c. 90, s. 11, any estate or interest in land which, under sec. 5, may be conveyed or assigned by any party, shall be liable to seizure and sale under execution against such party.*]

[*Sec. 5, enacts that a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any land, may be disposed of by deed.*]

[*C. L. P. Act, secs. 257-259, provides for the sale of an equity of redemption. These provisions seem to render several of the following decisions of no practical value.*]

Semble, that where a plaintiff has taken a fi. fa. against lands and tenements belonging to a defendant in several districts, the court would interfere to prevent more of these lands being sold than would satisfy the plaintiff's demand. *McGill* v. *McKay*, Tay. 88.

Lands and tenements held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his

executor or administrator. *Forsyth* v. *Hall*, Dra. 304.

[See 27 Vict. c. 15, confirming such sales.]

Where lands have been sold by a sheriff under a fi. fa. upon a judgment against an executor or administrator, the heir-at-law is entitled to recover the surplus from the sheriff. *Ruggles* v. *Beikie*, 3 O. S. 347.

Mere possession of land by a debtor constitutes primâ facie a seizin in fee, and such an estate cannot be sold under an execution against goods. *Doe* d. *Keogh* v. *Calhoun*, 1 Q. B. 157.

The sheriff could only sell the debtor's interest in possession; not a mere right of action while a third party was in adverse possession. *Doe* d. *Ausman* v. *Minthorne*, 3 Q. B. 423.

The interest of a husband in the freehold estate of his wife, may be sold under a fi. fa. against lands. *Moffatt* v. *Grover*, 4 C. P. 402.

Per Burns, J.—Lands acquired while the writ is in the sheriff's hands may be sold under it, if properly advertised, though they have not been twelve months owned by the debtor. *Ruttan* v. *Levisconte*, 16 Q. B. 495.

The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. *Reid* v. *Miller*, 24 Q. B. 610.

In ejectment, the plaintiff claimed through a deed from J. M. to J. The defendant claimed through a purchaser at sheriff's sale, under execution against J. M. at the suit of one C. The deed from J. M. to J. was made on the 4th February, 1857. C.'s judgment against J. M. was entered on 21st June, 1855, and registered on the 22nd in the registry office. On the 6th July, 1859, the sheriff sold the land under a pluries fi. fa. tested the 31st March, 1858:—Held, that the sheriff's deed could not transfer the estate previously vested in J. *Morrison* v. *Steer*, 32 Q. B. 182.

The court will, at the instance of a judgment creditor of a locatee of the crown, with execution against lands in the hands of the sheriff, direct the interest of the locatee to be sold, and order him to join in the necessary conveyance to enable the purchaser, under the decree, to apply to the crown lands department for a patent of the land, as vendee or assignee of the locatee. *Yale* v. *Tollerton*, 13 Chy. 302.

The interest of a debtor in land bought from the crown, but for which at the time of his death he had not fully paid, and had not obtained the patent, is available in equity for the benefit of his creditors; and their right is not destroyed by a friend of the heirs paying the balance of the purchase money, and procuring the patent to issue in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Chy. 309.

A plaintiff had property within the jurisdiction, consisting of a one-sixth interest (nominally worth $2,666) in lands, subject to a lease made to the defendants by the plaintiff's ancestor, the validity of which lease was in question in the suit. This lease was for twenty-one years, and gave defendants an option to purchase, and under its terms no rent or taxes was to be paid until the title had been quieted, or a certificate refused; and in the latter event, defendants were to accept the title or give up the term. Proceedings for quieting the title had been instituted, but were still pending:—Held, (by Strong, V. C., on affirming the order of the referee refusing to discharge an order for security for costs), that if the plaintiff succeeded in the suit, the land would be subject to the debts of the plaintiff's ancestor; and if he failed, the purchase money, when payable by the lessees, would be payable not directly to the plaintiff, but to his ancestor's personal representative; and that the plaintiff had not such an interest in the property as could be directly reached by execution. *Higgins* v. *Manning*, 10 L. J. N. S. 135.—Chy. Chamb.—Strong, on appeal from Holmested, *Referee*.

The claim of a debtor to compensation for misrepresentation of parties in obtaining a patent of land, is not liable to be seized, attached, or sequestered before the amount is determined by decree or otherwise. *Roberts* v. *The Corporation of the City of Toronto*, 16 Chy. 236.

A right to dower is not saleable under execution against the lands of a dowress. Till dower is assigned, she has no estate in the land, nor even a right of entry; neither does her interest come within the meaning of C. S. U. C. c. 90, s. 5, "a contingent, or executory, or a future interest, or a possibility coupled with an interest." *McAnnany* v. *Turnbull*, 10 Chy. 298. See, also, *Allen* v. *Edinburgh Life Assurance Co.*, 19 Chy. 248.

A creditor having execution against lands cannot claim fixtures which do not belong to his debtor. *Brown* v. *Sage*, 11 Chy. 239.

Where a debtor had entered into a binding contract for the sale of his land, before execution against his land had issued:—Held, that his interest as vendor was not saleable under the execution. *Parke* v. *Riley*, 12 Chy. 69.

A. entered into a parol agreement with R. for the sale to him of certain land, received part of the price, and gave R. possession of the premises. A. subsequently assigned by parol the balance of the price to S., to whom he was indebted. P., after this assignment, delivered to the sheriff an execution against the lands of A., and became the purchaser at the sale by the sheriff:—Held, that no interest in the lands passed under the sheriff's deed. *S. C.*, 3 E. & A. 215.

Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described being sold under execution. *Rathbun* v. *Culbertson*, 22 Chy. 465.

Where lands are subject to a charge for maintenance, the interest of parties beneficially interested therein, subject to such charge, is saleable under execution. *Ib.*

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4. *Proceeding under Expired Writs.*

A sale of lands under a fi. fa. which has expired, is void. *Doe Burnham* v. *Simmonds*, 5 Q. B. 436.

A. fi. fa. lands having been lodged in the sheriff's office, was allowed to expire without anything being done under it, either by seizing or offering for sale the lands of the debtor. Afterwards, a new sheriff being appointed, this writ other process was handed over to him, and

proceeded formerly to offer for sale the lands of the execution debtor, and made a return of "lands on hands for want of buyers;" whereupon the plaintiff sued out a ven. ex. and fi. fa. residue, under which the lands which had been previously offered for sale were sold, and a conveyance thereof made by the sheriff. Upon a bill filed by another judgment creditor, the court below set aside this sale, and ordered the deed to be cancelled; the ven. ex. and fi. fa. residue being, under the circumstances, absolutely void; which decree was affirmed on appeal. *Gardiner* v. *Jason*, 2 E. & A. 188.

Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what had been commenced while it was in force. *Doe* d. *Greenshields* v. *Garrow*, 5 Q. B. 237.

A fi. fa. lands had been renewed on the 25th of August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by plaintiff's attorney to the sheriff, and the latter on the same day sent the usual advertisement thereof to the *Canada Gazette* and a local paper. On the 2nd of September following, it appeared in a local paper, and in the *Gazette* on a subsequent day:—Held, that the writ was spent, and that the lands could not be legally sold under it. *Reynolds* v. *Streeter*, 3 P. R. 315.—C. L. Chamb.—Hagarty.

The defendant in ejectment claiming through a sheriff's sale under execution, it appeared that a fi. fa. lands issued 6th September, 1866, and was returned 17th October, 1867, lands on hand for sale, and no lands for the residue; but nothing had been done and no lands advertised under it. On the same day a ven. ex. and a fi. fa. residue was delivered to the sheriff, who advertised as if under the original writ, and sold the lands in question on the 2nd May, 1868. There was a mortgage upon it, which defendant, the purchaser, paid off on the same day, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due; but such a certificate as is provided for by the C. L. P. Act, sec. 258, on sale under execution of a mortgagor's interest:—Held, that the sale could not be supported, for the original writ had expired with nothing done under it, and the ven. ex. and fi. fa. residue had not been a year in the sheriff's hands before the sale; and moreover he had assumed to act under the original fi. fa. and ven. ex. and not the fi. fa. residue. Semble, that the want of proper advertisements would not have avoided the sale. *Lee* v. *Howes*, 30 Q. B. 202.

The expiration of a fi. fa. lands before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the commencement of the advertisement is. In this case, where lands had been advertised under other writs, the plaintiff's fi. fa. being at the time in the sheriff's hands:—Held, that although the sale under the writs so advertised neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement, and that the return of "lands on hand" to this writ after its expiry, was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a ven. ex. to sell the lands then in his hands. *Hall* v. *Goslee et al.*, 15 C. P. 101.

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5. *Other Cases.*

Lands may be sold on a judgment against one of several executors in as if it had been against all. *Doe* d. *Smith* v. *Shuter et al.*, 5 O. S. 655.

Alien friends residing in their proper country, cannot, upon a summary application to the court be deprived, under 5 Geo. II., c. 7, of the right to an execution against the lands of their debtor:—Semble, the alienage should be pleaded in bar of execution. *Wood* v. *Campbell*, 3 Q. B. 269.

See *Mason* v. *Babington*, 17 C. P. 149, p. 1425.

IV. Sale of Land under Execution.

1. *Inception of Execution.*

Semble, to support a sale by an ex-sheriff out of office, it must appear that while in office he acted upon the writ to an extent amounting in law and fact to an incipient step in the execution of it, and duly followed up such step after leaving the office. *Doe* d. *Miller* v. *Tiffany*, 5 Q. B. 79. See also *Campbell* v. *Clench*, 1 Q. B. 267.

Held, Draper, J., diss., that the facts in this case, as stated in the report, constituted such an inception of execution against lands by the sheriff, during the currency of the writ and while he was in office, that a deed made under such execution by the same sheriff, after the writ was current and after he had gone out of office, passed the legal estate to the purchaser. *Doe* d. *Tiffany* v. *Miller*, 6 Q. B. 426.

Held, also, Draper, J., diss., that the conduct of the execution debtor, also stated in the report, shewed an acquiesence on his part in the ex-sheriff's right to proceed with the sale of the lands as he did. *Ib.*

The above decision commented upon and adhered to. *Doe* d. *Springer* v. *Miller*, 10 Q. B. 57. See, also, *Doe* d. *Young* v. *Smith*, 1 Q. B. 195; *Hazlett* v. *Hall*, 24 Q. B. 484.

[The questions arising on these cases are now provided for by C. L. P. Act, secs. 268, 269.]

Held, that the deed in question in this case having been executed by the sheriff out of office, but in completion of the sale made by him whilst in office, was valid under s. 269 of C. S. U. C. c. 22. *Miller* v. *Stitt et al.*, 17 C. P. 559.

A fi. fa. against lands was returnable on the 15th September, 1863; the advertisement of sale was first published after that date; while the writ was current, the sheriff had told defendant that he had the execution and that the land would be sold unless he paid; the sheriff was also on the lands more than once before the writ expired, but he did not go to make a seizure:—Held, that there had been no inception of the execution during its currency. *Bradburn* v. *Hall*, 16 Chy. 518.

See *Douglass* v. *Bradford*, 3 C. P. 459, p. 1447.

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2. *Advertisement and Deed.*

It seems that a conveyance from the sheriff by deed under seal is necessary to complete a ven-

dee's title to lands sold, under the provisions of 5 Geo. II.: that the return upon the fi. fa. cannot be considered as a mode of giving such title, nor can such vendor take a title by act and operation of law alone: that a neglect on the part of the sheriff to advertise the property sold would not defeat the vendor's title; and although the land may be knocked down to the agent of a firm, the deed of conveyance may be afterwards made by request of the other partners to any individual of the firm. *Doe* d. *Moffat* v. *Hall*, Tay. 510.

A deed executed by a deputy sheriff, of lands sold under an execution after the death of the sheriff to whom the writ was directed, and after the appointment of a new sheriff, is void. *Doe* d. *Campbell* v. *Hamilton*, 6 O. S. 88.

The court will, after a sale of lands under an execution, prevent an assignment by the sheriff to the purchaser, where good cause is shewn for requiring their interference. *Bank of Upper Canada* v. *Miller*, H. T. 3 Vict.

Any want of regularity in giving public notice of an adjourned sale under a fi. fa. will not invalidate the sale where the debtor attended the sale by his agent and afterwards ratified what had been done. *Doe* d. *Dissett* v. *McLeod*, 3 Q. B. 297.

A sheriff's deed, being but a completion of the sale, is only good for land actually sold. A party therefore is not estopped by it from proving by parol that portions of the land therein described as sold were not in fact sold; and if the description of the whole land in the deed be so blended together that one cannot distinguish between what was sold and and what was not, the deed will be bad. *Doe* d. *Miller* v. *Tiffany*, 5 Q. B. 79.

The sheriff having, in 1839, put up and sold part of a certain tract of land, by mistake conveyed the whole, describing it so that on the face of the deed no parcel could be distinguished from the rest, and allowed to pass alone:—Held, that he must be considered as any other person having a power to execute: that he could not be regarded as functus officio by the execution of the first deed, which was wholly void; and that he might, therefore, in 1849, make a deed of the part actually sold. Quære, whether, *the debtor having a title to all the land conveyed*, if the part sold had been separately described and divisible from the part not sold on the face of the deed, it could have passed alone. Quære, also, whether the proper course would not have been to apply to the court to set aside what had been done under the execution. *Doe* d. *Tiffany* v. *Miller*, 10 Q. B. 65.

The court refused to interfere summarily to compel the sheriff to make a deed of a lot sold by him under execution, where it appeared that he had been advised not to complete the sale on account of an irregularity in the advertisement; and that the same land, on being again advertised and exposed to sale under a subsequent writ, brought a price far exceeding that for which it had been purchased by the applicant. *In re Campbell et al.*, 10 Q. B. 641.

Under a fi. fa. issued upon a judgment entered in November, 1851, the sheriff of the county of Oxford, in 1853, conveyed certain lands in the township of Oakland, reciting in the deed that they had been seized in December, 1851. By 14 & 15 Vict. c. 5, which came into force on the 1st of January, 1852, the township of Oakland was annexed to the county of Brant, but by the 12th clause it was enacted that all proceedings in any court at the time when the act should come into effect might be continued to trial and judgment in such court, and such judgment might be executed as if the act had not been passed:—Held, that under this provision the sheriff was authorized to convey as he had done. *Shenston* v. *Baker*, 12 Q. B. 175.

Nor will the omission to advertise at all, where there is no uncertainty as to what has been sold, though it may give a right of action against the sheriff. *Osborne* v. *Kerr*, 17 Q. B. 134, 141; *Lee* v. *Howes*, 30 Q. B. 292.

The sheriff, under a fi. fa. against one S., advertised for sale all his interest in an unexpired lease of the premises occupied by K. as a livery stable, on Main street, between James and Hughson streets. (Main street ran east and west, James and Hughson streets north and south.) K. was then no longer living on any part of the land so leased, but he had occupied a piece of about thirty feet frontage out of eighty feet which the lease covered. At the sale, as the weight of evidence shewed, and the jury found, the sheriff sold all S.'s interest in the lease, it being his impression that it covered eighty feet, and that K. was in possession of the whole. A few days afterwards, finding that there was a dispute as to what had been sold, the sheriff advertised another sale of all the remaining interest of S. in the lease; but, having taken advice, he abandoned this sale, and afterwards conveyed to defendant, the purchaser at the sale, all the term of S. in the premises mentioned in the lease. In the meantime, however, S., assuming that only what K. was formerly in possession of had been or could be sold under the advertisement, conveyed to defendant all the land mentioned in the lease, except that; and the plaintiff brought trespass against defendant, who claimed the whole of the land leased under the sheriff's sale and conveyance. The jury found for the defendant:—Held, that it was properly left to the jury, on evidence of what took place at sale, to say what land was actually sold: that it was the sale, not the advertisement, which must govern; and that the second advertisement could have no legal effect. If the advertisement had clearly referred only to what K. was then occupying, (which it was held not to do,) but the sheriff had put up and sold the whole interest under the lease, the lease, and not the advertisement, would still have governed, for the sheriff's advertisement cannot be treated as an auctioneer's printed terms of sale in ordinary transactions; his power to convey depends upon what the debtor owns, and what he actually sells, and not on the accuracy of his advertisement. *Osborne* v. *Kerr*, 17 Q. B. 134.

Held, that it was immaterial that the sheriff's deed was not made until after the debtor had assigned to the plaintiffs, it being part of the execution. *Ib.*

Defendant on the 13th October, 1852, granted the land in question to one S., to hold to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from the 1st April, 1853, fully to be complete and ended

but not to be underlet to any person except to the family of the said S., for any period during the said term. A yearly rent of £35, and 50s. per acre for land cleared, was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be void. The lessee entered, and on 1st April, 1859, a year's rent being in arrear, defendant distrained and sold the goods of S., who remained for some time on the premises as defendant's servant, and the sheriff afterwards, under executions which had been in his hands since November, 1858, sold the unexpired term of S. in the premises, describing it in the advertisement and deed as a term with fifteen years yet to run, at a rent of $100 a year. Per Robinson, C. J., the sheriff's deed would have been inoperative, owing to the misdescription of the interest which S. held in the land, and of the amount of rent. *Dalye* v. *Roberton*, 19 Q. B. 411.

Although a sheriff's deed relates back to the day of sale, for the purpose of defeating intermediate conveyances, still the vendee cannot bring ejectment until the execution thereof. *Gardler* v. *Beaton*, 12 C. P. 519.

Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title even if he be one of the execution creditors. *Paterson* v. *Todd*, 24 Q. B. 296.

In ejectment upon a sheriff's deed for land sold on execution, it appeared that the sale had been duly advertized in a local paper for three months before the 27th of August, 1864; and that an advertisement incorrect in some particulars had been inserted in the *Gazette* of the 11th of June, 1864, and four next numbers, the errors being corrected in the sixth insertion —all these advertisements being of a sale on the 27th August. On the 1st of October following, and in the five next numbers, the sale was advertised in the *Gazette* for the 12th of November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court-house, it was not shewn to have continued there for three months:—Held, that these advertisements could not be considered a compliance with the statute C. S. U. C. c. 22, s. 267, but that the defects would not affect the purchaser's title. *Ib.*

A fi. fa. lands had been renewed on the 25th August, 1862, and nothing done under it till the last day of its currency, 24th August, 1863. On this day a list of defendant's lands was given by the plaintiff's attorney to the sheriff, and the latter on the same day sent the usual advertisement thereof to the *Canada Gazette*, and a local paper. On the 2nd September following, it appeared in a local paper and in the *Gazette* on a subsequent day:—Held, that the writ was spent, and that the lands could not be legally sold under it. *Reynolds* v. *Streeter*, 3 P. R. 315.—C. L. Chamb.—Hagarty.

Semble, that this court would entertain a bill to compel a sheriff to convey property sold under execution; but the execution debtor must be made a party. *Witham* v. *Smith*, 5 Chy. 203.

A sheriff having a writ against lands for execution, should make reasonable inquiries as to what property the execution debtor has, and his interest in it; he should not advertise more of the estate than he finds the debtor is interested in, and if he knows what the debtor's interest is, he should give such statement of it in the advertisement as a provident owner would; and in regard to these matters he is not justified in acting irregularly by the instructions of the plaintiff's attorney, against his own judgment. *McDonald* v. *Cameron*, 13 Chy. 84.

A third person who purchases and gets the sheriff's deed is not affected by irregularities on the part of the sheriff, unless the circumstances are such that the purchaser's taking the deed can be said to amount to a fraud. *Ib.*

If the execution creditor purchases as either principal or agent, and it appears that he or his attorney interfered with the conduct of the sale by the sheriff, and that through such interference the sale was not properly advertised or conducted, and took place under circumstances of disadvantage to the debtor, the sale cannot be maintained except as a security for the debt, provided it is questioned without delay, and before the property has passed into the hands of a third party. *Ib.*

Although portions of township lots have been laid off into village lots, this forms no objection to an undivided interest in the township lots, as originally described, being sold under execution; and the purchaser at sheriff's sale is entitled to hold the interest acquired under such sale, notwithstanding the sheriff's deeds, so far as they concern the village lots, do not comply with the provisions of the Registration Acts of 1846, (9 Vict. c. 34,) and 1868 (31 Vict. c. 20, O.), the latter of which prohibits the registration of deeds of any portions of lots so laid out, unless they conform to the plan of the property registered under such act. *Rathbun* v. *Culbertson*, 22 Chy. 465.

See *Doe* d. *Cameron* v. *Robinson*, 7 Q. B. 335, p. 1456; *Morrison* v. *Rees*, 1 P. R. 25, p. 1461; *Bank of Montreal* v. *Monroe*, 23 Q. B. 414, p. 1458.

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3. *Irregularities in other respects.*

(a) *Inadequacy of Consideration.*

Where an execution creditor purchased property at sheriff's sale at one-sixth of its value, the court held that effect could only be given to such a transaction as a security for the debt and costs, and not as an absolute purchase. *Kerr* v. *Bain*, 11 Chy. 423.

Where property worth £1,500 had been sold at sheriff's sale for £90, in consequence of the title being disputed, the court refused to give effect to the sheriff's deed as an absolute purchase. *Chalmers* v. *Piggott*, 11 Chy. 475.

The plaintiff having purchased at sheriff's sale, for a small sum, the interest of his debtor in property which the debtor had previously mortgaged for a large sum, the validity of the mortgage or the amount due upon it being doubtful, the court declined to enforce the purchase as absolute; but, the plaintiff submitting to have his deed from the sheriff treated as a security for his debt, the court made a decree on that footing. *Malloch* v. *Plunkett*, 11 Chy. 439.

Inadequacy of price, sufficient to set aside a conveyance as between private individuals, will not serve as a ground for setting aside a sale by a sheriff under execution. The rule could only be applied in an extreme case. *Laing* v. *Matthews*, 14 Chy. 36.

A sheriff, in obedience to a ven. ex., in November, 1849, exposed for sale, by auction, and sold to the attorney of the plaintiff in the writ for £70, a farm of 150 acres, variously estimated as worth £2 10s. and £5 per acre; but which was subject to three rights of dower, two of the parties being young women. In April, 1867, the party claiming under the purchaser filed a petition under the act to quiet his title. The devisee of the execution debtor opposed the certificate on the grounds of improper conduct in the matter of the sale by the sheriff, evidenced by the gross inadequacy of consideration. The referee of titles reported in favour of the claimant; and, on appeal, both parties desiring an adjudication on the facts appearing in the affidavits and proceedings before the referee, the court affirmed the finding of the referee and dismissed the appeal with costs. *Ib.*

A creditor obtained judgment against his debtor's executors, and issued thereon execution against the lands of the deceased, which had had been devised to a minor. The creditor interfered to prevent competition at the sale, and then bought the property at one-half its value: —Held, that his purchase was not maintainable in equity. *In re Davis*, 17 Chy. 603.

The sheriff at a subsequent sale, under another small execution against the executors, put up the whole farm, and the same was knocked down to the purchaser of the half at the former sale, at one-sixteenth of the value of the farm. Before conveyance one of the legatees filed his bill to restrain the carrying out of this sale: and it was held that he was entitled to the relief prayed. *Jones* v. *Jones*, 15 Chy. 40.

(b) *Other Matters.*

A party whose lands have been sold under a fi. fa. cannot object to the sale on the ground of long delay in selling after the seizure, where such sale took place at his own instance or with his assent, and he has received the benefit of the proceeds of such sale; neither can his heir after his death. *Doe* d. *Harley* v. *McManus*, 1 Q. B. 141.

The fact that the whole of a farm may have been sold for a debt, which probably might have been satisfied by the sale of part, is no ground to invalidate the sale. *Doe* d. *Hagerman* v. *Strong et al.*, 4 Q. B. 510.

After land has been sold upon a writ valid upon the face of it, though the judgment may be reversed for error appearing upon the record, yet the defendant in the execution can only be restored to the money, not the land. *Ib.*

It is no objection to a sale under a fi. fa. from a district court that the writ directs a sum beyond the jurisdiction to be levied, which is stated in the writ to have been recovered for damages and costs. *Ib.*

Quære, would the writ and sale be void if it had been stated in the writ that a sum exceeding the jurisdiction had been recovered for damages only. *Ib.*

On a judgment in assumpsit a fi. fa. was issued in debt, and afterwards amended by rule of court. Before the amendment the sheriff had sold the land and given the deed, under which the plaintiff claimed:—Held, that the sale was not void as having been made under an erroneous writ; and, quære, whether it would have been voidable if moved against at the time of making the application to amend. *Doe* d. *Elmsley et ux.* v. *McKenzie*, 9 Q. B. 559.

M. devised lands to his two sons, John and James, and died in 1834. The will was registered in 1852, soon after James came of age, the title having been a registered one since 1833. In 1850, John, the eldest son and heir-at-law of M., conveyed the south half of the land to defendant, who registered his deed the same year. In 1856, the other half was sold to defendant under an execution against the executors, obtained on their confession. In ejectment by James:—Held, that it was no objection that the fi. fa. goods had not been returned before the fi. fa. lands issued; and that the executors had accepted office by giving the confession. *Manderille* v. *Nicholl*, 16 Q. B. 609.

In ejectment, it appeared that the land in question was brought to sale by the sheriff under several executions against M., one of which was issued by a client of plaintiff. Plaintiff's agent attended and bid at the sale, and the land was knocked down to him at the price offered, being sufficient to cover the execution. The defendant McIntyre also offered the same price. Before the completion of the sale, however, plaintiff notified both his agent and the sheriff that an injunction had been ordered by the Court of Chancery to issue restraining the sale, and that if the same were carried out he would apply to set it aside. This notice was followed by one from plaintiff's agent to the sheriff, to the effect that the latter was at liberty to convey the land entered in his name at the sale to any person he thought fit, as he relinquished all claim and interest therein. The sheriff accordingly, upon the injunction being subsequently dissolved, conveyed the land to the defendant McIntyre for the price bid by him at the sale:—Held, that in the absence of any evidence to the contrary, it must be assumed the sheriff had proceeded regularly in conveying the land to McIntyre, and that, no one appearing to be prejudiced by the transfer, the court was bound to uphold it. Held, also, that taking all the facts together—that it was the means by which his client had obtained satisfaction of his debt, and that it was made under the express authority of his agent, and so under his own authority,—the plaintiff could not be heard to impugn the conveyance of McIntyre. *Miller* v. *Stitt et al.*, 17 C. P. 559.

In ejectment, a sheriff's deed of the same land to one B. was produced by defendant, from which it appeared that the sheriff under a fi. fa. lands against defendant, as executor, and his wife (the widow of the testator), as executrix of the testator, sold to B., who conveyed to defendant. The judgment upon which the writ issued had been obtained upon a cognovit in an action by one Buell against defendant and his wife, as executor and executrix; but defendant and his

wife were not the executors appointed by the will, of which defendant was aware, as he had the will in his possession:—Held, that this deed could not defeat the plaintiffs' right to recover. *Hamilton et al.* v. *Lightbody*, 21 C. P. 126.

Where a sheriff offered for sale the interest of the debtor in certain lands, not stating what it was, although the means of ascertaining it were convenient, and the interest itself was actually known to the judgment creditor, and partially known to the sheriff, but not mentioned to the audience, the sale was set aside, because of the uncertainty of the interest or estate put up for sale. *Fitzgibbon* v. *Duggan*, 11 Chy. 188.

A testator charged several legacies on his real estate, which, subject thereto, he devised one-half to K., and one-half to G., his sons. Executions against the testator's lands, in the hands of his executor, to the amount of $131, and against the lands of the devisee R., to a larger amount, were placed in the hands of the sheriff, and the sheriff put up the half devised to R., under all these writs; it brought $1378; and the sheriff, after paying the small executions, applied the balance to the executions against R.:—Held, that it was wrong to sell under the executions against the executor more than was enough to pay those executions; that the effect of the sheriff's course was to apply the property of the legatees to pay the debt of another person, R.; and that the sale did not deprive the legatees of their charge; but R. having assented to the sale, the same was not disturbed so far as it affected his interest. *Jones* v. *Jones*, 15 Chy. 40.

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4. *Title acquired by Purchaser.*

The sheriff's deed is not to be considered as a mere release in the strict sense of the term. *Doe* d. *Dissett* v. *McLeod*, 3 Q. B. 297.

Where a party purchases land after a fi. fa. has been delivered to the sheriff, he holds the land subject to a right of sale under a fi. fa. by the judgment creditor *Doe* d. *McPherson* v. *Hunter*, 4 Q. B. 449.

Plaintiff sued defendant on a covenant for seisin and right to convey, and defendant pleaded only that he was seised and had good right to convey. It appeared that the plaintiff's interest in the land had been sold by the sheriff to one McG., and that the plaintiff had previously mortgaged it to one McC., and the plaintiff's attorney, being called by defendant, swore that this suit was authorised by the plaintiff to be brought in his name for the benefit of McG., and that he, witness, also represented the mortgagee, who was to be paid out of the verdict. The sum paid by McG., with the mortgage money, amounted to nearly the purchase money paid by plaintiff to defendant, with interest, for which the jury gave a verdict. On motion for a new trial, with leave to amend the pleadings, it was objected that the plaintiff could not recover, as the covenant running with the land had passed to McG., and that the damages were excessive; but the court refused to interfere, the verdict being just. *Campbell* v. *Burley*, 19 Q. B. 204.

Quære, whether a purchaser at sheriff's sale acquires a right to sue on covenants running with the land. *Ib.*

Where a debtor dies intestate, and his lands are sold under execution against his heir for the private debt of the heir, and the purchaser has notice before his purchase that there are debts of the ancestor's outstanding of which the creditors claim payment out of the land seized, such purchaser takes only the beneficial interest of the heir, subject to the payment of the ancestor's debts. *Peck* v. *Bucke*, 2 Chy. Chamb. 294. —Mowat.

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5. *Evidence of Title in Ejectment by Purchaser.*

Against the execution defendant, or those claiming under him.]—Where A. defended as landlord in ejectment against a purchaser at sheriff's sale of an expired crown lease, sold as belonging to B. by assignment:—Held, that after proof of the exemplification of the lease, the judgment, fi. fa., and sheriff's deed, a notice to produce the original lease and assignment, without specifying particulars, or shewing them to have been in A.'s possession, was sufficient to let in secondary evidence of the assignment to B.; and that as A. shewed no title, nor that he had ever been in possession, the same presumption should be made in favour of the purchaser as if he had been left to contend with the debtor himself. *Doe* d. *McGuire* v. *Dennis*, 2 O. S. 589.

A debtor in possession after a sheriff's sale is quasi tenant at will to the purchaser, and cannot dispute his title; and a third person defending as landlord, but shewing no privity with the debtor, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself. *Doe* d. *Armour* v. *McEwen*, 3 O. S. 493.

A purchaser of lands on an execution, is entitled to recover in ejectment against the debtor or his representative, without proof of the debtor's title, or that he was in possession of the premises. *Doe* d. *Fisher* v. *Chesser et al.*, 5 O. S. 144; *Moran* v. *Patton*, 10 Q. B. 640.

But if the tenant in possession do not claim under the execution debtor, the debtor's title must be proved. *Doe* d. *Crew* v. *Clark*, M. T. 4 Vict.

A purchaser at a sheriff's sale is not held to stricter proof of title against the servant of the execution debtor in possession, than he would be against the debtor himself. *Doe* d. *Lyon* v. *Legh*, 4 Q. B. 360.

Where the only question is, whether the defendant at the time of the sale had possession under the execution debtor or not, the title of the debtor need not be shewn. *Doe* d. *Russell* v. *Hodgkiss*, 5 Q. B. 348.

A. purchased at a sheriff's sale, and got a deed on the 29th September, 1845. B., the execution debtor, went into possession of the land sold as devisee under his father's will, who died in 1835. B., on the 28th of September, 1842, leased the land to C. for three years, who enjoyed it for a year, when B. having absconded from the province, D., his brother, purchased the tenant's interest, and went into possession. Upon the tenant quitting the place, he took from D. a written understanding to save him harmless against B.—B., in February, 1847, made a deed of the land to his brother, who was then in possession, for the consideration expressed of

£100. The deed was registered in July, 1847. The sheriff's deed to A. was not registered:—Held, in ejectment by A. against D., that upon these facts D.'s possession at the time of the sheriff's sale was the possession of B., the execution debtor, through his tenant C., and that therefore A. was entitled to recover. *Doe* d. *Russell* v. *Hodgkiss*, 5 Q. B. 348.

The plaintiff, a purchaser at sheriff's sale, produced the sheriff's deed, under which he had held possession by his tenants for several years. The defendant, being the heir of the defendant in the original suit, entered, and on action brought, objected that there were goods of his ancestor which might have been seized, and that the plaintiff had not proved a fi. fa. goods returned nulla bona:—Held, that these objections were properly overruled. *Doe* d. *Meyers* v. *Meyers*, 9 Q. B. 465.

P. brought ejectment for land in B.'s possession. B. thereupon attorned to P., and continued in possession. The sheriff afterwards, on an execution against P.'s lands, received by him (the sheriff) before the attornment, sold and conveyed the land to D., who then brought ejectment against B.:—Held, that B. was in privity with P., and bound by the sale:—Held, also, that the levy was sufficient, though the sheriff had not made an entry on the land:—Held, also, that as between the parties, proof of the fi. fa. against P.'s lands, without proof of the judgment was sufficient. *Douglass* v. *Bradford*, 3 C. P. 459.

Where ejectment is brought on a sheriff's deed against a stranger to the execution debtor, it is necessary to prove the judgment on which the execution issued; but Quære, per Draper, J., where the judgment debtor is the tenant in possession, and a stranger to the judgment and to the tenant comes in to defend—whether any more need be proved against such defendant than would have been required against the actual tenant; or whether an application must be made under 14 & 15 Vict. c. 114, s. 2, to strike out his defence. *Perry* v. *Piquott*, 12 Q. B. 372.

In ejectment, claiming under a sheriff's sale on an execution against executors, obtained on their confession:—Held, no objection that the writ against goods had not been returned before the fi. fa. lands issued, nor that the executors had not proved the will, for by confessing judgment they accepted the office. Held, also, that the court could not go behind the judgment even if there was anything to impeach it, which did not appear. *Mandeville* v. *Nicholl*, 16 Q. B. 609.

In ejectment against defendant claiming under a sheriff's deed:—Held, that the fact that the writ against lands appeared by the deed to have been issued on the same day as that against goods was no objection. *Eades et al.* v. *Maxwell*, 17 Q. B. 173.

Where the plaintiff in an action buys in the defendant's land under the execution, and brings ejectment upon the sheriff's deed, it is not necessary for him to shew, in proving his case at first, that a fi. fa. issued within a year after the judgment, or that an execution against goods was taken out. *Delisle* v. *Dewitt*, 18 Q. B. 155.

In ejectment, the plaintiffs claimed title under a sheriff's deed, purporting to be a conveyance of the land under a ven. ex.; the deed, however, only recited in an informal manner the ven. ex., not referring to the fi. fa. goods or lands, and no evidence was given to prove the lapse of the year required by law before such sale could take place:—Held, that under the deed as proved the court could not presume the sale to be regular, and a verdict for the plaintiff was ordered to be set aside. *Roe et al.* v. *McNeil et al.*, 13 C. P. 189.

Held, following Delisle *v.* Dewitt, 18 Q. B. 155; Roe *v.* McNeil, 13 C. P. 192; and Field *v.* Livingstone, 17 C. P. 15, that in ejectment under a sheriff's deed, by the execution creditor (the vendee of the sheriff), against the debtor, the plaintiff need not prove the judgment, but may rely on proof of the sheriff's deed and sale by him under the fi. fa. lands. Doe d. Bland *v.* Smith, 2 Stark. 199, referred to. *Ralston* v. *Hughson*, 17 C. P. 364.

In ejectment, upon a sheriff's sale under a fi. fa., brought against an alleged tenant of the executor of the debtor, no evidence need be given of the title of the executor, or of his testator. Such tenant cannot, after judgment by default against his landlord, as executor, set up the defence that the latter was not executor. *Sloan* v. *Whalen*, 15 C. P. 319.

Held, in ejectment by the sheriff's vendee of land, under a sale on a fi. fa., that the production of the ven. ex. under which the sale took place, and of the sheriff's deed, which recited the fi. fa., was sufficient primâ facie evidence to entitle the plaintiff to recover against the judgment debtor. *Low* v. *Hicks*, 21 C. P. 113.

Other Cases.]—A purchaser at a sheriff's sale of lands sold on an execution against a devisee, takes in preference to a purchaser on a subsequent execution, though prior judgment, against the executors of the testator. *Doe* d. *Auldjo* v. *Hollister*, 5 O. S. 739.

The sheriff's deed is primâ facie evidence that the writ was delivered to the sheriff and the lands seized and sold under it. *Doe* d. *Spafford* v. *Brown et al.*, 3 O. S. 90; *Mitchell* v. *Grover*, 3 C. P. 465.

In ejectment by the sheriff's vendee for land sold in execution, the writ of execution is sufficiently proved by its award on the roll, without producing the writ itself. *Doe* d. *Stocking* v. *Watts*, H. T. 6 Vict.

As to the right of a purchaser at sheriff's sale to set up the deed in the first place as valid, quoad the lessor and lessee, and then to repudiate it as invalid, quoad the execution creditor, *Doe* d. *McPherson* v. *Hunter*, 4 Q. B. 449.

Where a title is pleaded by purchase at sheriff's sale under a fi. fa., the judgment supporting the fi. fa. should be set out, and it should be averred that the sheriff seized while the writ was in force. *McDonell* v. *McDonell*, 9 Q. B. 259.

Although a sheriff's deed relates back to the day of sale for the purpose of defeating intermediate conveyances, still the vendee cannot bring ejectment until execution thereof. *Gwillim* v. *Beaton*, 12 C. P. 519.

The sheriff's deed was not produced, and after giving evidence of a search, which the court held sufficient, defendant, in order to prove it, put in an exemplification of the judgment and of the fi. fa. goods returned nulla bona

and he produced the fi. fa. lands found among the papers of the sheriff, since deceased, with a memorandum annexed, written and signed by the sheriff, stating that this lot had been sold at sheriff's sale, 11th December, 1824, for £125, to M., who had paid the sheriff's fees. The *Gazette* containing the advertisement of the sale of this lot on that day under the execution, was also produced. A memorial was then produced from the registrar's office of a deed dated the 16th December, 1830, by which the sheriff, in consideration of £125, granted F.'s interest in this lot to M. Possession had not been taken under the alleged deed till eighteen years afterwards, but it had gone for the last eighteen years in accordance with the title derived through it:—Held, that the sheriff could, in 1830, make a deed under the sale of 1824, notwithstanding the debtor's death; and that the evidence was sufficient to establish such deed. Variances between the amounts in the judgment and fi. fas. were held immaterial, as they could not avoid the sale. *Fields* v. *Livingston*, 17 C. P. 15.

The purchaser's title to land under a sheriff's sale is primâ facie good when the sale is made upon a legal writ, and a defendant seeking to defeat the sale on the ground of any defect anterior to the writ, must shew clearly and conclusively that there are those defects. *Doe* d. *Boulton* v. *Fergusson*, 5 Q. B. 515.

The title of a purchaser at sheriff's sale is not liable to be defeated by irregularities in the proceedings anterior to the judgment. So long as the judgment subsist in full force, it supports the execution, and the execution supports the sale. *Ib.*

Held, that the defendant in this case, claiming under a sheriff's deed upon a sale under a fi. fa. lands, who had purchased the judgment in the Court of Requests, at whose instance the action on it was brought, and who had purchased the land in question under an execution in that action, was bound to shew a judgment to warrant such execution. *McDade* d. *O'Connor* v. *Dafoe*, 15 Q. B. 386.

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6. *Setting aside Sale.*

The court refused to interfere equitably to set aside a sheriff's sale and covenant for the payment of the purchase money entered into thereon. *Wood* v. *Leeming*. Tay. 463.

Where an application was made to set aside a sale of land by a sheriff and delay the execution of a conveyance to his vendee, and notice of the motion and rule had been given to the sheriff and plaintiff's attorney, but not to the vendee, the court refused to interfere. *McGillis* v. *McDonald*, E. T. 3 Vict.

The court has authority to declare void a sale of lands by a sheriff. *McGill* v. *McGlaskan*, 6 Chy. 324.

The Court of Chancery will, in a proper case, set aside a deed for lands improperly sold by the sheriff under common law process, and will not leave a party to the remedy at law alone. *Campbell* v. *Smith*, 10 Chy. 206.

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7. *Other Cases.*

Held, that a judgment on sci. fa. against B., the heir of the deceased owner of the land, and a fi. fa. thereon awarding the sale of lands, of which the party deceased was seized on a specified day, previous to which he died, could not sustain a purchase, and that a sheriff's deed under such judgment and fi. fa. could give no title. *Varey* v. *Muirhead*, Dra. 486.

The heir at law is entitled to recover from a sheriff the surplus of moneys arising from a sale of his ancestor's lands on a fi. fa. against the lands in the hands of his executor. *Ruggles* v. *Beikie*, 3 O. S. 276.

The statutes 43 Geo. III. c. 1, and 2 Geo. IV. c. 1, s. 20, clearly contemplate a public sale in regard to lands, and that has always been the course both with respect to lands and goods.—Per Robinson, C. J. *Doe* d. *Miller* v. *Tiffany*, 5 Q. B. 79, 88.

Where the execution creditor had been paid his debt in full in 1840, by the assignee of the sheriff's vendee of land sold under a fi. fa. lands the court, upon the facts given in the report, set aside an order in chambers, obtained by the attorney for the assignee, and as if at the instance or with the consent of the execution creditor, for the issuing a fi. fa. lands in 1849 against the execution debtor, holding that it was not competent for the execution creditor at that distance of time to elect to consider his debt unsatisfied, and to act upon the assumption that the person who paid it did not make the payment in privity with his debtor. *Bank of Upper Canada* v. *Murphy*, 7 Q. B. 328.

The declaration (which is set out in substance in the report) was held insufficient:—1st. Because there was no averment that the sheriff seized before the return of the writ of fi. fa against lands; 2nd. That it not appearing that the said rent was anything more than a mere rent-seck, it would not be liable to seizure under a fi. fa. lands. *Dougall* v. *Turnbull*, 8 Q. B. 622.

Quære, does a rent charge come under the 5 Geo. II. c. 7, s. 4. *Ib.*

In an action against the sheriff for a false return to a fi. fa. lands it appeared that defendant, after the receipt of the plaintiff's writ, received another writ, at the suit of one S., and under this seized land owned by the debtor, and upon which S. had a mortgage for rent, S.'s judgment being for arrears of rent secured by such mortgage. S. bought the land for the amount of his judgment, and paid the sheriff's fees. At the trial, however, it did not appear whether defendant sold only the equity of redemption, or the debtor's interest in the land, exclusive of the mortgage. The court set aside a verdict for defendant, and granted a new trial with costs to abide the event. *Young* v. *Baby*, 4 C. P. 537.

The plaintiff in an execution against lands, is expected to point out to the sheriff the property of the debtor, but his not doing so does not relieve the sheriff, if by reasonable enquiries he could have ascertained the fact. Where the depaty-sheriff had notice of the debtor owning lands, it was held notice to the sheriff, although the latter had no personal knowledge on the subject, and he was held liable in an action for a false return. *Hutchings et al.* v. *Ruttan*, 6 C. P. 452.

A. by parol agreed with R. for the sale to him of certain land, received part of the price, and gave R. possession. A. subsequently as-

signed by parol the balance of the price to S., to whom he was indebted. P. after this assignment delivered to the sheriff an execution against the lands of A., and purchased at the sale the lands so agreed to be sold to R. :—Held, that no interest in the land passed under the sheriff's deed. *Parke* v. *Riley*, 3 E. & A. 215.

Semble, that this court would entertain a bill to compel a sheriff to convey property sold under execution; but the execution debtor must be made a party. *Witham* v. *Smith*, 5 Chy. 203.

A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment. An execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations; the mill and mill premises to an infant, on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and he should hold the same for the several owners. Accordingly, he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there and preventing any competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate upon being paid a proportionate share of the amount bid at the sale, except the mill and the mill premises, which the purchaser retained, and occupied and improved during the minority of the devisee, who on his attaining his full age demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court, under the circumstances, held the plaintiff entitled to redeem the mill premises; and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol. *McGill* v. *McGlashan*, 6 Chy. 324.

Although plaintiffs had been guilty of great delay in applying to this court for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an enquiry, the court granted the writ on an interlocutory motion; the plaintiffs undertaking to proceed to an examination of witnesses within one month after answer filed and hearing the cause forthwith thereafter, paying the costs at law incurred by reason of postponing the sale, and paying interest from the time the sale was to have taken place until the time of making the decree in the cause, in the event of the sale failing to realize enough to pay the full amount of the claim under the execution. *The Canada Permanent Building Society* v. *The Bank of U. C.*, 10 Chy. 203.

Where a mortgagor in possession was felling timber on the mortgage premises, the court at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the sheriff, granted an injunction to restrain future cutting, by the mortgagor, his servants, agents, and workmen, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor. *Wason* v. *Carpenter*, 13 Chy. 329.

V. Venditioni Exponas.

A ven. ex. against lands having but a few days between the teste and return is irregular, although the statutes respecting the teste delivery and return of the fi. fa. may have been complied with. *Armour* v. *Jackson* Tay. 115.

But it need not have three months between its teste and return. *Landrum* v. *Macmartin*, 1 Q. B. 394.—P. C.—Macaulay.

Nor, under 43 Geo. III. c. 1, need there be a year. *Doe* d. *Dissett* v. *McLeod*, 3 Q. B. 297.

Neither a sheriff nor his deputy can justify an entry, seizure, and sale of a defendant's goods under a ven. ex. *Stull* v. *McLeod*, T. T. 3 & 4 Vict.

The sheriff may sell under a ven. ex. after the return day. *Bank of U. C.* v. *Macfarlane*, 4 Q. B. 396.—P. C.—McLean.

Defendant in ejectment claimed under a sheriff's sale. It appeared that a fi. fa. was returned lands on hand, and a ven. ex. issued, to which there was a return of lands sold for £41, and no further lands; but this last part was of no effect, there being no fi. fa. residue. An alias ven. ex. then issued, instead of an alias fi. fa., and under this the land in question was taken and sold. Semble, that such sale could not be supported. *Chambers* v. *Dollar*, 29 Q. B. 599.

In ejectment, where defendant claimed under a sheriff's deed on an execution against lands, it appeard that a fi. fa. was returned lands on hand, and a ven. ex. issued, to which there was a return that the sheriff had made £41, and no further lands; an alias ven. ex. then issued, reciting a fi. fa. lands and a return thereto of goods on hand for want of buyers, and commanding the sheriff, as he had before been commanded, to sell the lands by him in form aforesaid taken. The sheriff, afterwards, in 1854, executed a deed reciting that he had seized this land in question under the alias ven. ex., and sold it to S., to whom he conveyed:—Held, that the sale could not be supported, and that the sheriff's deed passed nothing, for the proceedings shewed that this land had not been seized or advertised up to the return of the first ven. ex., and there was no fi. fa. lands which could warrant the second ven. ex. *Chambers* v. *Unger*, 25 C. P. 180.

See *Hall* v. *Goslee*, 15 C. P. 101, p. 1457.

VI. Alias, Pluries, Concurrent and Duplicate Writs.

Where, with a view of giving defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt, as the only proper mode of staying the execution, and which receipt the sheriff had stated in the return of the writ of fi. fa., the court ordered an alias to issue. *Hinnerley* v. *Gould*, Tay. 145.

It is an irregularity only, and not a nullity, to issue an alias after a return of "goods on hand" to the original fi. fa., and a ven. ex. upon it, on which the sheriff returns "that the goods had been exhausted by prior writs;" and the irregularity is waived by delay in the application against it. *The Commercial Bank* v. *McDonell et al.*, 1 Q. B. 406.—P. C.—Jones.

A pluries fi. fa. issued by the deputy clerk of the crown of an outer county, in which the papers of the cause had been filed, judgment having been entered in the office at Toronto: Held, regular. Held, also, that if such writ were irregular, a levy having been made under it on the 20th of December, this application on the 10th of February would be too late. Held, also, that the fact of a deputy clerk of the crown C. not having transmitted the original fi. fa. to Toronto, could not prejudice the plaintiff. *Gore Bank* v. *Gunn*, 1 P. R. 323.—C. L. Chamb.—Richards.

Held, conforming to previous decisions in this court, that where a fi. fa. against lands had been in the sheriff's hands for twelve months, and returned, nothing having been done upon it, the sheriff might sell under an alias issued thereon without waiting for a year from its receipt. *Campbell* v. *Delihanty et al.*, 24 Q. B. 236; *Nickall* v. *Crawford*, Tay. 277; *Ruttan* v. *Levisconte*, 16 Q. B. 495.

An original fi. fa. with the sheriff's return thereon, having been lost, the plaintiff was allowed to issue a duplicate, to obtain a return for warranting an alias. *McEwen* v. *Stoneburne*, T. T. 7 Will. IV.

The costs of a concurrent writ will not be disallowed unless it be shown that it was issued merely to make additional costs. *McKellar* v. *Grant*, 3 L. J. 14.—C. L. Chamb.—Hagarty.

Issue of second fi. fa. goods, the first having been returned, "money made" by mistake. *Rosel et al.* v. *Jones*, 2 L. J. 68.—C. L. Chamb.—Draper.

A fi. fa. lands was placed in the sheriff's hands, and, before the return day, the plaintiffs filed their bill in respect of property of the debtor fraudulently conveyed away. During the pendency of this suit sheriff returned the writ "no lands," and the plaintiffs thereupon delivered an alias writ to the sheriff.—Held, that the plaintiff had not thereby lost their right to proceed with the suit in equity. *Stevenson* v. *Franklin*, 16 Chy. 139.

See *Lee* v. *Neilson*, 3 L. J. 72, p. 1454.

VII. Equitable Execution.

Where a suit is brought for equitable execution against lands, in aid of a judgment at law, the bill must shew that an execution at law has been placed in the hands of the sheriff. *Shea* v. *Denison*, 14 Chy. 513.

Equitable interests cannot be reached by an execution creditor unless he commences a suit or takes some other step for the purpose during the currency of the writ. *Wilson* v. *Proudfoot*, 15 Chy. 103.

P. being insolvent, and unable to obtain in his own name a lease of certain real estate which he had previously held a lease of, procured one S. to apply for and obtain from the owner a lease to him, S., under an agreement that P. should continue to work the same as a nursery, and from the profits reimburse S. certain advances, and also pay a debt due by P. to him, and that P. should retain any balance for his own benefit. On a bill filed by a creditor of P., seeking to have S. declared a trustee for P., and to have his interest sold:—Held, that although there was no resulting trust nor any trust manifested in writing, still that P. had such an interest under the lease as could be reached in this court by an equitable execution on a proper case being made for such relief; and to enable the plaintiff to make such a case, leave was given to him to amend on terms. *Toms* v. *Peck*, 12 Chy. 345.

The interest of a debtor in land, bought from the crown, but not fully paid for at his death, and not patented, is available in equity for his creditors; and their right is not destroyed by a friend of the heirs paying the purchase money, and procuring the patent in the names of the heirs. *Ferguson* v. *Ferguson*, 16 Chy. 309.

VIII. Endorsement on Executions.

The court will not interfere on a strict legal ground only to reduce the sum endorsed to levy on a fi. fa. *Maitland* v. *Secord*, Dra. 456.

In taking out a fi. fa. against executors for costs, the costs directed to be levied must follow the judgment; and where the sum endorsed on the fi. fa. is not warranted by the judgment, it will be referred to the master to tax the proper costs, and to reduce the endorsement accordingly. *The Gore Bank* v. *Gunn*, 1 C. L. Chamb. 170.—Macaulay.

In an action on a bail bond,—Held, that the endorsement on the writ of execution being stated to be for a less sum than that mentioned in the judgment, was no ground of special demurrer. *Easton et al.* v. *Longchamp*, 3 Q. B. 475.

Ten dollars is an excessive endorsement on a fi. fa. goods for the expense of the writ, and the moment a writ so endorsed is handed to a sheriff the party aggrieved can apply to have a reference to the master to reduce the amount, and make the attorney in default pay the costs, even though the attorney accepts a less amount, which the debtor tenders to him, as sufficient. *Corbett* v. *Wallbridge*, 2 L. J. N. S. 331.—C. L. Chamb.—Hagarty.

Where part of a debt has been levied under a fi. fa., and the writ returned, either a fi. fa. residue or an alias may issue. The former is the more correct; but if the latter be issued, it must, on the face of it, agree with the judgment. The endorsement must be according to the true amount to be levied. *Lee* v. *Neilson*, 3 L. J. 72.—C. L. Chamb.—Robinson.

A plaintiff cannot levy on a fi. fa. the amount paid by him for a certificate of judgment. *Hutchinson* v. *Baby*, 2 P. R. 126.—P. C.—Burns; *Wilt* v. *Lai*, 1 C. L. Chamb. 216—Burns; *McKellar* v. *Grant*, 3 L. J 14.—C. L. Chamb.—Hagarty.

Plaintiffs, without having previously issued process, on 3rd October, 1857, took a confession of judgment, and neglected to file it, or a copy of it, within a month, as prescribed by the statute.

On 11th February, 1858, they entered judgment. On 24th October, 1858, issued a fi. fa. goods; had same returned nulla bonâ. On 10th August, 1861, issued a fi. fa. lands. Had same renewed 10th August, 1862. On 2nd February, 1863, amended the endorsement of levy on writ, and afterwards obtained a summons for leave to amend the endorsement on writs of fi. fa. lands, in the hands of the sheriff, by increasing the amount endorsed, or for a new writ of fi. fa. lands:—Held, that so long as the confession was open to the objection of not having been filed within the month, and so not valid to support the judgment, that the amendment could not be allowed. Semble, if relief could have been afforded to plaintiff, it could only have been by making the other execution creditors of defendant and the sheriff parties to the summons. *Rigney et al.* v. *Durie*, 9 L. J. 185.—C. L. Chamb. —A. Wilson.

In a fi. fa. and the endorsements thereon the plaintiffs were styled defendants, and vice versa, the words being transposed throughout, and the christian names of the defendant were also transposed:—Held, clearly irregular. *Davidson et al.* v. *Grange*, 5 P. R. 258.—C. L. Chamb.—Morrison.

IX. Renewing Writs.

Held, that under sec. 249, of C. L. P. Act, writs of execution (except a ca. sa.) could only be renewed once. *Nelson* v. *Jarvis*, 13 C. P. 176.

No renewal can take place when such a writ has been acted upon or a levy made. *Ib.*

27 Vict. c. 13, s. 2, which allowed repeated renewals (now C. L. P. Act, s. 249), was held not retrospective. *Miller* v. *Beaver Mutual Fire Insurance Association*, 14 C. P. 399.

The taking a writ from the sheriff for renewal, is not an abandonment, giving priority to other writs then in his hands, but the replacing the writ in his hands upon such renewal, gives it the same position as it held previous to the removal of it, the question of the object of such removal always being a matter of fact for decision upon the circumstances. *Rowe* v. *Jarvis*, 13 C. P. 495; *Muir* v. *Munro*, 23 Q. B. 139.

The day of the teste of a fi. fa. lands is inclusive; so that a writ issued on 16th May, 1861, expires on the 15th May, 1862, and a renewal on the 16th May, 1862, is too late. *Bank of Montreal* v. *Taylor*, 15 C. P. 107.

Where shortly before the return day of a fi. fa. lands, the plaintiff obtained it from the sheriff for renewal, and did not return it for fifteen days, when a year from the teste had expired:—Held, not an abandonment of the plaintiff's rights under the execution. *Meneilly* v. *McKenzie*, 3 E. & A. 209.

X. Abandonment.

Where personal property had been seized in execution by a sheriff and afterwards abandoned by direction of the plaintiff's attorney, and a memorandum of the suit being discharged given to defendant, but the sheriff was afterwards directed to proceed, and sold to the plaintiff in this action (the property in the meantime having been sold bonâ fide by the defendant, who had left it in the possession of the defendant in this action):—Held, that no property passed to the plaintiff by the sheriff's sale, as the levy had been abandoned, and a bonâ fide sale afterwards made by the execution defendant. *Gould* v. *White*, 4 O. S. 124.

A chattel was seized by the sheriff, and lent by him before the return of the writ:—Held, no abandonment. *Hamilton* v. *Bouck*, 5 O. S. 664.

The sheriff, on the 15th of April, 1835, received a fi. fa. lands, and on the 10th of May, 1836, sold some of defendant's lands under it; but other portions of the land, though included in the advertisement published previously to that sale, were not sold. There being no adjournment nor postponement of the sale, nor any new advertisement, the sheriff, in December, 1838, proceeded to sell under the same writ the lands unsold in 1836; but, Held, that the seizure under the writ of 1835, must be considered as abandoned, and the sale of 1838 void. *Doe d. Cameron* v. *Robinson et al.*, 7 Q. B. 335.

Held, under the facts set out in this case, that there was no reasonable ground to presume an abandonment of the execution against lands. *Mitchell* v. *Greenwood*, 3 C. P. 465.

A sheriff having seized goods under execution, took a bond for the delivery thereof when required, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor, was received by the sheriff:—Held, that the second writ took precedence of the first. *Castle* v. *Ruttan*, 4 C. P. 252.

Held, that under the evidence stated in this case, the sheriff could not be said to have abandoned the seizure under a fi. fa. goods. *Walton* v. *Jarvis*, 14 Q. B. 640.

It appeared that the plaintiff's attorney in the execution had directed the sheriff not to sell the goods of L., but to levy upon another defendant in the suit; and that that defendant having remonstrated and urged him sell, he telegraphed to the attorney to know if he should do so, and in answer, was told that he must act as he thought fit, according to his own judgment:—Held, that this answer was an abandonment of the first direction. *Boulton et al.* v. *Smith*, 17 Q. B. 400.

The bailiff, having merely made an inventory of the goods seized under a fi. fa. goods, leaving no one in possession:—Held, that they were not in "custodiâ legis," and therefore could not be held against the landlord's claim for rent. *Hart* v. *Reynolds*, 13 C. P. 501. See, also, *McIntyre* v. *Stata*, 4 C. P. 248; *Robertson* v. *Fortune*, 9 C. P. 427.

In an action against the sheriff for a false return:—Held, that the long delay in respect of the writ of H. over which the plaintiffs claimed priority, in the sheriff's hands, from 1859 to 1862, was not, under the circumstances stated in this case, in law an abandonment, although it was evidence thereof. *Mein* v. *Hall*, 13 C. P. 518.

Taking a writ from the sheriff for renewal is not an abandonment. *Rowe* v. *Jarvis*, 13 C. P.

495; *Muir* v. *Munro*, 23 Q. B. 139; *Mencilly* v. *McKenzie*, 3 E. & A. 209.

Held, that the non-adjournment of the sale advertised for 12th September, 1863, (which did not take place,) and the publication of an apparently independent notice in the following June, under the plaintiff's ven. ex., did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much upon intention. *Hall* v. *Goslee*, 15 C. P. 101.

Held, affirming Oswald *v.* Rykert, 22 Q. B. 306, that the issuing of a fi. fa. lands and alias fi. fa. goods concurrently was objectionable; but that the latter, not having been acted on, could be abandoned and the fi. fa. lands retained. *The Ontario Bank* v. *Kerby*, 16 C. P. 35.

In an action against a sheriff for a false return, it appeared that on the day before the plaintiffs' writ came in he received a fi. fa. at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ he did nothing. The plaintiffs' attorney wrote twice urging him to act, and ruled him, and in February, 1866, he returned that writ nulla bona, K.'s writ having been previously renewed. The court being left to draw inferences of fact:—Held, that as a matter of fact the sheriff never seized, or that as a matter of law he abandoned it. *Foster et al.* v. *Glass*, 26 Q. B. 277. See, also, *McGivern* v. *McCausland et al.*, 19 C. P. 469.

XI. Priority of Executions.

1. *Loss of Priority by Directions not to Execute.*

Where writs of fi. fa. goods were placed in the hands of a sheriff by several plaintiffs, with directions to levy, but not to sell unless another execution was delivered to him; and having received another execution returnable the same term as the former executions, he returned it nulla bona, and sold under the first:—Held, that the sheriff was liable for a false return, the directions by the first execution creditors being fraudulent as to the subsequent creditors, and the first executions thereby losing their priority. *Rose et al.* v. *Hamilton*, E. T. 3 Vict.

A fi. fa. placed in the sheriff's hands with instructions not to sell until another writ comes in, is not in his hands to be executed, and will not bind the goods, either against a subsequent execution or a bonâ fide purchaser for value. *Foster et al.* v. *Smith*, 13 Q. B. 243.

Judgment creditors having executions in the sheriff's hands under which a seizure had been made, signed an agreement giving the defendant an extension of time for payment on certain conditions therein mentioned. Upwards of thirty days afterwards defendant assigned under the insolvent acts, the conditions of the agreement having been so far performed:—Held, 1. That the writs were not in the sheriff's hands for execution, and that the assignment made more than thirty days after their delivery to the sheriff took priority. *In re Ross*, 3 P. R. 394.—C. L. Chamb.—J. Wilson.

The county of Elgin having a writ in the sheriff's hands against the lands of L. prior to the plaintiff's writ, passed a resolution requesting the warden to notify their solicitor not to enforce such execution until further instructions, which was transmitted to the solicitor. In May, 1862, the sheriff, being about to advertise, went to the attorney, and was told by him that he need not advertise under the county's writ. He therefore advertised L.'s lands in the *Gazette* and a local paper, under other writs, making no mention of it. After three weekly insertions, he was directed by the attorney to advertise upon it, and thereupon added a note to the local advertisement, stating that the proceeds of the sale would also be held liable to satisfy this writ, but made no change in the *Gazette*:—Held, that from the time of the direction to the sheriff not to advertise, which was the same in effect as a direction to stay on a writ against goods, the county's writ was not in the sheriff's hands to be executed; that it had therefore lost its priority; and that the subsequent order to proceed could not restore it. The omission of the writ from the advertisement would alone have been immaterial, as the seizure and sale have relation to all the writs in the sheriff's hands for execution. *Bank of Montreal* v. *Munro*, 23 Q. B. 414.

Although the fact of a party not pressing a pluries fi. fa. in the sheriff's hands, coupled with the undoubted fact that he had placed the original writs there not to be executed, is evidence on which a jury may find that the later writ has also been delivered to the sheriff not to be acted on, and has therefore lost its priority; yet, the jury having found otherwise, the court would not interfere with the verdict, as it could not be said that there was no evidence to support it. *Kerr et al.* v. *Kinsey*, 15 C. P. 531.

Two executions against lands were in the hands of the sheriff, and the sheriff had advertised a sale under the first writ. On the morning of the intended sale the sheriff was directed not to proceed with it, and accordingly the sale did not take place:—Held, that the first execution was thereby postponed to the second; the direction to the sheriff being peremptory, although it was given for no fraudulent purpose, and although in giving it there was no intention of abandoning the seizure. *The Trust and Loan Co.* v. *Cuthbert*, 13 Chy. 412.

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2. *Other Cases.*

In determining the priority of writs, the court will look to the fraction of a day. *Beckman* v. *Jarvis*, 3 Q. B. 280. See *Converse* v. *Michie*, 16 C. P. 167.

A purchaser at sheriff's sale of lands sold on an execution against a devisee, takes in preference to a purchaser on a subsequent execution, though prior judgment, against the executor of the testator. *Doe* d. *Auldjo* v. *Hollister*, 5 O. S. 739.

Where lands are conveyed to a purchaser against whom judgments are then registered, and executions against lands in the sheriff's hands, and a mortgage is taken back on the same day for a balance of purchase money, the judgments and

executions attach before the mortgage. *Ruttan* v. *Levisconte*, 16 Q. B. 495.

It is a matter of indifference under what writ a sheriff seizes and sells the property of a debtor, such seizure having relation to all the writs at the time in his hands. He must appropriate the money according to the priority of the writs. *Rowe* v. *Jarvis*, 13 C. P. 495. See *Bank of Montreal* v. *Munro*, 23 Q. B. 414.

It is not illegal for a sheriff, having withdrawn from the custody of goods under a fi. fa., again to take possession during the currency of the writ; and a second seizure under such writ prior to the receipt of another execution gives the first writ priority. *Gates* v. *Smith*, 13 C. P. 572.

An alias fi. fa. at the suit of B. was received by the then sheriff, F., on the 26th of September, 1861, and having been renewed was returned on the 7th of September, 1863, goods on hand 1s. and nulla bona as to the residue. This return was made at the request of B.'s attorney, although there had been no seizure, as the attorney doubted whether the fi. fa. could be renewed a second time. On the 22nd a ven. ex. and fi. fa. residue was delivered to the same sheriff, and remained with him until his removal from office on the 10th of March, 1864, when defendant was appointed, but no transfer of the writ to him by indenture was made until the 9th of May following. On the 15th of April, 1864, the plaintiff's fi. fa. came in, and soon after the debtor's interest in certain crops was sold, and the proceeds paid over by defendant to B., who indemnified him. The plaintiff thereupon sued the sheriff for falsely returning his writ nulla bona, contending (among other things) that the return to B.'s alias fi. fa. being false to B.'s knowledge and procured by him, the ven. ex. and fi. fa. founded upon it was void. There was no evidence of any fraud; and it appeared that B.'s writ had been placed and continued in the sheriff's hands for execution. The reason assigned for the long delay in acting upon it was that the debtor's goods had been sold under execution in 1861, and were supposed to be exhausted:—Held, affirming the judgment of the county court, that B.'s writ had priority, for the return, though not true in fact, bound the late sheriff and B., and could not prejudice the plaintiff. *Robinson* v. *Waddell*, 24 Q. B. 488.

The plaintiff, on the 14th April, 1864, gave defendant a fi. fa. against G., S., and L., the defendant then having a writ against G. and L. at the suit of Hingston, and one against G. alone, at the suit of F. On the 20th he received a writ against L., at the suit of Harty. G., S., and L. carried on business as G. & Co., each living at a different place, and S. having authorized L. to act for her in the partnership by power of attorney. The plaintiff's judgment and Harty's were both for partnership debts. On the 5th February, 1864, the firm made an assignment to E., in trust, to pay all their creditors equally. He sold the goods, and on the 14th April, 1864, paid the proceeds to the defendant, who gave a receipt for it, "to be applied to executions in my hands against G. and G. et al." E. had previously telegraphed to the plaintiff's attorney for instructions as to whether he should pay this money to the sheriff, and being told to pay him, he did so, and took the receipt, not being aware at the time of any execution but the plaintiff's. On the 20th April, 1864, Harty notified defendant not to pay over the money, as the plaintiff's judgment was invalid, and on the 19th September following, the plaintiff's judgment and execution, and all proceedings subsequent to appearance, were set aside. The plaintiff again proceeded with the action, and on the 4th December, 1864, placed another fi. fa. in defendant's hands, which he returned no goods, having paid over the money to Harty before the plaintiff had recovered judgment. The plaintiff having sued defendant for not levying, and for money had and received:—Held, that he could not recover: that as to the first count, the execution defendants had nothing in defendant's hands during the currency of the plaintiff's writ, for if the assignment to E. was valid, their estate had vested in him, and if void, they had through E. paid over the money to defendant, who received it as sheriff for the purpose mentioned in his receipt; and as to the second count, defendant was entitled to apply this money as specified in his receipt, and was not bound to wait until an execution came to him against all the members of the firm. *Clark* v. *Corbett*, 27 Q. B. 161.

On the 23rd July, 1868, M. recovered judgment against J. for $2,023.51, and issued a fi. fa. against goods, the execution of which was delayed until the end of the following month by an application to amend. On the third of October, 1868, J. gave plaintiff a chattel mortgage, which was registered the 6th October, payable a year after date. J., with the plaintiff's consent, continued his business, and had sold a large part of the chattels when the plaintiff (in January, 1869,) came to take possession. Thereupon the sheriff, whose previous action under the fi. fa., if any, did not appear, but who had no authority for the delay, seized and sold the remaining goods, when plaintiff brought trover against him, plaintiff, and defendant in the execution, and another who had joined in indemnifying the sheriff, contending that the delay in executing the fi. fa. gave his chattel mortgage priority. The jury gave a verdict for $1,510 against the sheriff, and in favour of all the other defendants. This verdict being inconsistent with any view of the facts, and exorbitant in amount, was set aside; costs to abide the event. *McGivern* v. *McCausland et al.*, 19 C. P. 460.

A mortgagee paying off a prior execution has a lien therefor against subsequent executions. *Trust and Loan Co.* v. *Cuthbert*, 14 Chy. 410.

A. obtained a judgment against B. and registered the same, and obtained fi. fas. against lands; kept them in force and filed a bill on the judgment before the act abolishing registration of judgments. C. had obtained judgment against B. and registered it, but subsequently to A. C. filed his bill to set aside a prior sale made by B. to D., not making A. a party. A decree was pronounced in his favour sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party and have his priority declared in such suit:—Held, that he could not by petition make himself a party to that suit, and that his remedy, if at all, was by bill. Quære, had he any remedy at all. *City Bank* v. *McConkey*, 3 L. J. N. S. 125.—Chy.

Where certain creditors of a deceased insolvent sued his executor, recovered judgment, and sold his real estate, and got paid in full:—Held, that

they were still bound to account, and that the other creditors of the insolvent were entitled to have the whole estate distributed pro rata under 29 Vict. c. 28. *Bank of British North America* v. *Mallory*, 17 Chy. 102.

The plaintiff and another bought from the testator's executors and trustees certain real and personal estate. The real estate was subject to a mortgage, which the vendors agreed to pay; the purchasers paid their purchase money, but the vendors applied the same to pay other debts of the testator and left the mortgage in part unpaid; the plaintiff, having bought out his co-purchaser, filed a bill against the executors. A decree by consent was made giving the plaintiff a lien on the testator's assets, ordering the defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and enquiries usual in an administration suit. The estate was insufficient to pay all the creditors. Before the making of the decree a creditor of the estate had obtained judgment against the executors, and the sheriff seized and sold goods of the testator in their hands:—Held, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry* v. *Sharp*, 18 Chy. 16.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority, nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Meyers* v. *Meyers*, 19 Chy. 185.

XII. Setting aside Executions.

The court will not set aside an execution upon the ground that the action was commenced in debt and the cognovit given in assumpsit. *Brown* v. *Waldron*, Tay. 494.

The court will, after a sale of lands under an execution, prevent an assignment by the sheriff to the purchaser, where good cause is shewn for requiring their interference. *Bank of U. C.* v. *Miller*, H. T. 3 Vict.

Where in an action against an absconding debtor proceedings had been carried to judgment and execution against his lands, and he moved to set aside the execution for a variance between it and the judgment, and the plaintiff was allowed to amend:—Held, that he was afterwards too late to object to irregularities in earlier proceedings in the cause, as he should have brought them forward on his first motion. *Dougall* v. *Lewis*, T. T. 5 & 6 Vict.—P. C.—Macaulay.

The court refused a rule to set aside a fi. fa. because issued by the officer at his own house before office hours. *Rolker et al.* v. *Fuller*, 10 Q. B. 477.

Where a fi. fa. is in itself regular, the court will not set it aside because the sheriff did not take any proceedings under it during its currency, but advertised lands after the return day thereof. *Morrison* v. *Rees*, 1 P. R. 25.—P. C.—Draper.

An irregular execution will not be set aside at the instance of a subsequent execution creditor. *Perrin* v. *Bowes*, 5 L. J. 138.—C. L. Chamb.—Robinson; *Farr* v. *Arderly*, 1 Q. B. 337; *Parker* v. *Howell*, 7 L. J. 209.—C. C.—Mackenzie.

A fi. fa. issued on a judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and, if knowingly issued, an abuse of the process of the court. *Randall* v. *Bowman et al.*, 1 L. J. N. S. 158.—C. L. Chamb.—A. Wilson.

Defendants, who were in business, knowing that the writ had been irregularly issued, said on the day after the issue of execution that they would not mind the issue of the writ if they were only allowed to keep their store open for the remainder of the week, to which the sheriff assented and made arrangements for so doing:—Held, not to be a waiver of the irregularity in the issue of the execution. *Ib.*

Quære, can debtors, who, being unable to pay their debts in full before the issue of execution, called a meeting of their creditors with a view to an assignment under the Insolvency Act, waive an irregularity in the issue of execution, whereby one of their creditors gains an advantage over the general body of creditors. Five days after the execution, and four days after the conversation above mentioned, the debtors made an assignment for the general benefit of creditors under the Insolvent Act:—Held, that the assignee in conjunction with the debtors, were the proper parties to move to set aside the execution. *Ib.*

The plaintiff issued a fi. fa. lands on the 7th June, 1865, and renewed it from time to time until 4th June, 1867. On the 30th March, 1867, defendant obtained his discharge in insolvency. Plaintiff had proved his claim for the full amount of the judgment in the Insolvent Court, and had never attempted to take any proceedings under the writ, which he refused to withdraw, although requested to do so. The court set the fi. fa. aside with costs. *Dickinson* v. *Bunnell*, 19 C. P. 216.

A person having a claim against the owner of a mill, brought an action against his executors, and recovered judgment. An execution against lands was sued out and placed in the hands of the sheriff, under which all the lands of the testator, of which the mill and mill premises formed a portion, were duly advertised for sale by the sheriff. The testator by his will had devised his lands to his relations; the mill and mill premises to an infant, on his attaining twenty-one, his father during his minority being entitled thereto. By an agreement made by the adult devisees with a friend of the family, it was arranged that this person should attend at the sheriff's sale and bid such an amount for the whole property as would cover the execution debt and costs, and that he should hold the same for the several owners. Accordingly, he attended at the sale and bid the stipulated amount, the proprietors and their agent also attending there, and preventing any competition by openly announcing the arrangement which had been made; and only one bid was made for the property, which was duly conveyed by the sheriff to the purchaser, who afterwards conveyed to the devisees their respective portions of the estate, upon being paid a proportionate share of the amount bid at the sale, except the mill and mill premises, which the purchaser retained, and occupied and improved during the minority of the devisee, who on his attaining his full age

demanded a conveyance, which demand the purchaser refused to comply with, alleging the purchase thereof to have been for his own benefit, whereupon the devisee filed a bill to compel the purchaser to carry out the arrangement. The court, under the circumstances, held the plaintiff entitled to redeem the mill premises, and that the arrangement under which the purchase was made at sheriff's sale was capable of being proved by parol. *McGill* v. *McGlashan*, 6 Chy. 324.

Where a rule for setting aside a fi. fa. against lands was discharged at law under a material error as to the facts:—Held, no bar to relief in equity at the suit of the debtor's grantee of the lands. *Paton* v. *The Ontario Bank*, 13 Chy. 107.

A judgment creditor had issued at the same time, and placed in the hands of the sheriff, alias fi. fas. against goods and fi. fas. against lands. The sheriff by direction of the creditor made a seizure of goods. The writs against goods were afterwards and before sale thereunder withdrawn; but meanwhile the debtor had conveyed his land in trust for creditors:—Held, that the grantee was entitled in equity to restrain a sale under the fi. fas. against lands. *Ib.*

XIII. Staying or Controlling Executions.

The court will not restrain a plaintiff from levying the whole of his debt on one of several defendants. *Zavitz* v. *Hoover et al.*, M. T. 2 Vict.

Refusal (by Macaulay, J.,) to control the plaintiff or his attorney, or the sheriff, so as to require them to proceed upon a fi. fa. against the goods of several defendants *in succession*, first exhausting the goods of one, and then levying on another. *Commercial Bank* v. *Vankoughnet et al.*, 1 C. L. Chamb. 260.

This court or a judge may at any time interfere, as exercising the powers of the Court of Exchequer, to restrain undue harshness or haste in the execution of a writ issued for the crown, although what is complained of may be strictly authorized. *Regina* v. *Desjardins Canal Co.*, 29 Q. B. 165.

The court will not stay proceedings on a fi. fa. goods taken out under a cognovit, because there has been a verbal arrangment when the cognovit was given that the plaintiff would only resort to lands. *McPherson* v. *Sutherland*, Tay. 422.

Where the plaintiff obtained judgment ten years ago, and two or three years afterwards fled from the province charged with a criminal offence, and a writ of execution was issued on the judgment without any leave of the court, or notice to the party, the court stayed the proceedings. *Hobson* v. *Shand*, 3 Q. B. 74.

Quære, as to the power of the court or a judge to delay plaintiff's proceedings on an execution, in order to enable defendants to institute an action, and to acquire a position in which they may apply to set off the judgment to be recovered by them against plaintiff's judgment. Semble, there is no authority for such a course. *Lynch* v. *Wilson*, 9 L. J. 242.—C. L. Chamb.—Draper.

Where judgment was, on 28th December, 1860, recovered by plaintiff against defendant for £2,486 14s. 8d. debt, and afterwards defendant made large payments of money to plaintiff, part of which plaintiff alleged he received upon an agreement to pay 12½ per cent. interest for forbearance, which agreement defendant denied, and the facts admitted between the parties went far to establish some such agreement or arrangement, a summons obtained by defendant (who sought to have all interest in excess of 6 per cent. applied in reduction of the judgment debt), calling upon plaintiff, among other things, to show cause why all proceedings should not be stayed on a fi. fa. against the goods of defendant, then in the hands of the sheriff, was discharged with costs. *Freeland* v. *Bissett*, 9 L. J. 299.—C. L. Chamb.—A. Wilson.

A judgment creditor issued at the same time, and placed in the hands of the sheriff, distinct fas. against goods and fi. fas. against lands. The Sheriff, by direction of the creditor, seized goods, and the writs against goods were, before sale, withdrawn; meanwhile the debtor had conveyed his land in trust for creditors. An injunction was granted at the instance of the grantee to restrain a sale under the writs against lands until the hearing. *Paton* v. *The Ontario Bank*, 12 Chy. 366. See, also, *S. C.* on the hearing 13 Chy. 107.

Where a bill is filed to restrain the seizure of the goods of A. on an execution against B., on the ground that the goods have a peculiar value which damages would not compensate, there should be distinct and precise allegations of the necessary facts: and a general allegation that the damage will be irreparable is not sufficient on demurrer. *Gartshore* v. *The Gore Bank*, 13 Chy. 187.

XIV. Miscellaneous Cases.

In an action against a sheriff for the overplus of money levied under an execution, the plaintiff must prove a demand of the money before action brought. *Ruggles* v. *Beikie*, 3 O. S. 276.

The court will not order that execution shall issue on a judgment for the benefit of a stranger to the judgment. *Gamble* v. *Bussell*, 5 O. S. 339.

The court refused to grant a mandamus to compel two justices of the peace to issue execution upon a conviction under 6 Will. IV. c. 4, s. 2, for selling liquors without license, the conviction having been founded upon the written statement of the informer, and the oath of one other witness, there being a doubt under the statutes whether the information ought not also to be on oath. *Regina* v. *McConnell*, 6 O. S. 629.

A sheriff cannot in any manner become the purchaser of property sold under an execution. *Doe* d. *Thompson* v. *McKenzie*, M. T. 2 Vict.

Where in an action by an executrix against a sheriff for money had and received to her use as executrix on a writ of fi. fa. against one D., which when produced recited a recovery by the plaintiff executrix against D. for not performing certain promises and undertakings made to the plaintiff and for her costs, &c., and the defendant offered to give in evidence a set-off against the plaintiff in her own right:—Held, that it was inadmissible, the plaintiff claiming in her representative character, although the writ of fi. fa. was informally worded. *Devlin* v. *Jarvis*, E. T. 3 Vict.

A sheriff seized goods under an execution, but left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested to do so. The landlord of the execution debtor having seized and sold the goods for rent due to him by the debtor:—Held, in an action of trover by the sheriff against the landlord that the sheriff had not at the time of the distress such a possession of the goods as precluded the landlord from distraining for rent. *McIntyre* v. *Stata*, 4 C. P. 248. See *Robertson* v. *Fortune*, 9 C. P. 427.

Courts of equity cannot, any more than courts of law, on the footing of want of notice of illegality, give effect to proceedings which, on principles of the common law and under acts of parliament are utterly void. *Gardiner* v. *Jusson*, 2 E. & A. 188.

Per McLean, J., parties sending writs to the sheriff by mail which require immediate attention, must run the risk of his delay in sending to the post office. *Robinson* v. *Grange*, 18 Q. B. 260.

It is not *necessary* that a writ of fi. fa., which has not been returned, should be enrolled before it can be given in evidence; but the writ itself may, if produced, be given in evidence, and if lost and unenrolled evidence may be given of it. *Soules* v. *Donovan*, 15 C. P. 121.

Held, that the issuing of the writ of execution may be entered on the roll at any time, though no return may then have been made to it. *Ib.*

Quere, whether the production of a writ of execution against the goods of defendant is sufficient for all purposes to shew the plaintiff in such writ to be his creditor. *Kissock* v. *Jarvis*, 6 C. P. 393.

To obtain an order for execution under C. S. U. C. c. 24, s. 19, the service of the summons must be personal, or leave must be obtained to make it in some other manner. *Clifton* v. *Durand*, 3 P. R. 60.—C. L. Chamb.—Burns.

A writ of assignment of dower is a writ of execution within the 249th sec. of the C. L. P. Act, and may therefore be tested on the day on which it is issued. *Fisher* v. *Grace*, 28 Q. B. 312.

There were three executions in the sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows:—"I agree with G. W. & C. (the plaintiffs,) to pay off the principal, interest, and costs, with sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with defendant to go out to the place and postpone it, for which the defendant was to pay the expense. When the bailiff got there, the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of $45) which was paid to defendant. The plaintiffs thereupon sued the defendant on his guarantee:—Held, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the plaintiffs were the proper parties to sue. *Guthrie et al.* v. *O'Connor*, 36 Q. B. 372.

EXECUTORS AND ADMINISTRATORS.

I. Probate and Letters of Administration.
1. *Generally*, 1467.
2. *Renunciation*, 1470.
3. *Foreign Administrators*, 1471.

II. Administrator of Administrator, 1472.

III. Rights, Authority, and Duty.
1. *Remuneration.*
(a) *Services Rendered*, 1472.
(b) *Expenditure and Advances*, 1473.
(c) *Costs in Administration Suits*—*See* Administration Suit.
2. *As to Debts due them by the Testator*, 1477.
3. *In Collecting and Realizing the Estate*, 1478.
4. *Managing Real Estate*, 1479.
5. *Other Cases*, 1480.
6. *Right to Redeem Mortgages*—*See* Mortgage.
7. *Dealing with and Purchasing from the Estate*—*See* Trusts and Trustees.
8. *As Trustees*—*See* Trusts and Trustees.

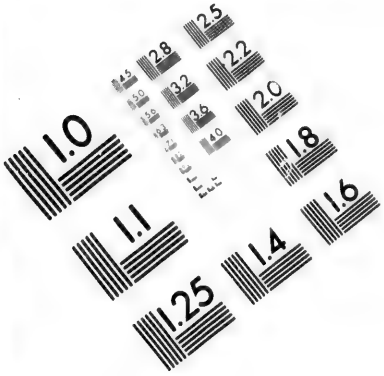
IV. Liabilities.
1. *Personal Liability.*
(a) *For Acts of each other*, 1482.
(b) *Other Cases*, 1483.
2. *Distribution of Assets*, 1485.
3. *Devastavit*, 1486.
4. *For Interest*, 1487.
5. *For Costs*, 1489.
6. *Other Cases*, 1490.
7. *Parties to Bills or Notes*—*See* Bills of Exchange and Promissory Notes.
8. *Legacies*—*See* Legacy.

V. Parties to Suits.
1. *Foreclosure*—*See* Mortgage.
2. *Bills of Sale*—*See* Mortgage.
3. *Other Suits*—*See* Pleading in Equity

VI. Actions and Suits by.
1. *Pleading*, 1491.
2. *Other Cases*, 1491.
3. *For Use and Occupation*—*See* Use and Occupation.

VII. Actions and Proceedings Against.
1. *Pleading*, 1492.
2. *Other Cases*, 1494.

VIII. Evidence in Actions and Suits by and Against.



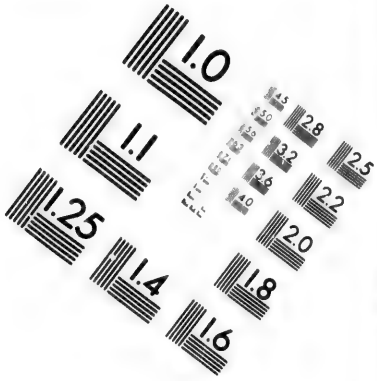
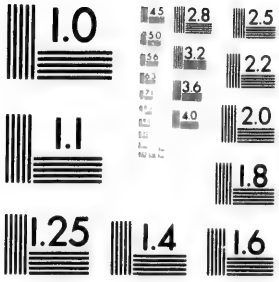
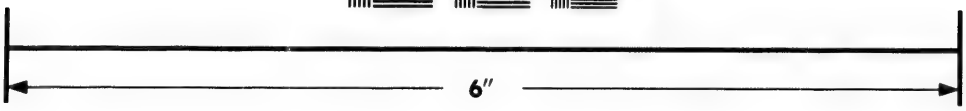
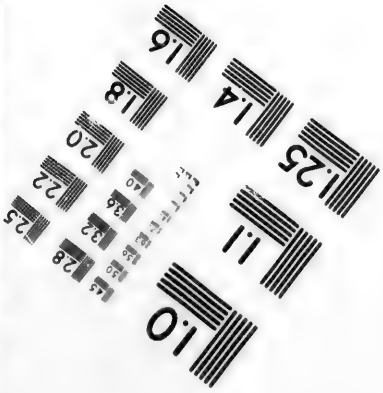
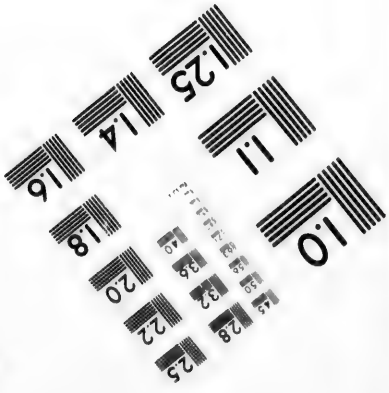


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1. *Proof of Representative Character*, 1498.

2. *Other Cases*, 1499.

IX. Actions on Administration Bonds.

1. *Assignment of Bond*, 1500.

2. *Under 33 Geo. III. c. 8*, 1500.

3. *Under Surrogate Courts Act, C. S. U. C. c. 16*, 1501.

X. Lands as Assets in the Hands of Executors or Administrators, 1502.

XI. Executor de Son Tort, 1505.

XII. Miscellaneous Cases, 1506.

XIII. Administration Suits—*See* Administration Suit.

XIV. Administration ad Litem—*See* Administration Suit.

XV. Reference to Arbitration by—*See* Arbitration and Award.

XVI. Creditor's Suit—*See* Creditor's Suit.

XVII. Distributing Estate—*See* Distribution of Estate.

XVIII. Appointment of Personal Representative—*See* Practice in Equity.

XIX. Special Powers under Wills—*See* Wills.

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1. Probate and Letters of Administration.

1. *Generally.*

Leave to sue on a bond given to the lieutenant-governour for the time being, as judge of the Court of Probate, should be applied for to that court, not to the Court of Queen's Bench. *In re Steyman*, 5 O. S. 71.

Action on a note made by defendant, payable to B., and endorsed by B.'s administrator to plaintiff:—Held, no ground for impeaching the endorsement of the administrator, that the debtor at the time of the intestate's death resided out of the jurisdiction of the Surrogate Court by which the letters of administration had been granted. *Wright* v. *Meriam*, 6 O. S. 463.

Where to an action on a note brought by an executor, the defendant pleaded that at the time of the testator's death the defendant resided in the London district, and that therefore the letters testamentary granted by the Surrogate Court of the Home district were void, and the plaintiff demurred, the court gave judgment against the demurrer. *King* v. *Claris*, H. T. 2 Vict.

Probate of a will granted by the Court of Canterbury, gives no title to an executor to sue for a cause of action accruing in this country, the testator having died here. He must produce letters testamentary from the proper authority in this province. *White* v. *Hunter*, 1 Q. B. 452.

A will devising lands in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the Court of King's Bench there, and copies thereof directed to be made and given to the parties legally entitled thereto:—Held, that an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such. *Patch* v. *Boyington*, 4 C. P. 125.

The law of England as to granting probate or administration, is the law to be administered by our Probate and Surrogate Courts. Where a party domiciled in New York died suddenly in itinere in the county of Wentworth, in this province, having trifling personal effects of less value than £5:—Held, that the Surrogate Court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted only to an inhabitant of this province. *Grant* v. *The Great Western Railway Co.*, 7 C. P. 438; affirmed on appeal, 5 L. J. 210.

The legislature has intended that only those causes in which disputed questions of law or fact arise should be removed to the Court of Chancery, and not contentions as to whom administration should be granted. *In re Beckwith*, 5 L. J. 256.—Chy.

The 36th section of the Surrogate Act provides for an appointment of an administrator pendente lite when the cause is reserved by the judge for argument in term. *Ib.*

Certain goods of testator were left in the house, where the plaintiff, his daughter, and her mother continued to live and use them for about a year, until the mother died, when defendant, who had been living elsewhere, took possession of the house with these things and refused to deliver them up to the plaintiff as the mother's executrix:—Held, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrong-doer: that as her mother's executrix she had no title: and that she therefore could not recover for them. *McCrary* v. *McCrary*, 22 Q. B. 520.

Testator by his will, after devising a farm to defendant, his son, in fee, directed that he should support his mother, "and that she shall have one horse, and my cutter, buggy, and harness, to be kept on the place," &c., "and the house and one acre of ground with the orchard all round the house her lifetime:"—Held, that she took the goods mentioned absolutely, not for life only. *Ib.*

An American probate of the will of the testator may be received as corroborative evidence of the representative character of the executor. *Sloan et al.* v. *Whalen*, 15 C. P. 319.

The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration. *Deal* v. *Potter*, 26 Q. B. 578.

Held, that the grant of letters of administration had relation back to the death of intestate, so as to enable the administratrix to sue upon a contract made by her before such grant, for the sale of the goodwill of intestate's business as a surgeon and physician. *Christie* v. *Clark*, 27 Q. B. 21; affirming *Christie* v. *Clark*, 16 C. P. 544.

What fees may be charged on grant of letters of administration by the registrar and surrogate judge, under C. S. U. C. c. 16, and the tariff. See *In re Dallas and the Registrar of the Surrogate Court for the County of Perth*, 29 Q. B. 482.

Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's

death as well as of the will. *Davis et al.* v. *Van-Norman*, 30 Q. B. 437.

Where a bill was filed by devisees against the executors, alleging the inability of the executors to attend to the trust of the will on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their stead, the court dismissed the bill with costs, on the ground that the jurisdiction to interfere in such a case belongs to the Probate and Surrogate Courts. *Corrigal* v. *Henry*, 2 Chy. 310.

Where the validity of a will relating to both real and personal estate was in dispute, the personal property being worth at least £2,000, and it was sworn and not denied that the questions to be determined were of such importance that they could be more effectually tried and disposed of in this court than in the Surrogate Court, the court ordered the removal of the matter into this court. *Re Eccles*, 1 Chy. Chamb. 376.—Mowat.

An executor, without proving the will, has power to do almost all acts incident to his office. *Robinson* v. *Coyne*, 14 Chy. 561. See *Bryce* v. *Beattie*, 12 C. P. 409.

A will was prepared and sent to the testator, and was subsequently seen—signed by the testator, in the hands of his wife—by the father of the residuary legatee and devisee, who read over the will, and immediately on his return home made a pencil jotting of the names of the executors, as well as of the several bequests other than the provision for the wife; and five days before his death the testator told him that his will was still in existence, and that he had given it to a person, whom he refused to name, for the purpose of having a codicil prepared; and a second memorandum was made by him from the words of the testator, of what he said the will contained, which agreed substantially with the first memorandum. After the death of the testator, no trace of the will could be discovered. A bill having been filed for the purpose of establishing the will, the court made a decree for the purpose, and directing probate thereof to be granted to the executors named therein. *Bessey* v. *Bostwick*, 13 Chy. 279.

A bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will. The wills disposed of both real and personal estate:—Held, that whether the will had been proved in common form or in solemn form, this court had jurisdiction to try its validity. *Perrin* v. *Perrin*, 19 Chy. 259.

The title of an executor being derived from the will and not from the probate, the court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump* v. *Bradley*, 15 Chy. 30.

Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment out of the amount to the solicitors of the legatee without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 4 Chy. Chamb. 27.—Taylor, *Referee*.

The Surrogate Courts here can grant limited administrations, as the Probate Court in England can. *In re Thorpe*, 15 Chy. 76. See *Comron* v. *Clarkson*, 3 Chy. Chamb. 368.—Taylor, *Referee*.

Where a person, resident in a foreign country, dies possessed of mortgages on land situate in the province, the Surrogate Court of the county where the land lies may grant administration where the Surrogate Court of no other county has jurisdiction. *In re Thorpe*, 15 Chy. 76.

L. appointed M. and K. executors and trustees of his will for the management of his property thereby bequeathed, (which was personalty) and the payment of the legacies; and he afterwards added and signed a memorandum as follows: "If anything should happen to the trustees, I appoint R. to be one of the trustees." M. proved the will; after his death K. renounced:—Held, that M.'s executor did not represent the testator L.; and that R. was entitled to probate. *In re De Laronde*, 19 Chy. 119.

Where a bill is filed against the estate of an intestate, alleging that letters of administration have been granted to the defendant of the estate of the deceased, such allegation is sufficiently established by shewing, at the hearing of the case, that the defendant has obtained letters of administration; although the grant thereof may have been made subsequently to the filing of the bill and the putting in of the answer, and although defendant has taken the objection by way of defence in answer. *The Edinburgh Life Assurance Company* v. *Allen*, 19 Chy. 593.

An administration order applied for against a person named in the will as executor, but who had not taken out letters of probate, was refused. *Outram* v. *Wyckhoff*, 6 P. R. 150.—Chy. Chamb. —Holmested, *Referee*.

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2. *Renunciation.*

A release by an executor who is also a trustee does not amount to a relinquishment of the trust, —confirming Doe. d. Boyer et al. *v.* Claus, 3 O. S. 146. *Doe* d. *Berringer* v. *Hiscott*, 6 O. S. 23.

Under 21 Henry VIII. c. 4, one or more of several executors has power to convey when the others decline to act. *Doe* d. *Ellis* v. *McGill*, 8 Q. B. 224.

A written renunciation, though not sealed, made before the surrogate, and produced from his office, is sufficient to entitle the remaining executors to act under 21 Henry VIII. c. 4. *Ib.*

Under C. S. U. C. c. 16, s. 1, the renunciation of probate by one of two or more executors is peremptory, and cannot be recalled on the death of the acting executor or executors. *Allen* v. *Parke*, 17 C. P. 105.

Where an executor, who has renounced probate of the will, is made defendant to a suit, the bill will be dismissed, as against him, with costs. *Stinson* v. *Stinson*, 2 Chy. 508.

Where executors named in a will renounce probate, what acts or dealings will, notwithstanding, render them liable as having assumed the duty of executors, considered. *Vannatto* v. *Mitchell*, 13 Chy. 665.

Three persons were named as executors. They declined to prove the will, and renounced pro-

bate, but expressed their willingness to assist the family with their advice, and accordingly assisted in preparing a list of debts due by the estate, and of the assets and value thereof. On being spoken to by a creditor, one of them stated that they had been named as executors, assured the creditor that he was all right, and that there was enough to pay the debts; another of them subsequently wrote to the widow stating that he and the other parties named "were in Port Hope yesterday, and after legal advice on the subject, have relinquished all further action on the will:"—Held, that these facts did not shew such an acting with the estate as would render the parties liable as executors, in opposition to their renunciation. *Ib.*

Held, that where a power of sale was given to executors *qua* executors, and not by name, they could not, after they had once renounced, execute such power. *Travers* v. *Gustin*, 20 Chy. 106.

See *In re De Laronde*, 19 Chy. 119, p. 1470.

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3. *Foreign Administrators.*

Where a note was made by defendant, a resident of Upper Canada, payable to P., who died in the state of New York, having the note then in his possession there:—Held, that his administrators appointed in that state might endorse the note so as to enable the endorsee to sue upon it in this country, without their having administered here. *Hard* v. *Palmer*, 20 Q. B. 208.

Declaration on a promissory note made by defendant, payable to P. or order, on demand, averring the death of P., and that J. P. and C. P. were duly appointed his administrators, and duly endorsed to the plaintiff: that when the note was made, and from thence to his death, P. resided in the state of New York: that the plaintiff at the time of the endorsement to him, and from thence hitherto, lived there also; and that at the death of said P. the note was in the said state. Plea, that the note was made at Kingston, in the united counties of F. L. & A., in Upper Canada: that defendant at the death of said P., and before and at the time of the making of said note had, and still has, his domicile there: that said note at the death of said P. was bona notabilia in said united counties: that said appointment of J. P. and C. P. as administrators was made only by a tribunal of said state, and that they were never appointed by the proper authority in Upper Canada:—Held, on demurrer, that the plea shewed no defence. *Ib.*

Powers and obligations of foreign administrators dealing in Canada with foreign assets, and settling claims of Canadian creditors, considered. *Grant* v. *McDonald*, 8 Chy. 468.

Injunction awarded at suit of the heir to restrain execution against the lands of a deceased person in the hands of his administrator, the defendant having administered to the estate in England only, and there being at the time no Canadian administrator. *Ib.*

A foreign administrator cannot effectually release a mortgage on land in this province. *In re Thorpe*, 15 Chy. 76.

See *Jessup* v. *Simpson et al.*, 14 Q. B. 213, p. 1505.

II. Administrator of Administrator.

An administrator of an administratrix cannot represent the intestate, but an administrator de bonis non must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a fi. fa. issued on a judgment against such administrator, is nugatory. *Ingalls et al.* v. *Reid*, 15 C. P. 490.

III. Rights, Authority, and Duty.

1. *Remuneration.*

(a) *Services Rendered.*

Where an administrator, who had acted as agent for the intestate during his life-time, had, with the assent of the deceased, used moneys belonging to him, without any attempt at concealment as to his so using them, the court refused to take the account against the administrator with rests. The master having allowed the estate of the administrator a commission of five per cent. on moneys passing through his hands in his life-time, the court refused on appeal to disturb such allowance. *McLennan* v. *Heward*, 9 Chy. 178.

Where the agent, after the decease of the principal, intestate, had procured letters of administration to his estate, and subsequently the person who became possessed of the assets as the personal representative of the administrator refused to account, and a bill was filed to enforce it, the court, under the circumstances, there being no evidence of any improper dealing with the estate either by the administrator or those representing him, allowed the defendants a commission of five per cent. on all moneys received and paid over or properly expended by themselves or their testator, and two and a-half per cent. on all moneys received by him or them, but not yet paid over; but refused the costs of the suit. *S. C. Ib.* 279.

This court will not refer it to the surrogate judge to settle the compensation to be allowed, but will finally dispose of the rights of all the parties. *Ib.*

The rate of compensation to executors or trustees should depend upon the amount passing through their hands, and the time and labour spent by them. In this case, a commission of five per cent. on all moneys received and expended by them, and half that amount on the moneys received but not expended, having been allowed, an appeal from the master's report, on the ground of excess, was allowed. *Thompson* v. *Freeman*, 15 Chy. 384.

Where the executors carried on testator's business for some years through an agent, one of the executors visiting the place occasionally to supervise the business generally:—Held, that a commission on the moneys received from this source was not a proper mode of compensating the executors, but that they were entitled to be compensated therefor; and that not illiberally. *Ib.*

The rule laid down in the last case followed, and executors held entitled to compensation under the Surrogate Act, 22 Vict. c. 93, for services performed before the passing of the Act. *McMillan* v. *McMillan*, 21 Chy. 369.

In no case will an executor be entitled to allowance for services performed by an agent, as

which were so performed by him gratuitously. *Chisholm* v. *Barnard*, 10 Chy. 479.

Where an executor had retained money in his hands unemployed, for which on passing his accounts he was charged by the accountant with interest and rests, he was, notwithstanding, allowed his commission and costs of the suit. *Gould* v. *Burritt*, 11 Chy. 523.

Four per cent on all transfers of stock and all moneys paid in and collected:—Held, not unreasonable. *Torrance* v. *Chewett*, 12 Chy. 407.

The old rule as to compensation of trustees has only been abrogated by the surrogate act so far as relates to trusts under wills. *Wilson* v. *Proudfoot*, 15 Chy. 103.

Since 22 Vict. c. 93, sec. 47, C. S. U. C. c. 16, s. 66, it has been the settled practice of the master here, in passing the accounts of executors, to allow them compensation for their executorship, without an order from the surrogate judge allowing the same. Where, therefore, an executor, pending an account before the master, obtained such an order, which the master acted upon without exercising his own judgment, an appeal from the report of the master by the creditors was allowed, and the executors ordered to pay the costs thereof. *Biggar* v. *Dickson*, 15 Chy. 233.

A legacy to executors, expressly as a compensation for their trouble, does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson* v. *Dougall*, 15 Chy. 405.

Where a legacy is given to executors as compensation, they are at liberty to claim a further sum under the statute if it is not sufficient. *Denison* v. *Denison*, 17 Chy. 306.

Where a suit for the administration of an estate is pending, it is improper for the surrogate judge to interfere by ordering the allowance of a commission to trustees or executors. *Cameron* v. *Bethune*, 15 Chy. 486.

A commission should not in general be allowed to an executor or a trustee in respect of sums which he did not receive, but is charged with on the ground of wilful default. *Bald* v. *Thompson*, 17 Chy. 154.

The rule of the court is to allow compensation to trustees of real estate under a will, as well as to executors. *Ib.*

Where the estate was large, requiring great care and judgment in its management for a number of years, the court sustained an allowance of $1500 to the principal executor and trustee, and $1500 to the others jointly. *Denison* v. *Denison*, 17 Chy. 306.

See also *Harrison* v. *Patterson*, 11 Chy. 105, p. 1476.

(b) *Expenditure and Advances.*

Costs.]—An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them. And if it should appear that his conduct has been malâ fide or unreasonable, he will be ordered to pay defendant's costs. *White* v. *Cummings*, 3 Chy. 602.

[See now 29 Vict. c. 28, s. 31.]

Under an administration order obtained by a creditor, the executors admitted a certain sum in hand, part of which they objected to pay into court, on the ground that it had been paid by them to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the master's office:—Held, that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these enquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character. *Re Babcock's Estate*, 8 Chy. 409.

A testator devised his real estate to his widow, and in the event of her re-marriage to his children. The widow afterwards filed a bill against the executors, charging mal-administration, which was wholly disproved; and the master having found that the personal assets were insufficient to discharge the remaining liabilities, the court directed the executors to receive their costs out of the estate: that a competent portion of the real estate should be sold, and that the testator's children should be made parties to the suit in the master's office for the purpose of retaking the accounts, if desired by the guardian, they not being bound by the accounts already taken; and, under the circumstances, refused the widow her costs. *Norris* v. *Bell*, 9 Chy. 23.

A retaining fee paid by executors to their solicitor in an administration suit may be a reasonable disbursement. *Chisholm* v. *Barnard*, 10 Chy. 479.

Executors are usually entitled to their costs, as between solicitor and client, out of the estate; and if the executors, in addition to the costs of the suit, have incurred any other costs, charges, and expenses in the administration of the estate, on this fact being stated to the court, but not otherwise, an inquiry will be directed, and the master will be authorized to include them in his account. *Story* v. *Dunlop*, 13 Chy. 375.

Where an executor has in good faith paid his solicitor's bill of expenses incurred in administering the estate, the master may, without taxing the bill, moderate it by deducting charges which appear not to be proper. *McCargar* v. *McKinnon*, 17 Chy. 525.

The court, although it considered the plaintiff entitled to be paid his demand, thought the executor, under the peculiar circumstances, was justified in having resisted payment without the sanction of the court, and that in the administration of the estate the executor would be entitled to be paid his costs of litigation. *Griffith* v. *Paterson*, 20 Chy. 615.

One of several children of an intestate instituted proceedings against her mother, the administratrix, and the administrator of the estate, seeking an account of the personalty, and also of the rents and profits of the real estate, which it was proved had been received by the adminis-

tratrix alone, none having been paid to the administrator. The accounts taken in the master's office shewed that in respect of the personal estate the personal representatives had properly expended $400 more than they had received; and that the administratrix had expended the rents so received by her in supporting the plaintiff and the other children of the intestate; and that all the parties interested therein, other than the plaintiff, had released the plaintiff from all liability in respect thereof; which release the plaintiff had also promised to join in, but subsequently refused to execute. The court, under the circumstances, though it could not deprive the plaintiff of her share of the rents, ordered her to pay the administrator his costs of suit; and also to pay to the administratrix her costs, less so much thereof as was occasioned by her resisting the claim of the plaintiff to the rents. *Parsill* v. *Kennedy*, 22 Chy. 417.

Other Cases.]—Where executors and devisees in trust of land were assessed as owners:—Held, that they were properly so assessed, and that their own goods might be seized for the taxes. *Dennison* v. *Henry*, 17 Q. B. 276.

A testator's sister procured a marble slab to his memory. His widow, the acting executrix, having in hands no funds of the estate, gave her the note to the sister for the price, which was moderate in reference to the estate and degree of the deceased, but she had not paid the note, when she made her claim for it in an administration suit, and its allowance was opposed by the testamentary guardian of the infant legatees. The question did not affect creditors of the deceased, and it was not pretended that the estate was liable for the note or for the price of the slab:—Held, under these circumstances, that the amount should be allowed to the executrix. *Menzies* v. *Ridley*, 2 Chy. 544.

An executor is entitled to interest on money advanced by him, and properly expended in the management of the estate. *Ib.*

In an administration suit the widow of the testator had made a claim for dower, which had been allowed, and upon an appeal from that decision the Court of Appeal reversed the judgment of the court below, in so far as it had allowed the claim for dower, but gave no directions as to the payment of the costs of appeal. The appellants having paid their own costs of the appeal, this court upheld the finding of the master in allowing them such costs out of the estate. *Ib.*

The lessee of land, with the right to purchase, devised the same to his son, if it could be paid for, and if it could not, that one half should be sold, and the purchase money paid for the other half, which he gave to his son, an infant. The executor advanced out of his own moneys sufficient to pay the price of the land, and the lessors conveyed to the devisee. The personal estate being exhausted, the court, under the circumstances, directed a sale of that portion of the lot which the testator desired should be sold, if it should appear upon enquiry before the master that the payment to the lessors was for the benefit of the infant. *Lanni* v. *Jermyn*, 9 Chy. 160.

Executors became personally liable to the surviving partner of the testator for the payment of a sum supposed to be equal to his share in the estate, and he thereupon released to them all his interest in the partnership estate, which was by them wound up, and the proceeds applied in liquidation of the testator's debts. This arrangement was found beneficial to the testator's estate, and the executors were held entitled to a first charge on the proceeds of the estate for the moneys paid by them to the surviving partner, and for what they still owed him on their personal obligation, as also the amount of commission allowed them by the judge of the Surrogate Court. *Harrison* v. *Patterson*, 11 Chy. 105.

The widow and administratrix of an intestate got in his personal estate, occupied the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs, to whom no guardian had been appointed: Held, that the personal estate, and the proceeds and profits of the real estate come to her hands, must first be applied towards payment of debts, and then to reimburse her for the sums spent in the infants' maintenance. No allowance was made for her improvements, but she was not to be charged with any increase in rental caused thereby. *In re Brazill, Barry* v. *Brazill*, 11 Chy. 253.

An executrix, who had an annuity charged on the income of the estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was consequence, found largely indebted to the estate:—Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate. *Morley* v. *Matthews*, 14 Chy. 551.

M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate: M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards: they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes; M. afterwards died insolvent, and indebted to both estates:—Held, in appeal, reversing the decree below, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 13 Chy. 35; *S. C.* in the court below, 16 Chy. 193.

An executor or administrator cannot, by paying off creditors of the estate, create a demand in his own favour that will give him a right of retainer in priority to other creditors. All that he would, under such circumstances, be entitled to would be to stand in the place of the creditors he has paid off; and if there prove to be a deficiency of assets, he will only be entitled to be paid pro ratâ with the general creditors of the estate. *Willis* v. *Willis*, 20 Chy. 396.

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children

"to be held for them until they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best; and when the above children shall come of age, the residue of the above property shall be given to the children in equal shares." The executors and executrix,—the widow,—having sold the real estate, (as the will empowered them to do) and applied a large portion of the proceeds in support and maintenance of the children:—Held, that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the master's office. *Grummet* v. *Grummet*, 22 Chy. 400.

2. *As to Debts due them by the Testator.*

An administrator being a creditor of the intestate, in order to secure his own debt, confessed judgment to his friend the plaintiff, to whom the intestate owed nothing, with the understanding that the lands in his hands should be sold under the judgment, and the proceeds paid over to him by the plaintiff. The court, on the application of the tenant of the land, set aside the judgment and execution with costs. *Bonistiel* v. *McMaster*, 6 O. S. 32.

An executor is entitled to take the personal property at its value for a debt due by the estate to him, and his purchase at public auction of the testator's personal estate, in lieu of money due him, was held valid. *Yost* v. *Crombie*, 8 C. P. 159.

He may retain a debt barred by the statute. Quære, where the personal estate of a testator is exhausted, can he retain such a debt out of the proceeds of real estate. *Crooks* v. *Crooks*, 4 Chy. 615.

A testator, a short time before his death in 1841, and during his last illness, signed a statement by which he acknowledged himself indebted to his father, one of his executors, in the sum of £73 8s. 5d. His will contained direct authority to his executors to sell his real estate for the payment of his debts. In 1843 the executors obtained an administration order, and the father sought to have his claims against the estate, including the amount so acknowledged, paid by a sale of the land. These claims were resisted by the widow and the heir-at-law, the testator having been in a weak and dying state when he signed the acknowledgment. The father had, until about 1861, been in the occupation of the land, and a surcharge was put in against him for the rents and profits:—Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator: that the statute of limitations does not bar the claim of an executor against the estate of his testator; and that an executor is not justified in keeping an estate open and unadministered in order to obtain interest had upon a claim against it. *Emes* v. *Emes*, 11 Chy. 325.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the statute of limitations. *Kline* v. *Kline*, 3 Chy. Chamb. 161. —Boyd, *Master*.

The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Ib.*

3. *In Collecting and Realizing the Estate.*

An executor sold a mortgage given to the testator, taking the purchaser's notes payable to himself or order:—Held, upon an issue of plene administravit, that this in law amounted to a receipt of the original debt, making the executor chargeable with the mortgage as an asset in possession. *Macbeth* v. *Macbeth*, 26 Q. B. 549.

The executor of a mortgagee had not, under c. 87, C. S. U. C. s. 5, any power to convey the legal estate to a person purchasing the mortgage. *Robinson* v. *Byers*, 9 Chy. 572.

[But see now 32 Vict. c. 10, O.]

Although the rule is, that executors or trustees will be charged with what they ought to have made, with what they actually did make, or with what they must be presumed to have made, out of the moneys of the testator, come to their hands; still, where such moneys had, before the repeal of the usury laws, been invested in first class security at the rate of six per cent. per annum, the court, on appeal from the master's report, considered the executors were not called upon, at the risk of being charged with the extra amount of interest, to call in those moneys and re-invest the same at the rates, as the evidence shewed, moneys could have been loaned at. It also appearing that part of the money of the estate had been loaned by the executors to themselves, they were charged with the higher rate of interest thereon. *Smith* v. *Roe*, 11 Chy. 311.

An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed as administratrix. *Yarrington* v. *Lyon*, 12 Chy. 308.

Executors should proceed with promptitude to realize the assets; and the law presumes that, as a general rule, a year should be sufficient for this purpose. They should exercise a reasonable discretion as to suing debtors, and preserve evidence of having done so in the case of uncollected debts, the onus of proof being on them, and not on the legatees. But where the result proves unfortunate, they are not charged with the loss, though the court should not concur in the propriety of the course which, in the bonâ fide exercise of their discretion, they took. A delay of ten months, which resulted in the loss of a debt, was held to require explanation. *McCargar* v. *McKinnon*, 15 Chy. 361.

Delay on the part of executors to sell lands, which by the will are saleable for payment of debts, will render the executors liable for rents and profits. *Emes* v. *Emes*, 11 Chy. 325.

In considering whether evidence is sufficient to relieve an executor, as between him and legatees, in respect of uncollected debts of the testator, the lapse of time in connection with the smallness of the debt is proper to be taken into account. *McCargar* v. *McKinnon*, 17 Chy. 525.

Executors, in the exercise of a prudent discretion, may accept land in payment of an execution debt. *Ib.*

A person intending to take out letters of administration executed a power of attorney to a creditor of the intestate, authorizing him to receive all moneys due the intestate. The power was given upon an agreement that the attorney should pay himself out of any money he should receive. The appointor afterwards revoked the power, and then took out letters of administration:—Held, reversing the decree of the court below, that the power was not valid against the administrator, and that payments made to the attorney by a debtor after administration granted, and with notice of the revocation, were unauthorized, and did not discharge the debtor. Spragge, C., diss. *Sinclair* v. *Dewar*, 19 Chy. 59; 17 Chy. 621.

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4. *Managing Real Estate.*

A. and B., executors and trustees under a will with power of sale, sell and take a mortgage to secure purchase money, they being in the recital named as executors. B., without the knowledge or consent of A., assigns the mortgage and appropriates the consideration money to his own use:—Held, that no estate passed under the assignment, except so far as the trust estate might be found debtor to B.; and also, that as between the contending equities of the trust estate and the assignee, the maxim qui prior est in tempore potior est in jure would apply in favour of the trust estate. *Henderson* v. *Woods*, 9 Chy. 539.

Where executors, without any authority, assumed to manage the real estate, they were made to account for their acts, as if they had been duly empowered as trustees. In such a case it is their duty to keep accounts, and be ready at all times to explain their dealings. *Chisholm* v. *Barnard*, 10 Chy. 479.

The testator, A. M., had been in partnership in business with one J. A., and died without any settlement of accounts, appointing A., P., and L. his executors. The testator had, besides his share of the partnership assets, a large amount of personal property, and also real estate, which he specifically devised to his four sons, then infants, and appointed A. their guardian. The executors received the rents of the real estate, and applied them to the maintenance and education of testator's children. The real and personal estate having proved insufficient for the payment of debts, the executors were held liable to account to the creditors of the testator for the rents received by them and applied to the maintenance and education of the children. *Harrison* v. *Patterson*, 11 Chy. 105.

Where an executrix, jointly with one or more of those entitled to the testator's estate, and during the minority of others of them, contracted for the sale of portions of the real estate, and the purchasers made improvements, the court refused to disturb the possession of the purchasers before the time had arrived for the partitioning of the estate, and charged them meanwhile with a ground rent only, and not with the improved value. *Morley* v. *Matthews*, 14 Chy. 551.

When an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or not competent, or not aware of the proceedings, the executors should act in the matter of the sale as a prudent owner would. *In re Davis*, 17 Chy. 603.

Executors with a discretionary power to sell their testator's real estate:—Held, not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into court, pending the suit, they were charged with interest. *McMillan* v. *McMillan*, 21 Chy. 369.

Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim. In fact, according to the terms of will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:—Held, that they were not responsible for any loss sustained by reason of the delay in selling. *Ib.*

The master by his report found that the executors had paid to some of the children of the testator, all of whom were equally entitled under the will, different amounts, and to one of them nothing, the estate proving insufficient:—Held, not a ground for appealing from the master's report, but that the question, whether the executors were estopped from denying the sufficiency of the estate to make payment to all the children equally, or whether those paid were bound to refund, was one proper to be discussed on further directions. *Ib.*

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5. *Other Cases.*

An express promise to pay made to a third party may enure to the benefit of an administrator de bonis non with the will annexed, though at the time of such promise he had not obtained letters of administration. *Beard* v. *Ketchum*, 6 Q. B. 470.

A. makes a note payable to B. or order; B. endorses to C., who endorses to D.; D., the holder, dies, leaving B. one of the executors; the executors of D. sue C.:—Held, that D. having made B. his executor, B. was discharged, and that there was no remedy against the subsequent endorser. *Jenkins* v. *McKenzie*, 6 Q. B. 544.

Ejectment. The plaintiff claimed under the grandson and heir-at-law of the patentee, F. Drouillard; defendant under his second son Dennis, to whom it was alleged that he had conveyed. The patent was for 1200 acres, including the land in question. Dennis devised this, with other land, among his children, who by partition conveyed it to one of them, J., who afterwards devised to his brother R.—R. died, and his land was sold under a judgment obtained against C., his wife, on a confession given by her as his administratrix, and was purchased by her at the sale, and conveyed to the defendant:—Held, that the fact of C. being administratrix could not be impeached, so long as the letters of administration granted to her remained in force; and that she could legally give the confession she did, and purchase under the judgment obtained on it against herself, though it might furnish grounds for suspicion of fraud. *Eades et al.* v. *Maxwell*, 17 Q. B. 173.

In ejectment it appeared that C. died in 1851, intestate, seized of an unexpired term of years in the land, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle, J. D., for life, and then to the plaintiff, the testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards, in 1860, J. D. administered to C.'s estate, and as such administrator assigned his interest also to F., under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff; and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamey*, 21 Q. B. 216.

Certain goods of testator were left in the house, where the plaintiff (his daughter) and her mother continued to live and use them for about a year, until the mother died, when defendant, who had been living elsewhere, took possession of the house with these things, and refused to deliver them up to the plaintiff as the mother's executrix:—Held, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrongdoer: that as her mother's executrix she had no title: and that she therefore could not recover for them. *McCrary* v. *McCrary*, 22 Q. B. 520.

Upon a judgment obtained against the executors of a mortgagor, a writ against the lands of the testator was sued out, under which his interest in the mortgage premises was sold; and afterwards the purchaser at sheriff's sale obtained a conveyance of the legal estate from the mortgagee, all which transactions took place after the passing of the 7 Will. IV. c. 2, 1837: Held, that under such circumstances the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Chy. 344.

Quære, whether an administrator de bonis non can call in question the administration of his predecessor in office. *Tiffany* v. *Thompson*, 9 Chy. 244.

Where the same persons are executors and trustees under a will, they do not lose their powers as such executors and become mere trustees, when all the testator's known debts are paid, or by mere lapse of time. *Ewart* v. *Gordon*, 13 Chy. 40.

Where advances were made by way of loan to the managing executor, as such, and subsequently security was taken therefor from him on part of the assets of the estate, such advances being made and security taken in good faith on the part of the lender, and it appeared that some of the advances were duly entered in the books of the estate, and the name of the lender, who had no other transactions with the estate, appeared as a creditor in several annual balance sheets sent to the other executors by their agent, and no objection on their part was ever made; the court refused, at the instance of such executors, to order the securities to be delivered back to them, without payment of such advances. *Ib.*

A testator's direction to his executors to continue to carry on business with his surviving partners, does not authorise the executors to embark any new capital in the business. *Smith* v. *Smith*, 13 Chy. 81.

M. was the administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered he took credit for the amount as a payment by himself; the heirs knew nothing of the loan until sometime afterwards; they had not authorized M. to borrow the money, and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes. M. afterwards died insolvent, and indebted to both estates:—Held, reversing the decree of the court below, 16 Chy. 193, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Chy. 35.

A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the court where there is no charge of fraud, or the like against the executors. *Foreman* v. *McGill*, 19 Chy. 210.

An administrator, being desirous of converting saw logs into lumber, for the benefit of the estate, an application under 29 Vict. c. 28, s. 31, was entertained, and an opinion of a judge given in favour of the course suggested. *Re Caldwell Estate*, 2 Chy. Chamb. 150.—Mowat.

Where an executor is appointed for a limited period or until the happening of some event, his power ceases with the occurrence of such event. *Conron* v. *Clarkson*, 3 Chy. Chamb. 368.—Taylor, *Referee*.

The assets of a deceased person are not liable for debts incurred by an executor or administrator in continuing the trade or business of the deceased. *Lovell* v. *Gibson*, 19 Chy. 280.

An administrator is entitled ex parte to an administration order, where the liabilities of the estate exceed the assets. *Re Halletette*, 10 L. J. N. S. 249.—Chy. Chamb.—Blake.

IV. Liabilities.

1. *Personal Liability.*

(a) *For Acts of each other.*

One of several executors cannot bind the others by a *cognovit*, and a judgment entered on such a confession was set aside as against all. The drawer of a bill accepted by the testator having joined in a confession thus given, the court refused to set aside the judgment as against him. *Commercial Bank of Canada* v. *Woodruff et al.*, 21 Q. B. 602.

Five executors and trustees took an assignment of a mortgage to two of their number,

which described them as executors and trustees under the will, but contained no further reference to the will. The agent for the five thereupon gave notice to the mortgagor that the assignment had been made to the executors:—Held, that he was justified in assuming that the assignment was made to the executors as such; and payments to one of them made bonâ fide, were held valid. *Ewart* v. *Dryden*, 13 Chy. 50.

Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts, and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Chy. 55.

Where such a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized. *Ib.*

One of two executors was indebted to the estate on a mortgage to the testator, of which his co-executor was aware, but took no steps to compel payment, and the mortgagor as executor executed a discharge under the statute, and registered the same:—Held, that the co-executor was liable to make good any loss occasioned thereby. *McPhadden* v. *Bacon*, 13 Chy. 591.

Quære, whether the discharge of mortgage, to be valid, did not require the signature of both executors. *Ib.*

Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss. *Sovereign* v. *Sovereign*, 15 Chy. 559.

See *The Provisional Council of the Corporation of the County of Bruce* v. *Cromar*, 22 Q. B. 321, p. 1500.

(b) *Other Cases.*

Where executors conveyed land under a power of sale in the will of testator, but covenanted for themselves, their heirs, &c., in the deed, for good title:—Held, that they were personally liable, and that the grant by them as executors could not control their express covenant. *McDonald* v. *Donell et al.*, 6 O. S. 109.

A. and B., executor and executrix, having given a cognovit signed as executor and executrix, and which the plaintiff's attorney led them to believe would bind them only as such:—Held, that though the cognovit might bind them personally in its terms, a personal judgment against them must be set aside:—Semble, also, that the judgment roll, alleging "a debt due by the testator in his life-time on an account stated, in consideration of which defendants promised to pay," would not warrant a judgment against defendants personally. *Gorrie* v. *Beard et al.*, 5 Q. B. 626.

Action against J. S. M. and J. his wife, M. N., and W. N., as makers of four notes signed "The executors of the estate of the late W. N., per Pro. J. S. M." M. N. was called as a witness by plaintiffs, and proved that J. S. M. had managed the affairs of the estate since testator's death, and she had left it to him to do what he thought best in winding it up; but she said she never gave him power to make her personally liable, and that she knew nothing of the notes. Held, that though M. might have sufficient authority as regarded the estate, he clearly had none to bind defendants personally, as they were sued. *The President, &c., of the Gore Bank* v. *Meredith et al.*, 26 Q. B. 237.

The plaintiffs sued defendant, an executor of E., as endorser of three notes payable to "the executors of the late E.," two being endorsed "J. M. B., agent of the executors of the late E." and the third "the executors late E., per pro B." B. held a power of attorney from the executors, by which they as executrix and executors authorized him (among other things) for them as such to make and endorse all such notes as might be requisite in the management of the estate. These notes, it appeared, were received by B. from the makers for debts due to the estate, and given by him, endorsed as above, to M., one of the executors, who was largely indebted to the estate, and was in difficulties, M. telling him that he wanted to get them discounted on his own account. They were so discounted by the plaintiffs, to whom M. owed a large sum, and who made no enquiries as to the extent of B.'s authority, or the circumstances under which M. obtained them. Defendant knew nothing of the matter until after the notes fell due. The court being left to draw inferences of fact, and the question being the personal liability of the defendant:—Held, 1. That the endorsements were sufficient in form; but, 2. That not being for the purposes of the estate they were not within the authority given to B., the extent of which it was plaintiffs' duty to ascertain; and a nonsuit was ordered. Quære, as to the effect of a power given by an executor. Semble, that it may authorize the attorney to charge him by acceptances, &c., in his own right, for otherwise it would be illusory, but only for the payment of testator's debts. *The President, &c., of the Gore Bank* v. *Crooks*, 26 Q. B. 251.

Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for $700, alleging non-payment, and on the common counts. Sixth plea, set-off on two promissory notes made by the plaintiff, payable to F. and H., and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff. Third replication, equitable: that the causes of action sued for accrued to the plaintiff as executor of one P., and not otherwise, for goods sold by plaintiff to defendant, which goods were assets of the estate, as will be the money sued for if recovered; and the plaintiff sues for the benefit of the estate only:—Held, that the replication was bad, for, among other reasons, the plaintiff on the transaction appearing would be personally liable. *Parsons* v. *Crabb*, 31 Q. B. 434.

Executors suffered judgment against them at law for a debt of their testator; and the lands were sold upon process issued thereon, although one of the executors owed the estate in a larger amount. The court ordered both executors to make good the difference between what the lands were actually worth, and the amount realized upon the sale. *McPhadden* v. *Bacon*, 13 Chy. 591.

One of several executors being indebted to the estate, the matter was referred by himself and his co-executors, and a large sum awarded against

him:—Held, that though the award might not be binding on the persons beneficially interested in the estate, it was binding on the executor, and in a suit by the executors he was decreed to pay the amount. *Koelln* v. *McKenzie*, 15 Chy. 331.

A widow and children were entitled under a will to support out of the testator's property, and goods were supplied for this purpose to the executors:—Held, that the creditor who advanced the goods had no charge against the estate, but must proceed against the executors personally. *Campbell* v. *Bell*, 16 Chy. 115.

Where certain creditors of a deceased insolvent sued his executor, recovered judgments and sold his real estate and got paid in full:—Held, that they were still bound to account, and the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ under the act of 29 Vict. c. 28. *Bank of B. N. America* v. *Mallory*, 17 Chy. 102.

Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor, notwithstanding, allowed a creditor to recover a judgment against him by default:—Held, that the executor, on obtaining an administration order, was not entitled to an injunction against proceeding on the judgment. *Doner* v. *Ross*, 19 Chy. 229.

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2. *Distribution of Assets.*

[*See now 29 Vict. c. 28, ss. 25–29*].

In payment of debts, a mortgage not due must be preferred before simple contract debts, and the plaintiff may shew that simple contract debts have been first paid, under the replication of assets in hand when action brought, and need not reply specially. *Forsyth* v. *Johnston*, T. T. 3 & 4 Vict.

Declaration against defendant, as executrix of McK., on an award made in pursuance of a bond executed by him in his lifetime, to refer certain differences to arbitration and abide by the award; avermeut, that the award had been made in the lifetime of the deceased; breach, that deceased had not in his lifetime, nor had defendant, as such executrix since his death, paid the sum awarded. Plea, that by covenant in a deed made by said McK. in his lifetime, he had incurred a specialty debt to one H., which was overdue, and defendant, as executrix, was bound to discharge it in preference to plaintiff's debt:—Held, on demurrer, plea bad, for the action was on a specialty, and an executrix could not plead an outstanding debt of the same degree to an action for another debt of equal degree. *McCallum* v. *McKinnon*, 16 C. P. 142.

Since the 29 Vict. c. 28, s. 28, abolishing all distinction between the different classes of debts in the administration of an estate, it is no defence for an executor sued on a promissory note of his testator, that there are specialty debts unpaid more than equal to the goods not administered. *Parsons* v. *Gooding*, 33 Q. B. 499.

Where certain creditors of a deceased insolvent sued his executor, recovered judgments, and sold his real estate, and got paid in full:—Held, that they were still bound to account, and that the other creditors were entitled to have the whole estate distributed pro ratâ, under the Act 29 Vict. c. 28, s. 28. *The Bank of British North America* v. *Mallory*, 17 Chy. 102.

By the statute 29 Vict. c. 28, s. 28, the assets of a deceased debtor, in case of deficiency, are to be distributed amongst his several creditors pari passu, and without any priority over each other; and where the executrix in such a case allowed judgment to be recovered by two creditors, and execution to be issued, under which they were paid nearly in full, when by applying to the court in that action, the proper distribution of the estate would have been ordered, the court charged her, in favour of the other creditors of the estate, with the excess beyond the ratable proportion of the claim due the execution creditors; giving an order over in favour of the executrix against those creditors, who were ordered to pay to the other parties to the suit all the costs, other than those of proving their claim at the amount allowed by the court, and to this extent thay were held entitled to recover their costs. *Taylor* v. *Brodie*, 21 Chy. 607.

S. administered to the estate of an insolvent, at the request of a simple contract creditor, and was on the following day served by the latter with a summons for his debt. He took no steps to ascertain whether there were any other debts, but allowed judgment by default, and all the chattel property of the intestate to be sold under the execution:—Held, at the suit of a specialty creditor, that the administrator could not set up the defence of no notice of the specialty debt, and that the amount produced by the sale must be applied in due course of administration. *Hutchinson* v. *Edmison*, 11 Chy. 477.

A surety for an administrator, deceased, who was indebted to the estate, on judgment being recovered against him paid the amount, and took an assignment of the administration bond to a trustee for himself. Quære, whether the debt to the surety was a specialty or a simple contract debt. *In re Whittemore, Ross* v. *Mason*, 2 Chy. Chamb. 17.—Mowat.

In case of a debtor dying leaving insufficient assets to pay all his debts, execution creditors whose writs are in the sheriff's hands do not lose their priority; nor does a creditor who has a sequestration in the hands of the sequestrators lose the advantage of it. *Meyers* v. *Meyers*, 19 Chy. 185.

See *Commercial Bank of Canada* v. *Woodruff et al.*, 13 C. P. 621, p. 1487.

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3. *Devastavit.*

The court allowed a judgment on a sci. fa. against an administrator to be amended in the name of the intestate, by making it correspond with the original judgment against him. On a return of devastavit a ca. sa. does not issue as a matter of course, without enquiry. *Willard* v. *Woolcott*, Dra., 201.

In an action of debt against an administrator to make him personally liable upon a judgment recovered by default against the goods of the intestate, alleging waste:—Held, that the record of the judgment in the first action and the writ of fi. fa. thereon, and the sheriff's return of nulla bona, were sufficient primâ facie evidence to shew a devastavit, and that the production by defendant of writs of fi. fa. against the intes-

tate's goods, with the sheriff's return of fecl thereon, without proving the judgments on which they were founded, was not sufficient evidence to shew that the intestate's estate had been exhausted. *Wilson* v. *Andrew*, 6 C. P. 428.

Plaintiff had sued defendant as administrator upon a special agreement by testator to take care of and re-deliver certain wheat, alleging in different counts a promise and breach by testator and defendant respectively. Defendant suffered judgment by default as to the second count, and afterwards confessed judgment as to the first. In an action of debt on the judgment, suggesting a devastavit :—Held, that the admission of assets afforded by the pleadings could not be rebutted by shewing that when the original judgment was recovered there were assets to satisfy it, but that afterwards, a sale being forced, they proved insufficient. *Walton* v. *Andrew*, 14 Q. B. 594.

This action was brought to contest the validity of a judgment by the Bank of Upper Canada against defendants, executors of Z., on a confession for £217,637 9s., the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared in evidence that nearly half of the judgment was for a debt due by Z. to the bank; the remainder was for debts of Z. assumed and paid by the bank at defendants' request, and for the advance of $60,000 to defendants, to enable them to complete the Sarnia branch of the Great Western Railway :—Held, that the debt on which this judgment was obtained was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. It appeared also that defendants, being trustees of the real estate, as well as his executors, had allowed out of the personalty of Z. to his widow, $60,000, to obtain a release of her right to dower in his, Z.'s lands. The plaintiffs contended that under the issue of "plene administravit vel non," they were entitled to judgment to this amount :—Held, that the application of the personalty to obtain a release of dower in land was a devastavit, and a misapplication of the money, of which the Bank of Upper Canada, being interested in the estate, had the right to complain. This amount, however, was afterwards, and before the commencement of this suit, made good to the bank out of the proceeds of the sale of lands. Under these facts, Held, that the verdict should be entered for defendants, and the plaintiffs were allowed to take judgment of assets quando. *The Commercial Bank of Canada* v. *Woodruff et al.*, 13 C. P. 621.

Held, that under the pleadings set out in this case, the plaintiff did not dispute defendants' right to keep the £4,000 mentioned to be applied on the Bank of Upper Canada judgment, but complained that defendants had not otherwise fully administered; and the complaint being the settlement of Mrs. Z.'s dower, which was decided in defendants' favour in the Commercial Bank *v.* Woodruff et al., 13 C. P. 621, that defendants were entitled to judgment. *Hamilton* v. *Woodruff et al.*, 14 C. P. 22.

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4. *For Interest.*

In a suit against an executor for an account, the court, under the special circumstances, charged the executor with the costs of the suit, and with interest on the balances from time to time in his hands, and directed the account to be taken with annual rests. *Erskine* v. *Campbell*, 1 Chy. 570.

By an agreement entered into between the executors of an estate in Lower Canada and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy until suit brought therefor without an express promise; and the legatee referred to having sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Chy. 518, affirmed on appeal, 8 Chy. 220.

An executor or trustee who has been guilty of negligence merely, in omitting to invest moneys, will be charged with interest at six per cent. *Wiard* v. *Gable*, 8 Chy. 458.

Where an executor had committed a breach of trust in selling lands to pay debts, for which the personal estate come to his hands had proved more than sufficient, and had also applied trust funds to his own use; the court ordered the account to be taken against him with annual rests. *Ib.*

The principle upon which an administrator should be charged with interest on funds belonging to the estate considered and acted on. *McLennan* v. *Heward*, 9 Chy. 178.

An administrator de bonis non having obtained a decree against the representatives of a deceased administrator for an account of his dealings with the estate :—Held, that he was entitled to charge the representatives with interest, &c., in the same manner, and to the same extent, as one of the next of kin might have done. *Ib.*

Although the court will order executors or trustees to make good moneys lost by neglect or default, it will not also charge them with interest on those sums. *Vanston* v. *Thompson*, 10 Chy. 542.

Where part of the money of the estate had been loaned by the executors to themselves, they were charged with a higher rate of interest thereon than six per cent. *Smith* v. *Roe*, 11 Chy. 311.

Leave to appeal from a report was refused with costs, where it appeared that the object of the appeal was to fix executors with interest upon a sum which they had invested, and upon which a loss occurred. *Coates* v. *McGlashan*, 2 Chy. Chamb. 218.—Spragge.

The widow of an intestate married again, and allowed her husband to use the moneys of the estate in her hands :—Held, that she was liable to pay interest at six per cent. only. *Fielder* v. *O'Hara*, 14 Chy. 223.

Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the prin-

cipal never reached their hands. *Sovereign* v. *Sovereign*, 15 Chy. 559.

Where the widow of the testator had received more than her proper share of the personal estate, the court charged her with interest on the excess. *Davidson* v. *Boomer*, 17 Chy. 509.

The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the master's report charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court ordered the executors to be charged with that amount, and with interest from the time of the apprizement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Chy. 153.

See *McMillan* v. *McMillan*, 21 Chy. 369, p. 1480; *Blain* v. *Terryberry*, 12 Chy. 221, p. 1497.

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5. *For Costs.*

Executors employing an attorney, are personally responsible to him for the costs. *Dickson et al.* v. *Crooks et al.*, M. T. 4 Vict.

Executors will be ordered personally to repay costs paid to them or their solicitor under a decree which is afterwards reversed. *Davidson* v. *Thirkell*, 1 Chy. 284.

Where executors had improperly dealt with a portion of the funds of the estate, by allowing one of their number to retain it in his hands at a low rate of interest, the court refused their costs prior to decree. *Ashbough* v. *Ashbough*, 10 Chy. 433.

Costs given to plaintiff under special circumstances, notwithstanding fraud, was charged against executors, which was not established. *Ib.*

Where the executors, by neglecting to prepare accounts or afford information reasonably called for by the legatees, had given rise to the suit, they were charged with the general costs thereof, less certain costs occasioned by unfounded claims set up by the bill. *Smith* v. *Roe*, 11 Chy. 311.

In litigating with third persons, executors are, with respect to costs, in the same position as parties who litigate in their own right. *Great Western R. W. Co.* v. *Jones*, 13 Chy. 355.

Where an executrix appealed against the master's report, and the appeal was allowed without costs:—Held, that she could not, on further directions, claim the costs of the appeal out of the estate. *Strory* v. *Dunlop*, 13 Chy. 375.

Where an administrator brought an unfounded action against the testator's widow, which she was put to costs in defending:—Held, that her only remedy for such costs was against the administrator personally, not against the estate. *Rodgers* v. *Rodgers*, 13 Chy. 457.

Where a bill was filed against an executor and trustee for the administration of an estate, and praying a receiver on the ground of the executor having become embarrassed, and of his misconduct, and the circumstances were such as to justify alarm on the part of the cestui que trust, the executor was charged with so much of the costs of the suit up to the hearing as was occasioned by the suit being for a receiver. *Budd* v. *Thompson*, 17 Chy. 154.

See, *Erskine* v. *Campbell*, 1 Chy. 570, p. 1488.

See, also, III. 1, (b) p. 1473.

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6. *Other Cases.*

Where in assumpsit on a contract against executors they pleaded that the cause of action accrued in Scotland, against their testator and one A. jointly: that A. was still living, and that by the law of Scotland where the contract was made, if one of the parties to a joint contract die, his personal representatives are discharged,—the plea was held bad on a general demurrer, as by our statute 1 Vict. c. 7, the law here is different, and the lex loci contractus applies only to the contract, not to the remedy. *Gilmore* v. *Crooks*, H. T. 6 Vict.

The executors of sureties are liable for the defalcation of the principal, committed after the death of their testator, and even after notice that they would not be liable. *Regina* v. *Leeming*, 7 Q. B. 308.

Held, that although the administratrix was not bound to sell the goodwill of testator's business as a surgeon and physician, yet, having done so, the proceeds were assets, for which she must account. *Christie* v. *Clark*, 27 Q. B. 21; *S. C.*, 16 C. P. 544.

In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will and had taken possession of the personal estate, and who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition:—Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Chy. 247.

Where an executor alleged that he had kept money belonging to the estate for several years in his house, until the same was destroyed by fire and the money lost, the court held the executor guilty of a breach of trust, and his affidavit as to the destruction being unsatisfactory, refused to discharge him from custody under a writ of arrest. *Lawson* v. *Crookshank*, 2 Chy. Chamb. 426.—Mowat.

A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor. The mortgagor afterwards agreed with B., the owner of other property, for an exchange free from encumbrances, and that B. should pay $2,000 for the difference in value. The mortgagor had endorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,600, no part of which, however, was payable. B. satisfied the $1,600, partly in money paid to the mortgagor, partly by a debt owing to B. by the mortgagor, and partly by moneys which had theretofore been lent by B. for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a re-

ceipt for $1,600 in full. The contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:—Held, that the contemporaneous payment was a valid payment pro tanto, the same having been made with the assent of the co-executor; but that the estate or the co-executor was not bound by the receipts endorsed on the mortgage; and that B. was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan. *Bacon* v. *Shier*, 16 Chy. 485.

VI. Actions and Suits by.

1. *Pleading.*

Where one of three executors is dead, and the survivors sue in right of the testator, the declaration must state that payment had not been made to the deceased executor. *Nichall et al.* v. *Williams*, Tay. 21.

Plaintiff in his declaration described himself administrator, &c., and laid causes of action accruing to him, administrator as aforesaid. Defendant pleaded ne unques administrator:—Held, bad, on general demurrer. There was no profert of letters of administration. *Walker* v. *Covert*, 5 O. S. 58.

Where a plaintiff sues in a representative character, the cause of action must be stated to have accrued to him as such. *Ham* v. *Madden*, 5 O. S. 729.

A bill filed by A. and B. as executors of a deceased mortgagee to foreclose, did not allege that probate had issued to them:—Held, defective on demurrer. *Lawrence* v. *Humphries*, 11 Chy. 209.

A bill filed by an administrator to obtain possession of certain chattels outstanding in the hands of a third party, and for administration of the estate:—Held, multifarious, both as against such third party and the persons interested in the estate. *Cole* v. *Glover*, 16 Chy. 392.

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2. *Other Cases.*

On a bond given to executors, they may sue either as executors or in their own right. *Davis* v. *Davis*, 5 O. S. 551.

Where money has been paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, it may be recovered back by the executors, as money had and received to the use of the testator. *Innes* v. *Brown*, 5 O. S. 665.

To determine whether a demand sued for on the record is one claimed by the plaintiffs as executors or not, the test now is, would the money when recovered be assets of the estate. *Elliott et al.* v. *Croker*, 8 Q. B. 156.

An action can be maintained by two or more executors for the goods of a testator where probate is only issued to one, or goods taken out of the possession of one of them, possession of one being possession of all. *Bryce et al.* v. *Beattie*, 12 C. P. 409.

The title of an administrator relates back to the death of the intestate, so as to enable him to replevy goods taken before the grant of administration. *Deal* v. *Potter*, 26 Q. B. 578.

The personal representative may file a bill *as creditor simply*, upon the testator's estate against a devisee of lands under the will, after the personal estate is exhausted, and obtain a decree as an ordinary creditor. *Tiffany* v. *Tiffany*, 9 Chy. 158.

In a suit by an administrator, with the will annexed, upon a mortgage, the defendant produced a release for the mortgage money given by the testator in his lifetime. Thereupon the plaintiff sought to be allowed to proceed against defendant as a creditor of the estate, but as this would involve an amendment creating an entirely different record, the court refused it. *Barrett* v. *Crosthwaite*, 9 Chy. 422.

VII. Actions and Proceedings Against.

1. *Pleading.*

A plea that defendants, executors as aforesaid, submitted to arbitration, does not imply that they submitted as executors. *Bleeker* v. *Myers et al.*, Tay. 285.

An executor is estopped from pleading plene administravit to a declaration on a sci. fa. to revive a judgment against himself. *Wood* v. *Leeming et al.*, 2 O. S. 508.

In the concluding part of a declaration against executors, it was averred "therefore an action hath accrued to the plaintiff to demand and have of and from the defendants, *executors* aforesaid, &c." Demurrer, on the ground that the averment should have been "to demand and have of and from the defendants, *as* executors:"—Held, declaration good. *Ferrie* v. *Jones et al.*, 5 Q. B. 504.

Assumpsit against an executrix. Plea, plene administrativit. Assets were admitted to an amount less than the claim. It was proved that testator had joined one M. in giving a note for the price of a carding machine, which M. was to hand over to him in order to save him harmless. This was not done, but after testator's death defendant got the machine from M. to hold as security against the note. It was also proved that there were crops in the ground at the testator's death:—Held, 1. That the verdict should be only for the value of the assets proved, and not for the amount of the debt; 2. That the carding machine would not form assets; 3. That the crops would be assets, in the absence of any evidence as to the contents of the will. *Fisher et al.* v. *Trueman et ux.*, 10 Q. B. 617.

The rule making the plea of non-assumpsit to a bill or note bad, is confined to cases where the action is *between the parties to the bill or note*; it does not extend to executors, &c. *Mason* v. *Hill et al.*, 5 Q. B. 60.

The plaintiff sued defendants as executors of the endorser of a note not come due till after the decease of the testator, averring due notice to defendants of dishonour, and that by reason thereof they became liable to pay the note, and being so liable, afterwards, as executors, promised to pay on request. A plea denying the promise was held bad, as raising an immateri

issue, the promise being implied from the facts averred in the declaration and not denied in the plea. *Ib.*

Where in an action against defendant as executor, on a judgment recovered against the testator, the pleas were, that testator did not promise, and, ne unques executor, and judgment was entered on the first issue only, taking no notice of the second:—Held, that although defendant's pleading the first plea would entitle the plaintiff to succeed on the second, yet the issue should have been disposed of; and that the judgment, therefore, would not support an execution against defendant as executor. *McDade d. O'Connor* v. *Dafoe*, 15 Q. B. 386.

Declaration on the common counts for goods bargained and sold to intestate; and for money paid for, and account stated with, defendant as administratrix. Plea, that after plaintiff's claim became due and before action plaintiff was indebted to S. M. & G., executors of H. G, in $800, and it was then agreed between plaintiff and intestate, in his lifetime, and said executors, that plaintiff should be credited in his account with said executors with $300, and be allowed same by them as if paid them by plaintiff, and that the intestate should become and be accepted by said executors as their debtor for the amount of said claim in lieu of plaintiff, and that plaintiff's claim against the intestate in respect of the last named sum should be discharged and satisfied; and in pursuance of said agreement plaintiff was so credited, and said intestate became and was accepted by said executors as their debtor; and plaintiff then accepted said agreement, and its performance as aforesaid, in satisfaction and discharge of his claim:—Held, plea bad, because professing to answer the whole declaration it only answered part, and because wholly inapplicable to the causes of action against the administratrix. *Waddell* v. *Gildersleeve*, 16 C. P. 565.

Declaration against defendant as executrix of McK. on an award made in pursuance of a submission by bond. Plea, a debt overdue on covenant by McK.:—Held, plea bad; for this action was on a specialty, and an executor could not plead an outstanding debt of the same degree. *McCallum* v. *McKinnon*, 16 C. P. 142.

Declaration on a contract by testator to build a marine boiler and steam engine for plaintiff, alleging partial completion by testator before his death, and a promise by defendants as executors to complete it for the balance due, but that they did not complete it in time, and delivered it unfinished and not according to the specifications, &c.:—Held, declaration not bad for averring a promise by testator to perform the work, and afterwards by defendants, as executors, to finish the same, testator having died before the time for completion expired. *Leonard* v. *Northey*, 22 C. P. 11.

The declaration alleged that one S., by his will, appointed defendant his executor; and after devising his farm, directed his remaining real estate to be sold and the proceeds thereof and his money and notes to be equally divided between his three sons, of whom plaintiff and defendant were two; that defendant proved the will and became possessed of assets more than sufficient to pay plaintiff's claim under the will, and properly applicable to the payment thereof, and afterwards promised and agreed with the plaintiff that the plaintiff was entitled to receive from him $500. and stated that sum as the plaintiff's claim under the will; and thereupon, in consideration of the premises, defendant promised the plaintiff to pay, and the plaintiff agreed to accept the said sum of $500 as and for his claim. Defendant pleaded that he did not become possessed of assets, and that he did not promise; and the jury found in his favour on the first plea:—Held, 1, that the plaintiff's claim was not a "purely money demand," to which his right was an equitable one only, under sec. 2 of the Administration of Justice Act, 1873; and if it were, that that section, which did not take effect till 1st January, 1874, would not apply to this action begun on the 11th December, 1873; 2. That the allegation of defendant having assets, was material, and the verdict on the first plea was therefore a bar to plaintiff's recovery; 3. That the possession of such assets was put in issue by the denial of the promise as alleged,—i. e., of the promise having been made in consideration of the premises. Semble, under the facts stated in the case, that the count should have averred a tender of a release, or a readiness and willingness to execute it. *Soules* v. *Soules*, 35 Q. B. 334.

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2. *Other Cases.*

Where a plaintiff had recovered a verdict against executors, for a breach of promise of marriage made by their testator, the court would not on the ground that such an action could not lie against personal representatives, arrest the judgment. *Davy* v. *Myers*, Tay. 89.

Where husband and wife executrix are sued, service of process on the husband only is sufficient, as well as in other cases. *Shuter et al.* v. *Marsh et ux.*, Tay. 172.

After a sheriff's death, his personal representatives cannot be joined with his sureties, in an action on the covenant given by the sureties and the sheriff, under 3 Will. IV. c. 8, for a default by the sheriff in his lifetime. *Boulton* v. *Hamilton*, H. T. 3 Vict.

An action for mesne profits may be maintained against an executrix under 7 Will. IV. c. 3; and where the action is founded on the judgment against the casual ejector in ejectment, it is no ground of defence that although the writ of possession is tested in the tenant's lifetime, it was issued and executed after his death without a sci. fa. *Green* v. *Hamilton*, E. T. 3 Vict.

An account stated by an executor of a debt due by his testator never before ascertained or determined, is sufficient to charge the executor as a substantive debt, without any express promise to pay. *Watkins* v. *Washburn*, 2 Q. B. 291.

When a plaintiff sues two or more defendants as executors, the entering a nolle prosequi and discontinuing *as to one*, is not a discontinuance of the action. *Masson* v. *Hill et al.*, 5 Q. B. 60.

The testator, having been appointed by the finance committee of the district council to collect wild land tax:—Held, that his representatives were liable to the council for money received by their authority and not paid over. *The Municipal Council of Lincoln, Welland, and Haldimand* v. *Thompson et al.*, 8 Q. B. 615.

On a plea of ne unques executors by two, the plaintiff may have a verdict against one only. *The Earl of Elgin* v. *Slawson et al.*, 10 Q. B. 289.

Assumpsit against an executrix. Plea, plene administravit. Assets were admitted to an amount less than the claim. It was proved that the testator had joined one M. in giving a note for the price of a carding machine, which M. was to hand over to him in order to save him harmless. This was not done, but after the testator's death defendant got the machine from M. to hold as security against the note. It was also proved that there were crops in the ground at the testator's death:—Held, 1. That the verdict should be only for the value of the assets proved, and not for the amount of the debt. 2. That the carding machine would not form assets. 3. That the crops would be assets, in the absence of any evidence as to the contents of the will *Fisher* v. *Trueman*, 10 Q. B. 617.

Upon an action brought against executors for the board and education of testator's daughter, a verbal contract, at the most for three years, was proved with the testator, and plaintiff's knowledge of his death was shewn by charges made in the plaintiff's account:—Held, that the contract not being a binding one upon the testator if alive, his executors were not liable on it. *Institute of Ladies of the Sacred Heart* v. *Matthews*, 10 C. P. 437.

A bill having been filed against trustees and executors, residing at Montreal, for an account of the estate, who, at the time of his death, and for some years previously, had been domiciled there, the trustees, &c., although not obliged to do so, had appeared to and answered the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there, was a very important difference as to the responsibility incurred by them according to the laws of Upper or Lower Canada, but which at the time of filing their answer they were not aware did exist:—Held, that under the circumstances they ought to be allowed to file a supplemental answer, for the purpose of placing the necessary facts upon the pleadings; and that the fact that such permission might enable the parties to set up a defence of want of jurisdiction in the courts of this province, was no objection against, but rather a reason for this permission. *Torrance* v. *Crooks*, 1 E. & A. 230.

An executor or administrator may by a submission to arbitration preclude himself from pleading plene administravit, and thus render himself personally liable; but, Held, on demurrer to the declaration set out in the report of this case, that an executor or administrator may, as such, refer to arbitration causes of action which arise in the lifetime of the testator or intestate, so as to bind the estate, and without making himself personally responsible; and, therefore, the declaration being for a breach of submission to perform the award made in pursuance of such a reference, and also on the common counts admittedly against the defendant in her representative character:—Held, that there was no misjoinder of causes of action. *Reid* v. *Reid*, 16 C. P. 247.

An executor of an executor represents the original testator, and is properly proceeded against on a claim against him. *Allan* v. *Parke*, 17 C. P. 105.

After the commencement of an action for injury occasioned by negligence and improper conduct of the defendant in the management of a vessel, defendant died:—Held, that the action could not be revived against his executor. *Cameron* v. *Milloy*, 22 C. P. 331.

A bill was filed in 1846, by devisees against executors charging them with improper conduct in the management of the estate; and the answers were all filed within a year afterwards. No further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate. The court under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate. *Meacham* v. *Draper*, 2 Chy. 316.

As a general rule an assignment for the benefit of creditors will be taken as a declaration of insolvency, and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging mal-administration and alleging that the executor had made an assignment for the benefit of his creditors, and was insolvent, the court upon a motion for an injunction and receiver, before answer, granted an interim injunction and receiver, notwithstanding the executor denied any mal-administration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 9 Chy. 443.

A., B., and G. were appointed executors. A. as acting executor, received a large sum belonging to his testator's estate, which he failed to account for, and a suit was commenced to administer the estate. This suit was compromised by the plaintiff therein, who was a beneficiary under the testator's will, and the co-executors who took security for the sum found due from B., who agreed to cease all further interference with the estate, which was thenceforth to be managed by A. B. continued to meddle with the estate; whereupon A. and G. filed a bill praying for an account, and for an injunction to restrain B. from all further interference with the estate:—Held, on demurrer, that the proceedings in the former suit and its pendency were no bar to the relief sought. *Aikins* v. *Blain*, 1 Chy. 212.

A legatee filed a bill against executors and another person, between whom and the executors it was charged, improper dealings had taken place with the estate. The charges made were not sustained in evidence, and the plaintiff was therefore ordered to pay the costs of the defendants to the hearing, and allowed only costs of and subsequent to decree; the cross-charges of improper conduct having been brought against the plaintiff by other legatees made parties to the suit, and not substantiated, the costs incurred in resisting such charges were directed to be paid by the parties making them. *Miller* v. *McNaughton*, 11 Chy. 308.

Where a legatee filed a bill charging the executors with neglect and improper conduct in the management of the estate, all of which were by the master's report shewn to be groundless, the executors having managed the estate to the best of their ability, and the case in reality be

such as should have been proceeded with by a summary application for an administration order, the court, on further directions, ordered the next friend of the plaintiff to pay the executors their costs up to the hearing; not the costs of the decree, or of taking the accounts, or of subsequent proceedings, but directed the plaintiff to pay her own costs thereof. *Moodie* v. *Leslie*, 12 Chy. 537.

The report in an administration suit found £1403 chargeable against an executor. Of this sum £1247 was for the price of land claimed and received by the executor, the testator's son, as heir, and his claim to this had long been acquiesced in by the other parties interested, till held otherwise in this suit, when the purchase money was declared to pass under the testator's will to the claimant and others as legatees. A sum of £133, the value of the testator's chattel property, left by this executor in the hands of the testator's widow, and finally lost to the estate, made up the remainder of the sum charged to this executor, except a balance of about £34. Under the circumstances the executor was allowed his costs, as of an administration suit, out of the estate; and was not charged with interest on the balance in his hands, which he was required to pay into court within a month, after deducting therefrom his share of the estate as legatee. *Blain* v. *Terryberry*, 12 Chy. 221.

A purchaser of real estate paid a portion of the purchase money during the lifetime of the vendor, and after his decease paid the balance to his personal representatives. None of the heirs-at-law were infants, but they refused to execute a conveyance to the purchaser, who filed a bill against the real and personal representatives for specific performance. The conduct of the personal representatives was shewn to have been correct, and the court, in making the decree dated, ordered the plaintiff to pay the personal representatives their costs; but gave the plaintiff his costs of suit against the heirs-at-law; not against the estate of the vendor. *Addaman* v. *Dent*, 13 Chy. 692.

Quære, where it is clear that a purchaser of real estate has paid all his purchase money, whether it is necessary, in a suit of specific performance against the heirs-at-law of the vendor, to make the personal representatives parties to the bill therefor. *Ib.*

In such a case it would seem sufficient to add the personal representatives as parties in the master's office. *Ib.*

By the master's report executors were found indebted to the estate, one of whom, being dissatisfied with the finding of the master, gave notice of appeal to the plaintiff, but did not serve any notice of appeal on the other executor: Held, irregular, and that a special application would be necessary to be allowed to give notice of the appeal after the regular time for so doing. The fact that the interest of the party not served was the same as the party appealing made no difference in respect to his right of being present upon the argument of the appeal. *Larkin* v. *Armstrong*, 1 Chy. Chamb. 62.—Blake.

The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children, and on the eldest son coming of age in 1852, the executor pointed out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had, was some household furniture. In 1867, the widow having set up a claim for dower rejecting an annuity provided for her by the will, the heir at-law filed a bill against the executor for an account:—Held, that the Statute of Limitations did not bar the relief; but, inasmuch as the executor had reason to believe he would never be called on for an account, the court thought the master, in proceeding under the decree, should act liberally upon the rule of court giving the master a discretion as to the mode of vouching accounts in his office. *Walmsley* v. *Bull*, 15 Chy. 210.

A bill was filed against an executrix de son tort, charging that she had sold the personal estate of the deceased and applied the proceeds in the purchase of certain lands, and praying that she be declared a trustee thereof for the next of kin, and, if necessary, that the estate of deceased be administered. An application was made under consolidated order 56 for the appointment of some person to represent the estate in the suit, on the ground that there was no personal estate outstanding, and the appointment in this way would save expense. The motion was dismissed, it being—Held, that the deceased was not interested in the matters in question in this suit, and therefore the case was not within the provisions of consolidated order 56; and no account having been taken of the personal estate it could not be said that the personal representative of the deceased would be merely a formal party, for a balance might be found due from the defendant to the estate, which it would be the duty of the personal representative to administer. *Leonard* v. *Clydesdale*, 10 L. J. N. S. 107.—Chy. Chamb.—Holmested, *Referee*.

A bill was filed against two executors and other persons. One of the executors, against whom charges of breach of duty were made by the bill, died. A motion by the surviving defendants, including the co-executrix of deceased defendant, to compel the plaintiff to revive, or in default that the bill be dismissed, was refused:—Held, that the proper parties to make such an application were the representatives of deceased defendants, and that the surviving defendants might move to dismiss for want of prosecution in the usual way. *Watson* v. *Watson*, 6 P. R. 229. Chy. Chamb.—Holmested, *Referee*.

VIII. Evidence in Actions and Suits by and against.

1. *Proof of Representative Character.*

The plaintiffs declared as executors, laying promises to the testator and to the plaintiffs after his death, and on an account stated with the plaintiffs. Defendant pleaded only the general issue, and plaintiffs proved an acknowledgment of the debt by defendant to them as executors:—Held, that it was not necessary to produce probate to prove their representative character. *Dickson et al.* v. *Markle*, Dra. 286. See, also, *McGill* v. *Bell*, 3 O. S. 618.

Upon the issue of ne unques administrator, the plaintiff, producing such letters of administration as he has pleaded, will be entitled to

succeed. If they do not give the plaintiff a right to sue, by reason of anything extrinsic, such as the place of residence of defendant, &c., the fact must be pleaded specially. Upon the issue of ne unques administrator de bonis non, the plaintiff need not produce the administration granted to the former administrator. *Beard* v. *Ketchum*, 5 Q. B. 114.

Held, that the evidence given in this case was sufficient to prove executorship as against one, if not as against both defendants. *Earl of Elgin* v. *Slawson et al.*, 10 Q. B. 289.

In ejectment, claiming through a sheriff's sale under an execution against executors obtained on their confession:—Held, no objection that they had not proved the will, for by confessing judgment they accepted the office. *Mandeville* v. *Nicholl*, 16 Q. B. 609.

An American probate of the will may be received as corroborative evidence of the representative character of the executor. *Sloan* v. *Whalen*, 15 C. P. 319.

In an action on a note endorsed to the plaintiff, in the state of New York, by the administrators of the payee, to prove the administrators' authority, an exemplification of letters of administration was put in, granted by the Surrogate Court of the county of Otsego, in New York, where the payee had died, and purporting to be signed by the surrogate, who certified it to be a copy of the original record of the letters, and a seal was affixed described as his seal of office. Attached to this was a certificate under the great seal of the State of New York, purporting to be signed by the governor, verifying the signature and office of the surrogate judge, and the seal of his court:—Held, sufficient. Held, also, immaterial that the administrators had added to their names "executors" instead of "administrators," the addition being surplusage. *Hard* v. *Palmer*, 21 Q. B. 49.

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2. *Other Cases.*

In an action by an administrator, a replication of a promise to the intestate, in answer to a plea of the Statute of Limitations, is not supported by proof of a promise to the administrator. *Wright* v. *Merriam*, 6 O. S. 167.

Where the defendant in an action of assumpsit paid money into court, and died, and the action abated, and the plaintiff afterwards sued his executor for the same cause of action, and took the money in the former suit out of court, but proved his debt to no larger an amount:—Held, that he could not retain the costs of the first action, and recover against the executors for the difference between the sum remaining and that originally paid in. *Carey* v. *Choat et al.*, 6 O. S. 467.

The plaintiff, as administrator, sued defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. Defendant denied the promise:—Held, upon the facts set out, Jones, J., diss., that if the admissions proved could be construed into an absolute promise to pay, still being made before the plaintiff had received his letters of administration, they could not support the issue raised. *Beard* v. *Ketchum*, 5 Q. B. 114.

Quære, whether the admissions in evidence would support an absolute promise to pay, if made to the administrator himself, and if so, whether the fact of their being made to a third person instead of to the administrator, made any difference. *Ib.*

Action on a bond that G. C., his executors, &c., should account and pay over on request. Defendant was one of three executors of G. C., but did not act in the affairs of the estate, and lived at some distance; and a request to pay over all moneys, &c., had been made upon the other two executors, but not on him. It was admitted, however, that all the executors had been sued on this bond, and served with process and declaration before the commencement of this action:—Held, that the demand was sufficient. *The Provisional Corporation of the County of Bruce* v. *Cromar*, 22 Q. B. 321.

Quære, per Hagarty, J., whether, as a general rule, when a demand upon executors is necessary it must be made upon all. Semble, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor. *Ib.*

IX. Actions on Administration Bonds.

1. *Assignment of Administration Bond.*

The bond being conditioned to exhibit an inventory into the Court of Probate on the first Monday in *June*, and the breach being that the administratrix did not exhibit an inventory on the first Monday in the *year*, the declaration was —Held bad on general demurrer. *Metcalf* v. *McKenzie*, 2 Q. B. 103.

The costs of an application in Chancery under sec. 82 of the Surrogate Courts' Act, (C. S. U. C. c. 16,) for an assignment of a probate bond in order to an action thereon at common law, cannot be taxed as *costs* in the action, but should be recovered as *damages* consequent on the breach of the condition sued for. *Closson* v. *Post*, 6 L. J. 141.—C. L. Chamb.—Draper.

An administration bond having been given to the surrogate judge of the united counties of Huron and Bruce, and the union having been afterwards dissolved:—Held, under C. S. U. C. c. 16, ss. 63, 65, that the judge of the senior county could not order such bond to be assigned, not having been named by the Court of Chancery as the judge to whose benefit it should enure; and that the plaintiff, suing as assignee under his order, must prove such nomination. *Staff* v. *McCarrow*, 35 Q. B. 22.

An application for the assignment of an administration bond under the act respecting Surrogate Courts, will not be granted without notice to the sureties. *Re Hilts*, 1 Chy. Chamb. 386.—Mowat.

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2. *Under 33 Geo. III. c. 8.*

[*Under this act the bond was taken to the governor of the province. Now, under C. S. U. C. c. 16, s. 63, it is taken to the judge of the Surrogate Court.*]

[*As to the form of such bond under the first act, and of a declaration thereon, see* Bagot v. *McKenzie, 6 O. S. 580; Metcalfe* v. *McKenzie, 2 Q. B. 103, 329.*]

Leave to sue on a bond given to the lieutenant governor for the time being as a judge of the Court of Probate, should be applied for to that court, not to the Court of Queen's Bench. *In re Stegman*, 5 O. S. 71.

Debt on an administration bond, assigning breaches in the declaration. Pleas, 1. That *after* the 1st of November, 1833, (the day named in the condition on which the administrators were to render their account,) to wit, on, &c., and as soon as they reasonably could, the administrators rendered a just and full account, which was allowed by the judge of the Surrogate Court; 2. Performance generally; 3. That on the 1st of November, 1833, there was no sitting of the Surrogate Court to which the administrators could have rendered their account:—Held, on demurrer, pleas bad. *The Earl of Elgin* v. *Crosby*, 10 Q. B. 97.

The next of kin cannot claim substantial damages in an action on an administration bond, where no decree for distribution has been obtained, by shewing merely that the administrator has received moneys for the estate. The proper course for the defendant in such a case is, to apply to the court to stay proceedings on the bond until a decree for distribution has been obtained. *S. C. Ib.* 256.

A breach, that although a large amount or value of goods, &c., of the deceased had come to the hands of the administrator, he had not well and truly administered the same according to law:—Held, bad; and that the only two modes in which a valid breach of a condition in the form prescribed by this act can be assigned are, non-feasance in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance in wasting the assets collected by conversion of the same to the administrator's own use, or some other misappropriation whereby the estate is diminished, to the prejudice of those entitled. *Neil* v. *McLaughlin*, 19 C. P. 350.

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2. *Under Surrogate Courts Act, (C. S. U. C. c. 16.)*

Held, that the rules and orders referred to in the 18th sec. of this act, being sanctioned by the the legislature, a bond in accordance with the form prescribed by them must be held sufficient, though it was alleged not to comply the statute. *Bell* v. *Mills*, 25 Q. B. 508.

Part of the condition was, that the administrator should, when lawfully called on, make and exhibit an inventory of all the estate and effects which had or should come into his hands. The first breach alleged was, that the judge had made an order upon him to bring in forthwith an inventory of the goods, chattels, and credits of the deceased, and that he did not make or exhibit an inventory of the goods which had come into his hands, or any inventory:—Held, that admitting the order to be too large, it was nevertheless good to the extent of the condition, and that the breach, not going beyond such condition, was also good. Held, also, that it was unnecessary to shew the amount recoverable in respect of such breach. *Ib.*

Held, that the non-payment of the plaintiff's judgment against the intestate could not be assigned as a breach of the bond, for the Surrogate Courts' Act gives no new remedy for the recovery of debts. *Ib.*

Quære, however, as to the mode of carrying out the provisions of sec. 65. *Ib.*

In an action on an administration bond, the want of a decree is a good plea to a breach for not distributing, but it is no ground for staying proceedings, nor is the want of a citation for an account, nor the omission to shew the receipt and misappropriation of funds. On such breach full damages may be recovered. Dictum in Earl of Elgin *v.* Crosby, 10 Q. B. 256, doubted and distinguished. *Neill* v. *McLaughlin*, 4 P. R. 312.

X. Lands as Assets in the Hands of Executors or Administrators.

[*By 27 Vict. c. 15, it is enacted that under the Imperial statute 5 Geo. II. c. 7, the title and interest of a testator or intestate in land might be, and hereafter may be, seized and sold under a judgment and execution recovered by a creditor of the testator or intestate against his executor or administrator, in the same manner, and under the same process, as under a judgment and execution against the deceased if living; and all such sales heretofore made are confirmed, excepting cases pending at the passing of the act, or theretofore finally adjudged.*]

Semble, that a fi. fa. cannot issue against lands of an intestate, as being assets in the hands of an administrator. *Doe* d. *Ruggles* v. *Carfrae*, Tay. 211.

The court refused to order a sheriff to refund money received by him as the price of land sold at sheriff's sale, the purchaser having been ejected, on the ground that lands could not be sold under a fi. fa. as assets in the hands of an administrator. *In re Carfrae*, Tay. 472.

Lands and tenements held in fee simple by a debtor at the time of his decease, may be legally taken in execution on a judgment against his executor or administrator. *Forsyth* v. *Hall*, Dra. 291.

Quære, whether, in order to sell the lands of a deceased debtor, against whom judgment was obtained in his lifetime, the proceedings should under 5 Geo. II. c. 7, be against his heir or personal representative. *Varey* v. *Muirhead*, Dra. 486.

Lands are assets for the satisfaction of debts in the hands of an executor, under 5 Geo. II. c. 7; and to a plea of plene administravit, the plaintiff may reply lands. *Gardiner* v. *Gardiner*, 2 O. S. 520.

Demurrer to a replication of lands, on the ground that the executors had no control over lands, or could not as executors dispose thereof:—Held, replication good. *Seaton* v. *Taylor*, 3 Q. B. 302.

Replication of lands held bad on special demurrer. *Bowes* v. *Johnson*, 6 O. S. 158; *Ward* v. *McCormack*, E. T. 5 Vict., R. & H. Dig. 208.

Lands may be sold on a judgment against one of several executors, in the same manner as if it had been against all. *Doe* d. *Smith* v. *Shuter*, 5 O. S. 655.

Semble, that lands may be sold under a judgment confessed by an executor. *Doe* d. *Lyon* v. *Lege*, 4 Q. B. 360.

Under 5 Geo. II. c. 7, lands are assets in the hands of executors for the payment of unliquidated damages in an action of covenant, not merely for debts. *Sickles* v. *Asselstine*, 10 Q. B. 203.

To an action on a covenant for title by the assignee of the bargainee against the executors of the covenantor, defendants pleaded that they had fully administered all the testator's goods. The plaintiffs replied lands. Defendants rejoined, that they had fully administered all the lands of the testator which had come to their hands, &c. The rejoinder was held clearly bad. The replication, being excepted to, was upheld on the authority of Gardiner *v.* Gardiner, 2 O. S. 520. Draper, J., yielded to the authority of that and other cases decided in this court, though he considered the replication bad, for the reasons stated. *Ib.*

An executor or administrator is not liable to have a judgment de bonis propriis entered against him on a replication of lands to a plea of plene administravit, which virtually confesses the truth of the plea. *Topping et al.* v. *Yardington*, 6 C. P. 347.

Action against an administrator. Defendant pleaded plene administravit, to which the plaintiff replied lands. The defendant rejoined, that he could not deny but that the intestate died seised of lands; but that his heir-at-law, for a valuable consideration, conveyed all his interest to defendant: that at and before the death of the intestate one H. held a mortgage on said land for its full value, and that defendant solely to prevent costs against the estate, and without any consideration, conveyed the equity of redemption to said H.:—Held, rejoinder bad. *Levisconte* v. *Dorland*, 17 Q. B. 437.

Declaration against administrators on a promise of intestate. Defendants pleaded a judgment recovered against them, and that they had fully administered, except goods, &c., to a small amount, insufficient to satisfy the judgment. Plaintiffs took issue on this plea, and also replied that the intestate died seised of lands, &c., which are assets in defendants' hands. Defendants confessed it to be true that the intestate died seised of the lands, and that they are such assets; nevertheless, inasmuch as defendants, as administrators, never had power to sell or apply such lands, &c., to the liquidation of any debts of the intestate, they prayed judgment if the plaintiffs should further maintain their action against them as administrators, as far as the same related to the liability of their own goods and chattels. Rejoinder held good on demurrer. *Mein et al.* v. *Short et al.*, 9 C. P. 244. See also *Mein* v. *Short*, 11 C. P. 430.

Semble, that for the purpose of enabling the creditor of an intestate to get execution against the intestate's lands on a judgment against the administrator, it is not indispensable to reply to a plea of plene administravit, or to a plea like the one in the present case, that the intestate died seised of lands. *S. C.* 9 C. P. 244.

Action against an executrix. Plea, a covenant by testator on which £3,500 remained due; and plene administravit, except goods not sufficient to satisfy said specialty debts. Application for leave to take issue and reply lands was refused, and the case of Mein et al. *v.* Short et al., 11 C. P. 430, referred to as the course to be pursued. *Holton* v. *McDonald*, 12 C. P. 246.

The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. He or his heir or his devisee after his death may sell or convey to a bona fide purchaser for value, at any time before judgment has been entered against him or his personal representatives, or execution against lands issued upon it; and such purchaser will have a good title as against creditors. Levisconte *v.* Dorland, 17 Q. B. 437, remarked upon. *Reed* v. *Miller*, 24 Q. B. 610.

An administrator of an administratrix cannot represent the intestate, but an administrator de bonis non must be appointed to the original estate; and a sale by the sheriff of lands belonging to the intestate under a fi. fa. issued on a judgment against such administrator is nugatory. *Ingalls* v. *Reid*, 15 C. P. 490.

Action on a judgment recovered against an executor. The declaration set out a judgment recovered, alleged the issuing of a fi. fa., and a return of nulla bona, and suggested a devastavit. Plea, that in that action defendant pleaded plene administravit: that the plaintiff replied lands, on which judgment was given that the lands were assets in the hands of the defendant as executor. The defendant then averred that the lands were sufficient, and that the plaintiff had not proceeded against them. Demurrer to plea on the ground that, where judgment has been recovered and a devastavit is shewn, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator:—Held, that the replication of lands was a full admission of the truth of the plea of plene administravit: that the plaintiff, by his replication in the former action, being estopped from setting up a devastavit now the defendant was at liberty to shew the true state of the case, to save himself from personal liability; and that the replication (of lands) commonly used since Gardiner *v.* Gardiner, is both illogical and unnecessary. *Hogan* v. *Morissy*, 14 C. P. 441.

Real estate cannot be sold in this province under an execution obtained against an executor de son tort. *McDade* d. *O'Connor* v. *Dafoe*, 15 Q. B. 386; *Wrathwell* v. *Bates*, 15 Q. B. 391; *Graham* v. *Nelson*, 6 C. P. 280.

Held, that the sale of the reversion in a term of years under a fi. fa. on a judgment against an executor de son tort, is a valid sale as against the rightful administrator; and Semble, it is not necessary that the tort executor should have been in actual possession in respect of the term. *Bain* v. *McIntyre*, 17 C. P. 500.

Since 27 Vict. c. 15, for the purpose of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor, in the same way as next of kin are bound; and although they are not entitled as of course to have the issues tried over again, it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the executor or administrator, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Chy. 280.

The opinion acted upon by Mowat, V. C., in the last case, that for the purpose of an exe-

tion against lands heirs are now primâ facie bound by a judgment against the executor, was followed by Strong, V. C., with an intimation that, but for that case, he (V. C. Strong) would not have arrived at the same conclusion. *Willis* v. *Willis*, 19 Chy. 573.

See *Mason* v. *Babington*, 17 C. P. 149, p. 1425.

XI. Executor de son tort.

Whether a party has made himself an executor de son tort is a mixed question of law and fact. The jury must find the facts if disputed, and the court are to say whether those facts create an executorship. *Haacke* v. *Gordon*, 6 Q. B. 424.

A party may make himself an executor de son tort by answering as executor to any action brought against himself, or by pleading any other plea than ne unques executor. *Ib.* See, also, *Jessup* v. *Simpson et al.*, 14 Q. B. 213.

Payments made to an executor de son tort form no defence to an action by the rightful executor. *Hunter* v. *Wallace*, 13 Q. B. 385.

Debt against defendants as executors of J. S., on a judgment recovered against him. Pleas, ne unques executors, and plene administraverunt. It appeared that the testator, who had formerly lived in St. Lawrence county in the United States, and in this province, died on his return from California, leaving a will, but appointing no executors. Defendants had obtained administration with the will annexed from the Surrogate Court of St. Lawrence county, being the proper tribunal there, and having duly administered all the assets (the greater part being appropriated to a debt due to one of the administrators,) had obtained their discharge. No assets were shewn in this country, and no intermeddling by defendants here. The evidence was conflicting as to whether testator's domicile was in this province or in St. Lawrence county, but the jury found that it was in St. Lawrence county; and a verdict was rendered for defendants:—Held, that such verdict was right. *Jessup* v. *Simpson et al.*, 14 Q. B. 213.

Held, that real estate cannot be sold in this province under an execution obtained against an executor de son tort. *McDade* d. *O'Connor et al.* v. *Dafoe*, 15 Q. B. 386; *Wrathwell* v. *Bates*, 15 Q. B. 391; *Graham* v. *Nelson*, 6 C. P. 280.

An action commenced against an intestate may be revived under C. S. C. c. 22, sec. 134, and continued against his executor de son tort. *Keena* v. *O'Hara*, 16 C. P. 435.

This question cannot be raised under a plea of ne unques executor. *Ib.*

Held, that the sale of a reversion in a term of years under a fi. fa. on a judgment against an executor de son tort, is a valid sale as against a rightful administrator; and, Semble, it is not necessary that the tort executor should have been in actual possession in respect of the term. *Bain* v. *McIntyre*, 17 C. P. 500.

Held, that in an action by a creditor against an executrix de son tort, she cannot set off a debt due from the plaintiff to her testator. Held, also, that she may be sued as executrix, and on her defending as such the plaintiff may reply that she is executrix de son tort. *Cameron* v. *Cameron*, 23 C. P. 289.

In proceeding against the heir-at-law of a purchaser, in order to obtain a specific performance or rescission of the contract, the personal representative of the deceased is a necessary party to the suit, and without one the suit is defective, though an executor de son tort is a defendant, and though no administration had been taken out before the filing of the bill. *O'Neal* v. *McMahon*, 2 Chy. 145.

An executor de son tort cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his, give a new start to the Statute of Limitations as against the rightful administrator, or the parties beneficially interested in the estate. *Grant* v. *McDonald*, 8 Chy. 468.

See *Leonard* v. *Clydesdale*, 10 L. J. N. S. 107, p. 1498.

XII. Miscellaneous Cases.

A disclaimer as executor by one of two executors and devisees in trust, does not prevent the trust estate from vesting. *Doe* d. *Boyer* v. *Claus*, 3 O. S. 146.

Where A., having only a bond for a deed, and not having paid all the purchase money, conveyed in fee to B., and died, and B. went into possession, and continued for several years, when A.'s administrator obtained a conveyance in fee to himself, from the person who had given A. the bond:—Held, that the administrator was guilty of a fraud, and that his title could not prevail against B. *Doe* d. *Dobie* v. *Vanderlip*, 5 O. S. 85.

Executors empowered under a will to sell lands, are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman et al.*, 28 Q. B. 337.

Sec. 27 of the Insolvent Act of 1865, does not enable the creditors of a deceased person to put his executors or administrators into insolvency in their representative character. *In re Sharpe*, 20 C. P. 82.

Held, that upon the death of a sheriff who had recovered judgment in an action on notes seized under a fi. fa., his personal representative, and not his successor in office, is entitled to execution. *Dickenson* v. *Harvey*, 6 P. R. 170.—C. L. Chamb.—Dalton, *C. C. & P.*

Where certain creditors of a deceased insolvent sued his executors, recovered judgments, and sold his real estate, and got paid in full:—Held, that they were still bound to account, and the other creditors of the insolvent were entitled to have the whole estate distributed pro ratâ, under the Act 29 Vict. c. 28. *Bank of B. N. A.* v. *Mallory*, 17 Chy. 102.

EXECUTOR DE SON TORT.

See Executors and Administrators.

EXECUTORY DEVISE.

See Will.

EXIGENT.

A writ of exigent ordered upon the application of the prosecutor, without it being applied for by the attorney-general. *Rex* v. *Elrod*, Tay. 120.

EXONERETUR.

See BAIL.

EXPRESS COMPANY.

I. CONVEYANCE OF GOODS BY—*See* CARRIERS.

Contract with an express company to carry and present notes for payment—Delivery to notary—Failure by notary to notify endorser of non-payment—Company held not liable. *McQuarrie* v. *Fargo*, 21 C. P. 478.

A parcel was left with an express company's agent, c. o. d. The consignee lived beyond the express company's limits. The parcel was received by the agent without objection, and forwarded by him, and delivered to the consignee without the sum due being collected:—Held, that the company were liable. *Bennett* v. *Vickers*, 12 L. J. N. S. 51.—D. C.—Ardagh.

The extent of the authority of an agent of an express company, and the liability of the latter under the circumstances set out in this case, discussed. *Ib.*

EXTENT.

Where in the execution of a writ of extent the counsel for the crown, considering the property returned by the finding of the jury to be ample to cover the crown debt, designedly omits property sold before the execution of the writ by the crown debtor to bonâ fide purchasers for value, and on an application subsequently made to quash that writ of extent and issue a second writ of the same teste as the former writ, in order to seize and make contribute the last mentioned property, there was no reason suggested for allowing the application but the fact that the crown debtor appeared from the books of the county registry office to have been possessed of other property than that returned, the application was refused. *Regina* v. *Merrigold*, 7 L. J. 18.—P. C.—Richards.

Poundage is recoverable from the defendant upon a writ of extent. *Regina* v. *Patton*, 9 Q. B. 307.

Other expenses attending the execution of the writ may also be recovered on application to the court or judge in chambers. *Ib.*

A writ of extent having issued on behalf of the crown, on affidavits not distinctly stating that the debt was in danger, but shewing the exact state of the affairs of the debtor; upon motion to set aside the same:—Held, that the insolvency of defendants was plainly inferable from the facts stated in the affidavits, and the rule was therefore discharged. *Regina* v. *The Port Whitby, &c., Road Co.*, 13 C. P. 237.

On the taking of an inquisition before the sheriff of the county of Ontario, a debt by H., for the sum of £245 10s. 6d. was proved at the date of the writ; and on the day of the inquisition H. appropriated the moneys belonging to the defendants in his hands, in certain payments on behalf of the defendants, which was proved. H.'s counsel, (though not stating he was appearing in his behalf) desired to cross-examine the witnesses and to put the question to one of them, "How much does the said H. now owe the company?" which the sheriff refused to allow. On application, on this ground, to set aside the inquisition so far as H. was concerned in finding him indebted in the amount above mentioned:—Held, that the question after the evidence as stated was given, was asking the witness to draw a conclusion of law upon the facts already proved; and that the refusal to allow it was no ground of objection. *Regina* v. *The Port Whitby and Lake Scugog, Simcoe, and Huron Road Co. In re Huston*, 13 C. P. 318.

The Port Whitby, &c., Road Co. being indebted to the crown, a writ of extent was issued on the 18th December, 1862, and was placed in the hands of the sheriff on the 19th, and notice thereof was given by the sheriff to defendant, directing him not to pay over any moneys. The inquisition began on the 23rd. On that day, before the proceedings commenced, defendant, who was indebted to and an officer of the company, paid over what he owed them in payment of the debts of the said company, chiefly to their officers:—Held, 1. That from the facts of the case collusion might be inferred; 2. That even if the money had been paid before the inquisition began, still the writ would prevail, for the inquisition as a judicial act would take effect from the earliest moment of the day on which it began. *Regina* v. *Huston*, 13 C. P. 488.

Held, 1. That a debt whereon to found a writ of extent may be found on inquisition without viva voce testimony. *Regina* v. *Reiffenstein*, 9 P. R. 175.—C. L. Chamb.—Galt.

2. That an affidavit of danger is sufficient, if it satisfy the judge to whom the application for a fiat for a writ of extent is made, that there is danger that the debt will be lost if immediate remedy is not granted. *Ib.*

3. That it is not an irregularity, that an inquisition finds that the defendant was a debtor to the crown on the 20th July, the inquisition being filed and a writ of extent issuing on the 21st of July. *Ib.*

4. That the rule which prevents a civil remedy being taken whilst the prosecution for the felony which is the foundation of the action is not concluded, does not apply where the crown, and not a private person, is the plaintiff. *Ib.*

A writ of extent was set aside by judge's order, and it was ordered that another writ might issue upon the fiat for, and tested as of the date of, the former writ:—Held, that such order was unobjectionable. *Regina* v. *McNab*, 30 Q. B. 479.

Held, also, that the affidavit set out in the report of this case, upon which the writ issued, was sufficient, and that defendant was sufficiently shewn by it to be a debtor to the crown. *Ib.*

Held, that the Post Office Act of 1867, 31 Vict. c. 10, s. 89, D., does not take away from the crown the remedy by extent upon a bond given by a postmaster. *Ib.*

EXTORTION.

See CRIMINAL LAW.

EXTRADITION.

I. CONSTRUCTION OF THE TREATY, 1509.

II. EVIDENCE AND PROCEDURE, 1511.

I. CONSTRUCTION OF THE TREATY.

Held, that the Ashburton treaty contains the whole of the law of surrender as between Canada and the U. S.; the 3 Will. IV. c. 6, being superseded by it, and the Imperial Act 6 & 7 Vict. c. 76, and provincial statute 12 Vict. c. 19; though in relation to other foreign powers, with whom no treaty or conventional arrangement existed, the 3 Will. IV. c. 6, is still in force. *Regina* v. *Tobbee*, 1 P. R. 98.—C. L. Chamb.—Macaulay.

Quære, how far the United States, Lower Canada, or England, would respect the 3 Will. IV. c. 6, if a fugitive surrendered by Upper Canada to a foreign power were taken through those countries. *Ib.*

Held, that though the surrender must be by the executive government, yet a party committed under a magistrate's warrant may apply for a habeas corpus, and the court or judge may determine whether the case be within the treaty. *Ib.*

Held, that the Ashburton Treaty as to the extradition of fugitive felons, and our acts passed to give effect to it, extend to British subjects committing the offences named in the treaty in the territory of the United States and becoming fugitives to Canada. *In re Burley*, 1 L. J. N. S. 20.—Duggan, *Recorder*; *S. C. Ib.* 34.—C. L. Chamb.—Draper.

Judges are bound to construe the treaty in a liberal and just spirit, not labouring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect. *Re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.—Hagarty.

Remarks on the propriety of giving a liberal interpretation to the extradition treaty, and the inadequacy of its provisions to meet the class of felonies of most common occurrence in both countries. *Regina* v. *Morton et al.*, 19 C. P. 9.

A. being a slave in the state of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about 30 miles from his home he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed, but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace; any slave found more than twenty miles from his home is declared a runaway, and a reward is given to whoever shall apprehend and return him to his master. A. having made his escape to this province was arrested here upon a charge of murder, and the justice before whom he was brought having committed him, he was brought up in this court on a habeas corpus, and the evidence returned under a certiorari. It was contended that as A. acted only in defence of his liberty, there was no evidence upon which to found a charge of murder if the alleged offence had been committed here, and that he could not be demanded by the treaty:—Held, that under the Ashburton treaty, and our statute for giving effect to it, C. S. C. c. 89, the prisoner was liable to be surrendered. McLean, J., diss., and holding that the information, warrant of commitment, and evidence (to which no objection was taken on argument) were insufficient: that if the charge had been clearly made out, the case was not within the treaty; and that the prisoner therefore was entitled to his discharge. *In re Anderson*, 20 Q. B. 124. See *S. C.* 11 C. P. 9.

Held, that a person convicted of forgery or uttering forged paper in the United States, who escaped to Canada after verdict, but before judgment, was liable to be delivered over. *In re Warner*, 1 L. J. N. S. 16.—C. L. Chamb.—Hagarty.

A British subject committing one of the crimes enumerated in the treaty within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the treaty, which provides for the surrender of "all persons" who being charged, &c. *In re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.—Draper, Richards, Hagarty.

Lawful acts of war against a belligerent cannot be either commenced or concluded in a neutral territory. *Ib.*

The fact that the person is charged with piracy committed in the foreign country, ought not to prevent the government of the country where the fugitive is found, from surrendering him on the charge of robbery made and proved in the latter country. *Ib.*

When surrendered to the government of the country from which he fled, the government of the latter are bound to try him for the offence for which he is surrendered, and not for any other or different offence. *Ib.*—Richards.

Burglary is not an offence within the treaty or the statutes passed to give effect to it. *In re Beebe*, 3 P. R. 273.—C. L. Chamb.—Morrison.

A prisoner was arrested here for having committed in the United States the crime of forgery, by forging, coining, &c., spurious silver coin, &c.:—Held, that the offence as above charged, did not constitute the crime of "forgery," within the meaning of the Extradition Treaty or Act. Definition of the term "forgery," considered.

In re Smith, 4 P. R. 215.—C. L. Chamb.—A. Wilson.

Held, that a warrant charging that the prisoners "did feloniously shoot at, &c., with intent, &c., to kill and murder," sufficiently charged an "assault with intent to commit murder," the words used in the treaty and statute. *Regina* v. *Reno et al.*, 4 P. R. 281.—C. L. Chamb.—Draper.

The prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch, with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them: —Held, that this was not an "assault" within the statute. *In re Lewis*, 6 P. R. 236.—C. L. Chamb.—Gwynne.

II. Evidence and Procedure.

Held, per Sullivan, J., that upon the facts, set forth in the judgment, the prisoner, who had been committed for extradition by the mayor of Toronto upon an alleged crime of forgery, had been committed upon insufficient evidence, and must be discharged. *In re Kermott*, 1 C. L. Chamb. 253.—Sullivan.

Quære, can a committing magistrate detain a prisoner upon evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case so as to bring it within the treaty. *Ib.*

A prisoner charged with forgery in Canada was arrested and surrendered by the government of the United States under the Ashburton treaty. Upon application for bail on the ground that there was no evidence of the corpus delicto:—Held, that the surrender of the prisoner by the United States government was sufficient evidence. *Regina* v. *VanAerman*, 4 C. P. 288.

Held, that it is in the discretion of the magistrate investigating into a charge under the treaty against a person accused of one of the crime mentioned in the treaty, to receive evidence for the defence. *In re Burley*, 1 L. J. N. S. 20.—Duggan, *Recorder*.

Per Richards, C. J., the judges of the superior courts in the country where the fugitive is found may, on a writ of habeas corpus and certiorari, consider if there was sufficient evidence before the committing magistrate to justify the committal, and so may review the decision of the magistrate on the evidence. Sed quære per Hagarty, and John Wilson, JJ. *Re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.; *Re Warner*, 1 L. J. N. S. 16.—C. L. Chamb.—Hagarty.

The duty of the court or a judge on a habeas corpus, is to determine on the legal sufficiency of the commitment, and to review the magistrate's decision as to there being sufficient evidence of criminality. *Regina* v. *Reno*, 4 P. R. 281.—C. L. Chamb.—Draper.

The magistrate cannot weigh conflicting evidence to try whether the prisoner is guilty of the crime charged. *Ib.*; *Re Burley*, 1 L. J. N. S. 20.

The magistrate should not go beyond a bare enquiry as to the primâ facie evidence of criminality of the accused, and should not enquire into matters of defence which do not affect such criminality. *In re Caldwell*, 5 P. R. 217.—C. L. Chamb.—A. Wilson.

Held, that a warrant of commitment issued by a magistrate under the treaty and our statute, C. S. C. c. 89, which used the words "did wilfully, maliciously, and feloniously stab and kill," and omitted the words "murder," and "with malice aforethought," and concluded by instructing the gaolor to "there safely keep him, the prisoner, until he shall be thence delivered by due course of law," did not come within the provisions of the treaty or statute, and was consequently defective. *In re Anderson*, 11 C. P. 9.

Held, that when a prisoner was brought before the court upon a writ of habeas corpus under our statute, the warrant of commitment upon which he was detained appearing on its face to be defective, the court had no authority to remand him, such power only being possessed by the court at common law, and the prisoner not being charged with any offence for which he could be tried in this province. *Ib.*

Held, that a magistrate, acting under the treaty and statute, after issue of a writ of habeas corpus, but before its return, might deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the court or judge before whom the prisoner is brought. *In re Asher Warner*, 1 L. J. N. S. 16.—C. L. Chamb.—Hagarty.

Where the accused, on his examination before the magistrate, admitted the acts charged, which primâ facie amounted to robbery (one of the crimes enumerated in the treaty), and alleged by way of defence matter of excuse which was of an equivocal character:—Held, that the magistrate could not try the case, but was bound to commit the accused for trial before the tribunals of the foreign country. *In re Burley*, 1 L. J. N. S. 34.—C. L. Chamb.—Draper, Richards, Hagarty, J. Wilson.

If the magistrate sitting on a similar charge if committed in Canada would commit for trial, he is equally bound to commit for trial in the foreign country when the offence, if any, has been committed there. *Ib.*

The warrant for committal till surrendered under the treaty need not set out the evidence taken before the committing magistrate, nor show any previous charge made in the foreign country, or requisition from the government of that country, or warrant from the governor-general of Canada, authorizing and requiring the magistrate to act. *Ib.*

The adjudication of the committing magistrate as to the sufficiency of the evidence for committal may be by way of recital in the warrant of commitment. *Ib.*

It is not necessary to the jurisdiction of a magistrate in Canada, acting under the treaty and statutes, either that a charge should be first laid in the United States, that a requisition should be first made by the government of the United States upon the Canadian government, or that the governor-general should first issue his warrant requiring magistrates to aid in the arrest of the fugitives; in other words, the charge may be originated before the magistrate in Canada. *Ib.*

It is not necessary, under the Extradition treaty and Act, 31 Vict. c. 94, D., that an original warrant should have been granted in the United States for the apprehension in this country of the

person accused, to enable proceedings to be effectually taken against him in this province for an offence within the treaty. *In re Caldwell*, 5 P. R. 217.—C. L. Chamb.—A. Wilson.

The evidence of accomplices is sufficient to establish a charge for the purposes of extradition. *Ib.*

Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanour or a felony. *Ib.*

Where a prisoner in custody under the Ashburton treaty obtained a habeas corpus and certiorari for his discharge, it was held that the argument as to the regularity or irregularity of the initiatory proceedings, such as information, warrant, &c., was a matter of no consequence, the material question being whether, being in custody, there was a sufficient case made out to justify the commitment for the crime charged. It was held, that certified copies of depositions sworn in the United States after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible evidence before the police magistrate. *Ex parte Martin*, 4 L. J. N. S. 198.—C. L. Chamb.—Morrison.

The authority of the magistrate need not be shewn on the face of a warrant of commitment, and where the crime has been committed in a foreign country, and the committing magistrate has (as McM. had in this case), jurisdiction in every county in Ontario, the warrant is not bad, though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, &c., of the county of Essex, and being signed by the police magistrate as such for the county of Essex. *Regina* v. *Reno et al.*, 4 P. R. 281.—C. L. Chamb.—Draper.

Under 31 Vict. c. 94, D., the last Extradition Act, all that the committing magistrate or the court or a judge has to do is, to determine whether the evidence of criminality would, according to the laws of Ontario, justify the apprehension and committal for trial of the accused if the crime had been committed therein. *Ib.*

Such decision, if adverse to the prisoner, does not conclude him; as the question of extradition or discharge exclusively rests with the governor general. *Ib.*

Evidence offered to a magistrate by a prisoner on an examination of this kind, by way of answer to a strong primâ facie case, may perhaps properly be taken, but would not justify the magistrate in discharging the prisoner. And, quære, whether it was not the intention of 31 Vict. to transfer to the governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up. *Ib.*

Under the circumstances of this case, it was held that there was sufficient primâ facie evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of shooting, to commit a murder. *Ib.*

Application for the discharge on habeas corpus of prisoners charged with robbery committed in the United States, and committed at Sandwich for extradition by Mr. McMicken, a police magistrate appointed under 28 Vict. c. 20. The prisoners, it seemed, had been previously arrested at Toronto on the same charge, and been discharged by the local police magistrate, after a lengthened investigation before him:—Held, that this did not prevent another duly qualified officer from entertaining the charge against them on the same or on fresh materials. Held, also, that sec. 373 of 29 Vict. c. 51, did not preclude M. from taking the information and issuing his warrant in Toronto, where there was already a police magistrate; for that the words of the section merely excluded him from jurisdiction there in local cases. Held, also, that the appointment of M. might well have been made under 28 Vict. c. 20, for any one of or for all the counties of Upper Canada, including Toronto, and his powers made the same as a police magistrate in cities, except as regarded purely municipal matters; and that this act was continued by 31 Vict. c. 17, s. 4., O.; but that as nothing was suggested impugning his authority to act, the warrant must be treated as executed by an officer possessing such authority. Held, also, that the depositions on which the warrant issued in the United States after the arrest in Canada, were properly admitted here as evidence of criminality, their admission being within both the letter and spirit of the 31 Vict. c. 94. *Regina* v. *Morton et al.*, 19 C. P. 10.

If the evidence present several views, on any one of which there may be a conviction, if adopted by the jury, the court will direct extradition. *Regina* v. *Gould*, 20 C. P. 154.

Under 31 Vict. c. 94, the depositions must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing, and not depositions taken subsequently to the issue of the original warrant, and without any apparent connection therewith. *Regina* v. *Robinson*, 5 P. R. 189.—C. L. Chamb.—Morrison.

In extradition cases, the forms and technicalities with which the statute surrounds the production of affidavit evidence must be strictly complied with; and therefore,—Held, that depositions taken in the United States cannot be read unless certified under the hand of the magistrate who issued the original warrant as being copies of the depositions upon which such warrant issued, although attested by the party producing them to be such true copies; but, Semble, the prisoner might be remanded to enable properly certified copies to be produced. *In re Lewis*, 6 P. R. 236.—C. L. Chamb.—Gwynne.

EXTRAS.

I. In Building Contracts—*See* Work and Labour.

FACTOR.

See Commission Merchants.

The defendants, as factors of one W., sold wheat to the plaintiff, who subsequently obtained an award in his favour in an arbitration on a separate transaction between himself and W., to which defendants were not parties, though they

actively intervened as W.'s agents. In an action of assumpsit by plaintiff to recover a balance of account:—Held, that he was not entitled to include in his debit against the defendants the amount of the sum awarded to him as against them. *Brunskill* v. *Rigney et al.*, 6 C. P. 509.

One C. being the lessee of a coal yard and premises, assigned the property to S. & H., who agreed to receive as warehousemen therein such wood and coal as C. might deposit, and grant him warehouse receipts therefor, in consideration of which he agreed to pay them two and a-half per cent. on the value of such goods, and to give them a first lien therefor. C. continued to hold possession of the premises as before the assignment, no visible change being made; his sign remained up, he brought in and took out coal as he pleased, and he was to pay the rent and taxes; but S. & H. entered from time to time to see that there was enough coal to meet their receipts, and on some occasions they prevented him from removing more coal, fearing that there would not be enough for this purpose. It was expressly agreed between them that all coal taken out for which receipts had been given, should be replaced with other coal. C. having become insolvent, a question arose as between his assignee and the receipt holders, and R. & Co., mentioned below, as to the right to the coal in the yard. Some of the coal had been sent to C., the insolvent, by R., to sell for him on commission, after the receipts had been given, and were outstanding:—Held, that C. could not, under the Factors Act, C. S. C. c. 59, pledge this coal for the payment of the receipt holders; and that R. was entitled before them to so much of his coal as remained unsold. *In re Coleman*, 36 Q. B. 559.

FALSE IMPRISONMENT.

I. Actions for.
  1. *Against Constables*—*See* Constable.
  2. *Against Magistrates*—*See* Justices of the Peace.
  3. *Trespass*—*See* Trespass.

II. Malicious Arrest—*See* Malicious Arrest, Prosecution, and Other Proceedings.

FALSE PRETENCES.

See Criminal Law.

FALSE REPRESENTATION.

See Fraud and Misrepresentation.

FALSE RETURN.

I. To Executions—*See* Sheriff.

FARM CROSSINGS.

See Railways and Railway Companies.

FEES.

I. Arbitrators — *See* Arbitration and Award.

II. Attorneys and Solicitors—*See* Attorney and Solicitor.

III. Clerk of the Peace—*See* Clerk of the Peace.

IV. Counsel — *See* Barrister at Law—Costs.

V. Coroner—*See* Coroner.

VI. Costs Generally—*See* Costs.

VII. Witness Fees.
  1. *In Actions or Suits*—*See* Costs—Evidence.
  2. *At Inquests*—*See* Coroner.

VIII. Executors—*See* Executors and Administrators.

IX. Jurors—*See* Jury.

X. Registrars.
  1. *Of Counties*—*See* Registry Laws.
  2. *Of Surrogate Courts*—*See* Surrogate Courts.

XI. Sheriff—*See* Sheriff.

XII. Trustees—*See* Trusts and Trustees.

FEIGNED ISSUE.

See Interpleader.

FELONY.

I. Generally—*See* Criminal Law.

II. Suspension of Action in Cases of Felony—*See* Action and Suit.

During the husband's imprisonment for felony the wife can contract, at all events as to what might be regarded as goods and chattels, as a feme sole; and Semble, that she may execute a deed of land without her husband joining. *Crocker et ux.* v. *Sowden*, 33 Q. B. 397.

FEME COVERT.

See Husband and Wife.

FENCES.

I. Generally, 1517.

II. Under the Acts Respecting Line Fences and Water Courses, 1518.

III. Covenants for Repairing and Rebuilding—*See* Landlord and Tenant.

IV. Division Fences—*See* Boundary—Limitation of Actions and Suits.

V. Railway Fences—*See* Railways and Railway Companies.

I. Generally.

Trespass for impounding and selling plaintiff's horses. Plea, that the horses were damage feasant. Replication, that by town meeting regulations fences should be five feet high, and that defendant's fence not being that height, but ruinous and out of repair, the plaintiff's horses escaped out of his close into defendant's close, without plaintiff's knowledge or consent:—Held, good on general demurrer. *Ives* v. *Hitchcock*, Dra. 247.

A land owner in this country must fence against cattle. *Spafford* v. *Hubble*, M. T. 2 Vict.

Declaration, that plaintiff and defendants possessed adjoining closes, and that by reason thereof it became the duty of defendants to keep in repair the division fence; and in another count it was charged, that defendants for the same reason were bound to keep in repair half of said fence:—Held, both counts bad, as shewing no facts from which the duty alleged would accrue. Quære, whether since the passing of 8 Vict. c. 20, an action like the present would lie. *Otto* v. *Polan et al.*, 9 Q. B. 363.

Trespass q. c. f. will lie by the owner of a close into which a neighbour's pig may break and enter, and do damage, against the owner of the pigs, unless he can excuse the act for defect of fences, or upon some other special ground. *Blacklock* v. *Millikan*, 3 C. P. 34.

Plaintiff ted defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof and the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way to prevent horses, &c., straying therefrom; and that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter, that the lease contained covenants allowing the plaintiff to enter on the land and view the state of repair, and that defendant would repair according to notice: that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which defendant, with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that upon the evidence, set out in the case, the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed, that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 Q. B. 307. See, also, *Pickard* v. *Wixon*, 24 Q. B. 416.

Action of trespass to land for removing a fence in May, 1868. The plaintiff was a tenant only, and his landlady swore that she leased the place to him in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year taxes and statute labour." There was no farther evidence as to the nature of the lease or duration of the term:—Held, that the damage should not, as a matter of law, have been nominal only, but estimated on the injury, the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession. *Fisher* v. *Grace*, 27 Q. B. 138.

II. Under the Acts respecting Line Fences and Water Courses.

[*The act now in force is 37 Vict. c. 25, O. The earlier statutes were 32 Vict. c. 46, O.; C. S. U. C. c. 57; 8 Vict. c. 20; and 4 Will. IV. c. 12.*]

The 4 Will. IV. c. 12, for regulating line fences, did not affect any agreement made between parties respecting division fences between them. *Lamb* v. *Mulholland*, 5 O. S. 109.

On the question of the sufficiency of a fence according to township regulations, where cattle are distrained damage feasant, the award of fence viewers is conclusive. *Stedman* v. *Wasley*, E. T. 4 Vict.

In an action for obstructing a drain, the jury having founded their verdict upon an award made by the fence viewers:—Held, under the facts stated in this case, that it was unnecessary to prove the regular appointment of the fence viewers; and that the award was binding under 8 Vict. c. 20. *Malone* v. *Faulkner*, 11 Q. B. 116.

Defendants having impounded plaintiff's horses for getting into his field, the matter was referred to the fence viewers, who awarded that defendants' fence was lawful, and appraised the damage. The plaintiff replevied, and desired to prove that defendants had put up the fence higher after the horses got over, and before the award:—Held, that under the Municipal Institutions Act, C. S. U. C. c. 54, sec. 360, the award was conclusive as to the legality of the fence. *Short* v. *Parmer et al.*, 24 Q. B. 633.

This court had no authority to set aside an award of fence viewers made under C. S. U. C. c. 57. *In re Cameron et al.*, 25 Q. B. 533.

The right of appeal to the judge of the County Court against an award of fence viewers, under 32 Vict. c. 46, s. 8, is not restricted to an award made under sec. 6, sub-s. 2 of the act, when the land benefited, is in two municipalities, but extends to an award made by three fence viewers under C. S. U. C. c. 57, which the later act amends, and is made part of. *In re McDonald et al.* v. *Cattanach et al.*, 30 Q. B. 432, affirming *S. C.*, 5 P. R. 288.

In trespass, defendant justified cutting the ditch complained of under an award of fence viewers, &c. The township clerk produced a copy, which he swore was a true one, of the fence viewers' award, the original being in his custody:—Held, that such copy was admissible in evidence under C. S. U. C. c. 32, sec. 6, these awards being made by a statutable public officer acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities. Semble, per A. Wilson, J., that if the copy had been one delivered by the fence viewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Deslippes*, 33 Q. B. 59.

In an action of trespass for pulling down a line fence between plaintiff's and defendant's adjoining premises in the city of Toronto, it appeared that the fence had been erected by the defendant, and was on his own land. The plaintiff had got the city commissioner to value the fence, treating it as a line fence, but no by-law was proved, the proceeding was wholly ex parte, and the award was uncertain :—Held, that this clearly could give no right. *Bragg* v. *Rogers*, 25 C. P. 156.

Quære, whether an action could have been sustained under C. S. U. C. c. 57, sec. 3, if it had not been repealed by the 37 Vict. c. 25, O.. *Ib.*

See *Otto* v. *Pelan et al.*, 9 Q. B. 363, p. 1517.

For decisions under these statutes relating to water courses,—*See* "WATER AND WATER COURSES."

FENCE VIEWERS.

See FENCES.

FERRY.

[*See 33 Vict. c. 33, D., 36 Vict. c. 48, s. 383, sub-s. 4.*]

In an action for disturbing plaintiff's ferry, it is not necessary to prove that defendant either received or claimed any hire or payment. *Burford* v. *Oliver*, Dra. 9.

The government of this country has power to grant a right of ferry on rivers separating Canada and the United States, and the grantee may maintain an action against any one who disturbs his ferry on the waters over which the British government has jurisdiction. *Kerby* v. *Lewis*, 6 O. S. 207 ; affirmed in *Regina* v. *Davenport*, 16 Q. B. 411.

A letter from the governor's secretary, authorizing a person in the name of the government to take possession of a ferry, is not sufficient to establish his right to the ferry, so as to enable him to maintain an action for its disturbance. *Jones* v. *Fraser*, 6 O. S. 426.

If, in such action, it be shewn that the ferry is under the management of a third person, who receives the ferriage for his own benefit by agreement with the plaintiff, the plaintiff can at most recover only nominal damages. *Ib.*

The crown grants a right of ferry to A., who leases by writing not under seal to B.—C. disturbs the right of ferry :—Held, that the right to sue is in A., and not in B. *Higgins* v. *Hogan*, 7 Q. B. 401.

The crown, on the 23rd of February, 1838, granted a lease to D. of "our ferry across the river Detroit, from Windsor to Detroit," during pleasure, at an annual rent, payable on the 24th of June. On the 14th of March, 1843, a precisely similar lease of the same ferry was granted to B., and it was proved that from that time B. had used the ferry greatly to D.'s injury :—Held, that the second lease revoked the first ; that D. was liable for rent only up to the then last yearly day of payment mentioned in his lease ; and that he was not liable for the use and occupation had afterwards. *Regina* v. *Davenport*, 16 Q. B. 411.

The crown has a right to grant a license of ferry across the Ottawa, between Ontario and Quebec, free from the restrictions contained in C. S. U. C. c. 46, that statute not applying to such a case. *Smith* v. *Ratté*, 15 Chy. 473, in appeal, affirming *S. C.*, 13 Chy. 626.

The 9 Vict. c. 9, s. 1, as well as the common law, authorizes a person to use his own boat within the limits of a ferry for business or pleasure, freely and without shewing his motives or occasion for allowing any person to pass in his boat, provided such person be not a traveller, and nothing be charged for carrying. *Ives* v. *Calvin*, 3 Q. B. 464.

The defendant was held liable under 8 Vict. c. 45, for plying with his steamboat on Sunday between the city of Toronto and the peninsula, persons carried between those places not being travellers within the meaning of the exception in the act. *Regina* v. *Tinning*, 11 Q. B. 636.

Particulars ordered in an action on the case for disturbing a ferry, as to the number of passengers, goods, &c., conveyed. *Ives* v. *Calvin*, 1 C. L. Chamb. 8.—Macaulay.

The omission to furnish full accommodation to any number of persons offering themselves to be ferried over is no defence to an action for a disturbance of an admitted right. *Hickley* v. *Gildersleeve*, 10 C. P. 460.

FIERI FACIAS.

See EXECUTION—SHERIFF.

FINES.

See BUILDING SOCIETIES.

Conviction by a magistrate for obstructing a highway, and order to pay a continuing fine until the removal of such obstruction :—Held, bad. *Regina* v. *Huber*, 15 Q. B. 589.

The crown may issue a fi. fa. for the sale of lands and goods in order to satisfy a fine imposed ; and the person fined may be said to be indebted, and the fine to be a debt. *Regina* v. *The Desjardins Canal Co.*, 29 Q. B. 165.

The Court of Quarter Sessions has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in default of payment. *Owens* v. *Taylor*, 19 C. P. 49.

FIRE.

I. WHEN AN EXCUSE FOR NON-PERFORMANCE OF CONTRACT, 1521.

II. CLEARING LAND, 1522.

III. INQUEST, 1524.

IV. MISCELLANEOUS CASES, 1525.

V. INSURANCE—*See* INSURANCE.

VI. Liability of Tenant after Fire—*See* Landlord and Tenant.

VII. Fire from Railway Engines—*See* Railways and Railway Companies.

I. When an Excuse for Non-performance of Contract.

For Carriage of Goods.]—The Imperial statute 26 Geo. III. c. 86, s. 2, enacting that owners of ships should not be liable for any loss or damage which may happen to any goods shipped on any such vessel by reason or means of any fire happening to such ship, is in force in this province. *Torrance* v. *Smith*, 3 C. P. 411.

Defendants seeking to avail themselves of that act, need not aver that they are British subjects. *Hearle* v. *Ross*, 15 Q. B. 259.

Defendants as common carriers undertook to carry goods of the plaintiff, who resided at Port Dover, from Buffalo to Caledonia, whence the plaintiff was to take them. Upon their arrival at the Caledonia station, the customs duties not having been paid, and no one being in readiness to receive them, they were placed in a bonded warehouse, and whilst there were destroyed by fire:—Held, that defendants were not liable, and that their duty as common carriers ceased on the deposit of the goods in the bonded warehouse. The principle of O'Neill v. Great Western R. W. Co., 17 C. P. 203, affirmed. *Inman* v. *Buffalo and L. H. R. W. Co.*, 7 C. P. 325. See *Thirkell* v. *Patterson*, 1 Q. B. 318.

Carriage of goods by railway—Special conditions exempting from liability from loss by fire. See *Milligan* v. *Grand Trunk R. W. Co.*, 17 C. P. 115; *Crawford* v. *Great Western R. W. Co.*, 18 C. P. 510; *Gordon et al.* v. *Great Western R. W. Co.*, 25 C. P. 488.

The plaintiffs, living at Southampton, having purchased goods at Montreal, directed them to be forwarded to Kingston, to the care of the schooner "Regina." They were sent in one of the mail steamers, but the captain of the "Regina" being unable to wait at Kingston, directed defendants, who were forwarders there, to send them on by the same steamer to Hamilton, and thence by the railway to Sarnia, where she would take them up on his way to Southampton. Defendants, however, shipped them into Kingston by a propeller, which was burned, with the goods on board, in the river St. Clair. They had been insured to go by the "Regina," but having been shipped on a different vessel the policy was cancelled. It was held in the Queen's Bench, Richards, C. J., doubting, that on the contract for not sending as directed, defendants were liable only for nominal damages, the loss by fire being too remote; and, Richards, C. J., also, that they were not liable in trover. On appeal.—Held, reversing the judgment, that defendants were liable on the contract for the value of the goods. *Wallace et al.* v. *Swift et al.*, 31 U. C. B. 523; 28 Q. B. 563.

Other Cases.]—Where a defendant had agreed to return a steamer chartered by him on a certain day in good repair, "dangers of the lake excepted," it was decided that damage to the steamer by an accidental fire, not occasioned by lightning, did not excuse the charterers, as it did not come under the exception. *Larned* v. *McRae*, 1 Q. B. 99.

Quære, whether a fire occurring in a steamer from some cause clearly connected with the use of steam, would come within such exception. *Ib.*

Where flour was delivered to defendants, who were warehousemen and carriers, with directions to sell as much of it as they could during the winter, and put the remainder in transitu for plaintiff in the spring, and some sales having been made before the navigation opened in the spring, an accidental fire destroyed the remainder, without any default or negligence of defendants:—Held, that as the flour at the time of the fire was in the hands of defendants as warehousemen, and not as common carriers, they were not responsible. *Thirkell* v. *McPherson et al.*, 1 Q. B. 318.

In consideration that the plaintiff would deliver to defendant 2,000 bushels of wheat, the defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour:—Held, that the word "therefrom" must be construed to mean thereafter, and not that the flour was to be made from the identical wheat delivered. This being the proper construction of the agreement, it was clearly no defence to plead that the defendant's mill containing the wheat was burnt down without any negligence on his part; though he would have been excused in that case if the other construction of the agreement could have been adopted. *Tilt* v. *Silverthorne*, 11 Q. B. 619.

In an action for work and labour against A. and B., the plaintiff put in an agreement headed, "An estimate for the carpenter and joiner work of a brick cottage, to be done for Mr. William Walker" (defendant's father.) Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were endorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was not to find materials, and no time was mentioned for completion of the work:—Held, that parol evidence was admissible to shew that defendants were liable on the contract. Held, also, that the destruction of the building by fire before the completion of the plaintiff's work could not defeat his claim for what he had already done. *Hubbard* v. *Walker*, 13 Q. B. 205.

II. Clearing Land.

A person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks for any injurious consequences that may ensue to the property of his neighbours. *Dean* v. *McCarty*, 2 Q. B. 448.

The plaintiff owned land in Nottawasaga, through which the defendants constructed their railway. Portions of the work of construction, including the cutting, grubbing, and clearing of the track of trees, to be done to the satisfaction of the defendants' engineer, were let to M. & G., who sub-let it to other parties. The engineer, who had power to urge on the work, but no control over the men, directed the workmen, servants of the sub-contractor, to hurry on, and told them to burn the brush and timber in the centre of the track, not on either side. The fire was lit in July, and spread into the plaintiff's land. In October, the fire having smouldered meanwhile, as the plaintiff alleged, broke out afresh, and did the greater part of the damage:

—Held, that the contractors, not the defendants, were primâ facie responsible for the injury, if caused by negligence on the part of those who set out the fire; and that the evidence, more fully set out in the report of this case, did not shew such an interference by the engineer as would make the defendants liable:—Held, also, that if the action could be maintained, only the damages awarded for the first fire in July should be recovered, as the weight of evidence shewed that the second fire arose from other causes than the first fire. *Gillson* v. *North Grey R. W. Co.*, 33 Q. B. 128.

On appeal the above decision was affirmed; and—Held, following Dean *v.* McCarty, 2 Q. B. 448, Blake, V. C., diss., that a proprietor setting out fire on his own land in order to clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence. *S. C.* 35 Q. B. 475.

Fletcher *v.* Rylands et al., L. R. 3 H. L. 330, commented upon, and held not applicable to this case. *Ib.*

Blake, V. C., was of opinion, that upon the rule of law laid down in that case, defendants here were liable whether the fire was set out negligently or not; and that they were responsible for their contractors, because the act done, the setting out of the fire, was not collateral, but was done necessarily in the work which the defendants had employed them to perform. *Ib.*

Quære, per Draper, C. J., whether a count alleging only wrongfully permitting a fire to remain on a defendant's land, without averring that it was caused by him, or arose through his negligence, shews a good cause of action. *Ib.*

Action for negligently setting out and managing a fire on a road allowance in order to clear it. The evidence shewed that the fire was set out by a person who had contracted with defendants to clear the allowance at a certain price:—Held, that defendants were not liable. *Carroll* v. *Corporation of Plympton*, 9 C. P. 345.

One M. agreed to burn and clear off the timber on defendant's fallow at a certain price per acre. While the work was in progress the defendant, who lived on the place, came occasionally to see how it was getting on, and advised him to set fire to the log heaps. M. told defendant that a brush fence, which extended to the corner of plaintiff's land, might take fire, but defendant said it would make no difference. M. then fired the heaps, and went home, two or three miles off, intending to return in a few days, when the heaps should be ready for branding. During his absence the fire spread to the plaintiff's land, and burned his fences, &c. The jury having found for the plaintiff on the charge of negligence:—Held, that M. upon the evidence was not an independent contractor, over whom defendant had no control, but rather a workman in his employment, and subject to his directions: and that defendant was responsible. *Johnston* v. *Hastie*, 30 Q. B. 232.

Quære, per Wilson, J., whether if M. had been such contractor, the defendant would have been liable. *Ib.*

In an action against a railway company for so negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining:—Held, that the Railway Act, sec. 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway. *Prendergast* v. *The Grand Trunk R. W. Co.*, 25 Q. B. 193.

A man must exercise care and discretion as to the time and mode of clearing his land: and if his neighbour be injured by rashness or inconsiderateness on his part, in setting out fire for that purpose, he will be liable to him; but this is always a question for the jury, and the court refused to disturb a verdict for defendant, though the evidence would fully have warranted a different finding. *Wilkins* v. *Row*, 15 C. P. 325.

However clear the rule may be that a party may kindle or permit fire to burn on his own land, still if it is likely by spreading to injure his neighbour, he is bound to put it out, or exert himself so to do, otherwise he will be liable. *Ball* v. *The Grand Trunk R. W. Co.*, 16 C. P. 252.

The first count of a declaration for setting fire to the plaintiff's barn, &c., alleged that the plaintiff, *at the time when*, &c., was possessed of a farm, &c.: that the defendant C. was *at the said time* possessed of the southerly portions of the lots of which the plaintiff had the northerly parts, and that G., being the servant and agent of C., and by his instructions, and negligently, set fire to a brush heap on C.'s land, &c., and that by reason of negligence the fire spread to the plaintiff's land and burned his barn, &c. The third count alleged possession of the plaintiff and C., as in the first count; it then described the defendant's premises as adjoining the plaintiff's premises, and then alleged that G. by the order, &c., of C. he the said G. being at the time in the service and employ of C., set fire to a brush heap, &c., and that the defendant did not use due care, &c., whereby, &c.:—Held, that the allegation, that C. was at the time when, &c., was a material allegation. That the allegation of G., *being*, &c., in the first count referred to the *time* stated, namely, at the time of the committing, &c., and was sufficiently certain. That the allegation distinctly appeared in the first count and was quite distinct from the wrongful act alleged. That the allegation that G. was at the time when, &c., was not in issue under the plea of not guilty, and should, if intended to be disputed, have been specially traversed. *Henderson* v. *Chapman*, 3 P. R. 331.—C. L. Chamb.—Wilson.

Persons have a right to set out fire on their land for the purpose of clearing it, and if the fire spread under the influence of a wind suddenly arising, and cause damage to a neighbour, no action will lie without proof of negligence. It was held a misdirection in such a case, to tell the jury that defendants were bound to have anticipated the rising of the wind, and to use extraordinary caution. *Buchanan* v. *Young et al.*, 23 C. P. 101.

[Actions against railway companies, for fires caused by sparks from locomotives—*See* "RAILWAYS AND RAILWAY COMPANIES."]

III. Inquest.

Under the 20 Vict. c. 36, the coroner is not the judge of the necessity for investigation

the cause of a fire: and therefore to an application for a mandamus to the treasurer to pay him his fees, it was—Held, no answer to shew that in the opinion of the reeve and others the enquiry was not called for. *In re Fergus et al.*, 18 Q. B. 341.

IV. Miscellaneous Cases.

In covenant against a sheriff's sureties, the breach assigned was, that the sheriff arrested the debtor in the original action on a ca. re. delivered to him, and afterwards allowed him to escape. Defendants pleaded that the gaol was accidentally destroyed by fire, and so the debtor escaped. The plea was held bad, for not denying that the fire occurred through the negligence or default of the sheriff or his deputy. *Corkery* v. *Graham et al.*, 1 Q. B. 315.

Declaration against a sheriff for not executing a fi. fa., alleging that there were goods out of which he could have levied the money endorsed, but that he did not levy the same. Plea, that before he could by due diligence have levied the moneys, the goods were destroyed by fire:—Held, on demurrer, plea bad; for levying includes seizure and sale, and consistently with the plea the goods might have been destroyed in defendant's custody after seizure, in which case he would be liable. *Ross* v. *Grange*, 25 Q. B. 396.

The defendant agreed with the plaintiff to saw for him, at a certain price, whatever logs should be delivered at the defendant's mill, the plaintiff to draw away the lumber as soon as possible after it was cut; the defendant also agreed to deliver at Port Perry, within a reasonable time, any lumber cut by him under the agreement after the first of March. Some lumber was cut before the first of March, and drawn away by the plaintiff; some was also cut after the 1st of March, and this was destroyed at the mill by an accidental fire in June following. The jury found that of the latter portion the defendant might have delivered about 40,000 feet before the fire:—Held, that the plaintiff was entitled to recover the value of the lumber so destroyed, and which might have been delivered, and that the defendant was entitled to be paid for sawing this lumber as well as that drawn away by the plaintiff. *Schofield* v. *Town*, *Town* v. *Schofield*, 12 Q. B. 439.

A steam saw mill having been burnt down, the engine and boilers were left, the boilers set in the brick wall of the furnace, and the engine supported by a frame which was bolted to timbers sunk in the ground. The sheriff seized both under a fi. fa. treating them as chattels, made two ineffectual attempts to sell, and returned goods on hand. On the return day of the writ they were removed by the plaintiff, who had purchased by verbal agreement from the execution debtor; but the sheriff followed, and took them as seized under the fi. fa., and afterwards sold under a ven. ex. The plaintiffs sued the sheriff:—Held, per Robinson, C. J., and McLean, J., while the engine and boiler remained fixed in the mill, after the fire, they partook of the realty, and could not be seized under the fi. fa. as chattels. Per Burns, J., by the fire they became chattels, and might have been seized; Held,—He, that the plaintiffs, having purchased them as chattels by verbal sale were estopped from asserting that the execution did not attach, because they were part of the realty. *Walton et al.* v. *Jarvis*, 14 Q. B. 640.

C. owning land on which the building for a steam saw mill had been in part erected, mortgaged it to D., having previously executed a mortgage of it to M. Afterwards the machinery was put in; D. assigned his mortgage to H.; and the mill having been destroyed by fire, the machinery, engine, boiler, &c., were removed by C., with the assent of H., to another county, to place in a new mill, and while still detached they were seized there under an execution against the goods of C., the mortgagor. On an interpleader issue between H., as plaintiff, and the execution creditor:—Held, that the plaintiff must succeed, for the machinery, &c., were fixtures before the fire, and after it continued to be the property of the mortgagee; and though there was a prior mortgage, the execution creditor shewed no right as against H. *Harris* v. *Malloch*, 21 Q. B. 82.

Defendant occupied a stall in the market, the cellar beneath which was used by the plaintiff to keep goods in. He went out, leaving a fire in his stove, with no one to watch it, and a block of wood too close to the stove. A fire broke out which burned through the floor, and destroyed plaintiff's goods below, and the jury found that such fire was occasioned by defendant's negligence:—Held, that it was nevertheless an accidental fire, within 14 Geo. III. c. 78, s. 83, and that defendant was not liable. *Gaston* v. *Wald*, 19 Q. B. 586.

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against. The defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse: he took no means to consume or prevent the smoke, and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke. *Carturright* v. *Gray*, 12 Chy. 399.

FIRE INSURANCE

See Insurance.

FISHERY.

The crown cannot grant an exclusive right of fishery in navigable waters in this province. *Moffatt* v. *Roddy*, M. T. 2 Vict.

In trespass for entering the plaintiff's close and digging post holes, and building a shanty, &c., and occupying the beach for the purpose of fishing:—Held, that the crown has the power to grant the beach to high water mark, and that the defendant was a trespasser, the patent having conveyed to the plaintiff the land on the waters of Lake Ontario. *Parker et ux.* v. *Elliott*, 1 C. P. 470.

Held, that no common law right exists to the public to use the beach above high water mark for the purpose of fishing, when the beach has been conveyed by the crown to a subject. *Ib.*

This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated 19th March, 1798, and contended that it conveyed the inlet; and that the "bank" referred to in the patent was part of the bay, and not part of the inlet, and consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded, the inlet; and further, that the locus in quo being navigable waters, if the crown could grant at all, the public had the right to use the fish in it:—Held, that the locus in quo was a navigable water, and therefore the public had a right to the free use thereof as such. *Gage* v. *Bates*, 7 C. P. 116.

Held, 1. That all her Majesty's subjects have a right to take bait or fish in any harbour, river, or public water in Upper Canada (not duly set apart by the governor in council for the natural or artificial propagation of fish,) so that in so doing they trespass not on crown lands or beaches, or by their place, time, or mode of fishing contravene any provision of the Fisheries Act, or any regulations made by the governor general under its provision, and applicable not merely to individuals, but equally to all Her Majesty's subjects. *Daragh* v. *Dunn*, 7 L. J. 273.—C. C.—Wilkes.

Held, that a boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt. *Ib.*

Held, that a constable acting under a warrant issued under the Fishery Act, 31 Vict. c. 60, D., directing him to convey plaintiff to gaol, and the gaoler to hold him for thirty days absolutely, and not until the fine, &c., be sooner paid, for the non-payment of which the warrant was issued, had no authority to receive the money and discharge the prisoner. Held, also, that under the act a warrant of commitment might issue in the first instance, the statute not requiring that a distress warrant must first issue. *Arnott* v. *Bradly*, 23 C. P. 1.

FIXTURES.

I. What are Fixtures.
1. *Buildings*, 1527.
2. *Machinery*, 1529.
3. *Hop Poles*, 1534.
II. Contracts Respecting, 1534.
III. When Removable, 1536.
IV. Recovery of, 1537.

I. What are Fixtures.

1. *Buildings.*

Vendor and Purchaser.]—A building put up by a vendee of land in possession, under a contract to purchase, resting upon a foundation in some parts let into the soil, and connected to the foundation by mortar, is a fixture belonging to the owner of the soil, and when wrongfully severed it becomes a chattel; and the defendants, the vendee of the land and others, who had at first removed it into the highway, and afterwards took it away, were held liable in trespass for taking the goods of the plaintiff, the owner of the soil. *Gasco* v. *Marshall et al.*, 7 Q. B. 193; followed in *Clearer* v. *Culloden*, 14 Q. B. 491.

A barn, whether affixed to the soil or not, is, as between vendor and vendee of the land, a part of the land, and not a personal chattel for which an action of trover will lie. G. died having a right of preëmption to certain lands; his executors disposed of this right to the plaintiff, who received possession of the land, and of a barn which was supposed to be on it. It turned out, however, that the barn stood partly on a highway, and partly on the defendant's land. The defendant removed it, and the plaintiff brought trover:—Held, that the action would not lie. *Bunnell* v. *Tupper*, 10 Q. B. 414.

A frame house rested upon posts sunk in the ground, but not in any way attached thereon:—Held, a fixture, and not liable to sei[zure] an execution against the goods of the vend[or] the land, by whom it had been put up as a dwelling house. *Bald* v. *Hagar*, 9 C. P. 382.

The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he had also agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all the buildings thereon:—Held, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court under the circumstances refused to interfere. *Clearer* v. *Culloden*, 15 Q. B. 582.

Landlord and Tenant.]—A greenhouse, conservatory, and hothouse, affixed to the freehold, were held not to be removable by a tenant; also, the glass roofs. *Gardiner* v. *Parker*, 1[8] Chy. 26.

But machinery for heating greenhouses, which rested by its own weight on bricks, and was not fastened to the freehold, was held to be removable; also, the pipes passing from the boilers through a brick wall into adjoining buildings. *Ib.*

Other Cases.]—The plaintiff insured with defendants a barn as appurtenant to his freehold. After it was burned, he made a claim under the policy, still treating it as appurtenant to the freehold, but having failed in proving title to the land, he sought to recover on the ground that the barn was a chattel, and as such insured by him:—Held, affirming the judgment below, that he was precluded from setting up such a claim, and that the plaintiff could not be heard to say the barn was a chattel. *Sherbourne* v. *The Beaver Mutual Fire Insurance Co.*, 33 Q. [B.] 1; 30 Q. B. 472.

Declaration, for entering plaintiff's land, [and] also plaintiff's dwelling-house thereon, and [re]

moving the house therefrom, and converting it to defendant's use. Plea, to so much of the count as refers to the dwelling-house, that before plaintiff became possessed and owner of the lot, defendants placed the said dwelling-house thereon, so that it might thereafter be removed by them, not affixing it to the land; and defendants afterwards, and while the land was unenclosed and used as a common, and the house open and unoccupied, in the day time, peacefully entered the lot and removed the dwelling-house, the same being their property, and placed it on their own land, which are part of the trespasses complained of. Replication, that defendants should not be allowed to plead said plea, because they were entitled to an interest in said land, and built the house on the land, and occupied it, and afterwards, and before the trespasses, &c., by deed conveyed the land, with the appurtenances, to A., who conveyed to plaintiffs:—Held, that the plea was bad, as shewing no justification for the trespass admitted. Held, also, replication good, by way of estoppel. *Cameron* v. *Hunter*, 34 Q. B. 121.

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2. *Machinery.*

Vendor and Purchaser.]—A building originally used as a storehouse was converted into a steam grist-mill. Afterwards the mill machinery was taken out, the boiler and engine being left to work various other machines, which were put in for the purpose of making sashes and blinds, such as planing machines, turning lathe, &c. These were fastened to the floors and timbers of the building to steady them while in motion, each machine being independent, capable of being moved without material injury to the building, or interfering with the engine, and of being worked by any other proper motive power. In the assignment under which the plaintiff claimed, these machines were described as chattels, but the deed being void as to the personalty for want of registration, he contended that they were part of the inheritance, not subject to an execution against goods, and passed to him with the land and building in which they were, which were included in the assignment:—Held, that the machines were chattels, and seizable under a fi. fa. goods. *Carscallen* v. *Moodie et al.*, 15 Q. B. 304.

One J. sold the land in question to W., who took possession under the contract for sale, and erected a set of hay scales, partly upon it, and partly upon the street. A pit was dug about three feet deep, which was boarded inside, and posts let into the soil to hang the scales upon, and as rests. The platform rested upon posts then let in, and hung upon hooks in the posts, so that the scales might be removed by lifting it up, without disturbing the posts or boards. The earth was banked up on the outside, so that teams could drive upon the platform. W. could not carry out the contract, and with his consent J. sold the land to the plaintiffs, and conveyed it to them by a deed in the usual form, in which nothing was specified as to the hay scales. The defendants, W. and another, having removed them, taking away all except the posts:—Held, that they were not fixtures as between J. and his grantees, the plaintiffs, and did not pass by the conveyance. *Markle et al* v. *Houck et al.*, 19 Q. B. 164.

Mortgagor and Mortgagee.]—An engine fastened into and bolted upon a wooden frame let into the ground, is a fixture, and is no less so because it could be removed without defacing or removing any part of the walls of the building. *Oates* v. *Cameron*, 7 Q. B. 228.

A. owning land on which was a saw-mill, mortgaged to C. and D. to pay for machinery put up in the mill, of which his son was in possession as tenant at will, paying no rent. A. made default, and C. and D. gave notice, and attempted to sell. Defendant, the sheriff, upon an execution against A., seized the machinery, which was replevied by the son, who claimed:—Held, that the property while attached to the freehold was the property of the mortgagees, and that the plaintiff being only their tenant by sufferance, (after default in the mortgage) could not remove it as trade fixtures. *Anderson* v. *McEwen*, 9 C. P. 176.

The firm of C., G. & Co. being indebted to the plaintiffs, mortgaged to them in fee certain land and premises, on which was erected an iron foundry, with the machinery and iron fittings used in the business. Previous to this mortgage a prior owner of the land had already mortgaged it in fee to one G., which mortgage was still outstanding. The defendant, assignee of C., G. & Co., removed certain portions of the machinery, and a dispute arose with the plaintiffs as to what part of the property so removed consisted of fixtures. The matter was referred to an arbitrator, who submitted a special case, describing particularly the various articles in dispute, and the manner in which they were annexed to the freehold. The different articles enumerated, and their connection with the freehold, are stated in the case, and the judgment of the court as given upon them respectively, some being held fixtures and some not. *Gooderham et al.* v. *Denholm*, 18 Q. B. 203.

Tools ordinarily in use for the purpose of working any of the machines so attached as to form part of the freehold:—Held, fixtures; other tools not *Ib.*

The arbitrator on a reference back amended his report in the description of some of the machines and tools and fittings mentioned in the case first submitted; and on the report so amended, which is set out in the case, the court gave judgment, altering their decision as to some of the articles. *Ib.*

Belting necessary for communicating the motive power from the engine:—Held, a fixture. *Ib.* 214.

C. owning land on which the building for a steam saw-mill had been in part erected, mortgaged it to D., having previously mortgaged it to M. Afterwards the machinery was put in; D. assigned his mortgage to H.; and the mill having been destroyed by fire, the machinery, engine, boiler, &c., were removed by C., with the assent of H., to another county, to place in a new mill, and while still detached they were seized there under an execution against the goods of C., the mortgagor. On an interpleader issue between H., as plaintiff, and the execution creditor:—Held, that the plaintiff must succeed, for the machinery, &c., were fixtures before the fire, and after it continued to be the property of the mortgagee; and though there was a prior mort-

gage the execution creditor shewed no right as against H. *Harris* v. *Malloch*, 21 Q. B. 82.

The execution debtor mortgaged a grist-mill and premises to one B., and this mortgage was assigned to the claimant, but not until after the execution issued. Previous to the execution, however, the debtor had executed a second mortgage to the claimant direct. The machinery of the mill had been disconnected, and taken down to be altered and repaired, *with the intention of replacing it again*:—Held, that while thus lying in the mill, and on the premises, it could not be treated as chattels. *Grant* v. *Wilson*, 17 Q. B. 144.

Held, that a planing machine standing by its own weight on the floor, without fastening, with belts and an engine to work it, is a chattel liable to seizure for taxes. *Hope* v. *Cumming*, 10 C. P. 118. See *McDonald* v. *Weeks*, 8 Chy. 297.

A. owning a term with right of purchase, built a water mill on the premises and mortgaged to B. for present and future advances. He afterwards introduced steam power, consisting of engine and boiler, into the mill, affixed as described in the case. Subsequently an extension of the term to B., the mortgagee, with right of purchase, was obtained from the reversioners by deed, to which A. and B. were parties, reciting their position:—Held, that the steam power belonged to B. as mortgagee, and could not be seized under execution against A., though they might be trade fixtures, and though the estate mortgaged was not a freehold interest. *Paterson* v. *Pyper*, 20 C. P. 278.

The owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty; and therefore a mortgage by him upon the fixtures was held not to be prejudiced by his subsequent mortgage of the land. The mortgage was not re-filed within the year, but within the year, the mortgagor having sold the fixtures, the purchaser gave the mortgagee a mortgage of the same in substitution of the original mortgage, containing a recital of that mortgage, and of the sale of the fixtures to him subject thereto, and that he had obtained an extension of time on condition of giving this mortgage for the sum unpaid:—Held, that the omission to re-file did not give the mortgagee of the land priority, for he could not be considered a "subsequent mortgagee in good faith for valuable consideration," within the statute; and that the prior severance of the fixtures continued down to the giving of the second mortgage, which carried it on by its recitals and legal effect. Semble, that if the chattel mortgage were paid off, the mortgagee of the realty would then be entitled to the fixtures. *Rose* v. *Hope*, 22 C. P. 482.

A mortgagor put up a steam boiler and engine for the purpose of working plaining machinery. The boiler rested on brick work, without fastening: the engine was firmly attached to the floor, with bolts and nuts to make it work steadily; the machinery propelled by it was all unconnected with the premises:—Held, that the boiler and engines were not fixtures. *Schreiber* v. *Malcolm*, 8 Chy. 433.

The intention, object, and purpose for which articles for the purposes of trade, or manufacture, are put up by the owner of the inheritance, are the true criterion by which to determine whether such articles become realty or not, not the mere fastening to the soil. *McDonald* v. *Weeks*, 8 Chy. 297.

The purchaser of the equity of redemption in certain mortgage premises, erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop, except by belting or similar means when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery or doing any damage to the realty in any way:—Held, that the articles were removable as trade fixtures. *Patterson* v. *Johnson*, 10 Chy. 583.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted. *Ib.*

McDonald *v.* Weeks, supra, considered and approved of. *Ib.*

On the sale of a woollen factory and machinery, it was stipulated that until the purchase money should be fully paid, the vendees were not to remove the machinery. The vendors afterwards conveyed to the purchasers, who, to secure the unpaid purchase money, executed a mortgage purporting to be of the factory only, and not mentioning the machinery:—Held, that the covenant against removing the machinery remained in force:—Held, also, that the mortgage covered not only the machinery which was fastened with nails or screws, but also machines which were kept in their place by cleats, as well as the plates and paper used with the press. The purchasers resold, their vendee having notice of the covenant, and the vendee subsequently became insolvent:—Held, that his assignee in insolvency was not at liberty to remove the machinery by reason of non-registration under the Chattel Mortgage Act or otherwise. *Crawford* v. *Findlay*, 18 Chy. 51.

See also *The Great Western Railway Co.* v. *Bain*, 15 C. P. 207, p. 1535.

Landlord and Tenant.]—The saws and other machinery of a saw-mill, are not trade fixtures. *Richardson* v. *Ranney*, 2 C. P. 460.

One I. being the tenant of premises under the plaintiff, consisting of a mill, &c., upon the same being burned down, refitted the machinery, putting in some of the old and some new portions. The sheriff under an execution against the tenant, seized some part of the gearing. It was not shewn whether the tenant's term had expired at the time of the seizure or not, nor whether he was under a covenant to repair and keep in repair or not:—Held, that the facts were not sufficiently shewn to enable the court to come to a decision, but that primâ facie, the landlord was entitled to the goods seized. *Donald* v. *Crombie*, 11 C. P. 601.

The execution debtor had leased from defendant certain premises in which were an engine and boiler, to be left by him in repair on the determination of his lease. Finding both unfit for his purposes, a larger cylinder was put into the

engine with defendant's consent and partly at her expense, which on being broken was replaced by another at the tenant's expense, as also a shaft, crank, fly-wheel, connecting-rod, slides, &c. with a different kind of engine-pump. A new boiler, also, instead of the old one, was put into the premises by the tenant, and was by brick-work attached to the freehold; it was also removable. All the additions made by the tenant had been so made for the purposes of his trade, and though attached to the freehold could be removed with little injury thereto, the machinery being admitted by holes made in the walls, and the shafting attached to the building. There, were, also, certain drying presses, vats, and cocks in the building, and all were placed on a temporary flooring, supported on scantling and tressle-work not let into the walls or ground; the partitions of the building were of wood:—Held, that the engine in its entire state belonged to defendant, as part of the freehold, and was not liable to seizure under execution; but that the temporary floors, scantling, partitions, presses, shafting, other than had been before in the building, vats and cocks, were all trade fixtures, and so liable to seizure under execution. *Hughes et al.* v. *Towers*, 16 C. P. 287.

The rule respecting trade fixtures, as between landlord and tenant, is, that all such as can be removed without materially injuring the building may be removed, and is liable for sale under an execution against the tenant. *Ib.*

The tendency of modern decisions seems to be to effectuate the apparent intention of the parties at the time the article in question was attached to the freehold. Defendant leased land to M. for 25 years for the purpose of boring for oil, salt, or minerals. M. was to be allowed two years for testing the oil-bearing character of the land, when, if oil was not found in paying quantities, the lease was to be null and void. A steam engine was placed upon the land, for the purpose of drilling the rock and experimenting for oil. It rested on sills let into the ground, and was fastened to the sills by bolts and spikes. It was similar to others which it appeared were movable, and were used on the surface for the purpose of sinking shafts to test whether or not there was oil there. The two years having elapsed without M. obtaining the oil, defendant declared the lease forfeited, and resumed possession of the land, and claimed the engine as part of the freehold:—Held, that under the facts disclosed, the engine was not a fixture. *Burnside et al.* v. *Marcus*, 17 C. P. 430.

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements:—Held, to be trade fixtures, and removable by the tenant. *Pronguey* v. *Gurney et al*, 37 Q. B. 347. See, also, *S. C.* 36 Q. B. 53, p. 1537.

Held, that neither the increase nor reduction of the rent, under the facts stated in this case, operated as a surrender of the term, and acceptance of a new tenancy, so as to prevent the tenants from claiming the fixtures. *Ib.*

A green-house conservatory and a hot-house affixed to the freehold, were held not to be removable by the tenant. Also, the glass roof. *Gardiner* v. *Parker*, 18 Chy. 26.

But machinery for heating green-houses which rests by its own weight on bricks, and was not fastened to the freehold, was held to be removable. Also, the pipes passing from the boilers through a brick wall into adjoining buildings. *Ib.*

Other Cases.]—Trespass against the sheriff for seizing under a fi. fa. The goods in question, an engine and boiler, had been in a saw-mill which was burnt down, and remained there, set in brick, and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ the execution debtor sold them verbally to the plaintiffs, who detached them from the mill, and removed them to another place, where the sheriff followed and sold under a ven. ex.:—Held, that the first attempt at sale was clearly illegal, as the goods were then fixed to the freehold, and could not be taken as chattels. Quære, whether the verbal sale was effectual, or whether the Statute of Frauds would apply. Semble, that it would not; but that the sale would in effect amount only to a license to the vendee to enter on the land and detach the goods; and Quære, whether on being so severed the fi. fa. would not attach upon them. *Walton et al.* v. *Jarvis*, 13 Q. B. 616.

After a second trial it was held on the same facts, per Robinson, C. J., and McLean, J., that the engine and boiler while fixed in the mill after the fire could not be seized as chattels. Per Burns, J.—By the fire they became chattels, and might have been seized. *S. C.* 14 Q. B. 640.

On the death of the owner of a distillery, the still goes to the heir or devisee with the realty. *McLaren* v. *Coombs*, 16 Chy. 587.

The widow professed to sell the property, but had no authority to do so under the will, except for her own life; the purchaser removed the still, sold it, and put in a new one. Finding after the widow's death that his title was defective, he removed the still, and it was—Held, that the devisee was not entitled to have the new still restored, but was entitled to the value of the old still. *Ib.*

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3. *Hop Poles.*

Hop poles left standing in the ground after the hops have been gathered, are not distrainable. Robinson, C. J., diss. *Alway* v. *Anderson*, 5 Q. B. 34.

II. Contracts Respecting.

The plaintiff contracted to sell a lot of land to A., who agreed to build a house upon it. A. put up the house, but the plaintiff refused to open certain streets, as he had agreed to do, and the lot was in consequence inaccessible. A. then assigned to defendant, who removed the house to another lot, which he also had agreed to purchase from the plaintiff; and after such removal the plaintiff executed a deed to defendant of this latter lot, with all the buildings thereon:—Held, that notwithstanding the deed the plaintiff might maintain trover for the house so removed; but the jury having given only nominal damages, the court, under the circumstances, refused to interfere. *Cleaver* v. *Culloden*, 15 Q. B. 582.

B. mortgaged to the plaintiffs certain premises, together with the water wheel and flumes, out-

houses, buildings, ways, waters, watercourses, privileges and appurtenances to the said premises belonging; and afterwards mortgaged to H. the same premises, describing them as the woollen works, and also all the fire engine, boiler, machinery and fixtures, and the water wheel, and all fixed machinery, and shafting and fixtures of every kind about the same. Subsequently to the mortgage to the plaintiffs there were placed on the premises certain looms, spinning machines, warping mills, and various other articles of the same kind, which were secured by nails and screws to the floors, and by braces secured by screws and bolts to the ceiling, but could be easily removed without injury either to the premises or to themselves. In an action to try the right to this last mentioned machinery, it was—Held, that the terms of the mortgage to the plaintiffs indicated an intention that the plaintiffs should not have a claim upon any portion of the machinery in the premises except that only which related to the motive power of the mill. Semble, that though the machinery might for many purposes have been looked upon as fixtures, yet as between the plaintiffs as mortgagees and B., and all persons claiming under him, it was not so annexed to the freehold as to be irremovable by the latter. *The Great Western Railway Co.* v. *Bain*, 15 C. P. 207.

Quære, as to the general right of a mortgagor to remove from the mortgaged premises machinery of the kind annexed in such a way to the freehold. *Ib.*

General review of the authorities both in England and this country on the subject of fixtures since Carscallen *v.* Moodie, 15 Q. B. 304. *Ib.*

Action on a covenant in a lease, that defendant had not incumbered, charged, or affected the premises leased in any manner, and assigning as a breach that A. and B., claiming under the defendant prior to the plaintiff's lease, and having a right to certain fixtures on the leased premises from the defendant, would have entered to remove them, if the plaintiff had not paid them for them. Plea, that before the lease to the plaintiff, the defendant had leased the same premises for five years to C., who had a right, under the lease, to the fixtures, which were trade fixtures, and that C. assigned to A. and B., who claimed these fixtures as trade fixtures:—Held, on special demurrer, plea clearly bad. *Cameron* v. *Tarratt*, 1 Q. B. 312.

Defendant leased a building to L., for the purpose of a mill, with certain special recitals and agreements as to the machinery. The assignee of the lessee sold the machinery to the plaintiff, who was taking it down when the defendant prevented him, and the plaintiff replevied. Defendant pleaded only that the machinery was not the plaintiff's:—Held, that the plaintiff was entitled to recover, for by the terms of the lease the machinery was expressly made chattels and the property of the lessee, and though defendant, after it had been detached from the freehold, might have distrained upon it for his rent, yet he had not placed his defence upon that ground. *Davy* v. *Lewis*, 18 Q. B. 21.

In an indenture of a lease, D. covenanted with A. at all times during the term to repair, support, amend, and keep the demised premises, with all necessary reparations and amendments whatsoever, and the said premises so repaired, "with the appurtenances, and all things which at the time of the execution of the said indenture were, or at any time during the term should be fixed or fastened to, or set up in or upon the premises," at the expiration of the term, peaceably to yield up to A. "with all and singular the fixtures thereto belonging," in as good condition as the same were at the execution of the indenture, reasonable use excepted:—Held, that the covenant extended to a building resting on blocks of wood, not let into the ground, also to a building laid upon scantling and old posts, not let into the ground, all placed on the demised premises during the term. *Allardice* v. *Disten*, 11 C. P. 278.

III. When Removable.

T. K. & Co., carrying on business as gas fitters and plumbers, contracted verbally with D., an hotel keeper, to supply a new hotel he was erecting with various articles in the way of their trade, which were to be paid for as the work progressed. D. afterwards left this province on account of ill health, having previously executed a power of attorney to one S., authorizing him to carry on his business during his absence. T. K. & Co. having discovered that D.'s estate was greatly involved, refused to proceed with their contract unless secured for their work and materials; whereupon S., with a view of inducing them to complete their contract, in pursuance of a previous arrangement, executed such attorney a chattel mortgage of the goods furnished by them, securing to them payment of their demand. At the time of the execution of this instrument D. was dead, but this fact was not known to the parties until some time after the completion of the work:—Held, reversing the decree of the court below, that T. K. & Co. were not under this mortgage entitled to remove any of the fittings put in the hotel; their only remedy being for the price of their work and material under their contract with D. Jacques *v.* Worthington, 7 Chy. 192, distinguished and approved of. *McQuesten* v. *Thompson*, 2 E. & A. 167.

The weight of authority is, that a tenant may remove trade fixtures which he might have removed during the term, if he remains in lawful possession after the end of the term, holding possession of the premises under a right still to consider himself a tenant. Declaration, that defendants being in possession of certain premises (described) as tenants of the plaintiff, wrongfully pulled down and carried away certain fixtures. Plea, that the premises were occupied by defendants as scale makers, having long before been let to defendants and others for carrying on their trade: that defendants and others, for such purpose, during their tenancies, put up the fixtures, (describing the fixtures put up by each and the others, during their tenancies, sold and conveyed their part of the fixtures to defendants who took possession thereof and used them on said premises in their trade; and being so possessed, they, during their tenancy, pulled down and carried away said fixtures, doing no unnecessary damage. First replication, as to the fixtures put up by the others, that they were not severed or removed during the tenancies of the parties who affixed them, nor for a long time afterwards:—Held, that the replication was bad, for if defendants owned the fixtures, and

moved them whilst in possession of the premises, with a right to consider themselves tenants, the delay to remove them "for a long time" would make no difference. Held, also, that the plea was good. There was an equitable rejoinder, which is set out in the report, the validity of which was not decided. Second replication, that the fixtures were so affixed to the buildings on the demised premises that they could not be removed without injury to the freehold. Rejoinder, that they were such trade fixtures as in the plea alleged, and were removed without causing more injury to the freehold than was permissible by the laws of Ontario concerning fixtures :—Held, that the replication and rejoinder were both good: that it might be a mixed question of law and fact, whether the alleged fixtures were so attached that they could not by law be removed; and that the rejoinder might be considered as an informal joinder of issue. The third replication set up, by way of estoppel, a surrender in law by defendants of the premises to one C., the then owner in fee, and an acceptance of a new lease from C., and that C. afterwards conveyed in fee to the plaintiff, who then saw the new lease, and was informed and believed that the said fixtures formed part of the freehold; and that defendants afterwards became plaintiff's tenants. Equitable rejoinder, that before the conveyance by C. to the plaintiff, the plaintiff knew that defendants were in actual occupation, claiming and using all said fixtures as their own, and was told by C. that he did not own or claim them, and only sold to the plaintiff the premises without them; and that the plaintiff by reasonable care could have obtained full information from defendants, but negligently omitted to do so:—Held, that the replication was good, and the rejoider bad. *Prongney* v. *Gurney et al.*, 36 Q. B. 53. See, also, *S. C.* 37 Q. B. 347.

See *Great Western R. W. Co.* v. *Bain*, 15 C. P. 207, p. 1535.

IV. Recovery of.

In trespass for taking away mill machinery, millstones, wheels, &c., the defendant pleaded not possessed, and it appeared that the injury was done by severing fixtures in the mill and taking them away :—Held, that the action would lie, as when they were severed they became personal property, for which the owner could maintain trespass. *Meyers* v. *Marsh*, 2 Q. B. 148.

In trespass, it was Held, on motion in arrest of judgment, that the word "fixtures" in the declaration did not necessarily mean things attached to the freehold. *S. C. Ib.*, 185.

Trover cannot be maintained for a fixture so long as it remains annexed to the freehold. *Jones* v. *Cameron*, 7 Q. B. 228.

A creditor having execution against lands, cannot claim fixtures which do not belong to his debtor. *Brown* v. *Saye*, 11 Chy. 239.

FLOUR.

I. Branding, 1538.

II. Inspection and Warranty, 1538.

III. Contracts for Manufacturing Wheat into Flour, 1538.

IV. Contracts for the Sale of—*See* Sale of Goods.

V. Warehouse Receipts—*See* Bills of Lading and Warehouse Receipts—Warehousemen.

I. Branding.

The seller of flour in barrels not marked or branded under 4 & 5 Vict. c. 89, s. 23, was not liable to the penalty imposed, only the manufacturer or packer; and magistrates had no summary jurisdiction where the accumulated penalties were more than £10. *Regina* v. *Beckman*, 2 Q. B. 57.

Where the inspector in a corporate town was the informer, he was not entitled to half the penalty. *Ib.*

II. Inspection and Warranty.

Held, that under the circumstances of this case, the plaintiff was entitled to recover, because certain flour sold to him as "Victoria Extra," had not passed inspection as "extra superfine." *Bunnel* v. *Whitlaw*, 14 Q. B. 241.

Where flour is guaranteed to inspect of a particular grade, such as "No. 1 superfine," it must inspect sweet of that grade. *Bain* v. *Gooderham et al.*, 15 Q. B. 33.

Where a person manufacturing flour marks it as of a particular quality, that amounts to a warranty of its being such quality :—Held, that in this case the evidence of representations made by the seller at the time of sale were sufficient to warrant the jury in finding an express warranty. *Chisholm* v. *Proudfoot*, 15 Q. B. 203.

III. Contracts for Manufacturing Wheat into Flour.

Semble, that if in an action upon the case for not manufacturing 400 bushels of wheat into flour, the plaintiff recover the value of the wheat delivered to defendant, he cannot recover for goods sold for part of the wheat which had, in point of fact, been re-delivered to the plaintiff; and that such re-delivery should have been proved in mitigation of damages; and that an action upon the common counts could not at any rate be sustained. *Andrus* v. *Burwell*, Tay. 382.

In consideration that the plaintiff would deliver to defendant 2,000 bushels of wheat; defendant promised to deliver to him, within a reasonable time therefrom, 500 barrels of flour: Held, that "therefrom," must be construed *thereafter*, and not that the flour was to be made from the identical wheat delivered. It was therefore clearly no defence to plead that the defendant's mill, containing the wheat, was burnt down without any negligence on his part; though he would have been excused in that case on the other construction of the agreement. *Tilt* v. *Silverthorne*, 11 Q. B. 619.

The plaintiff, having purchased a quantity of wheat, defendant agreed that, on condition of

the plaintiff delivering to defendant wheat of the same quality as the sample previously shewn to defendant, to be ground into flour, the defendant would manufacture the said wheat into flour, and for every four bushels and forty pounds of wheat, of the quality and according to the sample received, he would deliver one barrel of flour which should pass inspection as superfine at Montreal:—Held, that the contract was not a contract for the sale of the wheat but an agreement to manufacture for the plaintiff the identical wheat delivered into flour; that it was a condition precedent, on the plaintiff's part, that the wheat delivered should be of the same quality as the sample; that an acceptance of the wheat by defendant, and his manufacturing it into flour, did not cause the rules prevailing between vendor and vendee to apply with equal force in this case as in the case of an absolute sale, to conclude the defendant from afterwards disputing the correspondence of the wheat delivered with the sample. *Stephenson* v. *Ranney*, 2 C. P. 196.

See, also, *Mason* v. *The Great Western R. W. Co.*, 31 Q. B. 73.

FORCIBLE ENTRY.

See CRIMINAL LAW.

FORECLOSURE.

I. OF MORTGAGES OF LAND.

1. *Against Infants*—*See* INFANT.
2. *Against other Persons*—*See* MORTGAGE.

The mortgagee of chattels, like the mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured thereby. *Cook* v. *Flood*, 5 Chy. 463.

Where a party held a mortgage on chattel property, and also mortgages on real estate, the court refused to make a decree for sale of the chattels and of foreclosure as to the realty. *Ib.*

A mortgagee or judgment creditor of a railway company is not entitled to enforce payment of his demand by sale or foreclosure of the railway; he is only entitled to have a manager or receiver of the undertaking appointed. *Galt* v. *Erie and Niagara R. W. Co.* 14 Chy. 499.

Quære, whether the rule is otherwise in the case of a vendor seeking to enforce his lien for unpaid purchase money. *Ib.*

FOREIGN AGGRESSIONS.

See CRIMINAL LAW.

FOREIGN ENLISTMENT.

See CRIMINAL LAW.

FOREIGN LAW AND FOREIGNER.

I. FOREIGN LAW.

1. *Operation of*, 1540.
2. *Pleading and Proof of*, 1543.
3. *Laws of Lower Canada.*
   (a) *Generally*, 1544.
   (b) *Notice of Dishonour of Bills drawn or payable in Lower Canada*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
4. *Constitutional Law*—*See* CONSTITUTIONAL LAW.
5. *Domicile*—*See* DOMICILE.
6. *Foreign Bankruptcy Laws*—*See* BANKRUPTCY AND INSOLVENCY.
7. *Foreign Bills or Notes*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
8. *Foreign Corporations*—*See* CORPORATIONS.
9. *Foreign Currency*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES—MONEY.
10. *Foreign Judgments*—*See* JUDGMENT.
11. *Foreign Probate*—*See* EXECUTORS AND ADMINISTRATORS.
12. *Foreign Vessels*—*See* SHIP.

II. FOREIGNER.

1. *Aliens*—*See* ALIEN.
3. *Arrest of*—*See* ARREST.
4. *Extradition of*—*See* EXTRADITION.

III. MISCELLANEOUS CASES, 1546.

I. FOREIGN LAW.

1. *Operation of.*

Where an insolvent is discharged from arrest by foreign authority, the court will not set aside an arrest made under the process of this court for the same cause of action. *Brown* v. *Hudson*, Tay. 390. See, also, *Dascomb* v. *Heacock*, Tay. 438.

A plea that the defendant and plaintiff were both residing in a foreign country when the cause of action accrued, and that by the laws of that country the defendant is discharged because no action was brought within six years, the defendant and plaintiff having both resided there during all that time, was held bad on general demurrer. *Hart* v. *Wilson*, 6 O. S. 19.

Where a bill is made payable at a particular place in a foreign country, and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by our law. *Buffalo Bank* v. *Truscott et al.*, M. T. 2 Vict.

Where in an action of assumpsit on a contract against executors, they pleaded that the cause of action accrued in Scotland, against the testator and one A., jointly: that A. is still living, and that by the law of Scotland, where the contract was made, if one of the parties to a joint contract die, his personal representatives are discharged, the plea was held bad on general demurrer, as by our provincial statute 1 Vict.

c. 7, the personal representatives of a joint contractor are made liable notwithstanding the survivorship of the other, and the lex loci contractus applies only to the contract, and not to the remedy. *Gilmore* v. *Crooks et al.*, H. T. 6 Vict.

Held, that a foreign legislature could make no law creating a lien on legal estate in Canada, and consequently that any contract founded on such a consideration was void ab initio. *Genesee Mutual Ins. Co.* v. *Westman*, 8 Q. B. 487.

C. was indebted to the plaintiff, whose vessel he had chartered to carry certain lumber belonging to defendants from Collingwood to Chicago, and the plaintiff having threatened to detain the lumber on its arrival at Chicago if his claim was not paid, was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel. Quære, whether the plaintiff's forbearing to detain defendants' lumber as he had threatened would have been sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberly* v. *Baines et al.*, 15 Q. B. 25.

Declaration on a policy of insurance on a propeller. Plea, that the vessel was lost in Lake Michigan by coming into collision with a schooner in American waters, and that the right and liabilities under said policy on account of such collision ought to be governed by the laws of the United States, according to which all steamers must keep out of the way of sailing vessels, and in case of collision and loss occasioned thereby to the steamer, it is presumed that the fault was theirs, and her owners cannot recover from the owners of the sailing vessel, or from insurers: that the plaintiff's steamer did not avoid the schooner as she might have done, whereby the wreck was occasioned. Replication, that the plaintiff's vessel did not collide with the schooner through the want of ordinary care and skill in navigating her, such as is proper in the navigation of the lakes. Rejoinder, that the propeller was an American vessel, sailing under American colours, and in American waters at the time of the loss: that the defendants are an American company: that by the American law, as the plaintiff well knew, the schooner was justified in keeping her course, while the steamer should have turned out of her way to enable her to do so, as she might have done, yet the steamer's course was not altered, as it easily might have been; and so by reason of the said facts the collision did take place from the want of ordinary care and skill in navigating the steamer. Surrejoinder, that the steamer was not lost through the want of ordinary care and skill in those navigating her, as alleged in the rejoinder:—Held, on demurrer, that the surrejoinder was good. As to the plea,—Held, that the allegation of want of care on the plaintiffs' part formed no defence; and that if it had been averred in the declaration that the contract was made in this province, the American law would not govern, though the loss happened in their waters. *Patterson* v. *The Continental Ins. Co.*, 18 Q. B. 9.

To an action on a judgment recovered in the Supreme Court of the State of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B. not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do:—Held, a good replication, for defendants by their acts of incorporation being evidently designed to carry on the business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in New York the law there would govern. Per Hagarty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which that law must govern. In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made. The plaintiffs replied, that when called upon to pay, defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing; that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered, upon proof of such waiver, without any evidence of proof or adjustment. Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit it might, under 23 Vict. c. 24, be set up here; and whether the condition was waived or performed was a matter of evidence only, on which our law must prevail. *Waydell et al.* v. *The Provincial Insurance Co.*, 21 Q. B. 612.

A contract for the sale of goods to plaintiffs at a certain price, payable in Toronto, was made by defendant at Chicago, through his agent there, the goods to be shipped by the G. T. R. from Toronto. No sold note was signed by the broker until after action brought for the non-delivery; but it was proved that the 17th sec. of the Statute of Frauds was not in force in Illinois:—Held, that the contract being valid where it was made, could be enforced here, though not in writing. *Green et al.* v. *Lewis*, 26 Q. B. 618.

A policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here, with whom the plaintiff insured:—Held that the law of this country, and not of the foreign country, should govern, the contract being in fact made here. *Meagher* v. *The Ætna Ins. Co.*, 20 Q. B. 607.

The plaintiff in ejectment claimed as heir of his father, H., who it appeared, while a slave in the state of Virginia, had in 1825 been married to the plaintiff's mother, S., also a slave. The marriage was performed by a Baptist minister, with the usual ceremony, and with all the formalities practicable to make it binding, but without a license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and

working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there. It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying: that to constitute a strict legal marriage between free persons a license was essential; but that slaves could not obtain it, or in any way contract a legal marriage, being regarded by the law as property only, not persons. It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia arising from the law of slavery, which our law could not recognize; but,—Held, otherwise; for the parties not being British subjects, as in Ruding *v.* Smith, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated. *Harris* v. *Cooper*, 31 Q. B. 182.

The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the United States courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that by the law of the State of Michigan she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of twelve, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners, and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive (23 Vict. c. 24), it was competent to consider the "cause assigned" by the father: and so it was held (especially in view that the divorce suits would be tried in a few weeks' time, and so settle the merits of the case), that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her. *In re Kinney*, 6 P. R. 245.—C. L. Chamb.—A. Wilson.

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2. *Pleading and Proof of.*

A foreign law authorizing the discharge of an insolvent debtor must be directly proved, and the court will not listen to an application for the discharge of such person after he has allowed judgment to go by default, and is in execution. *Brown* v *Hudson*, Tay. 346.

The judge's private seal is not evidence of the proceedings of a foreign court of justice. *S. C. Ib.* 272.

If a foreign judgment against two defendants be several in its terms, the court here will hold it good as according to the law of the foreign country until the contrary be shewn; and the executor of one defendant may be sued, although the other defendant survive. *Ruey* v. *Goodwin*, E. T. 3 Vict.

To displace the defence to a note, by shewing the lex loci contractus as different from the law of our courts, such foreign law must be replead and set out on the record. *Hope* v. *Cabieux*, 21 C. P. 241; followed in *Robertson* v. *Cabieux*, 31 Q. B. 402.

Per Wilson, J., the plea was bad not alleging that the note, under the facts set void by the law of Quebec, by which the of the note must be decided. *Robertson* v. *Caldwell*, 31 Q. B. 402.

It is not desirable, even with the consent parties, that the court should construe of a foreign country, instead of the law is the law there, being proved by lawyers foreign country. *Meagher* v. *The Provincial Insurance Company, and the Home Insurance Co.*, 20 Chy. 354.

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3. *Laws of Lower Canada.*

(a) *Generally.*

Testator, by his will made in 1842, devised the land in question, lot 37, to his son J. and to the plaintiff, Alexander, another son, lot 32, but directed that if J. should prefer lot 32 he should take it, and the plaintiff should then have lot 37. By a codicil he declared his will to be, that if his son A. should not take holy orders, as he intended, then he should have lot 37, and J. lot 32, and the plaintiff the west half of lot 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family; but should Allan not divide or give over in full an equal portion of the house in St. Paul's street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise that my said son Allan shall only receive of my property what has been willed to him in my last will, then this codicil to be null and void." The will of Mrs. M. referred to was made in Upper Canada in 1828, and devised the house mentioned to her son Allan, "with power to give an equal share to his sisters Helen, Catherine, and Harriet, and to his brother John." After the testator's death, J. elected to take lot 32. Allan never took holy orders, but he had not divided the property in St. Paul street, but on the contrary treated it as his own, and having mortgaged it his interest was sold under a judgment to the mortgagees, who subsequently procured a release from the brother and sisters named in Mrs. M.'s will, of their interest, and obtained a judgment of distribution in Lower Canada. It was proved by two advocates from Montreal, that by the law of Lower Canada the will of Mrs. M. vested an equal interest in the land in Allan and his brothers and sisters named:—Held, that the condition in the codicil respecting the property in Montreal must be governed by the law of Upper Canada as regarded its effect upon the land in question. *Macdonell* v. *Macdonald*, 19 Q. B. 130. See *Macdonald* v. *Macdonell*, 2 E. & A. 341.

The crown in 1798 granted land to J. and E. Hay, and three others. In 1800 E. became a [illegible] in Montreal, by which, according to the law

Lower Canada she became civilly dead as regarded her property, and she afterwards died there in 1838:—Held, that she had clearly by our law not lost her share by becoming a nun. *Stuart* v. *Peaslee*, 20 Q. B. 513.

Held, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise the medical profession in the upper province subject to any local law affecting the profession there. *Shaw* v. *Linton*, 22 Q. B. 177.

By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "*customary, prefix, or accepted*," no mention being made of lands in Upper Canada:—Held, affirming the judgment of the Common Pleas, that this did not preclude her from claiming dower out of lands in Upper Canada held by her husband during the coverture; and that, notwithstanding the contract which was entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. VanKoughnet, C., diss. *Jamieson* v. *Fisher*, 2 E. & A. 242; *Fisher* v. *Jamieson*, 12 C. P. 601.

A bill having been filed against trustees and executors, residing at Montreal, for an account of the estate of the testator, who at the time of his death, and for some years previously, had been domiciled there, the trustees, &c., although not obliged to do so, had appeared to and answered, the bill, submitting to account, &c., in such manner as the court should direct. Afterwards, and before any evidence had been taken, they discovered that there was a very important difference as to the responsibility incurred by them according to the laws of Upper or Lower Canada, but which at the time of filing their answer they were not aware did exist:—Held, that under the circumstances, they ought to be allowed to file a supplemental answer, for the purpose of placing the necessary facts upon the pleadings; and that the fact that such permission might enable the parties to set up a defence of want of jurisdiction in the courts of this province, was no objection against, but rather a reason for this permission. *Torrance* v. *Crooks*, 1 E. & A. 230.

Trespass or trover will lie here for timber cut in the province of Quebec (the declaration not charging any trespass to the realty,) although it may be necessary in such action to try the title to the land on which it was cut. *McLaren et al.* v. *Egan*, 36 Q. B. 307.

By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country interest is not recoverable upon a legacy until suit brought therefor, without an express promise; and the legatee referred to having sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Chy. 518; affirmed on appeal, 8 Chy. 220.

By an ante-nuptial settlement made in Lower Canada in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no communion of property between them should exist, but that each should hold and continue to enjoy what each then had, or should thereafter acquire. In 1848 certain goods and chattels of the husband were sold at sheriff's sale, on execution against the husband, and having been bought in by a third person, were by a deed of donation conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under executions issued on judgments obtained against the husband:—Held, that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts. *Ryland* v. *Abbatt*, 11 Chy. 135.

A bill was filed in this court for the purpose of administering an estate in the province of Quebec, which had been assigned by an insolvent debtor to trustees for the benefit of creditors. All the parties to the suit, other than the debtor, who resided in Quebec, were resident in Ontario, it being a part of the agreement that the debtor should act as a manager for the trustees, and that all moneys received by him on account of the estate were to be deposited in a bank in Ontario to the credit of the trustees. A demurrer was filed on the ground of want of jurisdiction. The court overruled the demurrer with costs, giving to the defendants permission to answer, on their undertaking to afford the plaintiff facilities for going to a hearing at the then approaching sittings. *Grant* v. *Eddy*, 21 Chy. 45, 60, note.

III. Miscellaneous Cases.

In cases where if money belonged to an infant residing in Upper Canada, the court would invest it for his benefit, the court will, where the infant is resident in a foreign country, direct an investment for his benefit in the securities of such country. *Sanborn* v. *Sanborn*, 11 Chy. 359.

On the determination of the civil war in the United States the government at Washington became entitled to the property heretofore belonging to the Confederate government. *The United States of North America* v. *Boyd*, 15 Chy. 138.

During the war, United States postage stamps to the amount of $10,500 were taken by a Confederate ship from a United States vessel. There was no condemnation in a prize court, nor any transfer of the stamps to any person by the Confederate government. After the war was over, these stamps being in possession of an officer of the Confederate ship, were sold by him through a broker to the defendant in Liverpool at a large discount. The defendant alleged that he had bought without notice of any infirmity in the title; but the court—being satisfied that he bought with knowledge of the facts, or with a strong suspicion of them, and designedly avoided enquiry—ordered the stamps to be delivered up to the United States government. *Ib.*

By acts of the legislature of Canada and the state of New York respectively, a company was

incorporated in either country for the purpose of constructing a suspension bridge across the river Niagara, for railroad and other purposes, with compulsory powers as to the taking of lands, &c., and having the right to impose tolls for the user of the bridge. The two companies so incorporated joined in a lease of the upper or railway floor of the bridge for the term of their charters to a railway company, to be for their exclusive use, and the use of such other railway companies as the lessees might arrange with :— Held, that such assignment was ultra vires and void. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Chy. 490.

The Erie and Niagara Railway Company had, by statute, authority to arrange for the passage over such bridge from Canada into the United States ; but it was alleged that the lessees refused them permission to cross the bridge. Thereupon an information by the attorney-general of Ontario, at the relation of the Erie and Niagara Co., and a bill by that company, was filed against the two bridge companies and their lessees, complaining of such refusal ; and praying a declaration, 1. That the lease of the bridge was ultra vires ; 2. That the Erie and Niagara Company were entitled to the use of the bridge on paying reasonable tolls ; and for an injunction restraining the defendants from preventing the Erie and Niagara Company using the bridge. The evidence shewed that the Erie and Niagara Company had not effected any actual connection with the bridge, and that it was not clear they could do so without passing over lands of the lessees ; and that by their charter the American Bridge Company had the power of making a lease to one railway company exclusively. Under these circumstances, as the damage, if any, to the Erie and Niagara Company was only prospective, and they could not be said to have sustained any actual damage by the refusal of the defendants to recognize their right to use the bridge, the court at the hearing dismissed their bill as against all the defendants, and also dismissed the information as against the American Bridge Company with costs ; declared the lease of the bridge, as regarded the Canadian Bridge Company, void, and restrained them from further acting thereunder. And, Semble, that even if the Erie and Niagara Company had established a complete title to relief as against the Canadian Bridge Company, still as this court had no authority to interfere with the American Bridge Company, and could only have compelled the other defendants to permit the cars of the Erie and Niagara Company to cross as far as the Canadian Bridge Company's charter extended, i. e., to the centre of the bridge, and was thus unable to afford any effectual assistance, the court on this ground also would have refused to interfere. *Ib.*

Where a robbery had been committed in a foreign country, but no trial had taken place, and the money stolen had been invested in the purchase of property here ; the court restrained the selling or incumbering thereof. *The Merchants' Express Co.* v. *Morton*, 15 Chy. 274.

FORFEITURE.

I. Of Estates.

1. *Of Dower—See* Dower.

2. *Of Leases—See* Landlord and Tenant.

3. *Of Aliens—See* Alien.

4. *For Treason—See* Attainder—Inquisition.

5. *Under Wills—See* Will.

II. Of Goods—*See* Revenue.

III. Of Stock—*See* Corporations.

Plaintiff on the 20th January, 1866, agreed under seal with defendants to sell to them certain land for $5000 ; $2500 to be paid on 1st April, 1866, and $2500 on the 1st May, 1866, with interest, and to convey on these payments being made. Defendants covenanted to pay, and that if they made default, "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff ;" and that time should be of the essence of the contract. To an action on this covenant, alleging non-payment by defendants, and their neglect to complete the purchase, defendants pleaded on equitable grounds, that defendants went into possession and paid $1000, but having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void. At the trial it appeared that the whole purchase money was $6000, of which $1000 was paid down, and $1000 more on the 7th April, 1866, when, by an endorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease in May, 1865, and expended about $4000 boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th of May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their payments, and that the property was his, and they were trespassers. He brought several men with him, who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea :— Held, 1. That under the agreement defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff ; 2. That there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged ; and the verdict was upheld ; 3. That the endorsement extending the time for payment did not do away with the provision for forfeiture, but incorporated the extended time in the agreement as if originally there. *Marcus* v. *Smith et al.*, 17 C. P. 416.

Under an agreement with the plaintiff, dated 18th September, 1874, defendant agreed to purchase certain lands for $6,500, $500 to be paid in cash, $1000 and interest on the 1st May, 1875, and two further instalments of $500 each on the 1st May, 1875, and 1876, respectively, and defendant to assume a mortgage on the property of $4,000. The defendant was to recoup the plaintiff for any

interest he should pay on the mortgage up to the 1st May, 1875, and was to have a deed on payment of the moneys and mortgage, and possession on payment of the instalment on 1st May, 1875. The agreement then provided for time being of the essence of the contract; and that, unless said payments were punctually made, the agreement should be null and void, and the plaintiff should be at liberty to resell the land. The defendant having made default in payment of the $1,000 on the 1st May, 1875, the plaintiff attempted, without notice to defendant, to resell the property by auction; but having failed to do so, he also, after the 1st May, made arrangements with the tenant in possession for an increased rent, payable monthly, instead of yearly as before. On the 18th of the same month he sued the defendant on the agreement for the instalment due:—Held, Galt, J., dissenting, that neither the offering the property for sale, without any sale being effected, nor the new arrangements made with the tenant, amounted to an election by the plaintiff to put an end to the agreement, so as to form a defence to the action. *McCord* v. *Harper*, 26 C. P. 96.

If the sheriff's vendee verbally agree to accept payment of the redemption money for land sold for taxes personally, at a distance from the county town, in lieu of its being made to the treasurer for him, and the owner acts on this agreement, the other cannot afterwards, to the owner's prejudice, require the money to be paid for him to the treasurer, refuse to receive it himself when it is too late to pay the treasurer, and insist on holding the land as forfeited. Where such an agreement was proved by a credible witness, but there was contradictory evidence as to whether what took place amounted to an agreement, the court holding that the presumption in case of doubt must be in favour of fair dealing and not of forfeiture, gave the owner relief. *Cameron* v. *Barnhart*, 14 Chy. 661.

FORGERY.

See CRIMINAL LAW.

In an action by the last endorsee against the last endorser of a promissory note, it is no defence that the names of the prior endorsers are forged. *Eastwood et al.* v. *Westley*, 6 O. S. [illegible]

The Bank of B. N. A. in England received money there to be transmitted to A. in Upper Canada, and sent a letter of credit by post to A. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada, (A. having in the meantime died) and A.'s name forged on the letter of credit, and the money received by some person unknown:—Held, that A.'s executrix was entitled to recover the money from the branch at Toronto, as money had and received to A.'s use. *Gissing et ux.* v. *Hopper*, 6 O. S. 505.

A person against whom an action of ejectment was brought filed a bill to restrain the action, alleging as a ground, that the deed under which the plaintiff in the ejectment claimed was a forgery. The deed was dated about fifty years before the bill was filed, and all the persons who had witnessed the deed, four in number, were dead before the validity of the deed was impeached in any way. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs. *Fick* v. *McMichael*, 5 Chy. 646.

FORMA PAUPERIS.

See PAUPER.

FORMER ACQUITTAL.

See CRIMINAL LAW.

Held, that the acquittal of a locomotive driver on a train upon a charge of manslaughter for the death of a party, on account of whose death the action for damages was brought by his administratrix, did not constitute any answer to the action. *Ham* v. *The Grand Trunk R. W. Co.*, 11 C. P. 86.

FORMER RECOVERY.

I. BY JUDGMENT.

1. *Generally*—*See* JUDGMENT.
2. *As a Defence to Actions on Bills or Notes*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
3. *In Ejectment*—*See* EJECTMENT.

FORWARDER.

See CARRIERS.

FRAUD AND MISREPRESENTATION.

I. IN SALE OR CONVEYANCE OF LANDS.

1. *Improvidence*, 1551.
2. *Undue Influence.*
   (a) *Parent and Child*, 1553.
   (b) *Other Relations*, 1555.
   (c) *Inebriates*, 1557.
   (d) *Other Cases*, 1559.
3. *Fraud or Misrepresentation as a Ground of Action or Defence at Law*, 1561.
4. *Fraud or Misrepresentation as a Ground for Relief in Equity*, 1566.
5. *Setting aside Fraudulent Conveyances as against Creditors or Purchasers*—*See* FRAUDULENT CONVEYANCES.

II. ACTION FOR FALSE REPRESENTATION.

1. *Of Solvency*, 1570.
2. *Of Authority or Agency*, 1571.
3. *Against Bank Directors for False Reports*, 1572.
4. *Pleas of Fraud and Misrepresentation*, 1573.
5. *Other Cases*, 1574.

III. Compromise or Settlement by Fraud, 1579.

IV. Miscellaneous Cases, 1581.

V. By Attorney or Solicitor—*See* Attorney and Solicitor.

VI. Fraud and Illegal Consideration in Bills or Notes—*See* Bills of Exchange and Promissory Notes.

VII. Fraud in Procuring Patents—*See* Crown Lands.

VIII. Fraudulent Assignment—*See* Bankruptcy and Insolvency—Criminal Law—Fraudulent Conveyances.

IX. Fraudulent Conveyances—*See* Fraudulent Conveyances.

X. Fraudulent Judgment—*See* Fraudulent Judgment.

XI. As a Ground of Estoppel—*See* Estoppel.

XII. Fraudulent Removal—*See* Distress—Execution.

XIII. By Married Women—*See* Husband and Wife.

XIV. In Cases of Insurance—*See* Insurance.

XV. Contracts and Dealings with Lunatics—*See* Lunatic.

XVI. In Cases of Principal and Agent—*See* Principal and Agent.

XVII. Between Partners—*See* Partnership.

XVIII. At Sale of Land for Taxes—*See* Assessment and Taxes.

XIX. Fraud on Revenue—*See* Revenue.

XX. In Cases of Trust—*See* Trusts and Trustees.

XXI. Specific Performance of Contract where Fraud or Misrepresentation has been used at Sale—*See* Specific Performance.

I. In Sale or Conveyance of Lands.

1. *Improvidence.*

Although the number of persons in this country in the position of expectant heirs and reversioners is but small, still the same rule applies as in England; the principle of the doctrine being that such persons need to be protected against the consequences of their own improvidence in dealing with designing men. *Morey* v. *Totten*, 6 Chy. 176.

Where the tenant for life was the father of the reversioner, but the son was not dependent on him, and had no expectations from him, and both were illiterate:—Held, that the father's knowledge of a sale of the reversion by the son did not render such sale unimpeachable. *Ib.*

Where a woman of sixty, who had a first charge on property for her maintenance for life, was induced to exchange it for a life lease of part of the property, subject to conditions which rendered the transaction an improvident one on her part; and it appeared that she was illiterate and dull of intellect, and had no professional or other competent adviser in the matter, and did not in some important respects understand the nature or effect of the transaction:—Held, that it was not binding on her. *McLaurin* v. *McDonald*, 12 Chy. 82.

An improvident bargain for the sale of the plaintiff's property, where the parties were very unequal as regards means, intelligence and otherwise, and the papers were drawn by the vendee who omitted some important parts of the bargain, and the vendors had not the protection of competent independent advice, was held not to be binding on the vendors. *Fallon* v. *Kinsella*, 12 Chy. 388.

A widow of uncommon vigor of mind and strength of character, accustomed for many years to manage all her own affairs, and who owned property to the value of at least £25,000, incurred liabilities to the extent of £8,000; and the time of her indebtedness being one of great commercial depression, she could not raise money to pay, and was in danger of losing all she had by a forced sale. She had two sons-in-law, persons of wealth and credit; her solicitor, without any communication with them, advised her to offer her property to them on terms which would make it worth their while to devote their time and energy to save something for themselves; she after some days deliberation adopted this advice, and proposed to them to take all her property, except two farms with which she wished to provide for the only two members of her family, besides the wives of the two sons-in-law, who had not already had large sums from her; and the consideration which she proposed to the two sons-in-law, was that they should pay her liabilities and pay to herself an annuity. They, with some reluctance, accepted her proposal, which was duly carried out, and she lived for seven years without making any objection to the transaction, though she was aware that they had made considerable profit out of it. After her death, some of her heirs having filed a bill impeaching the transaction on the grounds of fraud and trust, the bill was dismissed with costs. *Wallis* v. *Andrews*, 16 Chy. 624.

The plaintiff, an infirm man seventy-five years old, and nearly deaf, having quarrelled with a son in whose house he had for some time lived, conveyed by deeds, which did not contain a power of revocation all his property at Caledon worth about $6,000, to another son, the defendant, with whom he went to live, the plaintiff receiving back at the suggestion of the person employed by the father to prepare the deeds, a bond in $2,000 penalty, securing to the father a maintenance or $125 a year, in the event of his being unable to continue to reside with the defendant, but which did not charge the amount on the realty in any way. On a bill filed by the father to be relieved from the transaction so entered into, the court, on the ground of the extreme improvidence of the bargain, and that the instruments did not, as the plaintiff swore, carry out his real intention, set the transaction aside, but the bill having improperly charged the defendant with having fraudulently practised upon the plaintiff, and with having by undue influence procured the deeds to be executed, this relief

was granted without costs. *Watson* v. *Watson*, 23 Chy. 70.

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2. *Undue Influence.*

(a) *Parent and Child.*

To sustain a deed of gift to a person standing in a confidential relation to the donor, (in this case it was by a father to his son), the donee must establish by clear evidence that the nature and effect of the deed were fully and truly explained to the donor: that he perfectly understood them: that he was made alive, by explanation and advice, to the effect and consequences of executing it, and that the deed was a willing act on his part, and not obtained by the exercise of any of that influence which the confidential relationship of the donee put it in his power to employ; otherwise such deed of gift will be set aside. *Mason* v. *Seney*, 11 Chy. 447. See, also, *Murray* v. *Murray*, 8 Chy. 293.

Where a son who had the entire management of his father's business,—the father being old, and for years unable to attend to business,—obtained deeds of gift from his father and mother of their property, without the intervention of any adviser, and failed to give such evidence as above mentioned, the deeds were set aside. *Mason* v. *Seney*, 11 Chy. 447.

The plaintiff being old and infirm, was induced by his son, with whom he resided and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent, independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the court decreed the lease void, and the will revocable at the pleasure of the plaintiff. *Donaldson* v. *Donaldson*, 12 Chy. 431.

A conveyance by a man, 84 years of age, of his farm, which was almost his only means, to his married daughter, subject to a provision that she should properly maintain him, but with no personal liability on the part of any one to see to his maintenance, was held to be a deed of gift, and only sustainable by the same evidence necessary in equity to maintain a deed of gift. *Beeman* v. *Knapp*, 13 Chy. 398.

A like deed, made two days afterwards to the grantor's son, who had managed the farm for some years along with farms of his own; the consideration for the conveyance being the son's personal bond to maintain the grantor and his wife during the rest of their lives, without any other security:—Held, not valid, unless shewn to have been made freely and voluntarily after independent and proper advice:—Held, also, that such a conveyance, unless so made, was not made good by evidence of a verbal agreement several years before, that the son should work the farm and maintain his father and mother, in consideration of the property being left to the son by will; a deed and will being essentially different. *Ib.*

In the case of a gift from a parent to a child, there is no rule which requires the child, in the absence of evidence shewing imposition or undue influence, to support the deed by the evidence which might be necessary in the case of a gift from a child to a parent. *Wycott* v. *Hatman*, 14 Chy. 219; *Armstrong* v. *Armstrong*, *Ib.* 528.

There is ordinarily no presumption of undue influence in the case of a gift from a father to a son, unless it is proved that the son occupied at the time, a relation of confidence and influence; but if that is proved, the gift may need for its support the same evidence as a gift to any other person occupying such relation. *McConnell* v. *McConnell*, 15 Chy. 20.

Where a father made a deed of gift of all his property to his son, and there was no evidence of undue influence on the part of the son, or of his having taken an unconscientious advantage of his father, and the court was satisfied that the deed had been duly executed, the son was not required to prove that the father in making the deed was aware of its nature and consequences; and the deed was upheld. *Armstrong* v. *Armstrong*, 14 Chy. 528.

A widower, a shrewd, thrifty man, possessed of considerable real and personal estate, being apprehensive of a suit against him for breach of promise, determined to convey his land to his children, which he did, taking conditional notes for the purchase money. The children did not occupy any confidential relation towards him, and the transaction was his own suggestion, without any influence or pressure on their part. What he retained was more than ample for his wants:—Held, in a suit instituted by the father seven years afterwards, that the deeds could not be impeached. *Luton* v. *Sanders*, 14 Chy. 537.

A gift can only be upheld if clearly proved; and evidence of loose, casual, and inconsistent admissions offered to prove a gift by a mother to her son, of all the donor's means was held insufficient. *McConnell* v. *McConnell*,, 15 Chy. 20.

Where there is no proof of mala fides or of an unfair exercise of influence, a gift of a trifling sum, as compared with the donor's property, does not stand in the same position as a gift of his whole property. *Ib.*

If the donee is a son who occupied to his father (the donor) a relation of confidence and influence, though a gift of the whole of his father's means, if large, may not be upheld without the evidence required in other cases, of due deliberation, explanation, and advice, the gift of more than a trifling proportion may be sustainable without such evidence. *Ib.*

A father having obtained a conveyance of the interest of his sons under a marriage settlement for an alleged consideration which did not exceed one-fifth of the value of such interest, and which was never paid, the transaction was set aside after the death of the settler and one of the sons, in a suit by the devisees of the deceased son. *McGregor* v. *Rapelje*, 17 Chy. 38; *S. C.* in appeal, 18 Chy. 446.

The defendant having received from the plaintiff, his father, money to buy land, bought a party's interest in an unpatented lot, and took an assignment in his own name. When the father afterwards came to this country with his wife and family, they all settled on the lot; the mother died five years afterwards, and a few days after her death, and while the plaintiff was in a state of mental depression, the defendant,

with the assistance of another son, in whom the father had confidence, induced the father to consent to defendant's retaining the lot so bought, in consideration, among other things, of defendant's agreeing to pay for another lot which had been bought, and of his procuring a deed of half this lot to the father, and of the other half to the son who was acting for the father. This consideration was not adequate; the transaction was otherwise an improvident one for the father; and there was considerable doubt whether the father had understood the bargain to be as stated by the defendant:—Held, not binding in equity, and that the plaintiff was entitled to a conveyance on payment of the sums which the defendant had paid in pursuance of the alleged contract. *Johnston* v. *Johnston*, 17 Chy. 493; affirmed on rehearing, 19 Chy. 133.

(b) *Other Relations.*

An unequal division of a residuary estate, agreed to by the parties interested, and sanctioned by the executors, was held not to be binding, where it appeared that the lady to whom the division was unjust had agreed thereto without professional or other independent advice, with undue haste, and in ignorance of the real value of the largest item of the assets of the estate, the other party to the agreement being her father-in-law, and being the only person, except the executors, who appeared to have had any of her confidence in matters of business. *Clarke* v. *Hawke*, 11 Chy. 527. See, also, *Merritt* v. *Shaw*, 15 Chy. 321.

It is essential to the validity of a deed of gift in favor of a person occupying towards the grantor a relation of trust and confidence, (in this case a brother in favour of his brothers,) that the grantee should show that the grantor had competent and independent advice in the transaction. *Dawson* v. *Dawson*, 12 Chy. 278.

A younger son who was entitled to a large estate under the will of his father, shortly after coming of age, purchased from a step-brother—twenty years his senior, and who was greatly embarrassed—the equity of redemption in fifty acres of land, the mortgages on which he was to pay off out of the purchase money. Shortly afterwards the purchaser left this country for the United States, where he resided for some years, during which time the mortgagees had foreclosed. The purchaser, having returned, filed a bill impeaching the transaction, on the grounds of undue influence on the part of the vendor and excess in price. On the hearing, the evidence failed to establish the fact of undue influence, and the evidence as to value being contradictory, the bill was dismissed with costs. *Denison* v. *Denison*, 13 Chy. 114; affirmed on rehearing, Mowat, V. C., diss. *Ib.* 596.

An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining her majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by this promise, conveyed the lot selected by her uncle, which was much more valuable than the other. The money (if any) paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and the suit impeaching the transaction. *McGonigal* v. *Storey*, 14 Chy. 94.

A man deliberately and with legal assistance executed to his son-in-law a deed of his farm, subject to a life-estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, and to indemnify him against certain mortgages. There was no fraud or pretence of undue influence, and the grantor fully understood what he was doing; but quarrels subsequently arose and the son-in-law left the farm; whereupon the father-in-law filed a bill to set aside the deed on the ground that the conveyance incorrectly mentioned a consideration of $2,000, and that the true consideration was not in writing; but as it appeared that the solicitor had recommended a writing, and that the grantor had voluntarily preferred to dispense with it, the court declined to cancel the transaction. *Cameron* v. *Sutherland*, 17 Chy. 286.

An old man whose mental faculties had been somewhat impaired by age, being in difficulties with his son, applied for advice to the attorney of persons against whom he had recovered a judgment for one debt, and a verdict for another debt; the attorney obtained from him a release of the two debtors without any consideration, and without his having any other advice in regard to the transaction; and the only evidence of what had passed between the two was the evidence of the attorney himself, the client being dead:—Held, that the release could not be maintained in equity. *Dewar* v. *Sparling*, 15 Chy. 633.

A farmer died intestate, leaving two sons and two daughters, and considerable property, most of which was in the possession of one of the sons. Two days after the funeral, at the suggestion of the sons, all went into town, the sisters being under the idea they were going to the registry office to make enquiries about the property, instead of which they were taken to see a lawyer about the estate; and while there, through the influence and importunity of the sons, and on the faith of their representations, some of which were not correct, and without full or correct information of the value of the estate, one of the daughters, in her husband's absence, and without any independent advice, executed a transfer of her interest in the estate to the son who was in possession, in consideration of his note for about one-fifth of the value of her share, payable in six years without interest. There were more reasons why she should have made a gencrous settlement with this son; but the settlement having been obtained as stated, was held by Mowat, V. C., not to be binding; and on the hearing the full court, considering the issue between the parties to be one of fact, refused to alter the decree. *Cassie* v. *Cochrane*, 20 Chy. 54[illegible]

The testator, who died in April, 1867, had been a captain in the army, and was represented as a man of intelligence and business capacity although addicted to habits of intemperance. He had no relatives other than the plaintiffs and the defendant, the latter—a minister of t[illegible]

Church of England—being the brother of his wife, who had died in the previous autumn. Soon after her decease the testator, who was then a resident in London, sent for the defendant, who resided at Brockville, to come to him in order to assist him with his affairs. This the defendant did, and, amongst other things, consulted the solicitor of the testator as to the state and condition of his affairs; and a power of attorney was prepared by the solicitor and executed by the testator authorizing the defendant to sell and dispose of sundry articles of furniture and other effects, which he did. Two days after this testator made his will, bequeathing to the defendant all his pictures, jewellery, trinkets, and wearing apparel; and to his brother, G. W., one of the plaintiffs, all his silver-plate bearing his family crest. Of the residue of his estate, real and personal, he gave one-half to G. W. and the other half he gave to the other plaintiffs his nieces; and appointed defendant executor. Next day the testator executed a transfer of a policy of insurance on his life to the defendant; the instructions for this instrument, as well as for the will, having been given by the testator personally to his solicitor, who testified as to the testator's thorough competency to execute both. The defendant was present with the testator when instructions for the transfer were given to the solicitor, and so remained until the instrument was executed. The testator died within six months afterwards, and the insurance money was paid to the defendant. The solicitor in his evidence stated that he was not informed as to the object of the transfer, which was absolute in form and for a nominal consideration, but that he understood it was by way of security for some advance or debt. The defendant did not prove the will, or obtain probate thereof until June, 1874, and on the 12th of October of that year the plaintiffs obtained an administration order, and sought in proceeding thereunder to compel the defendant to refund the insurance money, on the ground that the transfer of the policy had been obtained by fraud or undue influence, or was intended merely as in aid of the will or as a security: but the court (reversing the decision of the master)—Held, that the circumstances of the case were not such as to lead to the presumption that the defendant had been guilty of any fraud or undue influence in obtaining such assignment, and that he was not bound to give evidence that the testator voluntarily and deliberately performed the act, knowing its nature and effect. *Re White, Kersten* v. *Tane*, 22 Chy. 56.

(c) *Inebriates.*

The mere fact of a person executing while intoxicated, will not, as a rule, suffice to set such deed aside, unless undue advantage was taken. However, where a person sixty-two years of age, and an habitual drunkard, executed a deed of real estate in trust for the keeper of the tavern where he resided,—and who was in the habit of supplying him with whatever drink he desired,—for a greatly inadequate consideration, and afterwards devised the same property to his brother, the court, at the instance of the devisee, set aside the conveyance, and ordered the tavern keeper to pay costs of the suit. *Clarkson* v. *Wilson*, 4 Chy. 244.

An improvident deed, obtained by a tavern keeper from a boarder who was greatly addicted to intemperance, was set aside with costs. *McGregor* v. *Boulton*, 12 Chy. 288.

An old man, greatly addicted to drinking, executed deeds of all his property, real and personal, to the tavern keeper with whom he boarded, and accepted in consideration therefor the bond of the latter for his support for life, which was an inadequate consideration. Within five months afterwards the grantor died; and on the application of one of his heirs, the court set aside the deeds with costs. *Hume* v. *Cook*, 16 Chy. 84.

A person who had at one time been remarkable for strength both of body and mind, and was much respected, having become, from habitual drunkenness, imbecile, made a deed of valuable property to one of his sons who had been in the habit of furnishing him with drink; and about fifteen months afterwards executed a deed for the same property to the wife of the same son. A bill was afterwards filed to set aside these conveyances for fraud and incapacity on the part of the grantor. After evidence had been taken at great length, a release of the action was obtained from the plaintiff without the intervention of any legal adviser on his behalf. The court set aside the conveyances, as also the release, with costs. *Nerills* v. *Nerills*, 6 Chy. 121.

To a bill for specific performance of an agreement to purchase lands, the vendee set up that he had been led into drink by the fraudulent contrivances of the vendor, and while in an insensible state of intoxication had been induced to sign the agreement, in which the price stipulated to be paid for the property was most exorbitant, and which was now sought to be enforced. At the hearing it was clearly shewn that the purchaser had been at the time of executing the contract intoxicated, and that the price agreed to be paid was exorbitant, but the court exonerated the vendor from any fraudulent conduct, and therefore refused to give the defendant his costs in the dismissal of the bill. *Schofield* v. *Tummonds*, 6 Chy. 568.

A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice. A bill by his heir impeaching the deed was dismissed. *Corrigan* v. *Corrigan*, 15 Chy. 341.

A., who was greatly addicted to drinking, gave to B. a mortgage to secure a small debt; the property was worth at least seven times the debt; and the rent of half the property for three years would have paid off the claim; but five years before the debt was payable A., without any additional consideration, released his equity of redemption to B.; and B. was allowed to remain in possession for seven or eight years after the mortgage debt was paid off by rents:—Held, in appeal, affirming the decree below, that the facts and evidence shewed that the release was given on a parol trust, for the benefit of the mortgagor and his family, and that to set up the release as an absolute purchase was a fraud on B., against which the court should relieve notwithstanding the lapse of time and the death of some of the witnesses. *Crippen* v. *Ogilvie*, 18 Chy. 253.

A testator, amongst other things, devised to his wife the proceeds of all his rentable property,

after paying necessary outlays, for the maintenance and support of herself and six infant children, and gave certain parts of his estate to his children, to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of twenty-one. One of the sons sold the portion devised to him, and the widow joined in the deed to the purchasers, which declared that the widow had put her son in possession of the lands. The only executor beside the wife, who proved the will, was absent from the province, and gave no consent to the sale. Less than two months after the sale the purchasers sold the estate at an advanced price to one T., having in the interval created a mortgage thereon, and shortly afterwards the son died; and thereupon a bill was filed by the executors and the infant children against the purchasers and their vendee, T., and also the widow, seeking to set aside the conveyance on the ground that the same was obtained by the purchasers fraudulently, when the son and his mother were both in a state of intoxication, produced and brought about by the purchasers; and that their vendee, T., was affected with notice, as the want of consent of the executor should have put him on enquiry. The evidence, however, negatived the fact of intoxication on the part of the son, but shewed great mental incapacity on the part of the widow, and the court, although unable to set aside the transaction, refused the purchasers all the costs on account of their conduct in the matter. *Collingwood* v. *Collingwood*, 21 Chy. 102.

See *Edinburgh Life Assurance Co.* v. *Allen*, 18 Chy. 425, p. 1560.

(d) *Other Cases.*

T., who owned a farm which he had mortgaged to its full value, conveyed it to defendant, and procured her to execute a mortgage thereon in his favour for £1125. Defendant was a woman of fifty or sixty years old at this time, and had been living for some weeks at T.'s house, who had her entire confidence. She had no other adviser and there was no reliable evidence of the deeds having been read over or explained to her, and no evidence of any previous negotiation for a purchase by her:—Held, that the transaction was invalid. *Elgie* v. *Campbell*, 12 Chy. 132.

A sale at an undervalue to a person under whose influence the grantor is, is as objectionable as a gift. *Mason* v. *Seney*, 12 Chy. 143.

When a deed of gift is objectionable according to the doctrines acted upon in equity to guard against undue influence, the mere circumstance that the grantor had previously expressed an intention of at some time giving the property to the grantee is not a sufficient ground for upholding the deed. *Dawson* v. *Dawson*, 12 Chy. 278.

A deed in favour of a third person, obtained through the influence of one occupying a fiduciary relation to the grantor, and not giving him the advice which he ought to have received, cannot be sustained. *Ib.*

A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for his son eight or nine years old, and to whom it appeared she was much attached, in consideration of a certain sum, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration however, not being at all equal to the value of the property. The court, in the absence of proof of any undue influence, oppression, persuasion, or fraud, refused to set aside the agreement as against the infant. *Gourley* v. *Riddell*, 12 Chy. 518.

The plaintiff, a squatter on crown lands, assigned to defendant to enable him to obtain the patent for the plaintiff. There was no writing shewing the trust, and defendant having procured the patent in his own name, induced the plaintiff to release his interest in the estate for less than half its value. There was great inequality between the parties in their business capacity and otherwise, and defendant failed to shew that he had given the plaintiff all the information he was entitled to, or that the plaintiff had made the assignment without pressure or influence. The court held that the plaintiff was entitled to redeem on payment of the amount of defendant's advances, although seven years had elapsed before the plaintiff filed his bill impeaching the transactions; the excuse assigned for the delay being his poverty: it appearing that the parties could be restored to their original positions without loss to the defendant. *Brady* v. *Keenan*, 14 Chy. 214.

Differences having arisen between the parties, A. obtained against B. a decree for an account, and large sums were in dispute between them. While the reference was pending, B. got a release of the suit prepared for A.'s signature: a friend brought A. to B.'s office, and B. there induced A. to sign the release in consideration of $150, which he promised to pay. On a subsequent day A. went for the money, and then at B.'s request executed a quit claim deed of all his interest in the land. There was no evidence of the true state of the accounts at the time of these transactions: A. was sober when he entered into them, and he understood their nature; and B. had no fraudulent purpose therein: B. was a person of large experience, A. had little, if any, business experience, and his habits were intemperate and thriftless; and he executed the two instruments without the knowledge of his solicitor, and without advice;—Held, that the instruments were void in equity. *Edinburgh Life Assurance Co.* v. *Allen*, 18 Chy. 425.

The owner of land subject to mortgages past due, and otherwise pressed for money, applied to a third person, who agreed, after some discussion, to purchase the real estate, as also the chattel property thereon, for about $6,800, which the purchaser arranged, and went into possession of the property. Sometime afterwards the vendor filed a bill seeking to impeach the sale on the ground of undue influence and inadequacy of consideration; but the court,—being of opinion that the property was not worth more than $7,500: that the vendor had had ample time for deliberation between the verbal arrangement and the written agreement, which time he admitted he had employed in trying to do better with his property than by accepting the purchaser's offer, and that the bargain made betwe

the parties was as good a one as at the time and under the circumstances could have been obtained,—dismissed the bill with costs. *Shank v. Coulthard*, 19 Chy. 324.

A widow having a claim to certain lands belonging to the Six Nations Indians, prevailed upon a person to act as agent in procuring the acknowledgment by the chiefs of her title, which was done after great trouble and expense on the part of the agent, and in accordance with such recognition the crown patent for the land was perfected; whereupon the grantee of the crown conveyed by deed of gift to the agent an undivided moiety of the estate as a reward for his services in procuring the grant previously to which she had executed a power of attorney in favour of the agent, authorising him to sell or mortgage all her lands in Upper Canada, and subsequently went to England, where she continued to reside until the time of her death. During her residence there, she urged the agent to dispose of her moiety of the property, and in the course of the correspondence, stated that she would be willing to accept £1,000 for it. The agent, in 1844, having directed the property to be sold by auction, his sister became the purchaser for £628, having authorised the person who attended to bid at the sale, on her behalf, to go as high as £800 for the property. Upon a bill filed by the son and heir of the owner, in 1858, several years after the agent's death, seeking to set aside the deed of gift, as having been obtained by undue influence, and the sale by auction as having been made at a great undervalue; the court, under the circumstances, refused to disturb the title derived under the deed of gift; but set aside the sale by auction, as having been made at a price not warranted by the agent's authority. The infancy of the plaintiff at the death of his mother, and his absence subsequently on duty with his regiment, being deemed sufficient circumstances to excuse the delay which had occurred in instituting proceedings by him; and it was shewn that a suit instituted by his mother, during her residence in England, had been dismissed, owing to her inability to procure security for costs to be given. *Kerr* v. *Lefferty*, 7 Chy. 412.

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2. *Fraud or Misrepresentation as a ground of Action or Defence at Law.*

As a ground of Action.]—When on a sale of land there has been a conveyance perfected, unless fraudulent misstatement or concealment is clearly made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor. Semble, that where fraud is established, but the conveyance has been made, and the parties cannot be placed in statu quo, then the remedy is by an action for deceit, and assumpsit for money had and received, to recover the purchase money, will not lie:—Held, that on the evidence set out in this case, the defendant was not shewn to have been guilty of fraudulent misrepresentation or concealment title. *Thomas* v. *Crooks*, 11 Q. B. 579.

A., a crown land agent, being asked by the plaintiff whether there were any lands for sale by the government in the township of M., told him that there were not, but that B. had certain lots there to which he would sell his right, and the plaintiff being introduced by A. to B. paid £50 for his goodwill, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B., to enable the latter to obtain an advance upon the government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence; or as money had and received. *McMaster* v. *Geddes et al.*, 19 Q. B. 216.

Declaration, that defendant intending, &c., falsely and fraudulently represented to plaintiffs that certain land and timber were defendant's, and that he had the right to grant to plaintiffs the privilege of cutting the timber thereon, and that all crown dues in respect of such timber and the cutting thereof had been paid by him: whereas the land and timber were not defendant's property, nor had defendant any right to grant to plaintiffs the privilege of cutting the timber, nor had the said dues been paid by defendant, as defendant well knew; by reason whereof the plaintiffs were induced to contract with defendant to purchase said timber, and paid him 88 for the same, and for the privilege of cutting it; and not to investigate the title to the land and timber; and relying on the same, they cut and conveyed to Quebec the said timber to be sold on their behalf; and that by reason of the premises, and before sale, the timber was seized on behalf of the crown for non-payment of the said dues, and plaintiffs had to pay the same, and damages for the illegal cutting thereof, and were deprived thereof for a long time, and prevented during that time from selling the same, and the same became greatly depreciated in value:—Held, on demurrer, good; for it sufficiently disclosed a cause of action against defendant for assuming fraudulently to sell the privilege of cutting the timber discharged from crown dues to which it was subject, when it was not discharged from them; and that it did not profess to set out a case of either defendant or plaintiffs being mere wrong-doers, without license of any kind from the crown. Quære, as to an action on the case lying, where the cause of action arises from matter of contract. *Edsall et al.* v. *Hamell*, 16 C. P. 93.

Before the defendant can be charged with deceit in a contract for sale of land, he must be shewn to have contracted as required by the Statute of Frauds, and to have clearly practised or intended the deceit alleged. *Irving* v. *Merigold*, 3 Q. B. 272.

Declaration on the case for falsely alleging that a certain hotel stood upon defendant's land, whereby the plaintiff was induced to purchase said land, defendant well knowing that the hotel was not on his land, but on land adjoining, and belonging to the Queen. Pleas, 1. That the said hotel was not erected upon the land of the Queen, &c.; 2. That the plaintiff knew that the false representations, &c., were false, and if damnified thereby, he was damnified of his own wrong:—Held, both pleas bad. Held also that the declaration, given at full length in the report, was good in substance. *Tennery* v. *Stiles*, 5 Q. B. 254.

Defendant owing the plaintiff on bills and notes, executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land, but on searching at once he found a prior incumbrance, and told defendant he would not accept the mortgage :—Held, that the plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a reconveyance. *Adams* v. *Nelson*, 22 Q. B. 199.

Declaration, that the defendants owning the land upon which the provincial exhibition was to be held, advertised certain portions to be let by auction for the purpose of refreshment booths: that the plaintiff attended and leased one of such portions: that at the auction defendants made certain statements and representations as to the positions of the gates and entrances to the fair grounds, the number of persons to be allowed to sell refreshments, and the relative positions of the booths, on which the value of the plaintiff's letting was estimated and depended, and relying on which the plaintiff purchased and erected a booth; but that defendants departed from such representations, and so changed the position of the gates, and the number of the booths, that the plaintiff's letting became useless to him :—Held, that no cause of action was shewn, for the declaration was for a wrong, and the statements were not alleged to have been false when made, or to have been made in order to induce the plaintiff to contract. *Reid* v. *The Board of Agriculture for Upper Canada*, 26 Q. B. 565.

As a Ground of Defence.]—A. was in possession of the premises in question, without title thereto. B. came to him and represented himself as owner of said premises, when in fact he was not. A. by writing agreed to lease from B. for five years, at a rental of £4 10. This writing was signed by A. alone :—Held, that under the circumstances A. could dispute B.'s title to said premises on the grounds of fraud and misrepresentation. *Lynett* v. *Parkinson*, 1 C. P. 144.

One W., as agent for J., sold to defendant two lots of land for $1000, receiving $100 down and defendant's notes for the balance. This land had been purchased from the crown in 1854, by one Wake, who had assigned his right to Colvin, and Colvin to J. The instalments had all been paid to government, and W. told defendant that when he did the settlement duties, he could get the patent. He also handed to defendant the assignments and receipts, with an assignment from J. to defendant. The lots were then vacant, and defendant soon after went into possession and performed the settlement duties, but when he applied for his patent, he was informed that the original sale to Wake had been cancelled, as having been obtained in fraud of their regulations; and to avoid losing the land he again purchased it from government for $550. In an action brought by J.'s agent upon the notes, W. swore that he believed what he told defendant to be true, and had no doubt J. also believed it, and there was no proof to the contrary :—Held, that there was no evidence to sustain a defence on the ground of fraud; that there was not a total failure of consideration; and that the plaintiff therefore was entitled to recover. *Walker* v. *Douglas*, 23 Q. B. 9.

Declaration on a covenant to pay $500. Equitable plea, that the plaintiff agreed to sell to defendant certain land, which the plaintiff represented that he had purchased from government, and was entitled to obtain a patent for on payment of $500: that defendant thereupon covenanted to pay the plaintiff the $500, and plaintiff covenanted that on receiving it he would cause a patent to be issued in defendant's name: that defendant had always been ready to pay; but that plaintiff had not purchased from the government, and had no right to the land, nor could he procure a patent; and if defendant paid him the $500, he would receive no consideration, and would be unable to recover it back :—Held, a bad plea, for the agreement was not alleged to be the same as that sued on; no fraud was averred; no definite misrepresentation which induced defendant's contract; no breach of contract on the plaintiff's part was stated; and no ground for an injunction was shewn. *Cameron* v. *Borrowman*, 28 Q. B. 262.

Action on the common counts for work and labour in cutting and sawing timber for defendants. Plea—on equitable grounds, in substance, that the plaintiff falsely and fraudulently represented to the defendants that he had certain interests in and the title to certain lands, and certain interests in and the right to cut timber on other lands, whereby defendants were induced to purchase the said interests, &c., paying a certain sum down, and securing the rest by mortgage; and it was further agreed that the plaintiff should cut and saw into lumber all the saw logs on the said lands first mentioned for the defendants; that defendants, relying on plaintiff's representations, entered upon said lands and cut and made timber on said lands secondly above mentioned, and expended a large sum of money therein; yet that the plaintiff had not the right in respect of a large quantity of the said secondly above mentioned lands, by reason whereof defendants acquired rights of much less value than the plaintiff represented he possessed, namely, by a sum exceeding the plaintiffs' claim; and defendants first became aware of the said false and fraudulent representation after they had purchased said lands, cut the timber and expended the money as aforesaid, and defendants are likely to lose a large quantity of the said timber and saw logs so cut and made by them as aforesaid: that the plaintiff's cause of action arose in cutting and sawing into lumber, under said agreement, the saw logs upon the said above mentioned lands, and otherwise in part performance of this agreement. And defendants prayed that it might be declared that they were not liable to pay anything to the plaintiff, and that the plaintiff might be ordered to pay defendants what was just and equitable for the loss they had sustained :—Held, plea bad, as constituting no defence, but only amounting to a claim for unliquidated damages, the subject of an action at law and not of a suit in equity :—Held, also, that no ground was shewn for the rescission of the contract, and an amendment, by adding a prayer therefor, was refused. Quære, as to defendants' right to claim a rescission of the contract. *Lapp* v. *Firstbrook et al.*, 24 C. P. 239.

The defendant, to an action on a covenant for payment of mortgage money, pleaded on equitable grounds, that before making the mortgage sued on the plaintiff falsely and fraudulently represented himself to be the owner of the land, free from all incumbrances, but that the legal estate

was vested in one W., who held in trust for him: that defendant relying upon his representation purchased the land, &c., although the plaintiff then well knew of a mortgage to the Trust & Loan Co., which he fraudulently concealed from the defendant; and thereupon said W., at the plaintiff's request, conveyed to defendant by a deed containing absolute covenants for title free from incumbrances, and defendant executed the mortgage sued on to secure the balance of purchase money. The plea then alleged the existence of the mortgage to the Trust & Loan Co., which fact was well known to the plaintiff at the time of such sale and false representation, but was fraudulently concealed by him from defendant for the purpose of defrauding defendant, who otherwise would not have purchased: that the land was sold by the Trust and Loan Co., and defendant was evicted therefrom and lost the same, &c. Semble, that the plea shewed a good legal defence on the ground of fraud, but was not such an equitable plea as could be admitted under the Common Law Procedure Act. *Whitelaw* v. *Roots*, 20 Q. B. 78, 65.

Declaration on defendants' covenant to pay the ground rent on land, which B. held under lease, and which the plaintiffs, his executors, by deed reciting the lease, had assigned to defendants. Defendants pleaded, by way of equitable defence, that the sole object of their purchase was to erect buildings on Front street, for which purpose the frontage on said street was expressly stipulated for, and included in the description of said premises, and the rent calculated on such frontage, as in the declaration mentioned; and the property without such frontage was valueless: that they never were in actual possession of any part of the premises: that since April, 1862, defendants first discovered that the description in the lease did not include any frontage on Front street; and so defendants alleged that by such error and omission they had not the lands they bargained for: that the land in the lease to B. was specifically described, and the northern boundary of it adjoined the southern boundary of a strip of land belonging to the city, twenty feet wide, extending to Front street: that such strip was included in the deed between plaintiff and defendants: that the corportion had, since the execution of such deed, entered into possession of said strip, and now hold it by title paramount to the plaintiffs:—Held, on demurrer, reversing the judgment below, that the plea afforded no answer, for no concealment or imposition was alleged; and defendants, by calling for the lease, of which they had notice by the assignment, might have ascertained the facts at first. *Talbot et al.* v. *Rossin et al.*, 23 Q. B. 170.

To a declaration on the covenant to pay, contained in a mortgage of lands for the balance of purchase money, defendant pleaded a prior mortgage to B., executed by the plaintiff, and fraudulently concealed from him, which had afterwards been foreclosed, and defendant ejected. The plaintiff replied, in substance, that the mortgage sued on had been assigned to D., for whose benefit the plaintiff was suing, and that before this action, by indenture between D. and the mortgagee, of which defendant had notice, such prior mortgage "was released and discharged:"—Held, on demurrer, that the replication was good, for D., the beneficial plaintiff, having procured the discharge of B.'s mortgage, had removed the only objection urged by defendant, and was in a position to give him a good title. *McDermott* v. *Workman*, 24 Q. B. 467.

To a declaration on the common count for freight, defendant pleaded on equitable grounds as to $368, part of the money claimed, and being the difference between 90 cents and $1 per ton, that the plaintiffs falsely and fraudulently represented to defendant's agent that defendant had agreed to pay them freight at $1 per ton, and had chartered their vessel at that rate, whereas defendant had refused to pay them more than 90 cents per ton: that on the faith of such representations the agent delivered to them the coal and received a bill of lading expressing the freight to be $1 per ton, and the plaintiffs carried the coal and delivered it to the agent before defendant could forbid them:—Held, a good plea on demurrer, though unnecessary, the defence being admissible under never indebted. *Hammond et al.* v. *Conger*.—37 Q. B. 547.—Hagarty, sitting in vacation.

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4. *Fraud or Misrepresentation as a Ground for Relief in Equity.*

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in quantity:—Held, that as the whole estate, both legal and equitable, was in the crown, the court would not interfere, even if the plaintiff had established the case stated; and that no fraud having been proved, the bill ought to be dismissed with costs. *Bown* v. *West*, 1 O. S. 287.

Where a debtor, to effect a compromise with his creditors, offered a mortgage on property, which he represented as belonging to a person who desired to assist him, and the creditors accepted the offer and took the mortgage, but afterwards discovered that before it was executed the debtor had obtained a conveyance of the property to himself:—Held, that such conveyance was, under the circumstances, subject to the mortgage. *Fraser* v. *Sutherland*, 2 Chy. 442.

Defendant induced plaintiff's agent to agree with him for the sale of Black Acre, the agent supposing he was selling White Acre. The agreement was set aside with costs, it appearing that the agent's error was either fraudulently occasioned, or confirmed by, or at all events well known to defendant, when he entered into the agreement. *Talbot* v. *Hamilton*, 4 Chy. 200.

In 1819, one Street agreed in writing with one Ryckman to furnish the latter with certain supplies, in consideration of which Street was to receive from Ryckman a conveyance of certain lands; and the agreement was deposited with one Benson. The supplies were only partly furnished; but in 1824, deeds were prepared by Ryckman of the lands, and were handed to one Shook to be delivered to Street on getting up the agreement. Shook delivered up the deeds to Street on getting an order on Benson for the agreement; but on his presenting the order, it was found that the agreement was not forthcoming. The agreement afterwards got into Street's possession, and no explanation was affor-

ded of this. In 1825, the deeds were accidentally destroyed by fire. Several actions of ejectment appeared to have been afterwards brought, and with varying results; and in 1850, a bill was filed by Street's devisee of part of the property against the defendant, who claimed under Hiles, to whom Ryckman had sold and conveyed the property in 1832. The bill, which prayed for a conveyance and for the cancellation of the subsequent deeds under which defendant claimed, was, under the circumstances, dismissed with costs. *Street* v. *Hogeboom*, 3 Chy. 128.

A resident in England owning lands in Canada, where he had never been, was urged by a resident near the land to make him a lease, who represented in his correspondence that the lands were unoccupied, save by some squatters, who had built some huts and were stripping the land of most of the valuable timber, of which they were nearly denuded; that the lands were liable to forfeiture for taxes, and that the title of these trespassers would shortly become absolute by lapse of time. The owner was thus induced to execute a lease for twenty-one years, which he transmitted to the lessee, who went to the persons in possession, and got deeds of quit-claim of their interest respectively, taking from him a bond to re-convey in case he should not be entitled to the possession. It was shewn that the persons were not as represented, but substantial farmers, with valuable clearings and buildings. Upon a discovery of the misrepresentations, the lessor and the occupants who had executed quit-claims filed a bill to set aside the transactions, and the court held them entitled to the relief prayed for, and that they were not improperly joined as plaintiffs. *Baby* v. *Cavanagh*, 5 Chy. 378.

L., as daughter of a U. E. Loyalist, had been granted a lot of land, but left Canada for the United States, in 1825, where she had resided ever since. Various persons took possession of the land, and improved it so that it was worth £2,500. C. sent his agent to L. in Michigan, to treat for the purchase of her interest. This agent made numerous false representations as to the position and value of the land, and as to the intentions of his principal, and thereby induced L. to convey her interest in the land to C. for an inconsiderable sum. On a bill filed to set aside this conveyance:—Held, that the representations made by the agent were material, and to be considered in weighing the bona fides of the contract, which was ordered to be cancelled. *Latham* v. *Crosby*, 10 Chy. 308.

A party on a sale of land attended and stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, and he became the purchaser; but he subsequently refused to admit the right of the plaintiffs, his brother's family, to redeem the property in his hands. The court declared the plaintiffs entitled to redeem, and ordered defendant to pay all the costs of the suit. *Watson* v. *James*, 19 Chy. 355.

The plaintiff filed his bill, praying to have the benefit of certain mortgage securities executed by defendant, founding his right to relief, inter alia, on grounds of fraud, which he entirely failed to establish, and in his bill he had made statements which he knew to be untrue, and suppressed the truth in other matters; the court, considering him entitled to relief on other grounds, which he had sustained, made a decree in his favour, but without costs. *Hogeboom* v. *Davis*, 4 Chy. 588.

Misrepresentation in advertisement of land to be sold—Effect of. See *Osborne* v. *The Farmers' and Mechanics' Building Society*, 5 Chy. 326; *The Canada Permanent Building and Savings Society* v. *Young*, 18 Chy. 566.

By the advertisement of an intended sale of land in lots, it was stated, "The soil is well adapted for gardening purposes, and a considerable portion of the property is covered with a fine growth of pine and oak, which will yield a large quantity of cordwood, and the remainder is covered with an ornamental second growth of evergreen and various other kinds of trees." A purchaser at the sale, which took place upon the property, set up as a defence to a suit for specific performance that the soil was not such as was represented, and was unfit for gardening purposes, and that the trees upon the property were not of the description set forth in the advertisement:—Held, that these representations having been made in respect of matters which were objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, formed no ground for relieving the purchaser from the contract. *Crooks* v. *Davis*, 6 Chy. 317.

The rule is, that to entitle a party to set aside or vary a deed on the ground of misrepresentation by another party to it, the evidence thereof must be the strongest possible; and where a vendor makes verbal statements in relation to property, the correctness of which the purchaser has the means of testing by reference to documents within his reach and does not choose to do so, he will not, on the facts turning out to be different from what they were represented, be entitled to any relief. *Coates* v. *Bacon*, 21 Chy. 21.

M. having by fraud induced H. to advance money on mortgage upon the assurance that the title was correct, although well aware that the party executing the mortgage had no title, a writ of ne exeat was issued against him. A motion to discharge the writ on the ground that the bill alleged that the debt arose out of the fraudulent conduct of the defendant, was refused with costs. *Hunter* v. *Mountjoy*, 6 Chy. 433.

Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is, to institute proceedings in order to annul it, as it is rarely that effect can be given to a defence on such ground in a suit to enforce it. *Kains* v. *McIntosh*, 10 Chy. 119.

An unequal partition obtained in a County Court against a minor and feme covert through the contrivance of the co-tenant, the gross laches of the guardian ad litem, and the misapprehension of the referee (appointed under the 17th section of the Partition Act) as to the extent of his duty and power, was held not binding. The minor, on coming of age, filed a bill for a new partition, and a decree was made accordingly. *Merritt* v. *Shaw*, 15 Chy. 321.

The defendant, a man of weak intellect, was fraudulently induced to execute a quit-claim deed of certain land to which he was entitled as heir-at-law, but no consideration was given for such deed. The land was afterwards conveyed

to plaintiffs in these suits, for valuable consideration. After the lapse of more than fifteen years, the defendant brought ejectment against the plaintiffs, and it was decided that the legal title had not passed by the deed executed by him. The plaintiffs thereupon instituted proceedings in this court, to reform the deed executed by defendant, or, treating it as a contract only, for a specific performance thereof:—Held, 1. That though the plaintiffs had equities as purchasers for value, yet the defendant had an equity to set aside the deed he was deceived into executing; and that his equity being the older, and having the legal title in his favour, the court could not interfere to give the plaintiffs relief; and, 2. that though the laches and acquiescence of the defendant for so long a period, might be a reason for refusing him relief, were he a plaintiff, still they were no ground for granting the plaintiffs the relief sought: and the court dismissed the bill with costs. *Livingstone* v. *Acre*, 15 Chy. 610.

Two mortgages on property of a married woman executed by her and her husband, in manner required by the statute in that behalf, were impeached by her as having been obtained by fraud, practised by the plaintiff in collusion with the husband, and for want of the evidence necessary in equity to sustain gifts:—Held, that as the mortgages had been given for valuable consideration, and the mortgagee had been guilty of no fraud in obtaining them, they were valid securities. *Mulholland* v. *Morley*, 17 Chy. 293.

A person agreed with the owners of oil lands for the purchase of certain lots at stipulated prices, and was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed; one of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters parties would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed, and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market. The Court of Appeal (reversing the order of the court below in this respect) held that it was too late to rescind the purchase; but, that the company was entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties.—Spragge, C., and Mowat, V. C., dis. *Lindsay Petroleum Oil Co.* v. *Hurd*, 17 Chy. 115, in appeal; *S. C.* in the Court of Chancery, 16 Chy. 147.

On appeal to the Privy Council it was held that the contract must be wholly rescinded, the price repaid, and the land reconveyed. *S. C.*, L. R. 5 P. C. 221.

On the negociation for a lease of real estate in the city of Toronto, the intended lessee asked the intended lessor, who had owned, occupied, and paid the taxes assessed on the proposed leasehold premises for several years, what the taxes would be on the property, and the intended lessor answered they were about $70 or $75, but that he could not tell exactly, as he had never separated them from his personal assessment; the fact being that for some years the owner had been paying nearly double that amount. The intending lessee, however, accepted the owner's statement and executed the lease without making any reference to the Chamberlain's office, where the exact amount rated on the premises could have been ascertained. The court, under the circumstances, refused any relief to the lessee on the ground of misrepresentation. *Coates* v. *Bacon*, 21 Chy. 21.

The plaintiffs sought to set aside their purchase of a grist mill from the defendant, on the ground of false representations knowingly made to them by the defendant, and relied upon by them, as to the state of repair in which the mill was, and as to the water supply and the capacity of the mill for grinding. The evidence affirming and denying these representations was equally positive and explicit on either side. It appeared, however, that the purchase was not a hasty one; that the plaintiffs were and professed to be competent judges of the subject matter, one being a miller and the other an engineer; that they examined for themselves and made enquiries; that they were more eager to buy than the defendant was to sell; and that the conduct of the plaintiffs—which under the conflict of evidence was assumed to be the safest guide—was inconsistent with their assertion of a warranty, for they did not at first set it up, but asked to be relieved as a favour, and at one time it was agreed that they should pay $1,000 to be let off the bargain. Under all the facts, which are more fully set out in the judgment, the court refused to set aside the contract: but, as the evidence tended to shew a want of candour on the defendant's part, and a disingenuous exaggeration of the condition and capacity of the property, the bill was dismissed without costs. *Henry et al.* v. *Pindar*, 22 Chy. 257.

II. Action for False Representation.

1. *Of Solvency.*

A declaration that defendant falsely, deceitfully, fraudulently, and wilfully represented the maker and endorser (without naming them) of a promissory note, to be good:—Held, bad, on demurrer, for uncertainty. *Newman* v. *Kissock*, 8 C. P. 41.

In an action for false representation of the credit of a firm, the statement complained of was that the partners were worth from £4000 to £5000 between them, out of which they owed defendant and others £1000; and the plaintiff alleged that they were not worth from £4000 to £5000 (not adding between them); and that they were not then indebted to the defendant and others in £1000, but in £3000:—Held, that the denial of their worth was not more extensive than the statement, and that it was sufficiently alleged that they were indebted in more than £1000: 2. That it was sufficient to allege that the defendant wrongfully and falsely made such statements, knowing them to be false, without adding fraudulently, for fraud is included in the allegation; 3. That in the declaration, set out, it appeared that the plaintiff had given credit to the firm in question. *Fowler* v. *Benjamin*, 16 Q. B. 174.

2. *Of Authority or Agency.*

An agreement was made between plaintiffs of the one part, and the Great Western Railway, by their agent, of the other part, by which the plaintiffs contracted to furnish a large quantity of cordwood on the terms specified. The agreement was signed and sealed by the plaintiffs, and by defendant, styling himself "agent." No representation as to authority was shewn to have been made by defendant, but it was proved that after the company had accepted and paid for a portion of the wood they refused to carry out the contract, and defeated the plaintiffs in an action upon it by setting up the want of their corporate seal:—Held, that this evidence was insufficient to sustain an action against defendant for falsely representing to the plaintiffs that he had authority to bind the company. *McDonald et al.* v. *McMillan*, 17 Q. B. 377.

A person who induces another to contract with him as the agent of a third party by an unqualified assertion that he is such agent, is answerable to the person who so contracts, for any damages which he may sustain by reason of the assertion being untrue. And costs incurred by such third person for the recovery of damages in an action against the supposed principal, may be recovered as damages. *Eckstein* v. *Whitehead*, 10 C. P. 65.

Defendant having been appointed by the proper authority official assignee in insolvency for a county in which he was non-resident, assuming to act as such assignee, sold the goods of the insolvent to plaintiff, who purchased on defendant's assertion that he had the right to sell, after full discussion between the parties as to this right, and plaintiff having been satisfied by defendant's assertion, made in the honest belief that he had such right. The sale to the plaintiff having been pronounced invalid:—Held, that defendant's honest belief in his right to sell, as assignee, did not protect him from liability to plaintiff if he warranted his title, nor was the knowledge on plaintiff's part of the possible defect in defendant's title fatal to the warranty on the sale of the goods. Held, also, that had nothing occurred beyond the discussion of his title, and plaintiff had bought with this full knowledge, defendant would not have been liable; but as it was clear that after full discussion of the supposed defect of title, defendant might have induced plaintiff to buy on express warranty, a new trial was granted to ascertain this fact. The third count of plaintiff's declaration alleged that defendant, by falsely pretending and representing himself to be official assignee of the insolvent, and as such to have a lawful right and title to the goods then in his possession, and to sell and deliver the same to plaintiff, induced plaintiff to buy the same, and thereupon plaintiff paid defendant for same, whereas, in truth, defendant was not such assignee, and had no right to sell, whereby the goods were lost to plaintiff, and taken from him by process of law:—Held, a good count, as a count in case upon a breach of warranty. *Johnston* v. *Barker*, 20 C. P. 228.

Declaration, that a certain vessel insured in the Provincial Insurance Company was sunk, and that defendant, who was the agent of the company in effecting settlements on account of vessels lost or damaged—in consideration that the plaintiff would contract with defendant as, and assuming to be, the agent of the company, to raise the vessel for $3,100, the question of the liability to pay said sum to be referred to arbitration—promised the plaintiffs that he was authorized by the company to enter into the said contract as their agent, as follows, the contract was then set out, made between the plaintiffs and the company, and signed by the defendant for the company): that the plaintiffs entered into such contract with defendant, and assuming to be, the agent of the company, and raised the vessel; yet defendant was not authorized by the company to make such contract, and refused to pay the plaintiffs the $3,100, or to refer the question of liability to pay the same to arbitration, by reason whereof the plaintiffs could not enforce the contract against the company, and were put to expense, &c. Plea, that the plaintiffs were unable to enter the contract, not because defendant was not authorized to contract, but because the contract was by parol, and, as the plaintiffs well knew, not under the corporate seal of the company. Held, on demurrer, 1. That there was no assertion in the declaration of defendant being authorized inconsistent with the allegation of want of authority; 2. That the plea shewed no defence, for if defendant had been authorized as represented, the company could have been compelled in equity to affix their seal to the contract. *Calvin et al.* v. *Davidson*, 31 Q. B. 305.

S. by letter informed R. & K. that he was a partner in a firm, and that he had advanced to him £3000 as his share of the capital thereof. The firm having failed, made an assignment, in which S. was preferred to the amount of £3565, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1000. Held, notwithstanding that S. was bound to make good his representation to R. and K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, but consisted of capital advanced to the son, in which event that portion would be applied on their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. and K.; but, semble, if that had been shewn to have been the case, they would have had that right. *Rainey* v. *Dickson*, 8 Chy. 450.

Where a person falsely representing himself to be the agent for the owner of certain land entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not obtain a specific performance of the contract:—Held, that his remedy against the agent for the return of the deposit was at law and that a bill for that purpose would not lie. *Graham* v. *Purdy*, 8 Chy. 327.

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3. *Against Bank Directors for False Reports.*

The plaintiff sued defendant as director of a bank, alleging in substance that in a report made to the shareholders in 1866, and a statement accompanying it, the defendant falsely and fraudulently misrepresented the condition of the bank, over-estimating the assets and under-estimat-

the liabilities, thereby inducing defendant to believe it sound and to purchase stock:—Held, upon the evidence set out in the case, 1. That there was no evidence of fraud sufficient to maintain the action—that is, of false statements knowingly made by defendant with a fraudulent intent. The nature of the fraud required to sustain such a charge considered, and the authorities reviewed; 2. That the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by defendant. 3. That if the statements were false and fraudulent, defendant would be liable, although they were made to the stockholders, for they were intended and used for public information. *Parker* v. *Mc*[illegible], 32 Q. B. 273.

4. *Pleas of Fraud and Misrepresentation.*

In an action for money had and received against [illegible] attorney, he cannot set up as an answer to [illegible] client, that the judgment under which the money was collected was fraudulently confessed [illegible] the defendant in that cause to the client. *Thomas* v. *King*, Dra. 439.

A. and B. exchanged horses, each taking that of the other, and B. gave A. a note for a difference of value in the exchange. A. sold the horse he got from B. almost immediately; and after a lapse of two years, during which nothing appears to have been done by either party, B. is sued upon this note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

Held, that the obligor of a bond which, by the plaintiff's own shewing, is clearly fraudulent, could not plead fraud to prevent a recovery on it. *Smith* v. *Dittrich*, 8 Q. B. 589.

Where fraud is objected the distinction between sealed instruments and simple contracts will avail nothing. *Ib.*

In an action for calls on stock, a plea that defendant became holder of the shares by subscription, and was induced to become so by the fraud of the company, and that he has received no benefit from, and has repudiated the shares:—Held, good, on demurrer. *Provincial Insurance Co.* v. *Brown et al.*; *Provincial Insurance Co.* v. *Douroche*, 9 C. P. 286.

A sheriff having made a return to a writ of fi. fa. "lands on hand for want of buyers," and having subsequently, under a writ of venditioni exponas in the same suit, sold the lands under a binding contract, on which writ of venditioni exponas he made a return of "no lands;" a plea on equitable grounds to a declaration against him for a false return, that the plaintiff misrepresented to the sheriff that the lands levied on were the lands of the execution debtor:—Held, to be no answer to the action. *Patterson* v. *Thomas*, 11 C. P. 530.

Declaration against a sheriff for falsely certifying that there were no executions against the lands of one H. Plea, on equitable grounds, in substance, that the plaintiffs' agent duly authorized in that behalf, late in the day, and after the defendant's office was closed, applied to defendant's clerk for the certificate on the street; that the clerk having declined to return to the office to make the requisite search, the plaintiffs' agent then represented to him that the plaintiffs were aware of their own knowledge that there were no executions, and would take the risk of there being any, and would not hold defendant responsible if such certificate should prove untrue, of which the agent said there was no danger whatever; and the clerk thereupon signed the certificate at the agent's request, in reliance solely upon such representations, and without searching as his duty required, and under the belief induced by such representations that there were no executions, and upon the understanding aforesaid, that no responsibility should attach to defendant:—Held, on demurrer, a good defence, for it shewed that the certificate was obtained by the false representation of the plaintiffs' agent made by him at the time, for which the plaintiffs were responsible. *Colonial Securities Co.* v. *Taylor*, 29 Q. B. 376.

Particulars will be ordered of the fraud charged in a plea to a declaration, alleging the breach of an agreement. It is sufficient if the affidavit on which the application is founded, is made by the attorney on the record. *Bate* v. *McKay*, 5 P. R. 465.—C. L. Chamb.—Dalton, *C. C. & P.*

5. *Other Cases.*

In case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damages accrued. *Dickson* v. *Jarvis*, 5 O. S. 694.

A sheriff cannot maintain an action on the case as for a fraudulent representation, when, having seized goods on an execution of a third party, he is afterwards instructed by defendant to seize them on his execution, although on an adverse claim being set up, the plaintiff in the first writ withdrew his execution, and the defendant refuses either to withdraw his, or to indemnify the sheriff, and the adverse claimant afterwards prosecutes the sheriff, and recovers for the illegal seizure and detention. *Jarvis* v. *The Commercial Bank*, 6 O. S. 337.

Quære, can a misrepresentation avoid a contract without fraud. *Lacey* v. *Spencer*, 3 Q. B. 169.

An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury, and with knowledge of his claim. One M., in 1839, having a right of purchase of a lot from the crown, mortgaged to DeB. to secure payment of a sum by instalments, the last of which would fall due in 1849. Soon after this mortgage, M. gave to B. a bond for a deed, on certain conditions to be fulfilled by B., who took possession. In 1850, the plaintiff went in under an agreement for purchase from B., who had not fulfilled the conditions of his bond. In 1851, the defendant took an assignment of DeB.'s mortgage, and in the same year he claimed before the heir and devisee commission, making the usual affidavit of ignorance of any adverse claim, and obtained a patent. The plaintiff thereupon brought an action on the case, alleging in the first and second counts that the defendant maliciously contriving and intend-

ing to injure him, represented himself as assignee of the original nominee of the crown and claimed as such before the commission, and in order to defraud the plaintiff, and not having himself any well founded claim, and knowing the plaintiff's claim, made affidavit that he was not aware of any adverse claim, and procured his own claim to be allowed—whereby, &c. :—Held, that on the evidence the allegations were not supported; and that admitting them all to be true, no ground of action would be shewn. *Shields* v. *DeBlaquiere*, 12 Q. B. 386.

The first count of the declaration alleged that the plaintiff was an hotel keeper at Niagara Falls, and furnished guides and dresses to persons going under the falls, and by consent of the government, had a stairway for visitors down the bank of the river: that defendants also had a stairway for the same purpose; that the plaintiff's stairway had been burned down, and while he was rebuilding it, the defendants, contriving to injury him, falsely and maliciously, and without reasonable or probable cause, represented to the attorney-general that the land on which the plaintiff's stairway was built (which belonged to the crown) was necessary for military purposes, and that the land on top of the bank was required for a highway, and had so been used for many years by license from the crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road; and thereby the defendants induced the attorney-general to permit the use of his name in filing an information in chancery to restrain the plaintiff, and obtained an injunction against the plaintiff to restrain him from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the crown so to do, and lost the profits of his business, &c. The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshments and dresses to persons wishing to go under the falls; that there was a certain public stairway for such persons down the bank; that the defendants intending to injure the plaintiff, falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants, and the plaintiff lost the profits of hiring his dresses and selling refreshments, &c. :—Held, on demurrer, that both counts were bad; for as to the first no action would lie so long as the decree in equity remained in force, notwithstanding the subsequent license from the crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action. *Davis* v. *Barnett et al.*, 26 Q. B. 109.

The plaintiff declared that defendant,—by falsely pretending and representing to the plaintiff, that if the plaintiff would go with his vessel to Willie's bay, for the purpose of carrying a load of defendant's wood thence to C., he would be able to approach the shore and load the wood on his vessel with scows,—induced the plaintiff to go with his vessel to said bay for that purpose and to incur great expense, &c., whereas the depth of water, &c., was not sufficient, &c. Held, on motion in arrest of judgment, 1. That the declaration was sufficient, without averring that defendant knew of the want of water: 2. That it sufficiently appeared that defendant induced the plaintiff to go for the wood by his false representation, though no contract to carry was stated. *Harvey* v. *Wallace*, 16 Q. B. 508.

W. obtained from P. an order for £50, which was paid) on a statement that he could prosecute him for felony:—Held, recoverable on an action brought therefor. *Pasco* v. *Wigg*, 6 C. P. 57.

Although as a general doctrine of law a person who makes a false statement, knowing it to be such, which is acted upon by another, may be held liable for any injury thus caused, yet where a party, in laying an information before a police magistrate, had given an incorrect version of a statement made by him to the defendant, and caused the plaintiff's arrest, it was held that no action therefor could not be maintained against the defendant. *Sparks* v. *Joseph*, 7 C. P. 69.

The defendant insured his dwelling house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire, defendant swore to the same facts in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by the defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid him under false pretences and for perjury: and defendant to avoid the arrest and prosecution gave the plaintiffs a note for $700: Held, that the plaintiffs could not recover on the note, but in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration appeared but that of avoiding the arrest and prosecution. Held, also, that for the same reason the plaintiffs could not recover on the common counts, as for money paid under a mistake or misrepresentation of fact; but a new trial was granted to enable plaintiffs to shew the facts more fully. Quære as to the effect upon the validity of the note of the threats to prosecute defendant, if it had been shewn that the plaintiffs were entitled to recover the money for which it was given. *The Canada Farmers' Mutual Insurance Co.* v. *Bigelow*, 25 C. P. 1.

Defendants gave a receipt to C. H. & Co. stating that they had received and held on the (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff relying upon this receipt, and the representations made by C. H. & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiff. In fact, however, the defendants at the date of the receipt had only received some 2 bushels on account of C. H. & Co.:—Held, that defendants having given their receipt for 500 bushels of wheat, were estopped from setting up that they had not at the date thereof the quantity

tity of wheat mentioned therein in store for C. H. & Co. Held, also, that from the evidence it was to be assumed that the defendants gave this receipt to C. H. & Co. for the purpose of enabling C. H. & Co. by means thereof to sell the amount of wheat therein mentioned to any persons to whom they offered the same for sale, and thereby sufficient privity was established between plaintiff and defendants to enable him to sue for the damage he sustained by reason of their (defendants') false representation. *Holton* v. *Sanson*, 11 C. P. 605.

Defendants, a railway company, gave warehouse receipts to one B. for 7,500 barrels of flour as in store for him, on the faith of which the plaintiffs accepted and paid bills drawn upon them by B.; and there being a deficiency of 192 barrels, they sued defendants as for a false and fraudulent representation made by them, which they knew would, in the course of trade, be relied upon by persons dealing with B. The evidence shewed defendants knew such receipts were commonly used to obtain advances of money upon, and that they sometimes gave receipts to B. for flour in advance, on being told that it was on the way; but how the mistake in question occurred was not shewn:—Held, that there was a case to go to the jury, and that a verdict for the plaintiffs must be allowed to stand, although they might well have found otherwise. *McLean et al.* v. *The Buffalo and Lake Huron R. W. Co.*, 24 Q. B. 270. See *S. C.* 23 Q. B. 448.

Declaration stated that one A. having recovered a judgment against B. & B. his attorney (defendant,) delivered fi. fa. to plaintiff as sheriff, directing him to levy on certain goods in the possession of one Burns, as the goods of B. & B., that the plaintiff believing said representation to be true, levied and sold the said goods; and that he (plaintiff) afterwards suffered damage in an action brought by Burns the owner of the goods. Demurrer, that defendant acting as an attorney, is not liable under the circumstances stated, and that this action will lie at all, it should be against "A." the plaintiff in the execution:—Held, on demurrer, that it being expressly stated that there was a false representation, and that the defendant directed the plaintiff to levy, and having made him a mandatory or agent for taking the goods, that quoad the trespass in seizing under the authority of Humphrey *v.* Pratt, 5 Hugh, N. R. 154), the declaration was good: that plea, that (defendant) honestly believed the said goods belonged to B. & B., and made such representation only for the purpose of assisting the plaintiff in the execution of the writ:—Held, bad, as not being a traverse of any particular fact, and an answer merely to the false representation, but not to the direction to levy, which is the substance of the complaint. *Moodie* v. *Bowell*, 12 C. P. 555.

Defendants sold to plaintiff and received the purchase money for some wheat, which they represented to be their own, but which belonged to one B., who obtained it from the railway company, in whose cars it was. The plaintiff sued the company for delivering it to B., and the action was referred and decided against him, defendants being present at the arbitration, but it was not shewn that they were otherwise concerned in the suit. The plaintiff then sued defendants for the deceit, claiming as special damages the costs of this unsuccessful action:—Held, that such costs could not be recovered. *Merritt* v. *Neri a et al.*, 20 Q. B. 540.

Plaintiff being indebted to defendant on a note for $106 and book debts, executed a mortgage to him for £50. The land in said mortgage comprised, was sold by plaintiff, and after payment of the prior encumbrances thereon, there was left the sum of $80, to be applied on defendant's mortgage, on payment of which sum, defendant executed a discharge thereof. Defendant subsequently sued plaintiff in the Division Court for a balance on said note and book debts, and recovered the sum of $—. Plaintiff now sues defendant for fraud, in defendant's having sued him for said note, alleging that when said mortgage was given, defendant agreed to give up said note when the mortgage was satisfied:—Held, 1. Declaration not proved in fact; 2. Discharge of mortgage not being under seal, not an estoppel; 3. That if the declaration had been proved, plaintiff could not, after failing in the Division Court suit, maintain the action. *Bigelow* v. *Staley*, 14 C. P. 276.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges: that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury: whereas, the work had not been done, and plaintiffs thus lost the money. Common counts were added. It appeared that the corporation, by one resolution, directed that $300 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another, that $100 should be placed to the credit of each councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, *though contracted for*, had not then been performed. There was no evidence, however, of any fraud or collusion on defendants' part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended. The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action:—Held, that though giving orders false in fact might raise a primâ facie case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs. *The Corporation of the Township of Chatham* v. *Houston*, 27 Q. B. 550.

The declaration alleged that the defendant before the committing of the grievance, &c., was a carrier and express agent: that the plaintiff delivered to one W. a sum of money to be handed to defendant, to be carried and delivered to S., and that defendant falsely and fraudulently represented to the plaintiff that W. had delivered said money to him, whereby the plaintiff was satisfied of the fact, whereas in truth it had not been so delivered, but appropriated by W. to

his own use; and by reason of such false and fraudulent representation W. obtained time to and did abscond, and the plaintiff lost said money, which he would otherwise have recovered from W.:—Held, on demurrer, that a sufficient cause of action was shewn: that it was unnecessary to allege that defendant knew the representations to be false, the words *falsely* and *fraudulently* being equivalent to *knowingly*; or that defendant was a carrier at the time when, &c., for the ground of action being the fraud, his being a carrier was immaterial. *Young* v. *Vickers*, 32 Q. B. 385.

The plaintiff purchased a steam vessel from defendant on the faith, as he alleged, but which defendant denied, of certain representations made by defendant as to her power and capability; and, after some discussion, a document called a bill of sale, but not under seal, the vessel being unregistered, was executed. This merely stated that the defendant, in consideration of $3,000, sold and assigned the vessel to plaintiff, with a warranty only as to title. The boat did not answer the alleged representations as to power and capability, but no fraud was charged against defendant. The plaintiff having brought an action for a false representation, and also for breach of warranty:—Held, that the plaintiff could not recover as for a false representation, there being no imputation of fraud: that his remedy, if at all, must be for breach of warranty; and that although the document contained only a warranty as to title, still it was a question for the jury, upon the whole evidence, whether the defendant had in fact intended to warrant her power and capability, or whether the document contained the whole contract. *Bennett* v. *Tregent*, 24 C. P. 565.

Declaration, that the defendant and one L. did unlawfully and fraudulently combine, conspire, and agree together to defraud the plaintiff of $100, and in pursuance and furtherance of said combination and conspiracy, the said L. did procure and induce the plaintiff to lend him $100 on his note, and in pursuance and by means of such combination and agreement the said L. procured the said $100 from the plaintiff, without any intention of re-paying the same, and with intent to defraud the plaintiff, whereby the plaintiff lost the said $100:—Held, insufficient on demurrer for not shewing what representations were made or means used, or what the facts were which constituted the alleged fraud or cause of action. *Armstrong* v. *Lewin*, 34 Q. B. 629.

III. Compromise or Settlement by Fraud.

The relationship of a medical man to his patient is one of trust and confidence, and he must act bonâ fide in advising him, or any settlement made through him, or in consequence of advice given malâ fide, will be set aside. *Rowe* v. *The Grand Trunk Railway Co.*, 16 C. P. 500.

It is the duty of a party setting up that a settlement of a claim for injuries had been obtained by misrepresentation to establish not only that the settlement has been so obtained; but also, that the amount paid is inadequate compensation for such injuries; and where there was an entire failure of evidence on this latter point, a new trial was granted on payment of costs, *Ib.*

The plaintiff having sued upon a note, and on the common counts for goods sold and delivered, &c., defendant pleaded to the whole declaration that the goods were sold on credit, and before it had expired the plaintiff accepted from him a less sum in full satisfaction. Issue having been taken on this plea, it appeared that the plaintiff had settled for half the amount, and given a receipt in full to M., the defendant's brother-in-law, who paid it; but this settlement was brought about by a letter from M. to the plaintiff, saying that he had just heard from defendant, who was in New York, and on his way to California, and had placed means within his reach to pay fifty cents in the $, which the writer offered in full. There was strong ground for supposing the defendant never was in New York, or intended to go to California. The jury having found for the plaintiff for the half of the debt unpaid:—Held, that the plea should have been demurred to as pleaded to the whole declaration, and answering only to the claim for goods sold; but though the parties had treated it as an answer to the action, the court, under the circumstances, instead of so amending it, directed a rule, with leave to the plaintiff to reply fraud to the plea when amended. Semble, that the settlement if obtained on the representation, knowingly false, that the defendant was in New York, and on his way to California, would not bind the plaintiff; but, Quære, whether the plaintiff could reply the fraud, having affirmed the settlement by receiving and retaining the money. *Turner* v. *Bowerman*, 29 Q. B. 187.

A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to endorse to the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a less composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain violated the whole transaction, and that A. was not liable to B. on his guarantee. *Clark* v. *Ritchey*, 11 Chy. 499.

In 1846, the defendant contracted for the sale of a building lot in Toronto to the plaintiff's father (one of the defendant's workmen), for $500, payable in eight annual instalments: the purchaser went into possession and built two small houses on the lot. He died in 1855 intestate. The plaintiff, who was his only child, immediately afterwards enlisted and left Canada, leaving a power of attorney with one A. to manage his affairs; he was not quite of age at this time; in February, 1859, the defendant brought ejectment, and A. in the following March, filed a bill in plaintiff's name for specific performance of the contract. The defendant claimed that there was about $800 due thereon, and the claim appeared to be confirmed by a book produced by a book-keeper of the defendant, who was examined as a witness: the value of the property at the time, was about $700. A., believing the defendant's representations, agreed with him to dismiss the bill without costs, which he accordingly did, and gave up possession to the defendant. Some years afterwards, the plaintiff returned to the province, and discovered that not one-half the amount so claimed by the defendant was due at the time of dismissing the bill, and thereupon filed a bill for specific performance, and proved this state of the account

from entries in the books of the defendant and otherwise :—Held, in view of the misrepresentations of the defendant and the absence of the plaintiff, that the plaintiff's right to a decree was not barred by lapse of time. *Larkin* v. *Good*, 12 Chy. 585.

IV. Miscellaneous Cases.

A court of law can set aside a deed where a jury finds fraud in obtaining it; and although mere inadequacy of price is no ground, yet, in connection with the mental imbecility of the party executing it, it goes strongly to prove fraud. *Doe* d. *Jones* v. *Capreol*, 4 O. S. 227.

Where the defendant signed, as maker, a printed form of a note, and handed it to A., by whom it was filled up for $855, and the plaintiffs afterwards became endorsees of it for value without notice :—Held, that the defendant was liable, though it might have been fraudulently or improperly filled up or endorsed. *McInnes* v. *Milton*, 30 Q. B. 489. See *Sanford et al.* v. *Ross*, 6 O. S. 104.

Where goods have been openly set up for sale under a fi. fa., and bonâ fide bought by the execution creditor, he may, if he please, lend them immediately after sale to the execution debtor, and while in his possession they cannot be seized by the sheriff at the suit of a subsequent execution creditor; and where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant upon a direction from the judge that such arrangements must be looked upon as in themselves, without reference to the facts of the case, inconsistent with good faith and the rights of subsequent creditors—the court set aside the verdict for misdirection and granted a new trial, with costs to abide the event. *Williams* v. *McDonald*, 7 Q. B. 381.

C. and P. CinqMars, carrying on business at Belleville, being indebted to B. & Co. for goods, executed to them a confession of judgment. Other creditors pressing, an execution was issued on this confession, and an arrangement made that the goods should be sold by the sheriff: that a brother of C. and P. CinqMars, a minor, should buy them in, and the execution debtors receive credit for the proceeds, and that the business should be carried on by him and C. CinqMars, the goods remaining in his name as ostensible owner. P. CinqMars lived in Montreal. Afterwards the plaintiff packed up the goods, and being about to send them to his brother in Montreal, they were seized and sold by B. & Co as the property of C. CinqMars. For this the plaintiff sued; and the jury having twice found in his favour :—Held, that although it seemed clear that the plaintiff had never in fact purchased or paid for the goods, but had been set up as a purchaser merely to protect them from other creditors, yet as B. & Co. had concurred in holding him out in a false character, the court should not interfere. An appeal will not lie in such a case. *CinqMars* v. *Moodie*, 15 Q. B. 601.

Where J. H., R. M. and F. H., had agreed to give their notes to the creditors of E. F., (who had already made an assignment for their benefit) in composition for his debts at 10s. in the £, and had executed a deed to that effect, but in the expectation and faith that E. F. would receive back from the assignees one half of the stock of goods assigned by him, and that C. would receive the other half, he and E. F. thus becoming co-partners in the goods, and the goods were afterwards all delivered to C., with the knowledge and assent of E. F. :—Held, that their deed could not be avoided on the ground of fraud, because there was subsequently a partial failure in the arrangement on the faith of which they had made it. *Matthewson et al.* v. *Henderson et al.*, 15 C. P. 90.

If a deed be obtained by fraud, a person innocently taking under it for valuable consideration will be protected. *Ib.*

To an action on the common counts for goods sold defendant pleaded that at the time of sale the plaintiff agreed to and did receive in payment therefor two promissory notes made by one M. The plaintiff replied that he was induced to receive these notes by fraud (setting out defendant's fraudulent representation respecting them.) The facts as stated in the pleadings being admitted by the plaintiff's counsel :—Held, affirming the judgment of the County Court that the plaintiff could not recover, for there being an express contract defendant's fraud could not create an implied one, though it would entitle the plaintiff to recover back the goods, or maintain a special action for the deceit. *Sheriff* v. *McCoy*, 27 Q. B. 597.

Where executors had improperly dealt with a portion of the funds of the estate by allowing one of their number to retain it in his hands at a low rate of interest, the court refused them their costs prior to decree. Costs given to plaintiff, notwithstanding fraud was charged against the executors, which was not established, under the circumstances appearing in the judgment. *Ashbough* v. *Ashbough*, 10 Chy. 433.

On a bill filed by one of two infant plaintiffs in an administration suit, (after attaining majority) seeking to impeach the proceedings therein on the ground of fraud :—Held, that the fact that the plaintiffs in that suit, as also the trustees and the executors, had been represented by one solicitor; the omission from the decree of any direction as to wilful neglect or default on the part of the defendants therein; a material difference between the decree, and the decree on further directions as to the lands directed to be sold for satisfaction of debts; a purchase by the solicitor so acting for the several parties of a valuable portion of the estate, did not of themselves evidence fraud and collusion. *McDougall* v. *Bell*, 10 Chy. 283.

A certificate granted ex parte on a false affidavit was set aside with costs, notwithstanding the contention that the notices as to the service of which the false allegation was made would not have been directed had the full facts been before the court, the court declining to enter into any question of merits. *Re Ashford*, 3 Chy. Chamb. 77.—Mowat.

A. B. & C. were partners. Two of them, A. & B., before the expiration of the term, induced the third (C.) to agree to a dissolution, a valuation of the assets, and a settlement based on such valuation, under the false impression that A. was the partner who wrs to retire, and that the business was to be continued by B. & C., while

the fact was that the object of A. & B. was to get rid of C., and to carry on the business without him:—Held, that, by reason of this deceit, the transaction was not binding on C., every partner being entitled to the utmost good faith by his co-partners in effecting a dissolution of the partnership and winding up its affairs, as well as in their previous transactions. *O'Connor* v. *Naughton*, 13 Chy. 428.

Where the debtor died owing more than he had the means of paying, and a month afterwards, his mother, who wished to pay all his debts, was induced to give her note to one of the creditors for an amount which was less than one-eighth the value of her property, it was—Held, that in the absence of fraud, the note, though given without professional or other advice, could not be impeached in equity. *Campbell* v. *Balfour*, 16 Chy. 108.

FRAUDS (STATUTE OF.)

I. Respecting Agreements—*See* Contract.

II. Promises to Third Parties—*See* Guarantee and Indemnity.

III. Respecting Leases—*See* Landlord and Tenant—Specific Performance.

IV. Respecting Sales of Goods or Lands.

1. *By Auction*—*See* Auction and Auctioneer.
2. *Of Goods*—*See* Sale of Goods.
3. *Of Lands*—*See* Sale of Land—Specific Performance.

V. Respecting Uses and Trusts—*See* Trusts and Trustees.

VI. Parol Evidence to Vary Deeds or Writings—*See* Evidence.

VII. Respecting Wills—*See* Will.

FRAUDULENT CONVEYANCES.

I. As against Creditors.

1. *Under 13 Eliz. c. 5, and at Common Law*, 1584.
2. *Under 13 Eliz. c. 5; 22 Vict. c. 96; C. S. U. C. c. 26.*
   (a) *Generally*, 1594.
   (b) *By way of Preference*, 1597.
   (c) *Preferential Assignments for the benefit of Creditors*—*See* Bankruptcy and Insolvency.
3. *Under the Insolvent Acts*—*See* Bankruptcy and Insolvency.

II. As against Purchasers.

1. *Generally*, 1598.
2. *Voluntary Conveyances*—*See* Voluntary Conveyances.

III. As between Parties—*See* Fraud and Misrepresentation.

IV. By Marriage Settlement.

(a) *Before Marriage*, 1600.
(b) *After Marriage*, 1602.

V. Practice in Setting Aside.

1. *Parties*, 1603.
2. *Pleading and Evidence*, 1604.
3. *Costs*, 1608.
4. *Other Cases*, 1609.

VI. Assignment for the benefit of Creditors—*See* Bankruptcy and Insolvency.

VII. Fraudulent Assignment—*See* Criminal Law.

VIII. Bona fides in Bills of Sale and Chattel Mortgages—*See* Bills of Sale and Chattel Mortgages.

I. As against Creditors.

1. *Under 13 Eliz. c. 5, and at Common Law.*

[*See 35 Vict. c. 11, O.*]

Where A. being seized in fee of lands sold a portion of it to B., but gave him no deed, and B. went into possession, and A. afterwards sold all the land to C., directing that a deed should be made to B. of his portion when he paid for it in full, and C. sold all to D. except B.'s portion, which D. subsequently bought at sheriff's sale, where it was sold for B.'s debt, and C. then made a deed of B.'s portion to a stranger for a nominal consideration:—Held, that such deed was fraudulent as well against D. as against creditors. *Doe* d. *Wilcox* v. *Thorne*, 4 O. S. 315.

A., being indebted, made a voluntary conveyance of certain real estate to B. to prevent its being taken in execution, leaving, however, ample property to satisfy his creditors. A creditor obtained judgment after this against A., but before any execution against lands B. sold to defendant for valuable consideration, but with notice of the nature of the first conveyance. After this sale an execution was taken out, and this lot was sold, apparently to satisfy the judgment. It appeared, however, that the judgment was in fact satisfied by the heirs of A. out of his estate, and that the sale under this execution was intended for their benefit, and the purchaser at sheriff's sale was acting on their account, and had paid nothing:—Held, that this sale could not defeat the conveyance made by A. to B., and by B. to the defendants. *Doe* d. *Daily* v. *Vanloughnet*, 5 O. S. 246.

It is not always to be taken as conclusive evidence that a deed is fraudulent against creditors that the debtor has remained in possession receiving the rents and profits for a long time after the execution of the deed. *Doe* d. *Roy* v. *Hamilton*, 6 O. S. 410.

Semble, that since Wood *v.* Dixie, 7 Q. B. 8[illegible] a bonâ fide transfer of property made by a debtor to a third party, cannot be considered invalid merely because the object of the sale, in the mind of both parties, was to defeat an expected execution. But see the remarks of Robinson C. J., disapproving of that decision. *White* v. *Stevens*, 7 Q. B. 340.

Where goods have been openly set up for sale under a fi. fa., and bonâ fide bought by the execution creditor, he may, if he please, lend them immediately after sale to the execution debtor, and while in his possession they cannot be seized by the sheriff at the suit of a subsequent execution creditor; and where they had been so seized, and the sheriff was sued in trespass by the execution debtor, and the jury found for the defendant upon a direction from the judge that such arrangements must be looked at as in themselves, without reference to the facts of the case, inconsistent with good faith and the rights of subsequent creditors—the court set aside the verdict for misdirection and granted a new trial, with costs to abide the event. *Williams* v. *McDonald*, 7 Q. B. 381.

Where in trover the court thought the jury should have treated the transaction as being, on the plaintiff's own shewing, ipso facto fraudulent, they granted a new trial, though the verdict was only for £11 10s., with costs to abide the event. *Knowlson* v. *Conyer*, 7 Q. B. 455.

A. by deed of 14th of April, 1843, conveyed to B. certain lands, the consideration being expressed in the deed as £62 10s., but £12 10s. only was paid. At the execution of such deed A. was embarrassed, a fi. fa. having been issued against his goods in February, 1843. A. had other property besides the premises in dispute; and his property subsequently turned out well. In September, 1845, the sheriff conveyed the premises to defendant by deed, reciting an execution against the lands of A., tested 28th July, 1845; and upon this deed defendant relied, treating the conveyance to B. as voluntary and void as against creditors. After verdict for the plaintiff, B.,—Held, that the question of the deed to B. being voluntary, and as such fraudulent, having been submitted to the jury, and they having found that it was bonâ fide and for value, there was no sufficient reason to disturb such verdict. *Reaume* v. *Guichard*, 6 C. P. 170.

Where on alleged sale of goods in a store by a son to his mother, (the plaintiff) the only change in possession consisted in the former assuming the position of clerk to the latter, and no stock was taken, and there were other circumstances tending to shew want of bona fides in the transaction, and no evidence was given of a written assignment, or of such assignment having been registered:—Held, that a verdict for the plaintiff was against evidence, and a new trial was ordered. *Ranny* v. *Moody et al.*, 6 C. P. 471.

The sale of goods by parol in this case, without any actual delivery and change of possession:—Held, void as against subsequent creditors. *Williams* v. *Rapelje*, 8 C. P. 186.

In July, 1853, R., in order to provide for his daughter, and in consideration of 5s., assigned the land conveyed and money secured by a mortgage made by S. to a trustee for his said daughter. In August, 1856, the plaintiff recovered judgment against R., and subsequently obtained a garnishee order against C., the executor of S., to compel C. to pay him a sum then due on the mortgage from S. to R. At the time of the assignment there was nothing due and payable from R. to the plaintiff, nor was he in a situation to seek to enforce the payment of his claim until 1858:—Held, that the assignment of mortgage in 1853, as the law then stood, had not the effect of delaying, hindering or defrauding the plaintiff, so as to make it void under the statute 13 Eliz. c. 5; that the said statute extends only to the assignment of such things as are liable to be taken in execution, and that a mortgagee's interest is not so liable. *Lodor* v. *Creighton*, 9 C. P. 295.

In an interpleader the plaintiff claimed as purchaser under an execution, upon a judgment of which he was the assignee, the defendant under a subsequent execution. The bona fides of the judgment and assignment to the plaintiff, were not disputed, and the goods had been regularly sold under the fi. fa. upon it to the plaintiff. It appeared, however, that the execution debtor had been a party to the notes given by the plaintiff for a portion of the purchase money of the original judgment, and that since the sale he had remained, as before, in possession of the household furniture. The jury were told that if the object of the sale was to prevent other creditors from enforcing their claims, it would be void:—Held, a misdirection, and that it should have been left to them to say (as in Graham *v.* Furber, 14 C. B. 414) whether the sale to the plaintiff was bonâ fide for the purpose of relieving the execution debtor from the necessity of a forced sale of his goods, or for the mere purpose of protecting them from the claims of other creditors, in which latter case it would be fraudulent and void. *Clark* v. *Morrell*, 21 Q. B. 596.

Declaration on defendant's covenant, made in 1857, to pay the plaintiff £37 10s., and interest. Plea, that the covenant was contained in a chattel mortgage made by defendant at the plaintiff's request, and to hinder, defeat, and defraud his creditors, and without consideration. Upon demurrer,—Held, bad, for a covenant so executed is only void as against third parties, and not between the parties to it. *Scoble* v. *Henson*, 12 C. P. 65.

Though a sale of land may be fraudulent as against creditors, still where the evidence shewed that the execution debtor (the vendor) had not raised the crops, the subject of the seizure, or furnished the means of doing so, but the labour and means had been contributed by the vendee alone: Semble, Wilson, J., diss., that the crops were the sole property of the vendee as against the execution creditor. *Kilbride* v. *Cameron*, 17 C. P. 373.

A sale and conveyance for valuable consideration, paid at the time, of the grantor's interest in certain land to his father-in-law, made in 1857, was impeached as being fraudulent as against creditors under the 13 Eliz. c. 5. The learned judge asked the jury whether the deed was a bonâ fide transaction, a deed made for a valuable consideration, or whether it was fraudulently made, as a mere scheme or contrivance for the purpose of delaying, hindering, or defrauding creditors, in which latter case he said it would be void; and he refused to add, that if they believed the consideration was paid to cover the property and protect it from creditors, they should find against the deed:—Held, affirming the judgment of the Queen's Bench, 27 Q. B. 195, that the charge was unobjectionable, being substantially in accordance with Wood *v.* Dixie, 7 Q. B. 892, which was recognized and followed. Spragge, V.C., dissented, on the ground that the

jury should have been told, that although they might find that the conveyance was for value, yet if the intent and purpose of both grantor and grantee was to defraud creditors, the deed would be void; and that this was not the effect of the charge. *Smith* v. *Moffatt*, 28 Q. B. 486, in appeal.

In ejectment the plaintiff claimed through a deed from J. M. to J., made in 1857. Defendant claimed through a purchase at sheriff's sale under execution against J. M., at the suit of one C., and he contended also that that deed from J. M. to J. was void under the statute of Elizabeth. Both J. M. and J., however, swore that this deed was made in good faith for a valuable consideration; provision was made for paying off C.'s judgment out of the purchase money; and it did not appear that J. M. had any other creditors:—Held, that the deed was good. *Morrison* v. *Steer*, 32 Q. B. 182.

Divers conveyances made by defendant shortly before the commencement of this suit, declared fraudulent and void as against the plaintiff. *Prentiss* v. *Brennan*, 4 Chy. 148.

The owner of lands, subject to several mortgages, conveyed to his brother, but without his knowledge; and the person by whose advice the deed was executed stated in evidence that the deed, though absolute in form, was made upon trust for securing the incumbrances affecting the property, and for the benefit of the grantor's children; the grantor at the time being greatly involved, and having no other property except book debts and household furniture. A sale of the grantor's interest was subsequently effected by the sheriff upon an execution, and the purchaser having filed a bill impeaching the conveyance upon trust as a fraud upon creditors, and praying to be admitted to redeem, the court, under the circumstances, decreed in his favour. *Beamish* v. *Pomeroy*, 6 Chy. 586.

A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted. *Bank of B. N. A.* v. *Rattenbury*, 7 Chy. 383.

The agent of a bank having become largely indebted to it was sued, and when execution was about to issue, he absconded from the country; and, with the avowed object of defeating the claim of the bank, but, as the agent alleged, for the purpose of paying his other creditors, conveyed away to a person to whom he was only then introduced, a large quantity of valuable lands, to be paid for in goods at long dates, returning at night for the purpose of executing the conveyances, and which were executed without any investigation of the title of the property; and the agent subsequently assigned the agreement for the delivery of the goods to his son, taking in payment his notes payable over a period of several years. The court, under the circumstances, set aside the sale as fraudulent as against the bank. *The Bank of U. C.* v. *Thomas*, 9 Chy. 321. See *S. C.* in appeal, 2 E. & A. 502.

A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors. *Warren* v. *Taylor*, 9 Chy. 59.

There being disputed accounts between A. and B., an action at law was commenced by the former against the latter prior to February, 1859. In December of that year B. executed a mortgage for £130 to one H., to secure to him the payment of £30, but principally with the object of raising money upon it with which to pay off another indebtedness. There being a mistake in the description, and B. requiring more money than this mortgage would cover, another mortgage (for £200) was executed for these purposes. Both of these instruments were held by H. for sale, in order to raise the required amount, and he withheld them from registration until he could find a purchaser. On the 22nd September, 1860, A. recovered a judgment, which he registered on the same day. Hearing that A. was about to enter judgment, H. on the day of entering the judgment, and before the entry, though so far as appeared without the knowledge of B., registered the mortgages for the avowed purpose of retaining his priority. Shortly after the registration H. returned the first mortgage to B., intending to use the second one only, and endeavoured immediately afterwards to sell it, and had contracted to do so for the bonâ fide purpose of raising money wherewith to pay off the claim of A., though the object was not accomplished. Besides the lands covered by the mortgages, B. owned other available real estate more than sufficient to pay his debts, as also a quantity of household furniture. On a bill filed against B. and H., impeaching the mortgage as voluntary, without consideration, and with intent to defraud and delay creditors:—Held, that these charges were not supported; but the plaintiff was allowed to redeem on payment of the amount for which the mortgage was a subsisting security, and paying H. his costs of suit. Esten, V.C., diss., who thought for all in excess of £30, and interest, the mortgages were fraudulent and void. *Jackinson* v. *Duffill*, 10 Chy. 76.

S., by arrangement between himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances, praying that the discharge might be declared void, as being within the 13 Eliz. c. 5, under our C. L. P. Act, 1856., and for foreclosure or sale, and an order against H. to pay the deficiency:—Held, that the interest of a mortgagee is of a nature to bring it within the statute of Eliz., if it can be seized under the C. L. P. Act, or can be compulsorily applied to the payment of the debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute: that the mortgage would have been seizable had it not been discharged: that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received by the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee: that when the mortgage debt is to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled: that the discharge of the mortgage, and the arrangement between H. and S., had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again

and therefore that G. would not have been a proper party. *Bank of U. C.* v. *Shickluna*, 10 Chy. 157.

Where a person in business being liable to a bank as endorser for others to about £6,500, and on his own account to about £3,500, and otherwise to a large extent, made a gift of a mortgage which he held upon real estate for £250, by releasing the claim to the owner of the equity of redemption, (his assets at the time being much more than £10,000) and subsequently his indebtedness to the bank was doubled, and afterwards a judgment was obtained by the bank, and execution issued out against him for £6,855, in respect of moneys due at the date of the release:—Held, that these facts did not bring the case within the 13 Eliz. *Ib.*

M. mortgaged land to B. for $400, and afterwards caused it to be divided into village lots, and plans thereof made. M. then became indebted to C. and others, who obtained judgment and executions against him; W. was then also a creditor of M. by simple contract. B. advertised the premises for sale under the power of sale in his mortgage, such sale to be in village lots according to the plan thereof. M. and the sheriff, who held the writs of execution previous to the sale, agreed that the sheriff should buy in the premises at the amount due B., and hold the same in trust for M. It was found difficult at the sale to sell in village lots, and at the suggestion of the sheriff, and with M.'s consent, they were put up en bloc, and bought by the sheriff for the amount due B. W. afterwards obtained judgment and issued execution against lands, and on a bill by C. and W. against M., the sheriff and B., the sale was set aside as collusive, and tending to delay creditors, within 13 Eliz. c. 5. *Watson* v. *McCarthy*, 10 Chy. 416.

A. being largely indebted to B. & Co. and the owner in fee of certain real estate, conveyed the same to his son, without consideration. B. & Co. recovered judgment against A., and issued execution against his lands in May, 1864, but in February previous the son had conveyed the premises to D., taking for his purchase thereof his promissory notes not yet due, and still unpaid. Evidence establishing collusion between A., his son, and D., was adduced, and both the conveyances were declared fraudulent, and the lands held subject to the plaintiff's judgment debt. *Buchanan* v. *Dinsley*, 11 Chy. 132.

The owner of real estate worth $4,800, subject to a mortgage on which $1,950 was due, sold the equity of redemption for $500 to avoid executions at the suit of his creditors, he being insolvent, and the vendee aware of that fact, and that his object was to place his property out of the reach of his creditors. The purchaser resold the property for an advance of $1,000, after the institution of proceedings to set aside the transaction, of which the party purchasing was aware:—Held, that the transaction was within the 13 Eliz., and should be set aside, as having been made to hinder and delay creditors. *Forman* v. *Hodgson*, 12 Chy. 150.

In August, 1861, J. B., being indebted jointly with W. B. to T. in the sum of £88, for which judgment had been recovered, and to one R. in the sum of £10, agreed with R. B., who was his son, and was not then of age, to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment, and of his making a lease for life to J. B. or J. B.'s wife, of 25 acres of the land, being the arable portion thereof. R. B. was then the holder of a due bill for £20, given to him in satisfaction of wages earned by him as hired servant with an elder brother, and in pursuance of the said agreement transferred this to T., who received payment thereof, and also made a promissory note jointly with J. B. and W. B. for the balance of T.'s claim, which note remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not to J. B., for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861, and spring of 1862, J. B. became indebted to the plaintiffs, who recovered judgment, and filed a bill to set aside the transaction as fraudulent within the statute of Elizabeth:—Held, that under the circumstances, the conveyance to R. B. could not be deemed voluntary, but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs. *Delesdernier* v. *Burton*, 12 Chy. 569.

A person having a claim against an insolvent person, gave it to his sister, the wife of the insolvent, in order that she might thereby obtain from her husband a deed of his property in consideration of such debt, which she did through the intervention of a third party, who conveyed the land to her. The court set aside the conveyance at the instance of a creditor of the husband, as void under the 13 Eliz. and the Indigent Debtor's Act of this province. *Pegg* v. *Eastman*, 13 Chy. 137.

Voluntary conveyances are void against existing debts which are thereby defeated or delayed, whether the conveyances were fraudulent or not. *Irwin* v. *Freeman*, 13 Chy. 465.

Where a debt, the remedy for which is barred by the Statute of Limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment, and before the remedy was barred, is void as against a fi. fa. issued on the judgment. *Ib.*

A debtor sold his property, reserving by parol certain future rents to pay a creditor, and which were sufficient for the purpose: the object was to delay the creditor, and to compel him to wait for payment until these rents should accrue, and all parties combined for that object. The sale was held wholly void against the creditor, a transaction to delay a creditor being within the 13 Eliz. as much as a transaction to defeat him altogether. *Martha* v. *McKenna*, 14 Chy. 59.

Where an insolvent who was pressed by his creditors, and contemplated leaving the country in consequence of his embarrassments, made a conveyance on 1st August, 1858, of all his tangible property for an inadequate consideration to a relative who was aware of his circumstances, the conveyance was set aside as against creditors. *Crawford* v. *Meldrum*, 3 E. & A. 101.

An insolvent person executed to his son a mortgage for $1,000, of which $600 was a sum fraudulently pretended to be due to the mortgagor's wife:—Held, that, even if the remaining

sum was really due to the mortgagee, his concurrence in the fraud as to the $600 rendered the mortgage void in toto. *Totten* v. *Douglas*, 15 Chy. 126.

A married woman entered into a contract for the purchase of land; one of the terms being that the conveyance should be to herself. In payment of the principal part of the purchase money the husband assigned to the vendor a mortgage he held on other property, which, so far as appeared, was his only means. It did not appear that he was indebted at the time, but a month afterwards he endorsed a note for £40, which was not paid. The family, including the husband, went into possession of the land immediately after the purchase, and made improvements, but no deed was obtained, and a small balance of the purchase money remained unpaid for twelve years, when the money was raised by loan on the property, and the deed was taken to a son of the purchaser:—Held, that this deed was void as against the holder of the note. *Waddle* v. *McGinty*, 15 Chy. 261.

J., the owner of lands, conveyed his land in fee to L.—L. afterwards conveyed them to J.'s wife. She and her husband then mortgaged the lands to J.; but the wife was never separately examined. L. then filed his bill, alleging that the mortgage was to be taken to secure part of the purchase money, and that J.'s wife refused to be examined. By the decree it was referred to the master at Guelph to ascertain the consideration for the original deeds. The master reported that the original deeds were given by J. to L. without consideration, and to enable J. to defeat his creditors. From this report the plaintiff appealed; but the appeal was dismissed. Defendants then heard the cause on further directions; but the plaintiff did not appear:—Held, that under the circumstances the plaintiff was entitled to have the mortgage completed, or the deeds to J.'s wife given up to be cancelled. But as the plaintiff did not appear, he did not get a decree, though the defendants were refused any relief. *Lindsay* v. *Johnston*, 15 Chy. 446.

A person being embarrassed made a deed of land to his son in 1864, in alleged pursuance of a prior agreement, but he remained in possession and kept the deed in his own hands, and unregistered, for fifteen months; and there were other circumstances against the good faith of the transaction:—Held, that the deed was void as against subsequent creditors, the prior creditors having been paid. *Stevenson* v. *Franklin*, 16 Chy. 139.

A person indebted to his housekeeper in $600, conveyed to her some land in satisfaction of the debt, the consideration being not inadequate. On a bill by another creditor to set aside the conveyance as fraudulent and void, the court being satisfied that the debt was owing, and that the conveyance was intended to be effectual, held it valid, and dismissed the bill, but without costs. *Moore* v. *Davis*, 16 Chy. 224.

A sale made with intent of both vendor and vendee, to defeat the creditors of the former, is void in equity, whether the sale was or was not intended to take effect as between the parties to it. *Wood* v. *Irwin*, 16 Chy. 398.

Where such motives exist in the mind of a solicitor as would be sufficient with ordinary men to induce them to withhold information from the client, the presumption is, that it was withheld; and the uncommunicated knowledge of the solicitor is not imputed to the client as notice. Where mortgagees sold the mortgage to defeat or delay their creditors, but the vendee had no actual notice of the purpose, it was Held, that the circumstance of his having employed one of the mortgagees as his solicitor in drawing the assignment, &c., did not make the knowledge of the solicitor notice to the vendee. *Cameron* v. *Hutchison*, 16 Chy. 526.

A conveyance executed by a debtor in satisfaction of or security for a debt, if intended to operate between the parties, is valid, though obtained in order to gain priority to an expected claim of the crown under a recognizance. *The Attorney-General* v. *Harmer*, 16 Chy. 533.

A debtor conveyed land to his father and brother-in-law respectively, which they claimed to be bonâ fide, and for valuable consideration. On a bill by a creditor the court was not entirely satisfied with the account given of the transaction with the father, and had serious doubts in regard to the transaction with the son; but being of opinion that the evidence was insufficient to prove the account of the transactions on defendant's part to be false, sustained both conveyances. *Ib.*

H. being indebted to R., and both being in pecuniary difficulties, H. made an absolute conveyance of his land to R., which was intended to secure the debt due to R., but was made absolute in form to deceive H.'s creditors. Various subsequent dealings with the property took place with a view of securing the creditors of both parties, and by means thereof the interest of H. and R., if any, appeared to be a mere money charge on the property at the time fi. fas. against their lands were given to the sheriff; but—Held, that the writs bound their respective interests, and that they should be sold in equity to pay the execution debts. *Brock* v. *Saul*, 16 Chy. 589.

J. A. S. contracted to purchase from M. on credit a wood lot, 32, and to secure the price (£400) the purchaser's father gave a mortgage on his farm: this mortgage not being paid, was foreclosed. Shortly afterwards, M. being still willing to receive his money, J. A. sold lot 32 for £300, which sum went to M.; part of the remaining £100 was satisfied by delivering to M. a pair of horses raised on the farm, valued at £62 10s.; and W. S., another son of the owner, agreeing to pay the balance, £37 10s. The farm, by arrangement between all the parties, was conveyed to W. S., who was not more than twenty-one years old, if so much:—Held, that these transactions were, as respects the father and sons, a mere roundabout way of securing the farm from the creditors of the father, and the farm was ordered to be sold to pay the plaintiff, an execution creditor of the father. *McDonald* v. *McLean*, 16 Chy. 665.

A widow having by her conduct parted with her right to equitable dower in favour of her son, a subsequent creditor of hers, was not entitled to have her dower, set out and applied to pay his demand, though she was not aware of her right to dower at the time she was said to have parted with it. *Cottle* v. *McHardy*, 17 Chy. 345.

An insolvent executed to his son a mortgage for $1000, of which $400 was a pretended debt

to the son, and $600 a pretended debt to his mother. The son subsequently, under an arrangement with the father, transferred the mortgage to C., who was the holder of notes of the mortgagor to the amount of $600, which he gave up to the mortgagee, and he paid in cash $400 to the mortgagee. C. had notice of the character of the mortgage, but the transaction with him was bonâ fide:—Held, that he was entitled to claim for the full amount of the security, in priority to subsequent execution creditors of the mortgagor. Mowat, V. C., diss. *Totten* v. *Douglas (in appeal)*, 18 Chy. 341; 15 Chy. 126; 16 Chy. 243.

An insolvent sold land to his brother; a creditor filed a bill impeaching the sale as fraudulent; part of the consideration was said by the defendants to be a pair of horses and waggon, of the value of $200; but the parties had fraudulently given out after the sale that these horses were still the horses of the brother who had bought the land, and in this way had misled the plaintiff and other creditors:—Held, that this brother was estopped from afterwards setting up against the creditor that the $200 had been paid in that way; and, the plaintiff's debt being less than that amount, he was held entitled to a decree for payment, or in default a sale of the land. *McCaig* v. *McMurray*, 18 Chy. 604.

The release of a wife's dower to a purchaser is a good consideration for the grant of a reasonable compensation to the wife; and such a grant made bonâ fide is valid against the husband's creditors. *Forrest* v. *Laycock*, 18 Chy. 611.

A wife joined in a mortgage of her husband's estate to secure a loan of one-fourth or one-fifth of its value, and he subsequently sold the property; his wife claimed dower, and refused to join in the conveyance without a reasonable compensation. Her right to dower being supposed by all parties to exist, her husband had a piece of land conveyed to her, which she accepted, and thereupon she signed the conveyance. The transaction appearing to have been for the interest of creditors, it was held to be valid, independently of the question whether her claim to dower was well founded in law or not. *Ib.*

In January, 1860, a debtor assigned to certain creditors his interest in land under a contract of purchase: the assignment was made absolute in form so as to deceive other creditors; but the purpose as between the parties was merely to secure the debt due to the assignees. Shortly afterwards the assignees, with the debtor's consent, had an arbitration with the vendor in respect of the contract, obtained an award for $1,600 in lieu of the land, and received the money. In 1871 a bill was filed by another creditor against the debtor's administrator and the assignees, for payment out of the $1,600, and it was—Held, that the plaintiff was entitled to such payment: that in view of the fraud and trust, the lapse of time was no defence, and that a bill against the assignees by the creditor, instead of by the administrator, was proper. *Gillies* v. *Hoar*, 19 Chy. 32.

In a suit by a creditor, A., and his assignee B., to enforce payment of a debt due by C. out of the proceeds of certain property assigned by C. to D., it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:—Held, in another suit by B. and his assignee against D. and C.'s representatives in respect of another debt due by C. to B., that, notwithstanding the difference of parties, the decree in the first suit was binding in the second on the question of fraud. *Ib.*

Adequacy of consideration is not necessary to maintain a transaction under the 13 Eliz.; though the inadequacy may afford some evidence of guilty knowledge. But a conveyance by a father to his son, in consideration of an annuity of less value than the property conveyed, does not suggest the son's guilty knowledge of a fraud by his father, in the same way that a conveyance for an inadequate price to a stranger sometimes does. *Carradice* v. *Currie*, 19 Chy. 108.

A deed by a devisee to defeat a creditor of his own, is void against the devisor's creditors also. *Johnston* v. *Sowden*, 19 Chy. 224.

If one purpose of a sale and conveyance is to defeat a creditor, the sale is, in equity, void as to him. *Scott* v. *Burnham*, 19 Chy. 234.

A sale was made by a devisee to defeat the claim of a creditor of the testatrix; the creditor recovered judgment a few days after the sale, and before the purchase money; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due:—Held, in a suit by a creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment. *Ib.*

A conveyance between a debtor and a third party bonâ fide, and for valuable consideration, when the property was intended to pass and the consideration money paid:—Held, valid under 13 Eliz. c. 5, notwithstanding that the intent of the parties to the transaction was to defeat a creditor who had obtained judgment. *Dalglish* v. *McCarthy*, 19 Chy. 578.

Held, that a bonâ fide purchase from a grantee who had given no consideration, and who had taken a conveyance fraudulent against creditors under the 13 Eliz., was valid, notwithstanding such bonâ fide purchaser had notice of the former fraud, and purchased the property with a view of carrying out the intent to defeat creditors. Spragge, C., diss. *Ib.*

The person upon whom a robbery has been committed is, even before conviction, entitled to be considered as a creditor of the party committing the robbery, although the remedy for the recovery of the amount may be suspended until after conviction. Where, therefore, a person had feloniously possessed himself of certain securities, and invested a portion of the money realized therefrom in the purchase of real estate, the conveyance of which he procured to be made to his wife, in order to its being preserved in the event of proceedings being taken by the party robbed, the court, on a bill filed by a subsequent creditor, declared the conveyance void as against creditors, under the 13 Eliz. c. 5. *Reid* v. *Kennedy*, 21 Chy. 86.

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2. *Under 13 Eliz. c. 5; 32 Vict. c. 96; C. S. U. C. c. 26.*

(a) *Generally.*

M. sold goods to P., and took back a mortgage on them for the price, together with P.'s

note. Afterwards, and after the 22 Vict. c. 96, M., who was then insolvent, assigned the mortgage to F., and F.'s agent received possession of the goods, most of which, if not all, had been originally purchased by M. from F., and were still unpaid for. The goods having been seized under an execution against M., an interpleader issue was directed between F. and the judgment creditor:—Held, that the assignment of the mortgage to F. was void under 22 Vict. c. 96; but that, putting it aside, M., as mortgagee, had no interest which could be sold under execution, and that F., therefore, having possession, was entitled to hold the goods as against the execution creditor. *Ferrie* v. *Cleghorn*, 19 Q. B. 241.

Interpleader issue to try plaintiff's right to property seized by the sheriff on executions issued by defendant against C. The plaintiff claimed by purchase prior to the execution:—Held, that under C. S. U. C. c. 26, s. 18, a sale of goods for cash would not be void, where a similar sale would not be an act of bankruptcy in England; and that the sale in question would not, under the evidence, have constituted such an act there. The words, "in the ordinary course of trade," &c., were inserted in our statute by way of greater precaution, to protect the ordinary dealings of parties having mutual accounts, where the party selling was not known to be insolvent. Held, also, that the evidence did not shew C. to be in insolvent circumstances: that the judge's charge was virtually to the effect, "that if C. had sold his only horses when as a farmer he needed them, and when the sale so made would imply a suspicion that the same was not in the ordinary course of dealing, and if the plaintiff had then purchased, the sale would not have been bonâ fide:" and that such direction was in accordance with the statute. *Tuer* v. *Harrison*, 14 C. P. 449.

A sale or conveyance by an insolvent, though not in the ordinary course of trade, without intent to defeat or delay creditors, or to give a preference, is valid; for the intent with which it was made must govern. *Gottwalls* v. *Mulholland*, 15 C. P. 62.

The last clause of sec. 18, c. 26, C. S. U. C., does not avoid all conveyances by an insolvent which are not for the benefit of creditors, or which are not made in the ordinary course of trade to innocent purchasers; it merely excepts the cases therein mentioned from the operation of the antecedent portion of the section, but does not invalidate other transactions within the objects of the act. In this case the execution debtors on the eve of insolvency, and after service upon them of the writ at the suit of defendants (the execution creditors,) sold their stock in trade to the plaintiff, who knew that they had been so sued, taking from him notes payable in one, two, three, and four years, for the purpose of dividing them ratably among their creditors. These notes were accordingly accepted by the creditors, with the exception of defendants, who rejected them:—Held, that the jury were properly directed to support the sale to plaintiff, if they found it made bonâ fide with intent to transfer the property to plaintiff, and not colourable to protect it for the debtor, even though the effect might be to defeat the defendant's execution. Held, also, that save as to the provisions in our statute against preference, it is substantially like the 13 Eliz. c. 5. *Wood* v. *Dixie*, 7 Q. B. 892, was a case of preference, and does not decide that the intent to defeat creditors is not enquirable into, even when the sale was for good consideration, and intended to pass the property; but, Semble, it would not be sustained here under the provincial act, which prohibits preferences. Per J. Wilson, J., that the jury should have been further directed, that if the vendors were at the time of sale insolvent, or knew themselves to be on the eve of insolvency, and made the sale with intent to defeat or delay their creditors, or to give one or more a preference, the sale was void, unless made in the ordinary course of trade to an innocent purchaser: that a sale may be bonâ fide as opposed to colourable, and yet void by C. S. U. C. c. 26, s. 18, if the intent was to contravene its provisions; and that the question for the jury is, was it made with that intent. *Ib.*

Held, affirming the above judgment, that such sale was valid; but if the sale had been made with intent, by vendor and purchaser, to defeat or delay creditors, it would have been void, though made bonâ fide with the intention of passing the property. *S. C.* 3 E. & A. 194.

Semble, the 22 Vict. c. 26, has not altered the law except as to preferential assignments. *Metcalf* v. *Keefer*, 8 Chy. 392; 7 L. J. 270.

To maintain a sale impeached by creditors, it is not sufficient in this court to prove that the transaction was really intended to pass the property; for, as laid down by the Court of Error and Appeal in Gottwalls *v.* Mulholland, "although the sale may have been bonâ fide, with intent to pass the property, yet if made with intent by vendor and purchaser to defeat and delay creditors, it would be void." *Merchants Bank of Canada* v. *Clarke*, 18 Chy. 594.

A trader being insolvent, at a meeting of his creditors, entered into a written agreement to assign to trustees, for his creditors, all his property, (except certain policies of life insurance) and on the second day after he executed the deed agreed upon, which the trustees accepted, and several of his creditors executed it. Afterwards it was discovered that on the day between the agreement to assign and the execution of the assignment, the debtor had sold a valuable portion of his stock in trade at a credit running over three years, and had accepted as security the promissory notes of the purchaser. Thereupon the trustees filed a bill to set aside this sale as fraudulent and void as against them:—Held, that the trustees being in the position of purchasers, could claim only such rights as the debtor was legally entitled to at the execution of the deed of trust, and that the sale being binding upon the debtor, and those claiming under him, the trustees were not entitled to the relief prayed; but, Semble, that this sale would not have been sustained as against a judgment creditor who had sued out execution. *McMaster* v. *Clare*, 7 Chy. 550.

A preference which a debtor is induced to give by threats of criminal or other proceedings, is not void under the 22 Vict. c. 96, or the Insolvent Act of 1864. But to sustain the preference the pressure must have been real, and not a feigned contrivance between the debtor and creditor to wear the appearance of pressure, for the mere purpose of giving effect to the debtor's de-

ire and intention to give a preference. *Clemence* v. *Converse*, 16 Chy. 547.

As to conveyances made under pressure, see further "BANKRUPTCY AND INSOLVENCY," p. 430.

(b) *By Way of Preference.*

One A. sold to B. his interest in certain land, there being an amount due thereon to obtain a title, part of which A., and the remainder B., was to pay. B. gave to A. personal property worth £100, and among it the horse in question in this suit, for his interest in the land; but to secure the payment by A. of his share, (£42 19s. 4d.,) B. took from A. a mortgage on the horse. An execution having been issued out of the Division Court against A., the horse was sold under it, and purchased by the plaintiff, B. being present and protesting against the sale. B. subsequently got peaceable possession of the horse, and this action of replevin was brought to obtain possession of it from him, the plaintiff claiming it under the Division Court sale:—Held, that the mortgage was not void, as being a preferential assignment under the 18th section of the C. S. U. C., c. 26, it being a contemporaneous security for the purchase money of property taken at the time of the sale. *Ross* v. *Elliot*, 11 C. P. 221.

Held, that a mortgage by an insolvent, or by one on the eve of insolvency, executed under pressure by the creditor, as for instance, a threat of a criminal prosecution, but given to secure a pre-existing debt, was not a fraudulent preference under C. S. U. C. c. 25, s. 18, the pressure need rebutting the presumption of a fraudulent intention on the part of the debtor to prefer the creditor. The intent with which the instrument is given being a question for the jury, the circumstances of pressure attending its execution, ought not to be withdrawn from them. *Bank of Toronto* v. *McDougall*, 15 C. P. 475.

A mortgage of chattels to a creditor by a person in insolvent circumstances, not made with the intent of giving such creditor a preference, but under pressure, and to obtain an extension of time, under the expectation of being thereby enabled to pay all his creditors in full, is not void under the 22 Vict. c. 26. *Gordon* v. *Young*, 22 Chy. 318.

Where a fire policy was after a loss verbally assigned to a creditor by an insolvent person, in satisfaction of a debt not yet due, and in consideration of an advance of money at the time, the assignment was held void, as a fraudulent preference within C. S. U. C., c. 25, s. 18. *The Bank of Montreal* v. *McTavish*, 13 Chy. 395.

G. recovered a judgment against D., and afterwards, though insolvent, assigned it by two assignments to his attorney, one for costs due him by G. and the other for a debt due to R. by G. Afterwards, C. obtained a judgment against G., and attached the debt so due to him by D., and gave notice of the attachment to D. before the assignee of G. had given notice of his assignment. D. paid the moneys due to G. by himself to the sheriff, under an execution issued at the instance of the assignee of G.:—Held, 1. That the mere fact of C. having been the first to give notice could not entitle him to priority over the assignee of G., but that, by reason of the insolvency of G., the assignments were void under 22 Vict. c. 26, s. 2. That the solicitor of C. must be restricted to the costs incurred by him in the action brought by C. against D., and that R. must stand as an ordinary creditor. *Davidson* v. *Douglas*, 15 Chy. 347.

M. B., an unmarried woman, resided for some years with her sister and brother-in-law. He having become involved, conveyed his real estate to M. B., for the alleged consideration of wages due her as a hired servant. Notes were also made and given to M. B. by her brother-in-law; and, on these notes becoming due, judgment was obtained, under which M. B., sold the farm stock and other personal property of her brother-in-law, becoming herself the purchaser. The evidence as to bona fides and good consideration for the transfer of the land and giving of the notes was unsatisfactory, and the conveyance was set aside as fraudulent, at the instance of the creditors of the grantor. *Ball* v. *Ballantyne*, 11 Chy. 199.

The 22 Vict. c. 26, s. 18, against preferences, does not apply to a conveyance of real estate sold by the debtor before his insolvency, but not paid for. *Carrelice* v. *Currie*, 19 Chy. 108.

A person in embarrassed circumstances applied to one of his creditors to supply him with goods to enable him to carry on his business, which the creditor agreed to supply on obtaining security therefor, as also for his pre-existing debt; and a chattel mortgage for this purpose was accordingly given, and the goods supplied:—Held, that this was not such a preference as rendered the chattel mortgage void. *Risk* v. *Sleeman*, 21 Chy. 250.

II. AS AGAINST PURCHASERS.

1. *Generally.*

[*See 31 Vict. c. 9, O.*]

A deed purporting to be a deed of bargain and sale, but containing no statement of consideration pecuniary or otherwise, and no sufficient proof of consideration aliunde:—Held, void in law against a bona fide purchaser for value at sheriff's sale under judgment and execution, although the jury had by their verdict negatived any fraud in fact in the deed expressing no consideration. *Doe Prowdfoot* v. *McCrae*, 6 O. S. 502.

A debtor after judgment and execution against his goods, having conveyed certain lands without consideration, which he held as the legal owner under a deed containing no declaration of trust, and the same lands having been sold under an execution subsequently issued against his lands, the court held that the deed, being a voluntary conveyance, was fraudulent and void against the sheriff's vendee. *Doe* d. *Steel* v. *McGill*. M. T. 6 Vict.

A deed made by one brother to another in consideration of natural love and affection, is void as against a subsequent purchaser from the grantor for a valuable consideration. *Doe* d. *Phillpott* v. *Blanchfield*, 1 Q. B. 350.

Held, that under the special facts set out in this case, the deed of the defendant, B., to the lessor of the plaintiff, was not to be regarded as voluntary, under the 27 Eliz. c. 4, nor would the deeds subsequently executed for a valuable consideration defeat it on that ground of objection. *Doe* d. *Spafford* v. *Breakenridge*, 1 C. P. 492.

A deed by the heir-at-law to his mother of certain lands in lieu of dower is not to be considered as voluntary and fraudulent against subsequent purchasers for value, &c., although the consideration expressed in such deed be money, and no money in fact be proved to have been paid. *Pulsifer* v. *Boyington*, 4 C. P. 125.

A. conveys without consideration to N. W. a lot of land, who takes it and remains in possession some years, and leaves. A. subsequently conveys to T. W., for value, the same land. Upon a plea of ne unques seisie que dower, in an action for dower by the widow of N. W. against T. W.:—Held, that the first deed, being without consideration, was fraudulent as against the second, and that the claim for dower resting upon the seisin under it was not sustainable. *Wilson* v. *Wilson*, 8 C. P. 525.

A judgment creditor is not a purchaser for value within the 27 Eliz. c. 4. *Gillespie* v. *Van Egmondt*, 6 Chy. 533.

A vendee of the crown mortgaged his interest to a person, who took bona fide. Afterwards the vendee made a second assignment for a nominal consideration of £200, but no money in fact passed, the consideration mentioned being intended to cover the amount which the assignee would be obliged to pay the government for the balance due. On a bill filed by the mortgagee to set the second conveyance aside:—Held, that as against the plaintiff the second deed was voluntary; and even if it had been registered under the statute regulating the sale of crown lands, it would not have prevailed against the prior incumbrance of the plaintiff. *Garside* v. *King*, 2 Chy. 673.

As against a purchaser for value, a voluntary deed, and purporting to be so, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted either by or against him, this court will not interfere to remove the registration of the void deed as a cloud on the title. *Buchanan* v. *Campbell*, 14 Chy. 163.

In ejectment, both parties claimed the title through one N. M. The defendant contended that a deed from N. M. to C. & J. M., dated 12th September, 1838, was voluntary, and therefore void. The jury having found for plaintiff, upon motion for new trial:—Held, that the deed could only be void as against a subsequent purchaser for value, and that inasmuch as there was evidence to shew that C. & J. M., were in possession on the 31st of August, 1839, when N. M. conveyed to A. H. M. through whom defendant claimed, the deed to A. H. M. was therefore void, and he was consequently precluded from saying the deed to C. & J. M. was void because voluntary. *Weller* v. *Hartgraves et al.*, 14 C. P. 360.

A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:—Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Chy. 541.

The Voluntary Conveyances Act, 1868, 31 Vict. c. 9, O., gives effect as against subsequent purchasers to prior voluntary conveyances executed in good faith, and to them only; and a voluntary conveyance to a wife for the purpose of protecting property from creditors, was held not to be good against a subsequent mortgage to a creditor. *Richardson* v. *Armitage*, 18 Chy. 512.

III. By Marriage Settlement.

(a) *Before Marriage.*

Plaintiff was son-in-law of and lived with J. D., using half of the same shop, and had made arrangements with the expressed object of putting J. D.'s property out of reach of certain creditors. Part of the evidence admitted for this purpose was a settlement of J. D.'s real estate prior to plaintiff's marriage with his daughter. In an action to try the title to certain goods alleged to have been purchased by plaintiff at a sheriff's sale of J. D.'s goods, it appeared that the purchase money paid by plaintiff had been credited to him out of the sums payable by plaintiff to another estate, and in fact went in relief of the claims on J. D.:—Held, 1. That evidence of the settlement was admissible; 2. That the jury rightly found against the plaintiff's claim. *Cook* v. *Hendry*, 7 C. P. 354.

Although the consideration of marriage is one of the most valuable, still a settlement upon the marriage, either of the settlor or his child is, like any other conveyance, liable to be impeached and void under the statute of Elizabeth, on the ground of having been made to hinder and delay creditors. Where, therefore, a person in embarrassed circumstances hastened the marriage of his daughter, and conveyed all his real estate to a trustee for her benefit and the issue of the intended marriage—having stated to the solicitor who prepared the conveyance, and to the trustee that his object was to prevent his property from being seized by his creditors, and there being a strong presumption that the daughter and her intended husband had also been informed of this object—the court, upon a bill filed by a judgment creditor, against the husband and wife and their infant children, to set aside such settlement, declared the same void as against creditors; notice by the trustee of the fraudulent purposes of the settlor being sufficient to bind the issue of the marriage. To such a bill the settlor is not a necessary party. *Commercial Bank of Canada* v. *Cooke*, 9 Chy. 524.

A memorandum was produced partly destroyed by fire, to the effect that W. undertook to settle the property of his intended wife as her guardians should require; this proved to be in H.'s handwriting, and to have been seen in a perfect state since his decease, and, as the witness believed, signed by W., and that before the marriage he had produced and read a paper similar, so far as the memorandum went, to it. After the marriage the wife's property was all sold and the proceeds applied by W. to the purposes of his business, who subsequently, and while insolvent, assigned to the cashier of a bank a policy on the life of himself, (W.,) in trust, to pay certain bills of his in the hands of the bank and then to hold the moneys to be received on the policy for the benefit of his wife and children, but in the event of W. paying off the bills to re-assign the policy to him, or as he should appoint. W. having died, the trustee received the insurance money, paid these bills, and claim

a right to apply the surplus in paying off other liabilities of W. to the bank. Upon a bill filed by the widow and children of W. against the trustee, the court thought the ante-nuptial agreement sufficiently established, and ordered the trustee to pay over the balance, with interest; and that the trustee being the cashier of the bank, who had thus received the benefit of the moneys, he sufficiently represented the bank, and it was therefore not necessary to make the institution itself a party to the suit; but under the circumstances, directed all parties to the cause to receive their costs out of the fund. *Whitemore* v. *Lemoine*, 10 Chy. 125.

By an ante-nuptial settlement made in Lower Canada in 1833, according to the laws there in force, it was agreed between the parties to the proposed marriage that no communion of property between them should exist, but that each should hold and continue to enjoy what each then had, or should thereafter acquire. In 1848 certain goods of the husband were sold at sheriff's sale, on execution against the husband, and having been bought in by a third party, were, by a deed of donation, conveyed to the wife for her separate use. The parties having removed to Upper Canada, brought with them these goods, which were seized under execution issued on judgments obtained against the husband:—Held, that the marriage settlement and deed of donation properly vested the goods therein mentioned in the wife, and that they were not liable to seizure for her husband's debts. *Ryland* v. *Abatt*, 11 Chy. 135.

A deed purporting to be a bargain and sale in consideration of £1000, and bearing date the day before the marriage of the grantor to the grantee, was impeached by a subsequent creditor of the grantor. There was no evidence of any prior negotiation for a marriage settlement. The deed was not executed by the grantee, and there was no evidence that it was known to her, or to any one acting for her, until long after the marriage. The grantor, who was in trade, continued to deal with the property as owner, and the deed was not registered for three years afterwards, when the grantor had become insolvent:—Held, that the deed could only be regarded as a voluntary deed; and as it did not appear that the grantor was in circumstances at the time to make a gift of so much property, the deed was set aside as a fraud on creditors. Spragge, V. C., dis. *Mulholland* v. *Williamson*, 12 Chy. 91.

On appeal from the above decision, the court being satisfied that the deed was executed as a marriage settlement, and not considering there was any proof of a fraudulent intent, upheld the deed and varied the decree made in the court below accordingly, with costs. VanKoughnet, C. J. Wilson, J., and Mowat, V. C., diss. *S. C.* 14 Chy. 291.

The insolvent had conveyed by way of settlement to his intended wife a lot of land on which she had commenced a house, but which was not completed until after the marriage. On a bill filed by the assignee in insolvency, the court declared that for so much of the building as was completed after the marriage the creditors had a lien on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Chy. 156.

A widower, on his second marriage, executed a settlement which made provision for his children by his first marriage:—Held, affirming the decree below, 17 Chy. 38, that the provision could not be defeated by a sale for value by the settlor. *McGregor* v. *Rapelje, (in appeal)* 18 Chy. 446, affirming *S. C.* 17 Chy. 446.

See also *Leys et ux.* v. *McPherson*, 17 C. P. 266, p. 1691.

(b) *After Marriage.*

A settlor filed a bill to set aside a settlement on his wife and her heirs, alleging fraud by the trustees in inducing him to make the settlement. The wife died leaving no children by him, but leaving children by a former husband. The allegations of the bill failed, and it was accordingly dismissed, but it was held that the settlement only vested a life estate in the trustees; and, Semble, that the settlor could defeat the settlement by a sale. *Crafford* v. *McDonagh*, 5 L. J. 187.—Chy.

A person against whom several executions for small amounts were in the sheriff's hands, and whose chattel property when sold by the sheriff was not sufficient to pay those executions, made a settlement of the only real estate he had in trust for his wife and children:—Held, fraudulent and void under 13 Eliz. c. 5. *Goodwin* v. *Williams*, 5 Chy. 539.

The owner of real estate being about to enter into a business partnership, settled his property on his wife and children. The evidence shewed that it was made at the instance of the settlor's wife, and with a view to save the property from any debts which might arise in consequence of the partnership:— Held, that the settlement was void as against subsequent creditors; although at the time of the settlement the settlor was perfectly solvent, and no intention of fraudulently withdrawing his assets could be imputed to him, and the property in question was partly paid for by money given to the wife by her father. *Buckland* v. *Rose*, 7 Chy. 440.

When a debtor makes a voluntary settlement under circumstances that render it void as against creditors, the grantee is not entitled, as being in effect a surety for the debt, to hold the property exonerated from the debt, in consequence of time being given to the debtor, or of any like transaction that would free a surety from his liability in ordinary cases of suretyship. *King* v. *Keating*, 12 Chy. 29.

A. having received a large sum for the sale of a secret imparted to him and his wife by a relative of the latter, bought with it part of a farm, of which he took the deed in his own name; and afterwards gave instructions for a settlement of the property for the use of himself for life, with remainder to his wife and children; but the settlement was not prepared or executed for a year. Shortly before it was executed he had entered into a hazardous business, which proved disastrous—all his means not sufficing to pay its

losses. The farm was the only real estate he had in the province:—Held, at the suit of a creditor whose debt accrued before the settlement, that the settlement was void as against creditors. *King* v. *Keating*, 12 Chy. 29.

A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and he had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother. The wife was advised to take proceedings against him under the statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. To compromise these threatened proceedings, the husband made a settlement in favour of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof:—Held, that the settlement could not be impeached under the statute 13 Eliz. *Mason* v. *Scott*, 20 Chy. 84.

A post-nuptial settlement was executed by a person insolvent, but the trustee was ignorant of the fact of his indebtedness. The Court, on a bill filed impeaching the settlement as fraudulent against creditors, set it aside with costs as against the settlor; but ordered the trustee to receive his costs out of any residue of the fund, after payment in full of the claims of the creditors, with costs. *The Merchants Bank* v. *Macdonald*, 19 Chy. 476.

A person being embarrassed, proposed to assign a policy on his life, in trust, first to secure certain advances, and then for his wife. The advances were made and the assignment executed, but no trust in favour of the wife was declared, or was required by the lender as a condition of the loan. Subsequently the trustee made further advances to the settlor, and in his evidence stated that the settlor might have absorbed the whole amount if he (the trustee) had seen fit to advance it. After the death of the settlor all the advances were paid, and the residue of the insurance moneys invested for the benefit of the widow:—Held, that so far as the interest of the widow was concerned, the settlement was void. *Cotton* v. *Vansittart*, 20 Chy. 244.

A trader in insolvent circumstances, for the purpose, avowedly, of inducing his wife to release her dower in a property shewn to have been worth about $1,300, conveyed to her a farm, the net value of which was about $1,700:—Held, that this was a fraud upon creditors; and the court set aside the transaction with costs. *Black* v. *Fountain*, 23 Chy. 174.

V. Practice on Setting Aside.

1. *Parties.*

A person claiming under a disseisor, may obtain a release from the disseisee, notwithstanding he has previously executed what purported to be a conveyance in fee to a third person, void for fraud as well as for want of interest in the grantor; and may file a bill to have such conveyance delivered up, without making the disseisee a party. *Whitla* v. *M'Intosh*, 2 O. S. 10.

To a bill by an execution creditor of two joint debtors to set aside conveyances by one of them as fraudulent and void against creditors, the grantor was a defendant:—Held, that if the grantor was a necessary party, his co-debtor should be a party also. *Pyper* v. *Cameron*, 13 Chy. 131.

To a bill filed by one co-partner against another seeking to set aside a marriage settlement as having been made by the settlor at a time when he was insolvent, the trustees and cestui que trust of the settlement are necessary parties, as they are entitled to have the accounts of the partnership taken, and assets thereof applied in exoneration of the settled lands. *Thomas* v. *Torrance*, 1 Chy. Chamb. 46.—Esten.

To a bill to set aside a conveyance as void against the grantor's creditors, the grantor, to whom a small balance was due, and who resided in the United States, was—Held, not to be a necessary party. *Scott* v. *Burnham*, 19 Chy. 234.

The plaintiffs who were severally interested in certain chattels, joined in a bill seeking to have an alleged sale and transfer of them to defendant, set aside on the ground of fraudulent practices by the defendant. A demurrer on the ground of misjoinder of plaintiffs, was allowed, and a demurrer for want of equity was overruled, but, following the rule in Paine *v.* Chapman, 6 Chy. 338, without costs to either party. *Skinner* v. *Palmer*, 20 Chy. 374.

To a bill against a married woman to set aside a mortgage made to her on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:—Held, on demurrer, that since the passing of the Married Women's Property Act, 1872, the husband was not a necessary or a proper party. Semble, that such a dealing on the part of a married woman was a "tort" within the meaning of the above act, for which she could be proceeded against as if unmarried. *McFarlane* v. *Murphy*, 21 Chy. 80.

See *Commercial Bank* v. *Cooke*, 9 Chy. 524, p. 1600.

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2. *Pleading and Evidence.*

Where a party filed a bill to set aside a deed on the ground of fraud:—Held, that evidence of particular acts of fraud, although not charged in the bill, was admissible. *Wright* v. *Henderson*, 1 O. S. 304.

The plaintiff prayed that his deed to one of the defendants should be set aside for fraud, and though he failed to prove the fraud as alleged, yet the case being extremely peculiar and surrounded with many circumstances of suspicion, the court directed issues for the trial at law of the points in dispute. *Taylor* v. *Shaff*, 4 Chy. 2[illegible].

A defendant in ejectment filed a bill to restrain the action, alleging that the deed, under which the plaintiff claimed, was a forgery. The deed was dated about fifty years before the bill was filed, and the four witnesses to it were dead before the validity was impeached in any way. The court dismissed the bill with costs. *Fick* v. *Michael*, 5 Chy. 646.

After thirty years possession of land, by a person to whom the grantee of the crown had conveyed the property in exchange for other lands, the vendor discovered a defect in the title by reason of the non-registry of the conveyance and executed a deed to a person who had

in possession of a portion of the property for several years under the vendee's heir. To a bill filed to set aside this conveyance, the vendor and the second vendee set up the non-heirship of the plaintiff; a purchase for value without notice; and that the original vendee was a minor at the time of the exchange, and had repudiated the transaction on becoming of age; and further, that he had no title to the land conveyed in exchange. The court considered that the long possession and the absence of proof of the facts alleged by the defendants were sufficient to entitle the plaintiff to a decree with costs. *Harkin* v. *Robidon*, 6 Chy. 405; 7 Chy. 243.

The court, though it refused to set aside a purchase on the ground of fraud in the vendor, gave leave to amend the bill, alleging over value as a ground for relief. *Rees* v. *Wittrock*, 6 Chy. 418.

Where the circumstances attending a transfer of real estate from one brother to another, were such that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold. *The Bank of B. N. A.* v. *Rattenbury*, 7 Chy. 383.

The fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor, does not afford any ground for coming to this court to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside. Before the court can be called upon to do so, the creditor must establish his right to recover at law. *Whiting* v. *Lawrason*, 7 Chy. 603.

In a suit to set aside a voluntary conveyance as void against creditors, it lies upon the parties interested in supporting the deed to shew the existence of other property in the debtor available to his creditors; but in such a case, the parties having omitted to give such evidence, the court at the hearing directed an enquiry before the master as to the indebtedness of the grantor at the date of the conveyance. *Brown* v. *Davidson*, 9 Chy. 439.

A deed having been executed by a husband and wife under such circumstances as to make the conveyance voluntary, the court held that the onus was on the grantee, of proving that the grantors understood the nature and effect of the deed; and as it did not appear to have been explained before being executed, the deed was held invalid. *Fraser* v. *Rodney*, 12 Chy. 154; affirming *S. C.* 11 Chy. 426.

A bill, setting forth that one of the defendants procured a conveyance from the plaintiff by fraud, and afterwards mortgaged the property to another defendant, is not demurrable for want of a charge that the latter had notice of the fraud at, or before he received his mortgage. It will be for the defendant, in such a case, to set up the defence of no notice. *Kitchen* v. *Kitchen*, 16 Grey. 232.

In the case of a sale by an insolvent person to a relative, attended by suspicious circumstances, the reality and bona fides of the transaction should not be rested on the uncorroborated testimony of the parties to it. *The Merchants Bank of Canada* v. *Clark*, 18 Chy. 594.

Where a bill was filed to impeach a deed as colourable, and the evidence shewed it to be fraudulent, if not colourable, and the same statements would have been necessary had the bill sought to impeach it on the ground of fraud, the court refused to entertain an objection at the hearing that the bill had not sought to set it aside on that ground, or assigned fraud as an alternative ground of relief. *Commercial Bank* v. *Cooke*, 9 Chy. 524.

An execution creditor proceeded to a sale of the lands of his debtor, and sold a property which was subject to mortgage for £500, given, as the creditor alleged, to defeat creditors, but which property the creditor alleged was not worth more than £200, and became himself the purchaser thereof at the price of £10 10s.; whereupon he filed a bill setting forth these facts, or that the mortgage was given to secure a much smaller, if any debt, and praying alternative relief, in accordance with such allegations. The court at the hearing pro confesso refused to set aside the mortgage, but gave the plaintiff the usual decree as a judgment creditor, not as a purchaser. The proper course for the plaintiff was to have come to this court in the first instance, and not to proceed to a sale of the property with such a cloud upon the title. *Mallock* v. *Plunkett*, 9 Chy. 556.

Where a debtor executes a fraudulent conveyance, in respect of which relief in equity may have to be sought, the proper course for the creditor is, not to have the property sold by the sheriff at a great undervalue, and then to come into equity to have the sale confirmed; but to come into equity first to have the conveyance set aside, and the property then sold. *Kerr* v. *Bain*, 11 Chy. 423.

Where a bill was filed to set aside a conveyance as having been made to hinder creditors, on grounds which the plaintiff failed to substantiate, but the evidence of the grantee himself shewed that on other grounds the plaintiff was entitled to relief, at the hearing leave was given him to amend, setting forth such grounds, and a decree was made in his favour, but without costs. *Watson* v. *McCarthy*, 10 Chy. 416.

The owner of real estate being under arrest upon civil process, conveyed his lands to a person for the purpose of enabling the grantee to justify as special bail in the action; and after the same had been settled the lands were reconveyed, but in the meantime a writ against the lands of the grantee had been placed in the hands of the sheriff, and a sale was effected thereunder after such reassignment, and a conveyance made to the purchaser (the plaintiff in the writ,) who had notice of the claim set up by the original owner:—Held, that the transaction was one against public policy and morality, and that the court would not lend its aid to the grantor in getting back his estate; but the purchaser at sheriff's sale having in his answer disclaimed any interest in the lands other than a lien thereon for the full amount of his judgment and expenses, the court decreed the plaintiff relief upon the terms of his paying the full amount of such judgment and expenses, together with interest and the costs of suit; and the defendant having also by

his answer alleged that the conveyance was made for the purpose of enabling the grantee there n to justify as bail, and that he did justify as such bail upon the lands so conveyed, and submitted that "the plaintiff under the circumstances ought to be estopped and precluded from saying that the said lands are not the lands" of the grantee. Held, also, that although the defendant did not object that the act was against public policy, there was sufficient stated to enable the court to give effect to the objection of illegality, notwithstanding the answer did not state that such use would be made of the facts stated. *Longlois* v. *Baby*, 10 Chy. 358; affirmed on rehearing, 11 Chy. 21.

To a bill by an execution creditor to set aside as fraudulent against creditors, two distinct conveyances executed at different times to two separate grantees, the two transfers having no connexion with one another—a demurrer for multifariousness was allowed. *Pyper* v. *Cameron*, 13 Chy. 131.

The widow of the grantor in a deed impeached as fraudulent against creditors, was entitled to a legacy under the will of her husband:—Held, that nowithstanding such interest on her part, she was a competent witness to prove notice as against the purchasers from the grantee in the impeached deed. *Scott* v. *Hunter*, 14 Chy. 376.

Where a bonâ fide transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and afford to the other creditors reasonable satisfaction, as to the moral character of the transaction; and, if this duty is neglected, the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this court by the other creditors whom it disappointed. *Healey* v. *Daniels*, 14 Chy. 633.

The owner of an equitable interest in lands under a contract of purchase conveyed to the plaintiff, his brother-in-law, and subsequently while still in possession of the land, assigned it to third parties, in consideration of their giving him a lease of the premises, which was subsequently executed in the presence of and witnessed by the plaintiff after the deeds were completed. The plaintiff some time afterwards filed a bill impeaching the assignment and lease as fraudulent. The evidence tended to shew that the conveyance to the plaintiff was colourable only; and there not being any evidence of notice of the claim of the plaintiff—the court dismissed the bill with costs. *Davison* v. *Wells*, 15 Chy. 89.

A sale of land was effected subject to a mortgage created by a former owner:—Held, that this circumstance did not preclude the purchaser from setting up the defence of a purchase for value without notice. *Campion* v. *Fairbairn*, 15 Chy. 674.

The plaintiff having occasion to raise $3,100 to pay the church society for a lot which he had leased and improved, and which was worth $4,200 cash, procured defendant to raise the money and to pay it to the society; whereupon the society conveyed the land to the plaintiff, and the plaintiff to defendant. The defendant a few days afterwards sold the lot for $4,200 cash, to a person with whom the plaintiff had been previously negociating. Defendant admitted that, after the sale, he intended to give plaintiff the difference, less his own expenses and $200 for his trouble. There was great inequality between the parties, and some evidence of confidence between them, and the negociations between the two were private. The court inferred from the whole evidence that the intention had been expressed during the negociations between the plaintiff and defendant, and that the plaintiff had conveyed on the strength of it; and, Held, that it constituted an agreement which the court would enforce. *McLeod* v. *Orton*, 17 Chy. 84.

Where a creditor simply seeks to have a deed made by his debtor declared fraudulent and void, it is not necessary to allege that the creditor has carried his claim to judgment. In such a case, however, the creditor must sue on behalf of himself and all the other creditors. *Longueville* v. *Mitchell*, 17 Chy. 190.

In a suit impeaching a conveyance on the ground of fraud, the bill stated that the grantor for a professed valuable consideration conveyed the land; and the conveyance "was made with intent on the part of the said defendant to defeat, delay, and defraud the said plaintiff," and the other creditors:—Held, that this sufficiently stated a want of consideration for the conveyance, and that the object was to defeat, hinder, and delay creditors within the meaning of the 13 Eliz. c. 5. *Sawyer* v. *Linton*, 23 Chy. 43.

Where a bill was filed by an execution creditor to impeach a conveyance by the debtor, and it did not appear that the action at law had been commenced after the passing of the Administration of Justice Act, a demurrer on the ground that the plaintiff ought to have obtained relief in the suit at law was overruled. *Ib.*

3. *Costs.*

A creditor filed a bill to set aside a deed as fraudulent against creditors, and the grantee by his answer disclaimed and alleged that the deed was executed without his knowledge or consent and that when he became aware of it he had repudiated it:—Held, that having been properly made a defendant, he was not entitled to his costs. *Shuttleworth* v. *Roberts*, 11 Chy. 237.

Where a conveyance is set aside as void as to creditors, a sale ordered, and costs up to the hearing given against the defendants, the costs should be paid by the defendants immediately, where it is manifest the property is sufficient to pay the creditors in full. *Gilbert* v. *Tyrrell*, 11 Chy. 474.

Where a creditor filed a bill impeaching conveyances made by the debtor as fraudulent against creditors, and the relief prayed was granted at the hearing, the court ordered the difference between party and party and solicitor and client costs to be paid pro rata by such of the creditors as might avail themselves of the benefit of the suit, for the purpose of obtaining payment of their demands. *Pegg* v. *Eastwood*, 13 Chy. 137.

A bill was filed by creditors impeaching a conveyance as fraudulent, but the facts proved failed to establish more than a case of suspi-

against the bona fides of the transaction; and the same relief having been sought in a bill by other creditors who were also the personal representatives of the debtor, and which relief was refused, the court in dismissing the present bill did so with costs, notwithstanding the reasons for doubting the bona fides of the transaction. *Scott* v. *Hunter*, 14 Chy. 376.

Where a bona fide transaction takes place between a failing debtor and a favoured creditor, it is the duty of the creditor to employ all practicable means to free the transaction from undeserved suspicion, and afford to the other creditors reasonable satisfaction as to the moral character of the transaction: and if this duty is neglected the favoured creditor may have to bear his own costs of afterwards establishing the transaction, if impeached in this court by the other creditors when it disappointed. *Healey* v. *Daniels*, 14 Chy. 633.

A bill was filed impeaching a deed as void under the statute of Eliz., and the same was set aside with costs, as against the party beneficially interested; but without costs, as against the trustees, as the ground upon which the same was set aside was not necessarily, and probably was not known to them. *Dewitt* v. *Scanlan*, 20 Chy. 352.

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4. *Other Cases.*

In a suit by a judgment creditor to set aside a fraudulent settlement, and to realize his judgment, praying a sale of the property on default of payment, if the sale prove abortive:—Semble, that the usual order for redemption, or in default foreclosure will be granted; at all events it would be so if the judgment debt was subject to a prior mortgage which the judgment creditor should be entitled to redeem. *Commercial Bank* v. *Cole*, 1 Chy. Chamb. 205.—Spragge.

A party being in gaol on a charge of felony, was liberated upon the present defendant becoming bail for his appearance; and having between his liberation and trial conveyed his property to defendant for an inadequate consideration, afterwards filed a bill to set it aside on the ground of fraud, alleging his impression and defendant's assurance that the deed was merely a recognizance for his due appearance. This allegation being disproved, the court dismissed the bill, but without costs, and gave the plaintiff leave to file another, if so advised, on the grounds of inadequacy of consideration and undue influence. *Vallier* v. *Lee*, 2 Chy. 606.

The plaintiff had bought from defendant 47 acres, paid for it, and taken a conveyance, but subsequently discovered that 44 acres of it were covered with water; whereupon he filed a bill charging defendant with fraud. No evidence of any fraud having been given, and it rather appearing that both parties acted in ignorance, the bill was dismissed with costs, but without prejudice to any new bill being filed. *Clark* v. *Graham*, 2 Chy. 644.

The plaintiff made a note in favour of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by the payee, who, notwithstanding, sued on the note and recovered judgment. The plaintiff thereupon conveyed all his real estate to a third party, to defeat the judgment. A demurrer to a bill filed to have the grantee declared a trustee for the plaintiff, or for payment of the alleged purchase money, was allowed for want of equity. *Rosenburgher* v. *Thomas*, 3 Chy. 635.

A debtor conveyed his land in fee for a sum greatly below its value, but continued in possession without paying rent; the heir of his vendee several years afterwards sold and conveyed the land, the sale having been brought about and managed by the debtor, and the purchaser was shewn to have had notice of the indebtedness and other material circumstances. A creditor afterwards sued out an execution against the lands of the debtor, under which his interest in this property was sold for 5s. to the execution creditor, who filed a bill to set aside the sale by the original owner, and have himself declared the owner of the land. The court refused this, but gave him a right to redeem by virtue of his judgment, in accordance with an alternative prayer in the bill. *Wilson* v. *Shier*, 6 Chy. 630.

The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled; and that, although his title may be sufficient as a defence to any action at law. *Harkin* v. *Rabidon*, 6 Chy. 405; 7 Chy. 243.

Property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards the person claiming to be beneficially interested, filed a bill for a conveyance to himself. Under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee, and it appearing that the wife, who was not a party to the suit, and was living separate from her husband, was entitled to the beneficial inheritance, an enquiry was directed as to the cause of her separation, to ascertain how the court should direct the rents of the estate to be applied. *Phelan* v. *Fraser*, 6 Chy. 336.

A suit having been instituted by judgment creditors to set aside conveyances by their debtor made fraudulently and with a view to delay creditors, the debtor attempted to shew facts which, if established, would tend to annul the judgment altogether, or reduce it; such facts having been discovered since the judgment at law, and when it was too late to obtain a new trial:—Held, that the proper means of obtaining such relief was by cross bill; the order of the court (Gen. Or. 12, s. 4, of June, 1853,) permitting cross relief to be given to a defendant against the plaintiff, applying only where the defendant is entitled to some relief growing out of the same transaction as forms the foundation of the suit; not where the object of the defence is to obtain relief not growing out of such transaction, but against it. *Buchanan* v. *Cunningham*, 10 Chy. 513.

Where a party desires to impeach an instrument on the ground of fraud and extortion, the more convenient course is, to institute proceedings in order to annul it, as it is rarely that effect can be given to a defence on such ground in a suit to enforce it. *Kains* v. *McIntosh*, 10 Chy. 119.

A deed purporting to convey land to M. was executed by the plaintiff, under circumstances which made it an invalid deed. The grantee,

M., having afterwards sold and conveyed the land to R., receiving part of the purchase money, and a mortgage for the balance :—Held, affirming the decree, 11 Chy. 426, that on confirming the title of the purchaser, R., the plaintiff was entitled to the balance of the mortgage money from R., and to a decree against M. for what M. had received; but the court, under the facts, refused to remove the invalid deed as a cloud on the title of the grantor. *Fraser* v. *Rodney*, 12 Chy. 154.

A deed of gift void against the grantor may be set aside at the instance of his heirs after his death. *Dawson* v. *Dawson*, 12 Chy. 278.

An agreement may be allowed to stand, although a voluntary deed arising out of it may be set aside. *Delesdernier* v. *Burton*, 12 Chy. 569.

In setting aside a deed for fraud, at the instance of a judgment creditor by a decree of the court, the proper form is to avoid the deed only as against the parties injured by the conveyance, and direct a sale of the property; the court will not simply set aside the deed and allow the judgment creditor to enforce his claim at law. And where the wife of the grantor joins in such a deed to bar her dower, it should be avoided only so far as it passes the estate of the grantor, the creditor not being entitled to the benefit of such release of dower. Quære, in such a case what is properly the effect following from the release of dower, and to whose benefit it will enure. *Bank of Upper Canada* v. *Thomas*, 2 E. & A. 502.

Where a debtor conveyed away his estate, in fraud of creditors, to a person having a judgment against him, which conveyance was declared fraudulent against creditors, upon a bill filed at the instance of certain of them :—Held, in this respect varying the decree of the court below, that the creditor to whom the conveyance had been made, was not, under the circumstances, precluded from enforcing his judgment against the lands of the debtor, the conveyance of which had been so avoided. VanKoughnet, C., diss. *Ib.*

In a suit to declare a conveyance to a wife void as against creditors, it was alleged that the land had been conveyed by the father of the wife to the husband after executing his will, (whereby he devised the same property to his said daughter,) under pressure and undue influence such as, if true, to render the deed liable to be impeached on those grounds; but the court refused to try such issue in this suit, as the creditors of the husband were entitled to make out of his title to the property at the time of the conveyance impeached what they could towards satisfaction of their claims. *Pegg* v. *Eastman*, 13 Chy. 137.

Where a deed is set aside as fraudulent against creditors, a purchaser from the grantee in the impeached deed will not be allowed for improvements made by him upon the property. *Scott* v. *Hunter*, 14 Chy. 376.

The plaintiff had executed a conveyance of land without consideration, to avoid an execution expected, upon the secret trust or understanding that when called upon the grantee would re-convey, the court, under these circumstances, refused to enforce a re-conveyance, and a bill filed for that purpose was dismissed with costs. *Emes* v. *Barber*, 15 Chy. 679.

Delay for seven years in suing, Held, no objection to a party's right to set aside a deed as fraudulent against creditors, where the position of the parties to the impeached conveyance had not been materially altered by the delay; if that were shewn the court has the power of modifying the relief to be given, so as not to wrong the parties; or it might, in its discretion, refuse to give any relief. *Currie* v. *Gillespie*, 21 Chy. 267.

FRAUDULENT JUDGMENT.

I. When obtained by Confession or Default, 1612.

II. Miscellaneous Cases, 1618.

I. When obtained by Confession or Default.

An administrator being a creditor of the intestate, in order to secure his own debt, confessed judgment to his friend the plaintiff, to whom the intestate owed nothing, with the understanding that the lands in his hands should be sold under the judgment, and the proceeds paid over to him by the plaintiff. The court, on the application of the tenant of the land, set aside the judgment and execution with costs. *Bonisteel* v. *McMaster*, 6 O. S. 32.

A cognovit given by an administratrix to a creditor to enable him to sell the lands of intestate to perfect his title, without taking out an execution against goods, was set aside as collusive against the heir. *Ward* v. *McCormack*, 6 O. S. 215.

Where a plaintiff had been guilty of gross usury in taking a confession of judgment from a defendant, the court stayed the proceedings on payment of the true debt and interest, although the judgment had been assigned, the assignee having been shewn to have had notice of the usury before he took the assignment. *Knapp* v. *Forrest*, 6 O. S. 557.

Debt on a bond, conditioned to save the plaintiff harmless from all damages or suits regarding a certain sum advanced by one A. to the plaintiff, through the agency of B., and which sum was also claimed to have been paid to the plaintiff by one C., and to be now due and owing to C. Plea, that the plaintiff, if damnified, was damnified of his own wrong. Replication, setting out as a breach the recovery of judgment and execution against plaintiff by C., for the said sum. Rejoinder, that the judgment was recovered by the fraud and covin of the plaintiff, upon which issue was joined. It was shewn that the recovery by C. had been on admissions made by plaintiff after the execution of the bond :—Held not sufficient to support the plea; and the plaintiff having recovered a verdict, the court refused to interfere. *Powell* v. *Boulton*, 2 Q. B. 487.

Where a debtor being embarrassed executed a cognovit to one creditor without his knowledge and the debtor's household furniture being sold upon execution, the creditor purchased and immediately leased it to the debtor, at a rent amounting only to the interest of the purchase money, giving the debtor power to retain it as long as he pleased, and not making any provisions for deterioration; and it was afterward

seized at the suit of another creditor; and on the claim of the first creditor, an interpleader was directed, which was found in favour of the second execution creditor, on the ground that the sale to the first had been collusive—the court refused to grant a new trial on affidavit. *Secus* v. *Tobin*, 2 Q. B. 530.

Sullivan, J., upon the affidavits set out in the report of this case, refused to set aside the execution upon a cognovit, either on the ground of defendant's insanity, or of plaintiff's fraud. *Paterson* v. *Squires*, 1 C. L. Chamb. 234.

A security taken for a bonâ fide loan of money is not fraudulent and void merely because the money was lent to enable the borrower to leave the country in order to escape from his creditors. C. being involved went to K., and informed him that H., a creditor, was pressing him, and he must leave the country. K. lent him money to enable him to get away, took a confession of judgment, payable immediately, entered judgment, and issued execution, on which the sheriff seized C.'s goods which he had left behind. The day following the execution, H. sued out an attachment against the estate of C. as an absconding debtor:—Held, the bona fides of the loan not being disputed, that the object for which the money was advanced would not deprive K. of the benefit of his judgment as against H. *Hall* v. *Kissock*, 11 Q. B. 9.

M., the testator, died in November, 1847, indebted to the plaintiff in £35, having appointed defendant his executrix. The account was continued after his death, and was afterwards rendered to defendant and headed as against widow M.; and further advances were made to her from time to time, and payments made by her on account, down to August, 1849, the payments amounting to far more than the debt due from the testator. In December, 1849, a confession of judgment was obtained from defendant, as executrix of the testator. On a rule nisi to set aside the judgment entered on the confession:—Held, by McLean, J., that the plaintiff having transferred his claim against the estate to the individual account with the defendant, and with her assent, and having since received more than sufficient to cover the debt of the estate, he could not sever the two accounts and fall back upon the estate for the amount due at the testatrix's death, and the judgment was set aside. *Beatty* v. *Maxwell*, 1 P. R. 85.

Per Burns, J.—A subsequent judgment creditor of defendant cannot attack a prior judgment for insufficiency of the special endorsement on the writ on which it was obtained, but he may do so "on the ground that it was allowed to be entered by fraud, and to defeat his claim, for judgments obtained on a writ specially endorsed are for this purpose to be looked upon in the same light as if founded upon a confession. Where it appeared that the bona fides of the judgment was open to suspicion, an issue was directed to determine it. *Wilson* v. *Wilson*, 2 P. R. 374; approved of and followed in *Klein* v. *Klein*, 7 L. J. 296.—P. C.—Hagarty. See, also, *McKenzie* v. *Harris*, 10 L. J. 213.—P. C.—A. Wilson; *Parker* v. *Howell*, 7 L. J. 209.—C. C.—McKenzie.

A judgment will be set aside on the motion of a subsequent judgment creditor, only when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it, and if irregular only, he has no right to complain. *Balfour* v. *Ellison et al.*, 8 L. J. 330.—C. L. Chamb.—Burns.

Where the plaintiffs had incurred liabilities by joining with a trader in notes, and took a judgment by confession from him before they had discharged such liabilities, or before any actual debt was owing from such trader to them:—Held, that such transaction was not necessarily void as against the creditors of such trader, and that it was properly left to the jury to say whether it was bonâ fide. *Swayne* v. *Ruttan*, 6 C. P. 399.

An attachment issued against defendant on 6th July. On the same day a summons was served on him abroad at the suit of G. Within six months the plaintiff sued out another attachment. It did not appear whether the plaintiff in the first attachment had obtained judgment, or whether that writ was issued, or G.'s summons served first, but G. first obtained execution:—Held, that so far as appeared G. was entitled to the benefit of his fi. fa. as against these plaintiffs, and that the mere fact that defendant withdrew his plea and allowed G. to get judgment by default, was no ground for imputing collusion in obtaining such judgment. *Caird* v. *Fitzell*, 2 P. R. 262.—C. L. Chamb.—Burns. See, also, *Parker* v. *Howell*, 7 L. J. 209.—C. C.—McKenzie.

Where a trader being in embarrassment, arranged with the plaintiff to supply him with goods as agent, with a right to retain whatever sum he could make over a certain price, and also gave plaintiff a confession of judgment, under which execution was issued and the trader's furniture sold, part of which was purchased by the plaintiff, and remained in possession of a brother-in-law of the trader, in the house of the latter, and the bona fides of the transaction was proved at the trial solely by the evidence of the trader and his brother-in-law, when a disinterested witness might have been called. The court ordered a verdict for the plaintiff to be set aside, and a new trial had, on the ground that the ends of justice might be furthered by a second investigation. *Fowler* v. *Hendry*, 7 C. P. 350.

Where goods have been attached, a creditor obtaining a confession of judgment for the debtor without service of process, and execution upon it before the attaching creditors, does not obtain priority:—Held, that on the affidavits filed no case was made out for setting aside the judgment so obtained for fraud or collusion. *Bird* v. *Folger*, 17 Q. B. 536.

If the judgment entered upon a cognovit be irregular, another judgment creditor of defendant may move to set it aside. *Armour* v. *Carruthers*, 2 P. R. 217.—Q. B.

Defendants being insolvent, the plaintiff, on the 7th of January, issued a writ, which was served on the 12th. On the 17th an appearance was entered and a consent given two days after to withdraw the same, which was filed on the 23rd, and judgment entered for want of appearance on the same day. Execution was issued on the 30th. On the 12th of January, defendants dissolved partnership, and on the 23rd, L., one of the defendants, absconded from the province. A creditor of defendants, sued out an attach-

ment against the goods of L. under C. S. U. C. c. 25, s. 2, and applied under s. 22, to set aside the judgment and execution of plaintiffs for fraud and collusion in obtaining same between plaintiffs and defendants:—Held, that the withdrawal of the appearance by L. under the circumstances set out above, and in the affidavits filed on the motion, shewed sufficient grounds for setting aside the execution for fraud and collusion. *White* v. *Lord*, 13 C. P. 289.

Where the application is really in the interest of a subsequent judgment creditor, the mere fact that the judgment debtor makes an affidavit in support of the application, is not enough to make him the party applying. Where the debt is bonâ fide due, the circumstance that the debtor facilitates the plaintiff's recovery of a judgment on a specially endorsed writ, even in pursuance of a previous understanding, while he defends suits brought against him by other creditors, is not enough to constitute fraud. The C. S. U. C. c. 26, s. 17, which avoids judgments obtained on cognovits delivered under circumstances therein mentioned, does not extend to judgments obtained under specially endorsed writs. Quære, is the fact that the debtor agrees to expedite the creditor's recovery of a just debt by judgment, under any circumstances, a collusive, a fraudulent, or a wrongful proceeding. White *c.* Lord, 13 C. P. 289, in this respect doubted. *McKenzie* v. *Harris*, 10 L. J. 213.—P. C.—A. Wilson.

This action was brought to contest the validity of a judgment by the Bank of Upper Canada, against defendants, executors of Z., on a confession for £217,637 9s., the plaintiffs contending that the judgment was recovered in fraud of them and other creditors. It appeared in evidence, that nearly half of the judgment was for a debt due by Z. to the bank; the remainder was for debts of Z. assumed and paid by the bank at defendants' request, and for the advance of $60,000 to defendants, to enable them to complete the Sarnia branch of the Great Western Railway:—Held, that the debt on which this judgment was obtained, was not unjust or illegal, it being clear that executors may pay a debt of equal degree, in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another. *The Commercial Bank of Canada* v. *Woodruff et al.*, 13 C. P. 621; *Hamilton* v. *Woodruff et al.*, 14 C. P. 22.

Plaintiffs having seized the goods of defendants under an execution upon cognovit, other execution creditors applied to set aside or postpone the execution of plaintiffs, on the ground that the cognovit was void as against creditors under C. S. U. C. c. 26, s. 17:—Held, that the court ought not to interfere, but leave the parties to enforce their respective claims against the sheriff. *Ferguson* v. *Baird et al.*, 10 C. P. 493.

It appeared that B.'s judgment, which was attached, was made up for the most part of notes on which he was liable for the defendant in the execution, but which he had not then paid. The defendant had not defended B.'s action, though he had for a time defended that of the plaintiff:—Held, that this conduct did not of itself avoid the judgment, and that the jury were warranted in finding it not fraudulent. *Snarr* v. *Waddell*, 24 Q. B. 165.

Where final judgment in default of appearance to a specially endorsed writ was entered on the 23rd January, and execution issued on the 30th of same month, and a writ of attachment under the Insolvent Act of 1864, issued on the 3rd February, an application on the 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service was held to be too late. *Dunn* v. *Dunn*, 1 L. J. N. S. 239.—C. L. Chamb.—Richards.

Application by the Bank of Montreal to set aside the judgment in this cause, for fraud and collusion with the absconding debtor. The defendant, being largely indebted to the bank, absconded on the 24th of May, 1864, having previously, on the 7th of May, assigned part of his property to the beneficial plaintiff herein. The judgment was on a note for $1,000, dated 1st October, 1863. The summons was issued 27th April, 1864, judgment signed 17th May, and execution issued 25th. The fi. fa. was endorsed for $1,037.83 debt, and $17.39 costs. The beneficial plaintiff admitted that he had only advanced £100 on the note:—Held, that the beneficial plaintiff not denying or explaining the circumstances mentioned in the affidavits filed, or why he allowed judgment to be entered and the execution endorsed for $1,000 instead of $400, (the amount actually due him) until the judgment was attacked; the judgment was fraudulent and should be set aside. *Dickson* v. *McMahon*, 14 C. P. 521.

One of the creditors of defendant, an absconding debtor, applied to set aside the judgment, &c., in this cause, for collusion, &c. It appeared by the affidavits filed, that one of the notes on which the action was brought, was dated the same day the writ was issued. Three days after the defendant absconded. The relations between the defendant and the plaintiff, were proved to have been intimate. A lawyer had been consulted a week previously to the commencement of the action, in relation thereto, and no defence had been made:—Held, to be facts from which collusion might be inferred such as the statute was intended to prevent. *Bean* v. *Wheat*, 14 C. P. 51.

A judgment upon a confession obtained contrary to the C. S. U. C. c. 26, s. 17, was, upon the application of other judgment creditors of the debtor, postponed to their judgment. *McGee* v. *Baird et al.*, 3 P. R. 9.—Q.B.

A judgment will be set aside only on the motion of a subsequent judgment creditor when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain. *Balfour* v. *Ellison et al.*, 3 P. R. 30.—P. C.—Burns.

The suffering a judgment by default, where Statutes of Limitations would have been a bar, is no proof of fraud in defendant. If such judgment be fraudulent, as giving a preference to one creditor, it can only be objected to on that ground by the creditor, and not, as in this case, by the tenant of the executor. *Sloan et al.* v. *Whalen*, 15 C. P. 319.

Some nine years after defendant had obtained his discharge in insolvency, the plaintiff,

scheduled creditor, issued a fi. fa. against defendant's goods on a judgment recovered before the discharge, contending that the discharge was void, because defendant had, previous to his assignment, fraudulently allowed a judgment to be recovered against him and his assets taken; and, also, because, his assets being so taken, there was nothing at the time of the assignment on which it could operate. It appeared, however, that the plaintiff consented to the assignment, and did not appeal from the order of discharge; nor did he, when the discharge was being granted, raise the objection of no assets: —Held, that the fi. fa. goods must be set aside; and that the plaintiff's remedy, if any, was by action on the judgment. Semble, however, that the plaintiff, by his conduct and lapse of time, was precluded. *Parke* v. *Day*, 24 C. P. 619.

The fact that a debtor defends one action brought against him by a creditor, and allows judgment by default for want of an appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under 22 Vict. c. 96, ss. 18 and 19. *Young* v. *Christie*, 7 Chy. 312.

A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a bonâ fide debt. Subsequently both creditors brought actions to recover their respective demands, but in order to enable one of them to obtain a first judgment, no defence was entered to his action, while the other action was defended. The court (following the decision of Young *v.* Christie, in 7 Chy. 312) refused an injunction to restrain the first judgment creditor from enforcing the execution sued out on his judgment. *McKenna* v. *Smith*, 10 Chy. 40.

In a suit to set aside a judgment obtained by a son against his father, as being fraudulent against creditors, it was alleged by both that after the son had attained twenty-one, he had remained working with his father as his farmer and overseer, the father promising to pay him what was right, but no sum as wages was ever named. This alleged agreement continued for about eight years, the son in the meantime having married and brought his wife home to reside with his father, who clothed and maintained them. The father having become embarrassed, by having endorsed for his brother, on which actions had been commenced against him, settled accounts with the son, he demanding, and the father agreeing to give, $15 a month to the son, and $5 a month to the son's wife during her residence in the house, as wages. For this amount the father gave his note to the son, payable on demand, which was immediately put in suit, and the action not being defended, judgment and execution therein were obtained before the plaintiff could recover judgment in her action, which was defended. About the same time the father conveyed his farm to the son for $1,300, alleged to have been paid by the father of the son's wife, the property at the time being subject to several mortgages, one of them, for $2,000, having been given by the father in payment of a small lot of land near Sarnia, but which neither the father nor son had ever seen. The court, Spragge, V. C., diss., under the circumstances, declared the judgment and execution fraudulent and void as against the plaintiff, and ordered the defendants to pay the costs of the suit. *Douglass* v. *Ward*, 11 Chy. 39.

A judgment recovered at law by the fraudulent acquiescence of the defendant in the action, will be enquired into in this court at the instance of a subsequent creditor; although the rule at law is, that only the party to the action can move against the judgment there. *McDonald* v. *Boice*, 12 Chy. 48.

A judgment debtor had suffered a judgment and execution against his goods, in a suit which he had himself caused to be brought by a party as trustee for his wife, under the assumption that she was beneficially entitled to the money come to his hands from the estate of her father, which in fact she was not, but a third person, her mother, was equitably entitled. On an application at the instance of a judgment creditor, that a co-defendant with the judgment debtor should be directed to file a bill to impeach the judgment so obtained by the wife's trustee, the court refused to interfere, holding that there was sufficient doubt of the impeachability of the judgment to induce the court to refrain from directing a bill to be filed, but left the party entitled to the equity to take proceedings on her own responsibility. The application was under the circumstances refused without costs. *Granger* v. *Latham*, 2 Chy. Chamb. 419.—Spragge.

When a security intended to be given for the benefit of one supposed to be equitably entitled, although in preference to another creditor, and which would itself be unimpeachable, has been given by mistake to a wrong person, and that person the wife of the grantor, the transaction, although the grantee had been apparently influenced by motives of personal advantage, was held not necessarily to be impeachable. *Ib.*

II. Miscellaneous Cases.

Interpleader, to try the right to certain shares in a schooner, seized under an execution at the suit of the defendant against W. S. M., on the 2nd of April, 1863. The plaintiff's title arose thus: 1. On the 27th of April, 1859, W. S. M. made a voluntary conveyance to his son; 2. On the 5th of March, 1860, the sheriff, under a ven. ex. against W. S. M., sold to S. M.; 3. The son on the 24th of March, 1863, confirmed this title by a voluntary deed to S. M., who on the same day conveyed to the plaintiff. S. M. had in December, 1861, mortgaged to one T., who on the 28th of March, 1863, assigned to the plaintiff. All these conveyances were duly registered at the custom house. The defendant objected that a judgment should have been shewn to support the ven. ex., and he desired to prove fraud affecting the sheriff's sale, by shewing that W. S. M. supplied the money then paid; but it was not denied that the plaintiff was a bonâ fide purchaser for value without notice:—Held, that the defendant, who so far as appeared was not a creditor of W. S. M. until long after the deed to his son, and who was a stranger to the judgment on which the ven. ex. issued was not in a position to impeach the plaintiff's title, or to require that such judgment should be proved. *Vindin* v. *Wallis*, 24 Q. B. 9.

A. sued B., who had been previously sued by C., the plaintiff. Both suits were in the superior courts, but A. obtained judgment first, chiefly by having his case tried in the County Court. A. issued execution and sold the goods of B.,

who was his son, after which he issued execution against B.'s lands for the residue, and advertised them for sale. C. then filed his bill, charging that at the time of recovering judgment nothing was due from B. to A., and that the judgment was collusive and fraudulent. But it appeared that A. had advanced various sums to B., or paid them on his account, and had also given him goods to a considerable amount, while there was no evidence of anything having been paid or given on account by B. :—Held, that the judgment of A. was good under the circumstances ; but C. consenting to allow A. to examine B. as a witness, a reference was directed to ascertain the amount actually due from B. to A. at the time of A.'s recovering judgment, reserving further directions. *Stevenson* v. *Nichols*, 13 Chy. 489.

A judgment fraudulent against creditors as to part of the sum included therein, is void as against them in toto. *The Commercial Bank* v. *Wilson*, 3 E. & A. 257 ; 14 Chy. 473.

A sale was made by a devisee to defeat the claim of a creditor of the testatrix ; the creditor recovered judgment a few days after the sale, and before the payment of the purchase money ; and an unsuccessful application was afterwards made in the vendor's name to contest the amount due :—Held, in a suit by a creditor impeaching the sale, that the vendee had under the circumstances no equity to be allowed to contest the judgment. *Scott* v. *Burnham*, 19 Chy. 234.

For the purposes of an execution against lands, heirs are primâ facie bound by a judgment against the executor or administrator of their ancestor in the same way as next of kin are bound ; and, although they are not entitled as of course to have the issues tried over again, still it is open to them to shew, not only fraud and collusion, but that the judgment or decree, though proper against the defendant, was in respect of a matter for which the heirs were not liable. *Lovell* v. *Gibson*, 19 Chy. 280.

Where a judgment is successfully impeached on the ground of fraud and collusion between the creditor and the executor of the debtor, it is open to the parties interested in the estate of the deceased to set up the Statute of Limitations to the claim of the creditor, which the executor had omitted or neglected to plead. *Jardine* v. *Wood*, 19 Chy. 617.

Where by fraud and collusion a judgment has been recovered at law to protect the property of the judgment debtor, and a creditor takes proceedings at law for the recovery of his demand, he is precluded from applying to this court for relief, as the court of law has power to work out all the rights and remedies necessary to do complete justice. *Knox* v. *Travers*, 23 Chy. 41.

FRAUDULENT PREFERENCES.

I. Before C. S. U. C. c. 26 — *See* Bankruptcy and Insolvency.

II. Under C. S. U. C. c. 26 — *See* Bankruptcy and Insolvency—Fraudulent Conveyances.

III. Under Insolvent Acts — *See* Bankruptcy and Insolvency.

IV. By Judgment—*See* Fraudulent Judgment.

FRAUDULENT REMOVAL.

See Execution.

FREDERICKSBURGH (TOWNSHIP OF.)

Where it was shewn that a survey made in this township, under 7 Geo. IV. c. 16, was not made as nearly as could be ascertained in accordance with the original survey, according to that act, it was held invalid. *Doe d. Clapp* v. *Huffman*, M. T. 5 Vict.

FRONTIER (OUTRAGES UPON.)

See Criminal Law.

FURTHER ASSURANCE.

See Covenants for Title.

GAMING.

I. Lottery, 1620.

II. Horse Race, 1623.

III. Miscellaneous Cases, 1624.

I. Lottery.

[*See C. S. C., c. 95 ; 27 & 28 Vict. c. 32.*]

A declaration under 10 & 11 Will. III. for playing at a lottery, is insufficient if it state the charge for playing at a game "called" a lottery, without further specification. *Clarke* v. *Donelly*, T. T. 5 & 6 Vict.

The 12 Geo. II. c. 28, supersedes the 10 & 11 Will. III. with respect to lotteries of horses, carriages, and other personal chattels. *Ib.*

Where defendant sold for the plaintiff a pair of horses won by plaintiff at a raffle, and received the purchase money :—Held, that he could not refuse to pay it over, on the ground that the plaintiff had obtained the horses by gambling. *Jamieson* v. *Sherwood*, 14 Q. B. 282.

The imperial statute against lotteries, 12 Geo. II., c. 28, held to be in force in this country. *Corby* v. *McDaniel et al.*, 16 Q. B. 378 ; *Crone* v. *Widder*, 16 Q. B. 356 ; *Marshall* v. *Platt*, C. P. 189.

Assumpsit on a note made by A. payable to B., endorsed by B. to C., and by C. to plaintiff. A. pleaded, 5. That he gave the note to the payee as part of the consideration for the purchase of a lottery ticket, contrary to the statute, and, 6. The same defence, with the averment that the plaintiff became endorsee with full knowledge :—Held, both pleas bad. Held, also, that under the facts and pleadings, set out in the case, there was no defence under the statutes against gambling. *Wallbridge* v. *Becket*, 13 Q. B. 395.

Held, that under the statute 12 Geo. II. c. 28, securities given for the price of tickets are not void in the hands of a bonâ fide holder.

value. *Evans et al.* v. *Morley*, 21 Q. B. 547; 20 Q. B. 236.

Where the jury found that the plaintiffs had not notice of the illegality, the court refused a new trial, holding the defence not one to be favoured. *Ib.*

Plaintiff sold a tract of land to H., giving an agreement to convey on payment of the purchase money at certain periods, and H. re-sold it in lots by a lottery, which the plaintiff was aware of, but had nothing to do with. After the drawing, it was arranged that the plaintiff, instead of H., should enter into agreements with the persons purchasing by the tirage to convey to them the lots which they had drawn on the terms there agreed upon, and that the sums payable by them should be received by the plaintiff on account of the purchase money due to him by H. In an action by the plaintiff on the covenant to pay, contained in one of such agreements:—Held, that the sale by lottery was illegal, under the 12 Geo. II., c. 28, which must be treated as in force here, notwithstanding our act, 19 Vict. c. 49; and that the agreement declared upon, being an adoption of such sale, could not be enforced. *Cronyn* v. *Widder*, 16 Q. B. 356.

A sale of land by lot in which there were two prizes:—Held, within the 12 Geo. II., c. 28, *Marshall* v. *Platt*, 8 C. P. 189.

The plaintiff having illegally sold land to A., by lottery, this agreement was cancelled, and a new one made with B., to whom A. had sold. B. afterwards sold to defendant, to whom the plaintiff subsequently gave a deed, receiving a mortgage for the balance of purchase money. Neither B. nor defendant were concerned in the lottery. The mortgage was sold by the plaintiff, and an action brought upon it in his name. Held, that the mortgage was not connected with the first illegal sale, and that the plaintiff might recover. *Cronyn* v. *Griffiths*, 18 Q. B. 396.

Action on covenants for title in a conveyance by defendant to plaintiff. Plea, that one W., acting for defendant, sold the land in question by lottery, and disposed of the tickets for £30 each: that the plaintiff bought one of the tickets from W., knowing that he acted for defendant, &c. (setting out the scheme of sale). And the defendant averred that the plaintiff drew the land in the conveyance declared upon mentioned as his prize in said lottery: that defendant in pursuance of the illegal agreement executed said indenture; and that the plaintiff took it with full knowledge of the circumstances. Held, on demurrer, plea good, the agreement set out shewing a lottery within the statute. *Power* v. *Cassidy*, 18 Q. B. 403.

Declaration for £100, agreed to be paid by defendant to plaintiff for his right to certain land. Plea, that one J. sold by way of lottery, contrary to the statute, to one V., whose right with full knowledge of the lottery plaintiff purchased, and sold to defendant with J.'s consent, who conveyed to defendant. Held, plea good, as shewing a contract void under 12 Geo. II. *Lloyd* v. *Clark*, 11 C. P. 248.

Where an information was filed by a common informer, under 12 Geo. II., c. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession, and had not been served with the information, to come in and defend. Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant. *Meacham* v. *Street*, 21 Q. B. 396.

An information to forfeit land sold by lottery, contrary to 12 Geo. II. c. 28, may be filed by a private individual, and need not be by the attorney-general or any public officer. No writ or process is necessary, the information being the commencement of the proceeding; and at all events the want of it could not be objected to on demurrer, after defendant had appeared and pleaded. The plaintiff filed his information more than five years after the sale complained of:—Held, too late, for that the case came within the 31 Eliz. c. 5, by which he was limited to one year. No precedent having been found of such an information, the court suggested that it might be necessary to consider in any future case, whether it should not be shewn that the party exposing the land to sale by lottery had been properly convicted of the offence, whether the information must not be served on the party in possession of the land, whether all claiming title should not be called upon by proclamation or otherwise to come in and defend, and whether any preliminary proceedings were requisite. Semble, that the land is not liable to forfeiture after it has got into the hands of a bonâ fide purchaser for value, without notice of the illegality, or except in a proceeding against the person guilty of the offence, or one in possession who had acquired the land illegally. *S. C. Ib.* 498.

The first count of the declaration claimed £100, being the consideration for the assignment by plaintiff to defendant of his interest in an agreement for the purchase of certain freehold property. Second count, for money payable for land bargained and sold by plaintiff to defendant, on an account stated, and for interest. J., the owner of 50 acres, agreed to convey certain lots, in accordance with a lottery, to be held by one D. Lot No. 107 in the lottery was the prize, and was supposed to have a mill privilege upon it. One V., the holder of ticket No. 35, became entitled to No. 107, and he requested J. to convey it to plaintiff, which was done. Subsequently C. (defendant) agreed to purchase the mill privilege from plaintiff, but not being satisfied with his title, he took a quit claim deed from J., paying him £15 7s., which he said he would deduct from the amount he was to pay plaintiff. L. (plaintiff) had drawn another lot, and obtained a conveyance of it upon giving his notes for the purchase money, which notes J. gave to Clark (defendant) when he conveyed the mill pond to him. These notes formed no part of plaintiff's payment for lot 107:—Held, that the evidence did not support the declaration, inasmuch as if the lot mentioned therein was the mill pond, plaintiff had no right or title to it, and could not therefore bargain to sell it; and if it related to lot 107, the transfer alleged in the declaration was not proved, because plaintiff, at the commencement of the suit, was the holder of it. Held, also, that the evidence did not support a claim upon an account stated. *Lloyd* v. *Clark*, 12 C. P. 320.

A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees, first, by a lottery, and failing in that plan of disposition, then in trust to sell as the trustees should deem most advantageous :—Held, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared. *Goodeve* v. *Manners*, 5 Chy. 114.

II. Horse Race.

Where, according to the rule of a race, for one hundred guineas, the decision of the stewards was to be final, and the plaintiff's horse won the first heat, and came in first in the second, but, in consequence of alleged foul riding, was adjudged by the stewards to have been distanced, and another horse was pronounced the winner :—Held, that the plaintiff could not contest such a decision in an action for money had and received against the treasurer of the race, who had not paid over the purse. *Gorham* v. *Boulton*, 6 O. S. 321.

Plaintiff and A. bet upon a horse race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified not to do so :—Held, that the plaintiff might recover back the amount from defendant as money had and received. *Anderson* v. *Galbraith*, 16 Q. B. 57 ; *Sheldon* v. *Law*, 3 O. S. 85 ; *Battersby* v. *Odell*, 23 Q. B. 482.

Defendant, being the treasurer of a turf club by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted him for advances which he had previously made :—Held, that plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Denison*, 28 Q. B. 323.

The proprietor of a race course is not responsible for the purses run for, unless upon an express undertaking. *Gates* v. *Tinning*, 3 Q. B. 295 ; 5 Q. B. 540.

A winner has no right to recover his entrance money because the purse has not been paid over to him. *S. C.* 3 Q. B. 295.

A trotting match for £50 between two horses in sleighs on the ice, is legal within 13 Geo. II. c. 19, and 18 Geo. II. c. 34. *Fulton* v. *James*, 5 C. P. 182.

Two parties, W. & L., each deposited £50 in defendant's hands, to be run for by their horses on the following terms : L.'s horse (Butcher) was to distance W.'s horse (Warrior) three times out of five, in mile heats. Two heats were run ; the first Butcher distanced Warrior, the second Warrior distanced Butcher, when Warrior's owner contended that he had won the race as by the usual rule of racing, a distanced horse could not run again :—Held, that this rule was properly held inapplicable, and that the race was not won. *Wilson* v. *Cutten*, 7 C. P. 476.

III. Miscellaneous Cases.

In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value, also, after it was due, it is no defence that the note was assigned to the plaintiff's transferror in payment of a gambling debt and through fraud. *Burr* v. *Marsh*, M. T. 4 Vict.

No penalty can be recovered under 27 & 28 Vict. c. 4, s. 9, for not affixing stamps to a promissory note for money lost at play, for such note under 9 Anne, c. 14, is utterly void. *Tuck* v. *Golding*, 28 Q. B. 198.

Gambling, by a person who subsequently claims the benefit of the Insolvent Act, is not trading within the meaning of the Insolvent Act of 1864 ; and, Quære, whether gambling is trading at all under that act. *In re Jones, an Insolvent*, 4 P. R. 317.—C. L. Chamb.—A. Wilson.

GAOL AND GAOLER.

I. Court House—*See* Court House.

II. Bail to the Limits—*See* Bail.

III. Liability of Sheriff for Escape—*See* Sheriff.

[*See 36 Vict. c. 48, ss. 348, 356, O.*]

The court refused to discharge a prisoner out of custody, on the ground that the gaoler had taken him to a magistrate upon suspicion of his having committed a larceny in gaol. *Robinson* v. *Hall*, Tay. 482.

The court refused to commit a prisoner brought by habeas corpus from a county goal to the custody of the sheriff of York. *Ib.*

Held not unreasonable for a gaoler to charge 6d. per mile, both going and returning with a prisoner by habeas corpus. *Ib.*

In an action for an escape on final process, a plea of the insufficiency of the gaol is void. *Rowan* v. *McDonell*, H. T. 3 Vict.

Where justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to the gaoler, though their proceedings be erroneous, the gaoler is not liable. Secus, if the proceedings be wholly void. *Fergusson* v. *Adams*, 5 Q. B. 194.

Quære, Where a magistrate has, under the Summary Punishment Act, committed a party unconditionally when it should have been conditional, upon his not paying a fine, can his warrant be a justification to the gaoler. *Ib.*

Semble : That under 24 Geo. II. c. 44 s. 6, a copy of the warrant, if delivered by the gaoler without shewing the original, and no objection made, will be sufficient. Semble, also, that if the original be demanded, its production will be good, though shewn after six days. *Ib.*

The gaoler of a common gaol is bound to receive and detain until released a prisoner delivered into his custody by a constable on a charge of felony, without warrant; and may justify in an action for false imprisonment without shewing what the particular felony was with which the plaintiff was charged. *McKellar* v. *MacFarlane*, 1 C. P. 457.

Maintenance of city prisoners in county gaol—Agreement therefor—Municipal Act of 1866, s. 401 et seq. See *The Corporation of the County of Wentworth* v. *The Corporation of the City of Hamilton*, 34 Q. B. 585.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GAS COMPANIES.

In an action against a gas company for a nuisance, a plea of justification containing the averment that they are now managing their works carefully, and that the vapours complained of unavoidably arise, is bad, as applying the defence to the time of pleading, and not of action brought. *Watson* v. *Gas Co.*, 5 Q. B. 262.

Semble, that a declaration would be good in charging defendants generally with causing offensive vapors to arise, &c., without assigning the particular cause of the vapors; but the defect would be cured by the plea undertaking to describe the causes, &c., and to justify them. *Ib.*

Quere, can the gas company of the city of Toronto, under their act of incorporation and their lease from the city, carry on their work of manufacturing gas, &c., without liability for nuisances injurious to private rights, so long as they occasion no nuisance which they could by due care have avoided. *Ib.*

A gas company incorporated under C. S. C. c. 65, having made a charge for a special illumination, which was disputed, refused to supply gas to the same premises for ordinary purposes until their claim had been paid:—Held, that this was not justified, but that a mandamus would not lie, as the statute imposed no duty; and that the only remedy was by action. *In re The Commercial Bank of Canada and the London Gas Co.*, 20 Q. B. 233.

A company incorporated under the 16 Vict. c. 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which had paid the rent for the preceding quarter. *Smith* v. *The London Gas Co.*, 7 Chy. 112.

[As to calls on stock—*See* "CORPORATIONS."]

[As to liability on contracts not under seal—*See* "CORPORATIONS."]

GENERAL ISSUE.

See PLEADING AT LAW.

GENERAL SESSIONS.

See JUSTICES OF THE PEACE—SESSIONS.

GIFT.

I. OF GOODS INTER VIVOS. 1626.

II. OF LAND—*See* VOLUNTARY CONVEYANCE.

III. GIFTS OBTAINED BY FRAUD OR UNDUE INFLUENCE. *See* FRAUD AND MISREPRESENTATION.

IV. OF LEGACY—*See* LEGACY.

V. DONATIO MORTIS CAUSA—*See* WILL.

I. OF GOODS INTER VIVOS.

Held, that a gift from S. to the plaintiff, in this case of certain mares, not being accompanied by delivery, did not vest the property of the mares in the plaintiff. *Scott* v. *McAlpine*, 6 C. P. 302.

To make a valid gift of personal property inter vivos, an actual delivery and change of possession is not necessary; it is sufficient that the conduct of the parties should shew that the ownership has been changed. *Regina* v. *Carter*, 13 C. P. 611.

In trover for a stump machine, it appeared that the plaintiff had worked on a farm for defendant, his uncle, since he was ten years old almost continuously until of age. Defendant had stated that he intended to give the machine to the plaintiff if he remained with him until he came of age, and the plaintiff swore that after he came of age the defendant said "the machine was the plaintiff's," but he (defendant) wished the plaintiff to let him work it until he got the stumps out. The defendant denied this, and the machine had never been taken away by the plantiff. It also appeared that when taxed with selling the machine, defendant said he was about to sell his farm, and would then pay the plaintiff:—Held, that if the jury believed the plaintiff's account, there had been a complete gift inter vivos, and a verdict for the plaintiff was upheld. *Viel* v. *Viel*, 34 Q. B. 104.

Money was sent by a father to his son, the judgment debtor, as a gift, through a bank. Before any communication by the bank to the judgment debtor, the execution creditor obtained an attaching order and summons on the bank to pay over. The order was issued on the 17th of August, thirteen days before the bank agency at the place where the debtor resided was advised of the deposit:—Held, that the amount could not be attached. Semble, that the father might revoke the gift, and therefore it was not a debt. *Caisse* v. *Tharp*, 5 P. R. 265.—C. L. Chamb.—Dalton, *C. C. & P.*

A parent was not permitted to recall a gift, which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued due from them while she lived with them: the attempt to recall the gift not having been made until after the marriage and death of the son. Per Mowat and Strong, V.CC., and Spragge, C., diss. *Long* v. *Long*, 17 Chy. 251; 16 Chy. 239.

The only proof of the receipt of certain moneys by the wife during the life of her husband was her own evidence, but she also stated that the money had been given to her by him. The court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Chy. 373.

The holder of a mortgage security while labouring under an attack of sickness, of which he subsequently died, endorsed on the indenture a memorandum assigning the same to his wife

for the benefit of herself and his children, which he signed, but did not affix his seal thereto, although the memorandum expressed it to be under seal:—Held, that the wife took no interest under such assignment, either as a gift inter vivos, or as a donatio mortis causa; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs. *Tiffany* v. *Clarke*, 6 Chy. 474.

GLEBE LANDS.

See CHURCHES.

GOODS.

I. ASSIGNMENT, OR MORTGAGE OF—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

II. GIFT OF—*See* GIFT.

III. SALE OF—*See* SALE OF GOODS.

GOODWILL.

The goodwill of a professional business, as a surgeon's, may be sold by the personal representative, and the contract enforced, where the price has been agreed upon, or any other means of fixing its value provided. It is therefore an asset of the estate, to be accounted for in the ordinary course of administration. Semble, however, that the personal representative could not be compelled to find a sale for it. *Christie* v. *Clarke*, 16 C. P. 544. See *S. C.* 27 Q. B. 21.

The plaintiff purchased the defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one C., and entered into a like agreement with him:—Held, that the plaintiff after this sale had not such an interest in the contract with the defendant as entitled him to an injunction, and that his remedy, if any, was at law. *Jones* v. *Wooley*, 16 Chy. 106.

Defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London, in this province, under the name of "Mason's Hotel," or "Western Hotel;" Held, (affirming the decree of the Court below), that such sale implied an obligation, enforcible in equity, that defendant would not thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel;" and would not resume or carry on such business under any name or in any manner, in the premises in question; and would not hold out in any way that he was carrying on business in continuation of or succession to the business formerly carried on by him under the said names, or either of them. *Mossop* v. *Mason*, 18 Chy. 453; 17 Chy. 360; 16 Chy. 302.

[See, also, the cases of Contract, in restraint of trade, under "CONTRACT," p. 719.]

GRAFTON ROAD COMPANY.

The Grafton Road Company have power, under 10 & 11 Vict. c. 93, s. 35, to make contracts by parol. *Turley* v. *The Grafton Road Company*, 8 Q. B. 579.

GRAMMAR SCHOOLS.

See PUBLIC SCHOOLS.

GRAND JUNCTION RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

GRAND RIVER NAVIGATION COMPANY.

Declaration in case for wrongfully keeping up certain dams, and increasing the height of the same, and thereby penning back the water of the Grand river, and causing it to flow against the plaintiff's mills and over his premises. Plea, justifying under the defendants' act of incorporation, 2 Will. IV. c. 13:—Held, good, for that the act authorized the acts complained of and justified. *Kerby* v. *Grand River Navigation Co.*, 11 Q. B. 334.

The company are not liable for consequential injuries arising from works erected by them. *Young* v. *The Grand River Navigation Co.*, 12 Q. B. 75.

They are liable for obstructions in the natural channel, and not merely for such as occur in the artificial channels or works constructed by them. *Phelps* v. *The Grand River Navigation Co.*, 12 Q. B. 245.

They must exercise their powers reasonably, so as to avoid any unnecessary injury to neighbouring proprietors. *Moore* v. *The Grand River Navigation Co.*, 13 Chy. 560.

GRAND TRUNK RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

GREAT WESTERN RAILWAY COMPANY.

See RAILWAYS AND RAILWAY COMPANIES.

GROWING CROPS.

See CROPS.

GUARANTEE AND INDEMNITY.

I. OPERATION OF THE STATUTE OF FRAUDS.

1. *Agreements within the Statute*, 1629.
2. *Consideration*, 1632.

II. CONTRACT OF INDEMNITY, 1634.

1. *Indemnity Bonds*—*See* BOND.
2. *Bonds for the discharge of an Office*—*See* BOND.

III. Construction of Contract.

1. *What amounts to a Guarantee*, 1637.
2. *Extent of Liability*, 1639.
3. *As to the Person to whom given*, 1640.
4. *As to Continuance*, 1641.
5. *Other Cases*, 1642.

IV. Discharge of Guarantor—*See* Principal and Surety.

V. Pleading and Evidence, 1643.

VI. Miscellaneous Cases, 1645.

VII. As between Principal and Surety—*See* Principal and Surety.

VIII. Contribution between Sureties—*See* Bills of Exchange and Promissory Notes—Principal and Surety.

I. Operation of the Statute of Frauds.

1. *Agreements within the Statute.*

"Please credit A. £100, and I agree to hold myself responsible for the payment of the same." Quære, is this undertaking within the Statute of Frauds. *Parker* v. *Dutcher*, 2 O. S. 106.

Where in consideration of the sale of a vessel to A., B. joined with him in an agreement to deliver lumber:—Held, a joint contract, although B. was only surety, and that the consideration, therefore, need not appear on the agreement. *Thompson* v. *Cummings*, M. T. 4 Vict.

A guarantee endorsed on a note at the time of the execution in the following words, "We guarantee the payment of the within note," does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds. *Lee et al.* v. *Reid et al.*, 6 O. S. 295. See *Walker* v. *O'Reilly*, 7 L. J. 300.

The defendant, owing the plaintiff, delivered to him a note for $100, made by one John McGee, payable to defendant or bearer, on the back of which defendant signed the following guarantee, "In consideration of the sum of one hundred dollars, I guarantee the payment of the within note":—Held, that the guarantee was sufficient within the 4th sec. of the Statute of Frauds; for although no promise was named in it, yet the reference in the guarantee to "the within note" made it a promise enuring to the benefit of the bearer, whoever he might be. Semble, that the guarantee created an absolute promise to pay in all events, and that defendant was not entitled to notice of dishonour; but there was no plea raising this question. Quære, whether defendant could be treated as a joint maker. *Palmer* v. *Baker*, 23 C. P. 302.

A. being indebted to B., and C. to A., a promise by C. that he will pay B. the debt due to him by A. in consideration that B. will discharge A., is not within the statute. *Kissock* v. *Woodward*, 1 Q. B. 344.

Where the plaintiff had been employed by A. in getting out timber, which A. afterwards sold to the defendant, who agreed verbally with the plaintiff and others who had been working with him, the timber being in their possession, that he would pay the wages of the plaintiff and the others, if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there:—Held, that on shewing the sale there, the plaintiff was entitled to recover for his wages as money had and received; and that the case was not within the Statute of Frauds. *McDonell* v. *Cook*, 1 Q. B. 542.

Where defendant agreed that if the plaintiff would give up his claim against A. B. for £46, he would pay him £35 out of the proceeds of a certain raft when it should arrive at Quebec:—Held, that the plaintiff could sue the defendant on such agreement upon the common counts, without an agreement in writing. *McDonald* v. *Glass*, 8 Q. B. 245.

The plaintiff had worked for W. in getting out certain timber, but had not been paid in full. Defendant afterwards employed the plaintiff to get the same timber to market, promising in addition to his ordinary wages to pay him the arrears due by W.:—Held, not an undertaking to answer for the debt of another, but a new and original promise made upon a distinct consideration of benefit to defendant. *Tumblay* v. *Meyers*, 16 Q. B. 143.

A., deceased, was indebted to B., who had taken certain securities for the debt. C., on receiving these securities, gave B. the following agreement: This is to certify that I, C., do agree to settle all accounts against the estate of A., deceased, hereinafter mentioned; that is, an unsettled account between B. & A., and one note of hand held by D. against the said A., and one note held by E. against B.:—Held, not within the statute. *Gerow* v. *Clark*, 9 Q. B. 219.

Plaintiff had worked for M. & D. at their mill, and they owing him for wages, the plaintiff's father proposed to let them have a siding machine to put up in the mill, and that the plaintiff should work it until he had sawed enough to pay the arrears due to him and his wages while so engaged, and the price of the machine, they finding the power and timber. Defendant, who was then about to purchase the mill from M. & D., agreed to this proposition, and he afterwards completed the purchase. The machine was put up and worked by the plaintiff, and defendant afterwards promised to pay him his wages while so employed:—Held, that by the arrangement defendant had assumed the arrears due to defendant by M. & D. as a debt of his own, and was liable without any written agreement; but held also that his letters set out in the report of this case sufficiently shewed a contract in writing. *Clark* v. *Waddell*, 16 Q. B. 352.

H. signed a writing in the following words:—"Toronto, 16th December, 1858. Mr. Dixon—Please let the bearer, B., have what goods he may require, and charge yours, M. Hutchinson." Held, not a guarantee for goods furnished to B. on the authority of it, but a direction to furnish the goods on defendant's credit as principal. But Draper, C. J., and Richards, J., disagreed as to the defendant's liability on the common counts, and Hagarty, J., delivering no judgment, the rule dropped. *Grasett et al.* v. *Hutchinson*, 10 C. P. 265.

B. and another had executed a mortgage to the plaintiffs, by which the principal money became due on default in the interest, and the plaintiffs also held the mortgagors' note endorsed

to them by the payee. The mortgagors assigned all their estate and effects, including the mortgaged property, to defendant, in trust for creditors, and he, in consideration that the plaintiffs would not enforce payment of the principal money which had become due on the mortgage, but would accept the interest when he could pay it, verbally promised to pay the note:—Held, a promise to answer for the debt of another, and that the plaintiffs therefore could not recover. *Lee et al.* v. *Mitchell*, 23 Q. B. 314.

Held, under the evidence set out in this case, that there was no evidence of original liability on the part of defendant for the price of the goods in question; and that his promise to pay not being in writing was therefore void under the Statute of Frauds. But as the point suggested on the argument that S. (the purchaser) being an infant could not be primarily liable, the defendant must be, was not taken at the trial, the Court granted a new trial—costs to abide the event. *Merner* v. *Klein*, 17 C. P. 287.

A. being indebted to the plaintiff in $1,100 for timber furnished to him, and used in a vessel which he had contracted to build for the defendant, the plaintiff refused to furnish any more, and the defendant then said to him, that if he, the plaintiff, would furnish what further timber was required to finish the vessel, he (defendant) would pay the plaintiff for it, on the plaintiff getting an order from A.; and that if the plaintiff got an order from A. for the debt then owing by the plaintiff to A., he would pay it:—Held, that the promise as to the $1,100 was void, under the Statute of Frauds, not being in writing; and that it must be regarded as a mere naked undertaking to pay A.'s debt, not as made in consideration of the plaintiff furnishing A. with the timber. *Rounds* v. *May*, 35 Q. B. 367.

One A. had contracted to build certain houses for defendant, and the plaintiff agreed with A. to do the brickwork, but having some doubt as to A's. ability to pay, the plaintiff hesitated to go on. The defendant told the plaintiff that he would see him paid, whereupon the plaintiff proceeded and finished the work:—Held, that defendant's promise was within the statute, and being verbal only the plaintiff could not recover, for A's. liability to the plaintiff continued, and defendant's only liability arose from this promise. *Bond* v. *Treahey*, 37 Q. B. 360.

A. contracted to build houses for defendant, and sub-let the plastering to the plaintiff. The plaintiff commenced the work, but refused to go on without security, whereupon A. gave him a written order to the architects to give him certificates for the plastering as the work proceeded. After this the plaintiff got money from time to time from the architects without reference to A. A. failed, and the plaintiff stopped work for some weeks, when the defendant told him to go on, saying he, the plaintiff, knew all was right; and he thereupon went on and completed the work:—Held, that there was no substitution of the plaintiff for A., but that A's. liability continued; and that defendants promise being collateral, and verbal, was void, under the statute of frauds. *Poucher* v. *Treahey*, 37 Q. B. 367.

An undertaking as surety must, to comply with the Statute of Frauds, name the person to whom it is given. *The Corporation of the County of Huron* v. *Kerr*, 15 Chy. 265.

Where a guarantee did not sufficiently comply with the Statute of Frauds, but the transaction related to an interest in lands for one year, and the principal had gone into possession under the contract and retained possession:—Held, that the contract was binding on both principal and surety, on the ground of part performance. *Ib.*

In such a case some of the sureties, some weeks after possession was taken, refused to sign a formal lease. No proceedings were taken to enforce their undertaking until the year had expired, and the principal had given up possession, a defaulter in respect of his rent:—Held, that the delay was no bar to the suit. *Ib.*

See *Hall* v. *Denholm*, 11 Q. B. 354, p. 1633; *Irvine* v. *Nicholson*, 20 Q. B. 464, p. 1645; *Graham* v. *Watt*, 25 Q. B. 365, p. 1634; *Merner* v. *Klein*, 17 C. P. 287, p. 1645.

2. *Consideration.*

[*By 26 Vict. c. 45, s. 1, the consideration for the promise need not now appear in writing.*]

"I hereby guarantee to you the payment of the carding machine which Hugh McDonald, Esq., Stone Mills, has purchased from you, on the terms agreed on between you and him:"—Held, per Sherwood, J., that the consideration was sufficiently stated. Per McLean, J., that it was not. *Wilson* v. *Hill*, 6 O. S. 9.

A guarantee endorsed on a note, "We guarantee the payment of the within note," does not shew a sufficient consideration. *Lockhart* v. *Reid et al.*, 6 O. S. 295.

"Sir, Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging: I am willing to become responsible to you that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it, I will be responsible for the payment of your debt in twelve months:—Held, that this did not import a past consideration. *Jenkins* v. *Ruttan*, 8 Q. B. 625.

In an action on the following guarantee: "I do hereby promise to guarantee the payment of any sum to S. that the arbitrators chosen by himself and S. & Co., and a fifth person to be chosen by them, may award to said S., in the arbitration now pending between the said parties," dated the 29th of September, 1851,—the declaration stated, that in consideration that the plaintiff, at defendant's request, would leave certain differences between the plaintiff and S. & Co. to the award of, &c., the defendant promised to pay him any sum that might be awarded to him. A bond of submission was signed by S. & Co. on the 3rd of October, 1851: Held, that evidence shewing that the arbitration was not conclusively agreed upon when the guarantee was signed, that the guarantee sustained the consideration as alleged, and that the words "now pending," did not necessarily imply a past consideration. *Shaw* v. *Caughell*, 10 Q. B. 11[illegible].

The plaintiff declared on a verbal promise to pay two quarters' rent due on certain premises which had been leased by the plaintiff to one G., the consideration being that the plaintiff would forbear to distrain. It appeared that when the

promise was made only one quarter's rent was due:—Held, that the promise being void as to the second quarter's rent by the statute, was void altogether. *Hall* v. *Denholm*, 11 Q. B. 354.

C. had contracted with defendants to carry their lumber from Collingwood to Chicago, and had chartered the plaintiff's vessel for that purpose. C. being indebted to the plaintiff, gave him two orders on defendants amounting to £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave the plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. The plaintiff drew accordingly, but defendants then told him that C. had been overpaid by them, and they refused to accept. It was shewn that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel:—Held, that the plaintiff was entitled to recover from defendants, for that the evidence sufficiently shewed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendant's promise. Quære, whether plaintiff's forbearing to detain defendant's lumber as he had threatened would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not. *Moberley* v. *Baines et al.*, 15 Q. B. 25.

Defendant gave plaintiff the following: "I hereby become responsible to you for the payment of £120, on the 1st day of April next, in case C. fails in paying you that sum." In declaring on this the plaintiff alleged that C. was indebted to him in the sum named at the date of the guarantee, and that in consideration of his giving time till the 1st of April, defendant promised to pay then, &c. Defendant pleaded non assumpsit:—Held, that the plaintiff must be nonsuited, for the consideration stated was not supported by the instrument produced, and the plea put in issue the consideration as well as the promise. *Evans* v. *Robinson*, 16 Q. B. 169.

A. leased from B. certain premises, covenanting to pay certain rents. On the back of the lease was the following memorandum signed by C.: "I do guarantee that the within rents shall be paid by me, as they become due, according to the lease, in case it in event that the within named A. does not pay them." This was signed before the delivery of the lease, and as a part of the same transaction:—Held, that the lease and the endorsement might be looked at together to find the consideration, and that the letting of the premises was a sufficient one. *Merrick* v. *Esperance*, 10 C. P. 259.

Upon an action brought on a guarantee for the payment of two notes given in payment for land, the following guarantee was given in evidence: "I hereby guarantee to T. P., or bearer, the collection of two notes hereunto attached, said notes are dated as follows (setting them out,) I hereby agree to pay all costs that may occur in the collection, and the said T. P. or bearer, agree if the said notes cannot be collected from A. B., the maker of said notes, by the said A. B. paying the notes and costs, to transfer the judgment to him, or if the said J. B. considers best, may replace the said notes by other notes, subject to approval:"—Held, not to contain a sufficient consideration on its face, and parol evidence not being admissible to prove the consideration, that it was void. *Perrin* v. *Bingham*, 12 C. P. 306.

"I hereby guarantee to pay W. H., &c., $10 per month until the sum of $330 due by Messrs. B. and H., &c., shall be paid, &c. Signed, M. M." (the defendant):—Held, void, for not expressing or implying any consideration. *Palsgrave* v. *Murphy*, 14 C. P. 153.

The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from incumbrances, of two lots mentioned, then subject to a mortgage to one S.; and in consideration that the plaintiff would accept a conveyance and deliver up the goods; defendants in writing promised to pay the plaintiff $500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that the defendants had not paid the $500. The first agreement under seal, dated 1st June, 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay $1,406, $200 on receiving possession, $500 by a conveyance in fee of the two lots, to be taken as cash for that sum, and the remaining $700 by instalments as stated in the agreement. The second, dated 10th June, was as follows: "Six weeks after date, we, or either of us, promise to pay to Thomas Gibbs Greenham $500, value received, if in the mean time park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to A. S. deceased." Signed by all the defendants:—Held, assuming the promise sued upon to be within the Statute of Frauds, either as a contract by the third defendant to indemnify against the default of the others, or as respecting an interest in lands—that the two agreements (the connection between which was established by their contents), construed with the surrounding circumstances to be gathered therefrom, together with the averments in the declaration, sufficiently shewed the consideration for defendants' promise. Semble, however, that there need have been no writing to bind the third defendant, for the consideration was executed by the plaintiff delivering the goods without getting a conveyance free from encumbrances. Held, also, that under the first agreement the defendants were not entitled to possession of the goods until payment of the $200 and execution of the conveyance. *Greenham* v. *Watt* 25 Q. B. 365.

See *Higby* v. *Cummings*, 10 Q. B. 222, p. 1639; *Rounds* v. *May*, 35 Q. B. 367, p. 1631; *Guthrie et al.*, v. *O'Connor*, 36 Q. B. 372, p. 1643.

II. Contract of Indemnity.

Sheriffs recommended to take precise written engagements from attorneys when they mean to hold them liable in cases they have nothing to do with except professionally, though the court, where the attorney has verbally agreed to indem-

nify, if the agreement is admitted, will enforce it. *In re Corbett* v. *O'Reilly*, 8 Q. B. 130.

Covenant to indemnify "generally and without exception" against a charter party, which defendants had assumed:—Held, under the circumstances of the case, to mean rather without exception as to the description of claim, than as to time; and that defendants would be liable only for moneys accruing due under it during their co-partnership, and thence to the expiration of the charter. *Jones* v. *Walker et al.*, 9 Q. B. 136.

The plaintiff declared on a special agreement, not under seal, that in consideration that the plaintiff, then being a bailiff of a division court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, the defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty: that he did afterwards, as the law directed, seize and sell the crops on the said farm, by virtue of a warrant issued on said judgment, and that afterwards several persons claimed the said goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay; yet that the defendant, having notice of all this, refused to indemnify according to his agreement. A verdict having been found for the plaintiff, held, on motion to arrest judgment, that the declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out not to be a legal execution of the process, and therefore that the agreement was not illegal:—Held, also, that sufficient consideration appeared for the promise. *Robertson* v. *Broadfoot*, 11 Q. B. 407.

Held, that a party giving an absolute covenant for title, and a bond conditioned to pay off a mortgage upon the land by a day named, is liable for the amount of the mortgage, though no legal proceedings have been taken on it by which the party is dammified. *Carlisle* v. *Orde*, 7 C. P. 456.

Held, that the value of goods sold under a judgment recovered upon a mortgage made by the plaintiffs, against which they held a bond of indemnity from defendant, did not form the measure of damages, but they were held entitled to recover the amount of such judgment. *Raymond et al.* v. *Cooper*, 8 C. P. 388.

A person who indemnifies the sheriff for seizing goods does not by that act become liable as a trespasser. *McLeod et al.* v. *Fortune*, 19 Q. B. 98.

The plaintiff and M. having been in partnership, on their dissolution M., with the two other defendants, agreed to pay the debts of the firm, and to relieve the plaintiff therefrom; in consideration of which the plaintiff assigned to defendants all accounts, &c., due to the firm. In an action against defendants for certain debts due by the firm, which the plaintiff alleged defendants had not paid, and for some of which the plaintiff had been sued, and judgment recovered:—Held, that the plaintiff had no right of action unless he had himself paid such debts. *Gray* v. *McMillan et al.*, 22 Q. B. 456.

The plaintiffs being indebted to defendant in $80,000, and to other parties (whether partnership or individual debts) in an amount not exceeding $2,160, by deed dated October, 1859, in consideration of a release of the $80,000, and of $4,000 paid, assigned to defendant all their stock in trade, book debts, and assets (except household furniture) with a covenant on defendant's part to indemnify the plaintiffs from all debts and demands not exceeding $2,160, and a further covenant by both plaintiffs and defendant for $4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed. Upon an action brought upon the covenant to indemnify, and reference to arbitration, it appeared that the defendant had paid plaintiffs' liabilities to the amount of $1,857, and claimed the sum of $356, he having settled that sum by setting off the same with the creditors of the plaintiffs to whom the said debts were due, sums of money due from those creditors to the plaintiffs, being partnership debts due to plaintiffs and assigned to defendant by the deed above stated:—Held, that the sum so set off ($356) was not part of the debts against which defendant had covenanted to indemnify, and that the plaintiffs were entitled to a verdict for that amount. *Rutherford et al.* v. *Steel*, 12 C. P. 9.

Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence:—Held, that under defendant's covenant the plaintiff was entitled to recover the damages and costs in that suit, but not to inte[illegible] *Spence* v. *Hector*, 24 Q. B. 277.

When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering. Quære, whether, when sued on the covenant, he can dispute the liability of the covenantee to damages so recovered. *Ib.*

Held, that the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as, for instance, in this case, of a wrongful distress; and that the plaintiff could not be allowed to impeach the judgment of a competent court by which he was held to be a wrongdoer. *Irwin* v. *The Corporation of Mariposa*, 22 C. P. 367.

Held, that an equitable plea in an action upon a note that the plaintiff had covenanted to pay defendant's debts, which he had broken, whereby defendant was dammified to an amount equal to the amount of the note, was bad, and should be struck out as embarrassing. *Griffith* v. *Griffith*, 6 P. R. 172.—C. L. Chamb.—Gwynn[illegible]

W. sold and conveyed lands by metes and bounds to B., who conveyed to D. by a deed containing absolute covenants for title. A portion of the land so conveyed was subsequently claimed by one R., and an action of ejectment was brought by him to recover possession of it, and D. instituted proceedings under the covenant against B. Under these circumstances B. executed to his vendee a mortgage to indemnify him against all damages, costs and charges [illegible]

respect of the action of covenant. B. subsequently compromised with R. respecting his claim:—Held, that W.'s estate was only liable for what should be found to be the value of the piece of land so claimed, and not the amount paid by his vendee on the occasion of the compromise. *Hart* v. *Bown*, 7 Chy. 97.

The plaintiff endorsed notes for W. B., which were discounted at two different banks, and W. B. indemnified plaintiff against these endorsements by mortgage. The notes were paid when due, at these banks, with the proceeds of other notes of W. B., endorsed by plaintiff, and discounted at a third bank:—Held, that the indemnity secured the plaintiff against the last mentioned endorsements. *Burnham* v. *Burnham*, 10 Chy. 485.

Semble, that indemnity given to an endorser will protect him against liability on any other securities, in whatever shape, to which he may become a party at the request of the maker, to keep the amounts of the notes outstanding. *Ib.*

III. Construction of Contract.

1. *What Amounts to a Guarantee.*

A. contracts with a company to make a highway, and B. becomes his security to them. A. then employs C. to cut out certain timber for him, and while C. is thus engaged A. fails in his contract with the company. B., the surety, tells C. to go on and he will see him paid. Upon completing his work C. sues A. and B. jointly:—Held, that there was no joint contract by A. and B. with C., but that A. was primarily liable on his contract, and B. as a guarantor. *Nicholas* v. *King et al.*, 5 Q. B. 324.

"Sir,—Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging. I am willing to become responsible to you that good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default of your not receiving it, I will be responsible for the payment of your debt in twelve months:—Held, 1. An actual guarantee, and not a mere proposal requiring acceptance to render it binding: 2. That offering a mortgage subject to two prior mortgages, (which were given moreover after the guarantee) was not such a valid mortgage as the guarantee imported. *Jenkins* v. *Rutter*, 8 Q. B. 625.

W. made a note payable to plaintiff, but not negotiable, which defendants endorsed. It was proved to have been given for money lent to W. to the plaintiffs in defendants' presence, and for which they agreed to become security: that one of them had paid interest on it, and that both had promised to pay the note, when spoken to:—Held, that defendants could not be held liable as upon a note, nor as on an account stated. Quære, whether the plaintiffs could have recovered as upon a guarantee. *Skilbeck et al.* v. *Porter et al.*, 14 Q. B. 430.

"I guarantee the payment of the within," endorsed on a note, over the signature of the payee, treated as an endorsement of the note, and not as a guarantee or collateral engagement for its payment. *Walker* v. *O'Reilly*, 7 L. J. 300. C. C.—Mackenzie.

Defendant endorsed notes for the accommodation of the maker, who was in business as a druggist, without knowing how they were to be applied, and the maker transferred them to the plaintiffs for goods purchased from them. Defendant not being liable upon them as notes, the sums payable being uncertain:—Held, that there was clearly no right of action against him as upon a guarantee. *Fahnestock* v. *Palmer*, 20 Q. B. 307.

One H., requiring some proof spirits for his trade, received from defendant a letter to the plaintiff, a distiller, to whom defendant was well known, but H. a stranger. There had been no previous application by H. to the plaintiff for a credit, nor had the latter declined dealing with him without a guarantee. The letter was as follows: "The bearer is Mr. H., a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction, I am sure that Mr. H. will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for:"—Held, not a perfect guarantee in itself, but that to make it such the plaintiff should have notified defendant that he accepted the proffered guarantee, and that he had given or meant to give credit to H. on the strength of it. *Kastner* v. *Winstanley*, 20 C. P. 101.

The owner of a mill property wrote to an intending purchaser, "I will sell the mill as it now stands, at Glenmorris, with all rights and privileges belonging to it as sold me, and I will guarantee to give a head of five feet by laying out about £30; but as it is, there is four feet, and there is water enough to run ten run of stones if necessary:"—Held, that these representations amounted to express guarantees, upon the several points embraced in them. *Gale* v. *Hubert*, 6 Chy. 312.

S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced to him £3000 as his share of the capital thereof. The firm having failed made an assignment, in which S. was preferred to the amount of £3565, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1000:—Held, notwithstanding, that S. was bound to make good his representation to R. & K. so far as they alone were concerned; but that other creditors could not participate, the representation being only to a particular creditor; unless it should appear that a portion of the preferred claim of S. was not a debt of the firm to him, but consisted of capital advanced to the son, in which event that portion would be applied on their claims, it not appearing that the goods furnished by them had been sold upon the faith of the representation to R. & K.; but Semble, if that had been shewn to have been the case, they would have had that right. *Rainey* v. *Dickson*, 8 Chy. 405.

D. having negotiated for the purchase of unpatented lands, and the vendee of the crown requiring security for the purchase money, D. obtained from his father a letter addressed to himself, as follows: "If you make the contemplated purchase from H. of wild lands, amounting to 16,000 acres, at 8s per acre, and deducting all amounts due or hereafter payable on the same, I will become your security for the payment of the principal on the crown lands and

interest, and the interest on the deeded lands." "P. S.—I will see you have the £2000 to pay in cash when all papers are signed:"—Held, that this letter was not a promise to provide for the payment of the £2,000 cash, which could be enforced by the vendor. *Helliwell* v. *Dickson*, 9 Chy. 414.

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2. *Extent of Liability.*

"Messrs. A. & D. Shaw: Gentlemen,—I have just received a line from F. informing me that he wishes to purchase goods from you. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods, should he require that amount:"—Held, not applicable to the purchase of goods by F. and a partner, but by F. alone. *Shaw et al.* v. *Vandusen*, 5 Q. B. 353.

The executors of sureties are liable for the defalcation of the principal committed after the death of their testator, and even after notice given by the executors that they would not be liable. *Regina* v. *Leeming*, 7 Q. B. 306.

In an action on the following guarantee:—"Whereas H. H. & Co., of Albany, have authorized S. and J., of Houghton, Canada West, to draw on them to the amount of $5,000; and whereas the said S. and J. promise and agree to ship to the said H. H. & Co., a sufficient quantity of lumber, in the months of May, June, July, and August next, to pay the same. Now, therefore, in consideration of $1 to me in hand paid, I hereby guarantee to Messrs. H. H. & Co. that the lumber shall go forward agreeably to contract, and in default of the same, I will be responsible to them to the amount of the advances, the same not exceeding $5,000:"—Held, that defendant was not entitled to credit as against his guarantee for the gross value of the lumber sent, but that the plaintiffs were entitled to deduct their charges. Held, also, that the declaration, as to the statement of the consideration, was sufficiently supported by the proof. *Higby et al.* v. *Cummings*, 10 Q. B. 222.

In April, 1850, R. became security to the plaintiffs for S. to the extent of £100, and S. thereupon received goods from them to the amount of £151. In April S. desired to make a further purchase. R. wrote to the plaintiffs becoming security to the extent of £75, and in his letter he said, "I understand from S. that he has paid you £75 on account of the £100." The plaintiffs sent no answer, but supplied the goods required. The £75 had been paid by S., and in his letter enclosing it he said, "I send you £75 on account of goods bought by me, being one-half of the whole:"—Held, that R. was entitled to have the whole of this payment credited against the £151 secured by his first guarantee, and that the plaintiffs could not appropriate it to any part of the debt of S. for which R. was not liable. *Lyman et al.* v. *Miller*, 12 Q. B. 215.

A. agrees to become surety to B. for all such advances as B. may make to C. during a limited period. B. makes no individual advances to C. at all, but during the period B. with D., a stranger to A., make advances to C.:—Held, that B. cannot recover from A. such advances. *Stevenson* v. *McLean*, 11 C. P. 208.

One S. had contracted to build a house for defendant, and had employed the plaintiff, under an agreement, to do a portion of the work. The plaintiff complained that S. did not pay him as he had undertaken to do, and was unwilling to proceed, and after some negotiation, the following paper was signed: "Stratford, 21st of May, 1858.—$198.—Good to P. A. Loftus (the plaintiff) or bearer, for $198, payable so soon as Loftus completes and finishes his contract at T. C. Lee's dwelling house in Stratford. Alex. Scrimgour." This was endorsed by defendant Lee, and at the foot was written as follows:—"£56. A further sum of fifty-six pounds will be due to Loftus, being balance of contract, three months after said contract is completed and accepted by the architect. This sum I secure to Loftus for account of Scrimgour. T. C. Lee. A. Scrimgour." The work had been completed and certified; it was proved that before the writing was signed defendant had told the plaintiff that if he would wait he would be answerable for the whole amount due him, and defendant had paid the plaintiff $115, for which a receipt was endorsed on the paper. The first count of the declaration alleged that in consideration that the plaintiff, at defendant's request, would proceed with the work, defendant promised to pay him the £56, &c.; the other counts were for work and materials, and on account stated:—Held, that the plaintiff was entitled to recover the £56, but not the balance of the $198. *Loftus* v. *Lee*, 18 Q. B. 195.

One T. contracted with two firms in Quebec, N. & Co. and M. & Co., for advances, to be covered by shipments of timber within a specified period, agreeing to furnish defendant's guarantee for performance of his part of the contract. Defendant in a letter to M., a partner in one of the firms, guaranteed that T. would furnish timber in the year 1859, equal in value to the advances made by him, M., to said T.:—Held, 1. That in an action by M. alone he could only recover the amount of *his own* advances to T.; 2. That M. must, as far as defendant was concerned, give credit for all lumber received by him from T. *Stevenson et al.* v. *McLean*, 10 C. P. 414.

Defendants on the 20th April, 1867, guaranteed in writing the payment to the plaintiff, a nursery gardener, of his account against H. for nursery productions to be delivered to H. that spring, said payment to be made to the plaintiff by H. or the defendants within twenty days after receipt of the trees by H. On the 4th of February preceding, an agreement under seal had been executed between the plaintiff and H., that the plaintiff should deliver trees at certain stations, at the prices mentioned, in such quantities as H. might sell, for which H. agreed to pay one-half the days after delivery of the trees, and to give his note endorsed for the balance, payable in six or eight months from delivery, or the notes of the purchasers. In an action on the guarantee it appeared that the balance due by H. in all, for deliveries after the guarantee, was $460.22, of which $60 was due on the cash part of the transaction, and only $60 part had been entered by the plaintiff in his day book; for the rest he held purchasers' notes. Held, that the guarantee clearly could apply only to the $60. *Leslie* v. *Long et al.*, 27 U. C. R. 482.

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3. *As to the Person to whom given.*

"Mr. Thomas Mason. Dear Sir,—In reply to your favour of this date, I beg to say, I will

pay whatever sum you may agree upon to pay for an omnibus, if you should find one to suit you, so soon as the same is delivered to you in Hamilton; and this may be considered as a guarantee to the party from whom you may purchase. I remain yours very truly. (Signed) Samuel Mills :"—Held, that this, though addressed only to T. M., would attach at once as a guarantee in favour of any party who might furnish the omnibus; and that no further proof of acceptance or of consideration was required. *Manning* v. *Mills*, 12 Q. B. 515.

Defendant addressed to I. V. & Co. the following guarantee: "Gentlemen,—In consideration of your filling the orders for goods from your Birmingham house of J. C. & Co., say the spring importations, I hereby hold myself responsible for and guarantee the payment of the same to you." I. V. & Co. were the agents in New York for the Birmingham house referred to, whom the defendant knew, but they had no other connection with them. The goods having been furnished to J. C. & Co.:—Held, that the Birmingham firm could sue upon the guarantee, if intended for their benefit, which might be proved by parol evidence. *Van Wart et al.* v. *Carpenter*, 21 Q. B. 320.

One T. contracted with two firms in Quebec, N. & Co. and M. & Co., for advances, to be covered by shipments of timber within a specified period, agreeing to furnish defendant's guarantee for performance of his part of the contract. Defendant in a letter to M., a partner in one of the firms, guaranteed that T. would furnish timber in 1859, equal in value to the advances made by him, M., to said T.:—Held, that a joint action by M. and N. & Co. would not lie. *Stevenson et al.* v. *McLean*, 10 C. P. 414.

See *Guthrie et al.* v. *O'Connor*, 36 Q. B. 372, p. 1643.

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4. *As to Continuance.*

Where defendant agreed to lend the plaintiff £2,000, to be advanced as it might be required, and received from plaintiff a conveyance of land to secure the advances, and gave back a bond reciting the agreement, and binding himself to re-convey the lands on repayment of the sum advanced, on a certain day, and defendant before that day made further advances to £10,000, and received timber, &c., on account to £7,000:—Held, that the bond was a continuing security, and that defendant was not obliged to re-convey on payment of the £2,000 first advanced. *Wells* v. *Ritchie*, 6 O. S. 13.

The plaintiff sued defendant on the following guarantee: "I hereby hold myself accountable to you for any goods Mr. F. M. may purchase of you to the amount of £250 cy.:—Held, a continuing guarantee. *Ross* v. *Burton*, 4 Q. B. 357.

"Messrs. A. & D. Shaw. Gentlemen.—I have just received a line from F. informing me that he wishes to purchase goods from you. Being acquainted with his circumstances, and knowing him to be a man of prudence and integrity, I do not hesitate to be responsible to you for £150 or £200 worth of goods should he require that amount:"—Held, not a continuing guarantee. *Shaw et al.* v. *Vandusen*, 5 Q. B. 353.

Defendant and another addressed to plaintiff this note: "In consideration of your supplying to M. supplies of, &c., out of your store for his business, we agree to become responsible for the payment of $200 for such goods, and guarantee the payment of that amount, whether the same be due on note or book account, to you for said hardware, iron, &c.:"—Held, a continuing guarantee. Held, also, following Bradbury v. Morgan, 1 H. & C. 249, that the death of one of the guarantors did not extinguish the guarantee, in the absence of any notice to plaintiff on behalf of his estate, and the survivor having acknowledged his liability, and promised to settle. *Fennell* v. *McGuire*, 21 C. P. 134.

S. by letter informed R. and K. that his son was a partner in a firm, and that he had advanced him £3,000 as his share of the capital thereof. The firm having failed, made an assignment in which S. was preferred to the amount of £3,565, represented as made up of loans and advances to the firm. The actual capital advanced to the son appeared to be only £1,000:—Held, notwithstanding that S. was bound to R. and K. by his representation, and that such statement of S. operated as a continuing guarantee to them. *Rainey* v. *Dickson*, 8 Chy. 450.

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5. *Other Cases.*

Declaration on the following guarantee:—"Please credit A. £100, and I agree to hold myself responsible for the payment of the same," and averring that the plaintiff did credit A.:—Held, that the plaintiff must prove such averment; and that calling a clerk, who stated that such credit had been given, because he saw it entered in the plaintiff's books, which were not produced, and which entry had not been made by him, was not sufficient. Semble, that such guarantee might refer to an existing account, or to future credit, and that on the evidence it was properly found to apply to the former. *Parker* v. *Dutcher*, 2 O. S. 106.

A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument and the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning. *Kastner* v. *Winstanley*, 20 C. P. 101.

There were three executions in the sheriff's hands against one W., in two of which the plaintiffs were attorneys for the execution creditors, and the defendant was attorney for one H., who had the other execution. A sale had been advertised for the 25th January, and on that day the defendant signed an instrument under seal, as follows: "I agree with G. W. & C. (the plaintiffs) to pay off the principal, interest and costs, with sheriff's fees, in suits (naming the two suits in which plaintiffs were attorneys), in consideration of their agreeing to postpone the sale advertised of defendant's goods for one week." C. and the defendant then went to the sheriff's office, and instructed the person in charge to postpone the sale, and the bailiff left with defendant to go out to the place and postpone it, for which the defendant was to pay the expenses. When the bailiff got there the sale had been going on an hour, but it was stopped, and the goods sold were got back except to the amount of $45, which was paid to defendant. The

plaintiffs thereupon sued the defendant on his guarantee:—Held, that they were entitled to recover the amount unpaid in their two suits; for they had performed their agreement, and defendant had got what he had bargained for; and the plaintiffs were the proper parties to sue. *Guthrie et al.* v. *O'Connor*, 36 Q. B. 372.

One M., requiring machinery for a cheese factory, gave the plaintiffs, who manufactured such machinery, an order for it in March, to be shipped to him on the 1st May, at the price of $100. The plaintiffs required security before filling the order, and the defendant wrote to them on the 25th March, 1875: "I recommend M. to you, and if he should fail in his promise to you for anything in your way, I consider myself jointly liable for the amount of $200, payable in six months to your firm." The balance was secured by the guarantees of other persons. The machinery was shipped to M., the last shipment being on the 5th May, and M. gave his note payable in six months from that day—six months' credit being the plaintiffs' usual course of dealing:—Held, taking the guarantee in connection with the surrounding circumstances, that it must be referred to the specific order which M. had given, and of which defendant must be supposed to have been aware; and that defendant's liability arose immediately on M.'s default at the expiration of the six months' credit. The defendant's contention was that the guarantee limited the period during which defendant should be liable to six months from its date, and that a further time having been given he was discharged; and at this trial the learned judge ruled that it was a continuing guarantee for any goods to the extent of $200, but that defendant was not liable until the expiration of six months after M.'s default, so that this action, brought on the 9th December, was premature. *Boyle* v. *Bradley*, C. P., E. T., 1876, not yet reported.

See *Jenkins* v. *Ruttan*, 8 Q. B. 625 p. 1637.

V. Pleading and Evidence.

An action for goods bargained and sold cannot be maintained against a person who has become responsible for the payment of goods delivered to a third party. *McKenzie et al.* v. *McBean*, 4 O. S. 137.

An action for money paid will not lie against a person who has engaged to indemnify another against the costs of an action brought against him for the amount of these costs, after they had been paid by the party indemnified. The action should be special on the indemnity. *Miller* v. *Munro*, 6 O. S. 166.

Where in assumpsit on a promise to indemnify, the defendant pleaded that more than six years had elapsed since the promise accrued, the plea was held bad on general demurrer. *Ives* v. *Ives*, T. T. 3 & 4 Vict.

The plaintiff sued defendant on the following guarantee;—"I hereby hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you, to the amount of £250 currency." It was proved that the plaintiffs had sold goods to M. on the 19th November, 1845, amounting to £311, and that after the original credit of six months on the £311, (understood between the parties at the time of sale, as the jury found) had expired, the plaintiffs had extended the time by taking notes without defendant's privity. It was also proved that on the 2nd of April, 1846, other goods were sold to M. to the amount of £83, for which M. at the time gave his bill at three months. Defendant pleaded a defence which covered only the first sale of £311, to which the plaintiffs, by their replication simply denying the truth of his defence, admitted his claim to be limited:—Held, that though the sum of £83 might have been recovered under the continuing guarantee, yet that without a new assignment the plaintiff could not recover in this action. *Ross et al*, v. *Burton*, 4 Q. B. 257.

Where the plaintiff charged defendant as upon a guarantee to pay a certain judgment, which he set out in specific terms, and afterwards proved at the trial a guarantee extending to all claims:—Held, nonsuit right. *Sutherland et al.* v. *M Caskill*, 5 Q. B. 316.

Semble, however, that if the plaintiff had set out the guarantee as it was, and averred the claim under the judgment, he would have sustained his action. *Ib.*

Where A., in consideration of B.'s advancing money to C., guaranteed that B.'s acceptance of C.'s drafts should be covered by consignments of flour, together with commission; and in an action against A. for non-fulfilment, he pleaded that before the maturity of the drafts, which amounted in all to £1,500, the plaintiffs did receive from B., to cover the same, sundry large quantities of flour, amounting in the whole to 9[illegible] barrels, and did sell the same for a large sum namely, £1,657 5s. 9d., and much more than sufficient to cover the said drafts so accepted, &c., and the said commission:—Held, plea bad in not averring directly that the plaintiffs' advances were covered, together with commission; and also, in tendering an immaterial issue, in pleading that flour was received more than sufficient to cover, &c. *Ib.* 36. *et al.* v. *Sherwood*, 7 Q. B. 530.

One D. having recovered a judgment against M. & Co., certain notes payable to the firm were deposited with B., and underneath a [illegible] was the following guarantee: "We hereby, in consideration of £50 by us received from B. this day, guarantee the payment of the above notes by the respective makers at the respective maturities thereof." This was signed by M. & Co., and underneath was an agreement that the payment of the judgment within ten days, the notes should be returned to M. In an action against M. & Co., on this guarantee, averring non-payment of one of the notes: Held, that it was sufficient to declare on the guarantee only, without mentioning the agreement at the foot of it. *Day* v. *McLeod et al.*, 18 Q. B. 256.

The defendant purchased goods from the plaintiffs with instructions to charge and send them to one Fox, which they did, and after receiving a portion of the purchase money brought this action against the defendant, claiming that he was liable as purchaser of the goods. Several letters were put in evidence written by the plaintiff to Fox, in one of which was the following passage: "It is now so long since your account was due, that there is no other recourse left except to follow up Mr. McL. who is guarantor"

and in another, "We shall place the matter in the hands of G. L., Amherstburg, with instructions to proceed immediately against you and Mr. McL. for the amount." The plaintiffs also proved that the defendant had ordered goods in the same manner from merchants in Montreal, and in some instances paid, and in others given his own notes for them. The jury having found for the plaintiffs, and that the credit was originally given to the defendant, the court refused to disturb the verdict. *Ogilvie et al.* v. *McLeod*, 11 C. P. 348.

In an action for goods sold, Held, under the special facts set out in the case, that there was no evidence of original liability on the part of defendant, but that the only liability was from his promise to pay plaintiff the amount, and this being verbal, was void under the Statute of Frauds, to whom the goods were sold, *Merner* v. *Klein*, 17 C. P. 287.

The plaintiff sued on a guarantee, alleging, by way of inducement, that it was proposed to him by the defendant N., that if he he would allow a certain assignment made to him of a leasehold property to be put on record, he, N., would give him security on other real property for the payment of certain moneys, to which the plaintiff agreed; and the plaintiff averred that in consideration that he would allow the said assignment to be put on record, the defendants promised that the arrangement made with N. for the payment of the said balance should be duly carried out, otherwise defendants would pay the plaintiff £135, that being the sum to be secured. The breach was, that defendants would not carry out the said arrangement, nor secure to the plaintiff the £135. Defendant N. pleaded non-assumpsit. The guarantee, when produced, shewed that defendants had not agreed absolutely to secure the plaintiff, as alleged, but to pay the 135 if N. did not do so:—Held, that verbal evidence of an agreement to the effect declared upon was inadmissible, and that it would at all events have been useless, for an agreement, either by the other defendant, I., to become responsible for N.'s default, or by both to give security on real property, must be in writing. *Irvine* v. *Nicholson et al.*, 20 Q. B. 464.

See *Parker* v. *Ducher*, 2 O. S. 106, p. 1642; *Evans* v. *Robinson*, 16 Q. B. 169, p. 1633.

VI. Miscellaneous Cases.

Where a party binds himself in an agreement to pay the plaintiff £25 if A. B. does not fulfil all the covenants and conditions of the agreement, the £25 must be looked on as a penalty, and not as liquidated damages giving the plaintiff an action as for an absolute debt. *McLean* v. *Tinsley*, 7 Q. B. 40.

A. guaranteed to B. (a creditor of C.) certain composition notes, which B. was to endorse for the other creditors of C. B. represented to one or more of the creditors, before the composition was agreed to, that he (B.) was to accept a like composition himself, but he had a secret bargain with C. that he should be paid in full:—Held, on grounds of public policy, that this secret bargain vitiated the whole transaction, and that A. was not liable to B. on his guarantee. *Clarke* v. *Ritchey*, 11 Chy. 499.

GUARDIAN.

I. Of Infants—*See* Infant.

II. Of Lunatics—*See* Lunatic.

HABEAS CORPUS.

I. Issue of.

1. *When granted*, 1646.
2. *Who may grant*, 1647.
3. *Practice*, 1647.

II. Return to, 1648.

III. Discharge of Prisoner, 1649.

IV. Miscellaneous Cases, 1649.

V. In Cases of Extradition—*See* Extradition.

[*See. 29 & 30 Vict. c. 45.*]

I. Issue of Writ.

1. *When granted.*

It is not illegal to issue a writ of habeas corpus to bring up a debtor in custody on an attachment for the non-payment of costs, and the sheriff cannot therefore justify an escape from the attachment on the ground that the debtor was brought up by habeas corpus by the plaintiff, and that it would have been illegal for the sheriff afterwards to detain him, and so he was permitted to leave his custody. *Graham* v. *Kingsmill*, 6 O. S. 584.

A habeas corpus will not be granted to bring up a prisoner under sentence at the Sessions for larceny. *Regina* v. *Crabbe*, 11 Q. B. 447.

A writ of habeas corpus ad testificandum may be issued to the warden of the penitentiary to bring up a convict for life, to give testimony on behalf of the crown in a case of murder. *Regina* v. *Townsend*, 3 L. J. 184.—C. L. Chamb. Burns.

Though an offender for whose arrest a magistrate's warrant is issued be in a different county, and a prisoner for debt in close custody, he may be removed under writs of habeas and recipias. *Regina* v. *Phipps*, 4 L. J. 160.—C. L. Chamb.—Hagarty.

Where it appeared that the prisoner was in custody under a writ of capias, issued out of the County Court, regular on it face, but which, it was contended, had been improperly issued, a judge in Chambers refused to discharge the prisoner. *In re Bigger*, 10 L. J. 329.—C. L. Chamb. J. Wilson, Hagarty.

When a county judge has jurisdiction in the premises a Superior Court judge will not in general (if at all) exercise a power of appeal by habeas corpus, which was never intended as a means of appealing from the discretion of a county judge. *Runciman* v. *Armstrong*, 2 L. J. N. S. 165.—C. L. Chamb.—A. Wilson.

Semble, that a prisoner is not entitled to a writ of habeas corpus under the statute of Charles unless there be "a request made in writing by him or any one on his behalf, attes-

ted by two witnesses who were present at the delivery of the same." *In re Carmichael*, 1 L. J. N. S. 243.—C. L. Chamb.—J. Wilson.

The proper proceeding to reverse a judgment and sentence of the Court of Quarter Sessions is by writ of error, not by certiorari and habeas corpus. *Regina* v. *Powell*, 21 Q. B. 215.

Remarks as to the inconvenience, if not danger, of making the writ of habeas corpus a mere method of appealing from other tribunals on points more of practice than affecting the merits. *In re Munn*, 25 Q. B. 24.

The 29 & 30 Vict. c. 45 had in view and recognizes the right of every man committed on a criminal charge to have the opinion of a judge of a Superior Court upon the cause of his commitment by an inferior jurisdiction. *Regina* v. *Mosier*, 4 P. R. 64.—C. L. Chamb.—J. Wilson.

A deputy judge of a County Court declined, on the ground that he was the partner of the plaintiffs' attorney, to entertain an application by the defendant for a supersedias because he had not been charged in execution within the term next after judgment:—Held, that the defendant was entitled to be discharged from custody under a writ of habeas corpus. *Reid et al.* v. *Drake*, 4 P. R. 141.—C. L. Chamb.—A. Wilson.

A prisoner having been sent to the penitentiary upon a judgment which was afterwards reversed, as having been pronounced upon two counts, one of which was defective, a habeas corpus was ordered to bring him up to receive the proper judgment. *Cornwall* v. *Regina*, 33 Q. B. 106.

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2. *Who may grant.*

As to the right of a judge sitting in Chambers in Upper Canada to order the issue of a writ of habeas corpus, where the custody is not for criminal or supposed criminal matter; the Imperial Statute 56 Geo. III. c. 100, not being in force in this colony. *In re Hawkins*, 9 L. J. 298, doubted. *In re Bigger*, 10 L. J. 329.—C. L. Chamb.—J. Wilson, Hagarty.

A judge in Practice Court cannot grant a rule nisi for a habeas corpus ad subjiciendum. *Regina* v. *Smith*, 24 Q. B. 480.

Held, that at common law the judges of the superior courts of Common Law can order writs of habeas corpus ad subjiciendum in vacation, returnable either in term or vacation. *Re Hawkins*, 3 P. R. 239.—C. L. Chamb.—A. Wilson.

A judge in Chambers, under orders of 1853, may grant a writ of habeas corpus. *Re Paton*, 4 Chy. 147.

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3. *Practice.*

The affidavit upon which an order for a habeas corpus is moved, should be entitled in one of the superior courts. As a general rule it should be made by the prisoner himself, or some reason, such as coercion, &c., shewn for his not making it. It is discretionary with the judge to receive an affidavit of a different kind. *In re Ross*, 3 P. R. 301.—C. L. Chamb.—J. Wilson.

Quære, can a judge in Chambers rescind his order for a habeas corpus, or quash the writ itself, on the ground that it issued improvidently. *Ib.*

Quære, has he power to call upon the prosecutor or magistrate to shew cause why a habeas corpus should not issue, instead of at once ordering the writ. *Ib.*

II. Return to.

It is sufficient to return to a writ of habeas corpus a copy of the warrant under which the prisoner is detained, and not the original. *In re Ross*, 3 P. R. 301.—C. L. Chamb.—J. Wilson.

Held, that the person to whom a habeas corpus is directed, commanding him to return "the cause of taking and detainer," must return the original, and not merely a copy of the warrant, In re Ross, 3 P. R. 301, to the contrary, doubted. *In re Carmichael*, 10 L. J. 325.—C. L. Chamb.—Draper.

Quære, 1. As to the power of a judge sitting in Chambers, on an application of a prisoner for his discharge on a bad warrant, to remand him, and in aid of the prosecution to order the issue of a certiorari to bring up the depositions, &c.; 2. As to power of a court or judge, upon reading the depositions, to amend a bad warrant of a coroner, or issue a new one for the purpose of detaining a prisoner in custody. *Ib.*

The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen street, in the said city," and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the committment, conviction, information, and depositions were brought up. On application for her discharge:—Held, no objection that there was no evidence to warrant the conviction—for when a proper commitment is returned to a habeas corpus, and there was evidence, the Court will never enter into the question whether the magistrate has drawn the right conclusion from it. Semble, that on such an application affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him; but that such conduct may furnish ground for a criminal information. Quære, with regard to some of the objections, whether the court, on such an application, can go behind the warrant of commitment. *Regina* v. *Munro*, 2 Q. B. 44.

The mere fact of the warrant of commitment having been countersigned, under 31 Vict. c. 16, D., by the clerk of the Privy Council, does not withdraw the case from the jurisdiction of a judge on a habeas corpus. The prisoner may contradict the return to the writ by shewing that one of the persons who signed the warrant was not a legally qualified justice of the peace. *Regina* v. *Boyle*, 4 P. R. 256.—C. L. Chamb.—Morrison.

A habeas corpus directed to a gaoler was sent to the clerk of the crown, with a return stating that he held the prisoners under a warrant of committal annexed, but was unable to produce them for want of means to pay for their conveyance. This return having been marked by the clerk, "Returned and filed," a judge allowed these papers to be withdrawn for the purpose of having another return made. The prisoners were afterwards produced with the writ, to which

the foregoing return was annexed, and another stating that the prisoners were held under the warrant already spoken of and a subsequent warrant, by which an alleged defect in the first was intended to be cured:—Held, 1. That the first return was in fact no return, merely alleging matters of excuse for not making a return; 2. That a return cannot be filed until it has been read before the judge; and that the second return was authorized. *Regina* v. *Reno et al.*, 4 P. R. 281.—C. L. Chamb.—Draper.

III. Discharge of Prisoner.

The court refused to discharge a prisoner out of custody, on the ground that the gaoler had taken him to a magistrate upon suspicion of his having committed a larceny in gaol. *Robinson* v. *Hall*, Tay. 482.

The court refused to commit a prisoner brought by habeas corpus from a county goal to the custody of the sheriff of York. *Ib.*

Where a person is restrained of liberty under a statute, he should be discharged, unless the judge is satisfied by unequivocal words in the statute that the imprisonment is warranted. *In re Slater and Wells.*, 9 L. J. 21.—C. L. Chamb. —Hagarty.

Held, that where a prisoner is under a writ of habeas corpus discharged from close custody on the ground that the warrant of commitment charges no offence, he is not, under sec. 6 of 31 Chas. II. c. 2, entitled to his discharge as against a subsequent warrant correctly stating the offence, upon the alleged ground that the second is for "the same offence" as the first arrest. *In re Carmichael*, 1 L. J. N. S. 243.—C. L. Chamb. —J. Wilson.

Held, that in favour of liberty, it is the duty of a judge on a habeas corpus, when doubting the sufficiency of a warrant of commitment, to discharge the prisoner. *In re Beebe*, 3 P. R. 270. —C. L. Chamb.—Hagarty.

The judges of the Superior Courts are bound, when a prisoner is brought before them under 29 & 30 Vict. c. 45, to examine the proceedings and evidence anterior to the warrant of committal, and to discharge him if there does not appear sufficient cause for his detention. The evidence in this case warranted the magistrate in requiring bail. *Regina* v. *Mosier*, 4 P. R. 64. —C. L. Chamb.—A. Wilson.

IV. Miscellaneous Cases.

The court determined it not unreasonable for the gaoler to charge six pence per mile both going and returning with a prisoner by habeas corpus. *Robinson* v. *Hall*, Tay. 482.

A verdict was taken in a cause at nisi prius subject to a reference, and the rule of reference was afterwards made a rule of court, and contained the usual clause against filing any bill in equity; and the defendant, against whom the award was made, did not make any motion in the court in proper time, but filed his bill in equity, for which the court granted attachments against him and his solicitor, upon which writs of habeas corpus were subsequently issued. The court refused to entertain a motion to set aside those writs or suspend proceedings upon them. *Regina* v. *Maddock et al.*; *In re Manners* v. *Clarke*, 1 Q. B. 322.

HABENDUM.

See Deed.

The testator, who died in 1829, devised as follows: "To my son, J. P., I give and devise all that my real estate situate, lying and being lot No. 5, in the 4th concession of Yarmouth, in the London District, containing 200 acres, be the same more or less," and also I give and bequeath to my said son J. all that my real estate situate, lying and being lot No. 6, in the 4th concession of Yarmouth, in the London District, containing 200 acres, be the same more or less, to hold unto him, the said J. P., his heirs and assigns for ever:"—Held, that J. P. took a fee in lot five, the habendum applying to that lot as well as to lot six. *Philan* v. *Graham*, 22 Q. B. 380.

HABERE FACIAS POSSESSIONEM.

See Ejectment.

HAMILTON, (CITY OF.)

This city is a port on Lake Ontario. *George* v. *Glass*, 14 Q. B. 514.

HAMILTON, (TOWNSHIP OF.)

The plaintiff owned lot 28 and defendant lot 27, in the 3rd concession of Hamilton, between which there was no road allowance, and the plaintiff, previous to the survey of that concession made under 29 Vict. c. 72, had occupied the land in question for more than twenty years. By this survey it belonged to lot 27:—Held, Morrison, J., diss., that the effect of such survey was to fix conclusively the division line between the lots; but, Held, also, that the plaintiff's title by possession was not taken away by it, *Taylor* v. *Croft*, 30 Q. B. 573.

HANDWRITING.

See Evidence.

HARBOUR COMPANIES.

I. Liability for Obstructions, 1650.

II. Miscellaneous Cases, 1653.

I. Liability for Obstructions.

Defendants, incorporated under C. S. C. c. 50, constructed two piers running out into lake Erie, and had for some time collected tolls upon vessels, though it was said that the harbour was not finished, and that it was intended to carry the

piers further out. The plaintiff's vessel, bound for another port, met with an accident, and having attempted in consequence to enter this harbour, was wrecked upon a sand-bar about 200 feet outside of the piers, and the cargo was lost. It appeared that this sand-bar was of a shifting nature, disappearing and forming at different times, but defendants, some weeks before the accident, had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendant's negligence:—Held, that defendants were liable, and a verdict for the value of plaintiff's cargo was upheld. McLean, J., diss. *Webb* v. *Port Bruce Harbour Co.*, 19 Q. B. 615; affirmed on appeal, 19 Q. B. 623, and,

Per Draper, C. J.—By beginning to receive tolls, the company must be taken to assert that their harbour is capable of receiving and sheltering vessels of such size as it is fitted for. This includes the approach to the harbour; and if afterwards an obstruction renders it within their knowledge unsafe to attempt an entrance, they are bound either to remove the obstruction, or to close the harbour, by giving notice to the public that it cannot be safely approached. Hagarty, J., thought the weight of evidence strongly against the plaintiff, but concurred in the judgment, holding that to be no ground of appeal. He considered, however, that the verdict could be sustained only upon that part of the evidence which tended to shew that defendants had undertaken to remove the bar in question; and that if it were a known natural obstruction, outside of their harbour, which they had never professed to interfere with, then they would not be liable. *S. C.* in appeal, 19 Q. B. 623.

Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect. *Berryman* v. *President, &c., of Port Burwell Harbour*, 24 Q. B. 34.

Defendants, on the 5th November, 1866, resolved to close their harbour upon and after that day, to discontinue the receipt of tolls, and to remove the light which was placed on the western pier as a guide to the entrance; this determination having been come to in consequence of the water between the piers and on the bar outside them having become so shallow as to endanger the "larger class of vessels," which were in the habit of entering the harbour, and because the stormy weather had prevented their dredging it out. A printed notice of this resolve was accordingly on that day put up at Port Burwell, and also sent to different collectors of Customs, both in the United States and in Upper Canada, for publication in several newspapers, in which it was inserted. One of the notices was put up in the Custom House in Buffalo, and was also published in a newspaper there on 9th November. The plaintiff arrived in his vessel, from a port west of and beyond Port Burwell, on 7th November, having seen defendants' light on his way down, and on the 10th November he cleared again from Buffalo on his return trip, and on the morning of 11th November, in his endeavour to enter defendants' harbour, in consequence of stress of weather, the vessel struck on the western pier and was lost, the immediate cause of the striking against the pier being, as appeared, the absence of the light, the presence of which would have enabled the vessel, which was of light draft, to enter. Up to the time of the accident neither plaintiff nor any one on board had any actual notice of the removal of the light:—Held, reversing the judgment of the C. P., 17 C. P. 574: 1. That defendants had authority under the circumstances to close the harbour and remove the light. 2. That the notice of closing was sufficient, and that the plaintiff was not entitled to actual personal notice of the fact: 3. That defendants were not, therefore, liable to the plaintiff for the loss of his vessel, and that they were entitled to a verdict on the plea of not guilty. *Stevens* v. *The President, &c., of the Port Burwell Harbour*, 19 C. P. 376.

In the Common Pleas it was held, in the last case, that in addition to the value of his vessel the plaintiff was entitled to recover a further sum expended by him in good faith, and with reasonable expectation of success, in attempting to raise the vessel to repair her. *S. C.* 17 C. P. 574.

That an insurance company, which had a risk upon the vessel, was not entitled to recover, in the plaintiff's name, moneys expended by it in a similar attempt. *Ib.*

Semble, that a plea of not guilty put in issue the negligence only, and not the duty alleged. *Ib.*

Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge. *Ib.*

Held, that the defendants, in whom the harbour of Toronto is vested by 13 & 14 Vict. were not liable to the plaintiff for an injury caused to his vessel by running against an unsunken pier, at a point north of the winding line, in the line of Church street produced, which street does not extend to the water: for such pier was not within the limits of the harbour vested in defendants, and they had no power against the owner of the soil to remove it. *Hood* v. *The Commissioners of the Harbour of Toronto*, 34 Q. B. 87.

The above decision was affirmed on appeal. Semble, that the harbour was not by the statutes vested in the commissioners, but only the works constructed for its improvement. The case distinguished from Mersey Docks and Harbour Board Trustees *v.* Gibbs, L. R. 1 H. L. and others cited, on the ground that here the harbour was a natural one open to the public of right, not an artificial work erected by defendants, and which they invited the public to use on payment of tolls:—Held, also, that under the statute there was no duty imposed upon the defendants to employ the funds placed under their control, and the tolls which they were authorized to impose, in removing the obstruction complained of, which existed before the incorporation, but that a discretion was vested in them not to be controlled by a jury. Semble, per Burton and Patterson, JJ., the court be empowered to draw inferences of fact, that there was no sufficient evidence to shew knowledge to the defendants that the place in question was dangerous to vessels. Per Patterson, J., as to power to draw inferences of fact, when given by consent, is not confined to the court below but extends to this court. *S. C.* 37 Q. B. 72

II. MISCELLANEOUS CASES.

The Cobourg Harbour company are not wharfingers, because they have erected piers and wharves according to their charter, and are not therefore responsible for goods left upon their wharves unstored. *Logan* v. *The Cobourg Harbour Co.*, 3 Q. B. 55.

Under 4 Will. IV. c. 32, s. 5, parties receiving benefit from the Port Credit Harbour, in its present unfinished state, must pay the tolls prescribed. *Port Credit Harbour Co.* v. *Jones et al.*, 3 Q. B. 144.

Where the question was, whether the harbour was in a fit state to shelter vessels, until which time toll could not be exacted according to the 2 Will. IV. c. 15, and the judge directed the jury that if the harbour were fit to shelter twenty vessels, toll could be demanded:—Held, a misdirection. *Jenkins* v. *Port Burwell Harbour Co.*, T. T. 3 & 4 Vict.

In an action against a harbour company, for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, that the company had a legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground refuse to register the assignment. *McCulloch et al.* v. *Bond Head Harbour Co.*, 9 Q. B. 333.

Held, that under 12 Vict. c. 81, s. 60. sub-s. 4, owners of timber might be made to pay the salary of a harbour master, and their timber detained for non-payment of a tax levied for such salary, and themselves subject to fine and imprisonment. *Bogart* v. *Town Council of Belleville*, 6 C. P. 425.

The plaintiff owned land upon a creek running into lake Erie, at the mouth of which defendants, incorporated by 12 Vict. c. 60, constructed their harbour. A straight cut had been previously made by another company, of which the plaintiff had been secretary, from the creek, a little below his land, to the lake. While defendants were making their harbour, the plaintiff requested them to deepen this cut, which they did, and at his request placed on his land the earth which they had dredged up. Before defendants began their work, the plaintiff had piled along the front of his lot on the stream, that they did not pile along the land lower down, as the water being driven up from the lake by high winds, spread over this land, and ran thence on to the plaintiff's land, getting round the piles which he had placed:—Held, that defendants were not liable for this injury. *Rose* v. *The President, &c., of the Port Burwell Harbour Co.*, 20 Q. B. 341.

Land covered with the waters of a harbour, is not taxable:—Held, therefore, that the Buffalo and Lake Huron Railway Co. could not be taxed for the Goderich harbour. *The Buffalo and Lake Huron R. W. Co.* v. *The Corporation of the Town of Goderich*, 31 Q. B. 97.

Cobourg Harbour—Debentures issued by the town of Cobourg, under 13 & 14 Vict. c. 83, vesting the harbour in the town—Form and requisites of such debentures—See *Crawford et al.* v. *Corporation of the Town of Cobourg*, 21 Q. B. 113.

A. having entered into an engagement with B. to carry goods from Liverpool to Hamilton, for a certain sum per ton of 40 cubic feet, (as per agreement set out in this case,) transhipped them at Montreal, a port on the line of route, where harbour dues were charged, and sent them by rail from there. Upon an action brought for harbour dues thus charged and paid by A.:—Held, that the contract being to deliver the goods at so much per ton, B. was entitled to have them delivered at that price free of all expense. *Edmonstone et al.* v. *Young et al.*, 12 C. P. 437.

A harbour and road joint stock company by its charter, 16 Vict. c. 141, had power to levy tolls on goods landed or shipped within certain prescribed limits: and the harbour, roads, wharves, and all the real estate were to be vested in the company and their successors for ever. The company finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their charter, and the mortgagee foreclosed the security, entered into possession, and leased to the plaintiff, who sued defendant, owner of the wharf within the statutable limits of the harbour, for toll on goods shipped or landed on defendant's wharf:—Held, that the plaintiff could sue only in the corporate name, and a nonsuit was therefore directed. *Whiteside* v. *Bell-chamber*, 22 C. P. 241.

By 3 Vict. c. 33, the plaintiffs were incorporated, and were declared to be capable of contracting and being contracted with sueing and being sued, &c. They were also authorized to construct a harbour, to impose charges for the use thereof, and to demand and recover such charges. It was further enacted that if any person should neglect or refuse to pay the tolls or dues, the plaintiffs might detain the goods on which the tolls or dues were due and payable, until such tolls should be paid:—Held, that the plaintiffs were not confined to the remedy by way of distress, but could also maintain an action. *The President, &c., of the Bronte Harbour* v. *White*, 23 C. P. 164.

HASTINGS (COUNTY OF.)

Acts passed to remedy errors in registration of deeds, 9 Vict. c. 12, and 10 & 11 Vict. c. 38. — Construction of. See *Campbell* v. *Fox*, 26 Q. B. 631.

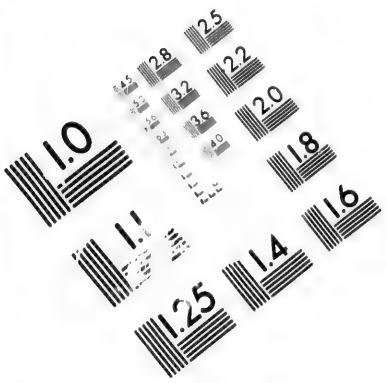
HAWKERS AND PEDLARS' ACT.

In an action of trespass for false imprisonment, a plea justifying the arrest, as a constable, without a warrant, under the Hawkers and Pedlars' Act, 58 Geo. III. c. 5, for peddling without license, must shew that the plaintiff was found trading at the time of the arrest, and that defendant took him before the nearest justice of the peace. *Oriatt* v. *Bell*, 1 Q. B. 18.

HEIR.

See ESTATE.

Where lands have been sold by a sheriff under a fi. fa. upon a judgment against an executor or



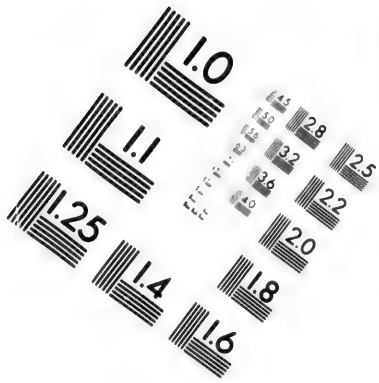
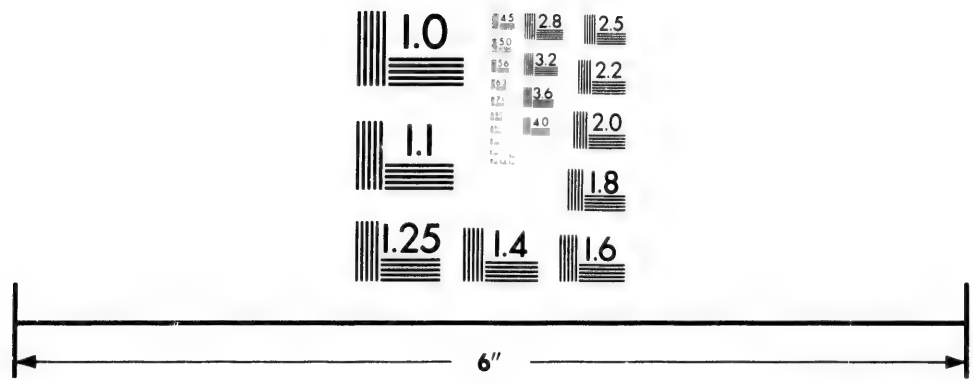
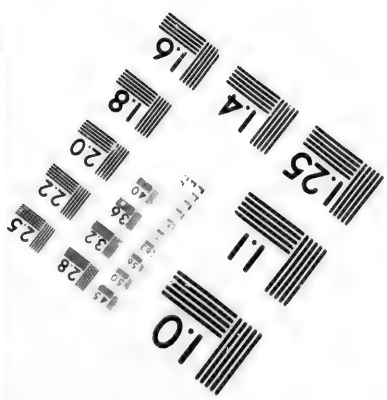
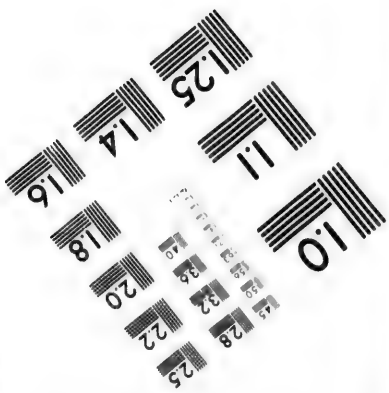


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administrator, the heir-at-law is entitled to recover the surplus from the sheriff. *Ruggles* v. *Beikie*, 3 O. S. 347; *S. C. Ib.* 276.

HEIR AND DEVISEE COMMISSION.

An action will not lie for knowingly prosecuting a false claim before the heir and devisee commission, to the plaintiff's injury, and with knowledge of his claim:—Held, in such an action, that the allegations were not supported; and that, admitting them all to be true, no ground of action would be shewn. *Shields* v. *DeBlaquiere*, 12 Q. B. 386.

The commissioners under the heir and devisee act, in deciding upon claims brought before them, are not bound by the strict rules applicable to courts of law. Where, therefore, a purchaser from the crown devised land, for which the patent had not yet issued, to his wife for life, with power of appointment amongst his decendants in tail; and she by her will devised her estate to one of such descendants in fee, who applied to the heir and devisee commission; and the commissioners recommended a grant in tail to the person named as devisee, and the crown acting upon such recommendation, issued a patent in favour of such devisee—to a bill afterwards filed to set aside the patent as having been issued in error, or through improvidence, a demurrer put in ore tenus at the hearing for want of equity was allowed. *Scane* v. *Hartrick*, 7 Chy. 161.

The heir and devisee commission having reported that the heirs-at-law of A. were entitled to a patent of certain lands in the Indian reserves, Charlottenburgh, the governor in council afterwards, upon a report of the solicitor-general in favour of B., a brother of A., issued a patent to B. for the lands. The heirs of A. thereupon filed a bill to have the patent set aside and a new patent issued to themselves, upon the ground of the patent having been issued to B. under an error. The court having found there was no error of fact:—Held, that the patent was properly issued to B. notwithstanding the finding of the commission. *McDiarmid* v. *McDiarmid*, 9 Chy. 144.

Semble, this court may, in a proper case, set aside a patent issued upon the finding of the heir and devisee commission. *Ib.*

HIDES.

Upon a sale of hides by weight, of specified qualities according to inspection, i.e., "cured and inspected No. 1 hides," &c.:—Held, that the weight as ascertained and marked by the inspector, under 27 & 28 Vict. c. 21, and 29 & 30 Vict. c. 24, were binding upon the parties in the absence of anything in the agreement to the contrary. *Macklem* v. *Thorne*, 30 Q. B. 464.

Held, that the seller must pay the inspector's fees, the agreement not providing otherwise. *Ib.*

Held, that upon the evidence set out in the report of this case the defendants were acting as principals, not as agents of the plaintiffs, the purchasers, and therefore could not charge commission. *Ib.*

Defendant bought hides, some of which had been produced within and some without the county of Middlesex, but all without the city of London. Some were purchased by him in an some out of the county, but none within t city; and they were brought by him into t city, placed in his tannery there, and manuf tured into leather. The plaintiff was an insp tor of raw hides and leather, appointed und 27 & 28 Vict. c. 21, 29 & 30 Vict. c. 24, and Vict. c. 37, D., for the city and county, having place of inspection within the city, but not el where:—Held, 1. That his compulsory pow extended only to the city, but that his limits inspection might extend to the area assigned him as the district in which the city was situa although his acting therein would be optio with him; and he might in his discretion go a into any part of the province not within anot inspector's limits; 2. That all raw hides, green raw hides, produced within a city or to for which there is an inspector must be inspect before being sold there: that if produced a sold without such city or town, they are exem from inspection until brought within it; and then purchaser must have them inspected bef selling or disposing of them in any way wh ever; 3. That the tanning or using the hi in his own business was not a "disposing them in any way whatever," within the stat 29 & 30 Vict. c. 24, s. 1. Wilson, J., di Defendant, therefore, was held not liable to penalty for not having these hides inspect *Oliver* q. t. v. *Hyman*, 30 Q. B. 517.

HIGH TREASON.

See CRIMINAL LAW.

HIGHWAY.

See WAY.

HIRING.

I. EMPLOYEES OR SERVANTS—*See* MA AND SERVANT.

II. OF HORSES—*See* HORSE.

III. OF HOUSES—*See* LANDLORD AND TEN

HOLIDAY.

See PRACTICE AT LAW—SUNDAY—TIME

HORSE.

I. LENDING OR HIRING.

1. *Liability for Injuries*, 1657.

II. WARRANTY, 1657.

III. MISCELLANEOUS CASES, 1658.

IV. LIEN OF INNKEEPER—*See* INNKE

V. INJURIES BY NEGLIGENT MANAGE OF—*See* NEGLIGENCE.

VI. RACING—*See* GAMING.

I. Lending or Hiring.

1. *Liability for Injuries.*

A. lent a horse to B. for a special purpose, and while B. was using him consistently with such lending, the horse was accidentally hurt, and subsequently left at a public stable, of which B. gave A. immediate notice. A. having seen the horse, refused to take him, and went to B.'s residence (20 miles from where the horse was left) and demanded him back sound as received:—Held, that B.'s non-delivery of the horse after such demand, did not furnish evidence of a conversion, and that A. could not maintain trover. *Wells* v. *Crew*, 5 O. S. 209.

The plaintiff charged defendant with taking a mare on loan, and using her improperly, whereby she died; and defendant pleaded that he obtained the mare on a contract for hire, not on loan;—Held, a good answer. *Robertson* v. *Jarvis*, 1 Q. B. 345.

Where in assumpsit for the immoderate riding of a mare loaned to the defendant, and not redelivering her, with a breach that she was not returned to plaintiff, but was so injured that she died, the defendant pleaded one plea as to redelivering her only, the plea was held a good answer to that part of the breach it professed to cover. *Campbell* v. *Boulton*, 2 Q. B. 202.

Action against a bailee for killing a horse lent to him by careless driving, and breaking a buggy and harness, and not returning them. Plea: 3. That the horse was a runaway horse, of the damage occasioned thereby; 4. that the plaintiff hired the horse knowing him to be a runaway, and that he ran away without the fault of the defendant; 5. That defendant did offer to return the buggy and harness after they were broken:—Held, pleas bad. *McKay* v. *Perrow*, 6 Q. B. 257.

The plaintiff lent or hired his horse to S., who, being on a journey, put it up at defendant's inn, where it was strangled in the stable there, owing, the jury found, to the negligence of defendant's servant in tying it up in the stall:—Held, that the plaintiff might maintain an action therefor. *Walker* v. *Sharpe*, 31 Q. B. 340.

II. Warranty.

A. and B. exchanged horses, and B. gave A. a note for the difference in the exchange; A. sold the horse he got from B. almost immediately, and after two years, during which nothing appeared to have been done by either party, B. was sued upon the note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared it free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

In an action on the case on the warranty of a horse, the plea of not guilty puts the warranty in issue. *Honeywell* v. *Davis*, 2 Q. B. 63.

Defendant sold plaintiff a stallion, warranting him to be a good coverer and foal-getter. The horse turned out worthless as a foal-getter, and the jury gave £150 damages. The Court, although considering the damages too high, refused a new trial. *Natrass* v. *Nightingale*, 7 C. P. 266. See also, *County of Simcoe Agricultural Society* v. *Patton*, 12 Q. B. 614; *Craig* v. *Miller*, 22 C. P. 348.

Plaintiff sold two horses to defendant, who sent them back as not agreeing with an alleged warranty. The plaintiff gave him repeated notice to take them again, or that she should charge him for their keep. Defendant, in answer, insisted that he had a right to return them. The plaintiff having sued upon common counts for agistment and pasturage, the jury found that the horses belonged to defendant:—Held, that the plaintiff could not recover, for the mere fact of ownership would not make defendant liable, and the evidence as to his conduct, &c., tended to negative any implied request or promise to pay. *Halliday* v. *White*, 23 Q. B. 593.

III. Miscellaneous Cases.

When a horse was stolen from the plaintiff and bought by defendant at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and defendant immediately retook it:—Held, that the plaintiff had a right to retake it, no property having passed to defendant by the sale; and that although it was in his possession only for a moment, yet the property revested in him, and he could maintain trespass against the defendant for the retaking. *Bowman* v. *Yielding et al.*, M. T. 3 Vict.

Quære, as to a farrier's right of lien on a horse for services rendered. *Nicolls* v. *Duncan*, 11 Q. B. 332.

A horse ordinarily used in the debtor's occupation, not exceeding in value $60, is a "chattel" within the meaning of the Exemption Act, 23 Vict. c. 25 sec. 4 sub-sec. 6, and is, therefore, not liable to seizure for debt. *Davidson et al.* v. *Reynolds et al.*, 16 C. P. 140.

A person serving with or attached to a militia cavalry troop as quartermaster is an officer thereof, and his horse protected from distress under sec. 31 of 18 Vict. c. 77. *Davey* v. *Cartwright*, 20 C. P. 1.

Defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan:—Held, not a case in which there should be a nonsuit on the ground that the evidence was consistent either with the existence or non-existence of negligence, but that the question was for the jury. Cotton *v.* Wood, 8 C. B. N. S. 568, and Jackson *v.* Hyde, 28 Q. B. 294, distinguished. *Henderson* v. *Barnes*, 32 Q. B. 176.

Declaration, that defendant was possessed of a wild, vicious, and mischievious horse, and it was unsafe and improper to permit the said horse to go or run at large on any public highway, yet defendant wrongfully and negligently permitted and suffered the horse, so being vicious, &c., to go at large on the public highway, where the plaintiff then lawfully was, whereby the horse ran at and jumped upon the plaintiff, and broke his leg:—Held, bad, for knowledge of the animal's vicious nature was not averred, and

the allowing it to be at large on the highway, was not a breach of any duty due from defendant to plaintiff. *Chase* v. *McDonald*, 25 C. P. 129.

HOTCHPOT.

A child, who has been advanced, is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing, either by the parent or the child so advanced. *Filman* v. *Filman*, 15 Chy. 643.

A testator devised a property to three granddaughters, as tenants in common in equal shares, and then devised to one another property in severalty, adding, "provided always * * that the said last-mentioned property so solely devised to my said granddaughter A., shall be valued by my executors hereinafter named, or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three granddaughters, in proportion to the value which my said executors or the survivor of them shall put upon said first-mentioned land; and in case I shall sell any or all of said first-mentioned lands, or that after my decease, my said three grandchildren shall sell the same, then and in that case the value aforesaid of the said residence and premises, hereinbefore devised to my said granddaughter A., shall be deducted from her one-third proportion of the proceeds of the sales of the said first-mentioned land:"—Held, (reversing the decision of Proudfoot, V. C.) that the above clause did not constitute a hotchpot clause; that the rents of the lands devised in severalty were not to be accounted for by A., but that she was only entitled to the same proportion of the rents of the land held in common as she was entitled to of the land itself after deducting the value of the land specifically devised to her. Proudfoot, V. C., diss. *Phillips* v. *Yarwood*, 21 Chy. 622.

HOTEL.

See INNKEEPER—TAVERNS AND SHOPS.

HURON COLLEGE.

By their act of incorporation 26 Vict. c. 31, Huron College is authorized to take, hold and convey lands sold, given or granted to it, provided that such land so held shall be only such as may be required for the purposes of college buildings, &c., and provided, also, that it may acquire any other real estate, by gift, devise or bequest, and hold the same for seven years, to revert to the person from whom it was acquired if not disposed of within that time. The plaintiff in ejectment claimed as assignee of a mortgage executed to the college in 1864, and assigned by them to him in the same year; and it was objected that they had no power either to take or assign such mortgage:—Held, that under the first part of the clause the college could take the lands; and if prevented from holding it by the first proviso, that the crown only could take advantage of their disability, and they could convey their defeasible title. *Beche* v. *Wood*, 16 C. P. 29.

Quære, whether they could not also acquire this land under the second proviso, the word "gift" being often confounded with "grant." If they could, they had assigned to the plaintiff within seven years, and in either view, therefore, he was entitled to recover. *Ib.*

HUSBAND AND WIFE.

[*The rights and liabilities of husband and wife have been so materially changed by the act of 1859, C. S. U. C. c. 73, and later legislation, that it has been considered more convenient to give the decisions under these statutes together. The cases down to sub-head* X., *except those in* IV. 1 (c), *are therefore confined to decisions before or independent of these acts.*]

I. MARRIAGE.
1. *Validity of*, 1661.
2. *Proof of.*
(a) *Generally*, 1663.
(b) *In Actions of Dower*—*See* DOWER.
3. *Contracts in Consideration of Marriage*—*See* CONTRACT.
II. ACTION FOR BREACH OF PROMISE, 1664.
III. MARRIAGE SETTLEMENTS AND AGREEMENTS THEREFOR.
1. *Ante Nuptial*, 1665.
2. *Post Nuptial*, 1667.
3. *Fraudulent against Creditors or Purchasers*—*See* FRAUDULENT CONVEYANCES.
IV. OPERATION OF MARRIAGE ON WIFE'S PROPERTY.
1. *Conveyance of Wife's Real Estate.*
(a) *Certificate and Examination*, 16
(b) *Decisions under C. S. U. C. c. 73, & 35 Vict. c. 16*—*See pp.* 1669, 1
(c) *Decisions under 36 Vict. c. 16*, 1
(d) *Other Cases*, 1671.
2. *Other Cases relating to Wife's Real Estate*, 1672.
3. *Wife's Equity to a Settlement*, 1673.
4. *Wife's Separate Estate in Equity*, 1
5. *Husband's Interest.*
(a) *Generally*, 1673.
(b) *Tenancy by the Curtesy*—*See* Est
V. QUARANTINE, 1674.
VI. HUSBAND'S LIABILITIES.
1. *For Wife's Necessaries*, 1674.
2. *On Contracts made by Wife*, 167
VII. PRIVILEGES AND INCAPACITIES OF W
1. *Privilege from Arrest or Attach* 1677.
2. *Liability on Contracts*, 1677.
3. *Liability in Equity for Fraud or representation*, 1678.
VIII. DEED OF SEPARATION, 1679.

IX. Actions and Suits by and against Husband and Wife.

1. *At Law.*
   (a) *For Injuries to Wife*, 1680.
   (b) *For Criminal Conversation*, 1681.
   (c) *Other Cases*, 1682.
2. *In Equity.*
   (a) *Wife Suing by Next Friend*, 1684.
   (b) *Service of Papers*, 1686.
   (c) *Answering*, 1686.
   (d) *Other Cases*, 1687.
   (e) *Parties to Foreclosure Suits*—*See* Mortgage.

X. Rights and Liabilities of Husband and Wife under C. S. U. C. c. 73, and Subsequent Statutes.

1. *Decisions under C. S. U. C. c. 73*, 1689.
2. *Decisions under 35 Vict. c. 16*, 1693.
3. *Decisions under 36 Vict. c. 18*,—*See p.* 1670.

XI. Alimony.

1. *Jurisdiction of Court of Chancery*, 1696.
2. *Writ of Arrest*, 1696.
3. *Writ of Ne Exeat*, 1697.
4. *When granted.*
   (a) *Desertion and Cruelty*, 1697.
   (b) *Interim Alimony*, 1698.
   (c) *Other Cases*, 1700.
5. *Amount*, 1700.
6. *Practice*, 1701.
7. *Costs*, 1701.
8. *Relief from*, 1701.
9. *Other Cases*, 1702.

XII. Miscellaneous Cases, 1702.

XIII. Bigamy—*See* Criminal Law.

XIV. Dower—*See* Dower.

XV. Competency of as Witnesses—*See* Evidence.

XVI. Custody of Infant—*See* Infant.

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1. Marriage.

1. *Validity of.*

Marriages contracted in Ireland between members of the Church of England and Presbyterians, celebrated by ministers not belonging to the Church of England, are legalized by the Imperial statute 5 & 6 Vict. c. 26; and such marriages celebrated before that act, are legal marriages in this country. *Doe* d. *Breakey* v. *Breakey*, 2 Q. B. 349.

H. P., patentee of the land in question, was married to one G. by a methodist minister, who had at that time no right to solemnize matrimony. She conveyed to M., but being told that the marriage was illegal, executed the deed by the name of Pringle, as if she were sole, her husband Green being the witness. After the passing of 11 Geo. IV. c. 36, her heir brought ejectment, contending that that statute confirmed the marriage, so as to avoid her conveyance executed as a feme sole:—Held, that the act had not such a retrospective effect as to destroy the deed. *Pringle* v. *Allan et al.*, 18 Q. B. 575.

It is not necessary that marriages should be solemnized in a church. *Regina* v. *Secker*, 14 Q. B. 604.

Where banns have been published, and no dissent then expressed by parents or guardians, the husband being under age is no objection, even by the English Marriage Act, 26 Geo. II. c. 33; but Quære, whether that act is in force here. *Ib.*

Semble, that the act is not in force here. *Regina* v. *Bell*, 15 Q. B. 287.

It is illegal, here as it was in England before 26 Geo. II. c. 33, to marry by license, where either of the parties is under twenty-one, without consent of parents or guardians; and the want of consent is a breach of the bond given on obtaining such license. *Regina* v. *Roblin*, 21 Q. B. 352.

Semble, however, that sec. 11 of the statute is not in force here, and that such marriage therefore is not void. *Ib.*

The plaintiff in ejectment claimed as heir of his father, H., who, it appeared, while a slave in the State of Virginia, had in 1825 been married to the plaintiff's mother, S., also a slave. The marriage was performed by a baptist minister with the usual ceremony, and with all the formalities practicable to make it binding, but without a license, which slaves could not obtain. They lived together as man and wife until 1833, H. having a house of his own in Richmond, and working at his trade as a painter, paying his master for his time, as was customary. In 1833 he escaped to New York, where he married another woman, while S. remained in Richmond, and was again married there. It was proved that by the law of Virginia, until the last five years, slaves were incapable of marrying: that to constitute a strict legal marriage between free persons, a license was essential: but that slaves could not obtain it or in any way contract a legal marriage, being regarded by the law as property only, not persons. It was contended that the parties having done all in their power to make their marriage binding, it must be held valid here, the only impediment to its validity in Virginia, arising from the law of slavery, which our law could not recognize; but, Held, otherwise; for the parties not being British subjects, as in Rudding *v.* Smith, 2 Hagg. Consist. R. 385, the validity of the marriage must, according to the general rule, be determined by the law of the country where it was celebrated. *Harris* v. *Cooper*, 31 Q. B. 182.

The intestate, H. M., was married in this province in 1850 to the sister of his deceased wife, by whom he had children, and died in 1856:—Held, that, though the marriage was voidable during the lives of both parties to it, yet not having been called in question till after the husband's death, it must now be treated as indissoluble, and that the issue thereof were entitled as heirs. *Hodgins* v. *McNeil*, 9 Chy. 305.

Held, also, that Lord Lyndhurst's Act, 5 & 6 Will. IV. c. 54, does not extend to the colonies. *Ib.*

2. *Proof of.*

(a) *Generally.*

A recognition by a party that A. is his wife, is sufficient to charge him with necessaries, although they do not cohabit, having in fact separated; and although she may not stricti juris be his wife. *Hawley* v. *Ham*, Tay. 385.

In trespass for crim. con. the plaintiff must give strict proof of his marriage. Mere casual conversations of defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient. *Campbell* v. *Carr*, 6 O. S. 482.

A certificate of marriage by a magistrate in the following form: "I do hereby certify that I have this day married A. and B. according to the Church of England," dated in 1801, with proof of cohabitation and reputation, but without proof of publication of banns:—Held, sufficient to establish the marriage against the evidence of cohabitation and reputation of marriage with another person alive at the time of the second marriage, defects of form in such cases being cured by 11 Geo. IV. c. 36. *Doe* d. *Wheeler* v. *McWilliams*, 2 Q. B. 77.

Where a marriage in fact has been proved, evidence of reputation and cohabitation is not sufficient to establish a prior marriage. *Doe* d. *Wheeler* v. *McWilliams*, 3 Q. B. 165.

The presumption arising from reputation may be rebutted by proof that the woman formerly lived with another man so as to raise the same presumption of marriage with him. The plaintiff having put in a will, in which the testator spoke of H. as his wife, was not estopped from denying the marriage. *George* v. *Thomas*, 10 Q. B. 604.

Reputation and cohabitation for twenty or thirty years is sufficient in ejectment, and if the presumption therefrom is to be rebutted, it must be by positive testimony. *Doe* d. *Breakey* v. *Breakey*, 2 Q. B. 349.

Where the evidence as to the fact of marriage was conflicting, the court offered the plaintiff an opportunity of obtaining better evidence or an issue to try the question, and if refused directed the bill to be dismissed. *Baker* v. *Wilson*, 6 Chy. 603.

A separation deed executed by the deceased husband, wherein he acknowledged the plaintiff as his wife, with proof of payments made to her under it, and a certified copy of the registry of marriage, from the parish registry in Ireland:—Held, sufficient against infant defendants, the adult defendants, by their answer, admitting the marriage. *Craig* v. *Templeton*, 8 Chy. 483.

The testimony of a woman of the ceremony having been performed, and evidence of respectable witnesses of general reputation:—Held, sufficient, without proof that the clergyman who performed the ceremony was duly authorized; and that evidence of reputation alone was sufficient. *Baker* v. *Wilson*, 8 Chy. 376.

Held, that a written contract was not essential to the validity of a Jewish marriage, which had been solemnized with all the usual forms and ceremonies of the Jewish service and faith; and that such a marriage was valid, though there existed in relation to it a written contract not produced. *Frank* v. *Carson*, 15 C. P. 135.

The declaration contained four counts; 1. For breach of promise by defendant, an unmarried man, to marry the plaintiff within a reasonable time; 2. For deceit, that the defendant, an unmarried man, falsely, &c., persuaded plaintiff to go with him to T. for the purpose of having a legal marriage celebrated between them, and to enter into a pretended marriage, and pretended that said marriage was lawful, and thereby persuaded plaintiff to cohabit with him as his wife; 3. That defendant, &c., pretended to plaintiff that he was unmarried, and desirous of marrying her, and by false pretences caused her to submit to a pretended marriage with him; and falsely, &c., persuaded her that it was a lawful marriage, and thereby induced her to cohabit with him; 4. For an assault. Evidence was given of attentions to plaintiff by defendant, and of letters; but it appeared that defendant was then married, and plaintiff was aware of it. It was also proved that defendant had said he would persuade plaintiff that he was divorced, and take her away, to spite her children; and that plaintiff had said she would have nothing to do with him till he was free. Defendant was never divorced, and his wife was still living at the trial. Defendant and plaintiff subsequently went to a hotel in W., and afterwards took a house there, passing as man and wife, and resided there for a short time. There was no positive evidence of any marriage ceremony:—Held, on motion for nonsuit, (A. Wilson, J., diss.) that there was no evidence to go to a jury on any of the counts; 2. That the presumption of innocence, that defendant had not been guilty of a conspiracy, was an answer to any presumption of a marriage ceremony from the cohabitation proved. *Wright* v. *Skinner*, 17 C. P. 317.

The patent from the crown issued in 1848 to M. A. T., describing her as the wife of B. T. In 1853 she conveyed to L., not describing herself as a widow:—Held, that the description in the patent was some evidence of her being married when it issued; but the court, being left to draw inferences as a jury, presumed, in favour of the validity of her deed made in 1853, that she was then sole and competent to convey. *The Edinburgh Life Assurance Co.* v. *Ferguson*, 32 Q. B. 253.

See *Nolan* v. *Nolan*, 1 Chy. Chamb. 368, p. 1699; *Carr* v. *Carr*, 2 Chy. Chamb. 71, p. 1699; *Bradley* v. *Bradley*, 3 Chy. Chamb. 329, p. 1699.

For other cases of proof of marriage—see "Dower."

II. Action for Breach of Promise.

The court refused to arrest judgment on a verdict against executors for a breach of promise of marriage by testator, on the ground that such an action could not lie against personal representatives. *Davy* v. *Myers*, Tay. 89.

To a count in assumpsit for a breach of promise of marriage, defendant pleaded a recission before breach by the defendant and plaintiff's guardian, with the plaintiff's concurrence, plaintiff being then an infant:—Held, bad, for the contract could only be avoided by the act of the

infant, and not of the guardian. *Parks* v. *Mayber*, 2 C. P. 257.

The defendant having allowed judgment by default is entitled, in mitigation of damages, to cross-examine the plaintiff's witnesses respecting the general bad character of the plaintiff. *McGregor* v. *McArthur*, 5 C. P. 493.

Where services were rendered by plaintiff to defendant in expectation that the defendant would marry her, but there was no contract of hiring, and the plaintiff expressly said that she was not to receive, and did not expect wages or pay:—Held, that on the defendant's refusal to marry the plaintiff, no action would lie as upon an implied promise to pay the value of such services in money. *Robinson* v. *Shistel*, 23 C. P. 114.

See *Wright* v. *Skinner*, 17 C. P. 317 p. 1664.

III. Marriage Settlements and Agreements therefor.

1. *Ante Nuptial.*

An execution creditor filed a bill against his debtor, the wife of the debtor, and certain other persons; and it appeared that the debtor on his marriage, settled certain lands (the subject of the suit) in trust, to the use of the wife for life, with power of sale to the trustee, to be exercised with the husband's consent. The legal estate was in one R., who had a primary charge on the premises. Under these circumstances, it was decreed that the plaintiff was entitled to redeem R.; that the wife's estate was exempt from every charge other than that of R.; that of this charge she must either keep down the interest or pay a proportionate share of the principal; that she was entitled to a provision out of her life estate; that subject to her interest, the property, on R. being paid, should be sold; and an enquiry was directed as to other judgments, in order to a proper application of the proceeds. *Pemberton* v. *O'Neil*, 2 Chy. 263.

Quære, whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing under the statute of frauds signed by the agent of the party to be charged. *Gillespie* v. *Grover*, 3 Chy. 558.

Property stood limited in trust for such purposes or persons as the wife should appoint; and in default of appointment, in trust for the wife and her heirs. The wife appointed part of her estate to her husband in fee, and the other part in trust for herself and children:—Held, that these appointments were authorized by the power, but it being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband, further enquiry was directed. *Fenton* v. *Cross*, 7 Chy. 20.

By an ante-nuptial settlement it was recited that the intended wife was seized in fee of certain lands, &c., and had also a claim to other property over which she had not then an absolute control; and that it had been agreed that the intended husband should enter into such covenants, &c., concerning all the real and personal estates as should be acquired from time to time by her during the coverture, as were therein contained, concerning the lands of which she was then seized, and which were thereby conveyed to trustees. And the intended husband covenanted to allow her during the coverture to receive to her own use the rents and profits of the lands, &c., so conveyed; and also, if he should become interested, in right of his intended wife, in any real or personal estate which should thereafter be given or bequeathed, or descend to her, he would allow the same to remain at her entire disposition, and that he would join with her in "conveying, assigning, and assuring, all such property as shall hereafter descend to, or be given or bequeathed to her, to the trustees upon the same trusts, and subject to the same provisoes, &c., as are expressed herein relative to the lands, &c., hereinbefore conveyed:"—Held, that this bound the wife to bring property afterwards given or devised to her into settlement, but that it did not bind lands of which she was then seised in reversion. *Ridout* v. *Gwynne*, 7 Chy. 505.

By a clause in a marriage settlement, it was stipulated that trustees should at their option, during the life of the intended husband, permit him or the intended wife to take and use the rents, issues and profits of the trust estate to their own use; and a subsequent clause provided that new trustees should be appointed in certain contingencies. Upon a bill filed by the wife to appoint a new trustee by reason of the residence of one out of the jurisdiction:—Held, that this trust was one of personal confidence, and could not be executed by a trustee appointed by the court. And the husband not having been heard of for upwards of four years, the court appointed a new trustee, and directed him to pay one half of the rents to the plaintiff, and the other half to be invested for the benefit of the husband. *Tripp* v. *Martin*, 9 Chy. 20.

By a marriage contract executed in Lower Canada, the intended wife, in consideration of certain provisions made therein for her separate benefit, agreed to renounce her dower in the lands of her intended husband, either "*customary, prefix, or stipulated*," no mention being made of lands in Upper Canada:—Held, affirming the judgment of the Common Pleas that this did not preclude her from claiming dower out of lands in Upper Canada held by her husband during her coverture; and that, notwithstanding the contract which was entered into would form a first charge on all the property which the husband held at the time of the contract, or which might be afterwards acquired by him. VanKoughnet, C., diss. *Jamieson* v. *Fisher*, 2 E. & A. 242; *Fisher* v. *Jameson*, 12 C. P. 601.

A father, before his daughter's marriage (in 1857,) wrote a letter to her intended husband, saying he would give her £2,500 when she came of age, and one fourth of his residuary estate at his death. In 1858, and before she came of age, the father advanced money to the husband, for which he took his note, but which he charged in his ledger to the joint account of the husband and wife, and intended, if the same was not repaid to set off the amount against his daughter's share of his estate:—Held, in a suit by the wife in the husband's lifetime for the administration of the estate, that the executors had a right to set off the advance against the wife's share:—Held,

that such right was not affected by the fact that the father by his will, made after the marriage, but before the advance, had directed that any advances he should make were to be deducted from the £2,500; the reason of this provision appearing to be that the testator did not contemplate making any advances to an amount exceeding £2,500:—Held, also, that such right was not affected by the fact that on a demand being made on the father for the whole £2,500, when his daughter came of age, he, in time, reluctantly yielded to the demand, not releasing, however, or agreeing or intending to release, his right against the husband for his previous advance. *Torrance* v. *Chewett*, 12 Chy. 407.

The insolvent had conveyed by way of settlement to his intended wife a lot of land on which he had commenced a house, but which was not completed until after the marriage. On a bill filed by the assignee in insolvency, the court declared that for so much of the building as was completed after the marriage the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignee the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Bowman*, 14 Chy. 156.

A parent was not permitted to recall a gift which, in view of the marriage of one of her two sons, she had made verbally to the two, of certain arrears of an annuity which had accrued from them while she lived with them: the attempt to recall the gift not having been made until after marriage and death of the son. Per Mowat and Strong, V. C C., and Spragge, C., diss. *Long* v. *Long*, 17 Chy. 251; 16 Chy. 239.

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2. *Post Nuptial.*

J. B. conveyed certain lands to trustees, to hold to the use of himself for life, then to the use of his wife for life, then to the use of their children, as he and his wife should appoint, and in default of any joint appointment as the survivor should appoint, and in default of any appointment, to the use of himself in fee, with a proviso, that after the death of J. B. and his wife, until the eldest child should come of age, the trustees might apply so much of the rents and profits as should be necessary towards the education of the children. A power of leasing for a certain sum was given, with a restriction that there should be no conveyance made of the reversion; and lastly it was provided that J. B. and his wife, with the trustees, should have such further and other powers for the disposition, control and management of the property, as the said J. B. and his wife might at any time thereafter, by deed, &c., direct and appoint—(the consideration for the settlement, as recited in it, was the release by J. B.'s wife of her dower in other lands)—J. B. and wife first mortgaged the land, and then conveyed the equity of redemption to the assignee of the mortgage, from whom the plaintiff purchased:—Held, that such conveyance was unauthorized by the settlement, and that the plaintiff's title was bad. *Stewart* v. *Wallbridge et al.*, 14 Q. B. 312.

A settlor filed a bill to set aside a settlement on his wife and her heirs, alleging fraud by the trustees in inducing him to make the settlement. The wife died, leaving no children by him, but leaving children by a former husband. The allegations of the bill failed, and it was accordingly dismissed, but it was—Held, that this settlement only vested a life estate in the trustees; and—Semble, that the settlor could defeat the settlement by sale. *Crafford* v. *McDonagh*, 5 L. J. 187.—Chy.

The owner of real estate conveyed the same to trustees for his daughter, E. S., one of whom was her husband, to dispose thereof "in such manner as the said E. S., her heirs and assigns, may at any time advise or direct, and to make such leases, and further to make such conveyances in fee simple of the said lands, &c., as the said E. S., her heirs, &c., may at any time advise or direct." The trustees created a mortgage in which E. S. joined:—Held, that the conveyance to the trustees effected a settlement to the separate use of E. S.: that her joining in the mortgage was a sufficient direction to the trustees: that the mortgagee was not bound to see to the application of the money, and that in default of payment he was entitled to foreclose. *Place* v. *Spawn*, 7 Chy. 406.

IV. Operation of Marriage on Wife's Property.

1. *Conveyance of Wife's Real Estate.*

(a) *Certificate and Examination.*

[*Before the 29th March, 1873, a married woman could convey her real estate only by deed executed jointly with her husband, and acknowledged and certified as directed.*]

[*By the Statute of Ontario, 36 Vict. c. 18, O., "The Married Woman's Real Estate Act, 1873," passed 29th March, 1873, the acknowledgment and certificate are dispensed with for the future; and subject to certain specified exceptions, all past conveyances in which the husband has joined are made valid, notwithstanding the absence of, or any defect in, the examination or certificate.*]

[*It is considered unnecessary, therefore, to do more than refer shortly to the several cases in which the validity of such deeds has been questioned on account of defects in the certificate.*]

As to the effect of the deed, in the absence of a proper certificate and acknowledgment, upon the estate either of the husband or wife. See *Doe* d. *Wilson et ux.* v. *Wessells*, 5 O. S. 282; *Doe* d. *Vansickler* v. *Fairwell*, M. T. 4 Vict., R. & H. Dig. 152; *Doe* d. *McDonald* v. *Twigg*, 5 Q. B. 167; *McKinnon* v. *Arnold*, 5 Q. B. 604; *Doe* d. *Dibble* v. *Ten Eyck*, 7 Q. B. 600; *Allison* v. *Rednor*, 14 Q. B. 459; *Moffatt* v. *Grover*, 4 C. P. 402; *McGill* v. *Frazer*, 5 C. P. 404; *Mallock* v. *Derwan et al.* 22 Q. B. 54; *Amey* v. *Card*, 2 Q. B. 501; *Farquharson* v. *Morrow*, 12 C. P. 311; *Doran* v. *Reid*, 13 C. P. 393; *Sampson* v. *McArthur*, 8 Chy. 72; *Hope* v. *Beard*, 8 Chy. 380; *Graham* v. *Meneilly*, 16 Chy. 661.

Who might give the certificate in Lower Canada under 7 Vict. c. 18, s. 16. See *Doe* d. *Pa* v. *Henderson*, 7 Q. B. 182.

Who might give it here in 1825. See *Amey v. Card*, 25 Q. B. 501.

Requisites of execution of deed in Ireland before the C. S. U. C. c. 105. See *Polmshee v. Brown et al.*, 12 C. P. 248.

Where the certificate endorsed on a deed, executed in Minnesota, was given by a person described as the judge of the District Court in that state, and under the seal of the court, but it was not stated in the certificate (which would have been enough,) or otherwise proved, that such court was a court of record: Held, insufficient. *McCammon v. Beaupré*, 25 Q. B. 419.

As to the validity of such certificates in point of form. See *Jackson v. Robertson*, 4 C. P. 272; *Monk v. Farlinger*, 17 C. P. 41; *Stayner v. Applegate*, 8 C. P. 133, 451; *McNally v. Church*, 27 Q. B. 103; *Morgan v. Sabourin*, 27 Q. B. 230; *Grant v. Taylor*, 28 Q. B. 234; *Robinson v. Byers*, 13 Chy. 388.

As to defects cured by the 22 Vict. c. 35. See *Monk v. Farlinger*, 17 C. P. 41; *Commercial Bank of Canada v. Smith*, 18 C. P. 214.

Defect cured by 2 Vict. c. 6. *McNally v. Church*, 27 Q. B. 103.

As to what is an execution by the married woman "jointly with her husband." See *Burns v. McAdam*, 24 Q. B. 449; *Monk v. Farlinger*, 1 C. P. 41.

The certificate and examination were unnecessary in the conveyance of a leasehold interest, which the husband alone could dispose of. *Sampson v. McArthur*, 8 Chy. 72, in appeal.

The words, "duly examined," instead of examined "apart from her husband:"—Held, insufficient. *Stayner v. Applegate*, 8 C. P. 133, 451.

"Surrender and yield up:"—Held, equivalent to the statutory phrase "depart with." *Simpson v. Hartman*, 27 Q. B. 460.

Held, immaterial that the certificate was not endorsed on the deed, but written in the margin on the face of it: that the venue sufficiently shewed where the examination took place; and that an admission which was made of the justices' authority must be taken to mean their authority as justices for that district. *Ib.*

Where some evidence was given to shew that the deed had been acknowledged before a judge of this court:—Held, that the jury were rightly directed, if they should find that the deed had been so acknowledged, to presume that it was done within the proper time. *Tiffany v. McCumber*, 13 Q. B. 159.

The certificate endorsed on a deed bearing date 18th May, 1826, was that at the court of general quarter sessions, holden at, &c., "on Tuesday, the 16th day of May, 1826, personally appeared, &c.," in the usual form:—Held, sufficient, for it should be assumed that the 16th was the first day of the sessions, which might have been continued and the certificate signed after the execution of the deed. *Allison v. Redmayne*, 14 Q. B. 459.

With regard to a deed thirty years old—Held, that from the certificate it was to be presumed, primâ facie, that everything was done by the judge, who made the same, to justify him in certifying what he professed to certify. *Oxner v. Vernon*, 14 C. P. 573, followed in *Monk v. Farlinger*, 17 C. P. 41.

As the names of the two witnesses to the deed were the same as those of the justices, and the handwriting similar, and the date of the deed and certificate the same:—Held, that it might be inferred that the execution took place in their presence. *Simpson v. Hartman*, 27 Q. B. 460.

Held, that as the judge could not have certified that the deed was executed in the presence of the witnesses who subscribed it without being himself present, the inference was that the certificate was executed in his presence. *The Commercial Bank of Canada v. Smith et al.*, 18 C. P. 214.

The solicitor of the husband, being city recorder, was held not to be disqualified to take, as a magistrate, the examination of a married woman for the conveyance of her land. Sprague, C., dubitante. *Romanes v. Fraser*, 17 Chy. 267; 16 Chy. 97.

Magistrates interested in the transaction are not competent to take the examination of a married woman for the conveyance of her land. The solicitor of the husband is not as such disqualified. *Ib.*

Where, after the decease of one of the justices by whom an examination was taken, the other, an old man of seventy-three, gave evidence that he did not recollect and did not believe that the wife was examined as the certificate stated, the court gave credit to the certificate notwithstanding the evidence. *Ib.*

A mortgage at the date of its execution, the same having been registered, was ineffectual to pass the wife's estate, by reason of her not having been examined apart from her husband; and subsequently such mortgage was re-executed by the husband and wife, and the fact of the wife having been duly examined endorsed thereon, so that the deed was made effectual to pass her estate, but no re-registration took place:—Held, that the registration was sufficient under the statute; but, that the examination of the wife upon the re-execution of the mortgage could not relate back to the first execution thereof, so as thereby to gain for it priority over an instrument which had been subsequently executed by the husband and wife, and duly registered. *Beattie v. Mutton*, 14 Chy. 686.

(c) *Decisions under 36 Vict. c. 18.*

Applications under 36 Vict. c. 18, s. 4, O., for orders allowing married women to execute conveyances without their husbands being also parties, should be made to a judge in Chambers, not to the referee. *Re Nolan*, 6 P. R. 115.—Chy. Chamb.—Spragge.

A married woman is not entitled by the Married Woman's Real Estate Act, 1873, 36 Vict. c. 18, O., to convey land to her husband. The requirement that the husband shall be a party to and execute such deed, means that he must be a grantor. *Ogden v. McArthur*, 36 Q. B. 246. See *Davisson v. Saye*, 20 Chy. 115.

Quære, as to the effect upon secs. 2, 3, and 4 of C. S. U. C. c. 85, of the repeal, by 36 Vict. c. 18, of 34 Vict. c. 24, which repealed them. *Ib.*

(d) *Other Cases.*

A mortgage signed and sealed by the husband, but in which the wife was the only granting party:—Held, wholly inoperative. *Foster* v. *Beall*, 15 Chy. 244; *Doe* d. *Bradt* v. *Hodgins*, 2 O. S. 213.

Semble, that care should be taken that the deed should expressly convey the interest of the husband; for if the deed merely shew that he joins for conformity, and to manifest his assent to his wife parting with the estate, his interest will not pass. *Doe* d. *McDonald* v. *Twigg et al.*, 5 Q. B. 167.

Quære, whether a deed by a husband alone of his wife's land will operate as an effectual transfer of the husband's marital rights therein. *Wallis* v. *Burton*, 5 Chy. 352.

Held, that it will. *Allan* v. *Levesconte*, 15 Q. B. 9.

Held, that a deed executed by a man and his wife (she owning the estate) under C. S. U. C. c. 85, while the wife was under the age of 21, was good and valid, independently of the statute, to pass the husband's interest in the land, although not sufficient to bar the wife's. *Doran* v. *Reid*, 13 C. P. 393.

M. conveyed the land in question to J., the wife of R., R. alone executed a lease to defendant, and died during the term before his wife: Held, that on R.'s death the term expired, and that the plaintiff, claiming under a conveyance from R. and his wife, could eject defendant without notice to quit or demand of possession. *Burns* v. *McAdam*, 24 Q. B. 449.

The 44th sec. of the C. S. U. C. c. 83, "An act respecting the assurance of Estates Tail," applies only to cases arising under that statute, and does not authorize the court in every case where a husband is living apart from his wife, to dispense with his concurrence in a conveyance by her. *In re Catharine McElroy*, 32 Q. B. 95.

Semble, that a married woman may execute a deed without her husband joining, during the imprisonment of the husband as a felon. *Crocker et ux* v. *Sowden et al.*, 33 Q. B. 397.

A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed to the purchaser was a conveyance by the husband only, with a bar of dower by the wife. The error was not discovered until after the property had been disposed of in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties and the grantor (the husband being dead) Vice-Chancellor Esten decreed the grantee in the second deed to be a trustee for all the parties interested; and this decree, on appeal, was affirmed with costs. *Grace* v. *MacDermott*, 13 Chy. 247.

The wife's conveyance of her equitable estate is valid without the husband joining in the conveyance; and the husband having the legal title vested in him, the wife's vendee was held entitled to a decree against the husband for a conveyance. *Adams* v. *Loomis*, 22 Chy. 99.

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2. *Other Cases Relating to Wife's Real Estate.*

Under the statutes passed to remedy an erroneous public survey in Binbrook, 4 Will. IV. c. 8, 7 Will. IV. c. 59, an inhabitant living in the front concession cannot be dispossessed by ejectment after a prior submission to arbitration by the husband of a married woman owning land in the adjacent township of Saltfleet, the husband not being the owner of the land, to whom alone these acts apply. *Doe* d. *Crooks* v. *Ten Eyck*. *Doe* d. *Crooks* v. *Calder*, 7 Q. B. 581.

On an application against a railway company to compel them to arbitrate as to certain land taken, it appeared that the land belonged to a married woman, and that the company had taken possession of it upon an arrangement with her husband, which would have been an answer to the application if he had been the owner. An arbitration was ordered. *In re Benson et ux. and the Port Hope, Lindsay, and Beaverton R. W. Co.*, 29 Q. B. 529.

A. died in possession intestate in July, 1851, leaving his widow, and the plaintiff his eldest son. The plaintiff, on the 15th October, 1851, by deed poll, in consideration of £50, "remised, released, and forever quit-claimed" the land, in fee simple, to his mother, who was still living on the place. Defendants claimed under her:—Held, that the deed could take effect as a release only: that the widow, being a tenant at sufferance, had no estate upon which it could operate; and that it therefore passed nothing. Hagarty, J., dissenting, on the ground that whatever words would amount to a grant of an incorporeal hereditament before the statute, would, by virtue thereof, operate on corporeal hereditaments; and quære, whether the estate of the widow was not sufficient for the deed to take effect as a release. *Acre* v. *Livingstone et al.*, 26 Q. B. 282.

The title acquired by a purchaser at sheriff's sale of the husband's interest in his wife's lands, is sufficient for a release from the husband and wife to operate upon. *Beattie* v. *Mutton*, 14 Chy. 686.

Though a man has been in possession for 20 years of land granted to his wife for life, he does not thereby acquire an absolute title, for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, if his wife should so long live. *Nolan* v. *Fo*, 15 C. P. 565.

A grant to a married woman of a life estate in land, does not require the assent of her husband to pass the title to her; and unless he repudiate it in some way, both will be seized in her right. *Ib.*

The effect of C. S. U. C. c. 82, sec. 10, is to create a tenancy in common only in cases where before the 1st July, 1834, there would have been a joint tenancy:—Held, therefore, that a conveyance of land to a husband and wife in fee did not make them tenants in common; but that they held, as before the statute, by entirety, and that on the husband's death the wife took the whole estate. *In re Shaver et al.* v. *Harl al.*, 31 Q. B. 603.

The receipt of rent by the wife, with the husband's assent, from a tenant of her estate, after the expiration of a term, creates a tenancy from year to year. *Johnston et al.* v. *McLellan*, 21 C. P. 304.

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3. *Wife's Equity to a Settlement.*

Semble, wife entitled to a provision out of her equitable inheritance, the husband not maintaining her, and his assignee seeking the aid of the court to make her interest available. *Gillespie* v. *Grover*, 3 Chy. 558.

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4. *Wife's Separate Estate in Equity.*

A testator having bequeathed £500 per annum, payable out of the rents of his real and personal estate indiscriminately, for the support of his widow and family, (the widow having become sole executrix,) her separate creditors were held entitled to have her share of the annuity severed and attached to satisfy their debts, subject, however, to the prior claims of the estate against her as executrix, to be recouped for breaches of trust and the like; and, Semble, that where there is no process whereby such a fund can be reached, this court has power under 22 Vict. c. 22 s. 288, to apply a remedy; as in this case by equitable attachment. *Bank of British North America* v. *Matthews*, 8 Chy. 486.

A purchase by a wife from her husband, the consideration being paid out of her separate estate, was Held, to be maintainable against creditors of whose debts she had no notice. The husband, after the purchase, expended money in improving the property:—Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought. *Hill* v. *Thompson*, 17 Chy. 445.

A husband and wife were respectively residuary devisees under a will, and they together with the other residuary devisees united in a conveyance purporting to transfer the property to the wife and her heirs, so that none of the other parties should have any estate right, title, or interest therein:—Held, that the conveyance was inoperative at law so far as it assumed to pass the interest of the grantee's husband, but that it had the effect of constituting the husband a trustee of the legal estate in favour of the wife: that in equity the wife had an absolute estate in the whole property to her separate use, and had therefore the same power of devising it as if she had been a single woman. *Davisson* v. *Sage*, 20 Chy. 115.

See *Place* v. *Spawn*, 7 Chy. 406, p. 1668; *Wagner* v. *Jefferson*, 37 Q. B. 551, p. 1695.

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5. *Husband's Interest.*

(a) *Generally.*

On the 6th September, 1842, the wife of the plaintiff, with his assent, in consideration of £50 paid, being the proceeds of the sale of her own lands, obtained from defendant a lease of certain premises, to hold to her own use during her life, defendant covenanting at the expiration of the lease to pay her, her heirs or assigns, £50: Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant; and that having assented to the demise to his wife, he could not sue for the consideration money paid for the lease, either as money lent or as money had and received to his use. *Healey* v. *Bongard*, 1 C. P. 212.

Defendant delivered to the deceased wife of the plaintiff a note in payment of a legacy bequeathed to her, and she died before payment of the note:—Held, that a plea, that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action. *Robinson* v. *Cripps*, 6 C. P. 381.

The only proof of the receipt of certain moneys by the wife during the life of her husband, was her own evidence, but she also stated that the money had been given to her by him. The court considered her entitled to retain the amount, and that it formed no part of the testator's personal estate. *McEdwards* v. *Ross*, 6 Chy. 373.

A married woman jointly with her husband conveyed her estate absolutely to a trading company, which at the same time covenanted to re-convey upon certain conditions, which they accordingly did several years afterwards; but while the estate was vested in the company, and before the passing of the act for the relief of married women, a judgment was recovered against the husband and duly registered:—Held, that this registration bound the estate of the husband; and his interest being equitable, was not affected by a sale of his interest under an execution at law at the suit of other creditors. *Ferrie* v. *Kelly*, 9 Chy. 262.

After the death of a man and his wife, a sum of money was found deposited in a bank at the credit of the wife, which had been so deposited in the lifetime of the husband, but it did not appear by whom. The wife survived the husband; and after her death, a question being made to whose estate the fund belonged:—Held, that it belonged to the estate of the wife. *Ferris* v. *Hamilton*, 9 Chy. 362

A mortgage had been created by a married woman upon her estate; after her death, a suit praying a sale of the mortgaged premises was brought against her husband and her children; and the court, in directing a sale of the mortgage property, refused to make the estate of the children liable to arrears of interest for more than six years; but, directed payment to the mortgagee out of any excess after payment of principal money, costs, and six years' interest of so much of his balance as would represent the husband's interest as tenant by the curtesy in such balance. *Taylor* v. *Hargrave*, 19 Chy. 271.

V. Quarantine.

Quarantine extends only to the mansion or dwelling-house in which the widow is entitled to reside concurrently with the heir. *Doe* d. *Callaghan* v. *Callaghan*, 1 C. P. 348.

VI. Husband's Liabilities.

1. *For Wife's Necessaries.*

A recognition by a party that A. is his wife is sufficient to charge him with necessaries, al-

though they do not cohabit, having in fact separated, and although she may not strictly be his wife. *Hawley* v. *Ham*, Tay. 385.

A husband having given notice to the plaintiff that he would not be responsible for goods furnished to his wife, who had withdrawn herself from his protection, was held not liable for goods furnished to her by the plaintiff without his knowledge after she had returned to him again. *Weaver* v. *Lawrence*, E. T. 2 Vict.

Where there has been a voluntary separation without the wife having an adequate support, she is entitled to pledge her husband's credit for necessaries. *Tait* v. *Lindsay et al.*, 12 C. P. 444.

In an action by a tradesman against a husband for the value of goods supplied to his wife, whom he has without cause turned out of his house, the question is, whether the articles furnished were really necessaries, and to disprove this defendant may shew that she had been already supplied by others with similar goods. *Archibald* v. *Flynn*, 32 Q. B. 523.

In an action against a husband for goods supplied to his wife, it appeared that up to February, 1872, when the husband received an appointment worth $1,200 a year, he had been in embarrassed circumstances and owed debts amounting to $3,000. In May, 1870, his wife being in delicate health went to live with her father at Brantford, and continued to reside with him for two years, with the exception of an occasional visit to her husband, who lived in St. Catharines, during which time the father expended on her and her son upwards of $1,000. In May, 1872, when visiting her husband, she complained for the first time of wanting clothes; the husband appearing to have always furnished her with money and clothes whenever she asked for them, and also to have paid for their son's board and clothes. The husband then gave her what articles she required and what money he possessed, at the same time expressly telling her not to incur any debts in Brantford. In the following month, however, she incurred the debt now sued for, consisting of silks, valuable laces, and shawls, amounting to the husband's salary for a quarter; the plaintiff at the time being fully aware that she was not living with her husband, but with her father:—Held, that the husband was not liable, and a verdict for the plaintiff was set aside. *Zealand* v. *Dewhurst*, 23 C. P. 117.

Where a husband's conduct towards his wife is such that she is unable safely or comfortably to remain in his house, she has a right to pledge his credit for the suitable maintenance of herself and children; and the party furnishing such support may recover therefor, though he is the father of the wife, and furnished it without any immediate intention of making a claim for his outlay. *Griffith* v. *Paterson*, 20 Chy. 615.

Where in such a case a father had for several years supported his daughter and grandchildren, but made no claim against the husband during his lifetime, and after his death made a claim against his estate, the court, although it considered him entitled to be paid his demand, thought the executor, under the peculiar circumstances, was justified in having resisted payment of the demand without the sanction of the court; and that in the administration of the estate the executor would be entitled to be paid his costs of litigation. *Ib.*

2. *On Contracts made by Wife.*

Semble, that a defendant's endorsement to... by his wife, though in her own name, but afterwards recognized by defendant, would make him liable to an action on the bill. *Re...* v. *Codd*, 7 Q. B. 64.

Declaration on a note made by defendant, payable to D. or order, and by D. endorsed to plaintiffs. Plea, that D. when the note was made was, and still is, defendant's wife. Replication, that defendant made the note with the intent that D. should endorse it away, and that she endorsed it to the plaintiffs by his authority. Held, bad on demurrer. *Melvert et al.* v. *Harrison*, 18 Q. B. 619.

Defendant, during several years prior to ... for part of the year 1862, had a shop which ... and his wife, who lived with him, attended, the shop being divided into two parts, in one of which defendant carried on a confectionery and saloon business, and in the other a fancy goods business, the latter being under the personal superintendence of the wife, who always gave the orders for the goods, which he, however, paid for. In 1862, defendant gave up the confectionery, &c., business, and then, as he stated, sold out the other business to his wife for a certain sum, she agreeing to pay him $5 a week, which, however, she failed to do. She continued, with his permission, to carry on the fancy goods business, still living with him as before. There was no change either in the exterior or in the interior of the shop, except that the defendant no longer carried on the confectionary, &c., business there, though he was frequently seen on the premises. In 1869, the wife gave an order for the goods in question, just as she had always previously to 1862 been in the habit of doing:—Held, that the business must be considered defendant's, and that he was liable to the plaintiff for the goods ordered in 1869:—Held, also that the Married Woman's Act, C. S. U. C. c. 73, had no application to the case. *Foulds* v. *Curtelett*, 21 C. P. 368.

The plaintiff went to British Columbia many years before this action, leaving his wife here, to whom he wrote and occasionally sent money. She procured the defendant to endorse a note made by her for the price of furniture to carry on a boarding house, (which she subsequently carried on with the plaintiff's knowledge,) and executed to defendant a chattel mortgage under seal in her own name on said furniture. The rent of the house being in arrear, and part of the mortgage money overdue, the landlord restrained, and defendant enforced his mortgage, and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance after the payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued defendant in trespass and trover:—Held, that the wife was the agent of her husband, the plaintiff, in respect to purchasing the furniture and to do all that was necessary to acquire it:—Held, also, assuming that she exceeded her authority in giving a mortgage under seal, yet as the mortgage would be valid without a seal in her own name, the seal did not make it invalid for all purposes, or prevent it from being given in evidence as a justification derived from the plaintiff through his agent of the acts complained of:—Held, also, that as by this act...

the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement. Semble, that the wife standing by and permitting the sale of the property under the mortgage, was some evidence under the plea of leave and license. Per Wilson, J.—Under C. S. U. C. c. 73, the wife had power to buy the furniture with her own means and on her own credit, and to deal with it as if sole and unmarried; and in the ordinary exercise of that right, she could give a mortgage by deed in her own name as if a feme sole. *Halpenny* v. *Pennock*, 33 Q. B. 229.

Where a wife took an active part in her husband's business and had the custody of his money, sums paid to her were treated as paid to the husband. *Robinson* v. *Coyne*, 14 Chy. 561.

VII. Privileges and Incapacities of Wife.

1. *Privilege from Arrest or Attachment.*

Where the defendant, being a married woman, and known to be so by the plaintiff, was arrested on a writ of ca. re., both writ and arrest were set aside with costs. *Foley* v. *White et ux.*, 2 Chy. 51.

When the writ of ca. re. is only against the wife and is irregular against her, the husband cannot be compelled to appear. *Ib.*

A married woman living on terms of separation from her husband, who was in Europe, was arrested for debt. It was not shewn that the creditor had any knowledge of her having a husband living:—Held, that although the wife might be entitled to her discharge on application, the arrest under such circumstances would not support an action of trespass. *Rennett et ux.* v. *Woods*, 11 Q. B. 29.

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shew some ground of exemption. *Maughan* v. *Wilkes*, 1 Chy. Chamb. 91.—Spragge. See, also, *Marchesseau* v. *Donohoe*, 6 P. R. 138.

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2. *Liability on Contracts.*

Where a married woman procured the plaintiff to endorse for her a bill of exchange, promising to indemnify him, and after the husband's death renewed the promise:—Held, that no action would lie, though it was averred that the bill was negotiated for the defendant's own use. Lee v. Muggeridge (5 Taunt. 36), Held, to be in effect overruled. *Dixie* v. *Worthy*, 11 Q. B. 328.

A bond of submission to arbitration, signed by the wife as well as the husband, is a valid bond. *McGill* v. *Proudfoot*, 4 Q. B. 40.

A. having devised certain real estate, in separate parcels, to B. and C., afterwards incumbered these lands. B. was a feme covert, and questions having arisen between B. and C. as to the amount of the incumbrance to be borne by each, they, by mutual bonds, in which B. and her husband joined, agreed to refer such questions; and an award was made between these parties:—Held, that B. being a feme covert could not enter into such an agreement to refer: that the statutes as to conveyances by married woman of their real estates, did not apply to such agreements; and that therefore the agreement and award were not binding on her. *Bagley* v. *Humphries*, 11 Chy. 118. See also *Great Western R. W. Co.* v. *Baby*, 12 Q. B. 106.

Held, that during her husband's imprisonment for felony, the wife could contract, at all events as to what might be regarded as goods and chattels, as a feme sole. *Crocker et ux.* v. *Sowden et al.*, 33 Q. B. 397.

A testator having devised his real property to such of the persons named as should be living at the death of his widow, the parties interested came to an agreement for partition during the widow's lifetime. There were several questions between the parties: the plaintiff, who was one of the devisees, was induced to consent to the partition upon a distinct understanding with another of the devisees, who was a married woman, that the latter should after partition, hold a portion of her share in trust for the plaintiff. This agreement was not known to the other devisees; the partition deed was executed by all the parties; the partition would not have been agreed to by the plaintiff but for the promise stated:—Held, that the promise was not binding, both because there was no writing within the Statute of Frauds; and because the party making it was a married woman. *Morley* v. *Davison*, 20 Chy. 96.

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3. *Liability in Equity for Fraud or Misrepresentation.*

Quære, whether a married woman consenting to a breach of trust can afterwards complain of it; and semble, that if she make a representation and encourage another to act upon it, she will be compelled to make it good. *Hope* v. *Beard*, 8 Chy. 380.

Where a married woman joined with her husband in making misrepresentations to the executor of a deceased person in order to obtain possession of a chattel belonging to the testator, the court, upon appeal from the master, held her responsible for such misrepresentation equally with a person sui juris, and overruled an objection to the finding of the master, charging her with the value of the chattel. *Blain* v. *Terryberry*, 11 Chy. 286.

A married woman, owner of real estate, representing herself and selling the property as a spinster, is not entitled in equity to set up that the sale was void because of a conveyance not having been executed in conformity with the statutes as to the conveyance of land by married women. *Graham* v. *Meneilly*, 16 Chy. 661.

Where for ten years a wife concealed from the public her relation to her husband, and allowed him to live with another woman as his wife, under an assumed name, the real wife living in the neighbourhood, and receiving from them her own support, it was held that she was precluded from claiming dower out of land purchased during this period in the husband's assumed name, and afterwards sold by him and his supposed

wife to a purchaser, who bought in good faith, and without any notice of the real relationship of the parties. *Holy* v. *Gordon*, 17 Chy. 599.

A married woman, while yet under 21 years of age, but representing herself to be of full age, conveyed land to a bonâ fide purchaser for value, and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his vendee (the same day) created a mortgage thereon:—Held, that the married woman, notwithstanding her nonage, was bound by her representations as to her being of age; and that the other parties, having acquired their interests with full knowledge of the existence of the deed by her to the purchaser and after the registration thereof, took subject to all the rights of the purchaser; and the court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them. And *quære*, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith. *Bennetto* v *Holden*, 21 Chy. 222.

VIII. Deed of Separation.

Where in a deed of separation the husband covenanted to pay his wife £150, and appointed trustees, who, being indebted to the husband in that amount, gave him their separate notes for payment to his order, which he endorsed in blank, and returned to them for the benefit of his wife, and one of the trustees then gave to the wife the notes signed by him, with an endorsement that they were not to be sold by her, and she assigned them to the plaintiff:—Held, that he could not recover against the trustee on the notes, as they having been returned by the husband to the trustee were cancelled; and that the wife had, at any rate, no power to transfer them. *Wilson* v. *McQueen*, E. T. 3 Vict.

A deed of separation between husband and wife, where the estate is conveyed to the wife for life, with remainder to the children of the marriage on her death, is not avoided by the subsequent reconciliation of the parties, as the interests of the children intervene to preserve the deed. *McArthur* v. *Webb et al.*, 21 C. P. 358.

Semble, that where a deed contains a covenant that a wife shall release her dower in consideration of a settlement made in her favour by a deed of separation, and she does so, after reconciliation and subsequent separation, at his instance, the deed is thereby revived. *Ib.*

Although the policy of the law is to induce a man and wife to resume co-habitation notwithstanding they may have agreed to a separation, and that on such renewal of co-habitation a deed of separation will be held void: still where property was conveyed to a trustee for the support and maintenance of a wife and her children in settlement of a suit for alimony, and the husband and wife afterwards renewed co-habitation, but the husband subsequently deserted his wife and family, the court refused, at the instance of the husband, to set aside the deed. *McArthur* v. *Webb*, 13 Chy. 303.

An unqualified covenant in a separation deed for payment of an annuity to the wife for her life, is not avoided by the subsequent reconciliation of the parties; or by the wife's leaving her husband afterwards without cause. *Walker* v. *Walker*, 19 Chy. 37.

IX. Actions and Suits by and against Husband and Wife.

1. *At Law.*

(a) *For Injuries to Wife.*

Case by the husband alone for negligent and unskilful treatment of his wife in child birth. The first count was bad for merely stating negligence without averring any damage accruing therefrom. The second count alleged that by reason of the defendant's improper treatment of the plaintiff's wife, her life was endangered, and she was much injured, being a ground of action for which the husband could not sue alone. The third count combined different causes of action, some for which the husband should sue alone, and others for which the wife ought to be joined: Held, that the proper course was to arrest the judgment, not to award a venire de novo. *Smith* v. *Carder*, 11 Q. B. 77.

The plaintiff sued defendant for neglecting, as a medical man, to attend upon his wife during child-birth, alleging the contract in one count to be to attend at 3 p.m. on the 12th April, and in another count to attend when notified:—Held, that upon the evidence stated in the case a contract and breach of it were shewn, which, with proper amendments, as pointed out in the case, would support the declaration; but, Held, also, that the plaintiff in this action could not recover for the personal injury and suffering of the wife. *Hunter* v. *Ogden*, 31 Q. B. 132.

After a count by husband and wife for injury done to the wife during coverture, a second count, by the husband alone—after setting out the fact that the horse and cutter, in which both plaintiffs at the time were, had been precipitated over a bridge with the wife, and that she was thereby greatly injured, and laid up for a long time in consequence of the injuries sustained by her, and endured great suffering—proceeded to allege that the husband was put to great trouble and expense by reason of the loss of his wife's society and her services, and was compelled to pay, and did pay, large sums of money on account of her illness to nurses and medical men, &c., and also lost the said horse and cutter, and was otherwise put to great expense, &c. The jury having found for the plaintiffs, and assessed damages generally on both counts:—Held, that after verdict the second count must be treated as a count only for the damage of the husband, for which he alone could sue; and that, treating it as such, it was well joined with the first count, under the C. L. P. Act, though damages were sought by him for the injury to the horse and cutter, as well as for that resulting to the husband from the injury to the wife. Held, also, that defendants were not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count. *Campbell et ux.* v. *The Great Western R. W. Co.*, 20 C. P. 345, *S. C.* in appeal *Ib.* 563.

The first and second counts in a declaration, in an action by husband and wife, charged slander of the wife, consisting of imputations of adultery and prostitution, without setting out the words: Held, clearly bad. The third count was for assaulting the wife, whereby, &c., and the fourth and fifth counts were respectively for assault of the wife, per quod consortium amisit, and of the husband himself. The plaintiffs claimed damages jointly under the first four counts, and the husband alone under the fifth count. Semble, that the claim for damages by both plaintiffs, though bad as to the fourth count, was good as to the first three, but that both plaintiffs being expressed in the declaration to sue in respect of all the counts, though the husband alone at the conclusion claimed in respect of the fifth count, the whole declaration was bad. *Breen et ux.* v. *McDonald*, 22 C. P. 298.

In a declaration by husband and wife for slander of the wife in accusing her of adultery, it was alleged as special damage that the wife had lost and been deprived of the hospitality of friends with whom she was in the habit of associating, and who now refused to associate with her:—Held, on motion for arrest of judgment, a sufficient allegation of special damage to support the action. Quære, whether the allegation of the loss of the consortium of the husband would have been alone sufficient. Held, also, that the declaration claiming the damages as the wife's, although when recovered they might belong to the husband, was no objection; and, at all events, was merely a matter of form, and so amendable. Held, also, that the course adopted by the husband at the trial, with the defendant's concurrence, in confining the action to be, in substance, that of the wife alone, and coming forward as a witness for the defence in support of a plea of justification, and allowing the case to be submitted to the jury on the question of the truth or falsity of the accusation, would now preclude the motion in arrest of judgment. *Campbell et ux.* v. *Campbell*, 25 C. P. 368.

The husband had sued the person accused of the adultery for charging which this action was brought, and recovered a judgment against him in an action of crim. con., and judgment had been given in Chancery against the wife on the ground of adultery, in a suit brought by her against the husband for alimony:—Held, that under these circumstances the verdict entered for the plaintiff must be set aside, when the plaintiff, C., if so advised, might raise the question whether he was not dominus litis. *Ib.*

(b) *For Criminal Conversation.*

In trespass for crim. con. the plaintiff must give strict proof of his marriage. Mere casual conversations of defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient. *Campbell* v. *Carr*, 6 O. S. 482.

To a declaration alleging that defendant debauched and carnally knew the wife of the plaintiff, defendant pleaded only not guilty:—Held, it necessary to prove that the woman was the plaintiff's wife. *Ford* v. *Langlois*, 19 Q. B. 312.

It is not necessary that direct evidence of adultery should be given: it is sufficient to prove proximate acts and circumstances:—Held, therefore, that the fact of defendant having supplied the plaintiff's wife, while living apart, with a bedstead and mattress at her boarding house: that he, an unmarried man, visited her at all hours of the day: that he was in the habit of driving and walking with her: that he admitted he kept a woman; and that he wrote a telegram from her to the plaintiff, calling her by his own name, were strong evidence of adultery. *Frank* v. *Carson*, 15 C. P. 135.

In an action of crim. con.:—Held, that the fact of plaintiff, having after verdict in his favour from mere motives of compassion and consideration for their child, taken back his wife to live with him, was not such a condonation as would induce the court to grant a new trial. *McMillan* v. *Jelly*, 17 C. P. 702.

Action for crim. con. Pleas, 1. That the plaintiff had been guilty of adultery with one L., by whom he had a child now living with him, and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence towards her, and finally put her away from him by force, and threatened to put her to death if ever she returned to him, so that she was in danger of her life, and did live apart from him permanently; 2. That the plaintiff's wife had, while so living apart from him, obtained an order for protection under the statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force:—Held, on demurrer, A. Wilson, J., diss., that the pleas shewed a good defence. *Patterson* v. *McGregor*, 28 Q. B. 280.

See *Campbell* v. *Campbell*, 25 C. P. 368 p. 1681.

(c) *Other Cases.*

Where husband and wife, executrix, are sued, service of process upon husband only is sufficient, as well as in other cases. *Shuter et al.* v. *Marsh et ux.*, Tay. 172.

In trespass q. c. f. et de bonis asportatis by husband and wife, where the general issue is pleaded, everything will be intended, after verdict, to support the declaration; and although the wife's interest do not clearly appear in all the counts, yet it will be supported on motion in arrest of judgment. *Howe et ux.* v. *Thompson*, M. T. 6 Vict. See contra, in an action on contract. *Shubery* v. *Cornwall*, 6 O. S. 253.

T. having the title to land, she and her husband brought trespass for injuries to it, and defendants pleaded that the land was not the plaintiffs'. It was objected that there was no joint property to sustain the action; but, Held, that the objection was not available as ground of nonsuit. Quære, whether it could have been on demurrer or in arrest of judgment. *Tucker et ux.* v. *Phillips et al.*, 24 Q. B. 626.

An affidavit of the wife of a party to a cause, cannot be read on motion for a new trial. *Henderson* v. *Wallace*, E. T. 2 Vict.

A wife could not sue in her own name, her husband living, for work performed by her. *Murphy* v. *Bunt et al.*, 2 Q. B. 284.

A husband entitled to land in right of his wife may bring ejectment therefor alone. *Doe* d. *Eberts* v. *Montreuil*, 6 Q. B. 515.

Where a wife, living apart from her husband is in possession of land, under such circumstances as precludes the presumption of her being agent for her husband, she must be made a defendant in ejectment for the land. *Woodward* v. *Cummings*, 6 P. R. 110.—C. L. Chamb.—Dalton, *C. C. & P.*

Where a wife, who had been abandoned by her husband for several years, took a lease of premises without his knowledge, and she brought an action for trespass thereto in her husband's name :—Held, that the action was proper. *Jones* v. *Spence*, 1 Q. B. 367.

Assumpsit by husband and wife. Declaration, 1st count, "That defendant was indebted to the plaintiff's wife, while sole and unmarried, in £200 for wages as a hired servant ; in £200 for money lent by her, &c., and in consideration whereof, defendant promised to pay her, &c., (while she was sole and unmarried,) on request &c. Pleas, 1st. Non-assumpsit. It appeared in evidence that the plaintiff's wife dum sola had lent defendant some money, when to be returned not clearly appearing ; and, further, that she dum sola had worked for defendant for three years. There was also evidence of admitted liability by defendant within six years. The jury gave a verdict for £25, but it was not distinctly stated whether for wages or the money lent. The court refused to disturb this verdict, it being in accordance with the justice of the case ; and it was said that the addition of another count would obviate all difficulty. *Barkerville et ux.* v. *Corbett*, 3 C. P. 159.

A married woman, during her husband's absence from the country, lent defendant money, taking an acknowledgment of indebtedness to herself. In an action on the common counts only by the husband and his wife, the jury found that it was the husband's money lent by the wife :—Held, that the wife was improperly joined. *Rischmuller et ux.* v. *Uberhaust*, 11 Q. B. 425.

In an action for the maintenance of an illegitimate child under C. S. U. C. c. 77 s. 4, it appeared that the plaintiff was a married woman :—Held, that the plaintiff could not sue, for it must be presumed that the necessaries furnished were her husband's, and she must fail on never indebted, no plea of abatement being requisite. *Jackson* v. *Kassel*, 26 Q. B. 341.

In an application by a married woman to revive a judgment under C. L. P. A. 1856 s. 303, her husband must be joined. *Swan* v. *Cleland*, 2 L. J. 235.—C. L. Chamb.—Richards.

In an action brought against a husband and wife for slander, the declaration alleged the words constituting the slander to have been spoken by both the defendants, while the evidence proved the wife alone to have made use of the words complained of. On motion for nonsuit :—Held, that the declaration should have alleged that the action was brought against the defendants for words spoken by J. W., being the wife, &c., and that it was not therefore supported by the evidence. *Wilson* v. *West et ux.*, 11 C. P. 127.

The plaintiff sued defendant, a married woman, on a demand exceeding $200, but abandoned the excess above $99.75. Defendant claimed a set-off exceeding $400, but consisting of various unconnected items :—Held, that no ground was shewn for a prohibition to the Division Court; that the suit was clearly within the jurisdiction; and that the defence of coverture should have been set up in the court below. *Read* v. *Wedge*, 20 Q. B. 456.

A. having obtained possession of certain goods and chattels by bill of sale from a sheriff upon an execution issued on a judgment recovered against a married woman without joining her husband. B. having recovered a judgment and issued an execution in the same way (without joining the husband) contended in an interpleader that A.'s judgment was null and void, and that he was entitled to the goods :—Held, that A.'s judgment not being absolutely null and void, and he being in possession with a prima facie title, he was entitled to raise the same objection to B.'s judgment, and that both judgments being open to the same objections, he was entitled to prevail. *Davis* v. *Levey et al.*, 11 C. P. 292.

The plaintiff proceeded by writ of revivor to obtain execution against the husband and wife on a judgment recovered against the latter before marriage. The declaration set out the writ, in which the judgment was stated, and prayed execution against both defendants upon it ; and defendant demurred, on the ground that no legal right of action was shewn against them, and that the proceeding by writ of revivor was not applicable.—Held, that under the C. L. P. Act, sec. 143 the proceeding was proper, and that the right of action need not be shewn, but only a right prima facie to have execution on the judgment. *Ashworth* v. *Patterson*, 21 Q. B. 269.

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2. *In Equity.*

(a) *Wife Suing by Next Friend.*

Where in the course of a cause it becomes necessary for a married woman, a party to the suit, to make an application exclusively on her own behalf, she can do so only by her next friend. *Cooney* v. *Girvin*, 1 Chy. Chamb. 94.—Spragge.

In suits by a married woman respecting her separate property, she must sue separately from her husband, (by her next friend,) and must make her husband a defendant. *Houlding* v. *Poole*, 1 Chy. 206.

Where a married woman files a bill without a next friend, the proper order to make, in the first instance, is that a next friend be appointed, and that all proceedings in the suit be stayed in the meantime. *McPherson* v. *McCabe*, 1 Chy. Chamb. 250.—Spragge.

Where one of several co-plaintiffs is a married woman she must sue by next friend, who must be a solvent person, capable of answering costs. *Rann* v. *Lawless*, 1 Chy. Chamb. 333.—Vankoughnet.

Semble, if the next friend of a married woman makes the necessary affidavit of justification, swearing that he is worth £100 over his debts, the question of his solvency will not be gone into. *McBean* v. *Lilley*, 2 Chy. Chamb. 247.—Spragge.

The test of the solvency of a next friend is whether he is worth £100 over and above what will pay his just debts. Motion to change next friend on the grounds of insolvency,

fused, as not sustained by evidence. *Stovel* v. *Coles*, 3 Chy. Chamb. 421—Taylor, *Referee*.

Where it becomes necessary to substitute a new next friend, the motion for the appointment should be on notice, and an order taken on praecipe is irregular. An order so taken was set aside with costs, on the grounds of irregularity, and without going into the question of the solvency of the party appointed. *Bennett* v. *Sprague*, 2 Chy. Chamb. 194.—Taylor, *Secretary*.

A defendant in a suit cannot act as the next friend of the plaintiff, a married woman. *S. C.* 4 L. J. N. S. 45.—Chy. Chamb.—Taylor, *Secretary*.

On a motion to dismiss the bill of a married woman, the court refused to count against her time which had been lost in consequence of an order obtained by the defendant requiring her to name a new next friend. *Poole* v. *Poole*, 2 Chy. Chamb. 475.—Mowat.

A husband and wife may jointly maintain one bill for specific performance of a covenant made by them for the sale of land of the wife, but the wife must sue by her next friend. *Jessop* v. *McLean*, 15 Chy. 489.

A feme covert plaintiff may change her next friend without giving him notice or security for costs already incurred, but notice to the opposite party is necessary. *Harvey* v. *Boomer*, 3 Chy. Chamb. 11.—Mowat.

Where a married woman is a co-plaintiff with her husband, who has a substantial interest in the suit, she must nevertheless sue by next friend. *Northorn* v. *McKinlay*, 3 Chy. Chamb. 65.—Strong.

On an appeal against the report of the master as a married woman and her husband, defendants in the suit, it is not necessary that the married woman should have a next friend; such case differing from an application by a married woman alone. *Hancock* v. *McIlroy*, 18 Chy. 209.

Where a married woman defended a suit in Chancery without a next friend, it was held that the husband and wife could appeal to the Court of Appeal without any next friend. *Butler* v. *Cook*, 18 Chy. 190.

A married woman applying under the Act for Quieting Titles, must proceed by next friend. *Hoagland*, 4 Chy. Chamb. 74.—Taylor, *Referee*.

A married woman brought a suit in her own name for redemption of lands, in which she claimed an estate for life under a lease made in 1856:—Held, not her separate property, so as to enable her to sue without a next friend under 35 Vict. c. 16, s. 9. A former suit in respect of the same subject matter in which the bill had been dismissed with costs, to be paid by the next friend of the plaintiff, was considered as substantially a decree against the plaintiff with costs, and proceedings were stayed in a second suit until security should be given for the costs of such second suit. A stay of proceedings until the costs of the former suit were paid was refused, there being a distinction in this respect between suits by married women and suits by persons sui juris. *Redman* v. *Brownson*, 6 P. R. 84.—Chy. Chamb.—Holmsted, Jr.

A married woman filing a claim under the Act for Quieting Titles, will not be required to name a next friend, as sec. 41 of the act provides that for the purposes of the act a married woman shall be deemed a feme sole. *Re McKim*, 6 P. R. 190.—Chy. Chamb.—Holmested, *Inspector of Titles*.

See, also, the cases under "Prochein Amy."

(b) *Service of Papers.*

Where a husband and his wife are defendants, service of a notice of motion upon the wife will not be a good service on the husband, unless made at his dwelling house. *Heward* v. *Magahay*, 1 Chy. Chamb. 366.—Spragge.

An application for an order to serve a married woman as if a feme sole, and for an order for substitutional service upon her for her husband, who could not be found, was refused, he not being shewn to be out of the jurisdiction. *Meyers* v. *Barker*, 2 Chy. Chamb. 407.—Taylor, *Secretary*.

Where a married woman claimed goods seized under a fi. fa., and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion. *Gourlay* v. *Ingram*, 2 Chy. Chamb. 237.—Taylor, *Secretary*.

(c) *Answering.*

A married woman had been served with an office copy of a bill as well as her husband, but no joint answer was put in, and an order was served upon her to answer separately from her husband. No answer having been put in after a month from such service, the court refused to make an order pro confesso against her, and directed a second office copy of the bill, together with an order, to be served upon her, directing her to answer separately within a time limited. *Miller* v. *Gordon*, 5 Chy. 134.

Where a married woman is interested in an estate, and no joint answer is put in by herself and her husband within the time limited, application may be made to allow her to put in an answer separate from her husband, the affidavits to state why her answer is required. *Gordon* v. *Wearer*, 5 L. J. 67.—Chy.

Until the time for answering has expired, the plaintiff cannot sue out an order for a married woman, defendant, to answer separately; and, if the wife put in an answer jointly with her husband, it is binding upon her, whether the suit be in respect of the wife's separate estate or not. *Clarke* v. *McElroy*, 10 Chy. 210.

Where husband and wife had jointly answered and demurred to a bill, which demurrer was overruled, and the order allowing the same only extended the time for the husband to put in his answer:—Held, notwithstanding, that the husband and wife might put in a joint answer. *Ib.*

Before an order will be made to answer separate from her husband, it must be shewn that an office copy of the bill has been served upon her, and that she is in default for want of answer. *Anonymous*, 1 Chy. Chamb. 9.—Spragge.

A solicitor accepted service of an office copy bill on behalf of defendant S. and his wife, and gave a written consent, in the event of no answer being filed, for an order pro confesso:—Held, that this did not dispense with an order for the wife to answer separately before proceeding to

take the bill pro confesso. *Sergeant* v. *Sharpe*, 1 Chy. Chamb. 63.—Esten.

An order will not be made to take a bill pro confesso against a married woman without her having had an opportunity to answer separately. *White* v. *Church*, 2 Chy. Chamb. 203.—Taylor, *Secretary.*

Husband and wife being defendants to a suit of foreclosure in respect of property belonging to the wife, the husband put in an answer alone, and the plaintiff moved to take the answer off the files for irregularity, and to take the bill pro confesso against the husband, which was refused with costs. *Elliott* v. *Hunter*, 1 Chy. Chamb. 158.—Spragge.

It is not necessary that the bill should be taken pro confesso against a husband before an order to answer separately can be obtained against his wife; it is sufficient that the time for the joint answer shall have elapsed. In a foreclosure suit to which a married woman is a defendant, it is not necessary that the bill be taken pro confesso against either husband or wife; the proper practice is, when the time for answering by both has elapsed, to apply in chambers for a direction to draw up the decree on præcipe. *Walker* v. *Tyler*, 1 Chy. Chamb. 189.—VanKoughnet.

It is not necessary to serve the bill on a married woman (her husband being a co-defendant) before obtaining an order to answer separately, service on the husband alone is sufficient. *Bunn* v. *Barclay*, 1 Chy. Chamb. 254.—Spragge.

The court will not, at the instance of the plaintiff, grant an order for a married woman to answer separately, unless the husband has been served with the bill, even though the husband has absconded and cannot be found. *Brandon* v. *Wheeler*, 1 Chy. Chamb. 262.—VanKoughnet.

Where the plaintiff applies for an order against a married woman to answer separately, on the ground that the time for the joint answer of herself and husband has elapsed and no answer has been filed, he must shew that the case is a proper one for such separate answer. *Wright* v. *Morrow*, 1 Chy. Chamb. 286.—Spragge.

At the time of serving an order to answer separately on a married woman, the original order should be shewn, and the fact sworn to in the affidavit of service, otherwise an order pro confesso will not be granted. *Robinson* v. *Dobson*, 1 Chy. Chamb. 302.—Spragge.

Where a married woman received an office copy order to answer separately by mail, and accepted service in writing, and returned the original order with service accepted endorsed thereon:—Held, sufficient service. *Keachie* v. *Buchanan*, 2 Chy. Chamb. 42.—Mowat.

The case of service of a bill upon a married woman, after an order has been obtained directing her to answer the bill separately from her husband, is not within orders 94, 95, and 96, which require a bill to be served within a certain time from its filing. *Dewar* v. *Folly*, 6 P. R. 135.—Chy. Chamb.—Strong, Holmested, *Referee.*

(d) *Other Cases.*

Where a mortgage was created by husband and wife upon lands of the wife, and the mortgagee, together with the husband, joined in a conveyance of all their interests to a purchaser, the court in a foreclosure suit refused an immediate reference under the orders of 1853, and directed the cause to be brought to a hearing in the regular way. *Wallis* v. *Burton*, 5 Chy. 352.

The fact that a married woman is a defendant to a foreclosure suit (the time for her separate answer having elapsed) does not render it necessary to apply to a judge for a direction to the registrar to draw up the decree on præcipe, as the registrar has power to do so without any direction. *Macfie* v. *McDougall*, 1 Chy. Chamb. 259.—VanKoughnet.

An order to take a bill pro confesso against a married woman is now unnecessary. *Hare* v. *Smart*, 1 Chy. Chamb. 316.—Mowat.

An order for an interpleader had been applied for to try the right of a married woman to certain goods seized under fi. fa., to which application her husband was not a party, and the motion was refused with costs, as reported in Gourley v. Ingram, 2 Chy. Chamb. 237. On that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application the solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband, the motion was renewed and an interpleader order granted by the secretary, which, on appeal, was sustained. *Gourley* v. *Ingram*, 2 Chy. Chamb. 238.—Spragge.

G. D., and H. D. his wife, incumbrancers, were made parties in the master's office, and not appearing on the day named in notice A.:—Held, by the master that an order in chambers must be obtained, giving the wife liberty to come in to prove her claims separate and apart from her husband. The order in chambers was afterwards obtained; and service of a fresh notice was dispensed with. *Marshall* v. *Widdis*, 3 L. J. N. S. 24.—M. O.—Taylor, *Secretary.*

Where a bill seeks the destruction of trust estate, some or one of the cestuis que trust are necessary parties In order to the proper constitution of the suit the husband of a female married plaintiff must be made a defendant thereto. *Baker* v. *Trainor*, 15 Chy. 252.

Where it would be attended with inconvenience to have a married woman examined by the court or judge, touching her consent to abandon her interest in the fund in litigation, the examination may be taken by the master. *Tompkins* v. *Holmes*, 14 Chy. 245.

Where the question as to whether the widow had elected to take an annuity in lieu of dower arose in connection with a claim of the defendant for past maintenance and education of the plaintiff, this point was reserved until after the master had made his report. *Walmsley* v. *B*... 15 Chy. 210.

A suit was brought by a married woman to which her husband was joined as a defendant. The plaintiff filed the usual affidavit on production of documents, producing all the documents in her possession relating to the matters in question in the suit. The defendant applied to compel further production, viz., of documents which, it appeared, the defendant, the plaint...

husband, had in his possession. It was alleged that he held these documents for the benefit of the plaintiff, and that it was intended to use them at the hearing :—Held, that the possession of the husband could not be said to be the possession of the wife ; that a better affidavit will only be ordered upon proof of admission under oath, by the party against whom the application is made, of having other documents in his possession besides those already produced ; that a feme covert plaintiff, whose husband is a defendant, is not bound to procure production of documents by her husband for the benefit of his co-defendants ; and that the rule respecting the obtaining of discovery from a co-defendant, protected the plaintiff's husband from liability to examination by his co-defendants. *Brown* v. *Copren*, 6 P. R. 203.—Chy. Chamb.—Holmested, *Referee*.

X. Rights and Liabilities of Husband and Wife under C. S. U. C. c. 73, and Subsequent Statutes.

1. *Decisions under C. S. U. C. c. 73.*

Rights and Liabilities of Husband.]—Quære, as to the effect of the C. S. U. C. c. 73, upon the husband's right to possession of his wife's land where he is not tenant by the curtesy. *Scouler* v. *Scouler*, 19 Q. B. 106.

That an action by the husband alone will lie against a party seizing separate goods of his wife out of the possession of her husband. *Krasmer* v. *Gless*, 10 C. P. 470.

The property of a woman married before the 4th May, 1859, without any marriage contract or settlement, is protected as against creditors of her husband, whose claims were contracted after 4th May, 1859, and not otherwise. But where the seizure for a debt contracted before the 4th May, 1859, was not made in the lifetime of the wife, it was held that the property, having passed by her death to the next of kin, under the statute of distributions, was not liable to be seized by the creditors of the surviving husband. His interest, however, under the statute, as husband surviving, and that interest only, was held to be liable to the execution. *Ramsay et al.* v. *Carruthers*, 10 L. J. 299.—C. L. Chamb.—A. Wilson.

Land of a married woman was leased by her alone to the grantor for his life, and defendant during cut timber upon it she and her husband sued for injury to *their* reversion :—Held, that they could not recover, for the husband was a necessary party to the lease : that the C. S. U. C. c. 73, recognizes his estate in her land during coverture, and has made no change in the conveyance by married women of their real estate ; and even if the lease could have any operation between the parties to it, it could not establish the plaintiffs' reversion as against a stranger. *Barwick et ux.* v. *Sullivan*, 25 Q. B. 105.

To an action by husband and wife on a note for $200, made to the wife before marriage, defendant pleaded that the wife was formerly the widow of one C., to whom defendant had been indebted in $400 : that she subsequently administered to his personal estate, and that afterwards defendant became indebted to her in $200 : that the note declared on was for these two sums, and that after its maturity, with the knowledge and assent of her husband and co-plaintiff, she agreed with defendant to accept from him a conveyance in fee of certain lands in full satisfaction and discharge of her claim on said note : that defendant accordingly executed a proper deed of said lands to her, duly registered, and tendered the same to her before action, and that she never expressed any dissent from said agreement until after said tender :—Held, on demurrer, a bad plea ; 1. As not averring that there was no marriage settlement, so as to bring the case within the provisions of C. S. U. C. c. 73 ; 2. Because the accord and satisfaction attempted to be set up being, as to two-thirds of the amount, in respect of a sum due to the wife in her representative character, was not pleaded as having been made with her husband. Held, also, that had it been the agreement to convey the land which was averred to have been accepted, it would have been bad, as not having been alleged to have been in writing, without which the plaintiff's would have had no remedy. McKechnie *v.* McKechnie, 7 Chy. 23 ; Muir *v.* Dunnette, 11 Chy. 85 ; Childers *v.* Childers, 3 K. & J. 315, distinguished. *Balsam et ux.* v. *Robinson*, 19 C. P. 263.

Semble, that the words in the act, "free from the debts and obligations of her husband and from his control and disposition without her consent," are not to be construed as giving the wife absolute control and disposition *without his consent* ; and remarks upon the danger to her of a different construction. *Ib.*

Where, on a debt contracted in 1855, the plaintiff, on 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of the amount of a legacy deposited by the wife of M. in her own name in the bank of the garnishees, she having been married on the 28th May, 1859. *Hope* v. *Muir*, 1 L. J. N. S. 275.—C. L. Chamb. —J. Wilson.

Rights and Liabilities of Wife.]—One of the plaintiffs having married since the devise to her of the land in question :—Held, that she was not entitled by the act to sue alone in ejectment, but that her husband must join. *Scouler* v. *Scouler*, 19 Q. B. 106.

Upon an action brought against a married woman for a cause of action which accrued dum sola :—Held, 1. That the husband was properly made a party thereto ; 2. That it is necessary to aver that at the time the action was commenced the female had separate estate. *Muldoon* v. *Bilton*, 10 C. P. 382.

G. having recovered a judgment in a Division Court against one D., on a note made by her after her marriage to K. (the present plaintiff,) under execution founded thereon he seized goods, &c., which were the separate property of D. (wife of K.) under C. S. U. C. c. 73, for the detention of which goods this action was brought :—Held, 1. That the statute does not enable a married woman to bind herself as a feme covert to a greater extent than she was able to do before the passing thereof ; 2. That an action on a contract made by a married woman before marriage, will not lie against her without her husband being joined with her therein as a party, he being a resident within the province. *Kraemer* v. *Gless*, 10 C. P. 470.

The plaintiff declared upon a bond dated 4th, of June, 1858, made by the defendant L. R. and two others, without her husband, when sole and unmarried, by the name of L. M., to the governor-general, for £300, conditioned for the due administration of the estate of A. M., alleging the issue of letters of administration, that goods and chattels of A. M. amounting to £250 came into her hands to be administered on the 1st July, 1858: that she wasted the same, and disposed thereof to her own use; and that the bond was assigned, by order of the judge, to the plaintiff as trustee for the next of kin, who thereupon became entitled to sue thereon, &c. After assessment of damages on judgment by default:—Held, on motion by defendants J. R. and L. R. in arrest of judgment, that the case came within sec. 18 of C. S. U. C. c. 73: that her husband was properly joined; and that it was necessary to allege that the cause of action accrued before marriage, and that she had separate estate. *Kirchoffer* v. *Ross et ux.*, 11 C. P. 467.

Sec. 18 of C. S. U. C. c. 73, applies only to cases where judgment has not been obtained against the woman before marriage. *Aylesworth* v. *Patterson*, 21 Q. B. 269.

In an interpleader issue, the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th of May, 1859, without any settlement:—Held, in the absence of any evidence to the contrary, that the reasonable presumption was, that the husband was tenant of the land, and, if so, the crops would be his; 2. As to the other property, that apart from our statute it would not be the claimant's merely because it had been purchased by money which belonged to her under the will; 3. That as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second sections; and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts. *Lett* v. *Commercial Bank*, 24 Q. B. 552.

In the County Court it was left to the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession:—Held, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it. *Ib.*

The purpose of this act was to preserve to a married woman for her own use, and as her own estate, all her own property which she had not disposed of expressly by a settlement, in like manner as if she had secured it by a settlement. *Leys et ux.* v. *McPherson*, 17 C. P. 266.

L., a few days before his marriage, in 1865, executed to his intended wife a bill of sale of his furniture and household goods, and had it duly filed. It recited the intended marriage, and that it had been agreed that the goods should be assigned to make some provision for the support of the intended wife, and purported to be made in pursuance of the said agreement and in consideration of 5s.:—Held, that the bill of sale was not a contract or settlement within the meaning of C. S. U. C. c. 73, s. 1, but was a valid transfer of the goods to the intended wife before marriage, and in consideration of it; and that her title to the goods was therefore, when the marriage took place, protected by the statute, notwithstanding her coverture. *Ib.*

Held, that a married woman having separate real property is not entitled by this act to contract debts for its improvement so as to make herself liable individually, (A. Wilson, J. diss.) or jointly with her husband. *Wright* v. *Garden et ux.*, 28 Q. B. 609.

The declaration alleged that the woman married before the 4th May, 1859, without a settlement, and having separate real estate, and after her marriage employed the plaintiff to repair a house on it, for which neither she nor her husband would pay:—Held, on demurrer, that the action would not lie. *Ib.*

L. and his wife, who had married in 1865, recovered judgment in the Division Court against B., for rent due to Mrs. L., on land which she had inherited from her father in 1852, and B. on the same day recovered a judgment against L. for a larger sum:—Held, that Mrs. L. being entitled under the act to the rent as her own, and her husband joined in the action for conformity only, there could be no set-off against it of B.'s judgment against L. Such set-off having been directed in the Division Court, a mandamus was granted to the clerk, to issue execution on the judgment recovered by Mrs. L. *In re Linden et ux.* v. *Buchanan*, 29 Q. B. 1.

A woman had been long in possession of chattels said (but not proved) to have been left to her by her deceased husband, and using them with her children. She then married the co-plaintiff. These goods were seized by a creditor of his:—Held, that her title before marriage was prima facie sufficient, and after her second marriage the goods were protected, under the act, against her second husband's creditors. *Corrie et al.* v. *Cleaver et al.*, 21 C. P. 186.

A married woman who was equitably entitled as cestui que trust, to a life estate in certain lands, joined with her husband in a note upon which judgment was recovered against them. Thereupon the plaintiff in the action filed a bill seeking to enforce his claim against the title of the wife:—Held, that the act had not the effect of increasing the interest of the wife so as to render her estate liable for the debt. *Royal Canadian Bank* v. *Mitchell*, 14 Chy. 412.

A married woman who has separate estate which is vested in trustees, cannot on that account be sued for a legal debt contracted before her marriage. In such a case a creditor has no locus standi in equity, until he has obtained judgment at law. *Chamberlain* v. *McDonell*, 14 Chy. 447.

Quære, whether a married woman has any and what jus disponendi in respect of her person

property, under the Act. *Chamberlain* v. *McDonald*, 14 Chy. 447.

Under this act, a feme covert was held competent to bind her interest as residuary legatee by her written authority to executors, given and acted upon in good faith, to accept land in satisfaction of a debt due to the estate, without evidence of the husband having concurred in giving the authority. *McCargar* v. *McKinnon*, 15 Chy. 361.

The act does not exempt personal property of a wife who was married on or before the 4th May, 1859, from liability for debts contracted by the husband before that date. Where a wife, who was married before the 4th May, 1859, purchased after that date property in her own name, and paid for it (as was alleged) with money theretofore given to her by her son, it was held, as between her and a creditor of her husband, whose debt was contracted before the 4th May, 1859, that money so given to the wife became instantly her husband's money, and that the land bought with it was liable to the creditor. *Fraser* v. *Hillia* , 16 Chy. 101.

A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before the 4th of May, 1859, was held to be good. *Re Hilliker*, 3 Chy. Chamb. 72.—Mowat.

The statute does not authorize a married woman, who has any child or children, to devise or bequeath her property otherwise than to or among such child or children; any disposition in favour either of her husband or other parties is void. *Mitchell* v. *Weir*. 19 Chy. 568.

See *Halpenny* v. *Pennock*, 33 Q. B. 229, p. 1677.

[See next sub-head.]

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2. *Decisions under 35 Vict. c. 16.*

Actions by or between Husband and Wife.]—The disabilities of a married woman, are not removed by recent legislation to such an extent as to enable her to act as prochein amy. *Giles* v. *Benjamin*, 6 P. R. 70.—C. L. Chamb.—Dalton, *C. C. & P.*

A married woman brought a suit in her own name for redemption of lands in which she claimed an estate for life under a lease made in 1866:—Held, not her separate property, so as to enable her to sue without a next friend under 35 Vict. c. 16, s. 9. *Redman* v. *Brownscombe*, 6 P. R. 96.—Chy. Chamb.—Holmested, *Referee*.

A married woman, married in 1870, who had without any just cause left her husband's house, and was living apart, demanded from him chattels and household furniture which, having been her property before marriage, came into his possession upon and by virtue of the marriage, and had been used by them jointly in his dwelling house, and on his refusal brought trover:—Held, under C. S. U. C. c. 73, and 35 Vict. c. 16, that the action could not be maintained. *McGuire* v. *McGuire*, 23 C. P. 123.

Held, that under 35 Vict. c. 16, s. 1, O., a married woman can maintain an action for her wages, earned whilst living with her husband, who as agent of the defendants employed her; and that her husband is a competent witness in her behalf. *McCandy* v. *Tuer et al.*, 24 C. P. 101.

Sec. 1 of 35 Vict. c. 16, so far as regards "the real estate of any married woman which is owned by her at the time of her marriage," applies only to marriages which take place after the passing of the act. Where, therefore, the plaintiff, who married in 1851, had lived upon the land in question, which was his wife's property, from 1852 until 1861, and had then joined with his wife in a lease to defendant for ten years:—Held, that on the expiration of such lease the plaintiff alone might maintain ejectment. *Dingman* v. *Austin*, 33 Q. B. 190.

The act of 35 Vict. c. 16, O., which gives power to a married woman in certain cases to sue and be sued alone, does not prevent her husband being considered as dominus litis, and the suit his suit, if she join him as a party plaintiff; nor does it obviate the necessity for a next friend in order to bind her. *Re S. and M., Solicitors*, 8 L. J. N. S. 245.—Chy. Chamb—Spragge.

Married women joined with their husbands in an application for taxation of costs:—Held, that notwithstanding the late act (35 Vict. c. 16,) the married women must, in such case, have a next friend. *In re Spencer et al.*, 19 Chy. 467.

Actions against Husband and Wife.]—Under the Married Woman's Act, 1872, a wife may be the sole defendant in ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the province. *Warren* v. *Cotterell*, 6 P. R. 11.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, that under 35 Vict. c. 16, s. 9, O., an action at law may be maintained against a married woman in respect of a debt incurred by her upon the faith of her separate estate before the passing of the act: Hagarty, C. J., diss., on the ground that section 9 applies only to debts incurred after the passing of the act. *Merrick* v. *Sherwood*, 22 C. P. 467.

Quære, as to the means of enforcing the judgment in such an action, where the separate estate consists of money to be paid into her hands by trustees. *Ib.*

Held, that during her husband's imprisonment for felony, the wife could contract at all events as to what might be regarded as goods and chattels as a feme sole. *Crocker et ux.* v. *Sowden et al.*, 33 Q. B. 397.

Under 35 Vict. c. 16, O., a married woman is liable only upon contracts entered into on the credit of her separate estate. *McCready et al.* v. *Higgins*, 24 C. P. 233.

The real estate of a woman married before 1859, not settled by any marriage settlement or deed, is not her separate estate; and sec. 1 of 35 Vict. c. 16, which applies only to marriages after that act, does not make it so. Where the plaintiffs furnished goods for such a married woman, having such real estate, upon the strength of her having it, and took her bond, without the consent or concurrence of her husband:—Held, that she was not liable upon it under 35 Vict. c. 16, during her husband's lifetime. *Ib.*

Declaration on a contract by plaintiff to build a house for defendant, alleging completion and non-payment; and on the common counts. Plea,

that the making the contract and the contracting the debts was before the Married Woman's Property Act of 1872, and that at that time defendant was, and still is, the wife of T. H. Replication, that the debt was the separate debt of the defendant, and was contracted for her own benefit, and in respect of her separate estate:—Held, following Merrick *v.* Sherwood, 22 C. P. 467, replication good, for that the Marrried Woman's Act of 1872, sec. 9, was retrospective. *Steels* v. *Hallman*, 33 Q. B. 471.

Semble, the right to sue given by 35 Vict. c. 16, s. 9, is a mere matter of procedure, and imposes no new liability on the married woman. *Ib.*

In an action against a married woman on a note, it is sufficient to plead merely that the note was made before the passing of 35 Vict. c. 16 O., and that she was then married, without regarding the fact of her having separate estate and having contracted the debt on the faith of it; but such matters are the subject of a replication. *Field* v. *McArthur*, 25 C. P. 167.

A married woman owned land under the will of her father who died in 1865, having devised all his real estate to his widow for life, and on her death, to his children in fee. By deed of partition between his daughters, of whom the defendant, who married in 1865 was one, and to which defendant's husband and the widow were parties, certain lots were conveyed to defendant in severalty, "to and for her separate use for ever." Defendant's husband employed the plaintiff to build on this land, and the plaintiff rendered his account to the husband, knowing nothing so far as appeared of defendant in the matter:—Held, that the defendant was not liable; for although the land was her separate estate, it could not be said that this work was done at her request or on her credit, or that there was any contract with her. *Wagner* v. *Jefferson*, 37 Q. B. 531.

To a bill against a married woman to set aside a mortgage made to her, on the ground that the same was fraudulent as against creditors, the husband was made a party defendant:—Held, on demurrer, that since the passing of the Married Woman's Property Act, 1872, the husband was not a necessary or proper party. Semble, that such a dealing on the part of a married woman, was a "tort," within the meaning of the above act, for which she could be proceeded against as if unmarried. *McFarlane* v. *Murphy*, 21 Chy. 80.

In a proceeding against a married woman to obtain a conveyance of property vested in her, it is not necessary to join her husband as a party. Where, therefore, a trader in contemplation of insolvency had purchased lands, the conveyance of which he took in his wife's name, with the fraudulent design of withdrawing part of his estate from his creditors, and thereupon a bill was filed by the official assignee for the purpose of obtaining a conveyance or sale of the property, to which bill the husband was made a party defendant, the court allowed a demurrer thereto by the husband, on the ground that he was not a necessary party. *Bousfead* v. *Whitmore et ux.*, 22 Chy. 222.

A married women, a defendant, living with her husband, was ordered as administratrix of a former husband, to bring certain accounts into the master's office, in a suit in which her present husband was joined as a co-defendant. On application to commit her for disobedience of the order, it was contended that the rule laid down in Maughan *v.* Wilkes, 1 Chy. Chamb. 91, that the husband must answer for the wife's default unless he shew some ground of exemption, was in effect abrogated by 35 Vict. c. 16, O., which renders married women liable for their separate engagements in certain cases:—Held, that sec. 8 of this act not being applicable to the present case, in which the marriage took place before the passing of the act, the other sections did not alter the above rule. It being shewn that the married woman was a woman of great force of character, and not in fact under the control of her husband:—Held, that this was an insufficient reason for exempting the husband from attachment. To be discharged from this liability he must satisfy the court that he has used his best endeavours to get his wife to obey the order. *Murcheson* v. *Donohoe*, 6 P. R. 138.—Chy. Chamb.—Holmested, *Referee*.

Semble, that such portions of the Married Woman's Property Act, 1872, as would deprive parties of their vested rights, if held to affect women married before its passing, should be so read as not to interfere with such rights: while the portions of the act which have not this effect, should go into operation as regards women married before, as well as after, the 2nd of March, 1872. *Adams* v. *Loomis*, 22 Chy. 99.

XI. Alimony.

1. *Jurisdiction of the Court of Chancery.*

The Court of Chancery having since its first establishment (1837) exercised jurisdiction in cases of alimony, refused to question the right. *Soules* v. *Soules*, 2 Chy. 299.

On a bill for alimony and the custody of children under twelve, the court can grant the latter relief without a petition. *Munro* v. *Munro*, 15 Chy. 431.

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2. *Writ of Arrest.*

Although the 22 Vict. c. 33, s. 2, (C. S. U. C. c. 24, s. 10) authorizes the arrest of a defendant for two years' allowance for future alimony and arrears, still, if the court has obtained funds of the defendant through any default of his, it may refuse payment of them to him without first securing the future payment of alimony. *Gott* v. *Gott*, 10 Chy. 543.

The court in an alimony suit, on a motion to discharge defendant from arrest under a writ of arrest, will look into the merits of the case so far as to enable it to judge whether the plaintiff can reasonably expect to succeed in her case, and if not, or if defendant displace the prima facie case made by her on obtaining the writ, he will be discharged. *Macpherson* v. *Macpherson*, 2 Chy. Chamb. 222.—Spragge.

A writ of arrest had been granted on plaintiff's affidavit, alleging violence and ill-treatment by defendant, and shewing that he had advertised his stock and farming implements for sale. A motion was made to set aside this writ, and the cruelty was denied. The plaintiff was shewn to be a young, robust woman, the defendant an old

man of sixty-eight; and the conduct of the plaintiff to have been violent and very immoral and unchaste. On defendant's denial of any intention to leave the province, the writ was ordered to be set aside. *Ib.*

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3. *Writ of Ne Exeat.*

Amount of bail on issue of writ of ne exeat provincii, under 20 Vict. c. 58, s. 3, in a suit for alimony. *Horn* v. *Horn*, 4 L. J. 261.—Chy. Chamb.—Spragge.

The writ of ne exeat granted after filing a bill in an alimony suit, remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife. *Macdonald* v. *Macdonald*, 5 L. J. 66.—Chy.

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4. *When granted.*

(a) *Desertion and Cruelty.*

Held, that under the circumstances set out in this case, the wife was entitled to a decree for alimony. Although in England the mere fact of desertion by the husband would not so entitle her; still, as in this country the court cannot decree restitution of conjugal rights; Semble, that desertion would be sufficient to warrant a decree for alimony. *Severn* v. *Severn*, 3 Chy. 431.

Desertion, although insufficient in itself to warrant a decree in England, does, when coupled with other acts of cruelty, form a material ingredient in determining a wife's right to relief. *Ib.*

Where a few days after leaving her husband's house, the wife was found with severe bruises and injuries upon her person, and the evidence raised a strong presumption that they were inflicted by him, the court decreed alimony. *Jackson* v. *Jackson*, 8 Chy. 499.

The wife must prove herself aggrieved, or the court cannot decree alimony. Where defendant in his answer denied the cruelty charged against him, and it was not proved, but at the hearing defendant consented to a decree for alimony, the court, on the grounds of public policy, refused to interfere. *Gracey* v. *Gracey*, 17 Chy. 113. See *Craig* v. *Craig*, 1 Chy. Chamb. 41.

A woman filed a bill for alimony on the ground of adultery and desertion, which suit was ultimately arranged by the husband agreeing to pay a sum of money, which the plaintiff accepted in payment of all past or future claims for alimony; and a decree was drawn up stating this arrangement, and that it was agreed to dismiss the bill; and that such dismissal should be treated as a dismissal on the merits:—Held, that such decree furnished no defence to a bill afterwards filed by the wife for alimony on the ground of subsequent desertion and adultery. *Henderson* v. *Henderson*, 19 Chy. 464.

A woman left her husband in consequence of disagreements, without any threats of personal violence, or any well founded apprehension on her part of violence; and the husband expressed his readiness and willingness to receive her back. The wife failed to return, however, and the husband left this province and went to reside permanently in the United States. The wife, without any communication having passed from her to her husband, or any intimation of a desire on her part to renew their marital relations, and without any offer to live with him, or any expression of willingness to do so, filed a bill for alimony on the ground of desertion:—Held, that in the absence of an offer on her part to return to her husband, and a refusal by him to receive her back, she was not in a position to claim alimony; that the domicile of her husband was her domicile also, and that his being resident in the United States afforded no ground for dispensing with an offer by her to return to and live with her husband, it not appearing that she was ignorant of his place of residence. *Edwards* v. *Edwards*, 20 Chy. 392.

The ecclesiastical courts in England will not, for an isolated act of personal violence, declare the wife entitled to a separation a mensa; and this court, following the same principle, will not, as a rule, for only one act of violence make a decree for alimony. But where a husband had for several years indulged in the use of intoxicating liquors to such an extent as to have produced repeated attacks of delirium tremens, during which he became very violent; and his wife had, on one occasion when he became intoxicated, been compelled by reason of his violence to leave home and go to a neighbour's house, where she remained all night, and on the following day, in company with two of her neighbours, had returned to her husband with a view of inducing him to abstain from drinking, when he assaulted her with a stick, inflicting several blows on her head; whereupon she ran away and he followed her, kicked at her, and told her to be gone, and otherwise conducted himself in a very violent manner, although this was the only instance in which he had, during eighteen years they had been married, ever struck her, the court made a decree for alimony, the wife swearing that she was apprehensive of further ill-treatment if she were to return to live with her husband; which decree on rehearing was affirmed by the full court. *Rodman* v. *Rodman*, 20 Chy. 428.

Where with a view of obtaining a decree for alimony it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specifically in the bill, in order that the husband may have notice of the acts charged against him, and so that he may, if he can, adduce evidence in rebuttal or explanation thereof; and this rule cannot be said to operate oppressively upon the wife, as the facts and circumstances charged, if true, must be all within her knowledge. *Ib.*

(b) *Interim Alimony.*

Semble, that the court will grant it in a proper case, pendente lite. *Soules* v. *Soules*, 3 Chy. 113.

Where in a suit for a separate maintenance interim alimony had not been applied for, the court refused to allow alimony from a date before making the decree. *Ib.*

On an application for an order for interim alimony, the affidavit as to the marriage should state such particulars (by whom solemnized, &c.) that the court may judge whether it has been duly solemnized or not. *Taylor* v. *Taylor*, 1 Chy. Chamb. 234.—Spragge.

On an application for interim alimony and costs, proof of the marriage is all that is required; it is not necessary to prove any of the other allegations in the bill. *Nolan* v. *Nolan*, 1 Chy. Chamb. 368.—Spragge.

In an alimony case where the marriage is admitted, or proved, interim alimony will be granted almost as of course, though defendant swears he is willing to receive and maintain the plaintiff. *Carr* v. *Carr*, 2 Chy. Chamb. 71.—Taylor, *Secretary*.

Interim alimony will be granted on primâ facie proof of marriage, although the validity of the marriage is disputed. *McGrath* v. *McGrath*, 2 Chy. Chamb. 411.—Taylor, *Secretary*.

On an application for interim alimony, the validity of the alleged marriage cannot be tried. If a marriage de facto is proved, it is sufficient. But the plaintiff must shew she is in want of means of support. When the parties had been living separate for four years, and the wife did not allege she was in want, and the husband swore she was better off than he was, an order was refused. *Bradley* v. *Bradley*, 3 Chy. Chamb. 329.—Taylor, *Referee*.

Interim alimony runs from the time of the service of the bill, if there has been no want of diligence on the plaintiff's part in making the application. *Howe* v. *Howe*, 3 Chy. Chamb. 494.—Boyd, *Master*.

A plaintiff makes out a primâ facie case for interim alimony by producing (1) an office copy of the bill (which need not be verified by affidavit), and (2) proof of marriage; but if the defendant oppose the application on the ground that the plaintiff has ample means of support, unless she can shew the contrary to be the case her application will be refused. *Smith* v. *Smith*, 6 P. R. 51.—Chy. Chamb.—Strong, on appeal from Holmested, *Referee*.

The question whether the plaintiff has been guilty of adultery cannot be raised on an application for interim alimony. *Campbell* v. *Campbell*, 6 P. R. 128.—Chy. Chamb.—Holmested, *Referee*.

The fact that the plaintiff has left the defendant, and refuses to return to him although he is willing to take her back to live with him, is no answer to an application for interim alimony. *Wilson* v. *Wilson*, 6 P. R. 129.—Chy. Chamb.—Holmested, *Referee*.

An omission to make the endorsement directed by consolidated order 488 to be made upon the office copy of the bill served, does not disentitle the plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion *Peterson* v. *Peterson*, 6 P. R. 150.—Strong, on appeal from Holmested, *Referee*.

Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony; it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a bonâ fide intention to go to a hearing, and had made offers to change the venue, with a view to enable the cause to be speedily heard. *Ib.*

The usual undertaking given by the plaintiff on obtaining the order for interim alimony, (viz., to proceed to a hearing at the first possible sittings,) was extended to the next sittings, where the defendant had failed, and wilfully refused to pay interim alimony and disbursements which he had been directed to pay. *Bowslaugh* v. *Bowslaugh*, 6 P. R. 200.—Chy. Chamb.—Holmested, *Referee*.

(c) *Other Cases.*

Where it appeared that the plaintiff's absence from her husband's residence was voluntary, and caused chiefly by her own violent temper, and that her husband was still willing to receive and support her, the court dismissed the bill, but ordered defendant to pay costs. *McKay* v. *McKay*, 6 Chy. 380.

The right of a wife is to reside with her husband in his home, or in the joint home of both. Where, therefore, it appeared that the husband resided with his children by a former wife, and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shewn, made a decree for alimony; and that although it was shewn that during such time the husband had been in the habit of visiting and remaining with his wife. *Weir* v. *Weir*, 10 Chy. 565.

A bill for alimony should allege that the husband has refused to receive his wife. It is not sufficient to allege merely that they are living apart. *Walsh* v. *Walsh*, 1 Chy. Chamb. 234.—VanKoughnet.

5. *Amount.*

The court, under the circumstances, referred it to the master to fix an amount to be paid during such time as the parties continued to live separately. *English* v. *English*, 6 Chy. 580.

The rule that the conduct of the wife should weigh much in determining the amount of alimony, is reasonable; still the court, under the circumstances of this case, adopted the husband's income as the proper guide. *Severn* v. *Severn*, Chy. 109.

Allowance increased from £25 to £200 per annum, it being shewn that the husband's income had so increased as to justify the addition. *I*

The rule as to allowing one-third of income how far applicable to this country considered *McCulloch* v. *McCulloch*, 10 Chy. 320.

Defendant owned real estate of the annual value of about £112 10s., but subject to a debt of £100; he had also household furniture and farm stock, and he worked his farm. The plaintiff with her eight children lived apart from him on account of his cruelty, and with no means. On a reference to the master to fix permanent alimony, he allowed £37 10s., which on appeal was increased to £80 per annum. *Ib.*

The purpose of allotting alimony is to enable a wife to support herself whilst living apart, but as the law does not contemplate a separation for life, the court will not sanction the payment of a sum in gross in lieu of an annual sum. *Hagarty* v. *Hagarty*, 11 Chy. 562.

An offer by a husband to support his wife separately is no bar to a suit for alimony,

an affidavit of the husband shewing his willingness to support his wife separately cannot be received. *Weir* v. *Weir*, 1 Chy. Chamb. 194.—VanKoughnet.

6. *Practice.*

The principle laid down in Waters *v.* Shade, 2 Chy. 218, in respect to opening publication, applies as well to suits for alimony as to other cases. *McKay* v. *McKay*, 6 Chy. 279.

An order on a motion to dismiss, giving leave to go to examination, has the effect of opening publication. *Weir* v. *Weir*, 1 Chy. Chamb. 194.—VanKoughnet.

The defendant consented to an order for alimony, and a motion for the order was refused, as it would amount to a decree. It should be brought before the full court. *Craig* v. *Craig*, 1 Chy. Chamb. 41.—Blake.

Such application must be upon notice. *Swinarton* v. *Swinarton*, 2 Chy. Chamb. 453.—Taylor, *Secretary.*

7. *Costs.*

A plaintiff succeeding is entitled as a general rule to her full costs. *Soules* v. *Soules*, 3 Chy. 113.

The test as to allowance of costs appears to be whether or not they have been vexatiously incurred. Therefore—where notice of examination and hearing was given and afterwards countermanded, upon its coming to the knowledge of the wife that the husband intended to produce a witness from abroad to prove adultery on her part while on ship-board—what was done having been done in good faith, so that she might be prepared to rebut so serious a charge, the costs in relation to such notice and countermand were allowed. *Glennie* v. *Glennie*, 1 Chy. Chamb. 155.—Spragge.

On a question arising under 32 Vict. c. 18, O., and the general order 491, it was held, that the plaintiff in an alimony suit is not entitled to the costs mentioned in the order. *Gibb* v. *Gibb*, 2 Chy. Chamb. 402.—Taylor, *Secretary.*

8. *Relief from.*

Where the plaintiff, after an order for interim alimony had been made, returned to her husband's house, and resided there for some time, but afterwards left by reason of cruelty, a motion to set aside the interim order on the ground of condonation, was refused with costs. *Maxwell* v. *Maxwell*, 1 Chy. Chamb. 27.—Blake.

After a decree had been made, and alimony paid for several years under it, the court entertained and afterwards granted a petition by the husband to be relieved from the decree, on the ground of the wife's subsequent adultery. *Severn* v. *Severn*, 14 Chy. 150.

Where in an alimony case, no one appearing for defendant, an order had been made for interim alimony for the amount endorsed on the bill, which defendant considered excessive: on motion by him to set the order aside, a reference was directed on payment of the costs (dives misit) of the application. *Hooper* v. *Hooper*, 3 Chy. Chamb. 114.—Mowat.

A husband, against whom his wife has obtained alimony on the ground of desertion, is not entitled, as of right, to have the decree vacated or suspended, on his afterwards offering to receive and maintain her. *Cronk* v. *Cronk*, 19 Chy. 283.

9. *Other Cases.*

Separation of husband and wife. Reference to settle the allowance in lieu of alimony. Declaration on submission bond. Special demurrer. *Beasley* v. *Stegman*, Tay. 498.

A bond given to a trustee, by a husband and his surety, to secure payment of alimony to the wife, in pursuance of a decree of the Court of Chancery, was held not to be assignable by the trustee and the wife, such assignment being contrary to public policy, and tending to lessen the inducement to reconciliation. The plaintiff declared as assignee of such bond. Defendant pleaded, on equitable grounds, the decree in Chancery for alimony: that the bond was given in pursuance thereof to the obligee, who had no beneficial interest therein, and the assignment was in fraud of the decree, against the will of the husband, and could not be maintained in equity. The plaintiff replied that the wife by deed assigned her beneficial interest to him. Semble, that the replication was not a departure. *Reiffenstein* v. *Hooper et al.*, 36 Q. B. 295.

A married woman had left her husband, and had for some time been living apart from him on account of his alleged adultery, and he had not contributed in any way to the support of her or her children, whom he allowed to remain with their mother. The wife was advised to take proceedings against him under the statute for not providing her and her children with food, &c., and also to file a bill against him for alimony. To compromise these threatened proceedings, the husband made a settlement in favour of the wife and children. The husband in fact was then insolvent, but neither the wife nor the trustees had any knowledge thereof:—Held, that the settlement could not be impeached under the statute 13 Eliz. *Mason* v. *Scott*, 20 Chy. 84.

A certificate of lis pendens should not be issued in a suit brought for alimony only. *White* v. *White*, 6 P. R. 208.—Chy. Chamb.—Holmsted, *Referee.*

The compromise of an alimony suit is a sufficiently valuable consideration for a deed from the husband to the wife. *Adams* v. *Loomis*, 22 Chy. 99.

XII. Miscellaneous Cases.

Where a wife had left her husband and gone to reside with her father, taking with her her infant child of about seven years old, and the husband obtained writs of habeas corpus to his wife's father to bring up her body, and to his wife to bring up the child, the court refused, on the return of the father and daughter to the respective writs that the husband had ill-treated his wife and child, to make any order that they should be delivered to him, but informed the wife that she was at liberty to go wherever she pleased, and to take the child with her. *Regina* v. *Baxter*, *Regina* v. *Snooks*, 2 Q. B. 370.

The common effect of a mortgage is to entitle the mortgagee to take possession at any time, even before default, unless the right to remain in possession till default be reserved; and where this right has not been reserved and the mortgagor has died, the widow, holding in privity with his title, stands in no better position, with regard to her right to the possession, than her husband. *Doe* d. *Morratt* v. *Smith et al.*, 8 Q. B. 139.

In trover against defendant for the conversion of certain personal property bequeathed by testatrix, a married woman, to the plaintiff, in trust for her children, and appointing him executor, the defendant claimed the property by gift inter vivos, from testatrix, and on such gift being disproved, he, amongst other objections, urged that the will was invalid on the ground of the absence of the husband's consent. The testatrix, who was living apart from her husband, died in possession of the property; there was no plea on the record denying the plaintiff's status as executor; the husband had never interposed, nor did defendant defend under the husband's right:—Held, under these circumstances, that it was not open to the defendant to raise the objection. *Adams* v. *Corcoran*, 25 C. P. 524.

A married woman, living apart from her husband, accepted some property for her wages:—Held, that the transaction was binding on the grantor, and all claiming under him. *Moore* v. *Davis*, 16 Chy. 224.

Where a wife joins in a mortgage, and on the death of the husband there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Chy. 113; *White* v. *Bustedo*, 15 Chy. 546.

A woman while living with a man to whom she believed herself to have been lawfully married, but who, it was afterwards discovered, was at the time of the pretended marriage with her, a married man, advanced money for the purpose of buying certain real estate, the bond for the conveyance whereof was taken, with her knowledge, in his name:—Held, that there was not any resulting trust in favour of the woman. *Street* v. *Hallett*, 21 Chy. 255.

IDEM SONANS.

See MISNOMER.

IDENTITY.

I. OF PERSONS, 1703.

II. OF GOODS, 1706.

III. OTHER MATTERS, 1707.

IV. IN PLEADING—*See* PLEADING AT LAW.

I. OF PERSONS.

In Proving Title to Land.]—The court refused to set aside a nonsuit where defendants and their ancestors had been twenty years and upwards in possession, where it appeared that the patent from the crown had been issued more than twenty years, and it was also shewn that the ancestor of the defendants had been allowed his claim under the Heir and Devisee Act for the land in question, though two or three years afterwards the patent issued in another name, but with a description that did not accord with that of the person under whom the plaintiff claimed. *Doe* d. *Baker* v. *Gould et al.*, 5 O. S. 35.

Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes, it will be presumed from the identity of the names. In this case, however, to confirm the identity, there were besides the names the description of the parties and the hand-writing, and the fact that the patent had been handed down with the different conveyances; and it appeared further that both parties assented to the title of one M., who claimed through the deeds as to the names in which proof of identity was insisted upon. *Nicholson* v. *Burkholder*, 21 Q. B. 108. See, also, *Doran* v. *Reid*, 13 C. P. 393; *Orser* v. *Vernon*, 14 C. P. 573.

Plaintiff claimed under a deed to him from one G. O. G., the heir of the patentee, A. G. He gave evidence that his grantor was the heir of one A. G., who had been a captain in the navy, and put in the patent to A. G. of 980 acres, with a deed to himself from the alleged heir of the same land, of which the land in dispute formed part:—Held, sufficient evidence to go to the jury of identity between the patentee and the alleged ancestor. *Brown* v. *Livingstone*, 29 Q. B. 520.

Lands were conveyed, in 1804, by deed to W. R. By a deed poll endorsed upon the deed of 1804, and dated in 1823, W. R., described as "the within named W. R.," granted the same lands to trustees of a marriage settlement executed in 1820, under which the plaintiffs claimed:—Held, that the W. R. who executed the deed poll would be presumed to have been the grantee in the deed of 1804, notwithstanding recitals in other deeds, produced by the plaintiffs as part of their chain of title, tending to shew that the grantee in the deed of 1804 was dead before 182[illegible] *Thompson et al.* v. *Bennett*, 22 C. P. 393.

In ejectment, the plaintiff claimed under one D. L. C., whom he alleged to be eldest son and heir-at-law of L. C., assignee of the grantee of the crown. The patent from the crown was to *F. Weis*, and the deed to L. C. was signed by *F. Weast* as a marksman. There was no direct evidence of the identity of Weis and Weast. The deed was proved by the memorial, as secondary evidence, but it was shewn to have been in the custody of defendant, who claimed under the will of L. C., which he produced, and that it had been with the patent in the possession of the C. family since 1816. It was not shewn there was any other F. Weis except the person who conveyed as F. Weast:—Held, that the identity of Weis and Weast, who made the deed to L. C., was sufficiently proved. *Wallbridge* v. *Jones*, 33 Q. B. 613.

In ejectment for land in the township of Mor[illegible] the plaintiff claimed under a deed from M., the patentee of the crown; and defendant by adverse possession. M. had conveyed to the plaintiff in 1873, being then 84 years old. It appeared that in January, 1835, one H., describing himself as attorney to M., and asserting himself to be fu[illegible]

empowered by M. to locate and settle 100 acres to which M. was entitled for militia services, petitioned that the location might be made in the township of Mono or Caledon. In March, 1835, a location ticket was issued in the name of M. for the land in question, but stating that no patent should issue until a resident settler had been established on the lot, who should occupy and improve the same within six months from the date of the ticket; and in December, 1835, a patent issued to M. M., who was examined as a witness, swore that he never knew H. or gave him any authority, and that he knew nothing of the lot until the plaintiff applied to him for a conveyance: Held, that there was evidence for the jury that M., by himself or his agents, had entered upon the land, after the issuing of the patent, or was aware that it had been so entered upon; and that evidence should have been received of the acts and statements of H. relative to the clearing the land, so as to enable the statute of limitations to run; and as this evidence was withdrawn from the jury, and the only question submitted was as to the identity of the patentee with the plaintiff's grantor, a new trial was therefore granted. On appeal the judgment was upheld. *Armstrong* v. *Stewart*, 23 C. P. 198, 205.

J. McK. having an order in council for 100 acres of land, executed in February, 1827, to one Shore a bond for a deed. The petition for a location and the bond were executed by Shore, and in the bond the obligor was described as of York, labourer. In May the patent issued to McK., and it was in the possession of Shore shortly after its date. Shore went into possession in 1828, cleared about seven acres, and after three years left it in the possession of the plaintiffs, who had the benefit of it up to within a short period of the death of Shore, which took place in 1849. The plaintiffs, claiming as heirs-at-law of Shore, filed their bill to obtain a conveyance of the land, and produced the patent. The defendants, Shortis and McC., produced a conveyance purporting to have been made by, and signed "J. McK., now of the town of Niagara," &c., yeoman, to James Smith, dated 7th September, 1833; and a conveyance from Smith to Shortis, dated May, 1849: both of which were registered. No oral testimony was given of the identity of the grantor in the deed to Smith with the locatee of the crown, and no evidence of its custody during the thirty years which had elapsed since its alleged execution; but the signature and death of one of the attesting witnesses were proved and the absence of the other witness was accounted for:—Held, 1. That there was sufficient primâ facie proof of the execution of the deed from McK. to Smith; 2. That such proof must be taken to include that the party by whom the deed purported to be executed was not only a person of that name, but the identical person in whom was vested the estate which the deed purported to convey. *Boyes* v. *Shortis*, 10 Chy. 243.

Other Cases.]—Where in an action against a father process was served upon his son of the same name, and appearance was entered and defence made by the son—the court held, that a verdict for defendant was correct; and that whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father. *Killens* v. *Street*, M. T. 4 Vict.

The admission of a person served with an office copy of the bill, that he was the proper party named in a bill, is not sufficient proof of the identity of the person served with the defendant. *Stilson* v. *Kennedy*, 1 Chy. Chamb. 236, 237, note.—Spragge.

It is not sufficient proof of the identity of a party served out of the jurisdiction, that the deponent to the affidavit of service swears that he served "the above named defendant." The affidavit should shew the means of knowledge. *Armour* v. *Robertson*, 1 Chy. Chamb. 252.—Spragge.

Held, affirming Spafford *v.* Buchanan, 3 O. S. 331, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the crown office; and that the identity of defendant with deponent may be presumed primâ facie from the name. *Wilson* v. *Thorpe*, 18 Q. B. 443.

Plaintiffs, suing upon a judgment, offered no proof of the identity of defendant with the person named in the judgment. Semble, that as defendant had pleaded in confession and avoidance, this, coupled with the identity of the name, was some evidence. *Hesketh* v. *Ward*, 17 C. P. 190.

Per A. Wilson, J., the evidence set out in this case was insufficient to shew that defendant was the maker of the note sued on, alleged to have been signed by him as a marksman, and the plaintiff should have been nonsuited. *Hand* v. *Agnew*, 32 Q. B. 559.

II. Of Goods.

In an interpleader issue, the plaintiff rested his case upon proof of a chattel mortgage of certain goods mentioned therein, made to him by the execution debtor and duly filed:—Held, clearly insufficient, for it afforded no proof that the goods mortgaged were the same as those seized by the sheriff and claimed. *Jones* v. *Jenkins*, 25 Q. B. 151.

The plaintiffs were in possession of certain timber limits under a license from the crown, which expired in April, 1872, but it was the practice of the crown lands department to recognize the right of licensees to a renewal, and a renewal was granted to the plaintiffs for 1872-73, and the ground rent paid in advance, the plaintiffs remaining in possession. In consequence, however, of some difficulty about the boundaries, the license did not issue until the 5th of April, 1873, but it was stated to cover the period between the 20th of June previous. During this period, certain persons, under whom defendant claimed, entered upon the land and cut a quantity of saw logs; and on the plaintiffs going to where they were lying in a creek or river on their limit for the purpose of marking them, they were forcibly prevented by defendant, who opened an artificial dam and caused the logs to be floated down the river, where they got mixed with some of defendant's logs. The plaintiff then went to where the logs were, and selected the logs in question, being of the same size and description as his own logs, and marked them:—Held, that plaintiff might maintain replevin; that there was sufficient evidence of identity; and that at all events, as the defendant's own wrongful act was the cause of any

difficulty, he could not object on this ground. *Gilmour et al.* v. *Buck*, 24 C. P. 187.

Goods were described in a chattel mortgage as "one kitchen table, four chairs, &c., (describing them,) "all contained in and about the dwelling-house and barn of the mortgagor, situate at or on lots," &c. :—Held, sufficient. The mortgage contained a proviso, that in case the mortgagor should attempt to sell or part with the possession of or to remove out of the county the goods, or any of them, the mortgagee might take possession of and sell them, &c. The mortgagee, claiming under this proviso, brought trover for the goods, which the defendant had seized under a distress for rent. It appeared that the goods were seized in October in the house mentioned in the mortgage, which had been executed in the previous August, and were of the same kind and description as those set out in the mortgage : Held, sufficient evidence that they were the same goods as those mortgaged. *Nattrass* v. *Phair*, 37 Q. B. 153.

III. Other Matters.

Where in an action for use and occupation, the plaintiff proved his case by evidence of admissions of defendant, who on his defence put in a lease under seal from the plaintiff, which he contended was for the same premises, but there was no distinct evidence of identity, and the jury found for the plaintiff, the court afterwards, on affidavits shewing that these were the only premises demised by the plaintiff to the defendant, made a rule absolute for a new trial without costs, unless the plaintiff would elect to enter his judgment for the amount of his verdict only without costs. *Boulton* v. *Defries*, 2 Q. B. 432.

Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proved a promise by the defendant, the maker, sufficient to take the note out of the statute, but could not identify the note as the one to which the promise applied, and it was not alleged or suggested that there was any other note in existence between the parties :—Held, that the not having identified the note was no legal defect in the evidence of the witness as to the promise to pay, and that the identity was to be presumed. *Reynolds* v. *O'Brien*, 4 Q. B. 221.

Trespass against a magistrate for seizing and selling plaintiff's goods. To prove the quashing of the conviction a rule of court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned :—Held, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in those respects. *Bross* v. *Huber*, 15 Q. B. 625.

The affidavit of a commissioner to take evidence stated that "the examination of A. M., the witness named in the said commission, was duly taken before me at, &c., as above certified, under and according to the directions of the said commission." Preceding this affidavit was a certificate stating that "the foregoing are the depositions of A. M., in the annexed commission named, upon the interrogatories taken before me at, &c., under the commission thereto annexed; and I certify that the same were taken according to the directions in said commission contained, and that annexed hereto and to said commission are the said interrogatories and the documents therein respectively referred to." On the commission was endorsed the following return : "The return of the within written commission will appear by the depositions, affidavits, and papers thereunto annexed :"—Held, that the examination or depositions, which were in effect held to be synonymous terms, was, or were, fully identified as the examination of the witness under and annexed to the commission. *Muckle* v. *Ludlow*, 16 C. P. 420.

IDIOT.

See Lunatic.

ILLEGALITY.

I. In Bills or Notes—*See* Bills of Exchange and Promissory Notes.

II. Validity of Contracts.

1. *As regards Public Policy or Statutes*—*See* Contract.
2. *Champerty*—*See* Champerty and Maintenance.
3. *Sale of Goods*—*See* Sale of Goods.

III. Recovery of Money on—*See* Money Counts.

A party suspected of stealing a horse was brought up on a warrant before a magistrate, who investigated and dismissed the charge. The suspected individual pretended no right to the horse, and the magistrate, after dismissing the charge, restored the horse to its supposed owner (the prosecutor) but before doing so took a bond of indemnity :—Held, that such bond was not necessarily void, as contrary to the general policy of the law. *Ballard* v. *Pope*, 3 Q. B. 317.

The sheriff, holding executions against defendant at the suit of different parties, took from him a bond reciting that he had seized his goods and indemnifying the sheriff "against any loss, damage, or liability, which may be incurred by reason of the execution, the wrongful execution or non-execution of the said writ." Semble, that such a bond would be void at common law, as being an indemnity to the sheriff for disobeying the command of the writ. *Corbett* v. *Hopkins*, 9 Q. B. 479.

Plaintiff declared on a special agreement not under seal, that in consideration that the plaintiff, then a bailiff of a Division Court, would do his duty as the law directed in seizing and selling crops on the farm of one K., on account of a certain judgment obtained by defendant against one M., he, defendant, then promised the plaintiff to indemnify him against all risk that might arise in relation to his doing his said duty; that he did afterwards sell, and that several persons claimed the goods, sued the plaintiff, and recovered a verdict of £50, which he had been obliged to pay, yet that defendant refused to indemnify. A verdict having been found for the plaintiff : Held, on motion to arrest judgment, that the

declaration sufficiently shewed that the plaintiff was required to do something which might possibly turn out to be a legal execution of the process, and therefore that the agreement was not illegal. *Robertson* v. *Broadfoot*, 11 Q. B. 407. See *Wallace* v. *Gilchrist*, 24 C. P. 40, p. 612.

Trover for pamphlets. Plea, not guilty. On the production of one of the pamphlets sued for at the trial, the judge in the County Court directed that the plaintiff was not entitled to maintain the action because the pamphlet was a scoffing and indecent attack on christianity, and ordered a nonsuit. On appeal, Held, that the defendant could not rely on the illegality of the publication under the plea of not guilty, but should have pleaded it specially: Held, also, that the plaintiff held property in the materials composing the pamphlets, independently of what was printed on them, and he would have a right to be indemnified therefor. Semble, that there was a legal wrong, for which the plaintiff should have recovered something: that the judge should have directed the jury as to the nature of works which the law protects and what it prohibits: that if the pamphlets were not illegal, they should give damages for their value as a literary production; and if illegal, they should give damages to the value of the paper, &c., irrespective of the words upon it. *Boucher* v. *Shewan*, 14 C. P. 419.

Courts of equity cannot, any more than courts of law, on the footing of want of notice of the illegality, give effect to proceedings which, on principles of the common law and under acts of parliament, are utterly void. *Gardiner* v. *Juson*, 1 E. & A. 188.

Held, that the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as, for instance, in this case, of a wrongful distress; and that the plaintiff could not be allowed to impeach the judgment of a competent court by which he was held to be a wrongdoer. *Irwin* v. *The Corporation of Mariposa*, 22 C. P. 367.

A debtor conveyed his real estate to trustees for the benefit of his creditors, to be disposed of by the trustees; first, by a lottery, and failing that plan of disposition, then in trust to sell as the trustees should deem most advantageous:—Held, that although the deed was void as to the trust for a lottery, it was valid as to the other trusts therein declared. *Goodeve* v. *Manners*, 3 Chy. 114.

A deed may be good in part, though void in part. Where, therefore, a conveyance was made of lands, and the grantees contemporaneously executed a declaration of trust in respect thereof, as follows: first, to lease the lands until sold, and to sell them; to pay the annual proceeds to the settlor for life, and after the death of the settlor, to pay the same, or in the discretion of the trustees a portion thereof, to A. M. during his life; and the trustees sold a portion of the estate, and after the death of the settlor, a bill was filed impeaching the settlement as void under the statute of Mortmain, which it admittedly was as respected the trusts declared of the corpus of the estate:—Held, that the trusts declared in favour of the settlor and A. M., were sufficient, however, to support the sale which had been effected; and the bill as against the trustees, the purchaser from them and A. M., was dismissed with costs. *McIsaac* v. *Heneberry*, 20 Chy. 348.

Where a party succeeds in establishing the illegality of an instrument, he will not be allowed to enforce any stipulation that may be contained therein for his benefit. *Attorney-General* v. *Niagara Falls International Bridge Co.*, 20 Chy. 490.

ILLEGITIMATE CHILD.

See BASTARD.

IMPRISONMENT.

I. ARREST.

1. *Generally*—*See* ARREST.
2. *Malicious Arrest*—*See* MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.
3. *Power and Duty of Constable in making Arrests*—*See* CONSTABLE.

II. ATTACHMENT—*See* ATTACHMENT OF THE PERSON.

III. CA. SA.—*See* CAPIAS AD SATISFACIENDUM.

IV. DURESS—*See* DURESS.

V. FALSE IMPRISONMENT—*See* TRESPASS.

VI. HABEAS CORPUS—*See* HABEAS CORPUS.

VII. BY MAGISTRATES—*See* JUSTICES OF THE PEACE.

VIII. PRISONER—*See* PRISONER.

The house of assembly has the power of imprisoning persons guilty of contempt in answering or refusing to answer questions before a select committee. *McNab* v. *Bidwell et al.*, Dra. 144.

A by-law enacting that persons wilfully neglecting, refusing, or failing to comply with its provisions, should be liable to a fine of £5, *or failing to pay the same* to 20 days imprisonment, without providing for any attempt to levy by distress:—Held, bad. *In re Greystock and the Municipality of Otonabee*, 12 Q. B. 458.

Under C. S. U. C. c. 55, s. 86, a warrant might issue to imprison a person for non-payment of statute labour tax, without first summoning him to answer, or making a conviction. *Regina* v. *Morris*, 21 Q. B. 392.

A city by-law to compel the drainage of land into the common sewers, imposed a penalty on any one of not less than one dollar, nor more than ten dollars for each month he should omit to do so, and provided for enforcing payment by distress or imprisonment, not exceeding 31 days:—Held, that the infliction of a penalty for each month and imprisonment for 31 days was wholly unauthorized. *In re McCutchon* v. *The Corporation of the City of Toronto*, 22 Q. B. 613.

A by-law with regard to markets, enacted that any person breaking any of its provisions should,

upon conviction before the mayor or any other magistrate of the town, forfeit and pay a fine not exceeding $50, nor less than $1 and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days. Quære, taking together sec. 243, sub-secs. 6, 7. 8, and secs. 206, 207, 360, 366, of C. S. U. C. c. 54, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or whether it must not be fixed by the by-law. There being room for doubt as to this point, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash upon this objection. *In re Fennell and the Corporation of the Town of Guelph*, 24 Q. B. 238.

Held, that the Court of Quarter Sessions is a court of record, and has power, in the case of an assault, to pronounce a sentence of fine and costs of prosecution, and imprisonment in default of payment; and that a warrant of commitment under the seal of the court, or signature of the chairman, is not necessary. *Owens* v. *Taylor*, 19 C. P. 49.

Quære, as to the propriety or impropriety of such court directing imprisonment to be continued until costs as well as fines are paid. *Ib.*

As to the rights of a married woman during imprisonment of her husband for felony. See *Crocker et ux.* v. *Sowden et al.*, 33 Q. B. 397.

IMPROVEMENTS ON LAND.

I. Compensation for, in Ejectment, under 59 Geo. III. c. 14; 12 Vict. c. 35; C. S. U. C. c. 93, 1711.

II. Under 36 Vict. c. 22, O., 1712.

III. Miscellaneous Cases, 1713.

IV. By Tenant—*See* Landlord and Tenant.

V. Allowance to Mortgagee in Possession—*See* Mortgage.

I. Compensation for, in Ejectment, under 59 Geo. III. c. 14; 12 Vict. c. 35; C. S. U. C. c. 93.

The 59 Geo. III. c. 14, s. 2, applies as well to surveys made upon request of individuals as by public authority, and to surveys made as well since as before the act, and although the occupation of defendant may have commenced since the act. *Doe* d. *Gallagher* v. *McConnel*, 6 O. S. 347.

Under what circumstances a defendant in ejectment can claim compensation for his improvements before he can be dispossessed under the judgment:—Held, under the facts stated in the case, that defendant could not be said to have been misled by an erroneous survey. The object and effect of the statute discussed. See *Doe* d. *Hare et al.* v. *Potts*, 5 Q. B. 492.

Where the government for any purpose has ordered a re-survey of a concession, and the surveyor so employed has planted posts to mark his survey, and defendant has settled on a lot as marked by this survey, the defendant in ejectment will not be entitled to his improvement under the 59 Geo. III. c. 14, and 2 Vict. c. 1 if the jury find that the plaintiff is holding a cording to the posts planted at the front angl of his lot in the original survey. The defendan in such case cannot be said to have settled o the land in consequence of an unskilful survey *Doe* d. *Moule* v. *Campbell*, 8 Q. B. 19.

Quære, whether the C. S. U. C. c. 93, s. 53 applies only where parties have taken possession according to the original survey, or to all case where a proprietor of land has been misled by an erroneous survey made by a licensed surveyor either at the request of the proprietor or of some former owner of the land. *Swanston et al.* v. *Strong*, 21 Q. B. 279.

Damages may be assessed in ejectment under sec. 53, C. S. U. C. c. 93, by a defendant for im provements made on lands not his own, in con sequence of an erroneous survey. *Mosier* v. *Keegan*, 13 C. P. 547.

In ejectment defendant gave notice that he did not defend the title, but claimed compensation for his improvements, which were made on plaintiff's land in consequence of an erroneous survey made before the passing of the statute 12 Vict. c. 35:—Held, that defendant was entitled to the value of such improvements, although such survey was a private one, and made on de fendant's own account. *Campbell* v. *Ferguson*, 4 C. P. 414; followed in *Hutton* v. *Trotter*, 16 C. P. 367, and in *Morton* v. *Lewis*, 16 C. P. 485.

A well and rail fence:—Held, evidence to go to a jury of improvements. *Morton* v. *Lewis*, 16 C. P. 485.

II. Under 36 Vict. c. 22, O.

Held, that the equitable defence in ejectment in this cause, filed under the Administration of Justice Act of 1873, secs. 3 and 4 setting up the right of a widow and dowress who had paid off a mortgage made by her husband, to possession of the land as against the plaintiffs, her children, until she should be re paid, and afterwards as dowress; and setting up also a lien for improvements made under a lease from her, (fully set out in the report of this case though probably not affording a good equitable defence, should be allowed. *Carrick* v. *Smith*, 34 Q. B. 389.

36 Vict. c. 22, O., as to improvements on land made in mistake before notice, and the lien there for, discussed. *Ib.*

Where a person purchased land knowing that his vendor was a married woman, and his assignees put up a house thereon after being warned by her and forbidden to do so, of which the defendant was aware:—Held, in ejectment by the vendee of the husband, that the defendant, who claimed under the assignees, could claim no lien for such improvements under 36 Vict. c. 22, O. Semble, that the belief required by the statute must be a reasonable belief. *Smith* v. *Gibson*, 25 C. P. 248.

Quære, as to how the right to such lien is to be tried, and whether a defendant in ejectment can first deny the plaintiff's title and then claim a lien under the statute. *Ib.*

Where in ejectment the defendant claims a lien for lasting improvements under 36 Vict. c. 22, O., his right thereto must be enquired into and adjudicated upon in the action. Quære, how such lien, if established, is to be enforced, and whether the possession can be changed until it is satisfied. *O'Connor et al.* v. *Dunn*, 37 Q. B. 430.

Remarks upon the effect of that statute in the case of a purchase by a mortgagee of the equity of redemption, supposed by all parties to be valid, and acquiesced in for many years, during which improvements were made, though in fact invalid on technical grounds. *Skae* v. *Chapman*, 21 Chy. 534.

III. Miscellaneous Cases.

Vendor and Purchaser.]—Where the owner of an estate was present, and permitted a third person to agree for the sale of his land, and the purchaser was let into possession, who made improvements, and being afterwards ejected by the owner of the property filed a bill for the payment of the value of those improvements, the court allowed a demurrer for want of equity. *Davis* v. *Snyder*, 1 Chy. 134.

Semble, that this court in a proper case has jurisdiction to decree compensation for improvements where the vendor is unable to complete the title to the puchaser, but the court will not make such a decree where specific performance of the contract can be compelled. *Ib.*

A vendor who was unable to complete his contract for sale of real estate, by reason of his title being defective, had, notwithstanding, instituted proceedings at law to enforce payment of the purchase money. Thereupon the purchaser filed a bill alleging his willingness to perform the contract if a good title could be made, but that a good title could not be made; and that he had paid part of the purchase money and made improvements on the property. The court refused the plaintiff any allowance in respect of the improvements made by him. *Kilborn* v. *Workman*, 9 Chy. 255.

A party contracted to purchase lands of certain infants from their mother, who was not capable of selling without the authority of this court, which was subsequently obtained. The purchaser having in the meantime gone into possession of and improved the property, afterwards applied to be relieved from the purchase, and to have the improvements paid for out of the estate, alleging his inability to carry out the bargain. The application was granted in so far as he sought to be relieved from the purchase, and he was declared entitled to be treated as the purchaser of the widow's dower, but he was refused any allowance in consideration of his improvements, or a return of the money he had paid. *In re Yaggie*, 1 Chy. Chamb. 52.—Esten.

Where a deed is set aside as fraudulent as against creditors, a purchaser from the grantee of the impeached deed will not be allowed for improvements made by him upon the property. *Hunt* v. *Hunter*, 14 Chy. 376.

Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to a specific performance of the contract; and the vendor, at the instance of the administratrix, conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. *Forsyth* v. *Johnson*, 14 Chy. 639.

There was a lapse of fourteen years after the vendor's conveyance before the bill for compensation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit. *Ib.*

With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Ib.*

Improvements made by a defendant under the belief that he was absolute owner, are allowed more liberally than to a mortgagee who improves knowing that he is but a mortgagee. *Carroll* v. *Robertson*, 15 Chy. 173.

A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:—Held, that, as a condition of relief against him he should be allowed for all the improvements he had made under the belief that he was absolute owner, so far as these improvements enhanced the value of the property, but no further; and that he was not restricted to such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Ib.*

The adult co-heirs of an estate agreed to a partition, and bound themselves to execute quit claims to carry it out as soon as the minors came of age and united therein. Some of the co-heirs went into possession of their portions and made improvements; some released their interest in the property allotted to others; but some of the minors on coming of age declined to adopt the agreement:—Held, on that account, that the agreement was not binding on any of the parties to it; and a decree for partition was made; and the master was directed to have regard in partitioning to the possession and improvements by the parties. *Wood* v. *Wood*, 16 Chy. 471.

The holder of a mortgage having become the purchaser of the mortgaged property under a power of sale contained in the mortgage, and afterwards, under a sheriff's sale; sold and conveyed to a purchaser, who went into possession and made permanent improvements. On his purchase being set aside, it was Held, that his vendee was entitled to be allowed for his improvements. *McLaren* v. *Fraser*, 17 Chy. 567.

Semble, the same rule would apply if the mortgagee himself had made the improvements. *Ib.*

The rule that a party in good faith making improvements on property which he has purchased will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced actively in this court, as well where the purchaser is plaintiff as where he is defendant; and that although no action has been brought to dispossess him. *Gummerson* v. *Banting*, 18 Chy. 516.

On taking an account of what was due to a plaintiff in possession, who claimed under a vendor of real estate in a specific performance suit, the master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions the court expressed the opinion that the only repairs made after suit commenced that could be allowed were such as it was the plaintiff's duty to make in order to save the premises from deterioration. *Hawn* v. *Cashion*, 20 Chy. 518.

The purchaser at a sale under a decree was by the decree declared entitled to an allowance for permanent improvements on the property. The purchaser died, and neither he nor his representative having carried out the purchase, an order was made in the usual terms directing a re-sale and the payment of any deficiency by the administrator of the purchaser's estate. The lands were sold and realized less than the sum bid by the purchaser at the previous sale. An order was granted allowing the amount of the deficiency on re-sale to be set off pro tanto against the amount found due by the report for improvements. *Ontario Bank* v. *Sirr*, 6 P. R. 277.—Chy. Chamb.—Holmested, *Referee*.

Trustees.]—The principle, that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant cestui que trust. *Bevis* v. *Boulton*, 7 Chy. 39.

Where trustees with power of sale had in good faith, but erroneously, made a conveyance of a portion of the trust estate to one of the cestuis que trust, for the collateral advantage to the whole property to be derived from certain buildings and improvements to be made on the part conveyed—thus committing a technical breach of trust; upon discovering which the grantee joined with the trustees in a conveyance of the whole trust estate for value, upon an agreement entered into between the parties that he should be paid such sum in respect of his improvements as the court might consider him entitled to, and thereupon filed a bill for that purpose—the court, under the circumstances, directed the grantee to be allowed such sum as it should be made to appear the improvements had enhanced the value of the whole property, or the price of the buildings and other improvements made thereon, whichever should be the lesser in amount, and referred it to the master to ascertain the amount; although the rule is that in such cases payment for improvements will not be allowed at the instance of the party making them. *Pegley* v. *Woods*, 14 Chy. 47.

Trustees being empowered to invest the moneys of the trust in the purchase of real estate, may in their discretion do so in the erection of a new building, when an increased income can be obtained thereby. It is, however, for the trustees to determine for themselves whether the circumstances are such as to justify such expenditure, and that the amount is proper. *Re Henderson's Trusts*, 23 Chy. 45.

Other Cases.]—A testator placed his two sons in possession of certain portions of his real estate, intending to convey or devise the same to them, but during his lifetime retained the full control of the property; notwithstanding this, the sons made valuable improvements upon their respective portions. Upon a bill filed after the decease of the father for a distribution of the estate, the court refused to make to the sons any allowance in respect of such improvements. *Foster* v. *Emerson*, 5 Chy. 135.

A father placed one of his sons in possession of certain wild land, and announced his intention of giving it to him by way of advancement. He died without carrying out this intention; but meanwhile the son had taken possession, and by his improvements nearly doubled the value of the land:—Held, that the son was entitled to a charge for his improvements, and to have the land allotted to him in the division of his father's estate, provided the present value of the land in its unimproved state would not exceed his share of the estate. Quære, in such a case, whether the son is not entitled to an absolute decree for the land. *Biehn* v. *Biehn*, 18 Chy. 497. See *Horey* v. *Ferguson*, 18 Chy. 498.

The widow of an intestate, having obtained letters of administration, received and got in his personal estate, went into occupation of the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs of the intestate, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds or profits of the real estate come to her hands, must first be applied towards payment of debts, and then to reimburse her for sums spent in the infants' maintenance. No allowance was made to the administratrix for her improvements to the realty, but she was not to be charged with any increase in rental caused by such improvements. *In re Brazill*, *Barry* v. *Brazill*, 11 Chy. 253.

A patent was issued to A. in consideration of improvements on the land, but the benefit of these improvements had, on an arbitration between A. and B., been adjudged to B., and the adjudication was in no way impeached or discredited; and it was shewn to be the settled policy and practice of the crown to issue patents in such cases to those entitled to the improvements:—Held, that though the award was known to the officers of the government, the patent should be set aside at the suit of the attorney-general, as having been issued through fraud, and in error and improvidence. *Attorney-general* v. *McNulty*, 11 Chy. 281; affirmed on rehearing. *Ib.* 581.

By letters patent dated in January, 1824, certain lands were granted to three parties upon the trust, amongst others, to convey the same to the incumbent whenever the governor should erect a parsonage or rectory in Kingston, and duly appoint an incumbent thereto, such conveyance to be upon trusts similar to those therein before expressed. In January, 1836, a rectory was created in Kingston. In May, 1837, the trusts for which the patent of 1824 had been issued having been carried out, and one of the trustees named therein appointed rector, the other two joined in a conveyance to him as such rector, to hold to him and his successors, subject to the uses and trusts set forth in the grant to them. In 1842, this incumbent created a lease for twenty-one years (under which the plaint-

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claimed,) whereby he covenanted for himself and his successors to pay for certain improvements made by the lessee on the premises, or that he or they would execute a renewal lease on terms to be agreed upon, and that until such payment for improvements or renewal of lease, the lessee should retain possession of the premises :—Held, that the incumbent either as trustee or rector, had no power to bind his successors to pay for improvements, or to enter into any agreement which a priori would extend the lease beyond the twenty-one years. *Kirkpatrick* v. *Lyster*, 13 Chy. 323; 16 Chy. 17.

An executrix, who had an annuity charged on the income of the estate, real and personal, expended money in good faith in improving the real estate, and in other unauthorized ways, and was in consequence found largely indebted to the estate :—Held, that her expenditure in improvements should be allowed so far as it had enhanced the value of the estate. *Morley* v. *Matthews*, 14 Chy. 551.

A purchase by a wife from her husband, the consideration being paid out of her separate estate, was held to be maintainable against creditors of which she had no notice. The husband, after the purchase, expended money in improving the property :—Held, in a suit by a judgment creditor of the husband to obtain the benefit of such expenditure, that the wife was entitled to shew that the debt for which the judgment was recovered had been satisfied before action brought. *Hill* v. *Thompson*, 17 Chy. 445.

A person in insolvent circumstances conveyed by way of settlement to his intended wife a lot of land, on which the settlor had commenced to put up a house, but which was not completed until after marriage. On a bill filed by the assignees in insolvency, the court declared that for so much of the building as was completed after marriage, the creditors had a claim on the property; but gave the wife the right to elect whether she would be paid the value of her interest without the expenditure after marriage, or pay to the assignees the amount of such expenditure; and it subsequently appearing that the husband had created a mortgage prior to the settlement, the wife was declared entitled to have the value of the improvements made after marriage applied in discharge of the mortgage in priority to the claims of the creditors. *Jackson* v. *Boorman*, 14 Chy. 156.

One of several tenants in common or joint tenants making improvements in a joint estate, is not entitled to be paid therefor unless, on the other hand, he consents to be charged with occupation rent. *Rice* v. *George*, 20 Chy. 221.

Trustees of real estate created a lease thereof, and verbally agreed to make certain improvements on the property, without which agreement the lessee would not have accepted the lease, but the improvements never were made :—Held, on rehearing, affirming the order pronounced 21 Chy. 56, that the stipulation as to improvements, upon which the lease was accepted, could be proved by parol. *In re Mason et al.*, 21 Chy. 59; but on appeal this decision was reversed, *Mason* v. *Scott*, 22 Chy. 596.

The Court of Chancery has no power to order the sale of a portion of a settled estate in order to raise money to make improvements upon the remainder, nor to authorize a mortgage for that purpose. *Re Moore's Settled Estate*, 6 P. R. 281. —Chy. Chamb.—Proudfoot.

A bill was filed for the specific performance of a contract for sale of land, for a sum less than $150. Before suit the plaintiff, the vendee, had entered upon the land and made improvements upon it, which increased its value to more than $200 :—Held, that the subject matter involved was more than $200, and that the plaintiff was therefore entitled to costs according to the higher scale. *Kennedy* v. *Brown*, 12 L. J. 174.—M. O. —Taylor, *Master*.

Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements by her :—Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon. *Brotherton* v. *Hetherington*, 23 Chy. 187.

And where the mortgagors so entering into the agreement were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them :—Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements. *Ib.*

IMPROVIDENCE.

See FRAUD AND MISREPRESENTATION.

INDEMNITY.

See GUARANTEE AND INDEMNITY.

INDEMNITY ACT.

I. FOR ACTS DONE DURING THE INSURRECTION OF 1837-1838.

Proceedings were stayed with double costs under the Indemnity Act, 1 Vict. c. 12, after judgment by default and assessment of damages. *Hyde* v. *Anger*, E. T. 2 Vict.

In trespass for seizing fire arms, a justification by defendant as an alderman of the city of Toronto, and claiming protection under this act, was held an answer to the action, although the fire arms had never been returned. *Lockhart* v. *Dixon*, H. T. 3 Vict.

INDEMNITY BOND.

See BOND.

INDIANS.

See INDIAN LANDS.

On a trial for murder, an Indian witness was offered, and on his examination by the judge it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being who created all things, and in a future state of rewards or punishment according to their conduct in this life. He was then sworn in the ordinary way :—Held, that his evidence was admissible. *Regina* v. *Pah-Mah-Gay*, 20 Q. B. 195.

A debt contracted by an Indian while C. S. C. c. 9, was in force, cannot now be sued for under 32-33 Vict. c. 6. *McKinnon* v. *VanEvery*, 5 P. R. 284.—C. L. Chamb.—Galt.

Quære, whether a judgment can be obtained against an Indian even under the latter act. *Ib.*

An Indian who is a British subject, and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount) has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving as an Indian a portion of the annual payments from the common property of his tribe. *Regina ex. rel. Gibb* v. *White*, 5 P. R. 315.—C. L. Chamb.—Dalton, *C. C. & P.*

INDIAN LANDS.

[*See 31 Vict. c. 42, D; 32-33 Vict. c. 6, D.*]

Where an inquisition had been found against defendant, under our statute 54 Geo. III. c. 9, the court refused to set the same aside on the ground that the lands vested in the crown thereby had been granted by the Mohawk Indians to defendant for a term of 999 years, in trust for the support of his wife (a Mohawk woman) and three children. *Rex* v. *Phelps*, Tay. 47.

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand river, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands :—Held, that as the whole estate both legal and equitable was in the crown, it was not a case in which the court would interfere even if the plaintiff had established the case stated in the bill by evidence. *Bown* v. *West*, 1 O. S. 287.

Form of conviction by commissioners appointed under 2 Vict. c. 15, for illegally taking possession of Indian lands. *Little et al.* v. *Keating*, 6 O. S. 265.

Semble, that the recital in a warrant by the commissioners, under the act, to dispossess the party convicted, that thirty days' notice had been given him to remove from the lands, does not afford sufficient evidence that such notice was in fact given. *Ib.*

The 12th clause of the Highway Act, 50 Geo. III. c. 1, cannot be taken to mean that every bye-road or short cut, used by the Indians across the plains or flats, is to be established as a permanent highway. It only means that roads which, under the provisions of that act, are to acquire the character of legal highways, should have that same legal character where they pass through Indian lands as in other parts of their course, although they might not be (as to such portion of them) public allowances made in any original survey, nor had any public money been expended or statute labour performed on them. *Byrnes* v. *Bown*, 8 Q. B. 181.

A grant of lands, in 1784, by the then governor of the province of Quebec, and under *his seal at arms*, to the Mohawk Indians and others, conveyed no legal estate ; 1. As not being by letters patent under the great seal : 2. For want of a grantee or grantees capable of holding. *Doe* d. *Sheldon* v. *Ramsay et al.*, 9 Q. B. 105.

Held, that the mere fact of a chief of an Indian tribe assuming to act as a duly authorized agent in the name and on behalf of the tribe, shewed no power in him so to act ; and therefore a lease signed by him as agent, &c., conveyed nothing. And, consequently, that such lessee had no estate which, on his being subsequently attainted of high treason, could be forfeited to the crown, and vested in the commissioners of forfeited estates, under 59 Geo. III. c. 12. *Ib.*

The agent for the disposing of the Indian lands on the Grand river does not come under the designation of a district agent of the commissioner of crown lands, so as to entitle purchasers holding his certificate to the benefit of the provisions in the land sale acts. *Young* v. *Scobie*, 10 Q. B. 372.

An action against a commissioner of Indian affairs for seizing and selling lumber cut on Indian land must be brought within six months from the seizure, not from the sale. *Jones* v. *Bain*, 12 Q. B. 550.

Semble, that the commissioners for restraining trespasses on Indian lands are not authorized to seize and sell timber cut by the Indians themselves, or by white people with their consent. *Vanvleck et al.* v. *Stewart et al.*, 19 Q. B. 489.

The 13 & 14 Vict. c. 74, prohibits the buying or contracting to buy from Indians, not merely any lands of which they are in actual possession, but any lands held by the government for their use or benefit ; but, quære, whether the clauses of the act relating to trespasses on Indian lands extend to any lands not actually possessed by them :—Held, that the indictment in this case, after verdict, sufficiently averred the lands purchased by defendant to be Indian lands, *i. e.*, lands held by the crown for them ; and, Quære, whether the act extends only to lands so held, or as well to the lands purchased by Indians from individuals :—Held, also, that no variance was shewn between the land described in the indictment and that which the defendant was proved to have contracted for :—Held, also, no objection that the purchase was alleged to have been from certain Indians named, whereas it was in fact from the tribe through their council :—Held also, that the evidence in this case was sufficient to sustain the conviction. Semble, that the meaning of the statute is, that no one shall attempt to bargain with the Indians for the purchase of their lands until he has first obtained the consent of the government, and that it is therefore contrary to the act to make even a conditional agreement, subject to their approval, the proposal should be made to government in the first instance. *Regina* v. *Baby*, 12 Q. B. 34[illegible]

The 13 & 14 Vict. c. 74, which prohibits the sale of land by Indians, applies only to lands reserved for their occupation, and of which the title is still in the crown, not to lands to which any individual Indian has acquired a title. *Totton* v. *Watson*, 15 Q. B. 392.

Defendant entered into a verbal agreement to farm the land of an Indian woman on shares for five years, and took possession. He was found guilty of a misdemeanour under 13 & 14 Vict. c. 74. *Regina* v. *Hagar*, 7 C. P. 380.

Held, that an Indian might sell cordwood cut by him on unsurrendered Indian reserve land, of which he was in occupation as a member of the tribe. Morrison, J., concurred on the ground only that the wood in this case might, for all that appeared, have been cut by the Indian in clearing the land with a view to its cultivation by him. *Fegan* v. *McLean*, 29 Q. B. 202.

Under the 2 Vict. c. 15, s. 1, parol testimony by one witness, deposing, to the best of his belief only, to the appropriation of the lands in question to the residence of Indian tribes, and to the non-cession of such lands to Her Majesty, is sufficient primâ facie evidence of those facts. *Regina* v. *Strong*, 1 Chy. 392; *Regina* v. *Johnston*. *Ib.* 409.

In regard to lands in the occupation of the Indians, it is unnecessary, in the proceedings of the commissioners, under 2 Vict. c. 15, and 12 Vict. c. 9, or by express evidence, to negative the exceptions specified in the latter of these statutes. The finding of the commissioners, under those statutes, is not bad for not adjudging that possession should be relinquished by the trespasser. *Regina* v. *Strong*, 1 Chy. 392.

The act respecting Indian lands, 23 Vict. c. 151, D., authorized the governor in council to declare applicable thereto the act respecting timber on public lands. An order in council was issued accordingly. Eight years afterwards another act was passed, 31 Vict. c. 42, which contained a clause authorizing the governor in council to declare the timber act applicable to Indian lands, and to repeal any such order in council and substitute others, and another clause authorizing the governor in council to make regulations and impose penalties for the sale and protection of timber on Indian lands:—Held, that the Timber Act continued in force until revoked or altered by a new order in council. *The Attorney-General* v. *Fowlds*, 18 Chy. 433.

INDICTMENT.

I. Generally—*See* Criminal Law.

II. For Nuisances—*See* Nuisance.

The production of the original indictment is not sufficient to prove an indictment for felony; but a record must be made up with a proper caption. *Henry* v. *Little et al.*, 11 Q. B. 296.

In an action for maliciously and without probable cause arresting the plaintiff:—Held, that an exemplification, by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *Anon* v. *Wright*, 13 C. P. 14.

Semble, that a person tried for felony and acquitted can only obtain a copy of the indictment and record of acquittal, to be used in an action for malicious prosecution, on the fiat of the attorney general; and the granting or refusing such application cannot be reviewed by this court. The application here was for a rule calling on the attorney-general to shew cause why judgment of acquittal should not be entered on the indictment:—Held, that the indictment not being a record of this court, or brought into it by certiorari, the court had no jurisdiction. *Regina* v. *Ivy*, 24 C. P. 78.

INFANT.

I. Contracts by.
1. *Deeds*, 1723.
2. *Other Contracts*, 1723.
3. *Ratification and Avoidance*, 1723.

II. Actions and Proceedings by and against.
1. *At Law.*
(a) *Ejectment*, 1725.
(b) *Other Actions*, 1726.
2. *In Equity.*
(a) *Foreclosure*, 1727.
(b) *Other Suits*, 1728.
(c) *Fraud or Misrepresentation by Infants*, 1732.
(d) *Parties to Suits—See* Pleading in Equity.
3. *Security for Costs by Next Friend—See* Costs.

III. Guardians.
1. *Application to Appoint*, 1733.
2. *Person Appointed*, 1734.
3. *Removal and New Appointment*, 1735.
4. *Other Cases*, 1736.

IV. Custody of Infants, 1737.
1. *Of Illegitimate Children—See* Bastard.

V. Infant's Estate.
1. *Maintenance and Advancement.*
(a) *Generally*, 1741.
(b) *Of Illegitimate Children—See* Bastard.
(c) *Conditions in Will—See* Will.
2. *Partition, Lease, and Sale of.*
(a) *Practice on Application for*, 1743.
(b) *Other Cases*, 1743.
3. *Investment of Moneys*, 1747.
4. *Other Cases*, 1747.
5. *Suits for Specific Performance where Infants' Rights are concerned—See* Specific Performance.
6. *Trustees of—See* Trusts and Trustees.

VI. Miscellaneous Cases, 1748.

VII. Apprentices—*See* Apprentice.

VIII. Illegitimate Children—*See* Bastard.

IX. Seduction of—*See* Seduction.

I. Contracts by.

1. *Deeds.*

A conveyance of land or mortgage made by an infant is not absolutely void, but voidable by him, either before or after he comes of age. *Doe* d. *Jackson* v. *Woodruffe*, 7 Q. B. 332; *Mills* v. *Davis*, 9 C. P. 510; *Featherston* v. *McDonell*, 15 C. P. 162; *Gilchrist* v. *Ramsay*, 27 Q. B. 500; *Miller* v. *Ostrander*, 12 Chy. 349.

Defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age defendant repudiated the mortgage, but adopted the purchase, by bringing an action to recover possession:—Held, that the mortgage being void, as the deed of an infant, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by assignment of the mortgage. *Grace* v. *Whitehead*, 7 Chy. 591. See *Featherston* v. *McDonell*, 15 C. P. 162, p. 1724.

A deed executed by a man and his wife (she owning the estate) under C. S. U. C. c. 85, while the wife was under 21, was held good and valid, independently of the statute, to pass the husband's interest in the land, although not sufficient to bar the wife's. *Doran* v. *Reid*, 13 C. P. 393.

Quære, whether the deed of an infant, unless legally avoided, would operate by estoppel to pass the title to the land, as soon as the fee vested in him on obtaining his majority. *McCoppin* v. *McGuire*, 34 Q. B. 157.

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2. *Other Contracts.*

The 27th clause of 13 & 14 Vict. c. 53, does not restrict infants from suing in the Division Courts for any thing but wages, but was intended only to enable them to recover for their own labour contrary to the principles of the common law. *Ferris* v. *Fox*, 11 Q. B. 612.

Quære, whether if an infant hire himself for wages to his parent, the contract is binding on the latter. *Perlet* v. *Perlet*, 15 Q. B. 165.

Where a minor enters into a contract of hiring, the wages he earns belong to him and not to his parents. *Delesdernier* v. *Burton*, 12 Chy. 569.

As to the marriage of infants, See *Regina* v. *Secker*, 14 Q. B. 604; *Regina* v. *Bell*, 15 Q. B. 287; *Regina* v. *Roblin*, 21 Q. B. 352.

Declaration by the administrator of A., alleging his death caused by negligent management of defendants' train. Plea, setting up that A. was a newsboy in the employment of C. & Co., selling papers on defendants' trains, under an agreement between defendants and C. & Co., which exempted defendants from liability. Quære, if such a contract is to be considered as made with the person carried, and if so, as to the effect of his being an infant. *Alexander* v. *Toronto and Nipissing R. W. Co.*, 33 Q. B. 474; *S. C.* in appeal, 35 Q. B. 453.

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3. *Ratification and Avoidance.*

The bringing an ejectment by an infant to regain possession of land conveyed by him, is so complete an avoidance of the deed that he cannot afterwards ratify it. *Doe* d. *Jackson* v. *Woodruffe*, 7Q. B. 332.

A contract of promise of marriage to an infant can only be avoided by the act of the infant and not by the act of her guardian. *Parks* v. *Maybee*, 2 C. P. 257.

Where defendant, during nonage, conveyed land in fee to the grantor of the plaintiff; and, though fifteen years had elapsed since his majority, took no steps to repudiate his deed, until he defended on this ground an action of ejectment brought against him for the land, a conveyance of which had in the interim, and after the conveyance to the plaintiff, been made to him (defendant) by the person entitled:—Held, that it might be assumed, under the power given to the court to draw inferences of fact, that the defendant had confirmed the deed, and that he could not now so set up in this suit the defence of infancy: Grace *v.* Whitehead, 7 Chy. 591, remarked upon. *Featherston* v. *McDonell*, 15 C. P. 162.

A mortgage by an infant may be avoided during infancy, and defending by guardian an ejectment brought by the mortgagee is a sufficient avoidance. *Gilchrist* v. *Ramsay*, 27 Q. B. 500.

An infant cannot, during his minority, avoid, on the ground of infancy, a lease which is for his benefit. *Hartshorn* v. *Earley*, 19 C. P. 139.

Declaration on defendant's covenant to pay off a mortgage to one L., on land conveyed by him to the plaintiff, alleging non-payment, and a sale of the land under the mortgage to one M., who evicted the plaintiff. Plea, on equitable grounds, that before the mortgage fell due, defendant, at the plaintiff's request, advanced to him the money required to pay it off, which the plaintiff promised and gave his bond to the defendant to do; that afterwards the plaintiff, owing defendant $400, gave him a mortgage therefor upon the same land; that when the mortgage to L. fell due, the plaintiff being unable to pay it off according to his bond, it was agreed by all parties that L. should sell one half of the land for more than her mortgage, and pay the plaintiff the surplus, and release to the plaintiff the other half: that L. accordingly sold half the land to M., and released the other half to the plaintiff by deed, in which defendant joined, which deed the plaintiff accepted, and L. also paid to the plaintiff the balance of the purchase money received for the other half, above L.'s mortgage. Replication, that the plaintiff, when all these transactions took place, was an infant, by reason whereof his alleged bond and mortgage were voidable, and he has avoided the same:—Held, that the replication was good, for that there was nothing alleged in the plea to which the plaintiff was prevented from setting up his infancy as an answer, and he might avoid the bond and mortgage whenever they were relied upon against him. *Gallagher* v. *Gallagher*, 30 Q. B. 415.

W. M. came of age on the 27th August, 1857. On the 1st of July previous, he executed a deed of the premises in question to U., under whom defendant claimed, which was registered on the 26th of August. This deed was re-acknowledged between the 28th and 30th of August, and the re-acknowledgment registered on the 5th of September in the same year. On the 28th of August

a judgment was entered up against W. M. in favour of the plaintiff on a confession of judgment in assumpsit signed the same day, and the plaintiff claimed through a sale by the sheriff upon a writ placed in the sheriff's hands on the 5th of October, 1857 :—Held, that there had been a sufficient re-acknowledgment of the deed by the infant, and that the confession of judgment was not per se *an act done* to avoid the deed. *McCoppin* v. *McGuire*, 34 Q. B. 157.

An exchange of lands by an infant is not void, but voidable only, and as such may be confirmed. Where, therefore, a party said to have been under age and intoxicated when he made the exchange, continued, after coming of age, in possession of the property received in exchange, and afterwards sold or exchanged it for other property, it was considered sufficient confirmation. *Miller* v. *Ostrander*, 12 Chy. 349.

II. Actions and Proceedings by and Against.

1. *At Law.*

(a) *Ejectment.*

When a minor gives a bond to convey, and he or his heir afterwards brings ejectment against the assignee of the obligee, the defendant is entitled to a demand of possession. *Doe* d. *Lemoine* v. *Vancott*, 5 O. S. 486.

An infant will be admitted to defend as landlord, by guardian. *Doe* d. *Sanderson* v. *Roe*, T. T. 3 & 4 Vict.

A guardian appointed by the Vice Chancellor upon the petition of an infant, cannot make a demise for the purpose of trying the title to the infant's land in ejectment. The demise should be by the infant. *Doe* d. *Marianne* v. *Alexander*, 1 Q. B. 120.

A guardian appointed to an infant, under 8 Geo. IV. c. 6, sec. 2, may bring ejectment to try the infant's title. Semble, it may also be brought in the name of the infant. *Doe* d. *Atkinson* v. *McLeod*, 8 Q. B. 344.

Held that the guardian of an infant appointed under C. S. U. C. c. 74, can under sec. 5 consent to the name of the infant being added as plaintiff in an action of ejectment which seems to be for the latter's benefit. Quære, whether such consent should be in writing. *Ogilvie* v. *McRory*, 15 C. P. 557.

C. S. U. C. c. 74, s. 5, does not vest the real estate of an infant in the guardian, and such guardian cannot, therefore, bring ejectment in his own name; he must proceed as guardian in the name of the ward. The last case distinguished. *Kinsey* v. *Newcombe*, 17 C. P. 99.

Plaintiff in ejectment, though an infant, sued in person. Defendant became aware of the infancy at the first trial, but took no objection until after the second trial, when a verdict was given against him for non-appearance. He then moved to set aside the proceeding on this ground, and for want of proper notice of trial : —Held, that defendant was precluded by his delay, and the court refused to interfere. *Ham* v. *Egan*, 3 P. R. 16.—Q. B.

Where in dower, after declaration filed and notice to plead served upon infant tenants, the latter neglect to plead, an order *nisi* may be made that, unless the infants plead within a given time, the demandant may assign John Doe for their guardian. *Robinson* v. *Blandshard et al.*, 9 L. J. 23.—C. L. Chamb.—Draper.

An infant plaintiff can sue out a writ of ejectment in his own name; but after appearance entered he cannot take any further step without having a next friend appointed, and any such further proceedings in the infant's own name will be set aside. *Campbell* v. *Mathewson*, 5 P. R. 91.—C. L. Chamb.—Hagarty.

(b) *Other Actions.*

An infant demandant may sue in dower, and if an infant tenant be sued the parol is not allowed to demur. *Phelan* v. *Phelan*, Dra. 386.

In trover, where the plaintiff sued by his mother as his next friend, the court held that the latter, by allowing herself to be made guardian for bringing this suit, did not waive any right she might have had to the goods sued for, and that her consent to become prochein amy was no legal estoppel on her. *Barker* v. *Tabor*, 5 O. S. 570.

Where a father took shares in an association formed to build a steamboat, in the name of his son, then an infant, and during the minority of the child, directed two of the shares to be transferred to the defendant, which was done :—Held, that the infant could not, on attaining his majority, maintain assumpsit for money had and received, to recover dividends on these shares, received by defendant. *Hall* v. *Bidwell*, 3 O. S. 22.

The mother in possession of the land belonging to the heir, a minor, may sue in trespass q. c. f. as the next friend of the minor. *Johnson* v. *McGillis*, 7 Q. B. 309.

Infancy is no ground for discharging a person from arrest. *Clarke* v. *Clarke*, 3 L. J. 149.—C. L. Chamb.—Robinson.

The 27th clause of 13 & 14 Vict. c. 53, does not restrict infants from suing in the Division Courts for any thing but wages, but was intended only to enable them only to recover for their own labour, contrary to the principles of the common law. *Ferris* v. *Fox*, 11 Q. B. 612.

Held, that the fact of the plaintiff, an infant, having sued by attorney and not by prochein amy was no ground for setting aside the process, for by the practice the prochein amy may be appointed at any time before declaration. Quære, however, whether as the writ, and not the declaration, is now the commencement of the action, the appointment should not more properly be made before suing out process. *O'Reilly* v. *Vanevery et al.*, 2 P. R. 184.—C. L. Chamb. —Richards.

An appearance entered by an attorney for an infant defendant (no prochein amy having been appointed,) is a nullity not an irregularity. *Fountain* v. *McSween*, 4 P. R. 240.—C. L. Chamb.—Hagarty.

Interlocutory judgment cannot be signed until after prochein amy appointed. *Ib.*

An infant cannot appear by attorney, but by guardian. If the appearance is by attorney, all

subsequent proceedings are irregular. An attorney who appears for an infant, knowing of his infancy, will be ordered to pay the costs of all subsequent proceedings, and of the application to set the same aside. *Macaulay* v. *Neville et al.*, 5 P. R. 235.—C. L. Chamb.—Dalton, *C. C. & P.*

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2. *In Equity.*

(a) *Foreclosure.*

On an application by the executor of a mortgagee, for the infant heir of a mortgagor to convey after the executor has obtained a final order for foreclosure, the petition and affidavits should be entitled, not in the cause, but in the matter of the infant. *In re Hodges*, 1 Chy. 285.

Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises, the infant heir is a person seized upon trust, within the meaning of the statute 11 Geo. IV., and 1 Will. IV. c. 10, s. 6, and may be ordered on petition without suit, to convey the estate to the executor, or to a purchaser from him. *Ib.*

But the court will not make the order, unless it appear that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a reference as to this will be directed. *Ib.*

Form of a decree upon a bill for foreclosure by a mortgagee against the infant heir of the mortgagor. *Saunderson* v. *Custon*, 1 Chy. 349.

Held, per cur., Sprague, V. C., diss., that in foreclosure suits against infant defendants the court would make a decree for summary reference to the master under the 77th order of May, 1850; the decree, however, directing that in the proceedings before the master the plaintiff should be obliged in the first instance to prove the execution of the conveyance. *Creelman* v. *Clefford*, 2 Chy. 213.

Where a decree of foreclosure against an infant defendant did not reserve a day after his attaining twenty-one to shew cause, and upon his attaining his majority, the infant applied upon affidavits to put in a new answer and raise a fresh defence:—Held, per cur., Blake, C., absente, that the relief asked could not be obtained without a re-hearing of the cause. *Mair* v. *Kerr*, 2 Chy. 223.

Upon the re-hearing of a cause, where the decree of foreclosure did not reserve a day to the infant:—Held, per cur., Blake, C., diss., that in decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one, must be reserved to the defendants. *Ib.* Affirmed on appeal, 26th February, 1852.

Where, under such a decree, an application is made to put in a new answer for the purpose of raising a defence different from that set up by the guardian of the infant, the application must be founded on affidavits shewing that the new defence is a proper one to be permitted. Where therefore, the ground of the application was, that the mortgagor was a mere trustee for others, and the affidavit in support of the motion did not state that the plaintiff had notice of such alleged trust, the motion was refused with costs. Esten, V. C., diss. *Ib.*

Held, in a suit revived against infant defendants, that the decree having been made in the life-time of their ancestor, it was not necessary to insert in the final order a day to the infants to shew cause. *Sutherland* v. *Dickson*, 2 Chy. Chamb. 25.—VanKoughnet.

The court, where it is considered beneficial to the interests of an infant defendant, will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale. *Bank of Upper Canada* v. *Scott*, 6 Chy. 451; *Lawrason* v. *Fitzgerald*, 9 Chy. 371.

Where a mortgagor had conveyed his equity of redemption to the trustees of his marriage settlement in trust for his wife for life, remainder to his children: and a bill of foreclosure was filed after his death against the trustees and widow, to which bill the children, being infants, were not made parties, the court granted a decree containing the usual reference to inquire whether a sale or foreclosure would be more beneficial to the infants; and gave liberty to the master to make the infants parties in his office. *Dickson* v. *Draper*, 11 Chy. 362.

Where a bill by a mortgagee against an infant heir of the mortgagor prays a foreclosure, and the court for the protection of the infant directs an enquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the master to make the executor of the mortgagor a party in his office, in case of the master's opinion being in favour of a sale. *Trust and Loan Co.* v. *McDonell*, 12 Chy. 196.

Where the heirs of the mortgagor are infants, and a foreclosure suit is instituted, the rule of the court is to grant a reference, as of course, to inquire whether a foreclosure or sale is more for the benefit of the infants; but if affidavits are filed to satisfy the court as to the proper decree, or if the guardian consents, the reference may be dispensed with. *Dudley* v. *Berezy*, 13 Chy. 141.

On motion for decree in this cause, Sprague, V. C., decided that infant defendants are not entitled, as a matter of course, to an enquiry whether a sale or foreclosure is most to their benefit, but that some grounds must be shewn. *Graham* v. *Davis*, 2 Chy. Chamb. 24.

It must appear clearly that the master reports a sale to be beneficial for infants, before a final order for sale will be made. *Edwards* v. *Barling*, 2 Chy. Chamb. 48.

Where in a foreclosure suit, the plaintiff's solicitor had taken proceedings after the plaintiff's decease, in ignorance of that event:—Held on motion to confirm those proceedings, that no order could be made except by consent, and there being infant defendants, no binding consent could be given in this case. *Graham* v. *Davis*, 3 L. J. N. S. 206.—Chy. Chamb.—Taylor, *Secretary.*

(b) *Other Suits.*

Where infants were the only parties residing within the jurisdiction of the court—their next

friend having died and no new guardian having been appointed—security for costs was ordered, but if the infants could find another next friend within the province, application might be made to discharge the order. *Parks* v. *Brown*, 4 L. J. 232.—Chy.

An infant out of the jurisdiction petitioning for relief will be required to give security for costs. *Stinson* v. *Martin*, 2 Chy. Chamb. 86.—Spragge.

The general rule is, that in suits for specific performance against the infant heirs of vendors, the decree should be without costs. *Commander* v. *Gilrie*, 6 Chy. 473.

The same rule as to the costs of a solicitor appointed by the court guardian ad litem to infant defendants in suits for specific performance seems applicable as in mortgage cases; but where the purchase money has not been paid, the court will direct the payment of the guardian's costs from it. *Ib.*

Where executors have appealed, infants in the same interest need not appear, and will not be allowed costs if they do. *McLaren* v. *Coombs*, 2 Chy. Chamb. 124.—VanKoughnet.

In such a case where they had appeared and contested, the guardian was allowed only an attending fee without brief. *Ib.*

The court will direct the costs of a guardian to be paid before granting a vesting order to the purchaser. *Thorne* v. *Chute*, 2 Chy. Chamb. 221.—Spragge.

Where in consequence of some of the defendants being infants, a conveyance which might otherwise have been settled by the parties was necessarily referred to a master, the costs of such reference were ordered to be borne by the testator's estate. *Rodgers* v. *Rodgers*, 2 Chy. Chamb. 241.—Taylor, *Secretary*.

Where the defendant was shewn to have been an infant when the note pro confesso was entered, such noting and all subsequent proceedings were set aside; but as defendant was tardy in applying, and his conduct censurable, the order was made without costs, and he, being now of age, was ordered to answer in a fortnight. *Adams* v. *Gillott*, 2 Chy. Chamb. 427.—Taylor, *Secretary*.

In a case where infants were interested, and it was necessary to have the conveyance settled by the master, and one of the parties to the conveyance being out of the jurisdiction, it also became necessary to obtain a vesting order, the decree allowed the purchaser the extra costs so incurred. *Re McMorris*, 3 Chy. Chamb. 430.—Taylor, *Referee*.

In the case of small estates, an administration suit can only be justified where every possible means of avoiding the suit has been exhausted before suit brought. Where a next friend filed a bill for a minor without having observed this rule, and the suit did not appear to have been necessarily in the interests of the minor, the next friend was charged with all the costs. *McAnnee* v. *La Flamme*, 19 Chy. 193. See *Hutchinson* v. *Sargent*, 17 Chy. 8, p. 1736.

Where any of the defendants are infants, the court will not grant a summary reference under the 77th order, until a guardian to the infants has been appointed. *White* v. *Cummins*, 2 Chy.

When it becomes necessary to revive by way of amendment against infant defendants, the proper course is, to amend simply in the first instance by making the infants parties. Then if the infants fail to have a guardian appointed, the plaintiff may apply, under order 13, to have a solicitor appointed guardian, and in either case the plaintiff may move that the suit do stand revived. *Kirkpatrick* v. *Fouquette*, 4 Chy. 549.

Where the plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives:—Held, that before an application to revive could be made, the decree must be drawn up, and a guardian ad litem appointed. *Beamish* v. *Pomeroy*, 1 Chy. Chamb. 32.—Blake.

Where infants have been made parties by revivor, they cannot set up a defence which their ancestor had not set up, except when such ancestor has been prevented by fraud or mistake from pleading such defence; and all the more particularly where the deceased defendant has been guilty of gross laches. *Burke* v. *Pyne*, 2 Chy. Chamb, 193.—Taylor, *Secretary*.

Where for the purposes of a suit it is necessary to obtain an order for the execution of a conveyance by infant representatives of a mortgagee, not parties to the cause, the proper mode of applying is by petition. *Owen* v. *Campbell*, *In re Mills*, 4 Chy. 630.

In a decree against an infant defendant as trustee of real estate, it is not necessary to reserve a day for the defendant to shew cause after attaining twenty-one years of age. *Lake* v. *McIntosh*, 7 Chy. 532.

A suit to redeem a mortgage alleged to have been created by an absolute deed, was instituted against the infant heir of the mortgagee. The question raised by the pleadings was, whether the transaction was a mortgage or sale, which, at the hearing, was decided in favour of the plaintiff, and the infant was ordered to re-convey. On his attaining 21, an application was made for leave to put in a further answer, and make a new defence, which was refused. Spragge, V. C., diss. *Ib.*

In a suit for specific performance where there were infant defendants, the court held that the plaintiff's laches precluded him from obtaining relief, but directed an enquiry as to whether it would be beneficial to the infants to affirm or annul the contract. If found beneficial to affirm it the plaintiff might excuse his laches, but:—Semble, all the parties beneficially interested must consent to the enquiry. *Chevallier* v. *Strong*, 8 Chy. 320.

Where, in a suit by the personal representatives of a vendor for the specific performance of the contract of sale, an infant heir was joined as a co-plaintiff, the court refused to make a decree, although the bill had been taken pro confesso against the defendant the purchaser, and ordered the case to stand over, with a view to the plaintiffs amending their bill, by making the infant a party defendant, in order that the contract might be established against him. *Hamilton* v. *Walker*, 12 Chy 172.

Proceedings which a defendant allows to be taken against him after he comes of age, are binding on him. There is no necessity for his

being served with notice of the suit after his coming of age. A motion to set aside such proceedings as irregular and void was refused with costs, but the defendant was allowed to take an order giving him leave to falsify any of the items in the costs taxed and accounts allowed by the master, reserving the costs of reference. *Lawrason* v. *Buckley*, 2 Chy. Chamb. 477.—Mowat.

The infant heirs of an intestate who were resident in this province, obtained the usual administration order against the administratrix, their mother, and in proceeding thereunder in the master's office, it appeared that the intestate was, at the time of his death, possessed of considerable real and personal estate in Ontario, and also of several bounty land warrants for lands in Manitoba, which had been duly assigned to him by the recipients thereof from the government of the Dominion, which were sold under the decree on further directions. On a special case being submitted for the opinion of the court:—Held, that this court, under the circumstances, had power to sell these warrants, and could order the parties interested in the estate to join in a conveyance thereof; or the court might, in its discretion, grant the usual order vesting the same in the purchaser: the principle being that if a person selects a tribunal in which to sue for the enforcement of his rights, he cannot afterwards say that the judgment of that tribunal is not binding on him; and the general rule being also clear that infants, like adults, are bound by proceedings in a suit in which they are plaintiffs: and that, to any proceedings that might be taken in the courts of Manitoba, the decree and proceedings in this court would be an answer, and bind the parties and estop them from disturbing any title acquired under the sale. A vesting order operates on equitable as well as legal estates. *Re Robertson*, *Robertson* v. *Robertson*, 22 Chy. 449.

Where an absent defendant is an infant the court has like powers as to granting an order for service by publication as in case of an adult; but semble, the notice published should not state that in default of answer the bill will be taken pro confesso. The court will also, in the exercise of the discretion given to it by 28 Vict. c. 17, s. 12, call upon such defendant by the same order to shew cause why a solicitor of the court should not be appointed his guardian ad litem. *Duffy* v. *O'Connor*, 1 Chy. Chamb. 393.—Mowat.

Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to specific performance of the contract; and the vendor at the instance of the administratrix conveyed the property, which had greatly increased in value, to a third person, and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. There was a lapse of fourteen years after the vendor's conveyance before the bill for compensation was filed, the heir having been a minor all this time. Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, the lapse of time was no bar to the suit. With a view to fixing the amount of compensation, enquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Foreyth* v. *Johnson*, 14 Chy. 639.

Where the heirs are minors the Court of Chancery has jurisdiction on petition of the executor and executrix to make an order vesting the estate in the purchaser, or as they may direct. This course will enable a title to be made free from any doubt. *Donaldson* v. *Berry*, 2 Chy. Chamb. 16.—Mowat.

In order to bind an infant defendant, by an award, &c., the proper mode is, to obtain an order of reference to the master to ascertain whether the submission to arbitration is for the benefit of the infant. *Allan* v. *O'Neill*, 2 Chy. Chamb. 22.—Spragge.

Where a married woman had signed a deed, which, however, contained no bar of dower, the secretary refused to direct a reference to enquire whether she intended thereby to bar her dower, though there were infant defendants who were interested in having the dower barred. Such relief would be properly the subject of a bill. *Thompson* v. *Thompson*, 2 Chy. Chamb. 211.—Taylor, *Secretary*.

The general rule is clear, that an infant plaintiff is, equally with an adult, bound by proceedings in a suit instituted by him. *McDougall* v. *Bell*, 10 Chy. 283.

The father of an infant plaintiff is in the first instance the proper person to act as next friend. Where therefore a brother aged 22, who, as well as the infant, lived with the father had been appointed, and there was conflicting evidence as to the brother's solvency, an order was made for security for costs:—Semble, that in such a case the evidence of the father would be admissible even though prochein amy. *German* v. *Elliott*, 2 L. J. N. S. 267.—C. L. Chamb.—Draper.

An administratrix was sued by her brother for a debt alleged to have been due by her husband, the intestate, and judgment was recovered; subsequently a reference was made in respect of other moneys come to her hands for the benefit of her children, and by her deposited with her brother, and this judgment and the amount due thereon were, at the arbitration, mixed up with questions as to these trust moneys, and the award was in respect of all. The parties also acted as if these trust moneys, and the debts of the estate were to be considered and dealt with together, but the infants were not represented before the arbitrators:—Held, that the infants were not bound by the award. *Secord* v. *Costello*, 17 Chy. 328.

In the case of an infant plaintiff, the court will not require security for costs, or remove a next friend because he is not a person of substance. A motion to remove a next friend of an infant on the ground that during the progress of the suit he had become insolvent, was refused with costs. *Re McConnell*, 3 Chy. Chamb. 423.—Taylor, *Referee*.

See, also, the cases under "Prochein Ami."

(c) *Fraud or Misrepresentation by Infant.*

A tenant in tail, who was supposed to be the fee simple, sold the property a few we

before the passing of the act respecting assurance of estates tail. The purchaser accepted the conveyance, and paid the purchase money, without seeing the will or having the title investigated. The eldest son of the vendor was not quite 21 at the time: he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase without giving any notice of title or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. *Re Sharer*, 3 Chy. Chamb. 379.—Mowat.

A married woman, while yet under 21 years of age, but representing herself to be of full age, conveyed land to a bonâ fide purchaser for value, and the conveyance was duly registered. After attaining majority, the married woman and her husband joined in a voluntary deed to another person as trustee for her, and he subsequently sold the land, and his vendee, on the same day, created a mortgage thereon:—Held, that the married woman, notwithstanding her nonage, was bound by her representations as to her being of age; and that the other parties having acquired their interests with full knowledge of the existence of the deed by her to the purchaser, and after the registration thereof, took subject to all the rights of the purchaser; and the court ordered the estate to be vested in the representatives of the purchaser, and declared the subsequent conveyances void as against them; and, Quære, whether the mortgagee would be allowed to retain possession of the mortgage, with a view of recovering back the money which had been advanced thereon to the mortgagor in good faith. *Bennetto* v. *Holden*, 11 Chy. 222.

III. Guardians.

1. *Application to Appoint.*

The subpœna and notice of motion for the appointment of a guardian had been served on the persons with whom infant defendants were residing: this was considered sufficient service. *Freeman* v. *Beckte*l, 2 Chy. 556.

On a motion for the appointment of a guardian ad litem, under the 21st order of May, 1850, the Court (Esten, V. C., dubitante,) permitted an affidavit, shewing that defendants were infants, to be filed after the day named for the motion to be heard. *Freeland* v. *Jones*, 2 Chy. 581.

Form of jurat in affidavits of execution and justification of bonds from guardian and sureties in the Court of Chancery in the matter of an infant. *Re Ausebrook*, 4 Chy. 109.

Where the mother of the infants is plaintiff, and the infants defendants, notice of motion to appoint a guardian ad litem must also be served upon them if of proper age. *Galbraith* v. *Galbraith*, 5 L. J. 41.—Chy. Chamb.—Spragge.

Notice of an application to appoint a guardian ad litem to an infant, who was a resident pupil at U. C. College, Toronto, served upon the principal of the college:—Held, sufficient under Ord. XIII., s. 5. *Whitmarsh* v. *Ford*, 1 Chy. Chamb. 357.—Spragge.

It is no bar to the appointment of a guardian ad litem to an infant defendant, in an administration in chambers by motion, that the application for guardian is made before the return of the notice of motion for the usual administration order. *Barry* v. *Brazill*, 1 Chy. Chamb. 237.—VanKoughnet.

Where the mother and father of an infant defendant were living apart, and the infant had absconded and could not be served with notice of application for the appointment, the notice was directed to be served at the residence of the mother, that being the infant's last place of residence; service on the father being dispensed with. *Bigger* v. *Beaty*, 1 Chy. Chamb. 236.—VanKoughnet.

An order appointing a guardian ad litem was set aside for irregularity, where the notice of motion for the appointment did not allow the infant six weeks to appear and shew cause, but the guardian thus irregularly appointed was allowed his costs up to decree. *Hamilton* v. *Hamilton*, 2 Chy. Chamb. 160.—Mowat.

An infant should be served with the bill before the return of the notice of application for the appointment of guardian, otherwise notice of the application will have to be re-served. *Robinson* v. *Dobson*, 1 Chy. Chamb. 257.—Spragge.

When on a plaintiff's motion for appointing a guardian to an infant defendant, the person appointed is nominated by or at the instance of the infant, he is not entitled as of course to his costs against the plaintiff. *Clements* v. *Arnold*, 3 Chy. Chamb. 75.—Mowat.

When a primâ facie case is made, shewing that no conflicting interests exist between the infants and the proposed guardian, or the party proposing him, the court will not go into the question of the fact or extent of interest. *Ferguson* v. *Langtry*, 2 Chy. Chamb. 473.

On a petition for the appointment of a guardian to an infant, other than his father, who was living, it was Held necessary that notice of the application should be served on the father. *Re Henricks*, 2 Chy. Chamb. 418.—Taylor, *Secretary*.

In a suit for the purpose (among other things) of having a guardian appointed, it is not the course of the court to direct a reference to the master to appoint a guardian, but only to approve of one, to be afterwards appointed by the court if it see fit. *Murphy* v. *Lamphier*, 12 Chy. 241.

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2. *Person Appointed.*

Although the court pays respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so where a compliance therewith would clearly be prejudicial to the happiness and moral training of the infants. *Anonymous*, 6 Chy. 632.

It is irregular to give a reversionary guardianship of wards in court to the successors in office of any named person. *Murphy* v. *Lamphier*, 12 Chy. 241.

There was a contest in a Surrogate Court between the stepfather and uncle for the guardianship of a child of ten or eleven years old; the child preferred her stepfather, and the Surrogate

Court appointed him guardian; but this court, on appeal, being satisfied that it was for the real interest of the child that the uncle should be guardian, reversed the order below. *In re Irwin, an infant*, 16 Chy. 461.

The father of infants died intestate, and his widow obtained letters of administration, who by her will appointed her sister, a married woman, sole guardian of her two infant daughters. After her death the paternal grandfather of the infants applied to the judge of the Surrogate Court to be appointed their guardian, who, in opposition to objections made by the sister, did appoint him their guardian:—Held, on appeal, (1) That although this Court has jurisdiction to appoint guardians to infants notwithstanding the enactment of the Surrogate Court (22 Vict. c. 93) it will not do so on an appeal like this. (2) That the fact of the person named as guardian in the will of the deceased mother of the children being a married woman was itself sufficient to prevent the court appointing her. It is not the practice of the court to give weight to the objection that a person sought to be appointed guardian to an infant is the next of kin to whom the lands of the infant would descend. Re Stannard, 1 Chy. Chamb. 15, referred to and approved of. *Re McQueen, McQueen* v. *McMillan*, 23 Chy. 191.

The court will appoint the testamentary guardian a guardian ad litem to infant defendants, without requiring all the infants to be produced in court, when it appears that the interest of the guardian is not opposed to that of the infants. *White* v. *Cummins*, 2 Chy. 487.

The court will not, even at the request of the infant defendants, in an amicable suit, appoint the plaintiff's solicitor their guardian ad litem. *James* v. *Robertson*, 1 Chy. Chamb. 197.—Van-Koughnet.

When a father and his infant children are co-defendants, if it appear that the interest of the father conflicts with that of the children, the court will not appoint his solicitor guardian ad litem to the infants. *Aikins* v. *Blain*, 1 Chy. Chamb. 249.—Spragge.

On motion to appoint a guardian, the master should not appoint the plaintiff's nominee, but should select one of the practitioners in the county town, the one who seems best fitted for the duty, and appoint him in all cases in which he is not concerned for any of the parties, if no nomination is made on the part of the infants, and if no special reason exists for naming some other solicitor. *Clements* v. *Arnold*, 3 Chy. Chamb. 75.—Chy.

A suit was brought for redemption of mortgaged property, and the mortgagee having died, his widow and infant heirs were the defendants. Upon an application for the appointment of a guardian ad litem to the infant defendants, a solicitor, nominated by the mother, was appointed guardian, it being considered that there could be no conflict of interest between the mother and her children. *Horkins* v. *Harty*, 6 P. R. 200.—Chy. Chamb.—Proudfoot, on appeal from Holmested, *Referee*.

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3. *Removal and New Appointment.*

A suit had been instituted by a creditor for the administration of the estate of a party deceased, and the agent of the plaintiff's solicitor was appointed guardian ad litem to the infant defendants. After a sale of the lands under the decree, at which the plaintiff, by leave of the court, had bid off a portion of the lands, a motion was made to change the name of the purchaser. The court refused the application, and directed that a new guardian should be appointed, who, unless the parties consented thereto, was to take measures to set the proceedings aside. *Fletcher* v. *Bosworth*, 5 Chy. 458.

Where the guardian for infant defendants, being notified, did not appear at the hearing, and their interests, which were not fully ascertained, were not represented, the court refused a decree in their absence, appointed another guardian, and directed the cause to be again brought on. *Sanborn* v. *Sanborn*, 11 Chy. 123.

Where a guardian ad litem dies, a new one may be appointed without notice. *Harper* v. *Harper*, 1 Chy. Chamb. 217.—Spragge.

Where a guardian ad litem of infant defendants leaves the province, another will be appointed on the ex parte application of the plaintiff. *Wilson* v. *Templeton*, 1 Chy. Chamb. 360.—Spragge.

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4. *Other Cases.*

The possession of a mother will not be considered tortious as against the heir, being her own child, but will rather be treated as the possession of a guardian. *Doe* d. *Moak* v. *Empey*, 3 O. S. 488.

The court will exercise a supervision over solicitors appointed guardians ad litem, and expect at their hands a proper attention to the interests of the infants. *Duncan* v. *Ross*, 2 Chy. Chamb. 443.—*Taylor*, Secretary.

The 22 Vict. c. 93, does not exclude the jurisdiction of this court, in respect to the appointment of guardians. *Re Stannard*, 1 Chy. Chamb. 115.—Esten.

A solicitor upon the plaintiff's application having been appointed guardian ad litem to infant defendants, and being unable to obtain his costs from the plaintiff or from the infants' estate, it was ordered that they be paid out of the suitors' fee fund. *McKay* v. *Harper*, 9 L. J. N.S. 10; Chy. Chamb.—Spragge, on appeal from Holmested, *Referee*.

The next friend of infants filed a bill against the mother of the infants—their guardian appointed by the Surrogate Court—and her husband, alleging certain acts of misconduct, which were not established in evidence; and the accounts taken under the decree resulted in shewing a balance of about $22 in the hands of defendants. The court being of opinion that the suit had been instituted recklessly and without proper inquiry, ordered the next friend of the plaintiff to pay the costs of the defendants as between party and party. *Hutchinson* v. *Agent*, 17 Chy. 8. See *McAndrew* v. *LaFlam*, 19 Chy. 193, p. 1729.

In a suit by a vendee of land brought against the representatives of the vendor for specific performance of the agreement, he was held not entitled to his costs. Some of the defendants being infants, the plaintiff applied for the appointment of a guardian ad litem, and one

appointed accordingly. The court, following the general rule, ordered the plaintiff to pay the costs of the guardian, and refused to give the plaintiff any remedy therefor against the estate of the vendor. *Mooney* v. *Prevost*, 20 Chy. 418.

Where on a rehearing the decree was affirmed, but the court was of opinion that the guardian of the infant defendants, who reheard, was justified in raising the question for the determination of the full court, they directed his costs to be paid out of the fund after satisfaction of the plaintiff's claim. *Aiery* v. *Mitchell*, 21 Chy. 510.

Letters of administration having been granted to the widow of an intestate, she, without any formal appointment as such, acted as guardian of their infant children, and received the rents and profits of the real estate, all of which she duly accounted for. The master in taking the accounts allowed her a compensation on the receipt and application of such rents and profits, as well as the personal estate, amounting in all to $133. On further directions the court, regarding the case as an exceptional one, refused to interfere with such allowance. *Doan* v. *Davis*, 23 Chy. 207.

See *Doe* d. *Marianne* v. *Alexander*, 1 Q. B. 120, p. 1725; *Doe* d. *Atkinson* v. *McLeod*, 8 Q. B. 344, p. 1725; *Ogilvie* v. *McRory*, 15 C. P. 557, p. 1725; *Kinsey* v. *Newcombe*, 17 C. P. 99, p. 1725.

IV. Custody of Infants.

Where a wife had left her husband and gone to reside with her father, taking with her her infant child of about seven years old, and the husband obtained writs of habeas corpus to his wife's father to bring up her body, and to his wife to bring up the child, the court refused, on the return of the father and daughter to the respective writs that the husband had ill-treated his wife and child, to make any order that they should be delivered to him, but informed the wife that she was at liberty to go wherever she pleased, and to take the child with her. *Regina* v. *Baxter*, *Regina* v. *Snooks*, 2 Q. B. 370. See *Regina* v. *Smith et al.*, 2 L. J. 185.—C. L. Chamb. —Robinson.

Where it appeared doubtful whether a minor was under or over sixteen, and she had been married by license with her own consent, the court refused to restore her to the custody of the applicant, with whom she had been living as an adopted child for some time previous to her marriage, but who was neither her parent nor guardian. Semble, that the English Marriage Act, 26 Geo. II. c. 33, is not in force here. *Re* Ann v. *Bell*, 15 Q. B. 287.

Quære, as to the proper form of application to the court, as against the mother, by the father, for the custody of his child. *Regina* v. *Sheriff* 3 Q. B. 197.

The order of this court commanding the wife to deliver the child to the husband, is sufficiently complied with by her placing the child in charge of the husband. If the child return of her own will to the mother, and is not afterwards forcibly obtained, the court will not further interfere. 3 Q. B. 403.

A girl aged thirteen years and ten months, who had lived with her aunt from her infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt, or go to her father. *In re Kinne*, 5 P. R. 184.—C. L. Chamb.—Hagarty.

Semble, that if the child had recently left or been taken away from her father, she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen. *Ib.*

Upon an application by the mother, under C. S. U. C. c. 74, s. 8, for the custody of her infant daughter, four years of age, the husband and wife having separated:—Held, that the statute does not take away the common law right of a father to the custody of his child, but only makes the recognition of this paternal right conditional upon the performance of the marital duty, and subjects it, in some degree, also to the interest of the child. If, therefore, upon an application of this kind, it appear that the husband and wife are living apart, the court will enquire into the cause of their separation, in order to ascertain (1) whether the husband has forfeited, by breach of his marital duties, this primâ facie right to the possession of his child, (2) and whether the wife, by deserting the husband without reasonable excuse, has relinquished her claim to the benefit and protection of the statute, which was intended to protect wives from the tyranny of their husbands who ill-use them. *In re Leigh*, 5 P. R. 402.—C. L. Chamb.—Gwynne.

The court will, upon the petition of the guardian duly appointed by the Court of Probate or Surrogate, interfere summarily, and order the person of the infant to be delivered to such guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending respecting the infant's estate. *Re Gillrie*, 3 Chy. 279.

A married woman living apart from her husband, petitioned under C. S. U. C. c. 74, s. 8, for the custody of her children under the age of 12. A deed of separation was also filed executed between them in 1852, which gave her the sole control of her children, then or thereafter to be born. An ex parte order was made upon the ground stated in the petition, verified by affidavits, for the delivery of the children to the petitioner, which order upon a subsequent application the judge refused to rescind. Numerous affidavits were filed on both sides, the substance of which appears in the report. A writ of attachment for contempt in not obeying the original order was by order of the judge issued from the Court of Queen's Bench; and the husband moved against it for irregularity. It was objected that while in contempt by not having surrendered himself under it, he could not be heard; but—Held, that he might nevertheless defend himself by objections to the process if irregular:—Held, Morrison, J., diss. 1. That an appeal would lie to the court from the judge's order. The cases in, and the principles upon which, an appeal is or is not allowed, reviewed by Wilson, J.; 2. That admitting the right to make an ex parte order in case of necessity, no sufficient ground was shewn for it here; 3. That the facts had not been properly stated in the first application, the real reason for the applicant leaving her husband's house and the arrangement then made between them having been withheld; 4. That the subsequent hearing of

both sides upon the merits, did not preclude him from taking advantage of these objections against the original order, which was therefore set aside. Per A. Wilson, J., that upon the whole case enough was not shewn to warrant an order for depriving the father of the custody of the children; and the deed of 1852 could not be given effect to as regarded children born by a cohabitation renewed after it and continued ever since. In reply to the affidavits filed by the wife in shewing cause to the summons to rescind the first order, the husband desired to file affidavits in answer to the recriminatory charges which had been made on her part; but the learned judge refused this. Per A. Wilson, J., this was a matter within his discretion. *In re Allen*, *Regina* v. *Allen*, 31 Q. B. 458; 5 P. R. 443.

An order was made for the delivery of infant children by the father to the mother. On an application to commit the father for contempt in not obeying this order, it appeared that in his absence from home the children had been removed from his house, and taken to the United States by his son, aged fifteen. They denied collusion, the son saying that he acted without his father's knowledge or consent; but the father took no steps to bring the children back, and did not offer to do so if time were given him. To the demand made for the children, the father replied that they were not in his custody:—Held, that he was not excused from obeying the order, and was in contempt. *Regina* v. *Allen*. 5 P. R. 453. —C. L. Chamb.—Morrison.

The Court of Chancery has not heretofore interfered, and Courts of Common Law will not, (subject to C. S. U. C. c. 74, s. 8,) interfere to deprive the father of his exclusive common law right to the custody of the children, except in cases where it is essential to their welfare and well-being, either physically, intellectually, or morally, that they should so interfere. It is not sufficient for the mother, claiming children as against their father, to allege that he holds what she calls dangerous and fanatical religious views (in this case those of the "Swedenborgians.") Nor will a child, even though within the year of nurture, be delivered up to the mother under that act, sec. 8, unless she establishes such a case as would justify her in leaving her husband's home. *In re Carswell*, 6 P. R. 240.—C. L. Chamb.—Gwynne.

The father of the infant children (under 12 years of age) was a Protestant, and the mother a Roman Catholic. She left him, taking the children, alleging cruelty on his part, and they both made statements complaining of each other's conduct. The husband afterwards took the children from her, placed them in the care of a Presbyterian minister, (the respondent,) and left the country, it was said, for a temporary purpose. On an application by the mother for the custody of the children:—Held, that she could not, under the circumstances, succeed against the father of the children; and therefore could not get an order against the respondent, his custody being that of the father. *In re Ross*, 6 P. R. 285.—C. L. Chamb.—A. Wilson.

The court has an absolute right in its discretion to give the custody of a child under twelve to the mother. *Re Davis*, 3 Chy. Chamb. 277.—Mowat.

The court exercised this right where the only evidence that the parents were living apart through the fault of the husband, was the evidence of the wife; holding that the court might, in its discretion, in the interest of the child, direct the custody to be given to the mother in cases where the cause of her living apart is, on her own statement, justifiable; and the judge is not prepared to say that he disbelieves such statement. *Ib.*

A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining 21 years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother, or in the event of the death of his mother, then that she should in like manner reside with his sister; and in the event of the death of his sister before the period named, he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions, he devised the estate to other parties. On a bill filed to obtain the construction of the will, the court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a court of equity could afford no relief; and that the estate devised to the daughter, unless the conditions were complied with, would be forfeited. A wife had obtained from the court an order giving to her the custody of her infant daughter, until she [illegible] age of 12 years:—Held, that this did not prevent the father of the infant appointing testamentary guardians of the infant. *Dunn* v. *McCaffrey*, 21 Chy. 55[illegible].

The parents of the child were foreigners. They lived apart, and had brought cross actions for divorce in the United States courts, the husband complaining of adultery, and the wife of cruelty. The child was placed by the father in custody of a person in Canada. The mother applied to have the child delivered up to her on the ground that, by the law of the State of Michigan, she was entitled, when living apart from her husband, to the custody of the child until it should arrive at the age of 12 years, subject, however, to the right of the court to interfere with and remove it for cause assigned. An ex parte order had been made in April, 1875, in the wife's divorce suit in her favour, directing the father to give up the child to her. In July, 1874, the wife had given a formal document to her husband renouncing all claim to the custody of the child:—Held, that the parents being foreigners and the domicile of the child not having, under the circumstances, been changed, the law of the State of Michigan must govern; but that the order in favour of the wife being ex parte, and the foreign judgment not being conclusive, (29 Vict. c. 24,) it was competent to consider the "cause assigned" by the father; and so it was held (especially in view that the divorce suit would be tried in a few weeks' time, and will settle the merits of the case,) that the mother having voluntarily given up the custody of the child to the father, she should not, under the present facts, have it re-delivered to her. *Re Kinney*, 6 P. R. 245—C. L. Chamb.—A. Wilson.

On a bill by a wife for alimony and the custody of children who are under twelve years of age, the court has jurisdiction to grant the latter relief without a petition. *Munro* v. *Munro*, 15 Chy.

V. Infant's Estate.

1. *Maintenance and Advancement.*

(a) *Generally.*

[See *C. S. U. C. c. 12, secs. 49-57; c. 74; 28 Vict. c. 17, s. 1.*]

Although the general rule is, that the court will not break in upon principal money for the maintenance and education of infant legatees, still in a proper case the court will so apply it, as well as to the advancement of the infants. *Ashbough* v. *Ashbough*, 10 Chy. 430.

The widow and administratrix of an intestate got in his personal estate, occupied the real estate, received the rents and profits thereof, and spent a considerable sum in improving it. She also maintained the infant heirs, to whom no guardian had been appointed:—Held, that the personal estate, and the proceeds and profits of the real estate, come to her hands, must first be applied towards payment of debts, and then to reimburse her for the sums spent in the infants' maintenance. No allowance was made for her improvements, but she was not to be charged with any increase in rental caused thereby. *In re Brazill, Barry* v. *Brazill*, 11 Chy. 253.

In a suit for maintenance out of the property of infants, the master is usually directed to inquire and state what would be a proper sum to allow, but no authority is given for the payment until the report is brought before the court for his approval. *Murphy* v. *Lamphier*, 12 Chy. 241.

The rule is, that money belonging to infants is not ordered in equity to be paid to their guardian, whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infants; but where the amount is small and is required for the immediate use of the infants, special circumstances may justify an exception. *Mitchell* v. *Ritchey*, 13 Chy. 445.

This court will not allow to a relative money expended by him in past maintenance of the infant, out of the proceeds of land of the infant sold in lieu of a partition under C. S. U. C. c. 86. *Kellar* v. *Tache*, 1 Chy. Chamb. 388.—VanKoughnet.

Where a testator bequeathed part of his residuary estate to [illegible] infant legatees, directing the interest to be expended [illegible] their support and education until 21 years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of the death of either [illegible] should be paid to the survivor; the will contained [illegible] gift over in case of the death of both—the court held, that the trustees had a discretion to apply part of the principal to the support and education of the legatees. *In re McDougall*, 14 Chy. 609.

In such a case the executors and trustees presented a petition under the statute 29 Vict. c. 28, s. 31; and it appearing that the parents of the legatees had abandoned them: that the executors had no other means of support; and that the interest on their share of the residuary estate was inadequate for their support; the court made an order approving of the application on part of the principal to supply the deficiency. *Ib.*

Investment and application of fund for maintenance and education of. See *Griffin* v. *McGill*, 4 V. S. 227.—Chy. Chamb.—Taylor, *Secretary.*

Maintenance under the statute can only be ordered where the infant is under twelve, and is transferred by the court to the mother's custody. *In re Eves*, 15 Chy. 580.

A child who has been advanced is obliged to bring into hotchpot that wherewith he has been advanced, only when it has been so expressed in writing either by the parent or the child so advanced. *Filman* v. *Filman*, 15 Chy. 643.

A testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one, and charged the same on the shares of two of the devisees; but the will was silent as to interest:—Held, that the infant was entitled to maintenance out of the estate of the testator, during her minority, to the extent (if necessary) of the interest on the legacy; and an inquiry as to the ability of the widow to maintain the infant was refused. *Binkley* v. *Binkley*, 15 Chy. 649.

By a deed of trust certain lands had been conveyed to trustees for the benefit of an infant, to whom the trustees were to convey in fee on her attaining 21:—Held, that the infant took a vested interest; and the court directed an enquiry as to her past and future maintenance. *Stewart* v. *Glasgow*, 15 Chy. 653.

Where a legacy bequeathed to an infant had been paid into court, the interest thereon was ordered to be paid out as it accrued, for the education and maintenance of the infant, on its being shewn that the money was required for these purposes. *Griffin* v. *McGill*, 2 Chy. Chamb. 318.—Taylor, *Secretary.*

Trustees may be allowed payments made for maintenance and education out of their capital. Under a general administration decree, the master may, without any special direction, take evidence as to such payments by executors, out of the infant's shares of capital, and report the facts. *Stewart* v. *Fletcher*, 16 Chy. 235.

A step-father's claim to be paid for past maintenance of a minor out of her capital, was rejected on the ground of his misconduct. *Fielder* v. *O'Hara*, 16 Chy. 610.

It is for the discretion of the court whether to allow for past maintenance out the corpus of an infant's estate not intended by a testator to be so applied. *Edwards* v. *Duryea*, 19 Chy. 101.

A farmer, by his will, gave to his widow his goods and chattels absolutely, also an annuity, and the use of his homestead and other real estate during her widowhood. She married again and claimed to be paid for the past maintenance of testator's children from the time of his death, out of the corpus of the estate devised to them at 21 and otherwise. The court refused to allow the claim. *Ib.*

The court will sanction the use of the corpus of an infant's estate, for his past as well as future maintenance, where the doing so is shewn to be for his benefit. And the court will also do so, where it is satisfied that the question of maintenance arises incidentally in a suit, and that it was properly instituted in order to the administration of an estate, and not as an indirect mode of doing what ought to be done under the provisions of 12 Vict. and the orders of this court, made to carry out the same, as the question of maintenance past as well as future can properly be dealt with, inasmuch as a great deal of the

information required by the statute and orders referred to can be evolved in taking the accounts in such suit. But where such a suit was instituted by a party asking for maintenance out of the corpus of the estate, the court, as a check upon such suits, refused to make any direction as to maintenance. *Goodfellow* v. *Rannie*, 20 Chy. 425.

33 Vict. c. 21, s. 3, O., only authorizes the application of the interest on insurance moneys apportioned to infants under 29 Vict. c. 17, for the maintenance of the infants. The principal can, under these acts, only be applied for advancement, but under the general jurisdiction of the court may be applied for maintenance. *Re Bazeley*, 12 L. J. 174.—Chy. Chamb.—Proudfoot.

See In re Hunter, 14 Chy. 680, p. 1745.

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2. *Partition, Lease, and Sale of.*

(a) *Practice on Application for.*

By an order in an infancy application under 12 Vict. c. 72, (C. S. U. C. c. 12), it was referred to the master to take an account of the value of the crops grown on the premises during a given year, and [illegible] what had become thereof, and how much had been converted by one J. O. to his own use beyond [illegible] third thereof; and it was ordered that [illegible], on service of the order and report should pay into court the amount found due by the master:—Held, that the order being final so far as J. O. was concerned, the report made in pursuance thereof did not require confirmation. *Re Yaygie*, 1 Chy. Chamb. 168.—Spragge.

It is the practice now, where the estate of infants is of small value, in order to save the expense of a sale by auction, to direct the advertisement to be inserted in a newspaper, asking tenders addressed to the registrar to be made for the property. *Re Hansell*, 1 Chy. Chamb. 189.—VanKoughnet.

All applications under 12 Vict. c. 72, for the sale of infants' estates must come on before the same judge. *S. C., Ib.*, 205.—Spragge.

On an application under C. S. U. C. c. 12, s. 50, for the sale of infants' estate, the examination of the infants by the master, under consolidated order 532, as to their consent, must be annexed to the petition. A certificate of the master stating that the infants have been examined by him, and that they consent is insufficient. *Re Axford*, 6 P. R. 192.—Chy. Chamb.—Holmested, *Referee*.

(b) *Other Cases.*

Where on the hearing of a cause for partition, it was shewn that the estate could not be divided without prejudice, the court, without waiting for any return to that effect, ordered a sale. *Bennett* v. *Bennett*, 8 Chy. 446.

In a suit for the partition of the real estate of an intestate, who was one of the executors of his father's will, and had taken possession of the personal estate, and who died a minor, it was claimed on behalf of infant legatees, who had not been paid their legacies, that an account should be taken of the personal estate come to the hands of such executor, and that their shares thereof might be charged upon the land in question before partition:—Held, that the executor having been a minor, his estate was not liable to account therefor. *Nash* v. *McKay*, 15 Chy. 247.

An unequal partition obtained in a County Court against a minor and feme covert through the contrivance of the co-tenant, the gross laches of the guardian ad litem, and the misapprehension of the referee (appointed under the 17th sec. of the Partition Act) as to the extent of his duty and power was held not binding. The minor on coming of age filed a bill for a new partition, and a decree was made accordingly. *Merritt* v. *Shaw*, 15 Chy. 321.

Where lands are sold for the purpose of effecting a partition, the share of an infant retains its character of realty. *Thompson* v. *McCaffrey*, 6 P. R. 193.—Chy. Chamb.—Proudfoot.

Ejectment: the plaintiff claimed title through one G., who was the grantee of V. and his wife, and D. and his wife, the said wives having been the patentees of the crown before marriage. Defendant claimed under a lease made by E., the father of the patentees, while they were under age and before marriage, as their guardian:—Held, that if the patentees' father was guardian in socage of the daughter under the age of 21 years, (as contended by defendant,) that guardianship ceased upon her attaining the age of 14, when the lease would be void. *Doran* v. *Reid*, 13 C. P. 393.

The guardian of an infant, tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him on the property, (doing no damage to the realty,) but the court refused to allow him out of such rents for any improvements made by him upon the premises. *Townsley* v. *Neil*, 10 Chy. 72.

Upon a petition for the sanction of the court to a renewal of a lease made by the infant's ancestor and containing a covenant for renewal:—Held, that none of the circumstances being alleged under which the court is empowered by the statute to act, the court had no authority to make any order. *Re Jackes*, 3 L. J. N. S. 69.—Chy. Chamb.—Taylor, *Secretary*.

Semble, the court has authority under Imperial Act 11 Geo. IV. and 1 Wili. IV. c. 65, s. 16, to sanction such a lease, but the lease must be produced to the court, in order that it may judge of the propriety of the terms. *Ib.*

Application for sale under 12 Vict. c. 72, of the estate of infants—Sale refused under the circumstances, the application appearing to be made for the benefit of the father than of the children. *Re McDonald, Re Taylor*, 1 Chy. 90.

The court will not direct a sale of the real estate of an infant, merely because the ancestor was indebted; it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit. *Re Boddy*, 4 Chy. 144.

The mother applying for the sale of real estate settled upon infants, was required to join in

conveyance for the purpose of surrendering the life interest vested in her under the settlement. *In re Kennedy*, 1 Chy. Chamb. 97.—Esten.

In directing the sale of infants' real estates the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The court will order a sale of a portion of an infant's estate to save the rest, for the benefit of the infant. *Re McDonald*, 1 Chy. Chamb. 97.—Esten.

When property was devised by a testator to his widow for the maintenance of his family until the coming of age of the youngest child, and then to R., one of the sons, charged with certain payments at intervals to the widow and other children, with a provision for the substitution of another son in the event of R. dying under age or without issue :—Held, 1. That the court had no jurisdiction to order a sale or mortgage of such property, the court having no power under 12 Vict. c. 72, to dispose of the real estate of infants against the provisions of any last will by which such estate was devised to such infants ; 2. That such property was not the real estate of the infants within the meaning of the act. *In re Callicott*, 1 Chy. Chamb. 182.—Spragge.

A testator by his will devised his property to his wife for life, and after her death to be divided equally amongst his children. The will further provided that the division should not take place until the youngest child attained the age of 21 years. An application being made when the youngest child was only seven years old, for sale of a portion of the land in order to pay off a mortgage on the whole :—Held, that an order for sale would be against the provisions of the will, and therefore in violation of C. S. U. C. c. 12, s. 51. *Re Smith*, 6 P. R. 282.—Chy. Chamb.—Holmested, *Referee*.

Where the property of infants has been sold under order of the court, and a purchaser applies for a vesting order, notice need not be given to the infants. *Boulton* v. *Stegman*, 1 Chy. Chamb. 199.—Esten.

In a proceeding under 12 Vict. c. 72, the mother was appointed guardian, and the sale of the greater part of the real estate of the infants was ordered, which was accordingly effected, the proceeds being applied in payment of the debts of the estate, but no investment of the surplus was made, although that course was directed by the order : the whole of such proceeds, together with $5,321 in addition, were expended in the support and education of the infants. The guardian thereupon applied for an order to sell the remainder of the real estate. The court refused the application, notwithstanding that the master reported the amount claimed as a proper sum to be allowed. *In re Hunter*, 1 Chy. 680.

Where it appeared to be for the benefit of the infants interested, and the plaintiffs, who were the only incumbrancers, consented, an immediate sale was ordered at the instance of the guardian of the infants, without requiring the consent of the mortgagor. *Cayley* v. *Colbert*, 2 Chy. Chamb. 431.—Taylor, *Secretary*.

Where it had been referred to the master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein as the master shall direct," and the master did not in settling a conveyance direct that an infant whose lands had been sold should be made a party, but merely that her guardian should ; and subsequently, after such infant had married, directed that she, being still an infant, and her husband should join in a new conveyance, which was done ; it was held that this was within the master's powers, and was in effect as if the court had directed the execution of the conveyance under 12 Vict. c. 72, and that the deed was binding, and passed the estate. *Rae* v. *Geddes*, 3 Chy. Chamb. 404.—Boyd, *Master*.

The Settled Estates Acts do not authorize the court in sanctioning an exchange of the lands of an infant cestui que trust ; but when in such a case it can be shewn that a part of the property of the infant is exposed to depreciation if the proposed exchange be not effected, the court may order the same to be carried out under the provisions of sec. 50 of C. S. U. C. c. 12. *Re Bishoprick*, 21 Chy. 589.

The principle of sec. 56 of C. S. U. C. c. 12, relating to the conversion of infants' estate sold under that act, is also applicable to all cases where it is necessary for collateral purposes to effect a conversion of an infant's estate from realty into personalty, the rule of the court in all such cases being, that the conversion shall not have any greater effect than is necessary for accomplishing the immediate purpose of the conversion, so far as the rights of the next of kin and heirs-at-law of the infant are concerned. *Fitzpatrick* v. *Fitzpatrick*, 6 P. R. 134.—Chy. Chamb.—Holmested, *Referee*.

The court may, under C. S. U. C. c. 12, s. 50, order a sale of infants' estate to satisfy claims of the deceased father of the infants, if it deems that course to be for the benefit of the infants. *Re Barker*, 6 P. R. 225.—Chy. Chamb.—Proudfoot.

An application to confirm a sale of an infant's estate was refused where it was not shewn, as required by C. S. U. C. c. 12, s. 50, that the sale was necessary for the maintenance of the infant, or that by reason of the property being exposed to waste or dilapidation, or to depreciation from any other cause, the interests of the infant would be promoted by a sale, and where also it appeared that the proceeds of the sale would not produce as large a sum as the property could be rented for, if placed in a proper state of repair. *Re Phelan*, 6 P. R. 259.—Chy. Chamb.—Holmested, *Referee*.

Where the person having the conduct of a sale under a decree of the court is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties to the suit object. The plaintiff had the conduct of a sale, and the next friend of the plaintiff was the highest bidder. The master certified that by reason of the next friend having bid the sale was abortive. The certificate was not filed or confirmed. A motion by the plaintiff to confirm the sale, notwithstanding the master's certificate, was refused, as the guardian for the infant defendants objected, and an order for a re-sale was refused, because until the master's certificate stood confirmed it was open to the parties to appeal from the certificate on the ground that the master ought to have reported that the next friend was the purchaser ; and be-

cause if the master were right in finding the sale abortive, no order for a re-sale was necessary. *Crawford* v. *Boyd*, 6 P. R. 278.—Chy. Chamb.—Holmested, *Referee*.

It is important that the next friend of an infant should be a disinterested person in proceedings taken to sell an estate in which the infant has an interest. Where, therefore, the mother, who had a claim against the estate, filed a bill as next friend asking for a sale of the property, the court refused to make the decree; but retained the bill in order that other parties to the cause, if so advised, might apply to make themselves plaintiffs and the infant a defendant. *Berry* v. *Berry*, 22 Chy. 202.

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3. *Investment of Moneys.*

In cases where, if money belonged to an infant residing in Upper Canada, the court would invest it for his benefit, the court will, where the infant is resident in a foreign country, direct an investment for his benefit in the securities of such country. *Sanborn* v. *Sanborn*, 11 Chy. 359.

The guardian ad litem to an infant has no authority after the object of the suit has been accomplished, to act for the infant in investing any funds for the infant. *Dix* v. *Jarman*, 1 Chy. Chamb. 38.—Blake.

An application to invest moneys of infants pursuant to an order of this court should be made by the infants, and not by the persons wishing to borrow. *Re Healey*, 1 Chy. Chamb. 190.—VanKoughnet.

The court, on the administration of an estate, takes charge of the share going to infants, and invests the same for their benefit, instead of the amount being left in the hands of a trustee. *Kingsmill* v. *Miller*, 15 Chy. 171.

Since the establishment of a government Dominion stock, the investment of infants' money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Ib.*

As a general rule, loans of money in court, cannot be made on property on which there is any prior charge, however small, unless all parties interested consent. *Andrews* v. *Hempstreet*, 1 Chy. Chamb. 347.—Mowat.

A petition had been presented for sale of an infant's estate, fifty acres of land, which produced $700 and upwards. On an application that the proceeds might be invested in the purchase of a farm, with the sanction of the court, on which it seemed to be intended the father of the infant—a farm labourer—was to reside with the infant; the referee refused to sanction the purchase. The circumstances under which such sanction would be given considered. *Re Mason*, 3 Chy. Chamb. 426.—Taylor, *Referee*.

See *In re Hunter*, 14 Chy. 680, p. 1745.

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4. *Other Cases.*

The principle, that when a trustee expends his money upon the estate, and thereby increases its value, the property will not be wrested from him without repaying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant cestui que trust. *Bevis* v. *Boulton*, 7 Chy. 39.

Where an execution is issued against the lands of a deceased person in the hands of his executors, and the heir is an infant, or is not competent to look after his own interests, or is not aware of the proceedings, it is the duty of the executors to act in the matter of the sale as a prudent owner would. *In re Davis*, 17 Chy. 603.

Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited by her with her brother, who was fully cognizant where the money came from, and to whom it belonged:—Held, that he was liable to account to the children as their trustee. *Secord* v. *Costello*, 17 Chy. 328.

VI. Miscellaneous Cases.

Infancy is not an inevitable difficulty within the fifteenth section of the Registry Act, so as to preclude the necessity of an infant devisee registering the will within six months of the death of the devisor, to avoid a conveyance by the heir at law. *McLeod* v. *Truax*, 5 O. S. 455. See also *Mandeville* v. *Nicholl*, 16 Q. B. 609.

The municipality of Darlington passed a by-law enacting, among other things, that no inn-keeper shall sell any intoxicating drink to any apprentice or minor without the permission of his legal protector:—Held, beyond the jurisdiction of the municipality to impose. *In re Barclay and the Municipality of the Township of Darlington*, 1[illegible] Q. B. 86. See also *Re Brodie and the Town of Bowmanville*, 12 L. J. 143. Not yet reported.

A widow, to whom dower had been assigned, agreed with the person by whom she was employed as housekeeper, to convey the same to him in trust for his son eight or nine years old, and to whom it appeared she was much attached, in consideration of a certain sum, for the payment of which the widow's lands were answerable, and were liable to be sold, and also an annuity secured to her; the consideration, however, not being at all equal to the value of the property. The court, in the absence of proof of any undue influence, oppression, persuasion or fraud, refused to set aside the agreement as against the infant. *Gourley* v. *Ruddell*, [illegible] Chy. 518.

In August, 1861, J. B. being indebted jointly with W. B. to T. in the sum of £88, for which judgment had been recovered, and to one R. B. the sum of £10, agreed with R. B., who was his son, and was not then of age, to convey to him 100 acres of land in consideration of his assuming payment of T.'s judgment, and of his making a lease for life to J. B., or J. B.'s wife, of [illegible] acres of the land, being the arable portion thereof. R. B. was then the holder of a due bill for £20, given to him in satisfaction of wages earned by him as a hired servant with an elder brother, and in pursuance of the said agreement transferred this to T., who received payment thereof, and also made a note jointly with J. B. and W. B. for the balance of T.'s claim, which also remained unpaid. No conveyance was executed by J. B. until June, 1862, and no life lease until March, 1865, when R. B. made a lease to his mother for life, it being made to her and not

J. B., for the purpose of preventing J. B.'s creditors from taking it in execution. In the winter of 1861, and spring of 1862, J. B. became indebted to the plaintiffs, who afterwards recovered judgment, and filed a bill to set aside the transaction as fraudulent within the statute of Elizabeth:—Held, under the circumstances, that the conveyance to R. B. could not be deemed voluntary, but that the life lease was voluntary, and must be set aside. The bill was therefore dismissed as against R. B., but without costs. *Delesdernier* v. *Burton*, 12 Chy. 569.

INFERIOR COURTS.

See COURTS.

INFORMATION.

I. BY ATTORNEY-GENERAL—*See* ATTORNEY AND SOLICITOR-GENERAL.

II. CRIMINAL—*See* CRIMINAL INFORMATION.

III. FOR LIBEL—*See* DEFAMATION.

IV. FOR INTRUSION—*See* INTRUSION.

V. BEFORE MAGISTRATES—*See* JUSTICES OF THE PEACE.

VI. QUO WARRANTO—*See* QUO WARRANTO.

On putting off the trial of an information for penalties, on the application of the defendant, costs will be imposed in the same manner as in civil cases. *Rex* v. *Ives*, Dra. 440.

On an information filed by the attorney-general for the Queen for goods smuggled, costs will not be allowed to the defendant against the crown. *Regina* v. *Mainwaring*, 5 O. S. 670.

The proceedings in an ex officio information may be either at the suit of the Queen or the attorney-general, but the defendant cannot be called upon to plead in vacation upon a rule to plead given in vacation, but is entitled to a regular rule to plead and an imparlance. *Regina* v. *Farnham*, 1 Q. B. 413.—P. C.—Macaulay.

Where an information was filed by a common informer, under 12 Geo. II. c. 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession, and had not been served with the information, to come in and defend. Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant. *Mewburn* v. *Street*, 21 Q. B. 306.

An information to forfeit land sold by lottery, contrary to the 12 Geo. II. c. 28, may be filed by a private individual, and need not be by the attorney-general or any public officer. *S. C. Ib.* 498.

No writ or process is necessary, the information being the commencement of the proceeding; and at all events the want of it could not be objected to on demurrer, after defendant had appeared and pleaded. *Ib.*

The plaintiff in this case filed his information more than five years after the sale complained of: held, too late, for that the case came within 31 Geo. c. 5, by which he was limited to one year. *Ib.*

Where it appears upon the record in a penal action that it is brought too late, the defendant may take advantage of the objection without having specially pleaded it. No precedent having been found of such an information, the court suggested that it might be necessary to consider in any future case whether it should not be shewn that the party exposing the land to sale by lottery had been properly convicted of the offence, whether the information must not be served on the party in possession of the land, whether all claiming title should not be called upon by proclamation or otherwise to come in and defend, and whether any other preliminary proceedings were requisite. *Ib.*

Per A. Wilson, J.—The crown is not obliged under the act relating to the sale of liquors, 37 Vict. c, 32, s. 44, O., to prosecute before two magistrates, as a private individual would be, but may proceed in this court by information. *Regina* v. *Taylor*, 36 Q. B. 183.

Remarks as to the form of the information in this case. *Ib.*

Where relief would be given at the suit of an individual in respect of an injury to a private water course, an information will lie at the instance of the attorney-general for an injury to a navigable stream. *Attorney-General* v. *Harrison*, 12 Chy. 466.

An act having been passed authorizing the construction of a street railway, confirming a covenant entered into for the purpose with the municipal corporation, and providing that the rails should be laid flush with the streets, &c.:—Held, that an information by the attorney-general to enforce the statutory restrictions was proper; and that unless the parties concerned chose, by proper alterations and repairs, to comply with the requirements of the statute, the attorney-general was entitled to a decree for the removal of the rails as of a nuisance; but that the municipal corporation was a necessary party to the information. *The Attorney-General* v. *The Toronto Street Railway Co.*, 14 Chy. 673.

INHERITANCE.

See ESTATE.

INJUNCTION.

I. FROM COURTS OF COMMON LAW.

1. *Generally*, 1751.
2. *In Ejectment*—*See* EJECTMENT.

II. FROM THE COURT OF CHANCERY.

1. *To Stay Legal Proceedings.*
   (a) *Election to Proceed at Law or in Equity*, 1752.
   (b) *Before Trial*, 1754.
   (c) *After Verdict or Judgment*, 1758.
   (d) *Against or in Ejectment*, 1761.
   (e) *When Money will be ordered into Court on Granting*, 1763.
   (f) *Pending Application for Specific Performance*—*See* SPECIFIC PERFORMANCE.

2. *To Restrain Waste.*
(a) *Generally*, 1764.
(b) *Cutting Timber*, 1764.
3. *Committing or Continuing Nuisances*,
(a) *Offensive Trades*, 1766.
(b) *Highways and Railways*, 1067.
(c) *Water Rights*, 1768.
4. *Removal and Sale of Chattels*, 1770.
5. *Infringement of Trade Marks, &c*, 1773.
6. *Breaches of Contract or Covenant*, 1774.
7. *To Corporations*, 1775.
8. *In Partnership Matters*, 1777.
9. *Between Joint Tenants and Tenants in Common*, 1778.
10. *Other Cases*, 1779.
11. *Practice.*
(a) *Delay in Application for*, 1780.
(b) *Affidavits on Application*, 1781.
(c) *Extending and Continuing*, 1782.
(d) *Dissolving*, 1782.
(e) *Damages*, 1783.
(f) *Costs*, 1783.
(g) *Other Cases*, 1784.
(h) *Amendment without Prejudice to Injunction*—*See* AMENDMENT IN EQUITY.
12. *Breach of Injunction and Commitment therefor*, 1786.
13. *Interlocutory Injunction*, 1789.

I. From Courts of Common Law.

1. *Generally.*

An injunction under sec. 286 of the C. L. P. Act, 1856, will only be granted to restrain defendant in an action from the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right. Where the vendor sues on a contract for the sale of timber, claiming a forfeiture for default in payment of the purchase money, an injunction will not be granted to restrain defendant or his assignee from cutting timber. *Walsh* v. *Brown*. 4 L. J. 68.—C. L. Chamb.—Burns.

Plaintiff having recovered damages in an action for overflowing his land, and the same overflowing being continued by defendant, though the verdict was not moved against:—Held, that the plaintiff could not claim an injunction, because he had not endorsed such claim on the writ of summons under C. L. P. Act, 1856, ss. 283, 4, 5, in which case only an injunction under sec. 286, can issue. *Arkland* v. *Hall*, 2 P. R. 388; *S. C.* 4 L. J. 282.—C. L. Chamb.—Burns.

Plaintiff sued defendants to recover back tolls illegally charged; and endorsed on his summons, "N. B.—Take notice that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction:"—Held, notice insufficient, according to the form in schedule A, to the C. L. P. Act, 1856, No. 59. *Richey* v. *Toronto Roads Company*, 23 Q. B. 62.

Quære, whether, on the facts stated in the case, the plaintiff could claim exemption from tolls; and whether an injunction would have been granted during the pendency of this action, brought expressly to test the right. *Ib.*

The plaintiff's claim to a writ of injunction in trespass to realty, can only be supported on his shewing a legal right to the premises in question which defendants are infringing, and that the remedy by judgment and execution in the suit would be inadequate. Where defendants shewed a decree in Chancery and a vesting order displacing the only right which the plaintiff set up as the foundation of his application for the writ, the injunction was refused. *Cunningham* v. *Cook et al.*, 2 L. J. N. S. 46.—C. L. Chamb.—Draper.

The defendant, though forbidden by the plaintiff, went on with the erection of a dam which he had commenced before the plaintiff purchased the adjoining land, and when completed it backed the water on to the plaintiff's land and injured a timber slide which he had there, for which the plaintiff brought an action and recovered $60. The court granted an injunction to restrain defendant from continuing the dam so as to pen back the water. *McNab* v. *Taylor*, 34 Q. B. 524.

II. From the Court of Chancery.

1. *To Stay Legal Proceedings.*

(a) *Election to proceed at Law or in Equity.*

A defendant to an action at law pleaded, by way of equitable defence, an agreement to give time by the plaintiff, and a verdict was taken for the plaintiff, subject to a reference. Before the arbitrator had done more than make an appointment to attend before him, the defendant filed a bill to restrain the proceedings at law, on the same grounds as had been pleaded by him in the action. The court dismissed the bill with costs. *Pomeroy* v. *Boswell*, 7 Chy. 163.

Semble, that it is a contempt of a court of common law to proceed in chancery after a reference under an order of that court, which ordered the parties to perform the award. *Ib.*

A defendant at law filed a bill to restrain proceedings, alleging as grounds for relief facts which, if properly pleaded, would have afforded a good defence at law. The court, without enquiring as to the merits of the case, dismissed the bill. *Morrison* v. *McLean*, 7 Chy. 167.

An injunction to stay proceedings on an execution at law was refused, where it was shewn that the facts upon which the right to the injunction was founded had been raised as a defence to the action by way of equitable plea. *Boulton* v. *Cameron*, 9 Chy. 297.

By the statute 23 Vict. c. 45, the courts of common law have power to impose such terms upon the party suing out a writ of replevin as will fully indemnify the defendant in the suit from all damages he may sustain by reason of the action. Under these circumstances the court will not interfere by injunction to restrain the plaintiff suing out such writ from taking possession of, and receiving the profits derivable from, the goods replevied; unless in case where it could be shewn that complete security could not be obtained at law. *Bletcher* v. *Burns*, 9 Chy.

A party to an action at law seeking relief against a judgment and execution thereon, upon a state of facts which, if proved, would have constituted a good defence to the action, must establish not only that there are such facts, but that at the time of such trial, and when he could, upon this disclosure, have obtained a new trial, he was ignorant of and could not, with reasonable diligence, have ascertained them. When a long time has elapsed since he ascertained such facts he is bound to make out as clear a case for an injunction as he would to obtain a decree to unravel the transactions which a court of competent jurisdiction has by its judgment closed. *Cunningham* v. *Buchanan*, 10 Chy. 523.

The maker of a note was sued thereon, and instead of raising the defence at law of want of consideration, save as to part, pleaded that the plaintiff in the action was not the holder, and the plaintiff had a verdict for the full amount, and issued execution against lands. The defendant in the action having filed a bill to restrain proceedings at law, a demurrer for want of equity was allowed. *Leitch* v. *Leitch*, 11 Chy. 81.

A rule nisi in a county court for staying an execution on the ground that it had been satisfied, having been discharged:—Held, no bar to an interlocutory injunction in this court on the same ground. *Bush* v. *Bush*, 15 Chy. 431.

Where a party had a clear right, in regard to certain equities, to set them up by way of equitable defence to an action at law, or to come to this court, and by mistake pleaded them at law as a legal defence only, upon which he necessarily failed:—Held, reversing the decree of Mowat, V. C., that this did not form any bar to relief on the same grounds in this court. *Arnold* v. *Allinor*, 16 Chy. 213; 15 Chy. 375.

An insurance company filed a bill seeking to have a policy declared void, and delivered up to be cancelled, on the ground of fraudulent misrepresentations when the same was being effected. The facts set forth would, if true, have been a good defence to the action, which had been brought on this policy; but in the view that there should be but one trial of the questions of fact, and that in this court alone could full relief be given in the event of the fraud being established, an injunction was granted to the hearing, restraining proceedings at law to compel payment of the amount covered by the policy. *National Life Assurance Co.* v. *Egan*, 20 Chy. 469.

Where a bill is filed to enforce a sale of mortgage premises, the court, under the Aministration of Justice Act, will, in addition to the relief formerly given, grant an order for immediate payment, on which a writ of fi. fa. may at once issue; and will also order possession to be given to the mortgagee, charging him with an occupation rent. And where a mortgagee was suing at law on the covenant, and in ejectment, and was also proceeding on a power of sale in the mortgage, the court refused to interfere, as complete justice could be done in the court of law. And, in like manner, where an action had been brought by a second mortgagee to recover a surplus of purchase money, after payment of the first mortgagee, the court refused to restrain such action at the instance of the mortgagor, although it was sworn that the second mortgage had been obtained by fraud and undue influence. *Imperial Loan and Investment Co.* v. *Boulton*, 22 Chy. 121.

Each party in a suit is bound under the Administration of Justice Act (1873) to apply to the court first approached for the full measure of relief and protection to which he may consider himself entitled. Where, therefore, an action of ejectment was brought, and the defendant limited his defence to a portion of the premises only, after which he commenced trespassing on the remaining portion, and the plaintiff thereupon applied to this court for an injunction to restrain such acts: the court acting upon the principle above stated, refused the application. *French* v. *Taylor*, 23 Chy. 436.

(b) *Before Trial.*

A sale of the equity of redemption had been effected under a power of sale in a second mortgage; and pending a suit in Chancery to set aside such sale, the first mortgagee, who was one of the purchasers, proceeded at law against the mortgagor upon the covenant in his mortgage; whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill, insisted upon the validity of the sale. From what had taken place, it was doubtful whether the mortgage debt was not extinguished in equity, as between the mortgagor and mortgagee, and the original cause being almost ripe for hearing, the action at law was restrained until the hearing. *Rees* v. *Beckett*, 2 Chy. 650.

Pending an appeal from the Court of Chancery, a mortgagee was restrained from proceeding to a sale of the mortgage premises under the power of sale. *Commercial Bank* v. *Bank of Upper Canada*, 1 Chy. Chamb. 64.—Esten.

Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines receiving the money, the court would restrain him from afterwards suing for the mortgage debt. *Munsen* v. *Hauss*, 22 Chy. 279.

The Canada Company, through their agent in Canada, contracted by letter to sell certain lands upon conditions, amongst others, of the vendee building a saw-mill. The vendee proceeded, with the knowledge of their agent, to erect a saw-mill and construct a dam across a river, the effect of which was to overflow a large tract of the company's land. Subsequently the company conveyed the lands contracted for, which were situate on both sides of the river, reserving the bed of the river and about thirty feet on either bank, the title to the bed being then in the crown. Afterwards the company, having obtained a patent for the bed of the river, proceeded at law against the persons owning the mill for the damage done by the overflowing, and recovered a verdict for £500; and other actions were also brought for the same injury. The court decreed a perpetual injunction restraining the actions, and a conveyance of the bed of the river and the portions on either side which had been reserved, and ordered the company to pay the costs. *Brewster* v. *The Canada Company*, 4 Chy. 443.

On a purchase of land, to be paid for by instalments, the purchaser, although not entitled in the meantime to call for a rescission of the contract, may require his vendor to shew a good title before making any payment, and if the vendor proceeds to enforce payment, the purchaser, upon bringing into court the principal and interest actually due, will be entitled to restrain the action, until the title has been investigated; and the payment of prior instalments will not disentitle the purchaser to insist upon a good title being shewn. *Thompson* v. *Brunskill*, 7 Chy. 542. See *Crooks* v. *Glenn*, 8 Chy. 239.

Upon the sale of land the vendor gave a bond to indemnify the purchaser against a mortgage on the land sold, and thereupon the purchaser gave a mortgage for £500, and paid the residue of the purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the prior incumbrance, and he sued the purchaser on his mortgage, who thereupon filed a bill claiming a right to apply the amount due by him in discharge of the prior mortgage, then due and unpaid. A motion for an injunction to restrain the action at law was refused. *Tully* v. *Bradbury*, 8 Chy. 561.

A vendor who was unable to complete his contract for sale of real estate by reason of his title being defective, had, notwithstanding, instituted proceedings at law to enforce payment of the purchase money. Thereupon the purchaser filed a bill, alleging his willingness to perform the contract, if a good title could be made, but that a good title could not be made; and that he had paid part of the purchase money, and made improvements on the property. Upon a reference as to title, it was shewn that the vendor was unable to make a good title. On further directions, the court ordered a perpetual injunction to restrain the action at law; repayment of the amount of purchase money paid with interest; and that the same should form a charge on defendant's interest on the land; and that defendant should pay the costs of the suit; but refused the plaintiff any allowance in respect of the improvements made by him. *Kilborn* v. *Workman*, 9 Chy. 255.

Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify against incumbrances, and the purchaser gave a mortgage on the land for part of the purchase money. He afterwards learned that before his purchase, these and other premises had been mortgaged to another person for a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee being about to sell under his mortgage the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor, and the vendor, claiming a right to apply the amount due by him in discharge of the first mortgage, and for an injunction to restrain any action for such amount, until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due, and the vendor had become insolvent. Under these circumstances, an interim injunction was granted upon payment of the amount due into court. *Heap* v. *Crawford*. 10 Chy. 442.

Where vendors had not furnished an abstract of title notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that, by reason of the delay, the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction. *Walton* v. *Armstrong*, 11 Chy. 379.

Where an action at law had been brought by a building society against W. as surety for the secretary; and W. filed a bill to restrain the action, founding his equity on a resolution or minute of the board of directors as follows:—"That W. had requested that his security for the secretary might be cancelled. It was suggested, also, that R. W.'s name should be erased from the said bond by wish of the board, and both be relieved as securities. T. was requested to submit two other names as securities in place of the two gentlemen named:"—Held, that such a resolution afforded no ground for interference. *Whittemore* v. *Ridout*, 2 Chy. 525.

The plaintiff had subscribed to aid in the erection of a parish church in Toronto, with a view of enabling the churchwardens to erect it on the old site, so as to avoid leasing off portions of the land about it used as a burying ground. Subsequently, at a meeting of the vestry, the plan of the building was changed, by reason of which, in excavating for the foundation of the church, the graves of several members of the plaintiff's family were disturbed. Thereupon the plaintiff wrote to the vestry clerk annulling his subscription, and being sued in the division court for such subscription, he moved for an injunction to stay such action. The court, under the circumstances, refused the application, with costs. *Heward* v. *Harris*, 5 Chy. 226.

Quære, whether this court will in any case restrain an action in the division court. *Ib.*

The owner of a steamboat sold ten of the shares in her, taking the bond of the vendee for a portion of the price. The vendee sold the same subject to this bond, and the shares were afterwards transferred in trust for the benefit of the original owner of the vessel, who still held the bond; notwithstanding which proceedings were taken by him to enforce payment of the bond. The court restrained further proceedings thereon, and ordered the bond to be delivered up to be cancelled, with costs. *Thompson* v. *Wilkes*, 5 Chy. 594.

The receiver in a cause distrained for rent. On the following day notice was given by a prior incumbrancer that he claimed the rent, and three days afterwards the bailiff was withdrawn. The tenant brought trespass against the receiver. The court restrained the action. *Simpson* v. *Hutchison*, 7 Chy. 308.

Proceedings under a fi. fa. at law having been set aside, and an action brought against the master, in whose name the fi. fa. had been sued out, an injunction was issued restraining proceedings:—Held, the application for an injunction in the original cause in this court was regular; and that to the officer of this court should be referred the question as to the amount of damage sustained by the proceedings set aside. *Fisher* v. *Glass*, 9 Chy. 46.

L. purchased from S., who conveyed to him, and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another party. L. having died, his widow sued at law for dower. A bill filed praying an injunction to stay the action, and for a declaration that the widow was, under the circumstances, not entitled to dower, was dismissed with costs. On re-hearing this decree was varied, by declaring that the mortgage was not extinguished as a charge on the purchase of the equity of redemption by S. from H., or merged in his legal estate; but the court restrained the defendant from proceeding at law for the recovery of her dower, and declared that the dower so to be allotted should be charged with the payment of one-third of the interest of the mortgage money, unless the defendant chose to pay off one-third of the mortgage debt. Per Esten, V.C.—That the question of merger is one of intention; in the absence of evidence of intention, the court will consider that course selected by the purchaser which was most for his benefit, and that in this case the mortgage became merged in S.'s estate; that the plaintiff had no equity to restrain the action for dower, and that the bill should be dismissed. *Henry* v. *Low*, 9 Chy. 265.

A testator devised to his wife all his real and personal property during widowhood, under which she entered upon the real estate, and took and applied to her own use the personal property. The court restrained an action for dower brought by her and her second husband, holding that she had elected to take under the will. *Westacott* v. *Cockerline*, 13 Chy. 79.

Although, since the C. L. P. Act, bills for discovery in aid of defences at law are rare, yet they will lie; but in such a case the plaintiff cannot move for an injunction to restrain the proceeding at law until he has filed interrogatories. Under special circumstances, however, the court directed the defendant to submit to an examination in aid of such motion, or in default ordered the injunction to go. *James* v. *Snarr*, 15 Chy. 229.

An intending purchaser of devised lands had some doubt whether a provision made by the testator was in lieu of dower, and asked the widow whether she had or claimed dower:—Held, that if even her answer was in the negative, it afforded no ground for the purchaser afterwards applying to this court to restrain an action for dower brought by the widow, on her being advised that, under the terms of the will, she was not put to her election. *Fairweather* v. *Archibald*, 15 Chy. 255.

When property was conveyed to a husband under an agreement with the grantee that the grantor should be allowed to remain in possession for life of a specified portion:—Held, that the widow of the grantee had no right to dower out of this portion during the life of the grantor; and an action by her, therefore, was restrained. *Slater* v. *Slater*, 17 Chy. 45.

Injunction granted to restrain an action at law to recover money secured by a life insurance effected by fraudulent misrepresentation. *National Life Assurance Co.* v. *Egan*, 20 Chy. 469.

(c) *After Verdict or Judgment.*

To an action on a bond for rents of certain market dues and fees, fraud, &c., was pleaded, and a verdict passed against defendants, who filed a bill to have the bond declared void, on the ground of fraud, &c., and for an injunction restraining proceedings on the execution issued. The answer denied the fraud, whereupon the plaintiffs amended their bill, introducing further charges of fraud, filed affidavits verifying those further charges, and moved for the injunction. The motion was refused with costs. *Walker* v. *The City of Toronto*, 1 Chy. 502.

The common injunction to stay execution will stay a sale under the execution, though the writ may be in the sheriff's hands when the injunction issues. *Neil* v. *Bank of Upper Canada*, 2 Chy. 386.

A mortgage had been created by an absolute deed with a bond of defeasance; a judgment was obtained against the mortgagee, and an execution against his lands under which the sheriff had advertised, and was about to sell the mortgaged property. Upon a bill filed against the judgment creditor and the mortgagee, these facts being admitted by defendants, the court granted a special injunction restraining further proceedings under the writ. *Ib.*

By an agreement between plaintiff and defendant, defendant was to procure goods, or guarantee the payment of goods to be obtained and sold by plaintiff for their joint benefit, in certain proportions; and the plaintiff, to indemnify defendant against all loss, executed a confession of judgment, to be acted upon only in default of plaintiff meeting the payment of such goods. The plaintiff made default, and defendant entered up judgment and sued out execution. The court dissolved an injunction which had been issued, although upon the agreement it was doubtful whether a partnership had not been created between the parties; but defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon, the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injuction should be continued in respect of that amount. Blake, C., diss., who thought the injunction should be continued to the hearing. *Watt* v. *Foster*, 4 Chy. 543.

An execution at law against the lands of M. at the suit of K., was in the sheriff's hands, under which certain lands in the county of Oxford were advertised for sale. The Bank of British North America, who were registered judgment creditors of M., but subsequent to K., offered R., the assignee of K.'s judgment, to pay the same if he would assign it, but the assignee refused to do more than discharge the judgment. The Bank of British North America then filed their bill against M. and R., praying to redeem R. and foreclose M., and moved for an injunction to restrain the sale by the sheriff. The court held a prior judgment creditor bound to submit to be redeemed by a subsequent judgmenf creditor, and to assign the judgment, and ordered that upon payment to R. (if he would receive and assign K.'s judgment) of the amount of that judgment and subsequent costs, and if not, then upon payment into court of the same

amount, an injunction should issue to restrain the sale by the sheriff. *The Bank of B. N. A.* v. *Moore*, 8 Chy. 461; 6 L. J. 255.

The solicitor of a mortgagee, in a suit of foreclosure, after a decree of absolute foreclosure, purchased the mortgagor's interest. The decree was subsequently set aside, and a decree nisi directed to be drawn up, directing inter alia a sale of the mortgaged premises, and that all judgment creditors should be served with the decree, and made parties to the suit. Notwithstanding this, the solicitor, who was also a judgment creditor of the mortgagee, proceeded to sell the mortgage premises under execution on his judgment. The court restrained the solicitor and ordered him to pay costs of the application. *Goodwin* v. *Williams*, 5 Chy. 178.

A., the purchaser of saw logs to be delivered at certain specified times, assigned the contract, and the vendor delivered one year's supply of the logs to the assignee. Afterwards A. becoming insolvent, absconded, and the vendor refused to complete the contract, asserting a right to stop the goods in transitu, or to retain them in consequence of A.'s insolvency. The assignee thereupon commenced an action at law in A.'s name against the vendor, in which he recovered judgment; and a bill by the vendor to restrain proceedings at law was dismissed with costs. *Wait* v. *Scott*, 6 Chy. 154.

Injunction awarded at suit of the heir, to restrain execution against the lands of a deceased person in the hands of his administrator, defendant having administered to the estate in England only, and there being at the time no Canadian administrator. *Grant* v. *McDonald*, 8 Chy. 468.

A creditor having proved his claim in the master's office, afterwards proceeded to sell under a fi. fa. Upon application of a co-defendant the sale was restrained with costs. *Cahuac* v. *Durie*, 9 Chy. 485.

A debtor while indebted to one creditor, and alleged to be insolvent, assigned a note to another creditor for a bonâ fide debt. Subsequently both creditors sued for their respective demands, but to enable one of them to obtain a first judgment no defence was entered to his action, while the other action was defended. The court (following Young *v.* Christie, 7 Chy. 312,) refused to restrain the first judgment creditor from enforcing his execution. *McKenna* v. *Smith*, 10 Chy. 40.

This court has no jurisdiction to restrain execution or other proceedings at law on a legal demand upon a written instrument, on the ground that defendant at law has a counter claim for unliquidated damages for the violation by the plaintiff at law of covenants in the same instrument. *Smith* v. *Wootten*, 12 Chy. 200.

A judgment creditor had issued at the same time, and placed in the hands of the sheriff, alias fi. fas. against goods and fi. fas. against lands; and the sheriff, by direction of the creditor, made a seizure of goods, and the writs against goods were afterwards, and before sale, withdrawn. Meanwhile the debtor had conveyed his land in trust for creditors. An injunction was granted at the instance of the grantee to restrain a sale under the writs against lands until the hearing of the cause. *Paton* v. *The Ontario Bank*, 13 Chy. 366; *Ib.* 107.

Where a bill is filed to restrain the seizure of goods of A. on an execution against B., on the ground that the goods have a peculiar value, which damages would not compensate, there should be distinct and precise allegations of the necessary facts, and a general allegation that the damage will be irreparable is not sufficient on demurrer. *Gartshore* v. *The Gore Bank*, 13 Chy. 187.

A judgment having been recovered against the obligor's executors on a voluntary bond in favour of a charity, and execution issued thereon against his lands, the court, at the suit of the heirs, restrained proceedings on such execution. *Anderson* v. *Paine*, 14 Chy. 110.

The title of an executor being derived ... the will and not from the probate, the court refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the executor before probate. *Stump* v. *Bradley*, 15 Chy. 30.

On an application for an injunction against an execution at law, the plaintiff in equity has not necessarily to satisfy the court by evidence that the facts, if disputed, are as his bill and affidavits state; but only that there is a substantial equitable case which ought to be decided before execution goes. *Treadwell* v. *Morris*, 15 Chy. 165.

Where a party wrongfully sued at law comes into equity promptly, so that, by means of our circuits, his equitable case can be tried within a few weeks of the time when a legal defence would be triable at law, if he verifies his bill, shewing a good equitable case only triable in the court, he can seldom be refused an injunction restrain any execution going until the equ questions are disposed of. *Ib.*

Injunction granted, at the suit of the creditors of a canal company who had a lien on the canal, against a sale thereof under a subsequent execution. *Town of Dundas* v. *The Desjardins Canal Co.*, 17 Chy. 27.

The plaintiff and another bought from a testator's executors and trustees certain real and personal estate; the real estate was subject to a mortgage which the vendors agreed to pay; the purchasers paid their purchase money, but the vendors applied the same to pay other debts of the testator, and left the mortgage in part unpaid. The plaintiff having bought out his co-purchaser, filed a bill against the executors; a decree by consent was made, giving the plaintiff a lien on the testator's assets, ordering the defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and inquiries usual in an administration suit; the estate was insufficient to pay all creditors; before the making of the decree, a creditor of the estate had obtained judgment against the executors, and the sheriff seized and sold goods of the testator in their hands:—Held, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry* v. *Sharp*, 18 Chy. 16.

Where a debtor died, leaving insufficient personal assets to pay his liabilities, and his executor notwithstanding allowed a creditor to recover a judgment against him by default:—Held, that the executor, on obtaining an administration order, was not entitled to an injunction against

proceeding on the judgment. *Doner* v. *Ross*, 10 Chy. 229.

A. gave a voluntary bond to B. for £5,000 and a few days afterwards a like bond to C.: neither was given for any fraudulent purpose. C. recovered judgment on the second bond; and the obligor had not property enough to pay both bonds:—Held, that B., whose bond was prior in date, had no equity to restrain proceedings by C. to enforce the judgment recovered; nor to set aside a conveyance made by A. of land of less value than the judgment, and which C. had accepted in discharge thereof. *Newenham* v. *Mountcashel*, 19 Chy. 530.

(d) *Against or in Ejectment.*

Where the sheriff puts a plaintiff in possession under a writ of hab. fac. pos., and the plaintiff afterwards quietly relinquishes that possession in consequence of hearing that an injunction had issued from the Court of Chancery:—Held, that upon the injunction being dissolved, they could not grant the plaintiff an alias writ of possession. *Doe* d. *Deane* v. *Henderson*, 5 Q. B. 208.

The owner of lands agreed to sell part, and put the party in possession, who improved the premises, and afterwards offered to sell his improvements back to his vendor. The amount to be paid was referred to arbitrators, who made an award, the terms of which were never complied with, and the vendor afterwards brought ejectment against the party in possession. The court granted an interim injunction, restraining the execution of a writ of possession. *Cook* v. *Smith*, 4 Chy. 441.

In 1834 a contract was made with A. for the purchase of the easterly fifty acres of a lot; through mistake the deed to A. covered the whole north half, but the purchaser went into possession of the portion intended to be conveyed, and shortly after the vendee of the westerly portion took and occupied it without any objection by A. (although all parties knew of the error) until 1857, when the assignee of A. brought ejectment, and recovered judgment; the evidence of adverse possession not being sufficient to defeat the deed so erroneously executed. The court restrained the owner of the legal title from proceeding to recover possession, and ordered him to convey to the plaintiff, who was equitably entitled thereto, and to pay the costs of the suit. *Arner* v. *McKenna*, 9 Chy. 226.

A person against whom an action of ejectment was brought filed a bill to restrain the action, alleging as a ground that the deed under which the plaintiff in the ejectment claimed was a forgery. The deed was dated about fifty years before the bill was filed, and all the persons who had witnessed the deed (four in number) were dead before the validity of the deed was impeached in any way. The court, under the circumstances, refused the relief prayed, and dismissed the bill with costs. *Fick* v. *McMichael*, 9 Chy. 646.

When an agreement not under seal was entered into by a mortgagee, who obtained from the mortgagor a deed of certain property, whereby the mortgagor was allowed to retain possession of a portion of the property, and the mortgagee the other portion until he was paid, such agreement having been destroyed by the mortgagee and ejectment brought on the deed, the court restrained the mortgagee from enforcing his legal right. *Harris* v. *Meyers*, 7 L. J. 243.—Chy.

In a proper case upon petition by defendant, the court granted an injunction against the plaintiff in ejectment proceedings. *Bartels* v. *Benson*, 9 Chy. 486.

In 1850 S. agreed with M. for the purchase of 100 acres of land, and they entered into a written contract. S. having paid part of the purchase money, applied to M., offering the remainder, and requiring his conveyance. M. then stated that he had no title to convey, offered to pay back the money received, and allow S. to remain in quiet possession of the land. This was done, and the written contract was given by S. to M., to be rescinded. M. then conveyed the land to his son, who, with knowledge of these facts, brought ejectment against S. At the trial the written agreement was put in as evidence against S., and was held to be an admission by him of the title of the plaintiff at law, and a verdict was accordingly recovered against S. On a bill filed for the specific performance of the original contract, and to stay the action at law:—Held, that the rescission of the contract was only conditional, M. then undertaking not to disturb the plaintiff in possession; that the use made of the contract at the trial at law re-established it as against M. and his co-defendant, and that the plaintiff was entitled to a decree for specific performance, and to a perpetual injunction against the action at law. Spragge, V. C., diss. *Stuart* v. *McNab*, 10 Chy. 234.

Two leases were executed between the same parties, and to the same effect, except that the first lease was for twenty acres, and the second for ten acres, parcel of the twenty. It was a condition of the leases that the lessee should commence digging for oil on or before the first of June, 1861, which he failed to do. On the 16th of September, 1863, the lessor accepted from the lessee $50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was endorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th of November, 1864, another memorandum was indorsed on the same lease, and signed by the lessor, agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was, until after this time, beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part; the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the Court of Chancery decreed that the ten-acre lease was binding on the patentee, and restrained him from bringing ejectment; and the decree was affirmed on appeal. *Flower* v. *Duncan*, 13 Chy. 242.

The owner of land deposited his title deeds on the 19th of May, to have a mortgage thereof prepared, which was accordingly made out and executed on the 30th. The preceding day the mortgagor made a lease, of which the mortgagee had no notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed; but, the mortgagee having in his answer deliberately sworn either to what was untrue, or to what he did not know to be true,

the court refused him his costs, although costs were given to the other defendants. *McKay* v. *Davidson*, 13 Chy. 498.

A mortgagor filed his bill alleging that nothing was due on the mortgage, and moved for an injunction to restrain execution in ejectment. Defendant set up a purchase and release of the equity of redemption, and alleged that except by this purchase the mortgage was not paid. The court considered that the evidence shewed there was a fair case to try as to the validity of his alleged purchase; and granted an injunction on the plaintiff's paying into court $200, and entering into the usual undertaking. *Keating* v. *McKee*, 14 Chy. 608.

The plaintiff, H., being in possession of land belonging to the defendant, and being entitled to retain such possession for another year, the defendant, in order to obtain immediate possession, agreed that in consideration thereof he would give another piece of land to the plaintiffs, husband and wife, for the life of the wife; the husband further agreeing that he would look after and take care of the former property whenever the defendant was absent; and would, during winter, see to the defendant's cattle and stock. In pursuance of this agreement, possession was delivered of the respective parcels, and the husband rendered some services, being all that were required of him. The defendant having afterwards brought an ejectment against the plaintiffs, the court Held the agreement enforcible, notwithstanding the stipulation as to personal services to be rendered, and granted an injunction. *Hewitt* v. *Brown*, 16 Chy. 670.

Where a writ of hab. fac. poss. was executed before an injunction restraining it could be served, but the plaintiffs in the ejectment suit had been informed of the intention to apply for the injunction, the court granted a mandatory injunction requiring the possession to be re-delivered to defendants in that suit, pending an appeal to the Court of Appeal against a decree dismissing a bill filed by them to redeem. *Campbell* v. *The Royal Canadian Bank*, 19 Chy. 477.

Where the owner of property had executed a mortgage and release thereof to a municipal corporation, and the corporation afterwards sold the property, with the knowledge of such owner, and without objection by him, until, as it was alleged (though as to this the affidavits were contradictory,) the purchaser had had seven years quiet possession, during which time he had improved the property, the case was held a proper one for granting an injunction to the hearing restraining an action of ejectment against the purchaser. *Brown* v. *McNab*, 20 Chy. 179.

See *French* v. *Taylor*, 23 Chy. 436, p. 1754.

(e) *When Money will be Ordered into Court on Granting.*

On issuing injunction to stay proceedings at common law, money found due by verdict or award must be paid into court. *Clarke* v. *Manners*, 2 O. S. 4.—Chy.

When a special injunction is granted staying proceedings at law, the amount claimed in the action must be paid into court. *Harrison* v. *Baby*, 1 Chy. 247.

If a defendant at law is guilty of delay in instituting his suit here, this may not bar his application for an injunction; but the court may require the payment of the money into court, to abide the event; or may impose other terms which, in case of a prompt application, it would not exact; or the court may refuse the motion altogether, notwithstanding the primâ facie case which the plaintiff's bill and affidavits present; and it may be expedient for the plaintiff in such a case to fortify his own affidavit with other evidence, which in case of an earlier application might have been unnecessary. *Treadwell* v. *Morris*, 15 Chy. 165.

A defendant at law unnecessarily delayed filing his bill for an injunction until it was too late to have the equitable case it set up heard for six months. There were executions to a large amount out against his lands at the suit of other persons; and the defendant in equity swore that, if delayed by an injunction, he believed he would probably lose his debt. This statement not being met, an injunction was refused, except upon the terms of paying the money into court. *Ib.*

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2. *To Restrain Waste.*

[*See C. S. U. C. c. 12, s. 27.*]

(a) *Generally.*

A general charge in a bill, that defendant, as executrix and trustee, is committing waste of testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or a receiver. *Sanders* v. *Christie*, 1 Chy. 137.

Where an injunction to stay waste was continued at the hearing, and it appeared that the waste committed did not exceed $20, the court refused to direct any account, and left the amount of the waste to be dealt with in any action for mesne profits which the plaintiffs might bring. *Raven* v. *Lovelass*, 11 Chy. 435.

A person who has an interest in remainder subject to an estate for life, cannot maintain a bill in respect of merely permissive waste by whomsoever committed. *Zimmerman* v. *O'Reilly*, 14 Chy. 646.

Such proof of possession as would maintain a suit at law against a wrong-doer, is sufficient primâ facie proof of title to enable a party to obtain a decree for an injunction to restrain waste. *Walker* v. *Friel*, 16 Chy. 105.

(b) *Cutting Timber.*

Vendor and Purchaser.]—In a suit by the original owner of lands and his vendee (to whom no conveyance had been made,) the court restrained an occupant of the land and a person to whom he had contracted to sell the timber, from cutting down the timber, such occupant having gone into possession under the owner; though it did not appear that such timber was of particular value to plaintiff, and though the affidavits were contradictory as to the occupant's authority from the owner to sell it. *Lane* v. *Judge*, 2 Chy. 301.

A purchaser having entered into possession under his contract, and failed to meet his

ments, was restrained from committing waste, or removing timber already cut down. *Farrier* v. *Kerr*, 2 Chy. 668.

The owner of land agreed to sell the growing timber, and it was stipulated that the price should be paid by the purchaser's note, endorsed by a responsible party, renewable for half at maturity, the delivering of such note within ten days to be the completion of the consideration for said agreement:—Held, that this was only a mode of payment, and not substituted for it; and that upon failure of payment the vendor was entitled to restrain the felling of timber or the removal of any already cut. *Mitchell* v. *McGaffey*, 6 Chy. 361. See also *Walsh* v. *Brown*, 4 L. J. 68.

Mortgagor and Mortgagee.]—The mortgagee of a term for years being in possession, will, at the suit of the mortgagor, be restrained from felling timber, although he may have obtained the consent of the reversioner. *Chisholm* v. *Sheldon*, 1 Chy. 318.

Although a mortgagor in possession will not be restrained from cutting timber for fuel, fencing and repairs upon the premises, he will be restrained from felling trees for other purposes, if it does not clearly appear that the property will still remain of sufficient cash value to satisfy the mortgage debt. *Russ* v. *Mills*, 7 Chy. 145.

Where a mortgagor in possession was felling timber, the court, at the instance of a judgment creditor of the mortgagor, with an execution against lands in the hands of the sheriff, restrained future cutting by the mortgagor, it being shewn that the property was a scanty security for the claims of the mortgagees and the amount due the execution creditor. *Wason* v. *Carpenter*, 13 Chy. 329.

Other Cases.]—A writ of injunction will be granted in the first instance upon an ex parte application under C. L. P. Act, 1856, s. 286, in an action of ejectment, to restrain the defendant from cutting and carrying away timber and logs from off the land, which is the subject of the action. *Robins* v. *Porter*, 2 L. J. 230.—C. L. Chamb.—Burns.

Quære, whether the doctrines applicable in England between termor and reversioner, in respect to felling timber, can prevail as to an estate here, the beneficial enjoyment of which is primarily obtained only through the destruction of the growing timber; and whether the doctrines of the common law, as to growing timber, can be applied in all their extent to forest land here. *Chisholm* v. *Sheldon*, 1 Chy. 318. See *Doyle* v. *Wigle*, 24 C. P. 405.

Where a strip of land was vested in the plaintiff according to the report of commissioners appointed to run the line between two townships, but defendant claimed it, and had applied to the court of Queen's Bench to quash the report, pending the application defendant commenced to fell the timber, alleged to be valuable, growing on the strip. The court restrained such felling until a decision of the motion pending before the Queen's Bench. *Christie* v. *Long*, 3 Chy. 630.

An injunction against cutting timber may be granted (since the 20 Vict. c. 56. C. S. U. C. c. 12, s. 27,) without proof of spoil, trespass and injury to the extent or of the character which might be necessary in England. *Wightman* v. *Fields*, 19 Chy. 559.

One S. was locatee of two lots of land, one a free grant, the other a purchase, which he transferred to the plaintiff. The plaintiff's agent swore that some pine timber had been taken off these "lots in 1870-71, by some person getting out square timber:" and, further, that the defendant was the only person getting out square timber that season. After two years, the court considered this evidence too indefinite as to the locality of cutting, and as to quantity cut, and the act too old in date to warrant the court in granting an injunction to restrain further cutting. *Hughson* v. *Cook*, 20 Chy. 238.

On an application to restrain the cutting of timber, the matter in dispute in this case being too insignificant to call for the interference of the Court of Chancery by injunction, the bill was dismissed with costs. *Bernard* v. *Gibson*, 21 Chy. 195.

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3. *Committing or Continuing Nuisances.*

(a) *Offensive Trades.*

A lessee for a term of years stipulated that he would not carry on any business that would affect the insurance. He made an under-lease omitting any such stipulation, and the under-lessee having commenced the business of rectifying high-wines, was restrained. *Arnold* v. *White*, 5 Chy. 371.

A party had carried on the business of a soap and candle manufacturer for several years without any steps being taken to restrain him, after which a bill was filed for that purpose, on the ground of nuisance and inconvenience to the complainant. The court refused a motion for an interlocutory injunction, but reserved the question of costs to the hearing. *Ratenhurst* v. *Coate*, 6 Chy. 139.

Defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse, using no means to consume or prevent the smoke. He was decreed to desist from using his steam engine so as to occasion damage or annoyance to the plaintiff from the smoke. *Cartwright* v. *Gray*, 12 Chy. 399.

In 1861, while defendant was building a tannery on land adjoining the plaintiff's premises, the plaintiff encouraged defendant to proceed. The business was commenced the same year. In 1863 additions were made to the buildings with the plaintiff's knowledge and acquiescence; and the plaintiff made no complaint about the business until 1868, though all this time it had been carried on, and the plaintiff had been residing on the premises adjoining:—Held, (affirming the decree of the court below,) that by his conduct he had debarred himself from relief in equity on the ground of a tannery being a nuisance. *Heenan* v. *Dewar*, 18 Chy. 438; 17 Chy. 638.

Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shewn that no

such refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that if the nuisance was increasing at all, it was not through the act of the defendants. The court refused an interlocutory injunction restraining the further continuance of such nuisance. *Swan* v. *Adams*, 23 Chy. 220.

P. permitted W., an adjoining owner, to dig a drain partly on his land for the purpose of draining a pit on the lands of W. which had been in use for some years, and which it was alleged had created a nuisance:—Held, that P., after having granted the permission and lying by so long, was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could shew that the nuisance had increased of late beyond what it formerly was. *Ib.*

(b) *Highways and Railways.*

The court has no jurisdiction on the ground of public nuisance to enforce by injunction the ordinary repair of a highway, or to restrain a road company from suffering a road to continue out of repair. Assuming such a jurisdiction, the attorney-general does not seem to be the proper party to sue. *Attorney-General* v. *The Weston Plank Road Co.*, 4 Chy. 211.

The court, however, will restrain a company authorized to construct a plank or macadamized road from constructing or continuing to construct one of poles. Where such a company had already re-constructed part of a road (which was out of repair) with poles, without any objection on the part of the public, and there was contradictory evidence as to the quality of the road so made; but it appeared that by adzing off the upper side of the poles, which the company offered in court to do, the road would be rendered sufficiently smooth, and that to be obliged to take up the poles would ruin the company, an injunction for the removal of the poles was refused. *Ib.*

A railway company being about to construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, and rendered greatly less eligible from the inconvenience and danger occasioned by the cars running immediately in front thereof, and the present traffic be diverted from that part of the road:—Held, that the injury as alleged did not amount to a private nuisance, and therefore the complainant was not entitled to an injunction; and, Held, also, that as the injury was not irreparable, the court would not, if otherwise in favour of the plaintiff, have granted the application. *Magee* v. *The London and Port Stanley R. W. Co.*, 6 Chy. 170.

Where the evidence, as to the injury done to a highway in the manner a railway was constructed, was conflicting, the court refused an injunction, leaving the parties to their legal remedy. *The Municipality of Fredericksburg* v. *The Grand Trunk Railway Co.*, 6 Chy. 555.

An act of parliament having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal; and the bridge, after being erected, having become unsafe through the default of the canal company, an incorporated road company acquired the road, and made several endeavours to get the bridge repaired, but all of them having failed, through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would have the effect of impeding the navigation of the canal:—Held, (reversing the decision of the court below,) that they had not any right to do so, and a permanent injunction was granted restraining them. Spragge, C., and Mowat, V. C., diss. *The Town of Dundas* v. *The Hamilton and Milton Road Co.*, 18 Chy. 311; 17 Chy. 31.

An information to restrain a nuisance, caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them," had put up such fence:—Held, bad on demurrer, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Chy. 402.

See *Attorney-General* v. *Keily*, 22 Chy. 458, p. 1786.

(c) *Water Rights.*

C. being seized in fee of certain lands on both sides of the river Humber, erected grist and saw mills on the east bank of the river; and on the west bank a woollen mill or factory, situate some distance further down the stream; and having leased the latter *together with* the water power privileges, &c., to certain persons who assigned to the plaintiff, subsequently thereto leased the grist and saw-mills to certain parties who had since assigned it to the defendant. At the time the lease of the woollen mills was made, a dam had been erected across the river by C., about a quarter of a mile up the stream, for the purpose of carrying the waters thereof to the grist mill and saw mill, but which it was said still permitted sufficient water to escape for driving the machinery of the woollen mill, and which had been built by C., for the purpose of consuming the water flowing from the said dam. After the defendant entered into possession of the grist and saw mills, he erected a new grist mill, and threw a new dam across the river lower down the stream than the old one, and of more permanent construction, in consequence of which in the dry season the bed of the river had been almost dry, and the plaintiff was unable to work his woollen mill. Thereupon he filed a bill and obtained a special injunction restraining the defendant from making or continuing, &c., the dam, &c., whereby the natural flow of the river might be prevented, &c., so as to injure, &c., the water power of the woollen mill, and at the time heretofore, used, &c., and which the defendant moved upon affidavit to have dissolved. Held, that the court would not dissolve the injunction, but retain the same until the hearing or a trial had been had at law. *Gamble* v. *Scotland*, 1 O. S. 161. See *S. C.*, 3 Chy. 281.

Under the circumstances set out in this case an injunction was refused restraining the defendant, who owned a mill on the river Otonabee from interference with the slides in the Otonabee rapids by throwing in rubbish, &c. *Attorney-General* v. *McLaughlin*, 1 Chy. 34.

An averment that the soil of a stream is vested in the crown, does not import that the crown has therefore power to interefere with the rights of riparian proprietors. *Ib.*

The plaintiff and defendant were owners of mills on the same stream, the defendant's being lower down than, and erected before, that of the plaintiff. By the erection of the dam of the defendant, it was alleged that plaintiff's mill privilege was affected injuriously; and although it was shewn that the plaintiff, in order to work his mill, was compelled to dam back the water so as to over-flow lands higher up, the property of the defendant, the title to which he had obtained after the commencement of this suit, the court (Esten, V. C., diss.) held, that the plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property. *Graham* v. *Burr*, 4 Chy. 1.

A mill owner dammed back a river so as to overflow the lot next above him, the owner of which filed a bill for an injunction, on the ground, amongst others, that he was prevented from building a mill on his land. It being doubtful whether or not he had a mill site upon his property, an enquiry was directed on that point. *Burr* v. *Graham*, 5 Chy. 491.

The owner of land through which a stream flowed into land on which a former proprietor had erected a mill-dam, which forced back the water and overflowed about two acres of the adjoining land, damaging it to the extent of about £2 per annum, brought trespass against the former owner of the mill for the value of the land so damaged, in which he established his legal right, and now applied for a perpetual injunction:—Held, per curiam, [Esten, V.C., diss.] that the small amount of damage occasioned was not a sufficient reason for withholding the aid of this court, and that the plaintiff, having established a clear right both at law and in this court, was entitled to a perpetual injunction to stay further trespass. *Wright* v. *Turner*, 10 Chy. 67.

The fact that a riparian proprietor has recovered nominal damages at law establishing his legal right, does not necessarily entitle him to an injunction. The exercise of this jurisdiction is discretionary, depending very much on the quality and irreparable nature of the injury complained of, and, when no mala fides exists, on the balance of inconvenience. Where, therefore, a railway company had constructed tanks, which were filled from a stream running through the plaintiff's land, for the use of their locomotives, in doing which they did not abstract more than 1-80th or 1-100th part of the water in the stream, the court refused to restrain the company from using the water of the stream, and dismissed the bill filed for that purpose with costs; notwithstanding that the plaintiff had, for the same act, recovered a verdict at law with 1s. damages. *Erickson* v. *Northern R. W. Co.*, 10 Chy. 259.

Defendant had built a drain from his premises on a lot of which the plaintiff became lessee. He being desirous of building on this lot, he requested defendant to stop up or remove this drain, which defendant at first refused, and afterwards objected, to do. It was alleged by defendant that the cost of diverting the drain would have been $14 only:—Held, that the plaintiff was not entitled to divert the drain, and sue defendant for the expense; and as the plaintiff's building could not be safely proceeded with until the drain was stopped up or diverted, an injunction was granted, requiring the same to be done. *Macaulay* v. *Roberts*, 13 Chy. 565.

Plaintiff claimed to be entitled under a lease to certain water rights, but his title was disputed, and the injury of which he complained had been going on for three years, and was not any greater at the time the plaintiff moved for an interlocutory injunction than it had been for three years before. The court refused the motion. *Rich* v. *Brantford*, 14 Chy. 83.

In 1844 a mill site was conveyed to the defendant, with the privilege of keeping the dam thereon at all times hereafter at its present head or height, but no higher; and in 1849 the defendant erected a new dam lower down the stream. This new dam was of the same height as the old dam; but the defendant placed on the dam movable stop logs to enable him to make use of the surplus water, which would otherwise flow over the dam. By experiments it was shewn that if these stop logs were not removed when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff to the extent of about one and a-half inches. The defendant, however, always had removed the logs when his mill was not working:—Held, that under these circumstances the plaintiff was not entitled to an absolute injunction against the use of the stop logs. Draper, C. J., VanKoughnet, C., and Spragge, V.C., diss. *Beamish* v. *Barrett*, 16 Chy. 318, in appeal.

Certain riparian owners filed a bill against another riparian owner to restrain him from maintaining a dam. Other persons were interested in maintaining the dam, whom the plaintiffs did not prove any title to interfere with; and one of the plaintiffs had sold a mill site to the defendant on verbal representations which implied that he was to have the benefit of the dam. The court held, that if the plaintiffs had any claim against the defendant, the proper course was to leave them to their legal remedy against him; and the bill was dimissed with costs. *Rosamund* v. *Forgie*, 18 Chy. 370.

See *McNab* v. *Taylor*, 34 Q. B. 524, p. 1752; *Brewster* v. *Canada Company*, 4 Chy. 443, p. 1754.

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4. *Removal and Sale of Chattels.*

This court will not grant an injunction at the suit of a mortgagee of chattels, against a judgment creditor of the mortgagor, to prevent a sale, the rule being universal that the court will protect the specific possession of chattels only in case they are of peculiar value. *Geddes* v. *Morley et al.*, 1 O. S. 323.

Although the court had refused an ex parte injunction to restrain the removal of chattels claimed by plaintiff, and directed notice of motion to be given, an interim injunction was subsequently granted, on an affidavit that defendants were removing the property, notwithstanding the notice had been served. *Wilmot* v. *Maitland*, 2 Chy. 556.

The plaintiff contracted with two of the defendants for the manufacture by them of 5000

saw-logs, to be delivered at the mouth of the river Trent, to be paid partly by instalments during the work, and the residue on delivery at the place designated; and at the same time or immediately after it was verbally arranged that the logs, as manufactured, should be marked with plaintiff's initials, and delivered to him as a security for his advances, without prejudice to the agreement for their being conveyed to the river. The stipulated advances were made, and the logs as manufactured were so marked, but not otherwise delivered to plaintiff:—Held, that the manufacturers could not afterwards dispose of these logs to the prejudice of the plaintiff; and having attempted to do so, to a third person for value, but who had notice of plaintiff's claim, an injunction was granted to prevent their removal by such person. *Fuller* v. *Richmond*, 2 Chy. 24.

When a warehouseman had delivered warehouse or transfer receipts to a party for one thousand barrels of flour, and afterwards delivered over some portion thereof, at the instance of the party who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of his trade, the court refused an injunction to restrain the delivery of flour subsequently brought by the same party to the warehouse, although such latter flour had been assigned bonâ fide to the plaintiff, who had made advances thereon after it was stored; and although such flour had not been manufactured at the time of giving the warehouse receipts. *Wilmot* v. *Maitland*, 3 Chy. 107.

The court will restrain a vendor from selling leasehold property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement. *McLean* v. *Coons*, 3 Chy. 112.

The court will restrain the attaching creditors of an absconding defendant from selling timber improperly cut upon land mortgaged by defendant to plaintiff. *Thompson* v. *Crocker*, 3 Chy. 653.

Saw-logs cannot be intended primâ facie to be of "peculiar value," without any evidence that they are so. But they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief may be given with respect to them in more instances than almost any other sort of chattel property. The relief however must be applied for promptly. *Flint* v. *Corby*, 4 Chy. 45.

On an agreement for the sale of a steamboat, the vendor delivered possession to the vendee, and covenanted to transfer the vessel with her machinery and furniture to the purchaser absolutely, upon payment of the balance of purchase money by instalments; and on default in payment of any portion the vendor should be at liberty to resume possession of the vessel, with her machinery and furniture. The court restrained the purchaser from removing the machinery from the vessel, so long as any part of the money remained unpaid. *Laughton* v. *Thompson*, 7 Chy. 30.

V. and D., traders, made an assignment to plaintiffs on the 9th of January, 1865, as insolvants, in pursuance of the Act of 1864. A judgment at law having been obtained against V., his interest in the partnership assets was sold for a nominal consideration to C., who had notice of the insolvency proceedings. C. having interfered with the partnership goods so as to hinder the plaintiffs from performing the duties of their office, an injunction was granted to restrain further interference. *Wilson* v. *Corby*, 11 Chy. 92.

A bill was filed against the Attorney-General and A., the superintendent of certain slides belonging to the crown, who was also collector of the rates thereat, alleging that he had seized certain saw logs of the plaintiff's, and was about to sell them on the false pretence that the tolls thereon had not been paid. The bill prayed for an injunction to restrain the sale. A. demurred to the bill, on the ground that being the agent of the crown he was exempt from personal liability. The demurrer was overruled, with costs. *Baker* v. *Ranney*, 12 Chy. 228.

A mortgage having been created on land on which was a steam saw mill, the mortgagor was restrained from removing the machinery, although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises. *Gordon* v. *Johnston*, 14 Chy. 402.

If the court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by giving him a lien on it. Accordingly where money was stolen the owner was held entitled to a leasehold, furniture, and other chattels, purchased with the stolen money, and an injunction was granted to restrain parting therewith until the hearing. *The Merchants' Express Co.* v. *Morton*, 15 Chy. 274.

Where a robbery has been committed in a foreign country, but no trial had taken place and the money stolen had been invested in the purchase of property in this country, the court granted an injunction to restrain the selling or incumbering thereof. *Ib.*

A mortgagee filed his bill for foreclosure and to restrain the vendee of the mortgagor from removing a building. The building having been actually removed, the court thought it a proper case for a mandatory injunction, but as it had been removed piecemeal, and there might be difficulty in restoring it, an inquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 16 Chy. 616.

Several persons united in purchasing a printing press and material for the establishment of a newspaper to advocate certain views, and agreed with a printer that he should establish it and should have a legal transfer of the property purchased on paying to the several parties the sums they had contributed. This agreement was acted on, and the printer paid some of the contributors accordingly. One of the parties, who claimed that he had not been paid, took possession of the press and material by a writ of replevin:—Held that the printer was entitled to relief in equity, and the replevin suit was stayed on security being given. *Dewhurst* v. *McCoppin*, 17 Chy.

Where the court has possession of a matter in which real estate is concerned, it will, if chattel property form part of the subject matter in

pute, deal with that also by injunction for the purpose of preserving the same in medio, without reference to the rule as to the court not interfering with chattels unless they are of special value, or form the subject of a trust. *Penman* v. *Somerville*, 22 Chy. 178.

See *Gartshore* v. *Gore Bank*, 13 Chy. 187, p. 1760; *Mason* v. *Norris*, 18 Chy. 500, p. 1779.

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5. *Infringement of Trade Marks, &c.*

A party professed to sell the secret of a preparation called "Jones's Patent Flour," and became bound not to disclose the secret to any other person in Canada, nor make use of it himself, except at the instance and for the benefit of his vendees. Notwithstanding, he afterwards commenced selling a similar article, done up in bags, bearing a general resemblance to those of his vendees, although differing in some minute particulars, and led parties purchasing it to believe that it was the same article. The court granted an injunction to restrain him from selling the same preparation, or any other preparation done up in such a manner as to lead the public to suppose that it was the same article, and from representing it to be such, although it was sworn by the vendor that the preparations were not the same. *Whitney* v. *Hickling*, 5 Chy. 605.

The right at common law of an alien friend in respect to trade marks, stands on the same ground as that of a subject. *Davis* v. *Kennedy*, 13 Chy. 523.

The plaintiff had duly registered, as his trade mark in the manufacture of soap, the word, "imperial," with a star following it. Defendant put on his boxes the words, "Imperial Bibasic Soap." An injunction was granted restraining him from using the word "Imperial." *Crawford* v. *Shattock*, 13 Chy. 149.

The plaintiff carried on business in the city of [illegible], having for his sign a figure of a gilt lion, and designating his place of business "The Golden Lion." Defendant for some years had conducted his business, and having commenced on his own account in the same line of business, placed in front of his shop a figure somewhat similar to that used by plaintiff. The court restrained defendant from using as a sign this or any similar figure. *Walker* v. *Alley*, 13 Chy. 366.

Plaintiffs sold liquid medicine in bottles, labelled "Perry Davis's Vegetable Painkiller." Defendant subsequently sold a similar kind of medicine in bottles, labelled "The Great Home Remedy Kennedy's Painkiller." Plaintiffs claimed the word "Painkiller" alone as their trade mark. It was proved that plaintiff's medicine was known and sold in the market by the name of "Painkiller," before defendant's was introduced, and that the trade would not be deceived by defendant's labels, although the general public might An injunction was granted restraining the by defendant of the word "Painkiller" as a trade mark, with account of profits and costs. *Davis* v. *Kennedy*, 13 Chy. 523.

The plaintiffs filed a bill to restrain the use of a label, or of any other label resembling it. Defendant admitted that the label he had used was an infringement of plaintiffs' trade mark, but that he had discontinued its use before suit, on hearing that the plaintiffs complained of the label, and that after suit he informed the plaintiffs' solicitors of this discontinuance, disclaimed all right of using the label, and was ready to account for the profits he had made, and to pay costs of suit. The solicitors declined to discontinue the suit, and defendant having put in his answer, the plaintiffs brought the cause on for hearing upon bill and answer. Defendant not disputing that his label was an imitation of the plaintiffs', or that he was aware of the plaintiffs' property in their label, an injunction was granted, and defendant ordered to pay the costs of suit. *Railway* v. *Coleman*, 15 Chy. 50.

Hiram Piper and Noah Piper carried on business under the name of Hiram Piper & Brother. They afterwards dissolved partnership, and each carried on like business in his own name. Subsequently Hiram assigned his business to the plaintiff, with authority to carry it on in Hiram's name, and then two sons of Noah Piper carried on a similar business next door, under the firm H. Piper & Co. An injunction to restrain the use of that name was refused. *Aikins* v. *Piper*, 15 Chy. 581.

A cigar manufacturer, to distinguish his cigars, called them "Cable Cigars," and afterwards adopted a method of stamping on each cigar, in bronze, an elliptical figure, with the name of "S. Davis," and the word "cable" within the same. A rival firm, two years afterwards, adopted the same method, using a trade-mark identical with this, except that they substituted their initials, "CP&C" for the other's name, and the word "CIGAR" for the word "CABLE." It was proved that persons had bought these cigars supposing them to be the cable stamped cigars:—Held, that the manufacturer of the cable cigars was entitled to an injunction to restrain the other parties from using the trade-mark which they had so adopted. *Davis* v. *Reid*, 17 Chy. 69.

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6. *Breaches of Contract or Covenant.*

The owner of several steamers, who carried on business as a forwarder, sold one of them to another forwarding firm, and upon the sale covenanted that he would not directly or indirectly have any interest in any vessel navigating the St. Lawrence below Ogdensburgh at any time thereafter, and also that he would not dispose of two other steamers then owned by him to any person or persons for the purpose of so navigating. The court held the owners bound by the covenant entered into by the original proprietors, and restrained them from navigating the river below Ogdensburgh with those vessels. *Holcomb* v. *Nixon*, 5 Chy. 278, 373.

The plaintiff purchased defendant's business as an exchange broker at Kingston, and the latter agreed not to go into the business there again. The plaintiff afterwards sold out to one C. and entered into a like agreement with him:—Held, that the plaintiff, after this sale, had not such an interest in the contract with defendant as entitled him to an injunction to restrain defendant from carrying on business at Kingston, and that his remedy, if any, was at law. *Jones* v. *Wooley*, 16 Chy. 106.

See, also, *Mossop* v. *Mason*, 17 Chy. 360.

7. *To Corporations.*

The town council of one of the towns mentioned in the schedule to 12 Vict. c. 81, were about to open a street without the permission required by the statute of certain parties owning houses on the land over which it would pass. The court restrained such opening upon a bill filed by a party owning land on the line of the intended street, although no house stood upon the land, and his premises were not within the exception in the proviso to sec. 60 of the act. *Wilson* v. *Town Council of Port Hope*, 2 Chy. 370.

A company incorporated under the provisions of 16 Vict. c. 173, for supplying a city with gas, will be restrained during the currency of a quarter from cutting off the gas from a house, the occupant of which has paid the rent for the preceding quarter. *Smith* v. *The London Gas Co.*, 7 Chy. 112.

The act 22 Vict. c. 122, incorporating the Northwest Transit Company, enacted that it should not be lawful for the company to proceed with their operations under the act until £50,000 of the capital stock should have been subscribed, and ten per cent. paid thereon. Subsequently, and before £50,000 had been subscribed, or the per centage paid thereon, a proposition was made by one C. to certain stockholders in the enterprise, that C. should sell a steam vessel belonging to him to the company for £5,000, and that in that event he should become a subscriber to the amount of £50,000, and that the steamer should be paid for by taking her as a payment of ten per cent. on the £50,000, which was acceded to, and the subscription and purchase made accordingly, in compliance with a resolution of the company :—Held, that this was an evasion of the statute, and an injunction was granted on motion, restraining the company from proceeding with any of the operations thereof until the conditions pointed out by the statute had been complied with. *Howland* v. *McNab*, 8 Chy. 47.

The town of St, Catharines was authorized by statute to issue debentures to £45,248, for which a special rate was directed, the proceeds to form a sinking fund. By the same act the town was prohibited from passing any by-law to create any new debt extending beyond the year in which such by-law was passed, until the debt was reduced to £25,000. The special rate authorized had been duly levied, but it was alleged that it had been applied to the general purposes of the town, and the debt had not been reduced. Defendants denied the misapplication of the fund, but did not shew how it had been applied ; and with a view of inducing the county council to remove the county town to St. Catharines, the town council of St. Catharines, without any by-law, contracted with certain builders to erect a gaol and court house for the county, at an outlay of £3,000, to be completed in two years. Upon an application, at the instance of certain of the holders of said debentures, the court restrained the town from proceeding with the buildings. On appeal to the full court, the injunction was dissolved, it appearing that the contract had been cancelled, and no liability incurred extending beyond the year. On production of the contract, it appeared that the rescission had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. VanKoughnet, C., dubitante as to any necessity therefor. *The Edinburgh Life Assurance Co.* v. *The Municipality of the Town of St. Catharines*, 10 Chy. 379.

An injunction granted to restrain trustees of a university founded by royal charter removing a professor thereof. *Weir* v. *Mathieson*, 11 Chy. 383.

A bill was filed by a rate-payer seeking to restrain school trustees from allowing the school house to be used for religious services, but the bill did not allege that it was filed on behalf of the plaintiff and all other rate-payers ; two of the three school trustees consented to the injunction being granted as asked. The court refused the application, on the grounds, first, that the suit was not properly constituted ; and if it had been, it appearing that a majority of the trustees were in favour of the views of the plaintiff, they had themselves the power to do that which they consented to the court doing. Quære, if the bill had been by the plaintiff on behalf of himself and all other rate-payers, whether then the suit would have been properly constituted. *Rubidge* v. *The School Trustees of the township of Thurlow*, 12 Chy. 115.

Where for the purpose of erecting a market house, a municipal council would require to levy a rate exceeding the two cents in the dollar allowed to be imposed by section 225 of the Act, it was held that a rate-payer was entitled to an injunction restraining the erection of the building by the council. *Wilkie* v. *The Corporation of the Village of Clinton* 18 Chy. 557.

Where a bill to restrain the issue of debentures by a municipal council, did not allege that the warden was individually acting in the matter, or taking any step otherwise than as the officer of the council and under the by-law, the court, on demurrer, held, that he was not a necessary party to the suit. *West Gwillimbury* v. *Simcoe*, 21 Chy. 68.

The court has jurisdiction to restrain a municipal corporation from obtaining the vote of the ratepayers in favour of a by-law, which if passed would be illegal without legislative sanction and which sanction such vote was intended to aid in obtaining in an informal and unauthorized manner. Where, therefore, the corporation of the town of Port Hope were about submitting to the vote of the ratepayers a by-law authorizing the harbour commissioners of the town to issue debentures to the amount of $75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the court restrained the corporation from proceeding to take the vote. *Helm* v. *The Corporation of the town of Port Hope*, 22 Chy. 273.

The rule of this court is never to interfere by injunction except where it can do so usefully and effectively. *The Attorney-General ex rel. ...* v. *The International Bridge Co.*, 22 Chy. 2...

A company was incorporated to construct a bridge across the Niagara river, which bridge was to be "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains ;" and the company completed such bridge so far as to permit ...

running of railway trains across it. The time limited for the completion of the structure for the passage of ordinary carriages had not elapsed, when the bridge company leased such bridge to a railway company, who were daily running trains across it; but no commencement was made with that portion of the bridge intended for the purpose of ordinary traffic, &c. An information was filed seeking to restrain the lessees from using the structure for railway traffic, until it was put in a condition to be used for ordinary passenger traffic, but a demurrer thereto for want of equity was allowed. *Ib.*

Quære, if even the time allowed for the completion of the bridge for ordinary traffic had elapsed, whether the court would have interfered by injunction, the work which had been done, having been done by authority of law, and the relief prayed being such as would, in the event of the order of the court being disobeyed, have necessitated the destruction of that portion of the work already completed. *Ib.*

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8. *In Partnership Matters.*

Where a managing partner was charged, on affidavit of his co-partner, with excluding the latter from access to the books and papers of the partnership, and with not delivering to him accounts, which the partnership articles stipulated for—an injunction and a receiver were granted against such managing partner, though his affidavit denied the principal charges, but not satisfactorily. *Prentiss* v. *Brennan*, 1 Chy. 371.

Where it was proved that a partner had purchased a house and a large part of the furniture thereof with partnership funds, improperly withdrawn by him for that purpose, and such partner, during the defendant in the cause, had withdrawn the partnership books and papers from the jurisdiction of the court, in breach of an injunction in that behalf, the court ordered the mother and sister of the defendant, and whom he left in possession, to deliver up to the receiver, already appointed, the house and all the furniture and partnership property. *S. C. Ib.* 484.

The court will relieve against an award made between partners in ignorance, on the part of the arbitrators and of the remaining partners, of important omissions by the other, the managing partner, in the books of the firm, in consequence of which the award had been too favourable to the managing partner. *Wilson* v. *Richardson*, 2 Chy. 448.

An injunction to restrain proceedings on a judgment recovered upon such an award was continued to the hearing, when the ultimate success of the plaintiffs at the hearing was not considered as clear, the amount of the judgment being ordered into court. *Ib.*

The plaintiff and defendant entered into an agreement, under which the defendant was to receive goods, or guarantee the payment of bills, which were to be obtained and sold by the plaintiff for their joint benefit, in certain proportions; and the plaintiff, to secure and indemnify the defendant against all loss in respect thereof, executed a confession of judgment, to be acted upon only in default of plaintiff meeting his engagement on such goods. The plaintiff made default, and the defendant entered up judgment and sued out execution. The court dissolved an injunction which had been issued, although upon the construction of the agreement it was doubtful whether a partnership had not been created between the parties; but the defendant (the plaintiff in the execution) having caused certain goods, provided by himself under the agreement, to be levied upon, the court directed that the amount thereof, at cost and charges, should be deducted from the amount of the debt and costs, or that the injunction should be continued in respect of that amount. (Blake, C., diss., who thought the injunction should be continued to the hearing.) *Watt* v. *Foster*, 4 Chy. 543.

Where a partner in a special contract applies the funds derived from such contract to other contracts, not belonging to such special partnership, an injunction will be granted against him, until the partnership be wound up, although such injunction may not have been prayed for in the original bill. *Thibodo* v. *Scobell*, 5 L. J. 117. —Chy.

A surviving partner, by reason of his liability to pay the debts due by the partnership, is entitled to receive all moneys, and collect all debts due to, and dispose of all the effects of, the firm for that purpose; the representatives of the deceased partner have a right to inspect the books of the partnership, and to be informed of the proceedings of the survivor; and any exclusion of them in these respects will entitle them to an injunction and receiver. *Bilton* v. *Blakely*, 6 Chy. 575.

Two persons were in joint possession of and carried on business as partners on property of one, when the owner mortgaged it, giving a power of distress in case of default, and the mortgagee distrained on the partnership property. On a bill by the assignee of the other partner, it not appearing that the latter assented to or had notice of the mortgage, the court granted an injunction to the hearing. *Mason* v. *Parker*, 16 Chy. 81.

Several proprietors of salt wells entered into an undertaking to sell their products through trustees, and in no other way; and a written agreement to this effect was executed by all the parties, except one, who was resident in England, and carried on his business here through an agent. The business was carried on under the agreement, notwithstanding his non-execution; and one of the other parties having subsequently attempted to act in contravention of the agreement, it was—Held, that the delay of the absent party to sign the contract, was no answer to a motion for an injunction restraining the contravention. *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Chy. 551.

See *Wilson* v. *Corby*, 11 Chy. 92, p. 1772.

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9. *Between Joint Tenants and Tenants in Common.*

Semble, no injunction will be granted between tenants in common, except in cases of actual destruction. But where a tenant in common of one moiety was trustee of the other under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so. *Christie* v. *Saunders*, 2 Chy. 670.

One tenant in common will be restrained at the suit of a co-tenant from digging earth for

bricks on the joint property. Esten, V. C. diss. *Dougall* v. *Foster*, 4 Chy. 319.

A tenant in common, upon satisfying the court that the cutting of the timber by his co-tenant operates to the destruction of the inheritance, is entitled to an injunction. *Proudfoot* v. *Bush*, 7 Chy. 518.

Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property; still, where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds; but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such years the mother might have been accountable to her infant children as trustee for them. *Bates* v. *Martin*, 12 Chy. 490.

Although the general principle is that one joint tenant will not be restrained from committing waste at the instance of his co-tenant, the rule is different where a bill has been already filed for a partition of the estate. *Lassert* v. *Salyerds*, 17 Chy. 109.

Where defendants, being part owners of a schooner and in sole possession, excluded therefrom the plaintiff, who was the other part owner, and the plaintiff did not allege that there had been any dispute as to the employment of the vessel, an injunction to restrain defendants' proceedings was refused. *Baker* v. *Casey*, 17 Chy. 195.

The plaintiff and L. were tenants in common of an oil well. They filled an oil tank with oil equal in quantity to 2,400 barrels, of which 1,600 belonged to the plaintiff and 800 to L., and they agreed that the oil was not to be sold under $5 a barrel; they were not partners. L., without authority contracted for the sale of all the oil in the tank at $1.25 a barrel:—Held on a bill against the purchaser, that L. had no right to sell the plaintiff's portion of the oil, and that the defendant's removal of it would be wrongful; but that as the oil was a staple commodity which had not any peculiar value, and as there was no fiduciary relation between the plaintiff and L., the plaintiff was not entitled to an injunction; and that his only remedy was an action at law. *Mason* v. *Norris*, 18 Chy. 500.

One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Chy. 614.

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10. *Other Cases.*

The court will grant an injunction to restrain a trustee from interfering with the trust estate where fraud is charged, and by the same order appoint a receiver. *Vernon* v. *Kinzie*, 2 O. S. 40.—Chy.

There are many cases in which the court will interfere by injunction to maintain things in statu quo pendente lite, not only where plaintiff's title to relief is unquestioned, but even where it is doubtful; provided there is a substantial question to be settled. *Attorney-General* v. *McLaughlin*, 1 Chy. 34.

But the court does not interfere by special injunction against a party in possession claiming adversely to plaintiff; nor, on the other hand, will the court, as a general rule, so interfere in favour of a party in possession to restrain a casual trespass. *Ib.*

Pending an appeal from this court a mortgagee was restrained from proceeding to a sale of the mortgaged premises under the power of sale. *Commercial Bank* v. *Bank of Upper Canada*, 1 Chy. Chamb. 64.—Esten.

In a suit for the specific performance of an agreement for the sale of lands, or to set aside a conveyance for fraud, the plaintiff is not of right entitled to an injunction to restrain alienation, unless it is alleged by the bill and proved that the holder of the land threatens and intends to convey the lands. *Kerr* v. *Hillman*, 8 Chy. 285.

As a general rule, an assignment for the benefit of creditors will be taken as a declaration of insolvency and equivalent to bankruptcy in England. Where, therefore, some of the legatees of a testator filed a bill against his executor and two of the legatees, charging maladministration, and alleging that the executor, subsequently to the death of the testator, had made an assignment for the benefit of his creditors, and that he was insolvent, the court, upon motion for an injunction and receiver before answer, under the circumstances, granted an interim injunction and receiver, notwithstanding the executor denied any maladministration of the estate, or that his insolvency was the reason for his making the assignment of his estate. *Harrold* v. *Wallis*, 8 Chy. 443.

An injunction granted to restrain trustees of a university founded by royal charter removing a professor thereof. *Weir* v. *Mathieson*, 1 Chy. 383.

A term's notice of intention to proceed is not necessary if the proceedings in the cause have been suspended by injunction, or delayed by consent or at defendant's request. *Baby* v. *Langlois*, 1 L. J. N. S. 209.—P. C.—Hagarty.

The same rule applies where on the application for the injunction at the instance of defendant, the plaintiff, during the pendency of the application, is placed under terms not to proceed with the action. *Ib.*

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11. *Practice.*

(a) *Delay in Application for.*

On an application on behalf of the crown for a special injunction, it appeared that the acts and threats complained of (obstructing the slide of the Chaudiere) occurred eight and eleven months before the filing of the bill, and the motion for the injunction was made twelve months after the answer came in:—Held, too late. *Attorney-General* v. *McLaughlin*, 1 Chy. 34.

Where parties complaining of the illegality of a municipal by-law or resolution, permit a term of the courts of common law to pass without moving to quash it, this court will refuse an injunction to restrain the municipality from enforcing the by-law. *Carroll* v. *Perth*, 10 Chy. 64; *Grier* v. *St Vincent*, 12 Chy. 330.

Although plaintiffs had been guilty of great delay in applying for an injunction to restrain the sale of lands under an execution at law, yet a sufficient case having been made out for an inquiry, the court granted the writ on an interlocutory motion; the plaintiffs undertaking to proceed to an examination of witnesses within one month after answer filed, and hearing the cause forthwith thereafter, paying the costs at law incurred by postponing the sale, and interest from the time the sale was to have taken place until the decree in the cause, in the event of the sale failing to realize enough to pay the execution. *Canada Permanent Building Society* v. *Bank of U. C.*, 10 Chy. 203.

See *Hughson* v. *Cook*, 20 Chy. 238, p. 1766.

(b) *Affidavits on Application.*

The affidavits on which an ex parte injunction is applied for must (to guard against abuse of that process) present a candid statement of the whole case, and must set forth not only the facts which the plaintiff thinks to be, but such as are in truth material to the determination of the application. An injunction obtained on affidavits in which this rule is not observed, will be dissolved on that ground alone, independently of the merits. *Ley* v. *McDonald*, 2 Chy. 398. See also *McMaster* v. *Calloway*, 6 Chy. 577; *In re Allen*, 31 Q. B. 458, 496-8, *Fisken* v. *Rotherford*, 7 L. J. 124.

On motion for an injunction against one defendant, the cross-examination of another defendant on his answer was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant against whom the plaintiff moved had no notice of the cross-examination, or of the plaintiff's intention to read the deposition on the motion. *Curtis* v. *Dales*, 12 Chy. 244.

There is no technical rule requiring the plaintiff's affidavit in support of a motion for an injunction to be corroborated by other evidence; though the absence of other evidence may sometimes be a circumstance material to be considered. *Treadwell* v. *Morris*, 15 Chy. 165.

Where on granting an interim injunction leave was reserved to plaintiff to file an affidavit of B., an application to extend which, when made, was enlarged in consequence of the other business of the court, and it was then agreed that no further affidavit should be filed, but the affidavit of B. was then in the plaintiff's hands ready to be used if the motion had not been adjourned, and was in fact filed and served the same afternoon:—Held, that plaintiff was entitled to read this affidavit. *The Merchants' Express Co.* v. *Morton*, 15 Chy. 274; 2 Chy. Chamb. 319.

On a motion for injunction to stay the wrongful selling of property by the legal owner, the plaintiff's affidavits alleged that the principal defendant had sold, or pretended to sell, to his son, who was also a defendant, but by mistake no injunction was asked against him. No threat of any further sale was alleged. Defendant filed no affidavit in answer:—Held, that the allegations were sufficient, and an injunction was granted. *Boardman* v. *Wroughton*, 16 Chy. 384.

(c) *Extending and Continuing.*

An ex parte injunction had been granted to restrain defendants, until further order, from interfering with certain saw logs in the Salmon river, and which the plaintiff claimed as his. Defendants having, notwithstanding, obtained possession of the logs, a motion to extend the injunction so that, in effect, the plaintiff might receive possession of the logs from the defendants was retained until after trial of issues as to the plaintiff's property in the logs, this being disputed by defendants. *Farwell* v. *Wallbridge*, 2 Chy. 332.

A plaintiff in an injunction suit, instituted in the county court, desiring to extend the injunction, must have the pleadings and papers in the cause transmitted to this court before the motion is heard. *Stevenson* v. *Huffman*, 4 Chy. 318.

A bill filed to restrain proceedings at law to enforce a judgment having been dismissed, the court continued the interim injunction obtained during the progress of the cause until the decision of the Court of Appeal, upon paying into court the amount of the judgment, or giving security to the satisfaction of the defendants. *Cotton* v. *Corby*, 7 Chy. 50.

Where in a foreclosure suit an interim injunction has been granted to restrain cutting timber, the registrar has no power to grant a decree on præcipe, with a provision for continuing the injunction. For this purpose the cause must be brought on for hearing. *King* v. *Freeman*, 1 Chy. Chamb. 350.—VanKoughnet.

(d) *Dissolving.*

A defendant may move to dissolve an injunction without moving at the same time to discharge a receiver of the funds to which the injunction related. *Sanders* v. *Christie*, 1 Chy. 137.

Where a defendant, upon filing his answer, obtains and serves an order nisi to dissolve a common injunction, and the plaintiff thereupon, at any time before the actual dissolution, amends his bill, the defendant before proceeding with the application to dissolve must answer the amendments, or be prepared to contend that even admitting them to be true the injunction ought to be dissolved. If he choose not to proceed with the application, the plaintiff must pay the costs incurred before the amendments. *Fisher* v. *Wilson*, 1 Chy. 218.

Exceptions to an answer cannot be shewn as cause against dissolving a special injunction; for if the answer be insufficient, it may still be used as an affidavit. *Harrison* v. *Baby*, 1 Chy. 247.

A defendant on moving to dissolve an injunction from a County Court, is not bound to have the proceedings returned from the County Court office. *Abraham* v. *Shepherd*, 4 Chy. 260. See *Stevenson* v. *Huffman*, 4 Chy. 318, supra.

An injunction had been obtained against a defendant, and after the time limited for putting in his answer had expired, an order pro confesso was taken out against him. He then gave notice of motion to dissolve the injunction:—Held, that the statements of the bill having been confessed by his allowing the order pro confesso to stand, precluded him from moving. *Manley* v. *Williams*, 5 L. J. 163.—Chy.

An ex parte injunction will be dissolved if material facts be suppressed, or misrepresented to the court, on moving for it. *Fisken* v. *Rutherford*, 7 L. J. 124.—Chy.; *Lee* v. *McDonald*, 2 Chy. 398; *McMaster* v. *Callaway*, 6 Chy. 577.

Where an ex parte injunction was served on 24th December, and the bill was not served, up to the 13th of May following, the injunction was dissolved. *Heron* v. *Swisher*, 13 Chy. 438.

See *Gamble* v. *Howland*, 1 O. S. 161, p. 1768.

(e) *Damages.*

Where a plaintiff filed a bill for an injunction and payment of damages; and it appeared that the wrongful act complained of had, without his knowledge, been discontinued before the suit:—Held, that the court had not jurisdiction to make a decree for the damages. Defendant having neglected to inform plaintiff of the discontinuance, though applied to respecting it, before suit, the bill was dismissed without costs. *Brockington* v. *Palmer*, 18 Chy. 488.

On obtaining an ex parte injunction restraining the sale of property, the plaintiff entered into the usual undertaking as to damages, and subsequently dismissed his bill; whereupon the defendant moved for a reference to the Master to inquire as to damages sustained by him, when, in answer to the application, it was shewn that, since the dismissal of the bill, an increased price had already been offered, and that it was probable a still greater advance in price would be obtained on a sale. The court, under the circumstances, refused the application, but without costs, and reserved to the defendant liberty to renew his application, on which he should be at liberty to use depositions and affidavits read on the present motion. *Featherstone* v. *Smith*, 20 Chy. 474.

Where a plaintiff on obtaining an injunction enters into the usual undertaking to abide by such order as the court may make as to damages, it is in the discretion of the court to grant or refuse a reference as to such damages where the injunction is afterwards not continued or is dissolved. Where, therefore, a person in the employment of the owner of a machine for which a patent had been granted, surreptitiously obtained such a knowledge thereof as enabled him to construct a similar machine for the defendant, the court, although unable to continue the injunction in consequence of the invalidity of the patent, refused the defendant a reference as to damages, he having availed himself of the knowledge which he knew had been so improperly obtained. *Hessin* v. *Coppin*, 21 Chy. 253.

(f) *Costs.*

Where a motion for an injunction to restrain a sale under a fi. fa. is refused, the proper course is not to give the costs of the application; as if the suit fail the plaintiff must pay the costs: and if it succeed, the order at the hearing provides for payment of them. *Carruthers* v. *Armour*, 7 Chy. 34.

Where the result of a motion for an interlocutory injunction depended upon a question of law and not of fact, and the motion was reheard at the instance of defendant, against whom an injunction had been ordered, the court, on reversing such order, gave the defendant the costs of the motion as well as of the rehearing. *The Fire Extinguisher Co.* v. *The North Western (Babcock) Fire Extinguisher Co.* 20 Chy. 625.

A bill had been filed for an injunction to stay an action of ejectment, which action the plaintiff successfully defended before any injunction could be obtained; he proceeded no further with his suit in equity, and the bill was dismissed with costs. It was claimed that the costs at law should be set off as against these costs, but the Referee considered that costs at law could not be set off against costs in equity, that being the rule in England. Strong, V. C., affirmed the order of the referee as to the first point, and without expressing any opinion as to whether costs at law could be set off against costs in equity in a proper case, affirmed the order of the Referee on this point also, on the ground that the lien of the attorney attached, and was paramount to any right to set off. *Webb* v. *McArthur*, 4 Chy. Chamb. 63—Taylor, *Referee.*

(g) *Other Cases.*

Injunction being prayed for in the prayer for process is sufficient. *Clarke* v. *Manners*, 2 O. S. 1.—Chy.

Although the court had refused an ex parte injunction to restrain the removal of chattels claimed by plaintiff, and directed notice of motion to be given; an interim injunction was subsequently granted on an affidavit that defendants were removing the property, notwithstanding the notice had been served. *Wilmot* v. *Maitland*, 2 Chy. 556.

Since the general orders of 1853 it is not necessary for a party to establish his legal right by an action at law before coming to this court. *Radenhurst* v. *Coate*, 6 Chy. 139.

Where defendants did not appear upon a notice of motion for injunction, the court directed the writ to issue, although entertaining great doubt whether a sufficient foundation for the interposition of the court had been laid. *Dennison* v. *The City of Toronto*, 6 Chy. 513.

An injunction was refused, the allegation of prayer of the bill having been framed with a view to relief on other grounds than those upon which the application was founded, although the affidavits in support of it would warrant the injunction. *Ely* v. *Wilson*, 7 Chy. 103.

On a motion for injunction an objection was taken that certain necessary parties were not before the court; but counsel appearing for the absent parties, and consenting to their being made parties, to be bound by the proceedings and treated as if actually defendants on record—Held, that this cured the defect for the purposes of the motion. *Attorney-General* v. *Municipality of the County of Grey*, 7 Chy.

Where a bill prayed specific performance of an agreement, and for an injunction against waste, and an account of waste committed, and the court was of opinion that the plaintiff's remedy, except as to the injunction, was at law, the decree was made without costs; the objection to the jurisdiction appearing by the bill, and not being raised until the hearing of the cause. *Raven* v. *Lovelass*, 11 Chy. 435.

An injunction may be granted in a proper case, though the bill is defective in respect of parties and form. *Dumble* v. *The Peterborough and Lake Chemung Railway Co.*, 12 Chy. 74.

Where a motion for injunction stood over, and before it was again brought on, the plaintiff amended his bill by adding parties necessary to the suit, for the purpose of obtaining the relief sought thereby, and in the absence of whom such relief would not have been granted, and again brought on the motion without giving a fresh notice, the court refused to hear the motion on this objection being taken. *Westacott* v. *Cockerline*, 13 Chy. 159.

Where after serving a notice of motion for injunction, and before the motion is made, the plaintiff amends his bill, such amendment is an answer to the motion. *McDonell* v. *Street*, 13 Chy. 168.

The plaintiff filed his bill against M. and B. claiming to be entitled to certain mortgage moneys as against B. which were payable by M. The only contest being between the plaintiff and B., an injunction was prayed to restrain M. from paying, and B. from receiving them, and M. was made a party solely for this purpose:—Held, that M. was a proper party to the suit, and a demurrer by him for multifariousness and want of equity was overruled. *McKenzie* v. *Brown*, 15 Chy. 399.

Semble, a bill properly dismissed for want of prosecution will only be restored under strong and special circumstances. Where an injunction bill had been dismissed, which had been filed to restrain proceedings at law, and judgment at law had been confessed in obtaining the injunction, and afterwards, on the dismissal of the bill, money paid under the pressure of the judgment which it was now alleged was in excess of any due, a motion to restore the bill and take accounts between the parties was refused. *Hodgson* v. *Pazton*, 2 Chy. Chamb. 398.—Taylor, *Secretary*.

Where an injunction is granted to a particular day, which is not a motion day, and the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omit to mention that such notice is given by leave of the court. *Johnson* v. *Cass*, 11 Chy. 117.

An injunction may be granted against a plaintiff at the instance of defendant, before decree. *Stewart* v. *Kingsmill*, 13 Chy. 347.

Where an ex parte injunction is granted before the bill is served, an office copy of the bill should be served with the injunction, or as soon as possible afterwards. *Heron* v. *Swisher*, 13 Chy. 438.

If an injunction may be granted to a defendant before the hearing, (as to which quære,) the answer must pray therefor specifically. *Brandon* v. *Elliott*, 14 Chy. 109.

Where a bill was filed to restrain one of the chartered banks of the province from purchasing from the water commissioners of the city of Toronto $900,000 of debentures issued by the city:—Held, that the water commissioners were necessary parties to the suit. *Jones* v. *Imperial Bank of Canada*, 23 Chy. 262.

Several proprietors of salt wells entered into an undertaking to sell their products through trustees, and in no other way; and a written agreement to this effect was executed by all the parties, except one, who was resident in England, and carried on his business here through an agent. The business was carried on under the agreement, notwithstanding his non-execution of the deed, and one of the other parties having subsequently attempted to act in contravention of the agreement, it was Held, that the delay of the absent party to sign the contract could not be set up as answer to a motion for an injunction restraining the contravention. *The Ontario Salt Co.* v. *The Merchants Salt Co.*, 18 Chy. 551.

In 1873 an injunction was granted restraining the Toronto Street Railway Company, on the ground of nuisance, from using their railway, unless by a day named the defendants should put the same in a good and sufficient state of repair, to the satisfaction of an engineer named, who on the day appointed reported the railway in such a state of repair as the decree in the cause required. Two years afterwards the said railway, as also other lines laid in the meantime by the same company, had, as was alleged, been allowed to go into such a state of disrepair as to become again a nuisance to the public, whereupon a petition was filed by the relators, alleging these facts, and claiming the benefit of the decree:—Held, that as the decree had already been complied with, a new information must be filed to obtain the relief now asked. *Attorney-General* v. *Keily*, 22 Chy. 458.

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12. *Breach of Injunction and Commitment therefor.*

Where an injunction forbids cutting down trees, it is no answer to a motion to commit, that the trees cut down in contravention of the writ were of little value. *Brown* v. *Sage*, 12 Chy. 25.

An injunction was issued restraining defendant from removing logs from a specified lot of land: before this he had removed logs from the lot to the adjoining road allowance, and after being served with the injunction, he took these away to his mill. The court refused to commit him for breach of the injunction. *Ball* v. *Sherlock*, 16 Chy. 658.

Injunctions must be obeyed according to the spirit as well as letter. *Bickford* v. *The Welland R. W. Co.*, 17 Chy. 484.

Where defendants were enjoined against removing from their premises certain iron rails claimed by the plaintiff, and they allowed another claimant to take them away without objection or obstruction on their part, and to remove them to the United States:—Held, that they committed a breach of the injunction. *Ib.*

Defendant and his agents, &c., were restrained by injunction "from preventing the plaintiff, his

counsel, &c., from having, and from in any way interfering with their having free access at all times to the books and papers of the co-partnership, and from removing such books from the usual place of business of said co-partnership, and from retaining or keeping any of said books, &c., in any other place. Upon the plaintiff, who had been a partner of defendant, applying to the brother and clerk of defendant for access to the books, and which had usually been kept locked up in a desk in the place of business of the co-partnership, where such application was made, such clerk answered to the effect, either that he had "instructions not to suffer," or that he had "not instructions to suffer" the plaintiff to see the books, when at the same time he was aware that the books and papers had been removed from their accustomed place to defendant's private residence by defendant, assisted by his said clerk, and subsequently removed by defendant to Toronto:—Held, that the clerk was guilty of a contempt of this court, and he was ordered to pay the costs of the motion to commit. *Prentiss* v. *Brennan*, 1 Chy. 428, 497.

Quære, whether a party whose committal had been ordered for breach of an injunction, and against whom a sequestration has been granted for the same contempt, can move against the writ before clearing his contempt. *Ib.*

The court refused to commit for breach of an injunction, where defendant made an affidavit of compliance with the writ, even though the affidavit was contradictory to a statement previously made by him; but defendant was ordered to pay the costs of the motion, as his conduct had caused it. *Campbell* v. *Gorham*, 2 Chy. 403.

In 1845, the plaintiff obtained an injunction restraining defendant from continuing any dam whereby the natural flow of the river, on which they both had mills, should be interfered with, to the injury of plaintiff's rights. To this bill no answer was ever filed, but a motion to dissolve the injunction was made and refused; and in the same year the plaintiff recovered a verdict against defendant at law, in respect of the same matters. An arrangement was then made between them that the dam should remain, and that each party should have the exclusive use of the water for a certain portion of every day, and this was acted upon for nearly seven years. Defendant then began to make a limited use of the water all day, and contended that owing to improvements in the machinery of his mill, this would not interfere with plaintiff's rights. The plaintiff denied this, and moved to commit for contempt:—Held, that the delay was no answer to the motion: that the defendant having abandoned the agreement, the plaintiff had a right to fall back on his injunction: that on this application the propriety of granting the injunction originally was not a proper subject of consideration; and the court being of opinion that the continuance of defendant's dam was a breach of the injunction, ordered defendant to stand committed in two weeks, unless in the meantime he obeyed the injunction. *Gamble* v. *Howland*, 3 Chy. 281.

Defendant appealed from an order directing his committal for breach of an injunction, and moved the court to stay proceedings under the order pending the appeal, which was refused. *Ib.*

On a motion to commit for breach of an injunction, the affidavits need not state that the writ was under the seal of the court. *Farwell* v. *Wallbridge*, 3 Chy. 628.

Where, after a breach of an injunction, defendant left the jurisdiction, substitutional service of the notice of motion to commit was ordered to be made on his solicitor. *Ib.*

On application for an attachment against defendant for disobeying an injunction in an action of detinue:—Held, that no order could be made without previous notice. *Melling* v. *Ellis*, 7 L. J. 18.—C. L. Chamb.—Hagarty.

Where the injunction operates strictly by way of restraint, the proper course is to move that defendant be committed for breach of the injunction, unless he shew cause at a future day to the contrary; and in the latter case the motion must be made on personal service of a notice of motion on defendant. *Ib.*

Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the court will commit for contempt. *Andrews* v. *Manson*, 8 L. J. 74.—Chy.

A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ. And after leaving his master's service he continues bound by an injunction issued while he was a servant against the master and his servants to restrain waste. *Brown* v. *Sage*, 12 Chy. 25.

A defendant is bound to obey an injunction of which he is made aware, before being served with it; but the plaintiff must not be guilty of delay in effecting formal service, as the rule for dispensing with such service applies only until the plaintiff has time to make the service. Where a breach of an injunction was sworn to by a single deponent, and was denied by defendant, and there was no corroborative evidence, the court refused to commit. *Stewart* v. *Richardson*, 17 Chy. 150.

After service of an injunction the plaintiff amended his bill, and added a new defendant, who was a mere trustee for the plaintiff, without, however, altering the frame of the bill, or the prayer. Afterwards defendants committed a breach of the injunction, and the plaintiff moved to commit them:—Held, that the amendment was not a waiver of the injunction. *McDonell* v. *McKay*, 12 Chy. 414.

An injunction while it stands should be obeyed; and where, after twelve weeks had elapsed from service of it, without the bill being served, defendant treated the injunction as gone, the court, while refusing a motion to commit for breach of it, refused defendant his costs of resisting the application. *Heron* v. *Swisher*.

A party disobeying [illegible] was refused his costs of resisting [illegible] commit for contempt, although at [illegible] time the injunction was dissolved upon [illegible] application, as granted improperly. A defendant served with a writ must obey it as long as it exists. *Notter* v. *Smith*, 1 Chy. Chamb. 21.—Spragge.

The defendant, in a suit on the equity side of the County Court, had, before being served with an injunction restraining the removal of a building, removed the same by direction of the city inspector as being a nuisance, having been erected partly on the public street. Notwithstand-

ing this, an order was made by the judge of the County Court for the committal of the defendant, who, without moving to dissolve the injunction on the facts, appealed to this court. In allowing the appeal, and directing defendant's discharge, the court did not give him the costs of the application. *Murphy* v. *Morrison*, 14 Chy. 203.

On the same day that an injunction restraining the felling of timber had been served, the plaintiff and the principal defendant in the cause entered into a written agreement, by which the latter agreed to give up possession of the premises on a particular day, and to refrain from cutting or removing any timber cut in the meantime; and the plaintiff thereby agreed "that I, the said T. M., do hereby, upon the above conditions being complied with, withdraw all suits now pending," &c. Defendant still continued to cut down and remove the timber, and a motion was made to commit him for breach of the injunction:—Held, that the suit was still pending, the acts agreed to be done by the defendant, being a condition precedent to the withdrawal of the suit. *Mulholland* v. *Downes*, 14 Chy. 106.

13. *Interlocutory Injunction.*

The office of an interlocutory injunction is simply to retain matters in statu quo. Where, therefore, the railway track of the Niagara Falls Suspension Bridge had been declared to be a public highway, and that an agreement that the same should be used by one railway exclusively was ultra vires the charter of the bridge company, the E. & N. R. W. company moved to restrain the G. W. R. W. company, with whom such illegal agreement had been made, from preventing the E. & N. F. R. W. company from crossing the lands of the G. W. R. W. company in order to obtain access to the bridge; and it was shewn that the latter company were not actively interfering to prevent the approach being obtained, but were simply passive, the court, on interlocutory motion, refused the injunction, although of opinion that, at the hearing, the relief should be granted. *The Erie & Niagara Railway Company* v. *The Great Western Railway Company*, 21 Chy. 171.

INNKEEPER.

I. Rights and Liabilities of.

1. *Guests*, 1789.
2. *Lien of*, 1790.
3. *Other Cases*, 1791.
4. *Under the Temperance Act, 1864*—*See* Temperance Act.

II. Disqualification as Members of Municipal Councils—*See* Municipal Corporations.

III. Regulation of Taverns and Shops—*See* Taverns and Shops.

I. Rights and Liabilities of.

1. *Guests.*

Where a traveller is shewn to have come to an inn as a guest, and to have stayed there six weeks, paying for his board by the week, two days in advance:—Held, that if dismissed abruptly without cause, he has a right of action against the landlord on the common law relation of innkeeper and guest. To put an end to this relation, the traveller must be shewn to have rented a certain apartment in the inn as tenant for a certain term. *Whiting* v. *Mills*, 7 Q. B. 450.

Where the declaration avers that defendant came as a guest and was so received, the intendment after verdict will be that the relation thus begun continued until it was interrupted by the wrongful act of defendant. *Ib.*

An innkeeper has the sole right to select the apartment for a guest, and if he find it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change. *Doyle* v. *Walker*, 26 Q. B. 502.

A guest who has been received loses the right to be entertained if he neglect or refuse to pay upon reasonable demand. *Ib.*

The plaintiff arrived in Toronto from Ireland, and drove from the railroad station to the defendant's hotel, having a portmanteau, carpet bag, &c., with him. He asked for a room, saying he wanted only to change his dress before going to a friend, had his things taken to it, and after occupying it for an hour went to his friend, with whom he remained. He was furnished with a key for the door but did not use it. Next morning he returned to get his things, but the portmanteau could not be found. The plaintiff said he intended to return that night, but he said nothing of his intention to defendant:—Held, that the plaintiff was not there as a guest after he had dressed and left the inn; and that defendant therefore was not liable as an innkeeper, the portmanteau having been lost after the plaintiff left. Quære, if defendant had been so liable, whether the plaintiff was not guilty of contributory negligence. *Lynar* v. *Mossop*, 36 Q. B. 230.

2. *Lien of.*

The plaintiffs owning a line of stages, entered into a special agreement with defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and defendant refused to let the plaintiffs remove the horses. The plaintiffs then brought trover:—Held, that defendant had no right of lien, as the plaintiffs employed defendant as a livery-stable keeper, and under a special agreement which gave him no continuing right of possession. Held, also, that a conversion was sufficiently proved. *Dixon et al.* v. *Dalby*, 11 Q. B. 79.

Defendant kept an inn and livery-stable. F., the plaintiff's hired man, boarded there for some months, and kept there the plaintiff's horses, with which he went out to work every morning on a gravel road, returning at night. Defendant charged a fixed sum per week for F.'s board and the horses' keep:—Held, that defendant had no lien on the horses for their keep; for neither the plaintiff nor F. was a guest, within the common law meaning of that term; F. did not live in the inn, and there was no continuing possession or right to it. *Neale* v. *Crocker*, 8 C. P. 224.

In sci. fa., upon a bond to the crown, it appeared that A., the obliger, had lived at an hotel with his family for some time, using his

own furniture, and that when the landlord objected to the removal of the furniture until payment of his bill, he had consented that a large portion of it should remain as security:—Held, that although the landlord could have no lien as an inn-keeper, A. being in his house as boarder upon a special understanding, yet that he was clearly entitled to it by the agreement with A., and that A.'s administrator was justified, therefore, in paying him as against the crown. *Regina* v. *Askin*, 20 Q. B. 626.

One W. left his horses at plaintiff's inn, agreeing that he should retain them as security for their keep. He was a teamster, not living at the plaintiff's, and it appeared that he and the plaintiff both used the horses as they wished. W. had had them away for three days, and had brought them back into plaintiff's yard, when they were seized under a division court execution against W. In an action brought by the plaintiff for this seizure, the jury having found for the plaintiff, and the question whether the goods had before the seizure been actually returned into the plaintiff's possession not having been submitted to them:—Held, that it could not be assumed that they had found this to have been the case, and a new trial was granted without costs. *Crabtree* v. *Griffith*, 22 Q. B. 573.

3. *Other Cases.*

The plaintiff lent or hired his horse to S., who while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall:—Held, that the plaintiff might maintain an action therefor. *Walker* v. *Sharpe*, 31 Q. B. 340.

An inn-keeper is not a trader within the meaning of the Insolvent Act of 1869. *Harman* v. *Clarkson*, 22 C. P. 291.

INNUENDO.

See DEFAMATION.

INQUEST.

See CORONER—FIRE.

INQUISITION.

I. OF COMMISSIONERS OF FORFEITED ESTATES, 1791.

II. CORONERS—*See* CORONER.

III. FORCIBLE ENTRY—*See* CRIMINAL LAW.

IV. UPON EXTENTS—*See* EXTENT.

V. OVERHOLDING TENANTS—*See* LANDLORD AND TENANT.

VI. OF LUNACY—*See* LUNATIC.

I. OF COMMISSIONERS OF FORFEITED ESTATES.

Where an inquisition had been found against defendant under the 54 Geo. III. c. 9, the court refused to set the same aside, on the ground that the lands vested in the crown by it had been granted by the Mohawk Indians to defendant for 999 years, in trust, for the support of his wife (a Mohawk woman) and three children. *Rex* v. *Phelps*, Tay. 47.

See, also, the cases under "ATTAINDER."

INSANITY.

See LUNATIC.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

I. OF DOCUMENTS—*See* EVIDENCE.

II. OF FLOUR—*See* FLOUR.

III. OF HIDES AND LEATHER—*See* LEATHER.

IV. OF PORK—*See* PORK INSPECTOR.

V. OF SCHOOLS—*See* PUBLIC SCHOOLS.

INSURANCE.

I. FIRE INSURANCE.

1. *Insurance Companies.*
   (a) *Generally*, 1793.
   (b) *Authority and Duty of Agents*, 1794.
   (c) *Foreign Insurance Companies*—See CORPORATIONS.
2. *Interim Receipts.—Liability before Issue of Policy*, 1795.
3. *Risks Insured*, 1799.
4. *Interest of Insured.*
   (a) *Real Property*, 1799.
   (b) *Personal Property*, 1801.
5. *Conditions, Representations, Concealment, Warranty.*
   (a) *Generally*, 1804.
   (b) *Description of Property or Premises*, 1805.
   (c) *Statement as to Value*, 1810.
   (d) *Statement as to Title and Incumbrances*, 1812.
   (e) *Assignment, Alienation, or Incumbrance, of the Subject Insured, of the Policy*, 1819.
   (f) *Prior and Subsequent Insurance*, 1824.
   (g) *Alteration of Premises, Increase of Risk, Change of Occupation*, 18
   (h) *Other Conditions*, 1838.
6. *Notice, Account, and Proof of Loss*, 18
7. *Waiver of Conditions.*
   (a) *As to Notice and Proof of Loss*, 18
   (b) *As to Time within which to Sue*, 18
   (c) *As to other Insurance*, 1851.
   (d) *Other Conditions*, 1852.

8. *Actions on Policies.*
(a) *Limitation of Time*, 1856.
(b) *Parties to Sue*, 1857.
(c) *Reference to Arbitration*, 1858.
(d) *Pleading and Evidence*, 1858.
(e) *Defence of Arson*, 1861.
(f) *Right to Recover back Premiums*, 1862.
(g) *Amount Recoverable*, 1862.
9. *Right to and Application of Insurance Moneys*, 1863.
10. *Insurance by or for Mortgagee—Right of Subrogation*, 1864.
11. *Mutual Insurance Companies.*
(a) *Premium Notes and Assessments*, 1865.
(b) *Other Cases*, 1866.
12. *Miscellaneous Cases*, 1868.
13. *Rights of Mortgagee to Insurance Money —See* MORTGAGE.

II. LIFE ASSURANCE, 1871.

III. MARINE INSURANCE.

1. *Loss before Issue of Policy*, 1873.
2. *Representations*, 1873.
3. *Seaworthiness*, 1874.
4. *Care and Skill in Navigation*, 1875.
5. *Abandonment and Loss*, 1877.
6. *Trading*, 1881.
7. *Miscellaneous Cases*, 1883.

IV. RIGHTS OF PRINCIPAL AGAINST AGENT FOR NOT INSURING — *See* PRINCIPAL AND AGENT.

I. FIRE INSURANCE.

1. *Insurance Companies.*

(a) *Generally.*

[*See 38 Vict. c. 20, D. ; 39 Vict. c. 23, O.*]

Held, that the act abolishing districts (12 Vict. c. 78,) did not take away from defendants the name given to them by their charter. *Hughes* v. *Mutual Fire Ins. Co. of the District of Newcastle*, 9 Q. B. 387.

Remarks upon the impropriety of insurance companies setting up defences of the kind indicated, instead of any bonâ fide reason that may exist for resisting claims made against them. *Brady* v. *Western Ins. Co.* (*Limited*), 17 C. P. 597. See also, *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

An insurance company was, by its charter, authorized to hold real estate for the immediate accommodation of the company, "or such as shall have been bonâ fide mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales upon judgments which shall have been obtained for such debts;" and having sold and conveyed a vessel, took from their vendee mortgages on real estate for securing the purchase money :—Held, a transaction within the charter, the price of the vessel being a debt existing previously to the execution of the mortgage ; and, Semble, that under these words it was not, as with banks, necessary to the validity of such a mortgage that any previous indebtedness should exist. *Western Ass. Co.* v. *Taylor*, 9 Chy. 471.

It is irregular to file a petition before it is heard. The proper proceeding, in order to bring it before the court, is to serve a copy with a notice of a day for hearing endorsed ; and this practice is applicable to petitions under the Insurance Companies' Act, 31 Vict. c. 48., D. *Re Western Ins. Co.*, 6 P. R. 86.—Chy. Chamb.—Holmested, *Referee*.

The deposit required to be made by foreign fire insurance companies is intended for the security of Canadian policy holders ; and on the insolvency of any such company, the general creditors of the company are not entitled to share the deposit with the policy holders. *In re Ætna Ins. Co. of Dublin*, 17 Chy. 160.

In case of a deficiency of assets, the costs of creditors in proving claims are to be added to the debts and paid proportionately, and are not entitled to be paid in priority to the debts. *Ib.*

See *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 267, p. 1884.

(b) *Authority and Duty of Agent.*

Authority to accept note for premium. See *Johnson* v. *Provincial Ins. Co.*, 26 C. P. 113, p. 1796 ; *Walker* v. *Provincial Ins. Co.*, 5 L. J. 162, p. 1797.

To bind by interim receipts. See *Penley* v. *Beacon Ass. Co.*, 7 Chy. 130, p. 1797 ; *Henry* v. *Agricultural Mutual Ass. Co.*, 11 Chy. 125, p. 1797 ; *Patterson* v. *Royal Ins. Co.*, 14 Chy. 169, p. 1798 ; *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Chy. 139, p. 1798.

To receive notice of other insurance. See *Hendrickson* v. *Queen Ins. Co.*, 31 Q. B. 547, p. 1829 ; *Billington* v. *Canadian Mutual Fire Ins. Co.*,—Q. B.—T. T. 1876, p. 1831.

To assent to assignments. See *Hendrickson* v. *Queen Ins. Co.*, 31 Q. B. 547, p. 1822.

To demand proof of loss. See *Faucett* v. *Liverpool, London, and Globe Ins. Co.*, 27 Q. B. 225, p. 1845.

To waive conditions. See *Lampkin* v. *Western Ass. Co.*, 13 Q. B. 237, p. 1850 ; *Johnstone* v. *Niagara District Mutual Ins. Co.*, 13 C. P. 331, p. 1853 ; *Scott* v. *Niagara District Mutual Ins. Co.*, 25 Q. B. 119, p. 1848 ; *Kreutz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131, p. 1853 ; *Brady* v. *Western Ins. Co.*, (*limited*), 17 C. P. 597, p. 1850 ; *Lyndsay* v. *Niagara District Mutual Fire Ins. Co.*, 28 Q. B. 326, p. 1854 ; *Crawford* v. *Western Ass. Co.*, 23 C. P. 365, p. 1854 ; *Mason* v. *Hartford Fire Ins. Co.*, 37 Q. B. 437, p. 1852.

Effect of agent's signing receipt without actually receiving the money. See *Walker* v. *Provincial Ins. Co.*, 8 Chy. 217, p. 1873.

Effect of agent's knowledge of the nature of plaintiff's business. See *Davis* v. *Scottish Provincial Ins. Co.*, 16 C. P. 176, p. 1806 ; *Crawford* v. *Western Ass. Co.*, 23 C. P. 365, p. 1854.

Effect of agent's knowledge and inspection of the property insured, where it has been erroneously described or valued in the application. See *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 25 C. P. 470, p. 1808; *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 37 Q. B. 380, p. 1809; *Redford* v. *Mutual Fire Ins. Co. of Clinton.*—Q. B.—5th April, 1876, p. 1812; *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380, p. 1808.

Effect of agent's knowledge of the state of plaintiffs' title, where it has not been truly represented. See *Hopkins* v. *Provincial Ins. Co.*, 18 C. P. 74, p. 1815; *Ashford* v. *Victoria Mutual Ass. Co.*, 20 C. P. 434, p. 1815: *Laidlaw* v. *Liverpool and London Ins. Co.*, 13 Chy. 377, p. 1817.

Effect of agent's knowledge of other insurances. See *Jacobs* v. *Equitable Ins. Co.*, 17 Q. B. 35, p. 1827.

Duty of agent to call attention to previous insurance. See *Tucker* v. *Provincial Ins. Co.*, 7 Chy. 122, p. 1797.

Authority of general agent here of foreign company. See *Campbell* v. *National Life Ins. Co.*, 24 C. P. 133, p. 1872.

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2. *Interim Receipts—Liability before Issue of Policy.*

Under section 10 of 6 Will. IV. c. 18, a policy signed by the secretary, but not by the president, is invalid. The company could be compelled, however, upon the defect being noticed, to execute a valid policy of the proper date; and their by-law would estop them from objecting that the policy was not in fact executed before the loss. *Perry et al.* v. *Newcastle District Mutual Fire Ins. Co.*, 8 Q. B. 363.

The declaration stated that defendants, in consideration of £28 paid to them as the premium of insurance of £1500 on certain property described in the plaintiff's application, promised to insure him against loss by fire to £1500 until notified to the contrary, subject to the conditions of the policy—that is, the policy usually issued by defendants in like cases; that the property was destroyed by fire, and although the plaintiff had done all things necessary on his part, yet defendants had not paid him the sum insured:—Held bad, the action for non-payment of the money not being maintainable without a policy under defendants' corporate seal. *Jones* v. *Provincial Ins. Co.*, 16 Q. B. 477.

A receipt in the following form:—"The Times and Beacon Assurance Company Agents' Office, Brantford, 3rd February, 1858. Received from, &c., the sum of $14, being the premium for an insurance to the amount of $2,000 on property described in the order of this date, subject to the approval of the board at Kingston, the said party to be considered insured for twenty-one days from the above date, within which time the determination of the board will be notified. If approved a policy will be delivered, otherwise the amount received will be refunded, less the premium for the time so insured:—Held, not an absolute insurance for twenty-one days certain, but that the company might within that period reject the risk, and give notice, after which their liability would cease: Burns, J., diss. *Goodfellow* v. *Times and Beacon Ass. Co.*, 17 Q. B. 411.

For the premium payable on an interim insurance on a stock of goods instead of a cash payment, the agent received the note of the insured, payable on the 1st of the next month. It was proved that the agent was authorized to receive notes for farm risks, for which the company had a printed form, and the note in question was filled in on one of these forms. There was nothing to shew that the agent was limited only to accept cash premiums in these cases, and that in accepting the note he had violated any express instructions, or exceeded the limits of his authority. He said his taking the note was a matter of business between the plaintiff and himself, and that he had no instructions from the company further than that they expected all premiums to be remitted on the 1st of each month. A nonsuit, therefore, which had been entered on the ground that the premium had not been paid in cash, was set aside, and a new trial granted. *Johnson* v. *Provincial Ins. Co.*, 26 C. P. 113.

A declaration on an interim receipt for a policy of insurance set out the receipt, signed merely by the agent of the company, acknowledging the payment of $6.50 as the premium on an insurance of $600 on certain property for thirty-six months, subject to the approval of the head office, and unless previously cancelled to bind the company for thirty days, after which it was to be cancelled and of no effect, and on such termination the insured was on demand to recover back the premium paid, less the proportion for the time insured; the insurance also to be subject to all the terms and conditions of the company's policy. It was then averred that the receipt operated in law and in equity as a valid insurance to the extent of $600, and, unless in the meantime cancelled, for the space of thirty days, and that while the insurance was in full force the said property was destroyed by fire: that the defendants did not at any time, before the fire or since, deliver to plaintiff a policy, or refund to him the premium or any part thereof, or notify him of the determination of the board, or pay him the insurance money:—Held, that although under sec. 2 of the Administration of Justice Act, 1873, an action at law is maintainable on an interim receipt, being purely a money demand within the meaning of that section, that the declaration was bad, as shewing no contract or facts from which a contract might be inferred binding upon this particular corporation, for under their act of incorporation they can only contract under seal. Held, also, that the declaration contained a sufficient averment of performance of conditions precedent, for the stipulation as to the approval of the head office did not constitute a condition precedent to the insurance taking effect, but merely enabled the company to cancel the insurance so effected, and there was a sufficient averment that the plaintiff had no notice of any such cancellation; and the conditions of the policy referred to could not be assumed to be conditions precedent. *Kelly* v. *Isolated Risk and Farmer's Fire Ins. Co.*, 26 C. P. 299.

A person made a proposal for insurance, but did not pay the amount of the premium, on the ground that the agent of the company agreed to take his note for the amount. The loss occurred a few days afterwards, and a bill was filed to

force the contract:—Held, that there was no contract, and that the agent was not authorized to bind the company as alleged. *Walker* v. *The Provincial Ins. Co.* 5 L. J. 162.—Chy.

The agent of an insurance company effected an insurance upon wheat in the name of himself and partner for £3000, there being already an insurance with the company on the mill in which it was stored of £750; the rule of the company being, that not more than £3,000 should be taken on any one building and its contents. The usual proposal was transmitted by the agent to the head office on the 23rd, and on the 27th the premises and wheat were burned, no action in the meantime having been taken by the company upon the proposal. Such agent, in making the proposal, had refrained from drawing the attention of the company to the previous insurance on the building; and the then secretary of the company swore that had he been aware of it, the second application would have been immediately rejected. After the loss the company paid the £750 (insured on the building), £2,250 (on the wheat), together making the sum of £3000 allowed by the rules to be on one building and its contents. A bill filed by the agent and his partner to compel payment of the additional £750 was dismissed with costs. *Tucker* v. *Provincial Ins. Co.*, 7 Chy. 122.

A person obtained from the agent of an insurance company the usual interim receipt. After the expiration of the time specified in it, but before any policy was completed, the property was destroyed by fire, after which the company refused to pay or to issue any policy; asserting that they had not approved of or accepted the risk. The evidence of the agent shewed that the risk had been accepted, and that he had so stated to the assured. The court, under the circumstances, directed an enquiry as to the amount of loss sustained by him, and that the company should pay it. *Penley* v. *Beacon Ass. Co.* 7 Chy. 30; 5 L. J. 213.

Quere, whether the court could, under such circumstances, compel the company to issue a policy. *Ib.*

An agent employed to receive applications, received from the plaintiff the usual premium, and gave to him a receipt therefor, "subject to approval by the Board of Directors, money and note to be returned in case application is rejected." It was alleged that this was verbally understood between the agent and the assured to be a final agreement for the policy and an acceptance of the risk. The directors having refused to effect the proposed insurance, and returned the premium note given to the agent:—Held, not liable to make good a loss. *Henry* v. *The Agricultural Mutual Ass. Co.*, 11 Chy. 125.

Held, also, that the agent's authority did not extend to the making of final agreements for insurance, or to the insuring temporarily of property, not of the classes specified in printed circulars of the company, or such as they were accustomed to insure. *Ib.*

A applied to an agent of the Royal Insurance Company to effect an insurance, and paid the premium. The agent gave the usual receipt, following a form supplied by the company, and which declared that a policy would be issued by the company in sixty days if approved of by the manager at Toronto; that otherwise the receipt would be cancelled and the amount of unearned premium refunded; and that the receipt would be void should camphene oil be used on the premises. The agent did not report the transaction to the company, and after the expiration of sixty days a fire occurred:—Held, 1, That this receipt contained a valid contract for *interim* insurance. 2. That the company, and not the insured, should sustain any damage occasioned by the agent's neglect, and that the company was liable for the loss by the fire. *Patterson* v. *Royal Ins. Co.*, 14 Chy. 169.

Where the clerk of an insurance company left a receipt for a renewal premium duly signed at the office of a policy holder, who desired to renew the insurance, the messenger declining to receive the money from the person in charge; and it appeared that the company had in hand money belonging to the insured: that the receipt was never demanded back, and that the insured relied on the renewal as having been effected:—Held, that after a loss it was too late for the company to set up that the premium had not been paid, even though their clerk might not have been authorized by his instructions to leave the receipt.—[Spragge, C., dubitante.] *Staunton* v. *Western Ass. Co.*, 21 Chy. 578.

This decree was affirmed on appeal, the court being of opinion that the evidence warranted the decree which had been made, and shewed that the effect of all that had passed between the parties was to establish the payment of the amount of the renewal premium. *S.C.*, 23 Chy. 81.

The plaintiff applied to the agent of the defendants to effect an insurance on certain buildings. The agent accepted the risk, and gave to the plaintiff the usual interim receipt, which stated "the said party and property to be considered insured until otherwise notified, either by notice mailed from the head office, or by me, to the insurer's address within one month from the date hereof, when, if declined, this receipt shall become void and be surrendered. N.B.—Should applicant not receive a policy in conformity with his application within twenty days from the date hereof, he must communicate with the secretary direct, as after one month from this date the receipt becomes void." The agent omitted to transmit the application to the company, and the plaintiff, not having been notified, applied personally to the agent, who stated such an occurrance was not unfrequent, and by way of satisfying the plaintiff granted a fresh interim receipt, repeating this on four several occasions:—Held (1), that such renewed interim receipts were valueless, there being, in fact, no new insurance effected; (2) that the neglect of the agent to do his duty by forwarding the application to the company, could not operate to the prejudice of the plaintiff; and (3) that the mere lapse of a month without any notice to the assured did not render the receipt void; but the stipulation gave the company a month during which to consider the application, and enabled them to terminate the risk within that period: but in such a case, if the company does not intimate an intention of terminating the risk, then there is a contract for insurance for the year binding on the company, on the same terms and conditions as the ordinary policies of the company. Patterson v. Royal Ins. Co., 14 Chy. 169, followed. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Chy. 139.

By a by-law (No. 16) of the company, it was declared that alienation by mortgage or otherwise, or any change in title or ownership of property insured, would vitiate the policy unless notice were given, and the consent of the board obtained and endorsed on the policy, and signed by the president and secretary. Held, that the word *policy* here meant *insurance* or some equivalent, and that the plaintiff, holding such interim receipt, was not exonerated from giving the notice required, as the consent might be endorsed on the receipt. *Ib.*

Where it appeared that the interim receipt was intended to cover and did cover goods not included in the policy subsequently issued :—Held, that the right of action on the receipt remained, and that the insured was entitled to recover for all his goods. *Wyld* v. *Liverpool, &c., Ins. Co.*, 23 Chy. 442, in appeal.

See *Hatton* v. *Beacon Ins. Co.*, 16 Q. B. 316, p. 1825; *Hickey* v. *Anchor Ass. Co.*, 18 Q. B. 433, p. 1850; *Fourdrinier* v. *Hartford Fire Ins. Co.*, 15 C. P. 403, p. 1836; *Bruce* v. *The Gore District Mutual Ins. Co.*, 20 C. P. 207, p, 1826; *Mason* v. *Andes Ins. Co.*, 23 C. P. 37, p, 1826; *Rowe* v. *London and Lancashire Fire Ins. Co.* 12 Chy. 311, p. 1805.

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3. *Risks Insured.*

Where in a policy losses by fire arising from riot or civil commotion were excepted, and in an action on the policy, the declaration negatived only that the loss arose from civil commotion :—Held, declaration bad, on general demurrer, as the terms riot and civil commotion were not synonymous. *Coudlin* v. *Home District Mutual Fire Insurance Co.*, H. T. 6 Vict.

Semble, that in the form adopted in ordinary policies, injuries to goods by wet, or in any manner from the exposure during the confusion of the fire before they can be got to a place of safety, and goods lost or stolen in such confusion, and the destruction, injury or loss, of which the fire can be said to be the proximate cause, are within the policy; but, in suing for such loss, the plaintiff must describe the occasion and manner of it. *Thomson* v. *Montreal Insurance Co.*, 6 Q. B. 319.

Paper bags for flour not filled burned in a mill, were, Held not to be covered by a policy upon the flour. *Hutchison* v. *Niagara District Mutual Fire Ins. Co.*—Q. B.—T. T., 1876. Not yet reported.

See *Billington* v. *Canadian Mutual Fire Ins. Co.*—Q. B.—T. T. 1876, p. 1831.

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4. *Interest of Insured.*

(a) *Real Property.*

Where the plaintiff had contracted to purchase the property insured, and had failed in paying punctually, but was proceeding in equity to compel performance by the vendor :—Held, that he had an insurable interest. *Milligan* v. *Equitable Insurance Co.*, 16 Q. B. 314.

An agreement by which a third party, having no interest in the freehold, was to carry on the saw-mill insured, in partnership with the plaintiff, and to share in the profit and loss :—Held, not to prevent the plaintiff recovering for the whole loss sustained. *Rice* v. *Provincial Insurance Co.*, 7 C. P. 548.

The plaintiff averred that at the time of effecting the policy, he was interested in the property insured : that his interest was before the loss assigned by him to one B., which assignment was accepted by defendants ; and that until the loss B. continued interested, and the plaintiff as trustee for him. Defendants did not demur, but pleaded, 1. That at the time of the loss the plaintiff had no interest ; and. 2. That before the fire he assigned the policy to B. without having the transfer endorsed, and without defendants' consent. It appeared that the statement in the declaration was true : that is, that the plaintiff had assigned his interest to B., which assignment was approved by defendants :—Held, that the plaintiff was entitled to succeed on the issue. *Park* v. *Phœnix Ins. Co.*, 19 Q. B. 110.

The plaintiffs, M. & H., while in partnership had purchased the land, on which they afterwards built the mill in question, which was burned, from one A., who held their bond for the balance of purchase money. Before the fire they dissolved partnership by a deed, in which it was agreed that M. should wind up the business, and should hold "the mill property" for his own use, but no regular conveyance of it had been executed. Held, that H. had sufficient interest to enable him to join in suing on the policy. *Mann et al.* v. *The Western Ass. Co.*, 19 Q. B. 314.

Declaration on a policy effected by plaintiff on a house with defendants, alleging that he sued on behalf of and as trustee for one D., to whom he had mortgaged the premises and assigned the policy. Demurrer, because the plaintiff shewed interest in the premises, and having none, cannot sue as trustee for another :—Held, that the objections were clearly untenable. *Richards* v. *The Liverpool and London Fire and Life Ins. Co.*, 25 Q. B. 400.

Plaintiff insured with defendants a house in his possession, which he had purchased, with the land on which it stood, as part of lot 5, but which was afterwards found to be upon the adjoining lot, B., having been built there in consequence of an unskilful survey. The house having been burned, it was objected that, having no title to the land, he had no insurable interest but—Held, otherwise, for under C. S. U. C. c. 54, s 53, he had a right either to the value of the improvements or to purchase at the value of the land. *Stevenson* v. *The London and Lancashire Fire Ass. Co.*, 26 Q. B. 148.

Quære, whether a company with whom the actual owner of a house, without fraud or wilful misrepresentation, insures it, can set up the legal title of a stranger to the land on which it stands, as a defence against the claim of the assured. *Ib.*

Declaration on a policy on plaintiff's interest in a mill. Plea, that before the loss the plaintiff had sold and conveyed his interest to one B. without notice to defendants or their agents. Replication, on equitable grounds, that the conveyance to B. was only to secure him against loss as surety for the plaintiff, who always continued in possession, and no loss had accrued to B. ; that one F. was entitled to the benefit of the plaintiff's covenant to insure, contained

mortgage of the property made to him by the plaintiff before the conveyance to B., and this action is brought on F.'s behalf as well as the plaintiff's :—Held, a good replication, for it showed an insurable interest in the plaintiff cognizable in a court of law; and the unnecessary statement of F.'s interest could not affect it. *Smith* v. *The Royal Ins. Co.*, 27 Q. B. 54. See, also, *Smith* v. *Provincial Ins. Co.*, 18 C. P. 223.

Quære, in such a case, as to the effect of 29 Vict. c. 28, sec. 7. *Smith* v. *Provincial Ins. Co.*, 18 C. P. 223

A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Assurance Co.* 20 C. P. 170.

(b) *Personal Property.*

A mortgagee of goods has an insurable interest, though the mortgagor continues in actual possession of them. *Ogden* v. *Montreal Ins. Co.*, 3 C. P. 497.

The omission of a mortgagor, in effecting an insurance in the name of the mortgagee, to mention the *amount* of the mortgage, does not avoid the policy. *Ib.*

Where the mortgage was under seal, and the mortgagee insured before default :—Held, that he was not entitled to recover on his policy more than the amount appearing on the face of his mortgage at the time of insurance, not being allowed to tack subsequent advances by parol. *Ib.*

Semble, that upon the evidence set out in this case, the pleas denying plaintiff's interest in the goods should have been found in defendants' favour. *Merrick* v. *Provincial Ins. Co.*, 14 Q. B. 499.

The owner of a stock of goods effected an insurance thereon, and while the policy was in force assigned the property insured, and with the assent of the company transferred the policy of insurance, to C. C. subsequently sold the property to M., who, in payment delivered his promissory notes indorsed by L., an accommodation indorser, only upon the express agreement that the goods should be sold by M., and the proceeds as received paid over to L. to retire the notes, and that the policy should be assigned to L. in trust to secure himself against the notes and pay any surplus to M.; and the policy was so assigned with the assent of the company, who had full knowledge of all the facts. The interest of M. in the goods and the liability of L. on the notes continued until the goods were destroyed by fire. In an action brought in the name of the insured, the declaration alleged the above facts, and that the plaintiff had continued to be and still was interested as trustee for M. and L. :—Held, reversing the decision of the Queen's Bench, 24 Q. B. 364, that the declaration shewed a good cause of action, and that L. had an insurable interest in the goods. *Davies* v. *The Home Ins. Co.*, 3 E. & A. 269.

Plaintiff sued upon a policy on wheat in a certain warehouse, alleging that at the time of effecting the policy, and thence until and at the time of the loss, he was interested in the property to the amount insured. Defendant pleaded that he was not, at the time of the loss, interested as alleged :—Held, that on these pleadings it was not admitted that the plaintiff, at the date of the policy, had in the warehouse the quantity mentioned in the receipt, and that in the absence of any proof of the extent of his interest, he would be entitled only to nominal damages. *Clark* v. *The Western Ass. Co.*, 25 Q. B. 209.

Plaintiff obtained a warehouse receipt from one F. for 2,000 bushels of wheat as in store for him, subject to his order, and effected an insurance on it with defendant, as upon so much wheat in F.'s warehouse :—Held, that in order to recover upon the policy, it was not necessary to prove that the identical wheat insured was destroyed; but that the quantity claimed for must have been in the warehouse under F.'s control *during the whole period* between the insurance and the fire. The warehouseman gave three receipts: 1. On the 24th of January, as from himself as owner, (as permitted by 24 Vict. c. 23) for 1,700 bushels; 2. On the 26th, to the plaintiff for 2,000 bushels; and, 3. On the 15th of February, to one P. for 3,000 bushels. The first receipt was transferred by F. to a bank as security for $1,000. When P. bought from F. the last mentioned quantity, the $1,000 was paid out of the purchase money, and thus the 1,700 bushels was released. F. had given these receipts fraudulently for more wheat than he really had; but the jury found that there were 2,000 bushels in the warehouse at the time of the fire :—Held, that the receipt for 1,700 bushels could not stand in the plaintiff's way, the claim on it having been extinguished; and that F.'s fraud on other parties could not be set up by defendants in answer to plaintiff's claim on the policy. *Ib.*

A condition provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, endorsed to certain banks. Per Wilson, J.—Such banks were the owners, by virtue of these receipts, not the plaintiff, and the condition was broken. *McBride* v. *The Gore District Mutual Fire Ins. Co.*, 30 Q. B. 451.

A., a warehouseman, insured wheat with defendants and assigned the policy to a bank, to whom he gave a warehouse receipt, signed by B., his clerk, and endorsed by himself. In an action on the policy on behalf of the bank :—Held, reversing the judgment of the Common Pleas, 18 C. P. 192, Spragge, C., Mowat, V. C., and A. Wilson, J., diss., that the bank had no insurable interest, as B. was not a warehouseman within the C. S. C. c. 54, sec. 8; and that the receipt was not in compliance with 24 Vict. c. 23, s. 1, not being signed by *the warehouseman*. *Todd* v. *Liverpool and London Globe Ins. Co.*, 20 C. P. 523, in appeal.

Held, that a mortgagee of a vessel, who was alone named in the policy as the assured, without any general words, or other indication of interest in any other, but who had, in fact, insured the mortgagor's interest also, as disclosed to the insurers at the time, could recover the whole amount so insured on parol evidence of that fact. *Richardson* v. *Home Ins. Co.*, 21 C. P. 291.

A warehouseman sold 3,500 bushels of wheat, part of a larger quantity he had in store, and gave the purchaser a warehouseman's receipt, under the statute, acknowledging that he had received from him that quantity of wheat, to be delivered pursuant to his order, to be endorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller :—Held, by the Court of Appeal, Spragge, C., and Morrison and Gwynne, JJ., diss., reversing the judgment below, 15 Chy. 337, 552, that the purchaser had an insurable interest. *Box* v. *Provincial Ins. Co.*, 18 Chy. 280.

The plaintiff, on the 10th September, 1874, insured with defendants on a barn and stable $100, on the produce, farming implements, &c., from time to time stored therein $400, and on horses and live stock $400. The policy was assigned by the plaintiff absolutely on the 27th January, 1875, with defendants' consent, to the Loan and Agency Company, who had a mortgage on the land on which the barn and stable stood for $400, but no claim to the chattels, and the actual nature of their interest in the policy was not mentioned in the assignment, nor notified to defendants until after the fire, which took place on the 12th, July, 1875. A correspondence, set out in the case, took place between defendants and the company, as a result of which defendants paid to the company the $100 insured on the buildings. The declaration alleged that the plaintiff was interested in the properties to the amount insured at the time of making the policy, and until and at the time of the loss : that having mortgaged the land on which said properties were situate, to the Loan and Agency Co., to secure certain money advanced, he with defendants' consent assigned to said company all his interest in the policy : that the property insured was burned, whereby said company became entitled to recover the amount of said loss : that all things happened to entitle them to sue therefor : that defendants paid to them the $100 insured on the buildings, but no more ; and that afterwards the company assigned to the plaintiff the policy and all causes of action thereon. Defendants pleaded, that the said Loan and Agency Co. were not at the time of the loss interested in the chattel property as owners or otherwise :—Held, that the plaintiff could not recover, for the Loan and Agency Co. had not at the time of the loss any interest in the goods ; and that there was nothing in the correspondence above mentioned, or in the dealings between the different parties, stated in the case, which made it inequitable in defendants to set up this defence, so as to entitle the plaintiff to relief under 38 Vict. c. 65, s. 1, O. *Hazard* v. *Canada Agricultural Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

Defendants also pleaded that the encumbrance to the Loan and Agency Co., was created by the plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent who took the plaintiff's application for insurance, also obtained the loan for him : that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing ; and that after the fire defendants were told by the company that they had a claim only to the $100 insured on the buildings, which they sent to them by letter .—Held, that defendants sending the money by letter was a written consent to the encumbrance ; and that their assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment. *Ib.*

See *Crawford* v. *St. Lawrence Ins. Co.*, 8 Q. B. 135, p. 1877 ; *Orchard* v. *Etna Ins. Co.*, 5 C. P. 445, p. 1883 ; *Scatcherd* v. *Equitable Fire Ins. Co.*, 8 C. P. 415, p. 1884 ; *Sherbonean* v. *Beaver Mutual Ins. Co.*, 30 Q. B. 472, p. 1818 ; *Toronto Savings Bank* v. *Canada Life Ass. Co.*, 14 Chy. 509, p. 1873.

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5. *Conditions, Representations, Concealment, Warranty.*

[*See, now, 39 Vict. c. 24, O., "An Act to secure uniform conditions in policies of fire insurance." It enacts that certain conditions specified shall be deemed part of every policy thereafter entered into or renewed. And if any company or other insurer desire to vary or add to or omit any of these conditions, such variations, &c., must be distinctly indicated in the manner directed, and shall then be in force so far as by the court or judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the company ; the decision of such court or judge to be subject to review or appeal to the same extent as in other cases.*]

(a) *Generally.*

Any fraud, concealment, or misrepresentation by a party effecting a policy of insurance of a matter material to be known by the insurer, will avoid the policy. *McFaul* v. *Montreal Inland Ins. Co.*, 2 Q. B. 59.

The not communicating at the time of the proposal for an insurance the fact that there was an insurance already effected with another company —Held, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy. *McDonell* v. *Beacon Fire and Life Ass. Co.*, 7 C. P. 308.

Held, that a written memorandum on the face of a marine policy, providing against liability except for total loss, must prevail, though several printed conditions inconsistent with it, were left in the policy :—Held, also, that a negative provision, that the insured should not have a right to abandon, except in a specified case, would not enable him to do so as of course in the event specified, if not otherwise entitled. *Meagher* v. *Etna Ins. Co.*, 20 Q. B. 607 ; *Meagher* v. *Home Ins. Co.*, 11 C. P. 328.

The following condition, "Insurance subsisting or effected with other companies, must be notified to the board, and if approved of, to be endorsed on the policy and signed by the secretary :"—Held, a condition precedent, and non-compliance with it a bar to the action, though it did not so expressly provide. *McBride* v. *Gore District Mutual Ins. Co.*, 30 Q. B. 451.

Remarks as to the conduct of business by insurance companies, and the necessity of legislative interference to prevent the multiplication of unreasonable conditions, and protect the public. *Smith* v. *Commercial Union Ins. Co.*, 33 Q. B.

A party in applying to insure, omitted unintentionally from his description of the property some particulars which he was not asked respe

ing, but which had the company's agent known, he swore he would not have insured:—Held, that there being no fraudulent concealment, the omission did not avoid the policy. *Laidlaw* v. *London and Liverpool Ins. Co.*, 13 Chy. 377.

At the foot of a series of questions in the form of an application, the following note was printed: "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part and be a condition of this insurance contract:"—Held, that the request to give full answers could not be construed as a notice that such answers were indispensable to the validity of the contract, or to the authority of an agent to bind the company by an intermediate insurance, there being no pretence of the omission to give full answers having been fraudulent. When such is the intention of the company, distinct notice to that effect should be given. *Rowe* v. *London and Lancashire Fire Ins. Co.*, 12 Chy. 311.

At the foot of the paper containing the answers to the several queries propounded by an insurance company, a memorandum was inserted stating that their agents were the agents of the applicants, so far as related to the making of applications, &c., and that the company would not be bound by any statement made to the agent not contained in the application:—Held, that the applicant was bound by a false statement contained in the application, even if the agent had, as was alleged, filled in the answer to the question without putting the question to the applicant. *Bleakley* v. *Niagara District Mutual Ins. Co.*, 16 Chy. 198.

Injunction granted to restrain an action at law to recover money secured by a life assurance effected by fraudulent misrepresentations. *National Life Ass. Co.* v. *Egan*, 20 Chy. 469.

(b) *Description of Property or Premises.*

A policy issued by defendants provided, "This insurance shall at all times and under all circumstances be subject to such conditions as are contained in the printed proposals issued by said company, a copy of which conditions is printed on the back hereof." One of these conditions was, that persons desirous of making insurance were to "deliver in" to the office or its agent the following particulars, viz., a statement as to the construction, &c., of the building, and whether any "hazardous trade" was carried on, or any "hazardous" goods were deposited in the premises containing the goods to be insured. There was, also, a condition that certain specified machinery and heating apparatus should, if used upon the premises, be particularly described. Plaintiff, by his agent, applied to defendants' agent for an insurance on his stock-in-trade, utensils, and shop furniture. At the time of the application certain goods of the class denominated "hazardous," and certain machinery, &c., of the kind provided against, were in use on the premises in question. Defendants' agent presented to applicant a printed blank form, which made no allusion to hazardous goods or trade, or to machinery, &c., and on the same being signed, defendants' agent accepted it and received the premium. Defendants' agent, however, when taking a risk a year previously on the same property and in the same premises, had inquired and was told by plaintiff's agent the full particulars respecting plaintiff's business and the premises in which it was carried on, and was also informed about the machinery, &c., upon the same; having been, moreover, referred to another company, by whom a risk on the said property had been taken, for all requisite information on the subject. It also appeared that the nature of plaintiff's business was well known by advertisement in the local newspapers, and otherwise:—Held, that the expression, "deliver in," meant deliver in writing, and that the plaintiff did furnish in writing all the information he was required to do, the defendants or their agent not having requested to be furnished with more, but having accepted it as sufficient by issuing the policy; and, in addition to this, that the evidence shewed that defendants, by their agent, did in fact know and had the means of knowing the nature of plaintiff's business, and the processes by which it was carried on. Held, also, that defendants were at liberty, if they pleased, to waive the presentment of their printed proposals containing the conditions of insurance; and that their agent having accepted the representation of plaintiff as to the proposed risk, defendants were, in the absence of any fraud or concealment on his part, liable to plaintiff for the loss sustained by him. *Davis* v. *The Scottish Provincial Ins. Co.*, 16 C. P. 176.

In his application the plaintiff untruly represented the building as furnished with a brick chimney:—Held, that on this ground the policy never attached, and that the plaintiff, therefore, might recover back his premium. *Mulvey* v. *Gore Mutual Fire Ass. Co.*, 25 Q. B. 424.

On the 9th of August, 1871, the plaintiffs applied to the defendants through their agent, H., at Hamilton, for an insurance on goods to the amount of $6,000, contained in a store on the South side of King street, described in the application as No. 272, in defendants' special tariff book, and marked No. 1 on a diagram endorsed on the application, and received from H. a letter and receipt for the premium, $37.50, being at the rate of 62½c. on the $100. On the following day the plaintiffs notified H. that they had added to their premises two flats in the adjoining building (which would be No. 273 in defendants' special tariff book,) and had placed part of their goods there. A few days after, H. inspected the building, and said an extra rate would be required. On the 29th H. notified defendants of the opening into the adjoining building, and asked as to the rate to be charged. The secretary at Montreal, on receiving the letter, pencilled on the application the fact of the opening, and he had previously drawn on the application a sketch of the premises taken from a former policy, when the plaintiffs only occupied 272. An increased premium, making in all 1 per cent. was fixed and paid by 23rd September, and the policy issued immediately thereafter dated as of the 9th of August, describing the premises substantially as in the application, and referring to the sketch and pencilled opening, through which it was said there was a communication with the adjoining house (No. 273). The policy was handed to the plaintiffs in September, 1871, and the premises were burned in March, 1872:—Held, that the alteration in the premises having been made before the policy issued, the description therein did not extend to

or cover the goods which were in the adjoining flats added when the extra premium was paid and the policy issued, and that the plaintiffs suing upon the policy were bound by the description contained in it. Semble, however, that the policy was not in accordance with the intention of the parties, the notice to and knowledge of H. as to the storing goods in 273, being notice to and knowledge of the defendants; and that in equity the policy might be reformed. *Wyld et al.* v. *London and Liverpool and Globe Insurance Co.*, 33 Q. B. 284.

On application to reform the policy, it was Held, that by what had taken place, these flats had become for insurance purposes part of No. 272, and that the plaintiffs not having been guilty of any fraudulent conduct whatever, and not having concealed any fact from the company, they were entitled to have the policy so rectified as to enable them to recover the full amount of their loss to the extent covered by the policy. *S. C.* 21 Chy. 458. Affirmed on Appeal, 23 Chy. 442.

Held, that the term, "Machine and Repair Shop," did not necessarily mean a shop in which iron work alone is to be done: that it was properly left to the jury to say whether the business carried on there, of making shingles, was that of a machine and repair shop; and that the evidence, set out, fully warranted their finding that it was. *Chaplin* v. *The Provincial Ins. Co.*, 23 C. P. 278.

The application for an insurance, which was made part of the policy, provided that any erroneous representation therein, or omission to make known any fact material to the risk, should avoid the policy. To a plea that the plaintiff by his application erroneously represented that there was no building within 100 feet from that containing the property insured, which representation was material to the risk, the plaintiff replied that he effected the insurance with one M., an agent of defendants having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums; that M. personally inspected the property insured, and knew its position and distance from other buildings; that the application was filled up with his knowledge and approbation, and transmitted by him to the defendants, who made no objection; and that there was no fraud on the plaintiff's part in reference to said distance. Defendants rejoined that the application was filled up by the plaintiff and handed to M., to be forwarded by him to defendants' head office for approval or rejection by the proper officer, who, as the plaintiff well knew, was not said M.; and that defendants, believing the statements therein, did through said proper officer accept thereof, and issued the policy:—Held, that the rejoinder was clearly a good answer to the replication, for that the fact of the misrepresentation being known to M., as well as to the plaintiff, could not, under the facts stated, prevent it from forming a defence. The tenth plea was, that the plaintiff represented the property to be of much greater value than it really was to induce the defendants to insure it for $2000, and such representation was of a fact material to the risk, by reason whereof the defendants, according to the terms of the policy and the law in that behalf, are not liable upon said policy. The plaintiff replied that the insurance was effected through M., having authority, &c., as in the former plea: that M. personally inspected the property and was aware of its value, and before and after such inspection solicited the plaintiff to insure it to the amount mentioned in the policy; and that there was no fraudulent misrepresentation on the plaintiff's part as to the value of said property. Defendants rejoined that the application was handed by the plaintiff to M. to be forwarded by him to the defendants' head office to be approved, &c. (as in the former replication), and the plaintiff well knew that on the representations in said application the proper officer would decide to accept or reject the application, and the defendants believing such representations accepted the risk. Per Hagarty, C. J.—the rejoinder was clearly good. Per Gwynne, J.—the tenth plea was in substance a plea of fraudulent misrepresentation, and the replication must be considered as setting up matter of evidence from which the denial of fraud was stated as an inference, but which did not displace the charge of fraud, and it was therefore bad. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 25 C. P. 470.

By one of the conditions on the policy it was provided that if an agent should fill up the application he should be deemed to be the agent for that purpose of the insured, and not of the company, "but the company will be responsible for all surveys made by their agents personally." In this case one M., a previous owner of the property, at the agent's request, filled in the application, and on its being read over to the insured he objected to the distances stated of the contiguous buildings. The agent, who had previously visited the premises, then undertook to go and measure the distances himself and see that the application was correct before forwarding it. The insured thereupon signed the application, and the agent, in forwarding the application to the head office, wrote to them in reference to the risk, but such letter was not produced at the trial:—Held, that what the agent undertook to do would constitute a survey within the meaning of the proviso, and that the agent must be presumed to have made it, so as to render the company responsible. *S. C.*, 25 C. P. 38[illegible]

Declaration on a policy of insurance against fire of the plaintiff's grist mill. Fourth plea, that by the policy it was agreed that the plaintiff's application, on which the policy was granted, and the survey and diagram of the premises, and all things therein contained, should be taken as part of the policy, and if the insured should therein make any erroneous representation, or omit to make known any fact material to the risk, the policy should be void. And the defendants alleged that there was a wooden building 58 feet from the insured premises, which was a fact material to the risk, and to be known to defendants, yet the plaintiff in said application and diagram erroneously represented that the building was 100 feet from said insured premises whereby said policy was void. In the fifth plea, after setting out the same condition, defendants alleged that there was a wooden building not shewn on the plan or diagram near the insured premises, which was material to the risk, and that the plaintiff erroneously omitted it. The ninth plea alleged that the plaintiff erroneously and falsely represented the cash value of the insured premises to be $9,000, which was a material fact, yet that they were worth much

as the plaintiff well knew. The plaintiff replied to the fourth plea, that the insurance was effected through one M., as an agent of the defendants, having authority to solicit, make out, and forward applications, to deliver policies when returned, and to collect and transmit premiums; that said agent personally inspected the property, and was fully aware of its position, and of the distance therefrom of the wooden buildings mentioned; and said application and diagram was filled up with the knowledge and approbation of said agent, and transmitted by him to defendants, and neither he nor they objected to the said buildings, or notified the plaintiff that his policy was affected thereby; and further, that there was no fraud or fraudulent representation by the plaintiff in reference to the distance of said wooden building from the property. There was a similar replication in substance, to the other two pleas:—Held, Harrison, C.J., diss., that the replications were bad, for that on the admitted facts the plaintiff knowingly concurred with defendants' agent in a misrepresentation to defendants of material facts, which was a fraud upon defendants; and the denial of fraud was therefore immaterial. *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 37 Q. B. 380.

Per Wilson, J.—The power of the agent to bind the company by accepting an application to take to his own and the applicant's knowledge could not be assumed from his powers as specified in the plea, though they might afford evidence from which a jury might infer such power. *Ib.*

Per Harrison, C.J.—Fraud or collusion on the plaintiff's part could not be assumed in the face of the replications denying, and in the absence of any rejoinder asserting it: the misrepresentations must be held, therefore, to have been simply mistakes made in good faith; and treating them as such, the defendants, under the facts stated in the replications, would be liable. *Ib.*

A party, on applying to insure, omitted unintentionally from his description of the property, some particulars which he was not asked respecting but which, had the company's agent known, he swore he would not have insured:—Held, that there being no fraudulent concealment, the omission did not avoid the policy. *Laidlaw* v. *Liverpool and London Ins. Co.*, 13 Chy. 377.

In the form of application signed by an applicant for insurance, the following notice was printed: "Applications for insurance on manufacturing establishments where steam is used for propelling machinery, must be approved of by the head office at Montreal:"—Held, that this notice did not refer to a vacant distillery, which had not been in operation for some years, and was not at the time of the application it was not contemplated to put in operation. *Rowe* v. *The Lancashire and Lancashire Fire Ins. Co.*, 12 Chy. 311.

At the foot of a series of questions in the form of application, the following note was printed: "The applicant is requested to answer the above questions fully, as it is especially agreed on the part of the applicant that this survey, as well as the diagram of the premises, shall form a part of and be a condition of this insurance contract:" Held, that the request to give full answers could not be construed as a notice that such answers were indispensable to the validity of the contract, so as to the authority of an agent to bind the company by an intermediate insurance, there being no pretence of the omission to give full answers having been fraudulent. When such is the intention of the company, distinct notice to that effect should be given. *Ib.*

See *Crawford* v. *Western Ass. Co.*, 23 C. P. 365, p. 1854; *Billington* v. *The Canadian Mutual Fire Ins. Co.*—Q. B.—T. T. 1876, p. 1831.

(c) *Statement as to Value.*

In application.]—The plaintiff insured with defendants certain buildings for $1100, stating their value to be £750. In an action on this policy, it appeared that a few days before he had insured the same houses, together with a driving shed worth $400, in another office for $900, and had then valued the whole at from $1200 to $1400. The evidence as to the actual value was contradictory, and the great difference in plaintiff's two valuations was not explained. The jury having found for the plaintiff:—Held, that the evidence supported a plea of fraudulent overvaluation, and a new trial was granted, with costs to abide the event. *Dickson* v. *Equitable Ass. Co.*, 18 Q. B. 246.

Where the insurers have neglected to inspect the buildings for themselves, but have trusted to the statements of the owner, the court will not interfere unless the evidence is very strong to shew fraud. *Ib.*

In an action on a policy for $1800, upon goods which the insured, at the time of insuring, estimated at a cash value of $4500, the jury were asked, among other questions, "Did T. (the insured) reasonably and actually believe there was such stock in trade was then of the fair value of $4500." They answered: "We cannot believe that he could think such a thing;" but said, when they handed in their answers, that they wished the verdict to be entered for $1200, which they found to be the loss sustained:—Held, that on this finding defendants were entitled to succeed; and a nonsuit was ordered. *Newton* v. *Gore District Mutual Fire Ins. Co.*, 33 Q. B. 92.

Held, in an action on a policy of insurance, following Riach *v.* Niagara Mutual District Ins. Co., 21 C. P. 464, that a representation of present cash value is not a warranty, but is so far material that on the trial the jury should say whether or not there was an over-valuation to the knowledge of the applicant, and if so, the policy is void. *Chaplin* v. *Provincial Ins. Co.*, 23 C. P. 278. See, also, *Rice* v. *Provincial Ins. Co.*, 7 C. P. 548; *Park* v. *Phœnix Ins. Co.*, 19 Q. B. 110.

When a party on applying to insure buildings overstates their value, the policy will not thereby be avoided, where it appears that such overvaluation was not made with a fraudulent intent. *Laidlaw* v. *Liverpool and London Ins. Co.*, 13 Chy. 377.

The first and second conditions endorsed on a policy declared that it was issued on the faith of the statements in the application, and on the plan shewing the situation of the property, and of all buildings or combustible materials within 100 feet of it, being in all respects accurate and true, and containing all the information required to enable the company to judge of the nature

and extent of the risk, and of the interest of the insured in the property; and that if in such application or plan, or in any written notice to the company respecting any change in the nature of the risk, there should be any untrue or inaccurate statement, whether intentional or not, the policy should be void The sixteenth condition, after providing that payment of losses should be made in sixty days, and that any difference touching any loss should, if the company should so require, be settled by arbitration, and that the company should have the option of replacing any property burned, proceeded, "In case of loss, if the property insured be found by arbitration or otherwise to have been over-valued in the survey and description on which this policy is founded, the company shall be held liable only, although there may have been no fraud, for such proportion of the actual value as the amount insured bears to the value given in the application for the insurance effected by this policy:" —Held, per Wilson, J., and affirmed by this court, Gwynne, J., diss., that the sixteenth condition was not a qualification of the second; but that each was separate—the second causing a forfeiture of the policy for an over-valuation in the application: and the sixteenth providing for a case in which on an amicable settlement or arrangement by arbitration it should turn out that the property had been over-valued, and giving to the company the option of waiving such forfeiture, and in such case making payment on the terms stated. Per Gwynne, J.—The statements mentioned in the first and second conditions had no reference to over-valuation, which was provided for only in the sixteenth condition. *Williamson* v. *Commercial Union Ass. Co.*, 25 C. P. 453. But on appeal this decision was reversed, the court concurring in the conclusion arrived at by Gwynne, J., *S. C.* in appeal 29th June, 1876. Not yet reported.

Defendants pleaded that by the application, which formed part of the policy it was declared that any misrepresentation would render the policy void; and that in the application, the plaintiff falsely represented that the value of the dwelling-house insured was $2,000, whereas it was not of that value, but of a much smaller value. Another plea stated the false representation to be that $1,500 was not more than two-thirds of the value of the buildings, whereas it was far more. The plaintiff replied to each plea, on equitable grounds, that one H., being defendant's secretary and their duly authorized agent, and having full knowledge of the value of the buildings, prepared the application, and without any enquiry of the plaintiff, but acting on his own knowledge of the buildings and their value, acquired in the proper discharge of his duty as such secretary and agent of defendants, wrote therein the said values; and the plaintiff honestly believing the values to be correct, and without any concealment, falsehood, or fraud, at the request of said H., signed said application:—Held, on demurrer, a good replication, for the representation as to the value was not a warranty, but statement of matter of opinion, a mistake in which, in the absence of fraud, would not avoid the policy:—Held, also, that if no fraud were necessary to support the plea, the replication would be a good answer, for the knowledge of the agent acquired as alleged, would be the knowledge of defendants. *Redford* v. *Mutual Fire Ins. Co. of Clinton*.—Q. B.—5th April, 1876, Harrison, C. J., sitting alone. Not yet reported.

By the rules of an insurance company no insurance on houses would be effected for more than two-thirds the value of the premises exclusive of the value of the land. The owner of houses applied for insurance to the extent of $5,850, having previously effected an insurance in another company to the extent of $5,000, and the copy of his application produced at the hearing shewed the value to be $8,500. This the claimant swore, if a true copy, was an incorrect statement of the value, as the actual cost of the buildings insured was upwards of $15,000. Held, that as this was not an over-valuation to the prejudice of the company, the plaintiff should be allowed, in a suit to enforce payment of the insurance money, to shew the true value. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Chy. 139.

See *McCuaig* v. *Unity Fire Ins. Assn.*, 9 C. P. 85, p. 1884; *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 25 C. P. 470, p. 1808; *Shannon* v. *Gore District Mutual Fire Ins. Co.*, 37 Q. B. 380, p. 1809.

In the account of Loss.]—The question of fraud is one for the jury, and although the court may be dissatisfied with the value set upon his property by the assured, still unless he appear to have valued it too high mala fide, and not by error of judgment, they will not disturb the verdict. *Rice* v. *Provincial Ins. Co.*, 7 C. P. 35

Defendants pleaded, that after the fire the plaintiff, in making his claim, had misrepresented and over-stated the amount of his loss, contrary to the condition in the policy:—Held, that to sustain this plea it was necessary to prove that the over-estimate did not arise from mistake or inadvertence, but was made designedly, for the purpose of obtaining a larger sum than the loss really sustained, or to prevent close enquiry. *Park* v. *Phœnix Ins. Co.*, 19 Q. B. 140.

Held, upon the evidence set out in the report of the case—it being probable that the loss, though over-estimated, was equal to the sum insured, and there being circumstances which might explain the over-charge—that the jury were warranted in finding for the plaintiff.

Where, in an action on a fire policy, the plaintiff in his statement of loss swore that his claim amounted to about twelve times the amount actually proved, and for which he actually obtained a verdict, and the judge before whom the case was tried was dissatisfied with the finding of the court, notwithstanding the usual practice to new trials where the defence charges a criminal offence, (this being made perjury by 32 & 33 Vict. c. 23, s. 5, D.) granted a new trial, costs to abide the event. *McMillan* v. *Gore District Mutual Fire Ins. Co.*, 21 C. P. 123.

(d) *Statement as to Title and Incumbrances.*

In application.]—The plaintiffs represented themselves as owners of an unincumbered estate in fee simple when they were only mortgagees in fee, and for a less sum than that insured:—Held, that they could not recover on the policy. *Brown et al.* v. *Gore District Mutual Fire Ins. Co.*, 10 Q. B. 353.

The application contained the following questions and answers: Q: "Occupied by applicant or tenant? A. "Tenant." Q. "Title by deed or how?" A. "Deed." Q. "Incumbered or not; if not, say no?" A. "No." The plaintiff afterwards made affidavit "that he is the bonâ fide owner of the said property and of the said policy; that the said property is not and was not in any way incumbered by mortgage or otherwise." It appeared that he was assignee of one J. P., who had a lease from one M. at a yearly rent, with a right of purchase at a certain price; and that there was a mortgage from M. to one H. including the property insured:—Held, that (irrespective of the mortgage) the plaintiff had misrepresented his title, and could not recover. *Walroth* v. *St. Lawrence County Mutual Ins. Co.*, 10 Q. B. 525.

The plaintiff applied as if the property were his own, stating that it was occupied by himself and unincumbered, and he obtained a policy for two-thirds of the actual value. He was only a lessee for years of the land on which the buildings were erected:—Held, that the policy was void. *Shaw* v. *St. Lawrence County Mutual Ins. Co.*, 11 Q. B. 73.

Defendants pleaded a false representation by plaintiff on obtaining a policy, that the land on which the building insured stood was unincumbered, whereas in truth it was mortgaged to one S. for £94. The plaintiff called S., who proved that at the time of effecting the policy about £100 was due on the mortgage:—Held, that the policy was void under C. S. U. C., c. 52, s. 27; and that evidence as to the value of the land was properly rejected. *Muma* v. *The Niagara District Mutual Ins. Co.*, 22 Q. B. 214.

In an action against a mutual insurance company, defendants pleaded a false representation by plaintiff in obtaining the policy, that the land on which the building stood was unencumbered, whereas it was mortgaged to one S. for £94. The plaintiff replied, on equitable grounds, in substance, that he acted as agent for S. on the agreement that any moneys due to him for services should be credited on account of this mortgage: that before applying for the policy, he delivered to S. a claim against a certain person, which S. accepted: that these moneys together with equalled the mortgage debt, and the same was then cancelled and paid, and S. ready to release the mortgage; that before applying the defendants delivered to plaintiff a printed form of application, and thereby required him to state that the land was unincumbered, and to make the statements in his application in the replication set forth, wherefore the plaintiff made such statements in his application, and by the procurement of defendants, and therefore the statement was not false or fraudulent. Semble, that the replication was clearly bad; but as the evidence disproved it, no formal judgment was given on the demurrer to it. *Ib.*

The declaration alleged that the plaintiff, at the time of the insurance and loss, was owner of the premises insured. Plea, that the premises were encumbered by a mortgage, and that the plaintiff did not truly state his title in his application. Replication, that the title was not incumbered by the mortgage:—Held, on demurrer, replication good; for the statement that plaintiff did not state his title truly was either useless, or the plea was in effect only an assertion that the plaintiff's title being encumbered by the mortgage, he did not state it truly; which was fully answered. *Williamson* v. *Niagara District Mutual Fire Ins. Co.*, 14 C. P. 15.

When a policy covers two or more distinct properties, each of which is insured thereby for a specific sum and at a fixed rate respectively, such policy must be considered as divisible; and therefore the fact of one of the said properties having at the date of the policy been under mortgage, whereby the assured had an estate therein less than a fee simple, or said property was encumbered, does not affect the right of the assured to recover in respect of the other properties mentioned in the policy, though no notice had been given to the insurance company at the time of application of one of such properties being under mortgage, and though no notice was by plaintiff procured to be made of such mortgage in such policy as required by c. 52, C. S. U. C. ss. 27, 67. *Date* v. *Gore District Mutual Fire Ins. Co.*, 14 C. P. 548. See, also, as to the policy being divisible; *Ramsay Woollen Cloth Manufacturing Co.* v. *Mutual Ins. Co. of the District of Johnstown*, 11 Q. B. 516; *Kuntz* v. *Niagara District Fire Ins. Co.*, 16 C. P. 573; *Russ* v. *Mutual Fire Ins. Co. of Clinton*, 29 Q. B. 73; *Samo* v. *Gore District Mutual Ins. Co.*, 26 C. P. 405.

The third condition was that, if the property were leasehold, or other interest not absolute, it should be represented to the company and expressed *in the policy in writing*. There was a mortgage which was mentioned *in the application*:—Held, sufficient, inasmuch as the application was by the terms of the policy a part of the latter. *Fourdrinier* v. *Hartford Fire Ins. Co.* 15 C. P. 403.

One of the conditions of a policy was that every incumbrance affecting the property at the time of assurance must be mentioned in the application otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S. and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff alone to support S. and wife during their lives, who by the said deed released to plaintiff and wife all their claims upon the property. In his application for assurance plaintiff stated the property to be unincumbered:—Held, affirming the judgment of the Court of Common Pleas, 16 C. P. 493, that there was no lien for purchase money, and that the property was not encumbered. *Mason* v. *Agricultural Mutual Ass. Association of Canada*, 18 C. P. 19.—In appeal.

One condition of a policy was that the application, with the survey and diagram of the premises, should form part of the insurance contract; and there was a proviso, in the shape of a covenant on the part of the assured, that the representation given in the application contained a just, full and true exposition of all facts, &c., and the interest of the insured therein, so far as same were known to the assured, and that if any material fact should not be fairly represented, the policy should be void. In the application plaintiff described the subject of insurance as "all the property of the assured," and to an enquiry therein whether he was owner, mortgagee, or lessee, he replied "owner." The pro-

perty consisted of two buildings belonging to plaintiff, though the land on which they stood was leasehold. Defendants pleaded that plaintiff in his application had misrepresented the facts, especially as regarded his title, having described himself as owner, whereas he was merely lessee. At the trial plaintiff tendered the evidence of the owner of an adjoining building, to shew that he (witness) had told defendants' agent how the buildings were situated, and that the agent knew the position of all to be the same; but this was rejected, as contradicting plaintiff's own written statement, and the jury were directed to find for defendants on the plea, the learned judge refusing to leave to them the question of misrepresentation on plaintiff's part:—Held, that this direction was wrong; that the word "owner," having no definite meaning in law, but being applicable to various interests which parties have in buildings, if plaintiff used it in good faith he ought not to suffer, and the question whether he fairly represented the facts regarding the risk should have been left to the jury:—Held, also, that in order fairly to judge of the answers of plaintiff, evidence might be given of the surrounding facts as to the ownership of the building and of the land; and that, to establish the bona fides of plaintiff's answer, he might shew that defendants' agent, who drew up his statement, had been informed by plaintiff, or some one else to plaintiff's knowledge, of the state of the title. *Hopkins* v. *Provincial Ins. Co.*, 18 C. P. 74.

To an action on a policy on chattel property, defendants pleaded that plaintiff, in his application, falsely, &c., stated that he held the property in which the goods insured were by deed and unencumbered, whereas said property was largely mortgaged. The evidence shewed that to a question contained in a printed form of application, wholly inapplicable in many of the questions to insurance on chattel property alone, whether the property was encumbered, defendants' agent, at plaintiff's dictation, filled in the answer that there was no encumbrance, and that the plaintiff was about to explain that the land was mortgaged, when the agent stopped him, stating that that was of no importance, as the proposition was merely for insurance of goods, and that question related only to realty; whereupon, the goods not being encumbered, the agent wrote the answer accordingly:—Held, that the question must be considered as relating to the goods insured, and not to the real property, and that the plea was therefore not proved. *Ashford* v. *Victoria Mutual Ass. Co.*, 20 C. P. 434.

By the policy the assured covenanted that his application contained a just and true exposition of all the facts respecting the condition, &c., of the property insured, and that if any material fact should not have been fairly represented the policy should be void; and it was also provided that the insurance might be continued for any agreed length of time, the continuance to be considered as under the original representation, except where varied by a new representation in writing, &c. On the application the assured stated that there was no incumbrance on the property. Subsequently, the premium was reduced, and a new policy issued on the same property and for the same amount, no new application being made or questions asked or answered. It turned out that there was in fact an incumbrance on the property:—Held, that in the absence of direct evidence to the contrary, this latter policy must be assumed to have been based on the original application; and, therefore, that the assured could not recover. *Martin* v. *The Home Ins. Co.*, 20 C. P. 447.

At the time of effecting an insurance on certain property, the insured erroneously stated in his application that there was only an encumbrance for $1,000, whereas there was a further encumberance of $500, whereby the policy became liable to be forfeited. The $500 was subsequently paid off, and after this, and after the policy had expired, the plaintiff, who had become the owner of the property, applied for a new insurance, and on being interrogated by the agent as to the encumbrances, told him of the $1,000, being the only one. The plaintiff, at the agent's suggestion, instead of effecting a new insurance, took an assignment of the expired policy:—Held, that under these circumstances, the defendants could not set up the misrepresentation in the original application as to encumbrances; but that it was sufficient that at the time of the plaintiff's insurance the application was literally true. *Chapman* v. *Gore District Mutual Ins. Co.*, 26 C. P. 89.

To an action on a mutual fire policy, defendants pleaded that the plaintiff in his application represented that he held the premises in fee simple, whereas "the plaintiff had not a title in fee simple, and the true title was not properly expressed in said policy, or in the application," but not alleging that the plaintiff made any statement as to encumbrances or outstanding equities:—Held, that on this issue the plaintiff was entitled to recover, notwithstanding the deed to him was absolute, he was in fact only mortgagee. *White* v. *The Agricultural Mutual Ass. Co.*, 22 C. P. 98.

The defendant insured his dwelling house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire, defendant swore to the same fact in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by the defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid to him under false pretences, and for perjury; and defendant, to avoid the arrest and prosecution, gave the plaintiffs a note for the $700:—Held, that the plaintiffs could not recover on the note, in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration apparent but that of avoiding the arrest and prosecution. Held, also, that for the same reason the plaintiffs could not recover on the common counts, for money paid under a mistake or misrepresentation of fact; but a new trial was granted to enable plaintiffs to shew the facts more fully. *Canada Farmers' Mutual Ins. Co.* v. *Watson*, 25 C.

Where a party, in answer to a question indorsed on the printed form of application, stated that he was the owner of the estate subject to a mortgage in favour of a building society for $1,500; the facts being, that he only held

tract of purchase: that a portion of the purchase money remained unpaid; and that a mortgage for the amount mentioned had been agreed for, but not executed; of which facts the company, through their agent, was aware:—Held, that the insurance was not avoided, it not being shewn that such misstatement was intentional or material. *Laidlaw* v. *The Liverpool and London Ins. Co.*, 13 Chy. 377.

The defendants' travelling agent obtained from the plaintiff his application, and in filling up the answers, the question as to the existence of incumbrances, was answered in the negative, when in fact the land on which one of the houses insured stood was mortgaged:—Held, that this vitiated the policy, not only as to that house, but also as to another building standing on land not in the mortgage, although separate sums were named in respect of each building. *Bleakley* v. *Niagara District Mutual Ins. Co.*, 16 Chy. 198.

The plaintiff in his application stated that he held the house in fee, when in fact he had a lease-hold only:—Held, a fatal objection, and that his having a right to remove the building could make no difference. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

Where the plaintiff on insuring stated that he was mortgagee:—Held, that he was not bound, unasked, to disclose that he was insuring for the mortgagor, and that the concealment was of an immaterial matter. *Ressor* v. *Provincial Ins. Co.*, 33 Q. B. 357.

The plaintiffs employed one R., an insurance broker, in no way connected with the defendants, to effect an insurance on their building and stock, informing him of there being incumbrances to a large amount on the building; and they signed a form of application in blank and handed it to R., who filled in the application, except as to incumbrances, which he left blank. R. then applied to one G., who also acted as a broker, and was in no way connected with the defendants; and G. submitted the application to defendants' local agent, who accepted the risk and received the premium. The agent then forwarded the application to the head office for approval, and it was returned to him for information as to the incumbrances. The agent then applied to G., who referred to R. R. having tried but failed to find the plaintiff, stated to G. that there were none, and G. then tore up the application and filled in another one, stating that there were no incumbrances, and signed the plaintiffs' name to it. This he handed to the agent, and on it the policy issued. It was also proved that after the issuing of the policy the plaintiffs effected a further incumbrance on the land, but did not notify defendants. The plaintiffs having sued defendants on the policy, which provided that if the assured was not the sole and unconditional owner of the property insured, unless the true title was expressed therein, the policy should be void:—Held, that they could not recover. Per Hagarty, J.—The plaintiffs enabled R. to deceive the defendants by entrusting him with the business, and they could not claim the benefit of an insurance obtained by him without being liable for the false statement, on the faith of which it was effected. Per Gwynne, J., Quære, whether under the circumstances, the unauthorized and false statement inserted by G. in the application made without the plaintiffs' authority, could be considered as the plaintiffs:—Held, also, that the policy was not divisible as to the real and personal property, but was altogether avoided. *Sams* v. *Gore District Mutual Fire Ins. Co.*, 26 C. P. 405.

See *Johnstone* v. *Niagara District Mutual Ins. Co.*, 13 C. P. 331, p. 1853.

In Statement of loss.]—It was a condition of the policy that persons sustaining loss should declare on oath whether any, and what other, insurance or incumbrance had been made on the insured property. The notice given said nothing about incumbrances and a mortgage was proved, made by the plaintiff about a month before the policy: Held, that though this mortgage was not within the condition, yet the plaintiff could not recover, for he had not complied with the condition, which required him to declare whether there was or was not any incumbrance, and he had not declared that there was not. *Markle* v. *Niagara District Mutual Fire Ins. Co.*, 28 Q. B. 525.

A condition was, that any fraud or attempt at fraud, or false swearing on the part of the assured, should cause a forfeiture of all claims under the policy. After the loss plaintiff made a statement under oath, that he was absolute owner of the property at the time of the fire, whereas under the conveyance to him and his wife he was only jointly interested with her therein:—Held, reversing the judgment of the Common Pleas, J. Wilson, J., diss., that he was not guilty of false swearing within the meaning of the condition: for that the word "false," as used there, meant wilfully and fraudulently false (of which defendants had themselves at the trial acquitted the plaintiff,) whereas it was merely an incorrect description of his title with which he could be charged. *Mason* v. *Agricultural Ass. Association of Canada*, 18 C. P. 19. In appeal; *S. C.* in C. P. 16 C. P. 493.

The plaintiff had lived with his father for about thirty-seven years, on land belonging to the crown. A barn had been built on it, resting upon abutments of loose stones, which the plaintiff, in October, 1867, insured with defendants. In December, 1867, a patent issued to one F., and in June, 1869, T., claiming through the patentee, recovered judgment in ejectment against the plaintiff and his father, and placed a hab. fac. in the sheriff's hands. A few days after, and before it had been executed, the barn was burned. Proceedings in Chancery were then pending by the plaintiff contesting the claim of T. The policy required that the plaintiff in his account of the loss should shew the true nature of his title at the time of the fire; and the plaintiff in such account stated that he was bonâ fide owner, and that his title was by possession for thirty years by himself and his father:—Held, that the account did not give a true statement of plaintiff's title: that the barn was part of the freehold; and that he could not recover. Wilson, J., diss., on the grounds that the plaintiff being in possession, and prosecuting his claim in equity, had an insurable interest: that as against an adverse claimant he might treat the barn as a chattel, which he could remove; and in this view his statement of title was correct. *Sherboneau* v. *Beaver Mutual Fire Ins. Association*, 30 Q. B. 472.

Held, on appeal, affirming the judgment below, that the plaintiff having insured the barn as appurtenant to his freehold, and claimed for it as such after the fire, he was precluded from setting up that it was a chattel. *S. C.*, in Appeal, 33 Q. B. 1.

See *Ross* v. *Commercial Union Ass. Co. of London*, 26 Q. B. 552, p. 1845.

(e) *Assignment, Alienation, or Incumbrance of the Subject Insured, or of the Policy.*

M. having insured with a mutual company, assigned all his interest in the policy and premises insured to the plaintiffs by way of mortgage to secure a debt, and the policy was duly ratified to them in accordance with 6 Will. IV. c. 18, s. 18. A loss having occurred, the plaintiffs sued in their own names as assignees, setting out the mortgage in the declaration. Defendants pleaded—3. That the debt due the plaintiffs was less than the sum insured: that the assignment was to secure the debt; and, as to any surplus, plaintiffs held as trustees for the mortgagor; that before the loss, M. insured in another office for £500, which defendants had no notice of, and never consented to or approved of. 4. That before the mortgage to plaintiffs, M. had mortgaged the premises insured to one R. in fee, who afterwards effected an insurance with another company without the knowledge and consent of defendants. Lastly, that before M.'s mortgage to plaintiffs he had mortgaged the premises insured to R. in fee, which mortgage is still in force and unsatisfied:—Held, on demurrer, third and last pleas good, fourth plea bad; for although the mortgage to R. mentioned in it would form a good defence of itself, yet it was not relied on for that purpose, but stated only as incident to another and insufficient defence, viz., the second insurance by R., and therefore it could not be acted on as admitted by the demurrer. Per Robinson, C. J. The 19th clause of the act applies only to absolute alienations, and the plaintiffs in this case, as mortgagees, were not entitled to sue in their own names. Per McLean, J., and Burns, J. They were so entitled. Per Robinson, C. J. A mortgage by the insured in a mutual insurance company, without consent, will avoid the policy. *Burton et al.* v. *Gore District Mutual Ins. Co.* 14 Q. B. 342.

Where an assignment had been made of the policy to a mortgagee of the property with concurrence of the company, after which the mortgagor effected another insurance without the consent required by the policy:—Held, on the premises being burnt down, that the policy was not void in equity as respected the mortgagee. Spragge, V. C., diss.:—Held, also, that on paying the amount of the debt the company was entitled to an assignment of the mortgage. *Burton* v. *Gore District Mutual Fire Ins. Co.*, 12 Chy. 156. Affirmed on Appeal, 21st January, 1875.

To an action on a judgment recovered in the Supreme Court of the State of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable therefor, and the said B. not being a resident of the State of New York, the plaintiffs, in accordance with the laws of that State, sued there in their own names as such assignees, and recovered judgment, as by the laws of said State they had a right to do:—Held, a good replication, for defendants by their acts of incorporation being evidently designed to carry on the business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Upper Canada, and if made in New York the law there would govern. Per Hagarty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which that law must govern. *Waydell et al.* v. *Provincial Ins. Co.*, 21 Q. B. 612.

An assignee of a policy cannot sue on it in his own name, although the company agree thereby to indemnify the assured and his assigns. *Bonner* v. *Anchor Ins. Co.*, 16 Q. B. 485.

Declaration, on a policy of insurance made to plaintiffs. Second plea, setting out, among other conditions, that if after insurance effected the applicant encumbered his property by mortgage, such encumbrance should avoid the policy, unless notice thereof were given. Averment, that after the insurance, and after assignment of the insured premises and the policy, and before the fire, the assignee encumbered the said premises by mortgage, and that no notice of the [illegible] given to defendants:—Held, plea bad: because the condition set out applied only to encumbrances created by the applicant, not by his assignee. *Richardson* v. *Canada West Farmers' Mutual and Stock Ins. Co.*, 16 C. P. 430.

One of the conditions of a mutual policy provided that, in case of real estate insured and a mortgage given to the insured, the mortgagee might continue his interest by giving notice, &c., and that "whenever any one has after insured shall alienate conditionally by mortgage, his policy shall be void," unless written notice thereof be given to the board of directors stating the amount and to whom mortgaged, who should have power to assent or cancel the policy:—Held, looking at the constitution and working of mutual insurance companies, that the alienation referred to was of the land on which the premises insured were situate. *Russ* v. *The Mutual Fire Ins. Co. of Clinton*, 29 Q. B. 73.

Quære, as to the meaning of the words "has after insured." *Ib.*

The plaintiff had insured a house and furniture in separate sums. The land on which the house stood had been devised to his wife; and a mortgage in fee was proved, of which no notice had been given, executed by himself, his wife joining to bar dower, after the insurance. It was not proved when she was married or acquired her property, so as to shew whether the Married Woman's Act would apply:—Held, that the policy was void; for unless that act applied his conveyance would pass a freehold interest

the land, and as against him it would be presumed primâ facie that he had power to mortgage as he assumed to do:—Held, also, that the policy was avoided as to the furniture, as well as the house. *Ib.*

Cases in which an infirmity of claim or title of the assignor will or will not attach to the assignee of a policy considered. *Kreutz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131.

The non-payment of a cash premium note given by the original assured in a mutual assurance company, the company having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy, the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment. *Starnes* v. *Canada Farmers Mutual Ins. Co.*, 22 C. P. 75.

Declaration, on a policy to plaintiff on premises subsequently mortgaged for $2000 to one S., alleging an assignment of the policy by plaintiff, with defendants' assent, to S.: that S. continued interested to $2000 until the loss, and plaintiff, during all the time last aforesaid, and at the time of the loss, was interested therein to said amount so insured, as also as trustee for S. Then, after setting out the loss, it proceeded, whereby said S. and plaintiff, as trustee for him, *and in his own right*, suffered damage, &c. Plea, assn. by plaintiff. Replication, on equitable grounds, that before the loss the policy was, with defendants' assent, duly assigned to S., and the action was brought by plaintiff, as trustee, and for benefit of S.:—Held, on demurrer, replication bad. *Chisholm* v. *Provincial Ins. Co.*, 20 C. P. 11.

Action upon a policy by A., the person insured, averring an assignment to B. & C., notified to defendants and endorsed on the policy, and an agreement by them that it should stand for the benefit of B. & C. Plea, denying the assignment, &c. The policy contained no condition as to assignment. The sale and transfer by A. to B. & C. of the goods insured was proved. The assignment was endorsed on the policy, purporting to be made by A. to B. and C., but not witnessed by M., defendants' local agent. It was proved that M. entered the transaction in a book kept by him, and communicated with the head office at Montreal; that the secretary there answered, suggesting a transfer of the policy, and a new policy upon which the premium for the unexpired term of the old policy should be credited; and that after loss B. & C. paid an additional premium to M. to cover an increase of the risk: Held, that this evidence was sufficient to sustain the issue for the plaintiffs. Held, also, that the declaration of B., one of the parties for whose benefit the suit was brought, was admissible as evidence for the defendants. *Rose et al.* v. *Commercial Union Assurance Co.*, 20 Q. B. 559.

In an action on a fire policy, issued to plaintiff, the declaration alleged an assignment of the policy and of the property insured to one M., and by M. to B. & P. with the assent of defendants, before the loss, and that the plaintiff sued as trustee for B. & P. The second plea denied the assignment to B. & P., and defendants' assent thereto. As to the second plea, it appeared that the assignment to M. had been assented to by A., a sub-agent, at Oil Springs, of P., the defendants' agent at Sarnia, (defendants' head office being at Montreal); and a memorandum was also endorsed by P. that the loss, if any, should be paid to M. only. A. had effected the insurance with plaintiff, and he swore that he was aware of the intended assignment by M. to D. & P., and drew it out, after speaking of it to the same form as in the assignment to M.; that C., defendants' inspector, who told him to use B. & P. purchased the property, which was then kept by the plaintiff as a temperance house, it being part of the bargain that the policy should be assigned, though the assignment was not completed for some months after the conveyance of the property. B. & P. opened a bar, for which an extra premium was charged by the company, and paid through A. to P. and by P. to the head office:—Held, Morrison, J., diss., that there was evidence of assent by the defendants to the assignment to B. & P., so as to sustain a verdict for the plaintiff on this plea. *Hendrickson* v. *Queen Ins. Co.*, 30 Q. B. 108. See *S. C.* in Appeal, 31 Q. B. 547.

Quære, are the words "all bills, bonds, notes, securities, accounts, books, book-debts, and documents securing money," contained in a general assignment for the benefit of creditors, sufficient to pass a policy at the time existing on the life of the assignor, and held by him for his own benefit. *Lee et al.* v. *Goerie*, 1 L. J. N. S. 76.—C. L. Chamb.—Richards.

To an action on a fire policy, the defendants set up a condition endorsed on the policy, that any subsequent mortgage of the property insured "must be notified to the secretary in writing forthwith, otherwise the policy shall be void." The plaintiff mortgaged part of the property insured to one McC., who mailed a letter to defendants' secretary, notifying him, as required by the condition, but the letter did not reach him:—Held, that the mere posting, without shewing that it reached the secretary, was not a compliance with the condition. *M'Cann* v. *Waterloo County Mutual Fire Ins. Co.*, 34 Q. B. 376.

Declaration—First count: On a fire policy, dated 22nd September, 1869, made by defendants to one B., for one year, with condition for renewal; alleging that B. renewed to 22nd September, 1873; that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss was solely interested; that the premises were destroyed by fire on the 13th March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants: breach, non-payment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B. and renewals by him, and loss by fire on the 14th March, 1873, whereby B. became solely interested: and that after the fire and before suit, namely, on the 5th November, 1872, B. by writing assigned to plaintiff, as assignee in insolvency, all his interest in said insurance, &c. Sixth plea: averring B.'s insolvency, and assignment to plaintiff on the 25th January, 1872, and that the current year expired in September, 1873, and that the plaintiff did not renew by paying the premiums, &c., and so that the policy was at an end. Equitable replication: that the defendants should not be allowed to so aver, because B., under whom

plaintiff claims, duly paid up renewal premiums to defendants, who accepted, and gave their receipts therefor, declaring policy renewed, &c., which receipt B. delivered to plaintiff, who adopted his act:—Held, replication good, for B's payment in renewal, and taking the receipts in his own name, would enure to the benefit of the estate. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

Where a fire policy after a loss had taken place was verbally assigned to a creditor by a person in insolvent circumstances, in satisfaction of a debt not yet due, and in consideration of an advance of money at the time, the assignment was held void as a fraudulent preference within the C. S. U. C. c. 26, s. 18. *Bank of Montreal* v. *McTavish*, 13 Chy. 395.

A by-law of the company (No. 16,) declared that certain circumstances would vitiate the policy unless notice were given, the consent of the board obtained and endorsed on the policy, and signed by the president and secretary. One of the circumstances which the by-law declared would vitiate the policy, unless notified in writing to the secretary, consented to by the board, and indorsed, was that "of alienating by mortgage or otherwise, or any change in the title or ownership of the property insured." A few days after obtaining the first interim receipt, the plaintiff mortgaged the property, which he notified verbally to the agent, who was otherwise well aware of the transaction, but no notice in writing was given to the secretary. Held, that such want of notice in writing to the secretary vitiated the policy; but quære, what the conclusion should be if notice, though not in writing, were traced home to the company. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Chy. 139.

Defendants pleaded that a certain encumbrance to the Loan and Agency Company (being a mortgage for a loan obtained by the plaintiff from that company) was created by the plaintiff without their written consent as required by the policy. It appeared that F., defendants' agent who took the plaintiff's application for insurance, also obtained the loan for him; that he witnessed the assignment of the policy to the mortgagees, and sent it to defendants' general agent, who assented to it in writing; and that after the fire defendants were told by the company that they had a claim only to the $100 insured on the buildings, which they sent to them by letter:—Held, that defendants sending the money by letter was a written consent to the encumbrance; and that their assent to the assignment of the policy was evidence of their assent to some transfer of the property, which would be essential to the validity of the assignment. *Hazard* v. *Canada Agricultural Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

One G. insured two houses with defendants, a mutual insurance company, and then mortgaged them to the plaintiff, to whom he assigned the policy, with defendants' assent. Afterwards G., in violation of one of the conditions of the policy, executed another mortgage to other persons, of which no notice was given to defendants. The assignment to the plaintiff was upon the express condition that the plaintiff should be bound by all the conditions of the policy, and that the policy should continue to be voidable as though the assignment had not been made:—Held, that the policy was avoided by G.'s act as against the plaintiff, who could recover upon it only in right of G. *Smith* v. *Niagara District Mutual Ins. Co.*,—Q. B.—13th March, 1876, Gwynne, J. sitting alone. Not yet reported.

Burton *v.* Gore District Mutual Ins. Co., 12 Chy. 156; 14 Q. B. 342, commented upon and distinguished, upon the grounds of the change since made in the law as to assignment of choses in action by 35 Vict. c. 12, O., and of the express condition in the assignment, and the provisions of the 36 Vict. c. 44, s. 39, O., relating to insurance companies. *Ib.*

The plaintiffs sued as assignees of a policy effected by defendants with one B. for $3,000, alleging that after it was executed B. mortgaged to them the property insured for $2,000, and assigned the policy to them as collateral security therefor. A loss by fire was then averred, and the full amount of the policy claimed. Defendants pleaded that the assignment was consented to by them on condition that the plaintiff should be bound by the conditions of the policy as B. was, and that it should continue voidable as though the assignment had not been executed; and then alleged another insurance effected by B. without defendants' consent, contrary to a condition of the policy, that no other insurance should subsist upon the insured premises without such consent. The plaintiffs replied that the alleged insurance was not of the same interest as that insured by the plaintiffs, and was not effected by or with the plaintiffs' knowledge or authority:—Held, no answer to the plea, and that the policy was avoided by B.'s act, following Smith *v.* Niagara District Mutual Ins. Co., *supra*; *Mechanics' Building and Savings Society* v. *Gore District Mutual Fire Ins. Co.*, —Q. B. 26th September, 1876, Galt, J., sitting alone. Not yet reported.

In another replication the plaintiffs alleged that the assignment was not on the terms that they should be bound by any conditions which would avoid the policy by B.'s acts, but that they became entitled to all the rights under it subject to all the conditions of the policy by which B. had been entitled and subject before the assignment, and that the insurance alleged was not effected or authorized by them:—Held, on demurrer, that the replication was bad; that the plaintiffs in their declaration had asserted a right to the whole policy as under an absolute assignment, when it was clear that B. was still interested, and that as to him the policy was void; and the plaintiffs should have traversed the consent alleged. *Ib.*

See *Miall* v. *Western Ins. Co.*, 19 C. P. 2[illegible] p. 1860; 157, *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*—Q. B.—T. T. 1876, 1858.

(f) *Prior and Subsequent Insurance.*

One of the conditions of a mutual policy was "that in case insurance shall subsist or be effected on the premises or property insured by the company in any other office, or from, by or with any other person or persons, during the continuance of such insurance, the policy granted thereon by the company shall be void, and

such double insurance subsist with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary." It appeared by the pleadings that three separate sums were insured—on a building, on the machinery and on the stock in it; and a second insurance, without the consent of the company, was effected on the building and machinery:—Held, that by the condition, and by the statute under which these companies are incorporated, the policy was altogether avoided, and not merely as to the property so doubly insured:—Held, also, that it was immaterial that such second insurance was with a foreign company, and therefore not capable of being enforced here, for the condition intends an insurance in fact. Quære, whether it would make any difference if the properties were wholly unconnected, so that a fire in one could not possibly endanger the others. *Ramsay Woollen Cloth Manufacturing Co.* v. *Mutual Fire Ins. Co. of the District of Johnstown*, 11 Q. B. 516.

A plea merely alleging that the property was insured in another office, is bad; the particulars of the alleged insurance must be stated. *Ib.*

The condition was, that if there should be any insurance at any other office, notice should be given, and the same endorsed on or stated in the policy, otherwise the first insurance should be void:—Held, that an insurance effected in another office by an interim receipt, was within the condition. *Hatton* v. *Beacon Ins. Co.*, 16 Q. B. 316.

The plaintiff's policy contained a condition avoiding the same if any double insurance should exist without defendants' consent. The plaintiff's father, without plaintiff's directions, paid the premium for an insurance on part of the same premises with another company, but no policy was issued until after a fire had consumed the premises, and the plaintiff received the insurance money on the second policy:—Held, 1. That an insurance had in fact been effected with the second company within the terms of the condition; 2. That the plaintiff having taken the benefit of such insurance, he had thereby avoided defendants' policy. *Dafoe* v. *Johnstown District Mutual Ins. Co.*, 7 C. P. 55.

The plea alleged that the plaintiff had effected other insurance. The evidence showed that the policy was effected by one S., (whose interest in the property did not appear), in his own name, and assigned by him to B., to whom the plaintiff's interest in the property had been assigned: Held, that the plea was not proved, for the insurance complained of was not shewn to be by or for the plaintiff, or of his interest, and it would be necessary to avoid plaintiff's policy. *Park* v. *Phœnix Ins. Co.*, 19 Q. B. 110.

Besides the provision of C. S. U. C. c. 52, sec. 28, the policy provided that in case of insurance in other companies, notice must be given to defendants, and their approval endorsed on the policy; and the passing of a resolution avoiding the policy, and mailing a copy addressed to the plaintiff, should avoid the same. After the issue of the policy in question, the plaintiff obtained from another company an interim receipt, by which they considered themselves bound until they should repudiate the risk. No notice was given to defendants of this further assurance until they received from plaintiff his statement and affidavit after the fire, when he swore to the existence of it, and on the second day after this defendants mailed to him a copy of their resolution avoiding his policy. It appeared, also, that the plaintiff had claimed under the policy against the other company:—Held, that the plaintiff having effected an insurance with another company, which from all that appeared was binding upon them, and having failed to notify defendants thereof, defendants were not liable under their policy, which they had the right to avoid even after the fire. *Bruce* v. *Gore District Mutual Ins. Co.*, 20 C. P. 207.

It was a condition that if the insured should make any other insurance on the same property, and should not notify defendants, the policy should cease. It appeared that shortly before the fire the insured made an application to the Provincial Ins. Co. for a further insurance of $1000, and obtained an interim receipt therefor. The validity of this receipt was disputed, but the plaintiff had taken proceedings in Chancery to compel the company to issue a policy; and had, in his proofs of loss, sworn to this additional insurance:—Held, an insurance, of which notice was required. *Mason* v. *Andes Ins. Co.*, 23 C. P. 37.

Sec. 28 of C. S. U. C. c. 52, makes a policy voidable "if insurance on any house or building subsists in the company and in any other office, or by any other person at the same time," without the consent of the company; and it was a condition of the policy that a further insurance by the plaintiff, or any other person, should render the policy void:—Held, that the further insurance must be by the same person who has before insured, or in the same interest. *Gilchrist* v. *Gore District Mutual Fire Ins. Co.*, 34 Q. B. 15.

The not communicating at the time of the proposal for an insurance, the fact that there was an insurance already effected with another company:—Held, not to be such a wrongful concealment as to sustain a plea of fraud, avoiding the policy. *McDonell* v. *Beacon Fire and Life Ass. Co.*, 7 C. P. 308.

M. having effected an insurance with a mutual insurance company, assigned all his interest in the policy and premises insured to the plaintiffs by way of mortgage to secure a debt, and the policy was duly ratified to them in accordance with 6 Will. IV. c. 18, s. 18. A loss having occurred, the plaintiffs sued in their own names as assignees, setting out the mortgage in the declaration. Defendants pleaded, 3. That the debt due to the plaintiffs, was less than the sum insured: that the assignment was to secure the debt, and as to any surplus plaintiffs held as trustees for the mortgagor: that before the loss, M. insured in another office for £500, which defendants had no notice of, and never consented to or approved of; 4. That before the mortgage to plaintiffs, M. had mortgaged the premises insured to one R. in fee, who afterwards effected an insurance with another company, without the knowledge and consent of the defendants. Lastly, that before M.'s mortgage to plaintiffs, he had mortgaged the premises insured to R. in fee, which mortgage is still in force and unsatisfied:—Held, on demurrer, third and last pleas good; fourth plea, bad; for although the mortgage to R. mentioned in it would form a good defence of itself, yet it was not relied on for that purpose, but stated only as incident to an-

other and insufficient defence, viz., the second insurance by R., and therefore it could not be acted on as admitted by the demurrer. *Burton et al.* v. *Gore District Mutual Ins. Co.*, 14 Q. B. 342.

To a plea of an insurance by the plaintiff with another company, without notice to defendants, or endorsement thereof on their policy, contrary to one of the conditions, the plaintiff replied, on equitable grounds, that he effected the insurance with defendants through N., their agent, residing at E. : that when he effected the second insurance complained of he had not received defendants' policy and had no notice or knowledge of said condition : that as soon as he became aware of it he gave notice to said N. that he had effected the insurance mentioned in the plea, and another insurance with the B. A. Co. ; and that as the insurance mentioned in the plea had then been cancelled, the said N. promised to have the insurance with the B. A. Co. endorsed on defendants' policy, and told plaintiff that it was not necessary to have the other noted, and that defendants' policy would still bind them : that after said notice, defendants noted on their policy the insurance with the B. A. Co., and returned said policy to the plaintiff as valid and subsisting : and defendants gave no notice to the plaintiff that they considered said policy cancelled, because the omission to note the insurance in the plea mentioned arose from the neglect of defendants and not of the plaintiff ; that at the time of the loss the plaintiff had no other insurance except that with the B. A. Co.; and by reason of the premises defendants waived the endorsement of the insurance mentioned in the plea. It appeared that the policy was made at the head office in Montreal, on the 5th of June, and sent to N. about ten days before the fire, which took place on the 7th of July, but it remained with him, not being called for by the plaintiff. On the 16th the plaintiff obtained the policy pleaded, but it was cancelled on the 30th. N. was agent also for the B. A. Co., and granted to the plaintiff a policy with that company about the same time as the defendants. On the 4th of July both those policies were sent to the respective head offices to have each marked on the other, and defendants' consent was noted on the 9th of July, and the policy returned. The agent knew of the policy pleaded before the fire, but not until after it had been cancelled :—Held, that the replication was not proved, for the omission to note the policy was not owing to the negligence of defendants : they were not aware of it while it existed, and it would have been useless to note it after it ceased. Held, also, that the agent could not have waived the forfeiture. Held, also, that the replication should not have been admitted, and might be struck out under the C. L. P. A. Act, sec. 290. *Jacobs* v. *Equitable Ins. Co.*, 17 Q. B. 35. See *Smith* v. *Commercial Union Ins. Co.*, 33 Q. B. 69, dissenting from this case on the question of waiver.

The jury, in the last case, having a second time found for the plaintiff, a new trial was granted without costs. The further insurance having subsisted for fourteen days only before it was cancelled, it was argued that a reasonable time must be allowed to give notice of it to plaintiffs, and procure the endorsement, and that this was a question for the jury ; but, per Burns, J., the question was not properly presented by the pleadings, and the plaintiff having given no notice at all, though he had ample time to do it, the question of reasonable time could not arise. It was contended also that the second insurance was void, owing to an omission by the plaintiff to comply with its conditions, but held that it was nevertheless an insurance within the condition in defendants' policy. *Jacobs* v. *The Equitable Ins. Co.*, 19 Q. B. 250.

On a third trial a verdict was found for defendants, the learned Judge having charged that the defendants had proved their plea, and not left it to the jury to say whether the plaintiff had given notice to them of the further insurance within a reasonable time. The court held the direction right. *S. C.* 19 Q. B. 257.

In an action on a policy of insurance, the defendants alleged that an additional insurance had been effected in another company without their being notified within a reasonable time, and in a proper manner, and without such notice being acknowledged by them, there being conditions endorsed upon their policy in accordance with these objections. It appeared that the notice of further insurance stated the amount to be larger than it really was, and gave the name of the company in which it was effected wrongly :—Held, that inasmuch as defendants were neither prejudiced nor misled by the mistake and no fraud appeared or was alleged in so giving the notice, the policy was not thereby vitiated. *Osser* v. *Provincial Ins. Co.*, 12 C. P. 133.

Sec. 29 C. S. U. C. c. 52, applies to insurance on goods as well as on buildings. The notice of additional insurance there referred to cannot be given after the destruction of the goods by fire or a loss upon them to the amount insured, or that the policy has ceased to cover a continuing risk. Where the declaration alleged such a loss —Held, that the defendants, in pleading an additional insurance without notice, might assume the loss to be as alleged, although the plaintiff under the allegation might recover for a partial loss ; and if it was in fact only partial, so that the notice might be given after it, the plaintiff should have replied this. The effect of the statute is not to avoid a condition made by the policy that such notice shall be given forthwith, notwithstanding the statute, the parties themselves may make any stipulation on the subject not opposed to it. *Potter* v. *Waterloo County Mutual Fire Ins. Co.*, 29 Q. B. 553.

The following condition, "Insurance subsisting or effected with other companies must be notified to the board, and if approved of, be endorsed on the policy and signed by the secretary. —Held, a condition precedent, and non-compliance with it a bar to the action though it did not so expressly provide. *Bride* v. *Gore District Mutual Fire Ins. Co.*, 30 Q. B. 451.

One of the conditions of an insurance policy was : "Persons who have insured property with this company shall give notice of any other insurance already made, or which shall be made afterwards made elsewhere on the same property, that a memorandum of such other insurance may be endorsed on the policy or policies of

with this company," &c. After the policy had been assigned, the assignees effected another insurance, of which the only notice given, if any, was a verbal one to P., the agent of the company in Sarnia, their head office being in Montreal, and not endorsed on the policy, which was not produced at the time:—Held, affirming the judgment of the Queen's Bench, that such notice was insufficient, Richards, C. J., Mowat, V. C., and Strong, V. C., diss. *Hendrickson* v. *Queen Ins. Co.*, 31 Q. B. 547.—In appeal. *S. C.* in Q. B., 39 Q. B. 108.

One condition was, that the insured should at once give notice in writing to the head office of any additional insurance, *and should have the consent of the directors thereto, if given, endorsed on the policy, otherwise the policy to be void*: and this notwithstanding anything contained in another condition as to giving notice with reasonable diligence:—Held, that the assured ran the risk, in effecting a second insurance, of getting defendants' assent, which he had not done, and that the question of reasonable time or diligence in giving notice and getting such assent, which was urged as a defence, could not arise. *Weigh* v. *Provincial Ins. Co.*, 20 C. P. 405.

Held, also, that the happening of the fire did not absolve the assured from performance of the condition. *Ib.*

The proposal for subsequent insurance spoke of the existing insurance with defendants, and plaintiff in his proofs of loss swore to the fact, but no evidence was offered in any way meeting this, while the plaintiff, in the second count of his declaration, admitted the property insured to be the same. Notwithstanding this, the question of identity of property covered by the different policies was submitted to the jury:—Held that this was wrong, as the question on the evidence was not open. *Ib.*

Declaration—First count: On a fire policy, dated 22nd September, 1869, made by defendants to B. for one year, with condition for renewal; stating that B. renewed to 22nd September, 1872: that prior to 25th January, 1872, he became insolvent, &c., and that the plaintiff was his assignee, and at the time of loss was solely interested: that the premises were destroyed by fire on the 13th of March, 1873, whereby the plaintiff, as assignee, became entitled to recover the insurance from defendants. Breach, non-payment. Second count: setting out apparently the same policy, &c., as in the first count, averring an insurance to B., and renewals by him, and loss by fire on the 14th March, 1873, whereby he became solely interested; and that after the loss and before suit, namely, on the 5th of November, 1872, B. by writing assigned to plaintiff, his interest in said insurance in insolvency, all his interest in said premises, &c. Second plea: that by one of the conditions the renewal policies became avoided if the assured or his assigns should effect any further insurance, and should not with reasonable diligence notify the company, and have it endorsed: that the plaintiff became assignee before the fire of the estate and effects, including this property and policy, and then effected a further insurance in the Western Assurance Co.; and that neither he nor B. gave notice, &c., whereby the policy was avoided:—Held, plea good, for the plaintiff was B.'s assignee within the policy, and had become possessed of B.'s policy for the benefit of the estate, and in such interest effected the second insurance. An equitable replication to this plea alleged that when the plaintiff effected the further insurance, he was ignorant of this insurance by B.: that as soon as he became aware thereof, he, with all reasonable diligence, notified defendants, and by their default it has not been endorsed:—Held, bad, for the assignee's ignorance could not deprive defendants of the benefit of their express stipulation. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

A further replication alleged that defendants with full notice of B.'s insolvency, and plaintiff becoming assignee, accepted from B. the renewal premium, and renewed the policy to him and for his benefit, from September, 1872, to September, 1873: that the subsequent insurance was for the plaintiff's benefit as assignee, and that B. had an insurable interest in the property greater than the sum insured with defendants, as they knew:—Held, bad, for it shewed no new contract released from the stipulation relied on in the plea. *Ib.*

It was proved that the plaintiff had mailed to the company notice of a further insurance, which the jury found that they had received, and they had not within two weeks thereafter notified the insured of their dissent:—Held, that under 36 Vict. c. 44, s. 38, O., they must be deemed to have assented to it. *Shannon* v. *The Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

In an action on a cash premium policy in the defendants' company, it appeared that the insured, after insuring with the defendants, effected insurances in other companies without notifying the defendants in writing, as required by the 38 Vict. c. 44, s. 37, and by the by-laws endorsed on the policy. After the fire the insured, on the 19th of January, 1875, furnished the company's local agent with proof papers of the loss, which contained a certificate of the further insurances, and the defendants objected to their sufficiency, saying nothing, however, as to the further assurances. On the 30th, on receiving a reply from the agent, they again wrote to him that in consequence of the failure of the assured to send the proper proof, as also to notify the company of the further insurance, the policy was forfeited: Held, that 36 Vict. c. 44, ss. 37, 38, O., applied to all policies issued by mutual companies, cash premium as well as mutual. Held, also, that under this act and the by-laws, the notice of the further insurances must be before the loss occurs, and that the notification here given was clearly insufficient. Held, also, that the 38 Vict. c. 65, s. 1, O., would not deprive the defendants of their right to insist on the forfeiture for this cause, for their objection was not to the proofs of loss. *Fair* v. *Niagara District Mutual Fire Ins. Co.*, 26 C. P. 398.

Defendants pleaded false swearing by plaintiff in his affidavit of loss, in stating that he had effected no additional insurance:—Held, that the sworn claim of the plaintiff for loss made upon a policy with another company was admissible without producing the policy; but that upon the evidence set out in this case, it did not sufficiently appear that the same property was insured by both companies. *Hazard* v. *Canada Agricultural Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

Quære, whether an affidavit as to other insurances is an affidavit in relation to the loss or damage. *Ib.*

The plaintiff having effected an insurance with defendants on his "stock manufactured and in process, used for the manufacture of agricultural machinery," afterwards insured with another company his "agricultural machinery in process of construction finished, and unfinished." Quære, whether the defendants policy extended to finished machines, or only to parts finished, or unfinished of machines yet in process of construction; but—Held, that the second policy covered at all events a part of the property included in the first, and that there was therefore a double insurance:—Held, also, that the construction of the policy, under the circumstances, was for the court, not the jury:—Held, also, that there was clearly no notice of or consent to the second insurance, as required by 36 Vict. c. 44, ss. 37, 38, the notice being verbal, and given to an agent who had no authority to receive it. *Billington* v. *The Canadian Mutual Fire Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

A policy avoided under sec. 37 of 36 Vict. c. 44, O., for want of the assent of the company to an additional insurance in the manner prescribed, is revived under sec. 38, and the company are deemed to have assented to the additional insurance, if, after notice of such insurance, the two weeks allowed by that section for the company to signify their dissent are allowed to elapse without such dissent; but during the two weeks the insured remains in the same position as at the time of effecting the additional insurance, and should a loss occur during such interval, he cannot recover:—Held, that in computing the two weeks, the day of the receipt of the notice is excluded, so that where a notice was given on the 5th July, and the fire occurred on the 19th, the time had not expired; and semble, the notice must be received by the company, and not by their local agent, and must be actually received by the company, not the date of its delivery at the post office. *McCrea* v. *Waterloo County Mutual Fire Ins. Co.*, 26 C. P. 431.

In this case R., who had insured on the 20th April, 1875, in defendants' company, on the 1st May effected an additional insurance in the Stadacona company, and on the 5th July posted a notice to defendants' local agent, informing him of the fact, which was received by the local agent on the 8th, and on the same day forwarded to the head office, where it was received on the 10th; and on the 20th, and after notice of the loss, they notified the insured that they dissented to the additional insurance and had cancelled their policy:—Held, that the notice was within the time allowed, and that the policy was forfeited. *Ib.*

The notice also notified defendants of the intention of the insured to effect an additional insurance in the Beaver & Toronto Mutual Insurance Co., and the insured, before the expiration of the fourteen days, and without any further notice to defendants, effected such insurance:—Held, that this also voided the policy. *Ib.*

Quære, as to the effect of a notice of the intention to effect a further insurance. *Ib.*

See *Williamson* v. *Niagara District Mutual Fire Ins. Co.*, 14 C. P. 15, p. 1859; *Noad* v. *Provincial Ins. Co.*, 18 Q. B. 584, p. 1882; *Tucker* v. *Provincial Ins. Co.*, 7 Chy. 122, p. 1797; *Mechanics' Building and Savings Society* v. *Gore District Mutual Ins. Co.*—Q. B.—26th September, 1876, p. 1824.

(g) *Alteration of Premises, Increase of Risk, Change of Occupation.*

The plaintiff insured with defendants on a stone building £400, and on furniture and other goods therein £200, all at the rate of eight per cent.; on a frame building £100, and on goods and tools therein £50; all at the rate of twelve per cent. It was a condition of the policy "that if after insurance effected the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring such insurance shall be void." It was proved that after insuring the plaintiff put up a steam engine in the frame building, and, in order to make it as safe as possible, erected a small engine house of brick at the back of the building. Some witnesses swore that if care was taken the risk would not be increased, but many swore that it would, and it was proved that the plaintiff was told by the agent of the company that if he put up the engine he would have to apply and pay an additional premium; that he made no such application; that he endeavoured to effect an insurance at other offices, but was refused, the risk being considered too hazardous, and that he had acknowledged that he knew the policy was void because he had made no arrangement with defendants in consequence of the additional risk. The frame building was destroyed by fire, which began in the upper part of it, and a portion of the goods in it were destroyed. The stone house was also much injured by the same fire, and the furniture in it partially destroyed. Held, that under the facts proved the policy was clearly avoided. *Reid* v. *Gore District Mutual Ins. Co.*, 11 Q. B. 345.

Semble, that a mere change in the occupation of a house insured against fire, without notice, &c., is not such a change of occupation as would avoid a policy effected under 6 Will. IV. c. 18, and the by-law set out in this case. *Hobson* v. *Billington District Mutual Fire Ins. Co.*, 6 Q. B.

Semble, that a demise of the house insured for one year is not "an alienation" within the act. *Ib.*

Plaintiff insured with defendant for £2,000, the property insured being described in the application as his stock of dry goods, contained in the first and second floors of a three-story building occupied by him as a dry goods store, the third story being occupied by another party as a dwelling and architect's office. By the policy the insured covenanted that the representations in the application were true, otherwise the policy should be void; and it was agreed that if the building should be used for any trade or business denominated hazardous, extra hazardous, or specially hazardous in the memorandum annexed to the policy, or for the purpose of keeping or storing any of the goods so denominated, unless agreed to in writing by the company, the policy should be void. There was also a condition of the policy that the application should specify the construction of the building containing the property

be insured, and by whom occupied; that it should be stated whether goods insured were or not of the descriptions denominated hazardous, extra-hazardous, or included in the memorandum of special rates; that if after the insurance the risk should be increased by any means within the control of the assured, or if such building should be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance should be void. In the memorandum referred to, hat-finishers and sulphur were included among the trades and goods deemed hazardous, and which it was stipulated should subject the building and all its contents to an additional charge; hat-bleaching was in the class called extra hazardous, and hat manufacturers in that of specially hazardous (each with a stipulation as to extra charge), and at the end of the last class was added, "and generally all trades requiring the use of fire-heat not before enumerated." It appeared that the goods kept by the plaintiff consisted in part of millinery, which in the defendants' printed instructions to their agents was classed as extra hazardous, and referred to be charged at a higher rate, but it was not mentioned in the policy or conditions; also, that the business of bleaching straw bonnets was carried on in the third story (described in the application as occupied for an architect's office), and a stove introduced into the cellar for the purpose of this process, in which sulphur was also made use of. No notice was given to defendants of any of these changes. A fire having occurred:—Held, that the policy was avoided; that bleaching bonnets was included in the trade of "hat bleaching" mentioned in the class "extra hazardous;" and that the plaintiff having carried on that business without notice to defendants, no question as to the increase of risk thereby was left to the jury, as the policy by the express terms of it was at an end. Held, also, that the other conditions were broken; for the occupation of the building was altered, and the risk increased by means within the control of the assured. The keeping of millinery would not have been fatal, for plaintiff could not be supposed to be aware of defendants' instructions to their agents; nor would the use of sulphur, for the memorandum referred to it only when kept as stock. *Merrick* v. *Provincial Ins. Co.*, 14 Q. B. 439.

Quære, as to the distinction between change in the occupation" and in the "nature of the occupation" of a building. *The Ottawa and Montreal Forwarding Co.* v. *The Liverpool and London and Globe Ins. Co.*, 28 Q. B. 518.

Defendants insured two buildings, each for different sums, by a policy providing that in case any alteration or addition should be made or to any risk, whether by the erection of apparatus for producing heat, by the introduction of articles more hazardous than allowed, or change in the nature of the occupation, or in any other manner whatsoever by which the degree of risk was increased, and an additional premium would be required, without notice and assurance thereof, the policy should be void. A plea setting up a defence under this as to one building, alleged that an alteration was made in fact, within the meaning of the condition, the plaintiffs having suffered a change in the occupation of the building, and by the introduction therein of painters who worked therein and thereon at their trade; and that another alteration was made in said risk by plaintiffs having permitted a change in the occupation of the other building insured, which adjoined building No. 1, and by the introduction therein of carpenters, who worked therein at their trade—whereby, and by means of such alterations, the risk on said building No. 1, was increased, &c.:—Held, pleas good; that the means by which the risk was increased could not be rejected as surplusage, as defendants contended, but that what was alleged as to the change of occupation might have increased it, and whether it did so or not was for the jury. A mere temporary introduction of painters and carpenters, for repairs, &c., would not avoid the policy. Quære, therefore, whether in this respect the plea was sufficient. Semble, that it was, because the court could not judicially know whether what was alleged on that point could increase the risk; but it was suggested that the plaintiffs should reply specially the circumstances under which the painters and carpenters were introduced. *Ib.*

The premises were, when insured, used as a store, and were after insurance used as a printing office, without notice to the company or the settlement and payment of any additional premium for the increased risk, contrary to a condition endorsed thereon:—Held, that the policy was vitiated. *Hervey et al.* v. *Mutual Fire Ins. Co. of Prescott*, 11 C. P. 394.

Defendants pleaded, (1) that the conditions provided that in the assurance of buildings containing any furnace, &c., the construction of the same must be particularly described when effecting the insurance, or if subsequently introduced due notice given to the company and the same sanctioned: that if after insurance the risk should be increased by any means within the control of the assured, or the premises occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addition should be allowed by endorsement on the policy, the assurance should be void. And defendants alleged that after effecting the insurance the plaintiff made divers alterations and additions to the building, and in such additions introduced two furnaces, of which said furnaces being introduced defendants had no notice or knowledge:—Held, plea bad, for the condition provided only against furnaces introduced into the building assured, not into additions made to it. The second plea was, that after the policy divers erections, which were within the plaintiff's control, were added to the buildings insured, whereby the risk was increased, without the defendants' knowledge or consent. The plaintiff replied, that by a condition of the policy, in case the risk should be increased by the erection of buildings, &c., it should be optional with the company to terminate the assurance: that the increase of risk was so occasioned, as alleged in the plea, and defendants did not terminate the assurance as provided for in the condition; and that said policy is valid and subsisting. Held, replication clearly bad, it being admitted, as stated in the plea, that defendants had no knowledge of the buildings being erected. *Lomas* v. *British America Ass. Co.*, 22 Q. B. 310.

The plaintiff also took issue on the above and other pleas. At the trial it was proved that an addition had been made, in which a boiler was

placed, and steam carried thence into the main building, from which certain furnaces were then removed. The jury gave a verdict for the plaintiff on the second plea, and found that the external risk was increased, the internal risk diminished, and on the whole the risk diminished by the alterations:—Held, that the plea was proved, and defendants entitled to have a verdict entered for them upon it, on leave reserved. *Ib.*

3. Defendants pleaded that by another condition all assurances, original or renewed, should be considered as made under the original representation, so far as it might not be varied by any new representation in writing, which in all cases it should be incumbent on the assured to make when the risk had been changed, either within itself or by the surrounding or adjacent buildings; and defendants averred that although after the original representation new buildings were erected adjacent to and around the buildings insured, and although the risk was changed thereby, yet the plaintiff did not make to defendants any new representation in writing of such new buildings, or of the change of risk, whereby the policy became void. Per McLean, C. J.—The plea shewed a good defence. Per Hagarty, J.—Not, for the change here occurred before the time for renewing the policy, and the condition did not bind the plaintiff to make a new representation until then. Sillem *v.* Thornton, 3 E. & B. 868, distinguished, as the alterations there seemed to have been in progress when the policy was effected. *Ib.*

See also *Heneker* v. *British America Ass. Co.*, 13 C. P. 99, decided in the same term,—an action on another policy upon the same property, in which the pleadings and decision were substantially the same. The third plea was held no defence.

A new action having been brought on this policy, the judgment as given in the former case was adhered to. The defendants further pleaded that the British American land company, of which company the plaintiff is commissioner, had, before the policy, leased the property to one L., who had covenanted to insure and keep insured, and that L., as lessee, made additions to the buildings which increased the risk, and that such increased risk was within the control of the land company as lessors, whereby the policy was avoided according to one of the conditions:—Held, that these additions, made by a lessee, were not within the control of the lessors:—Held, also, that the provision in the lease, that the lessee should not make alterations "in the arrangement of the mill or machinery," was not a prohibition from the putting up additional buildings; but if it were, the defendants had no right to resist payment because the landlord might have a right of entry for a forfeiture by the tenant. *Heneker* v. *British America Ass. Co.*, 14 C. P. 57.

One of the conditions was, "if the risk shall be increased by any means whatever, or if the buildings shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void." After the insurance, certain alterations were made in the premises insured, consisting of the removal from one room to another adjoining it, of a couple of dye-kettles, a different disposition of the flues and pipes connected therewith, and the erection of a new chimney, thereby to a slight extent increasing, (if considered as an isolated act) but to a great extent diminishing the risk. The jury found that, though the erection of the chimney did per se increase the risk, yet that, diminishing it in one place and increasing it in another, the risk on the whole was not increased; and they rendered a verdict for the plaintiff, which was upheld, and Heneker *v.* British American Ins. Co., 13 C. P. 99, distinguished. *Date* v. *Gore District Mutual Ins. Co.*, 15 C. P. 175.

Plaintiff, in March, 1861, made a written application to defendants for insurance on certain premises. The risk was accepted conditionally on certain alterations being made, until the making of which it was not to be considered as taken. After these alterations, no steps were taken towards completing the insurance until January, 1862, when a policy, dated in May, 1861, was issued and delivered to the plaintiff. Among other conditions of the policy were these:—1. That the policy should not be binding on the company until *actual* payment of the premium. 2. That applications for insurance should specify the construction of the building to be insured, and that *after* the effecting of the insurance any increase to the risk by any means whatever within the control of the insured should avoid the policy; 3. That if the property to be insured were leasehold, or other interest not absolute, it should be represented to the company, and expressed in the policy in writing. The premium was not paid in full till January, 1862, on the day of the issue and delivery of the policy to plaintiff. Between March, 1861, and January, 1862, a funnel for conducting shavings from an upper to a lower story, in front of a furnace, was placed in the insured building; which addition or alteration, it was proved, increased the risk. There was also a mortgage on the premises, which was mentioned in the application of insurance:—Held, 1. That the insurance was not effected until January, 1862, and that the policy not having then a retroactive relation to its date for any other purpose than for the computation of the period at which it should expire, the risk by the erection of the funnel was not increased *after* but *before* the making of the policy. *Fourdrinier* v. *Hartford Fire Ins. Co.*, 15 C. P. 403.

One S., being the owner of a frame building used as an hotel, and two barns, insured with defendants, $700 on the hotel and $150 on each of the barns. Subsequently S. mortgaged the land and premises in fee to plaintiff, but still continued in possession. The policy was ratified to plaintiff by defendants. After this, one A., tenant to S., carried on, in addition to the hotel, the business of storekeeping in the hotel, and while in possession and before the fire, with plaintiff's knowledge, made an addition to the hotel itself, which had the effect of placing the hotel nearer to barn No. 1, and removed barn No. 1 so as to make it nearer barn No. 2. A fire afterwards occurred, which originated in the addition made to the hotel, and destroyed it as well as the two barns. Plaintiff thereupon in his own name sued defendants for the total amount of the loss, $1,000. Defendants pleaded, that the policy was subject to conditions that any change in occupancy, or any alteration or addition to the buildings insured, not notified to the com-

for approval, should avoid the policy, with averments that the occupancy was changed in this, that while the frame building, at the time of insurance, was occupied as a tavern only, yet before the fire a large portion thereof was occupied by one J. D. as a store, of which no notice was given to the company, and that before the fire the buildings were altered, without defendants' knowledge, in the manner above described: —Held, 1. That the right of plaintiff, the mortgagee of S., to maintain the action in his own name on the policy did not properly arise upon the pleadings; but Semble, plaintiff had the right so to do. 2. That the change of occupancy was such as to avoid the policy, though plaintiff had no knowledge of it. 3. That the alterations and additions were such as to avoid the policy, though plaintiff had no knowledge of them, and were such as to avoid the whole policy, though in other respects divisible. *Kuntz* v. *The Niagara District Fire Ins. Co.*, 16 C. P. 573. See also, *S.* C. (now *Krentz* v. *Same Defendants*,) *Ib.* 131.

The policy provided that in case of any alteration or addition, &c., or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk was increased and a consequent additional premium would be required, the insurance should be void in default of notice and allowance thereof:—Held, that a mere ceasing to occupy was not within the condition. *Gould* v. *The British America Ass. Co.*, 7 Q. B. 473.

It was a condition, that in the event of any alteration, &c., whereby the risk should be increased, and a consequent additional premium required, the policy should be void, unless notified to defendants and allowed by them, and the consequent additional premium paid. It appeared that when the policy was effected by B., he was told by defendants' agent that if an elevator was erected on the premises without informing defendants, his policy would be avoided, as in that case he would have to pay an additional premium; but this was not inserted in the policy. A. erected an elevator, and did not give notice to defendants:—Held, on a plea setting out the condition, and alleging the erection of the elevator, that the risk was thereby increased, and that a consequent additional premium would have thereby been required; that the jury not having found any increase of risk, the facts afforded no defence. *Todd* v. *Liverpool and London Globe Ins. Co.*, 18 C. P. 192.

A policy provided that it should be avoided by any additions made to the building insured, unless written notice thereof was given, and defendants' consent endorsed. The plea stated an addition, without notice or consent, by which defendants alleged that the premises became materially altered so as to increase the risk. The plaintiff took issue:—Held, that the latter averment being surplusage need not be proved, and that defendants were entitled to succeed on having the addition without notice, although the jury found the risk not increased by it. There was also an equitable replication of parol waiver by an agent duly authorized, but his authority was not proved; and Semble, that such waiver could be no answer. *Lyndsay* v. *Niagara District Mutual Fire Ins. Co.*, 28 Q. B. 326.

Plea, that by one of the conditions, defendants were to be notified of all changes of occupation, or of vacancy: that at the time of insurance the premises were vacant, and afterwards they were occupied by B., in part as a dwelling house, and in part as an Orange lodge; and defendants were not notified. Equitable replication, that when the policy was made, defendants knew that the building was in course of construction, and that B. intended to occupy it as a dwelling; and that afterwards, with such knowledge, B. occupied as in the plea alleged; and defendants with knowledge thereof received the renewal premiums down to the time of the loss without objection:—Held, replication good, and that it sufficiently shewed notice to defendants of the occupation as a lodge. *Dickson* v. *Provincial Ins. Co.*, 24 C. P. 157.

A condition provided that in case the premises became vacant or unoccupied, unless notice thereof was given, and the company consented to retain the risk, the policy should be void:—Held, that the insured had a reasonable time to give notice: that three days was not too long a delay, the property being at Owen Sound and, the office of the company at Hamilton; and a fire having occurred on the third day, that the company was bound to make it good. *Canada Landed Credit Co.* v. *The Canada Farmers' Mutual Stock Ins. Co.*, erroneously reported as *The Canada Agricultural Ins. Co.*, 17 Chy. 418.

See *Grieve* v. *Smith*, 23 Q. B. 23, p. 1868; *Wyld* v. *London and Liverpool and Globe Ins. Co.*, 33 Q. B. 284, p. 1807.

(h) *Other Conditions.*

Where by a policy the insured agreed to keep twelve pails full of water on each flat of the building during the continuance of the policy, and he neglected to do so, but it appeared that the loss was not in any way affected by his default: —Held, that nevertheless he could not recover. *Garrett* v. *Provincial Ins. Co.*, 20 Q. B. 200.

By a policy on a "general stock of iron and hardware" it was provided that if gunpowder was kept on the premises without written consent, the policy should be void. To a plea setting up a breach of this condition, the plaintiff replied that it was well understood by the parties that the words "general stock of iron and hardware" included gunpowder in tins and canisters to the extent of 25 lbs., which was the gunpowder mentioned in the plea:—Held, replication bad; for the condition, which wholly excluded gunpowder, could not be thus qualified by parol evidence. *Mason* v. *Hartford Fire Ins. Co.*, 29 Q. B. 585.

A condition endorsed on a policy provided that, if for any cause the company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the company should refund a ratable proportion of the premium. Held, not essential that the notice should precede the termination of the insurance, but that they might be cotemporaneous, and that the company could terminate the risk, by giving notice that they did so, and refunding the unearned premium:— Held, also, that in this case, on the facts set out, there was evidence to shew a termination of

the risk under the condition. *Cain* v. *Lancashire Ins. Co.*, 27 Q. B. 453. See also, *S. C.* p. 217.

One of the conditions of the policy required, among other things, that where property was partially damaged by fire, the insured should forthwith cause it to be put in as good condition as the case would allow, assorting the various articles, and separating the damaged from the undamaged goods, so that the damage could easily be ascertained; and should cause a list of the whole to be made, after which the amount of the damage should be ascertained, &c. The declaration on this policy alleged a total loss of the property insured. The defendants pleaded, after setting out this condition, that portions of the property were partially damaged, but the plaintiffs did not, with regard to it, comply with requirements of the conditions. The plaintiff replied that the property wholly destroyed far exceeded in value the amount insured, and that he sued only for the loss thereon, and not on the property partially destroyed:—Held, replication good, for that the condition was not applicable where the claim was only for goods wholly destroyed. Held, also, that the replication was not a departure, for the plaintiff under the declaration for a total loss might recover for a partial one. *Williamson* v. *Hand-in-Hand Mutual Fire Ins. Co.*, 26 C. P. 266.

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6. *Notice, Account, and Proof of Loss.*

[*See 38 Vict. c. 65, s. 1, O.*]

The declaration averred that certain affidavits required by the conditions, were made by B. and D.:—Held, that proof of affidavits by such parties was indispensable, as well as that the affidavits should strictly conform to the terms of the policy. *Alderman* v. *West of Scotland Ins. Co.*, 5 O. S. 37.

A condition that the particulars of the loss shall be given under oath, within a specified time after the loss, must be complied with before the insured can recover on the policy. *McFaul* v. *Montreal Inland Ins. Co.*, 2 Q. B. 59.

The affidavit of loss had no jurat, and was not in the form of an affidavit, and on that ground, among others, the plaintiff was precluded from recovering. *Shaw* v. *St. Lawrence County Mutual Ins. Co.*, 11 Q. B. 73.

New trial granted on payment of costs, to enable plaintiffs to give evidence of a waiver of this condition, where a nonsuit would be equivalent to a verdict for defendants, the six months having expired within which the action must be commenced. *Cameron et al.* v. *Monarch Ass. Co.*, 7 C. P. 212.

The insured being bound within fourteen days to furnish a statement of claim, with proof thereof by affidavit or affirmation *when requested*: Held, the jury having found that a proper and bonâ fide demand had not been made, that the plaintiff was entitled to recover. *Cameron* v. *Times and Beacon Fire Ins. Co.*, 7 C. P. 234.

The company had required certain invoices, which the plaintiffs refused to produce, though it was in their power to do so; but the jury, being satisfied on other evidence that the loss had been actually sustained, found in favour of the plaintiffs:—Held, that not having complied with the condition in the policy, the plaintiffs could not recover, and a new trial was granted. *Cinq Mars et al.* v. *Equitable Ins. Co.*, 15 Q. B. 143.

Held, that the evidence set out here, being substantially the same as at the last trial, fully supported a verdict for defendants on the plea setting up that vouchers and explanations which the plaintiffs could have given, had not been furnished as required. *S. C. Ib.*, 246.

One condition was, that "In case of loss or damage on a policy assigned, where there is no actual transfer of the property insured, proof of loss shall be made by the insured in conformity with the conditions of this policy, in like manner as if no assignment had been made," &c. Quære, as to the exact meaning of such condition. *Davies* v. *Home Ins. Co.*, 24 Q. B. 364; *S. C.* in Appeal, 3 E. & A. 269.

Declaration on a policy made to one B., of whom the plaintiff was assignee in insolvency. Third plea, that before the loss, the plaintiff became the assignee, and the policies and insured property became absolutely transferred and vested in him, and he became and was the insured under the policy, and the person sustaining damage, but that he did not give notice of the loss, &c.:—Held, plea bad. Equitable replication, that before the loss the property was not absolutely vested, &c., in plaintiff, but B. still had an insurable interest in the property to the amount of the policy, which defendants knew and they renewed the policy to him for value for a year, during which the loss occurred; and B., who was the person sustaining loss, &c., gave the notice and proofs:—Held, bad, for it was a departure from the first count of the declaration which averred a sole interest in the plaintiff and that B. had no insurable interest apart from the plaintiff. *Dickson* v. *Provincial Ins. Co.*, 13 C. P. 157.

The plaintiff having insured his property with a mutual insurance company on the 1st December, 1864, for three years, mortgaged it to one N., and on the 13th May, 1865, assigned to him the policy. N. paid up all arrears of assessment but gave no note or security for the amount so paid. Defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N. His mortgage was paid off in 1868, and in March following the plaintiff sued on the policy. One of the conditions endorsed was that all persons insured and sustaining loss should forthwith give notice, and within thirty days deliver a particular account of such loss signed by them, and verified by their oath. Held, that the action could not be maintained. Per Morrison, J., N. was not the person insured and therefore could not give the notice of loss. Per Wilson, J., he was insured, and could have sued in his own name, but the contract of insurance having been absolutely transferred to him, the plaintiff could not sue. *Fitzgerald* v. *Gore District Mutual Fire Ins. Co.*, 30 Q. B.

The condition required that the assured should give immediate notice of any loss or damage by fire, within fourteen days, to the agent of the company, and as soon after as possible should deliver in a particular account of such loss

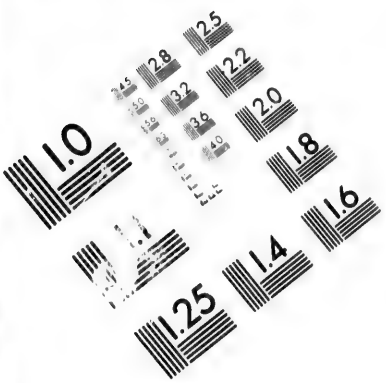
damage, signed with their own hands, and verified by their oath or affirmation, and should also declare on oath or affirmation in what manner the buildings were occupied at the time of the loss, and who were the occupants. That they should also produce a certificate under the hand and seal of a magistrate most contiguous to the place of the fire, that he had examined the circumstances, and believed the plaintiff had without fraud sustained loss to the amount which the magistrate should certify; and until such proofs, declarations, and certificates were produced, the loss should not be payable. A fire occurred on the 3rd of July. On the 7th one of the plaintiffs signed a written notice to defendants (set out in the case) stating the destruction of the mill: that its whole value was $2400, and that there was no other insurance; at the foot of which was a certificate, under the hand and seal of a justice of the peace, stating that he had examined several persons on oath in the matter, &c., and that he believed the assured had, without fraud, sustained loss by the fire "to the amount of his insurance and over." On the 20th one of the plaintiffs received a note from defendants' agent, to say that the papers sent were not in compliance with the policy; and on the 20th the following notice was sent to him, signed by the plaintiffs: "Gentlemen,—We hereby notify you that a fire occurred in our premises on the night of the 3rd of July, by which the following property was destroyed: to wit, a saw-mill, whole value $2400. We have not had any other insurance effected on said saw-mill. The above named sum is the whole value of the subject insured. The property is owned by us. The building was used as a saw-mill only," &c. (adding a short statement of the circumstances attending the fire.) At the foot was written, "Sworn and affirmed before me at Galt this 14th of July, 1858. (Signed) Thomas Simpson, J. P.;" and underneath the same justice certified that he had made enquiries, and believed the facts set forth, and that the plaintiffs had without fraud sustained loss to the amount therein mentioned. This was not under seal:—Held, McLean J. diss., that the plaintiffs could not recover, for the condition had not been complied with. As to the particular objections taken:—Held, 1. That the certificate and the affidavit were in time; and that it was unnecessary that the notice or affidavit should be given or made by all the owners of the property insured. Semble, that a notice given within fourteen days would be sufficient; 2. Per Robinson, C. J.—The paper sent on the 20th was insufficient, for it could not be treated as an affidavit of the truth of the statements as to the loss, or of anything more than that the notice was given, Burns, J., dubitante; but Held, that the omission to state what persons occupied the building at the time of the loss was fatal: 3. Semble, that the defect in the jurat, in not stating which of the plaintiffs were sworn and which affirmed, would not have been fatal; 4. That both certificates were insufficient, for not stating specifically the amount of the loss; and the second certificate for want of a seal. A nonsuit was therefore ordered. *Mann et al.* v. *Western Assurance Co.*, 10 Q. B. 190.

The plaintiffs, after the judgment in the last case, and about eleven months after the fire, obtained a new and sufficient affidavit and certificate, and brought another action, in which defendants pleaded that the plaintiffs did not as soon after the fire as possible deliver these papers. It appeared that when the first papers were furnished, defendants objected to their sufficiency, and that others were a few days after delivered, to which it was not shewn that the plaintiffs were notified of any objection until the first trial:—Held, that the words "as soon as possible" must be construed to mean within a reasonable time under the circumstances, and, Burns, J., diss., that it was properly left to the jury to say whether, considering all the facts, defendants had complied with the condition by furnishing the second set of papers, and was not a question of law upon which the judge should have decided. Held, also, that the affidavit and magistrate's certificate last furnished were sufficient, though M., who alone made the affidavit, was described as solely interested in the property, and the certificate stated the loss as his only. *S. C.* 19 Q. B. 314.

The policy required a certificate under the hand and seal of a magistrate, stating (among other things) that he was acquainted with the character and circumstances of the assured or claimant, and that he verily believed that he, by misfortune, and without fraud or evil practice, had sustained loss and damage on the subject insured to the amount certified. The action was brought by K., the official assignee in insolvency of W., the insured, who became insolvent after the loss. The certificate stated that the magistrate was acquainted with the character of W., and that he verily believed that the claimant, K., had, as such assignee, without fraud or evil practice, sustained loss and damage by the said fire to the extent of $2,500:—Held, clearly insufficient, for it was consistent with the magistrate's belief that the fire occurred through W.'s fraud or evil practice, and it did not state that K. had sustained the loss on the subject insured, but only by the fire. A coroner is a magistrate who may give such certificate. *Kerr* v. *British America Ass. Co.*, 32 Q. B. 569.

The policy required a certificate of a magistrate, that he was acquainted with the character and circumstances of the insured, and had made diligent enquiry into the facts set forth in his statement, and knew or verily believed that he really, and by misfortune, &c., sustained by such fire loss or damage to the amount therein mentioned. The certificate stated that the magistrate had read plaintiff's statement of loss, "and from diligent enquiries made by me, I verily believe that he hath really and by misfortune, and without fraud or culpable carelessness, sustained loss to the amount of over $3,000:"—Held, clearly insufficient, in not stating that he had made any inquiry into the truth of the matters set forth in the statement, or that the loss was sustained on the subject matter insured. *Mason* v. *Andes Ins. Co.*, 23 C. P. 37.

A fire policy on a saw-mill and machinery therein required, in the event of loss, a certificate containing certain information "under the hand of a magistrate or notary public most contiguous to the place of the fire, *and not concerned in the loss as a creditor or otherwise*," &c. The magistrate who certified had leased the land on which the mill stood to the plaintiff for fifteen years, of which nine were unexpired. The mill insured



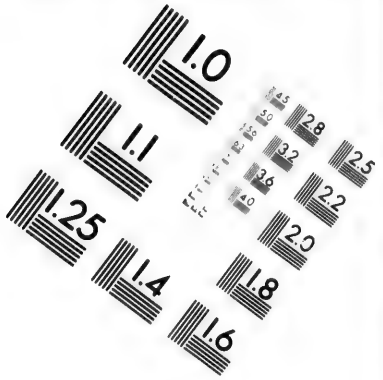
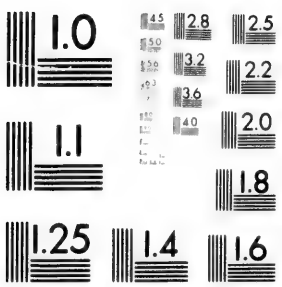
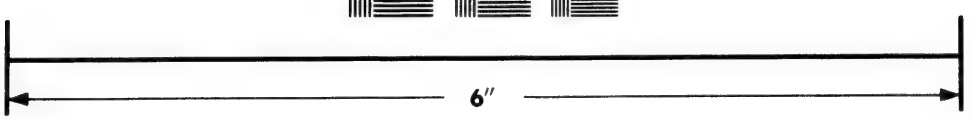
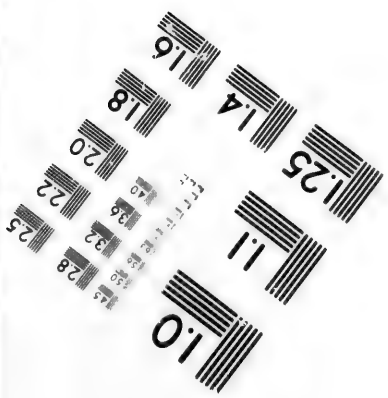
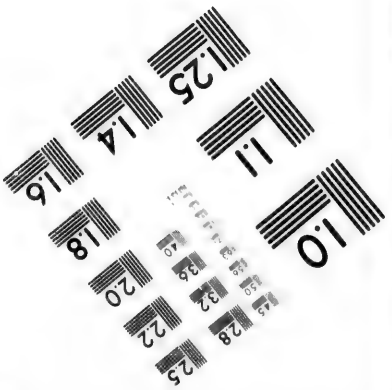


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by defendants had been built by the plaintiff to replace one previously burned, and no rent was due at the time of the fire. There were no covenants on the part of the lessor to keep in repair, and there was a covenant on plaintiff's part to leave the mill in sufficient repair at the end of the term to saw 2,000 feet in twelve hours; any machinery not required for this purpose to be removed by the plaintiff or paid for by the lessor. On motion to set aside a verdict entered for the plaintiff in an action on the policy: Morrison, J., was of opinion that the magistrate was not concerned in the loss, within the meaning of the condition; Wilson, J., that he was. The court being equally divided, the rule dropped. *McRossie* v. *Provincial Ins. Co.*, 34 Q. B. 55.

Held, that the affidavit of loss, and the justice's certificate, set out in this case, were clearly not in compliance with the conditions endorsed on the policy, and that the plaintiff therefore could not recover. Held, also, that mutual insurance companies are not precluded from making such conditions. *Langel* v. *Mutual Ins. Co. of Prescott*, 17 Q. B. 524.

Held, that sworn entries in the custom-house of the quantity and value of goods imported by the party claiming damages (occasioned by fire) under a policy, and who claimed a much larger amount than appeared to have been imported during the period claimed for, were evidence to go to the jury as a measure of damages. *Lazare* v. *Phœnix Ins. Co.*, 8 C. P. 136.

Defendant pleaded the non-fulfilment of a condition, which required the certificate of the nearest magistrate of the cause of the fire, upon which the plaintiffs took issue. It appeared that the plaintiff had sent defendants a certificate, which they had returned, owing to some alleged insufficiency. At the trial it was not produced, nor was plaintiff called upon to produce it, nor any evidence given of its contents:—Held, that the plaintiff having established a primâ facie case, he was entitled to recover, and that it was for defendants to shew that the certificate was insufficient. *Platt* v. *Gore District Mutual Fire Ins. Co.*, 9 C. P. 405.

Declaration on a policy made to plaintiffs—Plea, that by a condition on the policy, any loss or damage was to be paid within three months after due notice and proof thereof, in conformity with the by-laws and conditions annexed to the policy; and that such proof should further contain a certified copy of the written portion of the policy. Averment, denying that the proof did contain such certified copy:—Held, bad, because the production of the written part of the policy was not a condition precedent to plaintiff's right to recover. *Richardson et al.* v. *Canada West Farmers' Mutual and Stock Ins. Co.*, 16 C. P. 430.

Persons insured were bound, within thirty days after a loss, "to deliver in a particular account of such loss or damage, signed by their own hand, and verified by their oath or affirmation, and by their books of account and other proper vouchers." The plaintiff sent in his affidavit, stating generally the value of the goods saved and destroyed; a certificate of the reeve, as the nearest magistrate, as to his enquiry into and belief with regard to the fire being accidental, and of two merchants; and a book containing a statement of the goods lost, made up partly from invoices and partly from recollection, but not verified by his account books or other vouchers, which he had but did not produce, nor by his affidavit:—Held, clearly no compliance with the condition. *Greaves* v. *Niagara District Mutual Fire Ins. Co.*, 25 Q. B. 127.

The account given, under a similar condition, consisted of an affidavit, stating that the premises were occupied by plaintiff as a general merchant's store; that the whole value of the goods and merchandize destroyed was $800; and that accounts were attached of goods sold to that shewing however, only charges of "goods per invoice:"—Held, clearly insufficient. *Mulcay* v. *Gore District Mutual Fire Ass. Co.*, 25 Q. B. 424.

The plaintiff, suing upon a policy which required a particular account of the loss, as in the last case, had given only a statement that the property insured, consisting of general merchandise in his store, was totally consumed, as were also his books of account, invoices, and papers relating to the business, and that the value as nearly as could be ascertained without such books, &c., was $3,000. His affidavit was attached verifying this statement. The evidence at the trial, however, shewed that he had the means of furnishing a more particular account through those from whom he had purchased:—Held, no compliance. *Banting* v. *Niagara District Mutual Fire Ass. Co.*, 25 Q. B. 231.

The reasonable construction of this condition is, that the assured shall produce to the company something which will enable them to form a judgment whether the loss or damage claimed for was actually sustained; and so construed it is wholly unobjectionable. *Id.*

The plaintiff, suing under a similar policy, sent in his affidavit, stating in general terms the value of the different kinds of goods destroyed but without in any way mentioning his loss on the buildings insured, the only statement as to them being that they had been totally consumed, and without verifying his deposition by his account books or other proper vouchers:—Held, clearly not sufficient. *Carter* v. *Niagara District Mutual Ins. Co.*, 19 C. P. 143.

The proofs of loss consisted of an affidavit of the plaintiff, stating that the store was totally destroyed by fire on the 12th March, and that an annexed statement contained a true and correct account of the value of stock on hand on the 20th October, 1870, (about 17 months before the fire), of stock received since, of the sales and value of goods sold since, and of the value of stock saved, and that the plaintiff's loss to personal property was $2,249.90. The statement was attached to the affidavit, but was not itself signed or verified under oath, and gave no details of the stock on hand, received, &c., except the value in bulk. Only one book was produced in which a number of invoices were pasted, and a diary containing numerous memoranda, from which a more particular account of the loss might have been furnished:—Held, following the last case, that the statement was insufficient. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

The condition required the insured within fourteen days to give in writing an account of their loss or damage, such account of loss to have reference to the value of property destroyed

or damaged immediately before the fire, and to verify the same by their accounts, and by affidavit, and such vouchers as in the judgment of the company might tend to prove such account and value, and to produce such further evidence and give such explanations as might be reasonably required; and if there should appear any fraud or false statement in such account of loss or damage, or in any of such accounts, evidence, or explanations, or if such affidavit should contain any untrue statement, the policy should be void. Held, that as an affidavit could be required only to verify the account of loss or damage, the "untrue statement" must refer also to such account, and that an untrue statement in the affidavit as to the plaintiff's title would not avoid the policy. *Ross* v. *Commercial Union Ass. Co. of London*, 20 Q. B. 552.

In this case the statement complained of was, that the plaintiff was absolute owner of the building insured, which was unincumbered, whereas he had not yet paid for the land. He had, however, put up the building himself, so that if it had not become part of the realty his statement would have been literally true. *Ib.*

The policy required as particular and accurate an account of the loss as the case would admit, and such other evidence as the directors, &c., should reasonably require. The house insured was burned on the 21st August, 1867. On the 9th October the plaintiff sued, and on the 9th he furnished a builder's certificate of the value of the building, which had been required by the defendants before the action:—Held, that such certificate was reasonable evidence to require: that being demanded before action, the plaintiff could not sue without giving it; and that, in the absence of any special circumstances, the question whether it had been required within a reasonable time did not arise. Whether the condition authorized the demand of such certificate was a question for the court, though whether what was furnished complied with the requisition might be for the jury. *Fawcett* v. *Liverpool, London and Globe Ins. Co.*, 27 Q. B. 225.

The demand was made by defendants' inspector, whose duty was to visit the agencies and adjust losses. It was objected that only the directors could make it; but Held, sufficient, they having adopted the Inspector's Act. *Ib.*

The condition as to proof of loss required a certificate from the magistrate most contiguous to the place of fire:—Held, that the learned judge at the trial correctly ruled, under 36 Vict. c. 44, s. 33, O., that the requirement of a literal compliance with this condition was not just and reasonable. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

The policy contained a condition requiring person sustaining loss by fire to forthwith give notice thereof in writing, and as soon after as possible to deliver a particular account of the same, stating various particulars specified; and in case of buildings or other fixed property, to the company said statement by the certificate of a magistrate, &c. "They shall also produce a certificate under the hand and seal of a magistrate," &c.: "and until such proofs, declarations and certificates are produced, the loss shall not be payable." Defendants, after setting out this condition in their plea, alleged that although the plaintiff, as soon as possible after the fire, made a statement of his loss and damage according to the condition, yet he did not, as soon as possible after said fire, nor for more than eight months thereafter, produce to defendants such a certificate under the hand and seal of a magistrate as required by the condition. At the trial it appeared that the fire occurred on the 19th of April, 1874. On the 10th of May an affidavit of loss was sent in, accompanied by a certificate under the hand, but not under the seal, of a magistrate; and on the 4th of January, 1875, a second certificate, under the magistrate's seal, was delivered to the company. The jury having found for defendants on this plea:—Held, 1. That the condition requiring a seal was not unjust or unreasonable. 2. That the words "as soon after as possible," did not apply to the magistrate's certificate, which was required to be produced only within a reasonable time. 3. Semble, that the question of reasonable time here, there being no facts in dispute, was for the Court; and, under 37 Vict. c. 7, s. 33, the jury having found for the plaintiff on all the other issues, and the motion being to enter a verdict for the plaintiff on the evidence, the court held that the second certificate was produced within a reasonable time, and entered the verdict for the plaintiff on this issue. *Cammell* v. *Bearer and Toronto Mutual Ins. Co.*—Q. B.—E. T. 1876. Not yet reported.

The policy of a mutual insurance company required a certificate of the loss, &c., under the hand of the magistrate or notary public most contiguous to the place of the fire, and there was a plea that the plaintiff had not furnished such certificate, on which issue was joined. The plaintiff at the trial applied for leave to reply, 1. That it was by accident or mistake it was not furnished; 2. That defendants did not, within a reasonable time, object to the proof as regarded this certificate; and 3, that the condition was unreasonable. It appeared that the certificate furnished was by a magistrate of another county, who had not enquired into the circumstances: that there were suspicions as to the fire; and that the two nearest magistrates would not have given the necessary certificate. The learned judge, after hearing this evidence, refused to add these replications, and found as a fact that it was not by accident or mistake the certificate was not furnished, but that the plaintiff refrained from applying to the proper magistrates because he knew they would refuse:—Held, that under 36 Vict. c. 44, s. 33, the plaintiff might insist that the condition was unjust or unreasonable without specially pleading it; but that it was clearly not unjust or unreasonable; and the court under the Administration of Justice Act, s. 34, refused a new trial on the ground that the objection was not allowed at the trial. Semble, that a demurrer is the proper mode of raising the question. Held, also, that the non-compliance with the condition was not excused under 38 Vict. c. 65, s. 1, the omission to give the certificate not having been caused by necessity, accident or mistake, and the statement or proof of loss not having been given in good faith. A nonsuit was therefore upheld. The facts relied upon bring the case within that section must be pleaded. *Morrow* v. *Waterloo County Mutual Fire Insurance Co.*—Q. B.—T. T. 1876. Not yet reported.

Held, that the statement of loss set out in the report of this case, and sworn to by the plaintiff,

was sufficient. *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

A policy of insurance on several different kinds of goods for separate amounts on each is, in effect, a separate policy on each class; and where such a policy required the assured to deliver "as particular an account of the loss and damage as the nature of the case would admit:"—Held, he must give such account of the loss on each class of goods, and that a statement of loss upon his stock of merchandise, generally, was not sufficient. *Lindsay* v. *Lancashire Fire Ins. Co.*, 34 Q. B. 440.

One of the by-laws of an insurance company provided that a detailed account of any loss verified by oath was to be given to the company within thirty days after the loss sustained: and in case of any misrepresentation, fraud, or false swearing, the assured should forfeit all claim by virtue of his policy; and the act of the Legislature (36 Vict. c. 44, O.,) also required such proof to be given within thirty days after the loss sustained. The assured considering it unnecessary to do so, did not give the proof until after the thirty days had elapsed. Held, that under such circumstances the claimant could not recover the amount of his loss: but semble, if the proofs had not been furnished by reason of accident or mistake, relief might have been afforded him. *Hawke* v. *The Niagara District Mutual Ins. Co.*, 23 Chy. 139.

See *Fair* v. *Niagara District Mutual Fire Ins. Co.*, 26 C. P. 398, p. 1830; *Coulthard* v. *Royal Ins. Co.*—Q. B.—18th June, 1876, p. 1861.

See, also, I. 5 (d) p. 1812, and the next to sub-head.

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7. *Waiver of Conditions.*

[*See 38 Vict. c. 65, s. 1, O., and the schedule of conditions to 39 Vict. c. 24, O., No. 19.*]

(a) *As to Notice and Proof of Loss.*

Where notice of the loss and the particulars of it are required by a policy, they may be waived by the conduct of the insurers. In this case the declaration alleged that notice of the loss was given to defendants forthwith, and an account of the particulars of the loss as soon as possible (such being the conditions of the policy); and issues were taken on these allegations. There were two separate policies on a shop and on the goods contained in it. Both building and goods were destroyed. The fire took place on the 13th of June, and the notices, both as to the shop and the goods, were given on the 13th July. Defendants then entered into correspondence with plaintiff as to furnishing better particulars, which were afterwards furnished; and they then refused to pay for the goods on account of some suspicious circumstances attending the fire, but they paid the amount insured on the house:—Held, that defendants were precluded from objecting to the sufficiency of the notices, or to the time at which they were given. *Lambkin* v. *Ontario Marine and Fire Ins. Co.*, 12 Q. B. 578.

Defendants before the trial agreed that no objection should be taken to the want of a policy; that the question to be tried should be confined to the cause and manner only of the loss, and that all proceedings should be had in the same manner, and to the same effect, as if a policy had been duly issued and were produced:—Held, that they were precluded from objecti to the want of notice and proof of loss. *Wah et al.* v. *Western Ass. Co.*, 18 Q. B. 19.

To an action on a judgment recovered in N York, defendants pleaded that the judgment w on a policy of insurance made by them: t there was a provision in the policy, that in ca of loss the same would be paid within six days after proof and adjustment, and that proof or adjustment was ever made. The pla tiffs replied, that when called upon to p fendants refused, not for the want of such pro or adjustment, but for other and different reaso alleged in writing; that they thereby, accordi to the law of New York, waived the conditi pleaded, and under said law became liable, a said judgment was recovered, upon proof of su waiver, without any evidence of proof or adjus ment. Held, on demurrer, replication bad, f as the same defence could have been pleaded the original suit it might, under 23 Vict. c. 2 be set up here; and whether the condition w waived or performed was a matter of evidenc only, on which our law must prevail. *Wapl et al.* v. *Provincial Ins. Co.*, 21 Q. B. 612.

Defendants, among other pleas, traversed th delivery of a statement of loss, verified on oath within thirty days. It appeared the value of th premises destroyed was the only question afte the fire, and to settle that an arbitration wa proposed, but did not take place, and the proof were not sent in till the thirty days had e pired. The proposal to refer, however, w apparently after the thirty days, and after plai tiff had received the secretary's letter stati that he could waive nothing:—Held, that the was no evidence of waiver of the condition the policy, and a verdict for plaintiff was aside. *Niagara District Mutual Fire Ins. Co.* *Lewis*, 12 C. P. 123.

To an action on a policy, defendants plead non-performance of a condition requiring the livery of a particular account of the plaint loss, &c. The plaintiff replied de injuria, at the trial relied upon a parol waiver of t condition by defendants' managing director secretary. Quære, whether evidence of waiver was admissible, not being specially plied; but held, that if replied it would h been no answer to the plea, for it would h been setting up a substituted parol contract answer to the sealed policy; and a nonsuit therefore ordered. The 27-28 Vict. c. 38, g no authority to the directors to waive by p the performance of a condition precedent, less to the managing director and secret Quære, as to the effect of that statute. *Sco Niagara District Mutual Ins. Co.*, 25 Q. B.

Defendants' secretary wrote to the pla after the fire that defendants declined p his claim in consequence of the facts not stated in his application for the policy; an plaintiff relied on this as a waiver of the acc —Held, that such waiver should have specially replied, and Semble, that if it had the letter was not evidence of it. *Mul Gore District Mutual Fire Ass. Co.*, 25 Q. B.

Held, that the fact of the company, af ceiving the insured's proofs of loss, rem silent for some months and until action br was no waiver of the right to receive proofs. *Mason* v. *Andes Ins. Co.*, 23 C. P.

In an action on a policy of insurance the proofs of loss were not in accordance with the conditions of the policy, in that the magistrates's certificate stated that the magistrate was "contiguous" instead of "most contiguous" to the place of the loss, and also omitted to state that the insured had sustained loss on the property insured to the amount claimed by him; but it appeared that the certificate was in accordance with a printed form furnished to the insured, for him to fill up, by the company's agent, as well as with the policy at first delivered to the insured, and in his possession when the fire took place, but subsequently, and after the loss had occurred, on the ground of a misdescription of the property insured, exchanged for the policy sued on; and the defendants, though aware of the plaintiff having complied with the first policy, and of the mistake as to the subsequent one, never informed him, so that he might correct it, but laid by until the trial, when they attempted to take advantage of it:—Held, that under these circumstances the defendants could not avail themselves of the mistake. *Shannon* v. *Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

An insurance company cannot set up, in discharge of their liability, that the preliminary proofs were defective, where they did not make the objection to them when furnished, or until after a suit had been instituted for the loss. *Canada Landed Credit Co.* v. *Canada Farmers Mutual and Stock Insurance Co.*, erroneously reported *Canada Agricultural Insurance Co.*, 17 Chy. 418.

Per Hagarty, C. J.—The fact of the insurance company after receiving the proofs of loss not notifying their objections to them, could not be considered a waiver of such objections. Canada Landed Credit Co. v. Canada Agricultural Mutual Ass. Co., 17 Chy. 418, remarked upon. *Stickney* v. *Niagara District Mutual Ins. Co.*, 23 C. P. 372.

The statement of loss was required by the conditions to be given within thirty days. The fire was on the 11th August, and the statement was not sent until the 25th September, but the delay was occasioned by the delay of the company's agent to send a blank form for the purpose, as he had promised:—Held, sufficient; and Semble, that at all events the delay of a few days would not under the condition avoid the policy. *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*—Q. B.—T. T., 1876. Not yet reported.

See *Cameron* v. *Monarch Ass. Co.*, 7 C. P. 212, p. 1839; *Smith* v. *Commercial Union Ins. Co.*, 25 Q. B. 69, p. 1856; *Fair* v. *Niagara District Mutual Fire Ins. Co.*, 26 C. P. 398, p. 1830.

(b) *As to Time within which to Sue.*

A declaration by defendants that they intend to resist payment, is no waiver of the condition that the action shall not be brought until sixty days after proof of loss. *Hatton* v. *Provincial Ins. Co.*, 7 C. P. 555.

One condition of a policy was, that no action should be brought under it against the company, unless within twelve months after the right accrued. The plaintiff alleged a waiver of this condition, and relied upon an alleged conversation between his agent and the president of the company:—Held, that the condition could not be so waived, and that such evidence was properly rejected:—Held, also, that the letter, set out in the case, contained no evidence of a waiver of this condition. *Lampkin* v. *Western Ass. Co.*, 13 Q. B. 237.

Declaration, on a policy alleged to have been sealed and executed by defendants. Plea, that the policy was subject to a condition that no action should be brought on it except within six months from the loss, and that the plaintiff did not sue within that time. Replication, on equitable grounds, that when the loss occurred, defendants had not yet issued a policy to the plaintiff, although he had previously effected the insurance with them; that although requested they refused to execute the policy until after the commencement of this action; and that in consequence of such delay, he was prevented from suing within six months, as he otherwise would have done:—Held, replication bad, as a departure from the declaration, and as shewing in effect that the plaintiff was proceeding upon an equitable cause of action. Defendants also rejoined, on equitable grounds, that long before six months from the fire the policy was executed and ready for delivery to the plaintiff, of which he had notice, and defendants never refused to execute nor withheld the same from plaintiff:—Held, good. *Hickey* v. *Anchor Ass. Co.*, 18 Q. B. 433.

One condition was, that no suit should be sustained against the company, unless brought within six months after the loss. Within this time the plaintiff presented his claim for loss, when it was agreed by parol between him and one D. acting for defendants, that if plaintiff would not prosecute his claim until one S. returned from England, defendants would pay the same and take no advantage of this limitation clause. The insurance had been effected by and through D., and the premiums paid to him, or to S., who was associated with him in the management of the company, and the policy signed by D. as "manager for the said company in Upper Canada," under an express authority from the directors, two of whom signed the same, opposite a seal, with the name of the company upon it. It also appeared that after the six months there had been an actual tender of payment, though of a lesser sum than that claimed, by the agent of defendants to plaintiff:—Held, that D. had power to bind the company as their agent, and what had taken place amounted to a waiver of the condition. *Brady* v. *Western Ins. Co.*, (*Limited*, 17 C. P. 597.

Observations on the premature introduction into the declaration of the averment as to the six months' limitation of time, instead of leaving it to be pleaded by defendants. *Ib.*

It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants thereon after the lapse of one year from the loss, this being a condition also prescribed by the 36 Vict. c. 44. s. 54, O., relating to mutual fire insurance companies. The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, pro-

vided the plaintiff would refrain from suing during such examination, and while negotiations should be pending; and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiffs would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff $500 in full, which they had not paid. The fire took place on the 18th August, 1874. The claim papers were sent in on the 15th September. On the 28th October, the plaintiff was required to produce his books, invoices, and vouchers, &c. He then placed his claim in the hands of an attorney, who wrote to defendants, and was told that without the books there could be no settlement. On the 26th February, 1875, the plaintiff authorized certain creditors of his to settle the claim as they might think proper. These creditors employed other attorneys, who wrote to defendants on the 10th April, threatening a suit, after which defendants' general manager called on them and had an interview "without prejudice," in which he made an offer of $500, which was not then accepted. On the 20th April the attorneys wrote to the manager offering to take $800, and saying that unless the claim was settled at once they would sue on the policy. On the 26th April the board met, when this offer was declined, and the manager, who was called by the plaintiff, swore that this decision of the board was at once communicated to the attorneys. Nothing more took place until the 18th September, when the attorneys wrote accepting the offer of $500. The defendants took no notice of this, or of a subsequent letter of the 15th November, and the action was brought on the 9th December. One of the attorneys, who was also junior counsel for the plaintiff at the trial, being called as a witness, swore that a few days after the letter of the 20th April the manager called on them, talked of a settlement, for which he seemed anxious, and said that if two other companies interested would each pay $100 more, defendants would do so as well. One of the attorneys denied notice of the resolution refusing their offer of $500, but admitted that the manager told him then that defendants declined it. No mention was made of the limitation clause during the negotiation:—Held, that there was no evidence to go to a jury either of the agreement alleged to pay $500, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent defendants from insisting on the forfeiture. *Davis* v. *Canada Farmer's Mutual Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

Semble, that defendants could not be bound by the agreement alleged to pay the $500, unless under their corporate seal. *Ib.*

(c) *As to other Insurance.*

Where there was some evidence of a waiver of the notice of another insurance required, which the plaintiff could not take advantage of under his replication, the court, instead of a no suit, granted a new trial with leave to amen *Hatton* v. *Beacon Ins. Co.*, 16 Q. B. 316.

To a declaration against a mutual insuran company, defendants pleaded, 1. An insuran with another company, before the granting the policy sued on, without defendants' consen 2. A similar insurance after defendants' poli was granted. The plaintiff replied, on equitab grounds, to the first plea, that the insurance h been effected with the A. Co., which had faile and the plaintiff notified defendants thereof, a that said policy would not be renewed, to whi defendants made no objection, but afterwar granted the policy sued on, and received fro the plaintiff the calls on his premium note. A to the second plea, that the plaintiff notifi defendants' agent of the insurance, so that might endorse defendants' consent thereto their policy, or notify the plaintiff if defendan refused to do so, but that they did neither, a afterwards made the plaintiff pay calls on h note:—Held, on demurrer, replication bad, the 6 Will. IV. c. 18, s. 22, avoids the poli under the facts pleaded, and the condition co not be waived by defendants' conduct. *Merc* v. *Niagara District Mutual Fire Ins. Co.*, Q. B. 529.

One of the conditions of an insurance poli provided, that if the insured had at the time the policy, or should have afterwards, any oth insurance without the consent of defendan written on the policy, the policy should be voi The plaintiff relied upon a waiver of this cond tion by defendants' inspector, whose duty wa described as being "to examine into the circum stances, to adjust the loss, and to settle or r port to the office." A nonsuit having bee ordered upon the ground that the condition cou not be waived by the inspector, or in any wa except in writing;—Held, that the nonsuit wa right upon the evidence; and the court refuse to set it aside. Quære, whether, if the case ha been left to the jury, and they had found tha the agent had authority to waive the conditio the verdict could have been allowed to stand *Mason* v. *Hartford Fire Ins. Co.*, 37 Q. B. 43

(d) *Other Conditions.*

Declaration against a mutual company. Plea 1, that before insurance the plaintiff ha mortgaged the premises, which fact he wron fully and fraudulently concealed. 2. That the time of insurance the plaintiff's title w encumbered as in the first plea mentioned, a in his application he did not express the tr title nor the encumbrance, according to the c ditions and the statute, but stated the prem were freehold property. Replication to th plea on equitable grounds, that G., an agent the defendants, filled up the plaintiff's appli tion without noticing the encumbrance, a the plaintiff, in ignorance of the conditions a of the statute, signed it: that before the fire still being agent, informed plaintiff that he h omitted to state the encumbrance in the appli tion, and that it would be necessary to ass the policy to the mortgagee, and to obtain fendants' assent thereto: that the policy bef the fire was so assigned: that G. gave not to defendants that the plaintiff had mortga

the premises for about $800, and defendants assented to the assignment, and the mortgagee has ever since held it; and the action is brought as to the amount of such encumbrance for the mortgagee, and as to the residue for the plaintiff; and that subject to the encumbrance plaintiff was the owner. Replication to second plea, on equitable grounds, substantially the same. Rejoinder to first replication, that by one of the conditions in the application, G. was the plaintiff's agent for the purposes of the application: that until after the fire defendants had no notice that at the time of insuring there was any encumbrance: that the notice given by G. did not state that the mortgage had been made before effecting the insurance, nor the true amount of the mortgage, but a much smaller amount; and that defendants assented to the assignment in ignorance of these facts:—Held, on demurrer replications bad, and rejoinder good; for G. must be considered paintiff's agent in the second application (to allow the assignment) as well as in the first; and this second application mutually implied, if it did not expressly state, that the mortgage was not made until after the insurance. *Johnstone* v. *Niagara District Mutual Ins. Co.*, 13 C. P. 331.

Declaration, on a policy assigned to plaintiff by one S., the original assured, stating the assignment thereof with the consent in writing of defendants, and on security given by plaintiff for the portion of the premium note remaining unpaid, the subsequent ratification by defendants, evidenced by their endorsement on said policy, and assenting plaintiff to all the rights of S. in and upon the same. Plea, setting up a change in the occupancy of the premises, after the issue of the policy, from a tavern to that of a store, by one D., contrary to a condition of the policy, whereby the policy became void. Replication, on equitable grounds, in substance, that the alleged change took place before the assignment of policy to plaintiff: that defendants were, but plaintiff was not, aware of said change: that after said assignment and before the loss, plaintiff was intending to visit the premises to ascertain whether all conditions of the policy had been complied with, but defendants' agent prevented him by representing to him that all conditions of the policy had been complied with, and plaintiff upon such representation refrained from ascertaining the alleged facts in the plea contained, and was afterwards induced by defendants to pay further premiums in respect of such insurance, which defendants with full knowlege of all the facts accepted from plaintiff, who was then and continued to be ignorant thereof till after the fire occurred:—Held, on demurrer, replication bad: that defendants must be held to have waived the alleged cause of forfeiture, and their implicable ratification of the assignment be considered binding upon them, notwithstanding the prior breach of condition by the original assured, and that the said breach was still continuing at the assignment of the policy to plaintiff. *Kreutz* v. *Niagara District Mutual Fire Ins. Co.*, 16 C. P. 131.

Cases in which the original infirmity of claim in title of the assignor will and will not attach upon the assignee of the policy. *Ib.*

Construction of the expression "change of occupancy." Quere, whether plea good. *Ib.*

A policy provided that it should be avoided by any addition made to the building insured, unless written notice thereof was given to the secretary, and the consent of the board of directors thereto endorsed on the policy, signed by the president and secretary. Defendants in their plea stated an addition without notice or consent, by which they alleged that the premises became materially altered, so as to increase the risk. The plaintiff took issue:—Held, that the latter averment, being surplusage, need not be proved, and that defendants were entitled to succeed on shewing the addition without notice, although the jury found the risk not increased by it. *Lyndsay* v. *Niagara District Mutual Fire Ins. Co.*, 28 Q. B. 326.

There was also an equitable replication of parol waiver by an agent duly authorized, but his authority was not proved; and Semble, that such waiver could be no answer. *Ib.*

Declaration, on a policy on a woollen mill and machinery. Plea, in substance, that contrary to the conditions of the policy the premises were used not only for a woollen mill but also for the manufacturing and storage of shingles, and that there was misrepresentation and concealment and breach of warranty, the application stating and warranting that the premises were only used as a woollen mill, and that there was no special risk within 150 feet thereof; whereas they were used as a shingle manufactory, and there were special risks within 150 feet. Replication, on equitable grounds, by way of estoppel: that the plaintiff had by a former policy insured the mill with defendants, and before this policy was executed the defendants' agent inspected the premises, was informed of and saw the shingle mill, and on account of it made the plaintiff pay one half per cent. more than he had previously paid the defendants on the same premises, and in consideration thereof the defendants executed the policy:—Held, on demurrer, replication bad; for it did not aver that there was any fraud or even mistake in preparing the policy, but merely that one of its clearly expressed terms ought not to be insisted on by the defendants, by reason of an equity arising, not since, but prior to the execution of the policy. Semble, that the plaintiff's remedy was in equity. *Crawford* v. *Western Ass. Co.*, 23 C. P. 365.

Declaration on a fire insurance policy not under seal, alleging that, subject to certain conditions, the plaintiff was entitled to recover for loss of goods by fire, and setting out the third condition, which was to the effect that the plaintiff should give notice of every alteration, &c., in the building in which the goods insured were contained, and should have the allowance of the same endorsed upon the policy; and the 14th condition, to the effect that the plaintiff was to give a written statement of his loss, within 14 days after the fire, specifying the particulars and verifying it in the manner described in the condition. The declaration averred that the plaintiff was ready and willing to give the notice in the 14 days as required, but within that time the defendants took possession of the goods which remained, and prevented the plaintiff from giving the required account, and the defendants waived the said condition, and discharged the plaintiff from fulfilling the same. And as to the third condition, it was averred that the plaintiff

did give notice of every alteration, &c., in writing, and requested the defendants to allow the same in accordance with the conditions, and the defendants accepted the notice and waived the endorsement upon the policy, and discharged the plaintiff from requiring the same to be so endorsed, and afterwards continued and confirmed the policy. Fifth plea, to the whole count, that by another condition in the policy, no condition should be deemed to have been waived except by writing endorsed upon the policy, and signed by the general agent, and that the condition (14th) requiring a statement of loss to be put in in 14 days was not so waived. Eighth plea, setting out the third condition, requiring notice of change in building, &c., and averring that there had been such change, and the plaintiff did not notify the defendants of it in writing, nor was it allowed by endorsement, nor did the defendants waive such endorsement. Ninth plea, setting up the same defence as to the 3rd condition as the 5th plea did to the 14th, that the condition could not, under the terms of another condition in the policy, be waived, except by writing endorsed on the policy, and that it was not so waived. Replication by way of estoppel, to so much of the 8th plea as alleged that the alteration was not allowed by endorsement, and that the defendants did not waive such non-endorsement—that the plaintiff gave notice in writing of such alteration, and delivered the policy to the defendants to have the allowance of such alteration endorsed thereon, and also to have the allowance of a further assurance endorsed thereon, and the defendants accepted it for these purposes, and afterwards endorsed the allowance of the further insurance thereon, and returned the policy to the plaintiff, and informed him that all had been done under the policy and conditions which was necessary. The defendants rejoined to this replication, the condition already mentioned, that no condition could be waived except in writing endorsed on the policy. The plaintiff demurred to the pleas and to the rejoinder; and the defendants excepted to the declaration, and demurred to the replication:—Held, as to the declaration; 1. That the averment of prevention by defendants was a perfect excuse for non-compliance with the 14th condition; 2. That the averment of waiver and discharge of the third condition was sufficient, as being a parol discharge to the plaintiff from obtaining performance by the defendants of an act which they were to do under an instrument not under seal. Jacobs *v.* The Equitable Ins. Co., 17 Q. B. 35, dissented from. The fifth plea was held bad, as being pleaded to the whole count, and answering only the act of waiver alleged, not the alleged prevention by defendants of performance; and as setting up a want of waiver in a particular form to a ground of excuse (i. e., prevention of performance by defendants) not dependent on the waiver mentioned in the plea. Semble, that the declaration alleged separately such prevention, and that defendants in some other way waived performance; and did not state the waiver as a result merely of the alleged prevention. The eighth plea held good, as it concluded with a good traverse, that the defendants did not waive the endorsement of the alteration, &c. The ninth plea was also held sufficient, because it properly disclosed a further reason why the waiver alleged by the plaintiff should not be effectual, in this, that the fact of waiver w required to be verified in a particular form, a that such form had not been observed. The plication was held good as an estoppel, for t plaintiff was led by conduct and acts of the fendants to believe and might well have believ that no advantage would be taken of the n endorsation on the policy of the alteration, a might in consequence have refrained from ins ing elsewhere. The rejoinder was held good, it was not a departure from but supported t plea denying the waiver, and shewed why t estoppel against such denial should not appl *Smith* v. *Commercial Union Ins. Co.*, 33 Q. B.

Conditions in a policy for avoiding the su have, in case of a breach, the effect of avoidi the policy, not *ipso facto*, but if the insuran company so elect. Where breaches of co conditions had occurred before loss, and t company, after being notified of such breach took no notice thereof, but called for the pro of loss which were required on the footing of t policy being a subsisting instrument, and the were furnished, the company was held to ha precluded themselves from afterwards settin up the forfeiture. *The Canada Landed Cre Company* v. *The Canada Farmers' Mutual a Stock Ins. Co.*, erroneously reported *The Canad Agricultural Ins. Co.*, 17 Chy. 418.

An Insurance Company cannot set up, in di charge of their liability that the preliminar proofs were defective where they did not mak the objection to them when furnished, or until after the suit had been instituted for the loss. *Ib*

See *Jacobs* v. *Equitable Ins. Co.*, 17 Q. B. 35, p 1827; *Davis* v. *Scottish Provincial Ins. Co.*, 1 C. P. 176, p. 1806; *Campbell* v. *National Life Ins Co.*, 24 C. P. 133, p. 1872; *Shannon* v. *Hastin Mutual Fire Ins. Co.*, 25 C. P. 470, p. 1808 *Shannon* v. *Gore District Mutual Fire Ins. Co* 37 Q. B. 380, p. 1809.

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8. *Actions on Policies.*

(a) *Limitation of Time.*

Covenant on a policy which provided th losses should be paid within sixty days after t proof of them, and that no suit should be ma tained unless commenced within twelve month after *the cause of action should accrue*. Pl that *the fire took place* more than twelve mont before the suit commenced:—Held, no defen *Lampkin* v. *Western Ass. Co.*, 13 Q. B. 361.

It was a condition that "payment of los shall be made in sixty days after the loss sh have been ascertained and proved:"—Held, th the time was to be counted from the time wh the assured had put in all the proof on which relied; and that any objection to the sufficie of such proof must be raised by a special pl not under that condition. *Rice* v. *Provin Ins. Co.*, 7 C. P. 548; *Hatton* v. *Provincial Co.*, 7 C. P. 555.

A condition, that any proceedings to be tak against the company in respect of any loss s tained by the assured, should be instituted wi in six months after such loss should happen Held, not to apply to a case where the comp refused to complete the policy, and a bill filed to compel them to execute a policy, or

the loss sustained by destruction by fire of the property insured. *Penley* v. *Beacon Ass. Co.*, 7 Chy. 130.

A. insured with a mutual insurance company, for a policy expiring on the 26th June, 1863. The 29 Vict. c. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the act, if the loss had happened before, saving the rights of the parties under legal disability. To a plea that the loss happened before the act, and that the action was not commenced within one year from its passing, defendant replied, that when the act was passed A. was in prison (not saying for felony,) and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death :—Held, no answer to the plea. *Tallman* v. *Mutual Fire Ins. Co. of Clinton*, 27 Q. B. 100.

See *Provincial Ins. Co.* v. *Ætna Ins. Co.*, 16 Q. B. 135, p. 1883.

(b) *Parties to Sue.*

Per Robinson, C.J. Sec. 18, 6 Will. IV. c. 18, relating to mutual insurance companies, applies only to absolute alienations, and the plaintiffs in this case as mortgagees were not entitled to sue in their own name. Per McLean and Burns, JJ., they were so entitled. *Burton et al.* v. *Gore District Mutual Fire Ins. Co.*, 14 Q. B. 342.

An assignee of a policy of insurance cannot sue upon it in his own name, although the company have agreed thereby to indemnify the assured and his assigns. *Beemer* v. *Anchor Ins. Co.*, 16 Q. B. 485.

The policy insured V., "loss, if any payable to N. and M.," (the plaintiffs). The covenants of defendants were with "the assured :"—Held, that the plaintiffs could not sue upon such policy, the contract being with V., and that the averment in the declaration of an insurable interest in them was immaterial. *Every* v. *Provincial Ins. Co.*, 10 C. P. 20.

The plaintiff, owning property, insured it with a mutual insurance company on the 1st December, 1864, for three years. He mortgaged it to one N., and on the 13th May, 1865, assigned to him the policy. N. paid up all arrears of assessments, but gave no note or security for the amount unpaid. Defendants assented to the assignment on the 13th December following. The property was burned on the 2nd July, 1867. The notice of loss was given and the requisite affidavits made by N. His mortgage was paid off in 1868, and in March following the plaintiff sued on the policy. One of the conditions endorsed was, that all persons insured and sustaining loss should forthwith give notice, and within 60 days deliver a particular account of such loss, signed by them and verified by their oath :—Held, that the action could not be maintained. Per Morrison, J., N. was not the person insured, and therefore could not give the notice of loss. Per Wilson, J., he was insured, and could have sued in his own name, but the contract of insurance having been absolutely transferred to him, the plaintiff could not sue. *Fitzgerald* v. *Gore District Mutual Fire Ins. Co.*, 30 Q. B. 97.

A marine policy was in this form : The Ætna Ins. Co., of, &c., on account of C., loss, if any, payable to McC. (the plaintiff), in gold, do make insurance, &c. :—Held, that the contract on this policy was entered into with C. ; that McC. was not insured, and could not sue on the policy. Semble, that the insertion in the policy of the words "for or in the name of all persons interested," &c., or "for whom it may concern," would have enabled McC., on shewing interest, to recover ; also, that the words, "as broker" or "as agent," following after C.'s name, would have let in parol evidence to shew the interest and right of an undisclosed principal, who could have sued on the policy. *McCollum* v. *Ætna Ins. Co.*, 20 C. P. 289.

A policy was effected in the name of H. & D., then partners. After the fire, and two months after the making and delivery of the statement of loss, D. assigned all his interest in the policy to H. :—Held, that the action was properly brought, and the statement of loss made by H. alone. *Hutchinson* v. *Niagara District Mutual Fire Ins. Co.*—Q. B.—T. T. 1876. Not yet reported.

A fire policy, in favour of a mortgagor, contained a clause providing that in the event of loss under the policy, the amount the assured might be entitled to receive should be paid to A. L., mortgagee :—Held, reversing the decree below, 14 Chy. 461., that this clause did not make A. L. the assured ; and that a subsequent breach by the mortgagor of the conditions of the policy made it void as respected A. L., as well as himself. Spragge, V. C. diss. *Livingstone* v. *The Western Ins. Co.* 16 Chy. 9, in Appeal.

See *Kuntz* v. *Niagara District Fire Ins. Co.*, 16 C. P. 573, p. 1873.

[See, also, I. 4, p. 1799.]

(c) *Reference to Arbitration.*

By a condition endorsed on a policy of insurance, the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators. An action having been brought on the policy, and an application made under C. L. P. Act, s. 167, to stay proceedings :—Held, 1. That the arbitration intended by the condition was not merely a valuation : 2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute ; 3. Per Dalton, *C. C. & P.*, that the plaintiff was a "party" within the meaning of that section. Proceedings were accordingly stayed. *McInnes* v. *Western Ass. Co.*, 5 P. R. 242.—C. L. Chamb.—Dalton, *C. C. & P.*, and Gwynne ; affirmed in 30 Q. B. 580.

(d) *Pleading and Evidence.*

Where a declaration on a policy was in the old form, containing specific averments of performance of conditions precedent, it was referred to the master to strike out the superfluous matter. *Patterson* v. *Provincial Ins. Co.*, 2 P. R. 164.—C. L. Chamb.—Robinson.

Held, that in an action on a policy of insurance, it is not incorrect to set out all the conditions which, together with the body of the policy, form the contract between the parties. Semble, that a declaration which did not set out

such conditions would be bad. *Fair* v. *Canadian Mutual Fire Ins. Co.*, 6 P. R. 255.—C. L. Chamb.—Dalton, *C. C. & P.*

A declaration on a policy setting out facts from whence it might be inferred that the insurance was effected for the joint benefit of the plaintiff and another:—Held, bad, for not distinctly averring the interest of the other, and that the action was brought on their joint account. *Dunlop* v. *Ætna Ins. Co.*, 2 C. P. 252.

Declaration on a policy alleging that it was "subject to such conditions as are contained in the printed proposals issued by the said company," and that the plaintiff had kept all conditions precedent on his part, "according to the true intent and meaning of the said policy, and of such conditions as are contained in the printed proposals issued by the said company." Plea, that the policy was "subject to such conditions as are printed on the back of the said policy," and that among such conditions was one (setting it out) which the plaintiff had broken. Demurrer, on the ground that the condition pleaded was not shewn to be contained in the printed proposals:—Held, plea good. *Jacobs* v. *Equitable Fire Ins. Co.*, 18 Q. B. 373.

The declaration alleged loss, and notice, and as soon as possible thereafter, and within 30 days, the delivery of particulars, signed, and all the declarations required made on oath, and an account verified by the oath of the plaintiff, and shewing no other insurance on the premises. Plea stating the condition by which the insured was required to give a particular account under oath, and also to declare on oath whether any and what other insurance existed upon the premises at the time of the fire, and alleging that although the plaintiff had delivered due account of his loss, yet he had neglected to inform defendants whether any and what other insurance existed. Replication, that no other insurance was effected on the property insured:—Held, plea bad, for not traversing that the plaintiff had made a declaration upon oath, but alleging only that he had neglected to inform them as to whether there was any other insurance. *Williamson* v. *Niagara District Mutual Fire Ins. Co.*, 14 C. P. 15.

Declaration, that by policy dated 29th May, 1861, the defendants insured plaintiff against loss by fire in $1,200 on a stock of hardware, &c., contained in a frame building, &c.; and also that by a policy of 28th June, 1861, defendants insured plaintiff on a stock of hardware, &c., in a building, &c., in $1,200, at 20 per cent.; on his two-story dwelling house, &c., $800, and on household furniture therein $800, at 5 per cent., making in all $2,800; and averred that from the making of the policies the plaintiff was interested in the premises and stock till the fire, when he sustained a loss of $6,000; and averment that all things necessary had been performed by plaintiff to entitle him to bring this action:—Held, that the declaration must be considered as containing two counts, and the general allegation at the end thereof as referring to the whole declaration. *Date* v. *Gore District Mutual Fire Ins. Co.*, 14 C. P. 548.

Declaration on a fire policy, averring an assignment of the policy, with the assent of the defendants, to A. B., and that the action was brought as well on behalf of A. B. as on plaintiff's behalf. Plea, on equitable grounds, that A. B. was never interested in the insured property, and that before the loss the policy was cancelled by an arrangement between plaintiff and defendants, by which a policy on other goods was substituted and the unearned part of the premium credited by defendants to plaintiff on account of the new policy: Held, on demurrer, a good answer in equity, and would also, a good legal defence. *Miall et al.* v. [illegible] *Ins. Co.*, 19 C. P. 270.

The following condition was endorsed on the policy: "Insurance subsisting or effected with other companies must be notified to the board and if approved of, to be endorsed on the policy and signed by the secretary." Defendants have proved their plea under this condition, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. Semble, that a verdict should have been entered for defendants on the plea, and the plaintiff left to move for judgment non obstante, for that there can not be a nonsuit while another issue stands in favour of the plaintiff on the record. *Mellish* v. *Gore District Mutual Fire Ins. Co.*, 30 Q. B. 45[illegible]

Defendants will not be allowed to plead together an equitable plea that the policy had been assigned by plaintiff to secure a mortgage debt, and that the amount of it had been paid to the mortgagee, and a legal plea that the plaintiff had effected a subsequent insurance without notice, contrary to a condition of the policy. *Ott* v. *Liverpool, London, and Globe Ins. Co.*, [illegible] P. R. 156.—C. L. Chamb.—Gwynne.

In an action on a fire policy, it appeared that among the questions answered by the agent of the company on effecting the insurance, was one, "Had the applicant ever had any property destroyed by fire, and under what circumstances? Was it insured, and in what office," to which the agent answered that the plaintiff had never before had property destroyed by fire that he had heard of:—Held, that the plaintiff, as a witness on his own behalf might be asked on cross-examination what passed between him and the agent on this subject, but that the plaintiff's answer would be conclusive. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 32 Q. B. 610.

Action on a fire policy. Plaintiff was called as a witness, and said: "I did not tell E., defendant's agent, I had not been burnt out before I was not asked by him." E. was called, and it was proposed to ask him questions to contradict the plaintiff upon that point:—Held, that such evidence was properly rejected as raising a collateral issue. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 Q. B. 384.

The declaration, after setting out a condition of a policy, that the assured sustaining loss should, within fourteen days, deliver in a particular account thereof, &c., averred the performance of all conditions precedent. Defendants pleaded that the plaintiff did not, within fourteen days after the loss, deliver in the accounts; and in another plea, that he did not, although reasonably required, make proof by his declaration and books of account, &c. The plaintiff replied to the first plea, that the policy was not delivered

to him until long after the fire, and that within fourteen days after receiving it he delivered the account; and to both pleas, that he delivered an account, and that defendants afterwards made further requisitions, which were complied with, and defendants never notified them in writing that the proof was objected to because not given in time:—Held, on demurrer, replication bad, as being a departure from the declaration. *Coaldwell* v. *Royal Ins. Co.*—Q. B.—28th June, 1876. Galt, J., sitting alone. Not yet reported.

A suit in this court was brought against an insurance company to recover for loss sustained, on the ground that the policy was not a perfect one, and therefore that the plaintiff had no remedy at law; but the allegations in the bill were that the policy had been duly signed by the president and secretary, and countersigned by the agent at L. (the place where the insurance was effected) and was ready to be delivered to the plaintiff:—Held, that these allegations must be taken in law to include a delivery of the policy, although it had not actually reached the plaintiff's hands; and on this ground a demurrer for want of equity was allowed. *McFarlane* v. *Wales Ins. Co.*, 20 Chy. 486.

A bill against an insurance company on a policy, alleged that the policy was made by the company, but did not state that it was under seal:—Held, sufficient. *Workman* v. *Royal Ins. Co.*, 16 Chy. 185.

The bill alleged that the policy had been destroyed:—Held, that an affidavit of the fact must be annexed to the bill. *Ib.*

The policy was stated to be to pay any loss or damage by fire, "subject to the conditions thereon endorsed":—Held, that the language did not imply that the conditions were conditions precedent, and therefore that it was not necessary to allow due performance. *Ib.*

Where an insurance company set up several defences, some of which they failed to substantiate, the court on dismissing the bill did so without costs. *Hawke* v. *Niagara District Mutual Fire Ass. Co.*, 23 Chy. 139.

See *Gore District Mutual Fire Ins. Co.* v. *Simpson*, 13 Q. B. 560, p. 1865; *Burton et al.* v. *Gore District Mutual Ins. Co.*, 14 Q. B. 342, p. 1819; *Lindsay* v. *Niagara District Mutual Fire Ins. Co.*, 28 Q. B. 326, p. 1837; *Smith* v. *Commercial Union Ins. Co.*, 33 Q. B. 69, p. 1856; *Hazard* v. *Canada Agricultural Ins. Co.*—Q. B.—T. T. 1876, p. 1823.

(e) *Defence of Arson.*

The defendants by their plea denied the loss in the usual form, and under it desired to shew that the building had been designedly set fire to:—Held, that this evidence was rightly rejected, and that an application to add such a plea after trial was properly refused. *Mann et al.* v. *Western Ass. Co.*, 17 Q. B. 190.

The defence that the insured or his assignee wilfully and maliciously set fire to the insured premises, ought to be as satisfactorily established to the minds of the jury as to justify them in convicting him of the criminal charge for the offence. The fact that one of the jurors was a shareholder in an insurance company is no ground for a new trial; the plaintiff should exercise his right of challenge if he objects to the juror's presence. *Richardson* v. *Canada West Farmers Ins. Co.*, 17 C. P. 341.

Defendants gave such evidence to shew that the house had been burned by one K., by the plaintiff's procurement, as would well have warranted a finding for defendants. K., however, had been indicted for the arson and acquitted. The jury having found for the plaintiff, the court refused to interfere. *Gould* v. *British America Ass. Co.*, 27 Q. B. 473.

This case having been four times tried, the plaintiff having succeeded twice, and the jury having disagreed on the other occasions, and the defence being in the nature of a charge of arson, a new trial was refused. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 34 Q. B. 384.

See *Chisholm* v. *Provincial Ins. Co.*, 20 C. P. 11, p. 1821; *British America Ass. Co.* v. *Wilkinson*, 23 Chy. 151, p. 1871.

(f) *Right to recover back Premiums.*

In his application the plaintiff untruly represented the building as furnished with a brick chimney:—Held, that on this ground the policy never attached, and that the plaintiff, therefore, might recover back his premium. *Mulvey* v. *Gore District Mutual Fire Ass. Co.*, 25 Q. B. 424.

Where a risk has once begun to run, and is subsequently avoided by some neglect or default of the assured, there cannot be a return ordered of any portion of the premium. *Hawke* v. *Niagara District Mutual Fire Ins. Co.*, 23 Chy. 139.

See *Dowker* v. *Canada Life Assurance Co.*, 24 Q. B. 591, p. 1871.

(g) *Amount Recoverable.*

Where a person insures his house or goods for a part only of their value, and suffers a loss equal to the full amount insured, that sum, unless the policy be specially framed, must be paid, and not merely such a proportion of it as would correspond with the proportion between the sum insured and the whole value of the property. The condition in the policy "that in case of the removal of the property to escape conflagration, the company will contribute ratably with the insured and other companies interested, to the loss and expense attending such act of salvage," has not the effect of changing in this respect the law of partial insurance. *Thompson* v. *Montreal Ins. Co.*, 6 Q. B. 319.

Plaintiff insured with defendants $3,400, of which $1,000 was on his tannery and $500 on the machinery in it, on an application valuing the tannery and fixtures at $1,000, which was said to be two-thirds of the actual value, but agreeing that in case of loss defendants should only be liable as if they had insured two-thirds of the actual cash value, anything in the policy or application notwithstanding. The application was referred to in the policy as forming part of it, and stated the promise to be to pay all losses or damages not exceeding the said sum of $3,400, the said losses or damage to be estimated according to the true and actual value of the property at the time the same should happen. The building and machinery having been destroyed by fire, the jury found the total cash

value of the former to be $1,050, and of the latter $750:—Held, that the plaintiff could recover only two-thirds of those sums. *Williamson* v. *Gore District Mutual Fire Ins. Co.*, 26 Q. B. 145.

Plaintiff insured with defendants $2,000 on a building, and $2,000 on the furniture, and with another company $2,000 on the building and furniture together; and a loss occurred of $1,050 on the building, and $878 on the furniture. Defendants' policy provided that in case of loss, the assured should recover from them only such portion thereof as the amount assured by them should bear to the whole amount assured; and, under this, they contended that the other insurance must be treated as one for $2,000 on the building, and $2,000 on the furniture, so that they would be liable only for one-half of the loss on each; but, Held, that as the whole amount insured was $6,000, of which defendants had taken $4,000, they were liable for two-thirds of the loss. *The Trustees of the First Unitarian Congregation of Toronto* v. *Western Ass. Co.*, 26 Q. B. 175.

A policy insuring several different subjects of insurance at separate amounts, and containing a provision that "the company shall be liable to pay to the insured two-thirds of all such loss or damage by fire as shall happen to the property, amounting to no more in the whole than the aggregate of the amounts insured, and to no more on any of the different properties than two-thirds of the actual cash value of each at the time of the loss, and not exceeding on each the sum it is insured for," is to be treated as a separate insurance upon each subject, and the company is liable only for two-thirds of the loss on each, notwithstanding that on some of the subjects the loss is less than the amount for which those subjects are insured, and the whole loss less than the aggregate amount insured. *King* v. *Prince Edward County Mutual Ins. Co.*, 19 C. P. 134.

Where a separate insurance is effected on separate properties, the company only to pay as if they had insured two-thirds of the actual cash value, the insured can recover two-thirds only of the particular property injured. *McCulloch* v. *Gore District Mutual Fire Ins. Co.*, 32 Q. B. 610.

See *McCuaig* v. *Quaker City Ins. Co.*, 18 Q. B. 130, p. 1883.

[See, also, I, 4, p. 1799.]

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9. *Right to, and Application of, Insurance Moneys.*

B. having insured a mill erected on lands conveyed to him by A. in trust to sell, and after paying his own debts to pay any surplus to A., and having received the insurance money: Quære, whether he was accountable to A. therefor. Semble, not. *McPherson* v. *Proudfoot*, 2 C. P. 57.

Held, that in the absence of an agreement between the parties, the receipt of insurance moneys by the mortgagee during the currency of the six months allowed for redemption, does not necessitate the taking of a subsequent account; that the mortgagee is not in all cases bound to apply such moneys in reduction of the mortgage debt; and, conversely, that the mortgagee is not entitled in all cases to charge the mortgagor with the amounts of the premi
Russel v. *Robertson*, 6 L. J. 143.—Chy.

By a policy upon a dwelling house, the c
pany were to have the option of making
the loss or damage either in money, accor
to the sum insured, or by re-building, or by
pairing the same, according to circumstan
The house having been destroyed by fire,
company, instead of paying, elected to re-bu
which they commenced doing without hav
obtained from the insured any plan of the h
destroyed, and against his express objection
their proceeding; they also intentionally
parted from what was known to be a featu
the old building. Thereupon the insured
a bill to restrain the company from proceed
to erect the building in the defective man
pointed out, and praying that they might
decreed specifically to perform the condition
erecting a house exactly, or at least substa
tially, corresponding with that destroyed.
Vice-Chancellor decreed the relief as prayed,
on appeal the court reversed this decree,
dismissed the bill; but, under the circumstan
without costs. *Home District Mutual Ins. C.*
Thompson, 1 E. & A. 247.

One of several tenants in common, being
sole possession of the premises and claiming
be solely entitled, insured the buildings on t
property; the buildings having been destroy
by fire the insurance moneys were paid to t
party insuring, and new buildings were erect
by a person to whom he had contracted to
the property:—Held, on rehearing, varying t
decree pronounced, Sprague, C., dubitante, (
Chy. 155,) that the party insuring was entitl
to appropriate the insurance money to his o
benefit. *McIntosh* v. *Ontario Bank*, 20 Chy.

Held, also, varying the original decree, t
he was not entitled to any allowance in resp
of the new buildings. *Ib.*

The owner of land mortgaged the same, a
in pursuance of a covenant in the deed, insur
the buildings on the land. The policy provi
that the loss, if any, should be paid to the m
gagees. The buildings were shortly afterwa
destroyed by fire, and the insurance mo
paid to the mortgagees, who assigned the m
gage to trustees of the insurance company,
they thereupon proceeded to foreclose:—H
on appeal, by a puisne incumbrancer, from
report of the master, that the plaintiffs were
bound to give credit for the amount paid to
mortgagees. *Westmacott* v. *Hanley*, 22 Chy.

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10. *Insurance by or for Mortgagee—Right of Subrogation.*

See *Reesor* v. *Provincial Ins. Co.*, 33 Q
357, p. 1869: *Burton* v. *Gore District Mutual
Ins. Co.*, 12 Chy. 156, p. 1819; *Provincial
Co.* v. *Reesor*, 21 Chy. 296, p. 1870; *Westm
v. Hanley*, 22 Chy. 382, p. 1864.

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11. *Mutual Insurance Companies.*

[*The cases under this sub-head are such as r
solely to Mutual Companies. Other decisions
regard to these companies, but which may hav
a general application, will be found under the
sub-heads.*]

[*See 36 Vict. c. 44, O; 38 Vict. c. 65,*

(a) *Premium Notes and Assessments.*

Declaration on a promissory note alleged to have been made by one C., payable to the order of the Gore District Mutual Insurance company, by them endorsed to defendant, and by defendant to plaintiffs. Plea, that the said company are the plaintiffs, and that the plaintiffs are the persons to whom said note is made payable, and who endorsed to defendant, and are liable to him as such endorsers. The replication shewed that the note was given by C. under the statute on his insuring certain premises with the plaintiffs to secure the due payments of the premiums or assessments in respect of his policy:—Held, on demurrer, that the replication was bad, as shewing the note not to be what the declaration would import. *Gore District Mutual Fire Ins. Co.* v. *Simons*, 13 Q. B. 560.

A mutual insurance company sued upon a note alleging it to have been made by C., payable to the company or order, endorsed by them to defendant, and by defendant to them again. It was one of their ordinary premium notes, given to obtain a policy of insurance for C., endorsed by the secretary of the company, without recourse, and specially by defendant as follows: "I hereby make myself responsible for the within.—T. M. S." It was proved that defendant, when spoken to by the secretary, had said that C. ought to pay the note, but that if he did not, he supposed he must:—Held, that the plaintiffs could not recover, upon the declaration, for such notes are not negotiable, and the company cannot transfer them by endorsement. If this were otherwise—Semble, that the secretary might have endorsed the note for the company; but that the declaration of defendant could not be treated as dispensing with notice of non-payment to him. *S. C. Ib.*, 555.

Held, that a note, made by the insured in the mutual branch of a mutual insurance company, for the sum of $3, part of the sum of $36, for which the insured had already given his deposit or premium note, such $3 representing the portion of the deposit note payable to the treasurer for incidental expenses under C. S. U. C. c. 52, s. 22, was not a note given for a cash premium of insurance within the meaning of 29 Vict. c. 4, s. 5, so as utterly to avoid the policy if the note should not be paid within 30 days after the same was made payable. *Ellis* v. *Beaver and Peel Mutual Ins. Co.*, 21 C. P. 84.

To a declaration on a mutual insurance policy, averring the payment of the necessary premium for insurance, and setting out a certain condition endorsed on the policy issued to plaintiff, among other things, that any fraud or attempt at fraud or false swearing on the part of the assured, should vitiate the policy, and stating a compliance with this condition, defendants pleaded, negating this condition, that the plaintiff stated under oath that he had paid to defendants all premiums, dues, and assesments which were due and owing at the time of the fire, whereas plaintiff had not at that time paid all premiums, dues, to defendants, whereby plaintiff was guilty of false swearing within the meaning of said condition. There was a further plea setting out the provisions of section 5 of 29 Vict. c. 4, relating to mutual insurance companies, and averring that on effecting said insurance plaintiff gave his premium or deposit note to defendants for his insurance, and that defendants afterwards lawfully made and levied an assessment on said premium or deposit note so given by plaintiff to the amount of $4, and the same remained in arrear and unpaid for more than thirty days, whereby by force of said statute said policy became void:—Held, on demurrer, that both pleas were bad. *Crowley* v. *Agricultural Mutual Ass. Asso. of Canada*, 21 C. P. 507.

The non-payment of a cash premium note given by the original assured in a mutual assurance company, the company having assented in writing to the assignment, cannot be set up against the assignee and alienee of the policy, the note being current at the time of assignment, and the alienee or assignee not being aware of its existence or non-payment. *Storms* v. *Canada Farmers Mutual Ins. Co.*, 22 C. P. 75.

(b) *Other Cases.*

A judgment was recovered against a mutual insurance company, for the amount of a loss by fire. The execution was returned *nulla bona*, and the plaintiff applied for a mandamus to compel the defendants to pay over the money. In support of the application it was stated that an assessment had been levied by the defendants under their act of incorporation, for the purpose of paying this loss, and that they had received the money so levied. The writ was refused, because it was not clear on the affidavits that the corporation had no property out of which the debt could be levied, the statement being merely that the execution had been returned *nulla bona*; and because the defendants alleged that they were, and always had been, ready to pay over the money to the persons entitled, and the court would not decide in a summary manner on conflicting claims. But quære, whether the fact of the corporation having nothing which could be taken in execution, would be a sufficient ground for interposing by mandamus. *Hughes* v. *Mutual Ins. Co. of the District of Newcastle*, 11 Q. B. 241.

A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment by those who had been mutual insurers with the plaintiff, but no longer belonged to the company, their deposit notes having been cancelled. Plaintiff's attorney wrote on the 20th of December, to the treasurer of the company, demanding a portion of the claim, and on the 21st received an answer, saying that the defendants' solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney; and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum:—Held a sufficient refusal. *S. C.*, 13 Q. B. 153.

Per Robinson, C. J.—Sec. 18 of 6 Will. IV. c. 18, applies only to absolute alienations, and the plaintiffs in this case as mortgagees, were not entitled to sue in their own names. Per McLean and Burns, JJ., they were so entitled.

Burton et al. v. *Gore District Mutual Ins. Co.*, 14 Q. B. 342.

A treasurer of a mutual insurance company may take a chattel mortgage to himself for a debt due to the company; but it is more proper to make it to the company, and they have power to take it. *Brodie* v. *Rutton*, 16 Q. B. 207.

C. S. U. C. c. 52, s. 73, empowers any justice of the peace to examine on oath any person who comes before him to give evidence touching loss by fire, in which a mutual insurance company is interested, and to administer to him the requisite oath. Upon an indictment for perjury assigned upon an affidavit made in compliance with one of the conditions of a policy:—Held, that the policy must be produced, although the defendant's affidavit referred to the policy in such a way that its existence might be fairly inferred. *Regina* v. *Gagan*, 17 C. P. 530.

One of the conditions of a mutual policy provided that, in case of sale of real estate insured and a mortgage given to the insured, the mortgagee might continue his interest by giving notice, &c., and that "whenever any one hereafter insured, shall alienate conditionally by mortgage, his policy shall be void," unless written notice thereof be given to the board of directors, stating the amount and to whom mortgaged, who should have power to assent or cancel the policy:—Held, looking at the constitution and working of mutual insurance companies, that the alienation referred to, was of the land on which the premises insured were situate. *Russ* v. *Mutual Fire Ins. Co. of Clinton*, 29 Q. B. 73.

Per Gwynne, J.—The plaintiff in this case being insured upon the cash premium system, though defendants were a mutual insurance company, the policy was not subject to the provisions of the mutual insurance acts. *White* v. *Agricultural Mutual Ass. Co.*, 22 C. P. 98.

The Toronto Mutual Fire Insurance Company had divided their business into two branches, one being called the mercantile, in which both cash and mutual policies were effected. The defendant insured in the mercantile branch on the mutual principle. After the amalgamation of that company with the Beaver Mutual Fire Insurance Association, the directors of the new company transferred all cash system policies in their farmers' branch to the mercantile branch, crediting the latter branch at the same time with the estimated value of all unexpired cash policies:—Held, that this was unauthorized: that it was not a "re-insurance" with "any mutual or other insurance company," within the meaning of the acts; and that the defendant could not be assessed for losses on the policies so transferred. *Beaver and Toronto Mutual Fire Ins. Co.* v. *Trimble*, 23 C. P. 252.

An insurer with a mutual insurance company is not liable for assessment made before his insurance was effected, or premium note given. At the trial the learned judge so ruled, and refused to allow defendants to plead a subsequent assessment made after the policy. The court would not grant a new trial on the ground of such refusal, no affidavit of such assessment being filed. *Green* v. *Beaver and Toronto Mutual Fire Ins. Co.*, 34 Q. B. 78.

The 36 Vict. c. 44, ss. 37, 38, O., applies to all policies issued by mutual companys, cash premium as well as mutual. *Fair* v. *District Mutual Fire Ins Co.* 26 C. P. 3

Held, that the Beaver and Toronto Fire Insurance Company must be consi incorporated under the 32-33 Vict. c. that the 36 Vict. c. 44, O., which appl to companies incorporated under the C. c. 52, or any special act of the former of Canada or of Ontario, did not affec and that they were therefore not auth make an assessment for prospective loss v. *Beaver and Toronto Mutual Fire Ins.* C. P. 141.

By sec. 67 of C. S. U. C. c. 52, all the estate of any party effecting an insuranc mutual insurance company, in the pro sured, at the time of effecting the same jected to all claims against the assure such insurance; and a purchaser, takin veyance from the assured, will take su the charge of the company although notice, and that although such charge d appear on the registry affecting the pr the registry laws not providing for the r tion of such charge. *Montgomery* v. *G trict Mutual Ins. Co.*, 10 Chy. 501.

The liability of parties insured in insurance companies is a charge on the p insured; and on an application under the ing Titles Act, an affidavit is necessary that there is no such policy in existe that the policies named are the only one istence. *Ex parte Hill*, 2 Chy. Chamb. Mowat.

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12. *Miscellaneous Cases.*

All the evidence on either side as t in the plaintiff's statement of loss havin fairly left to the jury, who found for the tiff, the court refused to interfere, thoug would have been better satisfied with a the other way. *Lampkin* v. *Ontario Mut Fire Ins. Co.*, 12 Q. B. 578.

Covenant by lessee to insure premises name of the lessor, the insurance money expended in the erection of new buildi Held, a covenant running with the lan that an action would lie on it against the a of the lessee:—Held, also, that the m of damages was the value of the premis to the plaintiff by defendant's neglect to such value not exceeding the sum in defendant was to have insured by his nant; and that it could make no diff that on failure of the lessee to insure, the was allowed by the lease to do so, and the premium as rent. *Douglass* v. *Murp* Q. B. 113.

Defendant, as surety, entered into a bon his principal would insure, and keep in certain buildings on land mortgaged by h the plaintiff. Afterwards the position buildings was altered, the out-buildings brought nearer to the house, and the risk increased:—Held, that defendant was th discharged. *Grieve* v. *Smith*, 23 Q. B. 23.

Declaration upon a policy for $1000, u brick house. Second plea, on equitable grou that by the policy, whenever the defen should pay any loss to the insured, he agre

ll as mutual. *Fair* v. *Niagara Fire Ins Co.* 26 C. P. 398.

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assign over all his right to recover satisfaction therefor from any other person, town, or other corporation, or to prosecute therefor at the charge and for the account of defendants, if requested: that the plaintiff was the mortgagee of the said premises insured, and that although the defendants have always been ready, and have offered to pay the plaintiff the insurance and premium, upon the plaintiff assigning the said mortgage, and although the defendants have tendered an assignment, the plaintiff refused to assign. Equitable replication: that the mortgage contained a provision requiring the mortgagor to insure the premises, and that the plaintiff under the instructions of the mortgagor, and at his costs and charges, and as his agent, insured the said buildings. Rejoinder, on equitable grounds: that by one of the conditions of the policy, if any person insuring made any misrepresentation or concealment, such insurance should be void, and that at the time of insurance the plaintiff concealed from the defendants that he insured under the instructions and for the benefit of the mortgagor, whereby, &c.:—Held on demurrer, plea bad; for if it was intended to rely upon the condition, the mortgage security would give the plaintiff no right to recover from the mortgagor *for the loss insured against*, but only to recover his debt; and if it was intended to set up, apart from the condition, that because the plaintiff was mortgagee the defendants, on paying his mortgage debt, were entitled to the assignment, then enough was not shewn to entitle defendants in equity to a perpetual and unconditional injunction. Per Wilson, J., the plea was also bad: 1. Because the alleged agreement being that whenever the defendants should pay any loss the plaintiff would assign the mortgage, or prosecute for satisfaction if requested by defendants, the defendants were bound first to pay; and 2. Because it was not shewn that the insurance money was is large or larger than the amount of the mortgage. Semble, per Wilson, J., that defendants had not the right under such agreement to say whether the plaintiff should assign or prosecute:—Held, also, that the replication shewed good answer to the plea. Held, also, rejoinder bad, for departure, and because the plaintiff having stated that he was mortgagee, was not bound, unasked, to disclose that he was insuring for the mortgagor, and the concealment was of no immaterial matter. *Reesor* v. *Provincial Ins. Co.*, 33 Q. B. 357.

Quære, whether when a mortgagee insures property mortgaged to him, the insurance company can, in case of loss, compel him to assign them the mortgage. *Reesor* v. *Provincial Ins. Co.*, 33 Q. B. 357.

32 & 33 Vict. c. 23, s. 8, D., applies to all cases of perjury, not merely to "perjuries in insurance cases," which is the heading under which ss. 4 to 12 are placed in the act. *Regina* v. *Currie*, 31 Q. B. 582.

The plaintiff had been the agent of defendants, an insurance company, and had obtained about 1000 policies for them. Having left them, he entered the service of another company, and canvassed actively for that company among defendants' customers, asking those whose policies were about to expire whether they wished to be insured or to insure again. Defendants gave evidence that he asked several of them to *renew* their policies, not telling them that he was acting for another company, and that these persons believed he was acting for defendants. Defendants' officers were repeatedly informed of all this, and that the plaintiff was representing himself as their agent. Under these circumstances, they published in a newspaper an advertisement headed "Caution," and stating that notwithstanding plaintiff's false statements to the contrary, he was no longer their agent. The plaintiff sued for this alleged libel. There was no proof of malice in fact. It was objected that the communication was privileged, but the objection was overruled, and this question was left to be dealt with by the court upon the evidence, upon the leave which was reserved to move for a nonsuit—neither side requiring any question to be left to the jury:—Held, that the occasion was privileged, and that neither the expression, "false statements," nor the mode of publication afforded sufficient evidence of malice. A verdict for the plaintiff was therefore set aside and a nonsuit entered. Semble, that the learned judge at the trial might properly have ruled that there was a privilege, and no evidence of malice to go to the jury. *Holliday* v. *Ontario Farmers' Mutual Ins. Co.*, 38 Q. B. 76.

On a sale of real estate, the vendor took back a mortgage for part of the purchase money, which was made according to the short form under the statute, and contained the usual covenant on the part of the mortgagor to insure, but this, in the hurry of preparing the deeds, the mortgagor, who was a solicitor, omitted to fill up. It was proved, however, by both parties to the transaction that the mortgagor was to insure and was also to give a covenant for so doing. The vendor afterwards, during the absence of the mortgagor, insured the houses on the property in his own name, for the sum agreed upon, and charged the premium to the mortgagor, and the buildings being afterwards burnt down, obtained, by process of law, payment from the insurance company of the amount of the policy:—Held, that the company had not, under the circumstances, any right to call upon the mortgagee to assign his mortgage to them; and Quære, whether, in any case and under any circumstances, in the absence of fraud, he would be bound to do so. *Provincial Ins. Co.* v. *Reesor*, 21 Chy. 296.

A fire policy, after a loss has taken place, and money has become payable thereon, is such a specialty or security for money as is seizable under execution, though the amount payable has not been ascertained. *Bank of Montreal* v. *McTavish*, 13 Chy. 395.

Where an insurance company chooses, rather than litigate the question of their liability to the assured, to compromise his claim, they cannot afterwards impeach the settlement, although they may be able to shew they have been imposed upon. And where the money paid upon such a compromise had been, by the agent who effected the arrangement with the company, paid over to a bank to whom the claim had been assigned, who thereupon gave up certain notes held by the bank, the court refused to open up the settlement which had been made, although the evidence distinctly shewed that a gross fraud had been perpetrated upon the company; that the fire by which the alleged loss was said to have been sustained was caused by the parties

concerned, and that in fact the goods, the loss of which was claimed for, never were destroyed. Where, in obtaining the settlement of a pretended claim against an insurance company, the agent employed to effect the arrangement had been guilty of very improper conduct, which, however, had not had the effect of producing the compromise, the court, although compelled to dismiss the bill, refused him his costs of a suit brought to set aside the settlement, and to which such agent had been a defendant. *British America Ass. Co.* v. *Wilkinson*, 23 Chy. 151.

II. Life Assurance.

The exception in the last clause of 22 Vict. c. 85, which prevents corporations, &c., "heretofore authorized by law to lend or borrow money," from charging more than six per cent. interest, applies only to corporations created for the purpose of lending money, or at least expressly authorized to do so, not to all who by the general law are allowed to lend it. The defendants, a life insurance company, were in the habit of lending money, but made it a condition that all borrowers should insure their lives with them for double the amount of their loan. Semble, that even if the above mentioned exception had applied to them, this would not constitute usury. *Edinburgh Life Ass. Co.* v. *Graham*, 19 Q. B. 581.

A policy of insurance recited that the plaintiffs had proposed to effect an insurance on the joint lives of M. and his wife, and had delivered to defendants a declaration in writing, which was the basis of the contract, and paid the first half-yearly premium. By a declaration of trust the plaintiffs declared that in case of the death of either M. or his wife they would hold the insurance money for the survivor and for their children:—Held, that such policy was illegal, under 14 Geo. III. c. 48, s. 2; for the name of the person interested therein, or on whose account it was made, was not inserted in it as such, and the declaration of trust, which shewed that the plaintiffs had no interest, could not be incorporated as part of the policy. Held, also, that the plaintiffs might recover back the premiums, the omission to comply with the statute not being a "delictum" on their part, so as to make the maxim "in pari delicto," &c., applicable; but that they could recover only the first premium paid, the other payments not appearing upon the evidence to be made by them and their own money. Held, also, that it was unnecessary for the plaintiffs to produce the declaration referred to in the policy as the basis of the contract. *Dowker et al.* v. *Canada Life Ass. Co.*, 24 Q. B. 591.

Where the judgment debtor, after making a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at its value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage by him on real estate, and held by the garnishees, and the garnishees accepted the surrender, but on terms different to those proposed, it was held, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor. *Lee et al.* v. *Gorrie*, 1 L. J. N. S. 76.—C. L. Cham Richards.

Defendants, by a policy dated 25th Aug 1870, insured the life of J. C. for $1,000, t paid at his death to the plaintiff and two ot (the children of J. C. and his wife), if liv otherwise to the representatives and assign said wife and children:—Held, under 29 V c. 17, D., and 33 Vict. c. 21, O., that the pl tiff on the death of J. C. might sue for his plaintiff's) one-fourth share separately, wit joining the others interested in the pol *Campbell* v. *National Life Ins. Co. of the U A.*, 34 Q. B. 35.

The plaintiff H. and the other plaintiffs fants, by H. as their guardian and next fri declared on a policy of insurance, alleging by it, in consideration of the premium pai them by the plaintiffs, defendants assured life of F., and by said policy promised to the sum insured to the plaintiffs, who at time of making the policy were respectively wife and children of F.; and that while policy remained in force, the plaintiffs then ing respectively the wife and children of the said F. died, &c.:—Held, on demurrer, t the declaration sufficiently averred that the surance was effected by F., under the 29 Vict 17, for the benefit of his wife and children. Held, also, following the last case, that the pl tiffs could not sue jointly, but must bring se rate actions for their respective shares. plaintiff H. was, however, allowed to amend declaring anew or her own share separately, the names of the other plaintiffs were str out. *Fraser et al.* v. *Phœnix Mutual Life Co.*, 36 Q. B. 422.—Gwynne, J., sitting alone.

By the non-payment of the renewal premiu at the stipulated times, a policy of life insura became forfeited. The policy provided that p ment, if made when over due, would not be c sidered as continuing the policy unless the insu was in good health at the time; but the pract of the company was, to receive payment of s premiums, and to issue the renewal receip within thirty days after the stipulated tim provided the insured were then in good heal Held, that the proviso as to the insured being good health, did not apply to his actual st but to the general understanding of the par and their consequent action thereon. Wh therefore, at the time of paying the premium giving the receipt, the insured had in fact ceived an injury which soon after resulted death; but it clearly appeared that no dan was anticipated by either the insured or medical attendant, or by the defendants th selves, who had made enquiry and had knowledge of his condition:—Held, that payment was good, and the forfeiture waived Held, also, that the proviso as to the ins being in good health, was to guard against fr committed on the company, and not to pre the company themselves, when in full posse of the facts, dealing with the insured:—H also, that the general agents in Canada foreign company, must be regarded in the light as the general agents at the head offi the foreign country. *Campbell* v. *National Ins. Co.*, 24 C. P. 133.

The assignee of a person upon whose li policy of insurance has been effected, is not

titled to cl im interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge. *The Toronto Savings Bank v. Canada Life Ass. Co.*, 14 Chy. 509.

See *Lee* v. *Gorrie*, 1 L. J. N. S. 76, p. 1822; *National Life Ass. Co.* v. *Egan*, 20 Chy. 469, p. 1005.

III. Marine Insurance.

1. *Loss before Issue of Policy.*

The owners of a quantity of wheat on board a vessel, applied to the agent of an insurance company to insure the same, who took the risk, subject to the approval of the head office, who authorized the insurance, and directed the agent to remit the amount of premium at once. The owners of the wheat, instead of paying the premium, credited the amount to the agent in their books, and before any policy was delivered information was received of the loss of vessel and cargo, which had in fact occurred before the proposal for insurance was made. The company then refused to issue a policy, and a bill filed to compel them to do so, or pay the amount of loss sustained, was dismissed with costs. *Walker* v. *Provincial Ins. Co.*, 7 Chy. 137.

Quære, whether if in a receipt for premiums the words "lost or not lost," are not inserted, and before the policy issues a loss has occurred and become known to both parties, the insurers would be liable for the loss. *Ib.*

Held, on appeal, affirming the decree, that the mere fact of the agent of an insurance company sending a receipt for the premiums to the office of business of the assured, without actually receiving the money, although the receipt was in fact relying on the amount being sent, was not sufficient to complete the contract of insurance. *S.C.* 8 Chy. 217.

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2. *Representations.*

Where a party insuring a vessel omits to mention to the underwriters that she has then sailed, such omission, though the insured knew the fact, will not vitiate the policy, unless the vessel be lost the time of the insurance what is called a "missing ship." Aliter :—If the insured, when expressly questioned as to the fact, says, not by way of opinion or expectation, but positively, that the vessel has not sailed when she really has. Semble, that there is a distinction to be drawn when the owner of the cargo, who is not the same time the owner of the vessel, is insuring his cargo, as to the probability of any representative statement being made to the underwriters with respect to the time of the vessel's sailing. *Perry* v. *British America Fire and Life Ins. Co.*, 4 Q. B. 330.

Where an applicant in his proposal to an insurance company for a policy for £1,000 on a vessel and tackle already insured for £3,000, valued at £6,000, and on the trial the average value of competent parties was between £3,000 and £4,000:—Held, that the applicant's valuation was not in itself constitute a fraud to vitiate a contract, but was evidence to go to a jury with the circumstances in the case, and the court ordered a verdict for plaintiff. *McCraig* v. *Unity Ins. Asso.*, 9 C. P. 85.

3. *Seaworthiness.*

Semble, that the seaworthiness of a vessel is a fact to be considered with reference to the particular navigation in which the loss of the vessel may occur—as, for instance, if a vessel insured between Toronto and Quebec, were lost by stranding in the river St. Lawrence, the question for the jury would be, not was she well found and seaworthy for the navigation of the open lake Ontario, but was she so for the navigation of the river; and if in the opinion of the jury she was suitable for the river navigation, though clearly not so for the lake, the policy will not be vitiated, unless it be so framed as to leave no doubt that the intention of the parties was to make the unseaworthiness of the vessel for either navigation an absolute cause of forfeiture, without reference to the particular navigation in which the loss should occur. *Gillespie et al.* v. *British America Fire & Life Ass. Co.*, 7 Q. B. 108.

In an action upon a policy of insurance, where the questions of unseaworthiness and deviation were involved, and where there had been two verdicts in favour of the plaintiff, the court, entertaining a strong conviction that on the plaintiff's own shewing, and giving every weight to his evidence, he was not entitled to recover, granted a new trial. *Haworth* v. *British America Ass. Co.*; *Coulson* v. *Ontario Fire and Marine Ins. Co.*, 6 C. P. 60, 63.

In a policy on a plaintiff's vessel, insuring only against perils of the sea, one condition was, that defendants were not to be liable for loss or damage arising from unseaworthiness. The vessel in question, some fifteen minutes after she had left port, began to leak, and in about five hours went down. Both weather and water, it appeared, were at the time perfectly calm, and no actively adverse cause could be or was assigned for the accident, nor was any evidence given by plaintiff to rebut the presumption, which, it was contended, therefore arose, that the loss was not occasioned by perils of the sea :—Held, that the plaintiff was bound to have given this evidence, and that the absence of it disentitled him to recover. The court granted a new trial, though of opinion that defendants were entitled to a nonsuit, suggesting whether, if evidence were given of defendants' knowledge of the age, build, and material of which the vessel was built, at the time of the insurance, it might not be held to modify the condition as to seaworthiness, so as to make it subordinate to the particular vessel being insured. *Coons* v. *Ætna Ins. Co.*, 18 C. P. 305.

On the new trial one H. was called by plaintiff, who proved that he, as defendants' agent, accepted the risk on the vessel in question; that he had seen but did not examine her, but judged her wholly from the registry, and insured her as B 1; that a B 1 vessel would be insured as readily as an A 1, the charge on freight being the same, and the sea-worthiness would be expected to be the same, though the A 1 would not be so likely to go to pieces :—Held, that these facts did not bring the case within the principle laid down in Burgess *v.* Wickham, 3 B. & S. 669, and Clapham *v.* Langton, 34 L. J. Q. B. 46; and, therefore, Held, that the new evidence did not alter the position of the parties, and that a nonsuit was properly directed. *S.C.* 19 C. P. 235.

In a marine insurance policy issued by defendants to plaintiff, among other excepted perils or losses, were those arising from rottenness, inherent defects, and other unseaworthiness. At the trial it appeared from plaintiff's own evidence that the vessel in question, after sailing all day on a summer sea, with a light breeze, in the evening suddenly came up into the wind, or broached to, refused to answer her helm, and at once began settling down, when the crew abandoned her, and after they had rowed about thirty-five yards she sank. The master could give no reason for this, nor was any evidence offered in explanation of it, while the evidence for the defence went to shew that she was old and rotten in parts, that she in fact leaked before starting across the lake, in the canal and at the port of lading, and that men would not go in her without being paid extra wages; and the plaintiff himself stated that she was old and he had given instructions not to canal her by night or leave port in a gale. The diver, who examined her, also found one stave wholly out and another partially so. The whole case having been left to the jury on this evidence:—Held, that the learned judge should have ruled according to Coons *v.* Ætna Insurance Company, 18 C. P. 365, and 19 C. P. 235, and if plaintiff declined a nonsuit, should have explicitly told the jury to find for defendants; and a new trial was, therefore, ordered. *Myles* v. *Montreal Ins. Co.*, 20 C. P. 283.

In an action on a marine policy, insuring plaintiff against perils of the lakes, loss arising from unseaworthiness excepted, where the evidence shewed that the vessel was in excellent condition and seaworthy when she left port, and apparently up to the time of loss; that a squall struck her, and more than three hours after it was found that she was leaking much, in consequence of which she filled and went down, there being no charge or suggestion of fraud, malpractice, overvalue, or anything whatever against the plaintiff, the only remarkable circumstance being, that in the protest made by the master and mate there was no mention of the squall, nor was any cause assigned for the leak or consequent loss:—Held, that the judge was right in submitting the case to the jury, and that the evidence fully warranted the finding for the plaintiff. *Dawson* v. *Home Ins. Co.*, 21 C. P. 20.

Action on a policy on a vessel, alleging a total loss. Plea, that the plaintiff knowingly and wrongfully sent the vessel from the port of Toronto in an unseaworthy state, and permitted her to remain on the lake in such state, and without being properly equipped, and that by reason of the premises only the vessel was wrecked and lost;—Held, that the plea was not proved by shewing that the vessel was unseaworthy when she was wrecked, unless such unseaworthiness was the immediate cause of the loss. *Woodhouse* v. *Provincial Ins. Co.*, 31 Q. B. 176.

See *Hamilton* v. *Montreal Ass. Co.*, 23 Q. B. 437, p. 1880.

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4. *Care and Skill in Navigation.*

The plaintiff entrusted the defendants, as commission agents, with a quantity of flour either to sell for him at Toronto, or to send it to be sold at Quebec or other places, as circumstances might require. He directed that the flour sh be insured, and the defendants effected an surance with the British America Insurance The flour was shipped by the defendants at Credit, consigned to G. & Co., Quebec. Ov to the negligence and want of skill of the tain, and of a pilot who was taken in at K ston, the vessel was stranded in the St. L rence, and the cargo lost. The policy contai an express stipulation that the company wo not be liable for any loss occasioned by the w of ordinary care or skill in the navigation of vessel, and the plaintiff therefore failed to cover on it; but it appeared that this was ordinary form of policy, and that the defenda could not have procured any other:—Held, t the plaintiff could maintain no action aga the defendants for taking such a form of poli and that, in the absence of any ground for s picion, it was not their duty to enquire into skill and experience of the captain or crew the vessel. And semble, that if an insura might have been effected on more favoura terms, yet the defendants would have been ju fied in insuring as they did, having received special instructions, and the company being with which such insurances were usually effect by the trade. *Silverthorne* v. *Gillespie et al.* Q. B. 414.

Action on a marine policy. The jury, up issues raised as to the negligence of the capta and crew, having found for defendants, a ne trial was refused upon the evidence. *Gille et al.* v. *British America Fire and Life Ass. Co* 7 Q. B. 108.

Semble, that with respect to the cargo insur as well as the vessel itself, a marine policy m by an express (though not by an implied) agre ment, become legally invalid for the want care and skill on the part of the captain crew in navigating the vessel; and semble, th the wording of this policy amounted to such express agreement. *Ib.*

Declaration on a policy of insurance on a p peller. Plea, that the vessel was lost in L Michigan by coming into collision with a schoo in American waters, and that the rights liabilities under said policy on account of collision ought to be governed by the laws of United States, according to which all steam must keep out of the way of sailing ves and in case of collision and loss occasioned th by to the steamer, it is presumed that the f was hers, and her owners cannot recover f the owners of the sailing vessel or from insur that the plaintiff's steamer did not avoid schooner as she might have done, whereby wreck was occasioned. Replication, that plaintiff's vessel did not collide with the schoo through the want of ordinary care and ski navigating her, such as is proper in the na tion of the lakes. Rejoinder, that the pro was an American vessel, sailing under Ame colours, and in American waters at the ti the loss: that the defendants are an Ame company: that by the American law, a plaintiffs well knew, the schooner was ju in keeping her course, while the steamer s have turned out of her way to enable her so, as she might have done: yet the ste course was not altered, as it easily might been, and so, by reason of the said fac collision did take place from the want of or

care and skill in navigating the steamer. Surrejoinder, that the steamer was not lost through the want of ordinary care and skill in those navigating the steamer :—Held, on demurrer, that the surrejoinder was good. As to the plea, held that the allegation of want of care on the plaintiff's part formed no defence ; and that, if it had been averred in the declaration that the contract was made in this province, the American law would not govern, though the loss happened in their waters. *Patterson* v. *Continental Ins. Co.*, 18 Q. B. 9.

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5. *Abandonment and Loss.*

Where in an action on a marine policy the plaintiff recovered as for a total loss, the facts shewing only a partial loss, which, however, were not so distinctly left to the jury, the court granted a new trial without costs. *Davis* v. *St. Lawrence Inland Marine Ins. Co.*, 3 Q. B. 18.

A. having with B. (though B. was not named in the mortgage) a mortgage upon a vessel, insured her for £600. The vessel was wrecked and abandoned by the mortgagor, and the insurers sent their agent to take charge of her. The loss was proved to be equal to the amount of insurance :—Held, that A. had an interest in the vessel to the amount of the mortgage ; and that the loss under the circumstances being an actual loss, requiring no notice of abandonment, the verdict for the plaintiff could not be disturbed. *Bousfield* v. *St. Lawrence Ins. Co.*, 8 Q. B. 135.

When the owners of a vessel which was stranded gave notice of abandonment, and the master afterwards on behalf of those concerned entered into a contract to get the vessel off, which was done ; and the jury expressly found that the evidence was such as to warrant a prudent owner in abandoning the vessel as a total loss, and rendered a verdict for the plaintiff generally ; the court being of opinion that the evidence warranted the finding of the jury, and that the plaintiffs were entitled under it to give notice of abandonment, (as of total constructive loss) sustained the verdict. *King et al.* v. *Western Ass. Co.*, 7 C. P. 300.

Declaration (alleging a total loss) on a policy of $5000 on the hull, tackle, apparel and other furniture of the steamer "Boston," which stated the value to be $15,000—that in case of loss, prompt notice of the disaster and plan adopted for the recovery and saving, &c., should be given ; same, labour, and travel, &c., without prejudice to the insurance, and after survey, as therein provided, insured were to cause the same to be repaired ; and in case of refusal insurers were authorized to interpose and cause the same to be repaired, &c. All acts done or committed to be for the benefit of all concerned, and not to prejudice parties : that the insured should have no right to abandon unless under particular circumstances, and under no circumstances except by written notice delivered to the authorized agent of the insurers, nor unless such notice should be sufficient to vest in the company an unincumbered and perfect title to the subject abandoned. That an endorsement on the policy the vessel was insured against total loss only. Averment, that the plaintiff duly abandoned to said defendants, and thereupon accepted the said abandonment. Second plea, that the vessel became stranded while proceeding upon her voyage, and the plaintiff ought to have used prompt and efficient means for her safeguard and recovery, and repaired her when recovered ; but plaintiff neglected and refused, and thereupon defendants interposed according to the terms of the policy, recovered and repaired the vessel, and put her in as good repair as before she was stranded, and offered to restore her on payment by plaintiff of his fair proportion, but he refused ; and that defendants caused a proper survey to be made before repairing. Upon demurrer,—Held, no answer, because it did not shew there was no constructive total loss, and the right so to act must, under the terms of the policy, be taken to be for the benefit of all concerned, and without prejudice to the rights of either party. Third plea, that plaintiff did not duly abandon, nor did defendants accept the abandonment, as alleged ; fifth plea, that the abandonment as alleged was not sufficient to convey to and vest in defendants an unincumbered title to the vessel. Both pleas held good on demurrer, because if not traversed they would lessen the proof to be given for a constructive total loss (with a view to which the declaration seemed framed). Fifth plea, that if the note given for the premium should not be paid at maturity, the full amount of premium should be considered earned, and the policy should become void while said note remained over-due ; and that the plaintiff did give his note, which remained over-due at the time of the commencement of suit. Upon demurrer :—Held, that there being a provision in the policy that the premium note in case of loss should be deducted before payment of the amount insured, and the premium note not being shewn to be due when the loss occurred, the plea was bad. *Meagher* v. *Home Ins. Co.*, 10 C. P. 313. Followed in the Queen's Bench pro formâ. *Meagher* v. *Ætna Ins. Co.*, 19 Q. B. 530.

Defendants insured a vessel for $5000 by a policy which provided, among other things, that no acts of the insurers or insured in case of disaster with a view to saving the property should be considered as a waiver or acceptance of abandonment, but should be without prejudice to the rights of either party : that the insured should not have a right to abandon in any case, unless the amount which the insured would be liable to pay under an adjustment as of a partial loss, exclusive of general average, should exceed half the amount insured. A memorandum was written on the face of the policy, and set out in the plaintiff's declaration, as follows : "N. B.—It is hereby understood that the above named vessel is insured against total loss only, and no claim for general average loss or particular average loss to attach under the policy." The vessel struck upon a reef in the St. Lawrence, on the 30th of July, in calm water, and where no wind could affect her. On the 6th of August the plaintiff gave notice of abandonment, but defendants refused to accept it, and ten days after they got her off and repaired her, at an expense in all of about $3000, the declared value of the vessel being $15,000 :—Held, 1. That the written memorandum providing against a recovery except for a total loss must prevail, although several printed conditions inconsistent with such an agreement were left in the policy ; 2. That the negative provision, that the insured should not have a right to abandon unless, &c., (as above,) would

not enable him to do so as of course in the event specified, if not otherwise entitled; 3. That the evidence shewed no total loss, actual or constructive, and that the plaintiff therefore had no right to abandon. The test by which this right must be determined is, whether a prudent man would think it worth his while to attempt to save and repair the vessel; 4. The policy having been prepared in the United States, where defendants were incorporated, and transmitted to their agent here, with whom the plaintiff insured—that the law of this country, and not of the foreign country, should govern, the contract being in fact made here. *Meagher* v. *Ætna Ins. Co.*, 20 Q. B. 607. See, also, *Meagher* v. *Home Ins. Co.*, 11 C. P. 328.

The underwriters, ten days after they got the vessel off the rock, carried her to a harbour in the U. S., where they had her repaired at an expense of $3,000—one-fifth of the declared value of the vessel—which sum the plaintiff neglected to pay. Thereupon the underwriters caused such proceedings to be taken against the vessel in the courts of the United States as resulted in the sale of the vessel under process, at which the agents of the insurers became the purchasers in their own names, but in reality in trust for their principals. The insurers subsequently sold the vessel, and their vendee shortly afterwards resold her, and, owing to peculiar circumstances, at a very large advance. The plaintiff instituted proceedings at law to recover the amount of the policy, which resulted in favour of the defendants, and ten years afterwards filed a bill in this court seeking to charge the insurers as trustees for him of the vessel:—Held, without reference to the delay in proceeding in this court, that the insurers were entitled to hold the property unaffected by any claim of the plaintiff, and the court, although it considered the plaintiff entitled to any surplus that remained in the hands of the insurers after payment of the amount expended by them upon the vessel, were unable to grant him that relief, and dismissed his bill with costs. *Meagher* v. *Ætna Ins. Co. et al.*, 20 Chy. 354.

The declaration on a marine policy set out, as among its provisions, that a regular survey should be held as soon after an accident as possible, by competent persons mutually chosen, &c., and when a vessel after survey should be found capable of being repaired and made as good as she was prior to the accident, no abandonment would be allowed without the consent of the defendants: that she should be sound and seaworthy, and well manned and found, and if on a regular survey she should be declared and found unseaworthy on account of being unsound or rotten, or incapable of prosecuting her voyage on the same account, then the assurers should not be bound to pay anything. Plaintiffs then alleged a total loss, for which they sought to recover. Defendants pleaded that no such regular survey was held as required by the proviso set out in the declaration, although the vessel was at time of the accident and of commencing this suit above water, and was a proper subject of survey, and they were willing to choose a surveyor:—Held, on demurrer, plea good, for that the provision for a survey was not confined, as the plaintiffs contended, to the case of a partial loss; and on this declaration the plaintiffs could have recovered for that, as well as for a total loss. *Hamilton* v. *Montreal Ass. C*[illegible] Q. B. 437.

In marine insurance, notice of abandon[illegible] is indispensably necessary in all cases wher[illegible] insured elects to abandon. In this case vessel insured ran upon the rocks on the 1[illegible] October, and the defendants' agent was info[illegible] of it by the insured on the 16th October, h[illegible] was not informed of his abandonment as [illegible] total loss until he made the protest before agent on the 17th October, and no formal [illegible] donment in writing, under the terms of policy, was made until 27th December follow[illegible] when the vessel had been floated off and u[illegible] lost by the carelessness of the insured:—H[illegible] that the notice was too late to be available, [illegible] if there had been such a loss as would hav[illegible] titled the insured to abandon. Whether a[illegible] is to be considered a total loss, depends o[illegible] fact whether the vessel, as injured, is usele[illegible] the owner unless at an expense that no pru[illegible] man, if uninsured, would incur, an expens[illegible] ceeding the value of the ship when repa[illegible] In this case it appeared that on the ninth[illegible] after the vessel went upon the rocks, the [illegible] tain, on returning to her, found her in as go[illegible] state as on the second day, and that she rema[illegible] between two and three weeks on the rocks, [illegible] then floated two or three miles below. It [illegible] ther appeared that there was not the slig[illegible] attempt made to get her off or recover her, or e[illegible] to examine her, while all the witnesses said t[illegible] would have tried to get her off, and it seem[illegible] beyond doubt there were eight days during whi[illegible] from the calm state of the water, an atte[illegible] could have been successfully made; for wit[illegible] three days after she first ran on the rocks [illegible] floated again without any assistance, and th[illegible] was evidence that even one man could h[illegible] hauled her off, but the captain, a witness stat[illegible] intimated to him that he did not mean to [illegible] anything with the vessel:—Held, that the e[illegible] dence wholly disproved a total loss, either act[illegible] or constructive:—Held, also, that the fact[illegible] the plaintiff not having made any exertion to [illegible] the vessel off was no ground for a new trial[illegible] if the vessel got on the rocks by perils of [illegible] sea and was injured, the plaintiff was entit[illegible] to be indemnified for that; and that he was[illegible] obliged to take her off, but might leave he[illegible] the rocks until she went to pieces, though[illegible] could not recover for the destruction thus vo[illegible] tarily suffered. *Harkley* v. *Provincial Ins.* [illegible] 18 C. P. 335.

Held, following Ralli *v.* Janson, 6 E. & B.[illegible] that where by a marine policy goods of the [illegible] species, shipped in packages, are insured, [illegible] from average, unless general, and it is not [illegible] tinctly expressed that the packages are s[illegible] ately insured, the ordinary memorandum exc[illegible] the underwriters from liability for a total l[illegible] destruction of part only, (not being general [illegible] age), though one or more package or packa[illegible] entirely lost or destroyed by the specified p[illegible] Here some of the packages were tin plates, [illegible] others tinned sheets. Semble, that it eit[illegible] the entire species had been entirely lost, [illegible] plaintiffs might have recovered as for a tot[illegible] of that species. *Moore et al.* v. *Provincia*[illegible] *Co.*, 23 C. P. 383.

Where to an action on a policy of insu[illegible] on plaintiff's vessel, the defendants pleaded [illegible] before the loss the parties cancelled the p[illegible]

while the evidence shewed that the cancellation took place after the loss:—Held, that the plea was disproved, and that the plaintiff was entitled to recover. Per Hagarty, C. J.—Knowledge on the part of the defendants, and ignorance in the plaintiff of the loss having occurred at the time of such cancellation would render it inoperative; and even if the defendants were equally ignorant with the plaintiff, the cancellation would still be void as made under a common mistake of fact. *Brown* v. *British America Ins. Co.* 25 C. P. 514.

Defendants insured the plaintiffs' vessel by a policy containing nothing as to deck loads. A full and deck load of coal was shipped upon her at Cleveland for Toronto by a bill of lading, which provided, "all property on deck at risk of owners." She went ashore during the voyage, and the coal upon deck was thrown overboard in order to get her off and save the vessel and the rest of the cargo which was thereby accomplished. It was admitted that the usage at the date of the policy as well as at the time of the loss, was for vessels trading between Toronto and Cleveland to carry deck loads:—Held, looking at the special terms of the bill of lading, that the defendants were not liable to contribute their share of the loss. Semble, however, that for the bill of lading the defendants would be liable, for that the usage to carry deck loads being admitted, the jettison of such load, in the absence of any usage to the contrary, must be contributed for in general average. *Spooner et al.* v. *Western Assurance Co.*, 38 Q. B. 82.

An insurance company accepted a note for the premium of insurance on a vessel, and the policy contained the following clause: "In case of loss, such loss is to be paid in thirty days after proof of loss; the amount of the note given for the premium, if unpaid, being first deducted." A partial loss having occurred, it was held, that the insured had a right in equity to set off the amount against the note. *Berry* v. *Columbian Ins. Co.*, 12 Chy. 418.

The policy of insurance on a vessel provided that no partial loss or particular average should be paid unless amounting to five per cent. The vessel went on a shoal at Matanzas, but did not sink immediately, and was therefore supposed to have received no injury, and the contrary was not discovered until after she had sailed for Europe with a cargo. She touched at Queenstown for orders, and thence sailed for Stockholm, where she discharged her cargo and returned to England. On being examined there she was found to have sustained damage exceeding five per cent. The court, being satisfied that the injury was either wholly sustained at Matanzas, or was the immediate and necessary consequence of that occurred there, it was held that the insured was entitled to recover. *Ib.*

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6. *Pleading.*

In an action on a marine policy it is necessary to aver that the loss occurred during the continuance of the policy; and if the policy extend only over certain waters, and the vessel is stated to have been lost on a voyage commenced from a certain place, such place must be alleged to be within the waters over which the policy extended. *Boulanger* v. *British America Fire and Life Ins. Co.*, 7 Q. B. 439.

Where there is an express covenant in a policy that a vessel shall be seaworthy and well found, &c., at all times during the continuance of the policy, it must be so expressly averred in an action on the policy. *Ib.*

To an action on a policy of insurance on a steamer against fire, defendants pleaded, in their sixth plea, that by the policy the plaintiffs warranted that the total amount of said insurance on said steamer should not exceed three-fourths of her declared value, otherwise the policy should be void, and the insurance on her far exceeded three-fourths of said value. The plaintiffs replied that the warranty referred to was to the effect that the total amount of insurance *against fire* should not exceed three-fourths of the declared value, and that such insurance did not exceed said value:—Held, on demurrer, a good replication, and that the defendants might have rejoined, re-affirming the condition to be as they had alleged, and denying that it was such as the plaintiffs asserted. *Noad et al.* v. *Provincial Ins. Co.*, 18 Q. B. 584.

The seventh plea set up as a defence other insurances without notice to defendants, or having the same endorsed on their policy; and the plaintiffs replied that they gave due notice of such insurances to defendants, who neglected to endorse the same:—Held, replication bad. *Ib.*

Declaration on a marine policy, setting out the issue of same by defendants, and of a similar one by another company: that the vessel was lost; that by the policy the defendants were allowed in certain cases to interpose, recover, and repair the vessel; that the vessel sank while towed by plaintiff's tug; that the defendants and the other company, being desirous of recovering the vessel, by their respective duly authorized agents in that behalf, entered into an agreement in writing with plaintiff, reciting the loss, that plaintiff should raise vessel for $3,000, and plaintiff, defendants, and the other company should submit to the arbitrament of arbitrators —one to be chosen by plaintiff, another by defendants and the other company, and the third by two so chosen—the question by whom said money and other expenses should be paid, &c.; that the plaintiff raised the vessel, had always been willing to appoint, and did appoint, an arbitrator, and was willing to submit such question, &c., of which the two companies had notice, and although the plaintiff requested them, &c., yet defendants always since wrongfully refused, either in concert with the other company or otherwise, to appoint an arbitrator, and always wrongfully refused and continued to refuse to appoint or concur in appointing on their behalf, and that of the other company, and by reason of such wrongful refusal, &c.:—Held, on demurrer, good, and that an objection that the agreement was not shewn to have been under seal was premature, for that it might either arise as a matter of evidence at the trial, or be made the subject of a plea; and that in the face of the averment that the act done, by which it was sought to bind defendants, was by an agent duly authorized, it could not be assumed that the authority was not full and sufficient:—Held, also, that the contract disclosed was joint; that defendants, could have pleaded in abatement; that each was liable for the other, whether the joint non-performance was caused by such other or not; and

that, there being no plea in abatement, the declaration was good against the demurrer. *Calvin* v. *Provincial Ins. Co.*, 20 C. P. 21. See *S. C.* 27 Q. B. 403.

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7. Miscellaneous Cases.

The plaintiff effected an insurance with defendants on certain wheat to be carried in a schooner from Port Darlington to Kingston, and from thence to Montreal by such boats, barges, or vessels, as might be deemed necessary and proper for the safe transport thereof. The schooner proceeded to Port Sidney, about three miles below Kingston; the wheat was there transferred to a barge, which returned to Kingston in order to complete her cargo, and while so returning, the barge was stranded, and the wheat lost. The plaintiff endeavoured to prove a custom in support of the course taken by the schooner, but the evidence only showed that certain forwarders, having storehouses at Port Sidney, had been in the habit of doing as was done in this case; and it appeared that no such question as the present had ever been raised:—Held, that such evidence was wholly insufficient, and that the policy was avoided by the deviation in the voyage. *Fisher* v. *Western Ass. Co.* 11 Q. B. 255.

Plaintiffs having insured a steamer for £1500, reinsured with defendants for £500, under a policy which provided that no suit should be maintained thereon unless commenced "within the term of twelve months next after any loss or damage shall occur." The steamer was injured in November, 1854, and the plaintiffs having paid the amount claimed on the 9th of August, 1855, brought this action on the 8th of August, 1856, to recover from defendants their proportion:—Held, too late, for that the loss or damage referred to in defendants' policy was the injury to the vessel, not the payment by the plaintiffs. Whether under the other construction the action would have been in time, was a question raised but not decided. *Provincial Ins. Co.* v. *Ætna Ins. Co.*, 16 Q. B. 135.

Where a policy of insurance on a steamboat, against fire, provided that in the event of loss the damage should be estimated "according to the true and actual cash value of the said property at the time the same shall happen:"—Held, that in estimating loss the defendants were not entitled to have taken into account a depression in the value of steamers generally, caused by circumstances which might be temporary only. *McCuaig* v. *Quaker City Ins. Co.*, 18 Q. B. 130.

A party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel. *Orchard* v. *Ætna Ins. Co.*, 5 C. P. 445.

Upon an action for insurance upon a vessel under the usual interim receipt:—Held, that the mortgagor of a non-registered vessel had not such an interest as was saleable under a fi. fa., the 23 sec. of 8 Vict. c. 5, only declaring that the registered owner, although he shall have mortgaged the vessel, shall be considered to be the owner thereof; and that by a purchase under a fi. fa. of the mortgagor's interest in a non-registered vessel, the legal estate did not pass. The plaintiff, at the trial, claiming as owner under a sale as above stated, and the judge r against him, applied, and was allowed to his interest as mortgagee. Upon a motio nonsuit upon that ground, held, that it matter in the discretion of the judge at nisi to permit such a variance in the line of proo the defendants not shewing themselves d fied by the exercise of this discretion, a no was refused. *Scatcherd* v. *Equitable Fir Co.*, 8 C. P. 415.

Held, that the condition clause written the face of a marine policy of insurance prevail over the printed parts of the policy are at variance with it. *Meagher* v. *Hom Co.*, 11 C. P. 328. See *S. C.* 20 Q. B. 607.

Held, that an insurance company which risk on a vessel were not entitled to re from a harbour company in the name of th sured moneys expended by them in an att to raise the vessel. *Sweeney* v. *President of the Port Burwell Harbour*, 17 C. P. 574

A parol agreement, entered into by "the authorized agents" of the company, to re arbitration the question of the legal liabil said company to bear any portion of the e ses of raising and repairing a vessel insure them and lost:—Held, not binding upo company, as not being a contract relating t purposes for which it was incorporated. *C* v. *Provincial Ins. Co.*, 20 C. P. 267.

The policy insured against perils of the l rivers, &c., and declared that the goods were laden on board vessels classed not below B 1 the memorandum declared that the policy co goods from Great Britain to Montreal and H ton by standard steamers and sailing vessels. declaration averred in one count a loss in the St. Lawrence; and in another, that at Quebe goods were transferred to a standard lighte be carried to Montreal, according to the cus of navigation, in which they were lost. defendants pleaded that the Sarmatian, w carried the goods from Liverpool, went on Quebec, 150 miles from Montreal, where goods were transferred to another vessel, n standard steamer or sailing vessel, and classed. The plaintiffs replied that the na tion from Quebec to Montreal was dangerou steamers like the Sarmatian, and that for purpose of safely landing the goods shipped Liverpool to Montreal it was the custom to such goods into local lighters at Quebec, of w the vessel in which these goods were lost one. Held, on demurrer, plea good and rep tion bad, for it was admitted that the vessel not such as the policy required, and it was alleged that the goods could not be safely ca in such vessels from Quebec to Montreal. *M et al.* v. *Provincial Ins. Co.*, 23 C. P. 383.

McCollum v. *Ætna Ins. Co.*, 20 C. P. 289, p.

INTEREST OF MONEY.

I. Mode of Computation, 1885.

II. When Allowed.

1. *Generally*, 1885.
2. *At what Rate*, 1886.
3. *From what Time and for what P* 1886.

4. *On Awards*, 1887.
5. *On Bonds or Debentures*, 1887.
6. *Under Wills*, 1888.
7. *On other Claims*, 1889.
8. *On Bills or Notes — See* BILLS OF EXCHANGE AND PROMISSORY NOTES.
9. *By Building Societies — See* BUILDING SOCIETIES.
10. *On Judgments—See* JUDGMENTS
11. *On Mortgages—See* MORTGAGE.
12. *Between Partners — See* PARTNERSHIP.
13. *On Sales of Land—See* SALE OF LAND.

III. PLEADING AND PRACTICE, 1891.

IV. MISCELLANEOUS CASES, 1891.

V. LIABILITY OF EXECUTORS AND ADMINISTRATORS FOR—*See* EXECUTORS AND ADMINISTRATORS.

VI. LIABILITY OF TRUSTEES FOR—*See* TRUSTS AND TRUSTEES.

VII. USURIOUS—*See* USURY.

I. MODE OF COMPUTATION.

The method usually adopted in making out an account between debtor and creditor upon a loan of money—viz., that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest—is not the correct way of arriving at the balance. It is so much in favour of the debtor, that where there has been a long arrear of interest, and payments made on account of the debt not covering the interest alone, the debtor in a few years, without making any payment in the mean time, will make his creditor his debtor to a very large amount. *McGregor et al.* v. *Gaulin et al.*, 1 Q. B. 378.

The proper mode of computing interest, in the absence of payments made specially on account of principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments, and charging interest on the balance. *Bettes* v. *Farewell*, 15 C. P. 450.

But where various payments had been made on a note payable with interest, not always sufficient to cover the interest due at each time of payment: Held, that the usual mode of adding the interest to the principal, deducting the payment, and charging interest on the balance, should not be adopted; but that interest could only be computed on the balance of principal remaining due at each payment. *Barnum* v. *Turnbull*, 13 Q. B. 277.

Explanation as to the mode of computing interest, &c., where under an execution part is paid, and a new writ issued for the balance. *Cummings* v. *Usher et al.*, 1 P. R. 15.—C. L. Chamb.—Draper.

II. WHEN ALLOWED.

1. *Generally.*

Interest is usually allowed, without demand made, on sums awarded to be paid at a particular time. *Towsley* v. *Wythes*, 16 Q. B. 139.

Where principal and interest is paid for another, interest may be recovered on the whole payment. *The Municipal Council of the County of Wellington* v. *Municipality of the Township of Wilmot*, 17 Q. B. 82.

Interest is in practice much more frequently allowed by our juries than English authority would seem to warrant. *Spence* v. *Hector*, 24 Q. B. 277.

The court being left to decide as a jury, allowed interest to the plaintiffs on money levied and improperly withheld by the sheriff. *Michie et al.* v. *Reynolds*, 24 Q. B. 303.

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2. *At what Rate.*

Held, following Howland *v.* Jennings, 11 C. P. 272, and Montgomery *v.* Boucher, 14 C. P. 45, that the agreement between the parties fixes the rate of interest recoverable as damages, however exorbitant that rate may be. The jury having perversely allowed only ten per cent per annum, although they found that defendant had signed the note or instrument agreeing to pay five per cent. a month, a new trial was granted without costs:—Held, also, that the amount agreed upon was recoverable under under the common count for interest and account stated. *Young et al.* v. *Fluke*, 15 C. P. 360.

Held, that the plaintiffs, a banking institution, having stipulated for and retained, in discounting a note, interest at a larger rate than seven per cent. were not entitled to avail themselves of the provisions of their act of incorporation (27 & 28 Vict. c. 85, s. 21), allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than seven per cent., which was held to be the meaning of the act; and that, therefore, the note bearing no rate of interest on its face, they were not entitled to more than six per cent. from its maturity. *Royal Canadian Bank* v. *Shaw*, 21 C. P. 455.

Where a day is named for payment of a note, with interest at a rate specified, the claim for interest after that day is a claim for damages for breach of the contract, not as upon an implied contract, and is in the discretion of the court or jury. Where a note was made, in British Columbia, payable 150 days after date, with interest at two per cent. a month, the court, under the circumstances stated in this case, allowed only six per cent. after maturity. *Dalby* v. *Humphrey*, 37 Q. B. 514.

Where it appeared that an agent had received large sums of money for his principal, and had used it for many years in his own business, instead of remitting it, as he might and should have done, to his principal, he was charged with six per cent. interest and annual rests. *Landman* v. *Crooks*, 4 Chy. 353.

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3. *From what Time and for what Period.*

Where defendant gave a confession on the 13th of May, 1856, containing an agreement that judgment might be entered at once, but no exe-

cution to issue until default in payment of a sum named on the 1st of June then next, "with interest thereon from this day till paid," and judgment was not entered till 28th April, 1857: —Held, that the plaintiffs were entitled to interest from the date of the cognovit, not from the entry of judgment only. *Ramsay et al.* v. *Carruthers*, 23 Q. B. 21.

On a purchase of land the vendee gave his promissory note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator, it was Held, that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Chy. 570.

Since the passing of the Administration of Justice Act, (36 Vict. c. 8, O.,) and to avoid circuity of action, the court will allow interest to a defendant for more than six years in a suit to redeem. *Howeren* v. *Bradburn*, 22 Chy. 96.

Where the answer of a defendant omitted to set up a claim to interest for a period exceeding eight years, the court, on an appeal from the master, offered, if it was necessary that such a claim should be set up, to allow the defendant then to do so, as all the facts were before the court. *Ib.*

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4. *On Awards.*

When an award fixes no day for the payment of money, a party suing for the sum awarded is not as a matter of right entitled to interest. *Bentley* v. *West*, 4 Q. B. 98.

In an action on an award it appeared that the plaintiff in April gave in a statement of his claim, with interest up to that time, at twelve per cent., the usual rate allowed in the dealings between the parties. Time was allowed defendant to prove his defence; and in making their award on the 6th October, the arbitrators added interest at the same rate up to the 1st of September, on the sum claimed in April for principal and interest:—Held, that they had power to do this, and to award interest on the amount until paid. *Stewart* v. *Webster*, 20 Q. B. 469.

An award found that on 1st September, 1860, defendant was indebted to plaintiff in £3,249, and ordered him to pay it accordingly, with interest half yearly until paid:—Quære, as to the intention and effect of this direction. *Ib.*

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5. *On Bonds or Debentures.*

A plaintiff on a bond of indemnity cannot recover interest in the nature of damages beyond the amount of the penalty. *McMahon* v. *Ingersoll*, 6 O. S. 301.

Sci. fa. on a bond conditioned to pay $2,782.68, in five equal annual instalments, with interest on the whole amount from time to time remaining due, on the 1st June in each year. The declaration recited that the first instalment and interest, due on the 1st June, 1862, had been paid: that on 30th November, 1864, damages were assessed for the second and third instalments, and interest on the unpaid principal $2,226, up to 1st June, 1864, which were paid on 15th April, 1865: that there was afterwards a further breach by non-payment of the fourth instalment of principal on the 1st June, 1865, with interest on the said $2,226, from 1st June, 1864, to 15th April, 1865, and interest from 1st 15th April, on the principal remaining unpaid on that day, to 1st June, 1865. The plaintiff claimed execution for the damages to be assessed on this further breach:—Held, that interest on the $2,226 could not be recovered; for the plaintiffs on their sci. fa. for the second and third instalments should have assessed all damages for non-payment of such instalments up to the date of that sci. fa., 30th November, 1864, which would include interest; and their execution for such damages would bear interest also. *Rande et al.* v. *Burton et al.*, 25 Q. B. 9.

Action on bond payable by instalments. Judgment was entered for the penalty. Proceedings were had from time to time by sci. fa.:—Held that defendants were bound to pay the expense of levying the sum due, but that the plaintiff could recover only the penalty, and might not charge interest on the penalty, or amounts remaining due thereon. *S. C.*, 4 P. R. 9.—P. C. —Morrison.

The plaintiffs sued for interest on two bonds made by defendants on the 27th January, 1853, for the payment to the plaintiffs, or order, of the principal money named on the 1st of November, 1855, at the agency of the Bank of Upper Canada in Hamilton, together with interest thereon. Both counts alleged that although defendants paid the principal on the 29th of January, 1861, with interest up to the 1st November, 1855, yet they had not paid any interest after that day:—Held, that such interest was recoverable; but that it was a good defence that they were ready to pay the principal and interest on the day and at the place, and had always been ready and willing to pay, but that the bonds were not presented then or at any time. At the trial it was proved that when the bonds fell due and up to July, 1857, defendants had funds at the agency out of which they would have been paid if presented. Held, that the plea was proved: that defendants were not liable to pay interest after the bonds matured. *McDonald et al.* v. *Great Western Railway Co.*, 21 Q. B. 22

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6. *Under Wills.*

A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children or child, if there should be but one, "the sum of £1,500, due to me by C., and secured by a certain mortgage," &c.:—Held, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express and the Statute of Limitations therefore not applying to the case. *Loring* v. *Loring*, 12 Chy. 2

Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realized; and from and out of the same, when

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6. *Under Wills.*

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m and out of the same, when

realized and invested in the whole, and thus available for division, and not before, to pay certain legacies :—Held, that until the whole was realized the legatees were not entitled to interest. *Smith* v. *Seaton*, 17 Chy. 397.

The rule as to the allowance of interest from one year after the death of a testator, does not apply, in the absence of express directions, where the bequest is by way of appointment under a settlement. *Deedes* v. *Graham*, 20 Chy. 258.

A testatrix, who, under her marriage settlement, had the power of appointment over certain moneys invested on mortgage, appointed certain parts thereof to her two daughters, and, until payment, to pay them the interest secured by the mortgage :—Held, on appeal from the Master's report, that he had properly allowed interest on the sums so appointed from the death of the testatrix, and not from one year after the death. *Ib.*

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7. *On Other Claims.*

Held, that the township of Waterloo was liable under the statute 14 & 15 Vict. c. 5, for its share of the debts of the Guelph and Dundas road incurred by the county of Waterloo, (of which it formed one township,) while that county was united to the county of Wellington and Grey; notwithstanding, too, that an arbitration took place between those counties upon their separation, by which it was determined that "Wellington should assume the liability of the former united counties :—Held, also, that interest on the certained debt was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for the defendants. *The Municipal Council of the County of Wellington* v. *The Municipality of the Township of Waterloo*, 1 P. 358.

Held, that a plaintiff may claim interest on a bond for money rent made payable by a covenant contained in the lease executed by defendant. But, Quære, as to his right to recover interest on each instalment of rent as it falls due without shewing a previous demand or other warning to defendant of an intention to demand interest in the event of non-payment. In this case an order was made for the allowance of interest from the commencement of the suit. Semble, the master ought not to allow interest on computation in such a case without a judge's order to that effect. *Crooks* v. *Dickson*, 1 L. J. N. S. 211.—C. L. Chamb.—A. Wilson.

Held, affirming the order in the last case, that in an action of covenant for rent, an order by a judge directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially indorsed, from the date of the said writ, was properly made, although no interest was claimed in the declaration. *S. C.* 15 L. J. N. S. 223.

Plaintiffs sued defendants under 18 Vict. c. 99 and C. S. U. C. c. 31, ss. 155, 157, for the proportion of jury expenses payable by defendants from 1855 to 1869, inclusive. As to 1867 and 1868, defendants in 1868, levied the sum for 1867, but applied it to other purposes. In 1869, they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest, which the plaintiffs demanded :—Held, that such interest was recoverable. *The Corporation of the County of Frontenac* v. *The Corporation of the City of Kingston*, 32 Q. B. 348.

Where the estate of a bankrupt is sufficient to pay in full, and a surplus remains, interest must be allowed on all debts proved under the commission where the debt, by express contract or by statute bears interest, or where a contract to pay it is to be implied; but on no other debts will interest be allowed. *Re Langstaffe*, 2 Chy. 165.

An executor is entitled to interest on moneys advanced by him out of his own means, and properly expended in the management of the estate. *Menzies* v. *Ridley*, 2 Chy. 544.

A merchant agreed in writing to advance money for the purpose of getting out timber, to be forwarded to him at Q. for sale; for which advances he was to be paid certain commissions. The timber was duly forwarded to him in the autumn; but, prices being low, he, with the assent of the other party, held the timber over till the following spring, and claimed interest on his advances from the 1st December until the sale of the timber, the case not being provided for by the agreement. It appeared that it had been customary in the trade to charge interest in such cases, where there was not any writing; but there was no evidence of such custom being known to the plaintiff :—Held, that interest could not be charged. Mowat, V. C., diss. *De Hertel* v. *Supple*, 14 Chy. 421; 13 Chy. 648.

Interest held to be allowable to a creditor on a preferred debt consisting of drafts and promissory notes from the date until paid, and pending suit. *City Bank* v. *Maulson*, 3 Chy. Chamb. 334.—Boyd, *Master*.

The assignee of a person upon whose life a policy of insurance has been effected is not entitled to claim interest on the amount of the policy until he is in a position to give to the assurers a full legal discharge upon payment of the claim. *Toronto Savings' Bank* v. *Canada Life Ass. Co.*, 14 Chy. 509.

No interest is allowable with respect to arrears of an annuity. *Goldsmith* v. *Goldsmith*, 17 Chy. 213.

Where the Court of Appeal orders payment of money, and says nothing as to any antecedent interest thereon, such interest cannot afterwards be added by the Court of Chancery; at all events, in cases in which though interest is usually given, it was not a matter of strict legal right but of discretion. *Box* v. *Provincial Ins. Co.*, 19 Chy. 48.

Where a principal was found indebted to his agent, on the taking of accounts in this court, the court in exercise of its discretion allowed interest on the amount from the time of filing the declaration (which contained a count for interest) in an action at law brought by the agent and to restrain which the bill in this court was filed. Mowat, V. C., diss. *Ridley* v. *Sexton*, 19 Chy. 146.

Creditors who had filed bills to enforce their claims having, by order made under an administration decree, been restrained from proceeding with their own suits, are directed to prove under the administration decree. It was held that they were entitled to six years' arrears of inter-

est computed back from the commencement of their own suits. *Meyers* v. *Meyers*, 19 Chy. 185.

III. Pleading and Practice.

In an action on a merchant's account, where the writ was specially endorsed, claiming interest, and defendant did not appear:—Held, that his non-appearance was an admission for the charge of interest. *Standing et al.* v. *Torrance et al.*, 4 L. J. 235.—C. L. Chamb.—Burns.

A claim for interest on a demand for specific goods and chattels sold, endorsed on a writ of summons is good, and cannot be disputed after judgment signed in default of appearance, but if claim for interest is endorsed, in order to gain an improper advantage and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside. *Mearns* v. *Grand Trunk R. W. Co.*, 6 L. J. 62.—C. L. Chamb.—Draper.

Semble, the endorsement for interest on a specially endorsed writ, is in general a matter of claim only. If it be correct, judgment goes rightly for it without any enquiry where the plaintiff claims it and defendant does not dispute it. *McKenzie et al.* v. *Harris*, 10 L. J. 213.—P. C.—A. Wilson.

A writ of summons was specially endorsed for interest on the balance of an account, and for protest charges on an unaccepted draft:—Held, that the endorsement was right as to the interest, but not as to protest charges. Bank of Montreal *v.* Harrison, 4 P. R. 331, explained. *Sinclair* v. *Chisholm*, 5 P. R. 270.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, that an action of debt is not maintainable for interest only on debentures, the principal not being due. *Lyall* v. *The Mayor, &c., of the City of London*, 8 C. P. 365.

A count for the interest for the forbearance of money, at the rate of thirty per cent. per annum:—Held, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged. *Bleakley* v. *Easton*, 22 Q. B. 348.

IV. Miscellaneous Cases.

Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that the payments be applied in the first place to keep down the interest. *McGregor et al.* v. *Gaulin et al.*, 4 Q. B. 378.

Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest, and at the trial to support this count he offered in evidence a written undertaking, signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent. until payment, in consideration of the plaintiff allowing three months' time. The learned judge ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this, and satisfied, he sued defendant on his undertaking to recover twenty-four per cent., the balance of interest agreed to be paid by it:—Held, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay Fee*, 20 Q. B. 268.

To save interest by an appropriation of purchase money, the money should be separated from the purchaser's general bank account, and notice of the appropriation must be given to the vendor. *Great Western Railway Co.* v. *Jo* 13 Chy. 355.

INTERNATIONAL LAW.

I. Extradition—*See* Extradition.

On the determination of the civil war in United States, the government at Washington became entitled to the property theretofore belonging to the Confederate Government. *United States of North America* v. *Boyd*, 15 Chy. 139

Held, that a foreign legislature could make a law creating a lien on legal estate in Canada, and consequently that any contract founded on such a consideration was void ab initio. *Genesee Mutual Ins. Co.* v. *Westman*, 8 Q. B. 487.

Letters rogatory such as are provided for by an act of congress of the United States as issued from any foreign court will be issued by the court here, although in the present state of the law no reciprocal accommodation can be afforded here to suitors in the United States. *United States* v. *Denison*, 2 Chy. Chamb. 176.—Taylor, *Secretary.*

In letters rogatory so issued here the usual offer to render similar service when required is necessarily omitted. *Ib.*

Such letters need not necessarily be in the name of the sovereign, but were issued as from the judge of the Court of Chancery. *Ib.*

INTERPLEADER.

I. When Relief, Granted.
   1. *To the Sheriff*, 1893.
   2. *In Other Cases*, 1894.

II. Practice.
   1. *Time for Applying for Order*, 18
   2. *Amending Issue*, 1896.
   3. *Rescinding Order*, 1897.
   4. *Other Cases*, 1898.

III. Form and Construction of Issue,

IV. Evidence, 1899.

V. Action by Claimant against Execution Creditor for Seizure,

VI. Costs, 1903.

VII. Action on Bond, 1904.

VIII. Miscellaneous Cases, 1905.

IX. Directing Issue on Application to Attach Debts—*See* Attachment of Debts.

X. In Division Courts—*See* Division Courts.

I. When Relief Granted.

1. *To the Sheriff.*

[See 28 Vict. c. 19; 34 Vict. c. 12, s. 14; 36 Vict. c. 8, s. 41, O.; 39 Vict. c. 7, s. 9, O.]

Where an adverse claim is made to property seized in execution, a judge will direct an issue, unless the execution creditors give the sheriff a sufficient indemnity. *McKay et al.* v. *McKay*, 1 C. L. Chamb. 165.—Robinson.

The crown cannot be a claimant within the meaning of the statute authorizing the settlement of claims of goods taken under the execution by interpleader. *McGee* v. *Baines*, 3 L. J. 151.—C. L. Chamb.—Robinson.

A sheriff cannot have an interpleader until he has seized the goods. *Goslin* v. *Tune*, 2 Q. B. 177.

Nor where he has allowed any large portion of the goods to be taken out of his possession. *Wheler* v. *Murphy et al.*, 1 P. R. 336.—C. L. Chamb.—Robinson.

Defendant, as sheriff, having seized under a writ in the county court certain goods, which were claimed by the plaintiff, on the 4th March applied to the judge of the county court for an interpleader. The plaintiff commenced this action of trespass, to which defendant pleaded while the interpleader summons was pending, and issue was joined in April, but the case was made a remanet at the spring assizes. On the 9th June the judge of the County Court made an order barring the claimant, and in September the defendant applied for leave to plead that order in bar of this action. The application was refused. *Roblin* v. *Moodie*, 2 P. R. 216.—C. L. Chamb.—Burns.

The goods seized by the sheriff were claimed by the guardian in insolvency of the estate of the defendant, against which defendant a writ of attachment under the Insolvent Act had also issued to the same sheriff:—Held, that under 29 Vict. c. 19, s. 2, the sheriff was entitled to interplead, and an issue was directed. *Burns* v. *Steel*, 2 L. J. N. S. 189.—C. L. Chamb.—A. Wilson.

A sheriff has a right to interpleader where the proceeds of the sale of goods under execution are claimed by the official assignee in insolvency of the judgment debtor. *Brand* v. *Bickle*, 4 P. R. 191.—C. L. Chamb.—A. Wilson.

A judge has authority by interpleader order to restrain an action against the execution creditor as well as against the sheriff. *Buffalo & Lake Huron R. Co.* v. *Hemmingway*, 22 Q. B. 562.

On an application for a rule nisi to rescind two interpleader orders granted to the sheriff, or to revive a previous rule nisi for the same purpose which had been allowed to lapse. The court, under the facts stated in the case, refused to interfere, holding, 1. That the sheriff was entitled to interplead the second time, the claimant having alleged a different title from that on which the first summons was obtained, claiming first as partner and next as sole owner. 2. That the final order, restraining an action against the execution creditors and their attorneys, was authorized and proper; and the loss of the costs, therefore, in consequence of which the first application against it lapsed, formed no ground for interference. *Gagnor et al.* v. *Salt*, 24 Q. B. 180.

Interpleader may be directed for the proceeds of a sale in the sheriff's hands. The sheriff seized goods on the 1st October, and sold portions on the 17th and 26th. On the 4th November one R. claimed, and much correspondence ensued. On the 23rd December R. sued the sheriff, who, on the 31st, obtained an interpleader summons. On the hearing it was admitted that R. owned all that he at last claimed, part of which had been sold, and the rest, with the proceeds of the sale, remained in the sheriff's hands, and it was not shewn clearly that the plaintiff had directed the seizure of these particular goods. Under these circumstances it was ordered that R.'s action against the sheriff should be stayed, and his claim against the execution plaintiff barred on delivery to him of his goods unsold, and the proceeds, without deduction, of the sale, and that the plaintiff should be barred as to such goods and proceeds. The sheriff was ordered to pay the costs of R.'s action, as he might have applied before it was brought, and the parties to pay their own costs of this application. *Booth* v. *Preston and Berlin Railway Co.*, 3 P. R. 90.—C. L. Chamb.—Hagarty.

2. *In Other Cases.*

Where money was placed in defendants' hands by plaintiffs, on an agreement between plaintiffs and A., to be paid over by defendants to A, in the whole or in part, on his making up certain accounts and performing his agreement with plaintiff, but plaintiffs sued defendants for the money before they had come to any decision as to A.'s claim, which they were to determine upon:—Held, that they were not entitled to an interpleader. *Cotton et al.* v. *Cameron et al.*, 2 P. R. 62.—C. L. Chamb.—Burns.

An interpleader will not be granted in order to try the validity of an attaching order, or to determine the amount due to the judgment debtor. *McNaughton* v. *Webster*, 6 L. J. 17.—C. L. Chamb.—Draper.

A common law judge has no power, unless by statute, to direct a feigned issue to be tried by a jury. *McLaughlin* v. *McLaughlin*, 15 C. P. 182.

Where proceedings are taken to garnish a debt which is claimed by a third party as assignee, there is no power to direct an interpleader issue to try the validity of the alleged assignment. *Kerr et al.* v. *Fullerton*, 3 P. R. 19.—C. P.

On an application to set aside a fi. fa. lands on the ground that the judgment had been paid before issuing it, the judge directed a feigned issue as to the fact of payment. *Reynolds* v. *Streeter*, 3 P. R. 315.—C. L. Chamb.—Hagarty.

Goods belonging to plaintiff and stored in defendants' warehouse, were alleged to have been sold by plaintiff to M., who, with plaintiff, came there and marked them in a certain way, after which, under plaintiff's instructions, they were dispatched by defendants to T. as plaintiff's property, and delivered to his order. M. having claimed the goods, an interpleader as between plaintiff and M. was refused to defendants. *Brill* v. *Grand Trunk R. W. Co.*, 20 C. P. 9.

One G. recovered a verdict against the plaintiff, in March, 1863, in the County Court of P., which G. assigned during the same month to D. & R., of which assignment notice was given to the plaintiff in November following. In April, the month after the verdict, the debt was attached by certain creditors of G., and they, as well as D. & R., pressed the plaintiff for payment, but took no step to settle the right as between themselves. An execution in the suit having been placed in the hands of the sheriff, the plaintiff paid the amount to the sheriff, which was immediately paid over to D., the attorney in the action. In the meantime a writ had been ordered to issue at the suit of the attaching creditors, by the judge of the County Court of N., which action D. refused to defend; and judgment was entered by default the same day that the debt and costs had been paid to the sheriff:—Held, under the circumstances, that the plaintiff was not bound to take upon himself the responsibility of deciding between the rival claimants, and that he was entitled to file a bill in this court, calling on them to interplead, without paying the money into court. *Davidson* v. *Douglas*, 12 Chy. 181.

Where a person in good faith, but from wrong information, replevied property which did not belong to him; and after a verdict against him, a new claimant insisted that the property was his, and threatened an action:—Held, not a case for an interpleader in this court. *Fuller* v. *Patterson*, 16 Chy. 91.

On an application for an interpleader order it is only necessary to make out a primâ facie case. The secretary has a discretion to grant such an order and unless it can be shewn that no primâ facie case was made out, it will not be set aside on appeal. *Gourlay* v. *Ingram*, 2 Chy. Chamb. 238.—Spragge.

An order for an interpleader had been applied for to try the right of a married woman to certain goods seized under fi. fa., to which application her husband was not a party, and the motion was refused with costs, as reported in Gourley *v.* Ingram, 2 Chy. Chamb. 237. On that application certain depositions or examination of the husband had been put in to shew that the claimant was a married woman, but had not been formally read, the fact not being disputed. On the close of that application, the solicitor for the plaintiff took away with him these depositions, and notice having been served on the husband, the motion was renewed, and an interpleader order granted by the secretary, which on appeal, was sustained. *Ib.*

An interpleader order was granted in this case in favour of an auctioneer, who had sold goods for the mortgagee of the owner, but had, in obedience to a judge's order, paid over the proceeds to an assignee of the owner, subsequently appointed in insolvency proceedings. *Watson* v. *Henderson et al.*, 12 L. J. 149.—C. L. Chamb.—Dalton, *C. C. & P.*

The plaintiffs having in their hands a sum of money, the proceeds of certain goods sold by them as auctioneers at the instance of one W., but which was claimed by B., the official assignee of one H., an insolvent, were ordered by the judge in insolvency to pay the amount to B., which they did, and notified the attorneys of W. of the fact, who thereupon proceeded w an action at law which he had previously in tuted against the plaintiffs to recover this mon The plaintiffs thereupon claiming to be sta holders only, filed a bill of interpleader agai W. and B.:—Held (1), That the plaintiffs, h ing already paid over the money to one of claimants, were not in a position to call u W. and B. to interplead; (2) That the plainti obvious duty, upon being sued at law, was have pleaded the facts and applied to that cou which would in a proper case have made an or allowing the money to be brought into cou adding B. as a party to that suit, and discha ing the plaintiffs here from further attendan therein, and directing B. and W. to test th respective claims to the fund so brought in court; there being no reason why such proce ings should be an exception to that which h been laid down as the general rule introduc by the Administration of Justice Act, th wherever proceedings are commenced, there co plete relief between the parties is to be work out. *Henderson* v. *Watson*, 23 Chy. 355.

The Administration of Justice Act, 1873, applies to proceedings in County Courts as w as to those in the superior courts of the provinc Where, therefore, the judge of the Coun Court of Wentworth had in garnishee proce ings made several orders for payment out moneys admitted to be in the hands of an insu company, and subsequently the judge of t County Court of Essex, in opposition to t contention of the company, made a similar orde at the instance of another creditor, which ha the effect of rendering the company liable to a sum greatly exceeding the amount found d to the original debtor, and the company filed bill calling upon the several claimants to inte plead, the court refused to make such an orde on the ground that the rights of all parties migh have been adjusted in the suit in the county Essex, and if dissatisfied with the decision the the company might have appealed from it. *Victoria Mutual Fire Ins. Co.* v. *Bethune*, 23 Chy. 56

II. Practice.

1. *Time for Applying for Order.*

A writ was delivered to the sheriff on the 9 of October, returnable on the first of Michael Term next. A seizure was made next day, a on the 12th two parties separately gave notice claim. On the 5th day of Michaelmas Term sheriff applied for an interpleader:—Held, delay not being accounted for, that the appli tion was too late. *Thompson* v. *Ward*, 1 R. 269.—P. C.—Draper.

An application for relief after the return of the writ, is too late unless the delay be sa factorily explained. *Cole* v. *McFaul*, 1 Q. B. 2 —P. C.—Jones.

Held, that the sheriff was not justified, by fact that the first seizure did not embrace all goods of defendant, in delaying to apply till could get possession of the residue. *Miller* v. *lan*, 1 L. J. N. S. 327.—C. L. Chamb.—A. Wil

2. *Amending Issue.*

The court has jurisdiction, and will exer a discretion to do substantial justice bet

the parties, and to that end will grant relief or indulgence to the party who has not given notice of his intention to ask for it, and although the matter is before the court, upon the application of the opposite party. *Mulholland* v. *Downs*, 2 Chy. Chamb. 233.—Spragge.

Where an interpleader order had been granted to try the ownership of certain goods seized under fi. fa., an interpleader issue was tendered by one party which contained an error, the other side, whilst pointing out the error, refused to agree to its amendment, but gave notice that he would not accept or act on the issue, and then moved to set aside the writ of interpleader and notice of trial. The secretary refused the application, and gave the other party leave to amend the issue nunc pro tunc. On appeal the decision was sustained. *Ib.*

Where there was a variance between the issue directed by an interpleader order and the issue stated in the record, the latter being the issue which, if asked, the court would have directed; —Held, that after the trial no advantage could be taken of the variance. *Gourlay* v. *Ingram*, 2 Chy. Chamb. 309.—Mowat.

3. *Rescinding Order.*

Where the claimant neglects to bring the issue to trial, the proper course is to move to rescind the interpleader order. *Sewell* v. *Buffalo, Brantford, and Goderich R. W. Co.*, 3 L. J. 29.—C. L. Chamb.—Burns.

Goods of defendant being seized on the 27th May, 1858, one B. claimed them, and an interpleader issue was directed. The nature of the claimant's title was not shewn in the application, and he afterwards applied to amend or rescind the order, on the ground that the writ was received by the sheriff in June, 1857, and the title was acquired subsequently. The sheriff gave no explanation of his delay, and the execution plaintiff denied that he had authorized it:—Held, that the interpleader order must be rescinded, with costs to the execution plaintiff, but not to the claimant, to be paid by the sheriff. *Master* v. *Milne*, 2 P. R. 386.—C. L. Chamb. —Burns.

Held, that the execution debtor is not entitled to move, in the cause in which judgment is obtained against him, to set aside the interpleader order, &c., the same being between the execution creditor and strangers to the cause; and he has no right to be heard in the interpleader suit, the result of which establishes nothing to affect his interest:—Held, also, that there was no warrant for an application to a common law judge to compel the interpleader bond assets of the execution debtor. *McNider* v. *Baker*, 10 L. J. 193. —C. L. Chamb.—Draper.

A summons to rescind an interpleader order should be struck in the original cause, and not in the interpleader suit, which is a mere collateral proceeding to the original cause. *Salter* v. *McNeil*, 10 L. J. 299.—C. L. Chamb.—Richards.

Held, that an application against an interpleader order was too late after lapse of four months, the affidavit of the claimant that he knew nothing of it until shortly before the term in which he applied, being inconsistent with the statements of his counsel, and with other facts sworn to. *Buffalo and Lake Huron R. W. Co.* v. *Hemmingway*, 22 Q. B. 562.

See *Balkwell* v. *Beddome*, 18 Q. B. 231, p. 1905.

4. *Other Cases.*

Where no time has been limited by an interpleader order for the plaintiff to make up the issue, the court will order the issue to be made up by the claimants by a certain day, or on default thereof to be barred from prosecuting the claim. *Shiels* v. *Davis*, 6 Q. B. 628.

The plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act. *Brydon* v. *Clandinan*, 7 Q. B. 198.

Where proceedings in interpleader have begun under a judge's order, all subsequent applications must be made to the same judge. *Commercial Bank* v. *Clarke*; *Taylor et al.* v. *Clarke*, 1 P. R. 276.—P. C.—Draper.

The affidavit on which to apply for an interpleader summons on behalf of the sheriff, should state that the application is made solely for the benefit of the sheriff, and that he does not collude with either claimant or plaintiff. *Whittier* v. *Whittier*, 3 L. J. 28.—C. L. Chamb.—Hagarty.

In interpleader applications if the affidavits forwarded by claimant be lost he will be allowed an opportunity to file others; or if the nature of his claim appear on the affidavits filed by the execution creditor, then the usual issue may be directed. *Wilson et al.* v. *Bull et al.*, 3 L. J. 202.—C. L. Chamb.—Robinson.

As a rule, applications arising out of or consequent upon an interpleader ought to be made to the judge who made the interpleader order. *Gladstone et al.* v. *McDonell*, 4 L. J. 210.—C. L. Chamb.—Robinson.

Right of claimant to make applications in regard to the proceeds of the goods when sold considered. *Ib.*

Held, that on an application to set aside a verdict, and grant a new trial on the ground of merits, the affidavits must disclose what the merits are, but—Held, that in an interpleader issue it is not necessary to set out the merits, inasmuch as the very issue itself discloses what the defendants' claim is. *Vidal* v. *Bank of Upper Canada*, 15 C. P. 421.

The judge of a County Court has no power under 28 Vict. c. 19, to refer an interpleader issue to be tried before the judge of the County Court from which the execution issued, reserving to himself the question of costs and all other questions. He must either dispose of the whole proceedings himself or order them to be disposed of before the judge of the court from which the process issued; and where such a reference had been directed, on appeal from the decision of the judge who acted thereunder and tried the issue:—Held, that such proceedings were coram non judice. *Nicholls* v. *Lundy*, 16 C. P. 160.

Notice of trial is as essential in interpleader and feigned issues, as in ordinary cases. *Wilson et al.* v. *Dewar*, 4 P. R. 13.—P. C.—Morrison.

Remarks as to the power of the judge to order the postponement of the trial of an interpleader

issue, where the interpleader order directs it to be tried at a particular sitting. *Robinson* v. *Richardson*, 32 Q. B. 344.

The plaintiff in an interpleader issue at law having filed his bill for relief in this court, while the interpleader is pending, is not bound to elect. *McLean* v. *Beaty*, 1 Chy. Chamb. 84.—Esten.

Where a married woman claimed goods seized under a fi. fa., and an interpleader order was applied for, it was held that her husband ought to be served with notice of the motion. *Gourlay* v. *Ingram*, 2 Chy. Chamb. 237.—Taylor, *Secretary*.

Where on an interpleader issue the amount in dispute was $60.40 only, a verdict having been given in favour of the claimant and the judge of the County Court who tried the issue, having certified that he was satisfied with the verdict, the court refused a new trial, although they thought that if the case had originally come before this court for trial on the same evidence, the opinion of the court might have been against the claimant. *S. C.*, 2 Chy. Chamb. 309.—Mowat.

The verdict not having been endorsed on an office copy of the order of interpleader, but on the record only :—Held, to be immaterial. *Ib.*

III. Form and Construction of Issue.

An interpleader issue is to be taken distributively, and an assignee claiming should succeed as to any part of the goods of which there has been a change of possession, though as to the rest the assignment may be void for want of registry. *Feehan* v. *Bank of Toronto*, 10 C. P. 32.

The question on an interpleader issue is not whether the execution creditor had a right to seize the goods under his writ, but whether the plaintiff had such an interest in them as entitled him to resist the seizure. *Grant* v. *Wilson et al.*, 17 Q. B. 144.

The proper issue in an interpleader case is to try whether the goods at the time of the seizure, not at the time of the delivery of the writ to the sheriff, were the goods of the claimant. *Van-Every et al.* v. *Ross et al.*, 11 C. P. 133.

The proper frame of an interpleader issue between the claimant and an attaching creditor is, whether the goods attached were at the time of the seizure, the property of the claimant as against the attaching creditor, and not as against the absconding debtor. *Doyle* v. *Lasher*, 16 C. P. 263.

IV. Evidence.

On an interpleader issue to try the title to goods seized, the plaintiff claimed all, asserting that he had derived some by purchase from the assignee of the execution debtor, and others by subsequent purchase from third parties. The assignment being invalid :—Held, that it was necessary for him to shew what goods he was entitled to without it, and on his failure to do this that the jury were rightly directed to find for defendants. *Crapper* v. *Paterson*, 19 Q. B. 160.

Interpleader issue to try the right to goods in possession of and bought by plaintiff at sheriff's sale under fi. fa. against execution debtors, as against defendant, the execution debtor :—H
that plaintiff was not bound to prove a j
ment to support the prior execution under w
she bought the goods. *Hammill* v. *De Wolf*
C. P. 419.

The form of an interpleader issue under C
U. C. c. 30, s. 8, to try title of claimants of g
as against the execution creditor, assumes
right of the execution creditor to seize the g
of the execution debtor by virtue of a judg
recovered against him, and consequently
execution creditor is not bound to prove
judgment. *Holden et al* v. *Langley*, *Patterso*
Langley, 11 C. P. 407, 411.

Interpleader, to try the right to certain sh
in a schooner, seized under an execution at
suit of the defendant against W. S. M., on
2nd of April, 1863. The plaintiff's title a
thus : 1. On the 27th of April, 1859, W. S.
made a voluntary conveyance to his son
On the 5th of March, 1860, the sheriff, unde
ven. ex. against W. S. M., sold to S. M.
The son on the 24th March, 1863, confirm
this title by a voluntary deed to S. M., who
the same day conveyed to the plaintiff. S.
had in December, 1861, mortgaged to one
who on the 28th of March, 1863, assigned to
plaintiff. All these conveyances were duly
gistered at the custom house. The defend
objected that a judgment should have b
shewn to support the ven. ex., and he desi
to prove fraud affecting the sheriff's sale,
shewing that W. S. M. supplied the money th
paid ; but it was not denied that the plain
was a bonâ fide purchaser for value without n
tice :—Held, that the defendant, who, so far
appeared, was not a creditor of W. S. M. un
long after the deed to his son, and who was
stranger to the judgment on which the ven.
issued, was not in a position to impeach
plaintiff's title, or to require that such judgm
should be proved. *Vindin* v. *Wallis*, 24 Q. B.

Held, that defendant was not required in an
terpleader issue between himself, and an assig
in insolvency, to prove his judgment and ex
tion. *McWhirter* v. *Learmouth*, 18 C. P. 13

A. obtained possession of goods by bill of
from a sheriff upon an execution issued on a j
ment recovered against a married woman wit
joining her husband. B. having recover
judgment and issued an execution in the
way (without joining the husband) seized
same goods which A. claimed, and B. conte
in an interpleader that A.'s judgment was
and that he was entitled to the goods :—H
that A.'s judgment not being absolutely
and he being in possession with a prim
title, he was entitled to raise the same obje
to B.'s judgment, and both judgments
open to the same objection, he was entitl
prevail. *Davis* v. *Levey*, 11 C. P. 292.

In an interpleader issue the plaintiff
his case upon proof of a chattel mortgage
tain goods mentioned therein, made to hi
the execution debtor, and duly filed :—
clearly insufficient, for it afforded no pro
the goods mortgaged were the same a
seized by the sheriff and claimed. *Jo*
Jenkins, 25 Q. B. 151.

The Interpleader Act makes no distin
between an attaching and an execution cr

ant, the execution debtor:—Held,
was not bound to prove a judg-
rt the prior execution under which
e goods. *Hammill* v. *De Wolf*, 10

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Holden et al v. *Langley, Patterson* v.
. P. 407, 411.

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Q. B. 151.

erpleader Act makes no distin
attaching and an execution cre

and whatever transfers the sheriff may impeach, the attaching creditor may impeach also. In such an issue it must be assumed that the attaching plaintiff is a creditor in fact; and, Semble, that this cannot be disputed in any case. *Doyle* v. *Lasher*, 16 C. P. 263.

V. Action by Claimant against Execution Creditor for Seizure.

The claimant of goods seized, by accepting an interpleader order, does not waive his right to bring trespass against the execution creditor for seizing and selling his goods. But Semble, that such suit should not be brought until the decision of the interpleader order, and that if so brought the defendant might obtain a stay of proceedings on application to the proper court. *Cotton* v. *Stokes*, 10 Q. B. 262.

In an action of trespass against the plaintiff in a writ of fi. fa. for taking, &c., the goods of the present plaintiff, the defendant pleaded that he had committed the trespasses in aid of the sheriff's officer acting under the writ, and at his request, in the execution of the same, and then showed an interpleader order of the judge of the County Court out of which the fi. fa. had issued, by which the present plaintiff, who had claimed the goods when seized under the fi. fa., was barred from prosecuting any claim to the goods against the sheriff or his officer, or against any person acting under or in aid of them:—Held, that the order, though valid so far as respects the sheriff and his officer, could not be a protection to the execution creditor. *Park* v. *Taylor*, 6 C. P. 414.

The interpleader order being for the sheriff's protection only, an action would lie at the suit of the claimant to recover from the execution creditor the damages incident to, or arising out of the seizure. *McCollum* v. *Kerr*, 8 L. J. 71. C. L. Chamb.—Draper.

Goods seized by the sheriff under an execution in this court, as the goods of B., were claimed by C. An interpleader was then awarded, to which the claimant became a party. The sheriff sold the goods and paid the proceeds into this court, to await the result of the interpleader issue. During the pendency of the interpleader order the claimant brought trespass in the Queen's Bench against the execution creditor for the seizure, which action was tried at the same time as, and with the interpleader issue. The claimant was successful in both cases. The proceeds of the sheriff's sale were then paid to him out of court. Upon application to this court to stay proceedings in the Queen's Bench suit, the rule was discharged, as this court has no such power. The court suggested that the plaintiff in the Queen's Bench suit be called upon to deduct the amount received out of this court from his verdict in the Queen's Bench, and be left free to recover the residue in that suit—costs of the interpleader issue to be refused him. *Stokes* v. *Cox*, 3 C. P. 267.

Held, that where the claimant, under an interpleader order, (after first directing a sale, and countermanding it,) accepted part of the proceeds of the sale of the goods, he thereby affirmed the sale, and could not hold the execution creditor liable for a conversion. *Appelby* v. *Myrill et al.*, 8 C. P. 397.

Certain goods of H.'s were seized under an execution at the suit of defendant, and claimed by the plaintiff. The issue was decided in the plaintiff's favour, who then sued defendant for the seizure, which he had directed:—Held, that the action would lie, and that by the Interpleader Act (C. S. U. C. c. 30, s. 5,) the result of the issue was conclusive as to the plaintiff's right to the goods, though not replied as an estoppel to the defendant's plea that the goods were not the plaintiff's. *Harmer* v. *Gouinlock*, 21 Q. B. 260.

In an action against the execution creditors by the claimant of the goods sold after the decision of an interpleader issue in his favour:—Held, 1. That the accepting and contesting the interpleader issue formed no evidence to make defendants liable for the previous seizure by the sheriff; and this having been left to the jury as tending to establish their liability, in conjunction with defendants' evidence of a direct order to seize, a new trial was granted without costs; 2. That for any loss sustained after the date of the interpleader order, (that is, in this case for the sale of the goods by the sheriff under value,) defendants were not liable. *Kennedy* v. *Patterson et al.*, 22 Q. B. 556.

Held, following the last case, that accepting and contesting an interpleader issue, could not make an execution creditor a trespasser by relation, or liable for the original seizure. *Phillips* v. *Findlay*, 27 Q. B. 32.

Defendants caused plaintiff's goods to be seized under an execution against his father, believing them to belong to the latter. The goods in question consisted of some articles of machinery, metal, &c., in the upper portions of a shop, where the plaintiff carried on his business. The sheriff did not take possession before the 20th, and an interpleader order was made on the 29th January, and during part of this interval the plaintiff was allowed to continue his business. The jury gave the plaintiff $1,000 damages, which was held excessive, as no damages were recoverable after date of interpleader order, and a new trial was ordered on payment of costs. *Lister* v. *Northern R. W. Co.*, 19 C. P. 408.

An execution was issued from the Division Court on the 1st February, and received by the bailiff on the 3rd, when the horse in question was seized. The plaintiff having claimed it, an interpleader summons issued, and the trial was fixed for the 3rd March. It was only partly heard on that day, and adjourned on the plaintiff's application. The horse when seized was given by the bailiff, at the plaintiff's request, to one A., who kept it. On the adjournment it was ordered to be given to the plaintiff, on her giving security, and A. gave the security, but kept the horse in his own possession. The interpleader suit was tried on the 7th May, and the plaintiff succeeded in it—after which she brought this action of trespass:—Held, that she was entitled to recover damages for the detention of the horse down to the 3rd March, until which time A. held it for the bailiff; but not after that time, for the order then made that she should give security, as a condition of getting the horse back, was the act of the judge, for which defendant was not responsible. *Henry* v. *Mitchell et al.*, 37 Q. B. 217.

On the 6th February the defendant wrote to the bailiff instructing him not to seize a particu-

lar horse mentioned, and they contended that as on the receipt of this letter the bailiff should have given the horse up, they were not liable for its further detention. The evidence shewed that the horse seized was not the one mentioned in the letter; but Semble, that if it had been, defendants would still have been liable for the continuance of the wrongful seizure which they had authorized. *Ib.*

VI. Costs.

Where a sheriff obtains a rule under 7 Vict. c. 30, calling upon parties to sustain their claims to property seized, and one party fails to appear, his claim as against the sheriff is barred, and the party appearing is entitled to have his costs paid by the party failing to appear. *Johnson* v. *Baldwin*, 1 Q. B. 280.—P. C.—Jones.

An interpleader suit, in which the trustees of this defendant and this plaintiff were respectively plaintiffs and defendants, was arranged on the understanding that all costs, including the sheriff's fees, &c., should be paid to the plaintiff's attorney. The costs, except sheriff's fees, were paid by an order on the trustees by their attorney, who stated that, as soon as the sheriff's fees were taxed. H., one of the trustees, would pay them. These trustees subsequently transferred all the property which this defendant had previously assigned to them to other trustees, the sheriff's fees still being unpaid; and H. swore that he was not aware of these fees being due until after the transfer. Plaintiff's attorney sued the trustees for the fees, but was nonsuited; and the judge in chambers declined to order the trustees to pay them, considering he had no jurisdiction over them. *Dunn* v. *Boulton*, 2 C. L. Chamb. 195.—Draper.

Where the claimant established his right to all except a small portion of the goods:—Held, that he was entitled to the costs of the interpleader rule, and of the feigned issue and trial, from which defendant might deduct the costs incurred in proving his claim to those goods found to belong to him. *Dempsey* v. *Caspar*, 1 P. R. 134.—P. C.—Burns.

Where an interpleader order has been granted by a judge, an application for costs of the issue must also be made to a judge, and not to the court: but Semble, that it need not be to the judge who granted the order. *Sewell* v. *Buffalo, Brantford and Goderich R. W. Co.*, 2 P. R. 56; 3 L. J. 29.—P. C.—Hagarty.

Two interpleader actions having been twice tried, resulted in favour of the plaintiff, the claimant, and on application to the judge who granted the orders to dispose of the costs, the matter was referred to full court:—Held, that the plaintiff was entitled as of right to the costs of the actions; and that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being new, each party was ordered to pay his own costs of the application. *Bellhouse* v. *Gunn*, 20 Q. B. 555.

Where a feigned issue is directed upon an interpleader application, and is found against the claimant, the execution creditor will, on the production of the record, obtain an order of course for the payment by claimant of all costs in red in consequence of his claim. *McPhers Norris*, 3 L. J. 49.—C. L. Chamb.—McLea

No costs of the day for not proceeding to pursuant to notice in an interpleader suit wi allowed till the termination of the proceedi *Salter* v. *McLeod*, 10 L. J. 299.—C. L. Cha —Richards.

An execution creditor made defendant i interpleader issue, may be ordered to give rity. *Lovell* v. *Wardroper*, 4 P. R. 265.— Chamb.—Draper.

A delay in applying for security from the July until the 11th August is fatal to the a cation. *Ib.*

Plaintiffs and defendants, being joint ow of a vessel, instituted a suit to have the part ship terminated. The vessel was sold un order of this court, and notes taken in part ment, and deposited with the registrar of court. Subsequently these notes were sued in the name of the registrar, and execution tained, under which the vessel was seized as property of the makers. Being claimed by tain persons, the sheriff obtained an interple order between them and the execution plain but without the leave of the court being as by the execution plaintiff therefor, or to litigation at law; and the claimant succeeded the issue. On motion to have the costs of issue paid out of the moneys in court:—He that the sanction of the court should have b obtained to the contest at law, if the par meant to look to the fund in court for their co and that not having been obtained, applic must make out a special case to get the costs of the fund. Under the circumstances the co at law were ordered to be paid, but only betw party and party, and on terms. *Macdonald Carrodi*, 1 Chy. Chamb. 145.—VanKoughnet

The sheriff before making application for interpleader order should make some inquir to the nature of the claim, otherwise he will ordered to pay costs. *Walker* v. *Niles*, 3 C Chamb. 59.—Taylor, *Secretary*.

The claimant in an interpleader issue, if of the jurisdiction, is bound to give security costs. *S. C. Ib.* 108.—Strong.

An interpleader suit must be dismissed costs, if the plaintiff does not establish at hearing a case making interpleader proper. *of Montreal* v. *Little*, 17 Chy. 685.

VII. Action on Bond.

Goods were seized under defendant's execu and being claimed by the plaintiffs under a signment from the execution debtors, an in pleader was directed, under which the plai gave their bond for payment of defend claim, or any less amount to be ordered, in he should succeed on the issue. A judg having been obtained for defendant, an was made allowing defendant to enforc bond, on which judgment was according tained. Defendants (plaintiffs in the i pleader) then applied to rescind or modif order, on affidavits stating that before th signment to them the sheriff held an exec against these goods for more than their

which they had paid to prevent a sacrifice, and that the goods were subsequently sold to them for less than the sum so paid. It appeared, however, that this was the first occasion on which that execution had been mentioned, or any claim made on account of it, by defendants. The court refused to interfere. *Balkwell* v. *Bellamie*, 18 Q. B. 231.

Goods being seized under a fi. fa. as belonging to defendants, one C. claimed them, and an interpleader issue was directed. C., with two sureties, gave a bond to pay the execution creditor the appraised value of the goods seized, if they should get a verdict, or to produce them when called upon, according to any rule of court or judge's order. The execution plaintiffs succeeded on the issue, and sued the sureties on their bond, and the goods, which had remained in possession of the sureties, were seized there under another execution against defendant. The court, under these circumstances, refused to order the bond to be given up on production of the goods, but made an order on the obligors to deliver up the goods, leaving them to plead performance to the action. Semble, that under the condition of the bond a tender of the goods, without any order made, would discharge them. *Elliott et al.* v. *Sicklesteel*, 21 Q. B. 43.

VIII. Miscellaneous Cases.

The sheriff, upon the plaintiff refusing to indemnify, applied to the court for an interpleader order, which was granted. Pending the interpleader issue the plaintiff offered the indemnity, but the sheriff sold and paid the proceeds to the plaintiff:—Held, upon an application by the party in whose favour the interpleader issue had been found by the jury, that the sheriff was liable to an attachment for selling the goods in contravention of the interpleader order, obtained at his instance, and for his own protection. *Henderson* v. *Wilde*, 5 Q. B. 585.

The plaintiff may be nonsuited on the trial of a feigned issue under the Interpleader Act. *Bryson* v. *Claudinan*, 7 Q. B. 198.

The sheriff seized upon a fi. fa., and the goods were claimed, obtained an interpleader summons. The creditor did not attend, and the sheriff was ordered to withdraw from possession, but the claimant was not barred from any action against him:—Held, that the sheriff might seize the same goods under an alias writ, though he could not have been compelled to do so. *Dempster* v. *Caspar*, 1 P. R. 189.—C. L. Chamb.—Hagarty.

No appeal will lie from an interpleader issue. *Cameron* v. *Kerr*, 18 Q. B. 470.

An appeal will lie from the County Court to the superior courts upon an interpleader as well as other matters. *Feehan* v. *Bank of Toronto*, 10 P. R. 32.

A certiorari does not lie to remove an interpleader issue from a county to a superior court. Such a writ do improvidently issue the application should be to quash the certiorari, and not for a procedendo. *Jones* v. *Harris*, 6 L. J. 16.—C. L. Chamb.—Burns.

It is no part of the duty of a sheriff, under an order for an interpleader issue, which has been determined in favour of the claimant, without tender of his costs for so doing, to restore the goods seized to the custody of the claimant in the same state as they were at the time of the seizure. The proper mode, however, of raising such a question would be in an action against the sheriff for withholding the goods, and not on application to a judge for an order on him to restore them. *McCollum* v. *Kerr et al.*, 8 L. J. 71.—C. L. Chamb.—Draper.

The declaration complained that defendant, as sheriff under a fi. fa. at the plaintiff's suit, levied upon a certain quantity of bricks made by F., one of the defendants in the writ, whereupon one B. claimed them, and an interpleader issue was directed, and that until payment into court of the value of the bricks, or security given therefor, defendant should continue in possession; yet that though the money was not paid, nor security given, defendant wrongfully allowed the bricks to be removed by B. Defendant pleaded that the interpleader order was duly set aside; to which the plaintiff replied that the order contained a clause protecting defendant against action, and that it was not set aside for informality, but at the plaintiff's instance, long after defendant had allowed the removal, and to enable plaintiff to bring this action:—Held, on demurrer to the replication, that the declaration was bad for not averring that the bricks belonged to F., and that the replication was also bad, being no answer to the plea. *Dafoe* v. *Ruttan*, 19 Q. B. 334.

An order to examine the defendant in an interpleader issue may be granted under the Administration of Justice Act, 1873, sec. 24, the words "action at law," including an interpleader proceeding. *Canada Permanent Building Society* v. *Forest*, 6 P. R. 254.—C. L. Chamb.—Dalton, *C. C. & P.*

Where an interpleader order is pending, the court will in its discretion enlarge the time for returning writs in the sheriff's hands. *Walker* v. *Niles*, 3 Chy. Chamb. 59.—Taylor, *Secretary.*

Two writs were in the hands of the sheriff, and while an interpleader order was pending he was served with a notice to return one of the writs; and not having done so, an application was made to compel him to make a return. Under the circumstances the secretary enlarged the time for making the return, and made no order for costs. *Ib.*

INTERPRETATION OF WORDS AND TERMS.

See Words.

INTERROGATORIES.

I. Examination of Parties and Witnesses out of Court—*See* Evidence.

II. Interrogating Plaintiff or Defendant in Ejectment—*See* Ejectment.

III. Under Acts for Relief of Insolvent Debtors—*See* Bankruptcy and Insolvency.

INTESTATE.

I. Administrator of—*See* Executors and Administrators.

II. Administration Suit—*See* Administration Suit.

III. Estate of—*See* Distribution of Estate—Heir and Devisee Commission—Partition.

INTOXICATION.

See Drunkenness.

INTRUSION.

In an information for an intrusion, the venue may be laid in any district. *Attorney-General* v. *Dockstader*, 5 O. S. 341.

A continuance in possession of land, under an erroneous impression that it was their own, of intruders, as against the King, after grant made, is not a disseisin of the grantee. *Doe* d. *West* v. *Howard*, 5 O. S. 462.

Where defendant justifies under a third person, he must shew his own title and that of the person under whom he justifies, and also traverse the title in the crown. *Regina* v. *Gould*, H. T. 3 Vict.

The plea of not guilty puts in issue only the question of intrusion, and not the title of the crown. *Regina* v. *Munro*, H. T. 6 Vict.

Under a crown grant the grantee may maintain ejectment against a person who has been in adverse possession for upwards of twenty years, and it is not necessary that the crown should proceed by information of intrusion in such a case before the grant, or that the grant should specially convey the crown's right of entry on the land to the grantee. *Doe* d. *Fitzgerald* v. *Finn*, *Doe* d. *Fitzgerald et al.* v. *Clench*, 1 Q. B. 70.

Information for intrusion. Plea, not guilty, with the words, "per stat." in the margin. The crown gave evidence of their title, commencing within twenty years before the information brought, but gave no further proof of the trespass and intrusion, and defendants gave no evidence :—Held, that a general verdict could not be entered for the crown. Semble, that the crown was entitled to a writ of amoveas manus. *Attorney-General* v. *Stanley*, 9 Q. B. 84.

The property of the soil adjacent to the shore, and which is covered by the waters of the lakes or of navigable rivers, is in the crown, subject to the right of the public to pass over the water in boats, and to fish and bathe therein :—Held, therefore, where the defendant had encroached on a portion of lake Ontario not far from land belonging to himself, but not adjoining it, by the construction therein of certain crib work and piers, upon which he had built a warehouse, that these not being natural accretions to his land, but artificial improvements to the waters of the lake or harbour (the harbour being then vested in the crown) must be considered to be upon the soil of the crown, and that the defendant was liable to be removed therefrom on an information of intrusion at the suit of the crown. *Attorney-General* v. *Perry*, 15 C. P. 329.

On an information for intrusion :—Held being no proof that the crown had been possession for twenty years, that un guilty defendant could not give evidence under a crown lease. Held, also, that th on this plea was not entitled to judg once, but must go down to trial to shew trusion and damages, and because the def under the plea might shew the crown possession for twenty years, and thus crown to proof of title. *Regina* v. *Si* Q. B. 539.

In an information of intrusion the proc cess to bring the defendant into court i of subpœna ad respondendum, directed defendant. *Attorney-General* v. *McLa* P. R. 63.—A. Wilson.

This writ can be issued after the inform filed, and, in this country, without the i tion being entered ; and a specific prayer process is not necessary. *Ib.*

A subpœna ad respondendum directed defendant, issued on an information of int need not be served fifteen days before turn. *Ib.*

The affidavit of service of the subpœna information of intrusion, is properly enti styling the attorney-general "informan may be tested as of term, though sued vacation. *Ib.*

To an information of intrusion filed Majesty's attorney-general for the Dominio secuting for her Majesty, defendant pleade the lands mentioned were not ordnance pr or property in any manner under the of the Dominion of Canada, but, on the co thereof, the said lands became upon the p of the B. N. A. Act, 1867, and still are the pr of the province of Ontario, in which th situated. Issue having been joined on thi the title at the trial was gone into, and a entered for the crown, with leave to defen move to enter it for him :—Held, that the was clearly entitled to recover, for, among reasons, the plea set up no title in defe and admitted the crown title by stating th to belong to this province ; and the fact attorney-general for Canada prosecuting f crown could not shew that a Dominion ti necessarily claimed. *Attorney-General* v. E 33 Q. B. 94.

Remarks upon the form of, and defects nisi prius record. *Ib.*

INVASION.

See Criminal Law.

INVENTIONS.

See Patent.

INVESTMENT OF MONEY.

I. Money in Court, 1909.

II. By Agents, 1909.

III. By Trustees—*See* Trusts and Tr

IV. Infant's Estate—*See* Infant.

I. Money in Court.

As a general rule, loans of money in court cannot be made on property on which there is any prior charge, however small, unless all parties interested consent. *Andrews* v. *Hempstreet*, 1 Chy. Chamb. 347.—Mowat.

The court will not grant a loan of money except to persons of undoubted credit, apart from the question of value of security offered *Attorney-General* v. *Alexander*, 3 Chy. Chamb. 101.—Taylor, *Secretary*.

Where the applicant was a young woman residing with her father, the application was refused. *Ib.*

Prima facie money in court should be invested in the public funds; but the court has, under C. S. U. C. c. 12, s. 72, a discretion to authorize investments on mortgages of real estate. *Re Roman, Farrell* v. *Scanlon*, 6 P. R. 221.—Chy. Chamb.—Spragge. On appeal from Holmested, Referee.

II. By Agents.

The plaintiff entrusted $500 to defendant, who signed a receipt stating that it was to be lent, with $300 of his own, to one H., "being secured upon the said H.'s storehouses," and in defendant's name, and bearing interest at nine per cent, payable to defendant, who would, on receipt of the interest, pay to the plaintiff her interest, $45 a year, and at the expiration of two years defendant to pay over to plaintiff both principal and interest; but defendant not to be responsible for the money except as paid by H. to him. Defendant, who acted gratuitously, and, as he said, under the advice of a solicitor, finding that H. had not yet obtained the patent, advanced the $800 to H. on the security of a bond, unregistered, conditioned that H. should give a mortgage on the property within a month after receiving the patent, or pay the money in two years; but H., after the patent issued, gave the mortgage to another person, and became insolvent. The declaration alleged that defendant promised to invest the money on the security of a mortgage on the storehouses, and defendant admitted that this was the agreement. He argued that he was a gratuitous bailee only, and not shewn to have been guilty of negligence; but:—Held, that it was a case of contract founded upon good consideration, the entrusting of it with the money, and that having broken it he was liable. Upon appeal this judgment was affirmed. The defendant, it appeared, without the plaintiff's authority, took a second mortgage on the property, nearly two years after the first, extending the time of payment for three years for the principal and accrued interest:—Held, that this was clearly such a breach of his agreement, and such a dealing with the plaintiff's money as to make him liable:—Held, also, that the plaintiff should recover interest at nine per cent. for two years only, and at six per cent. thereafter. Per Patterson, J., the agreement to "invest" the money upon the storehouses required defendant to obtain a valid legal charge thereon. Semble, that defendant, not being an attorney, would not have been liable, if, having undertaken gratuitously to invest the plaintiff's money in a mortgage, he had instructed a competent attorney to attend to the matter, and followed upon his advice. *Holmes et ux.* v. *Thompson*, 10 Q. B. 292.

A. received $1,200 belonging to his son-in-law R., and invested it with other money of A.'s own in the purchase of a farm, which cost $3,200. R., with his family, went in possession of the farm, and A., the father-in-law, by his will devised the farm to R.'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of $200 to a daughter of R., and of $600 to another person. It was assumed in the cause that R. was at the time of the purchase and thenceforward of unsound mind and unable to give a valid assent to the transaction; and the court held that on that assumption he was entitled to the $1,200 as against A.'s estate, and that the devise to his wife and son was no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the court directed inquiries whether R. was at the date of the transaction of mental capacity to assent to the purchase; and if so, whether he did assent thereto; also, inquiry as to the occupation of the land by R. and his family before the death of A., and the value of such occupation. *Goodfellow* v. *Robertson*, 18 Chy. 572.

ISSUE BOOK.

See Trial.

JAIL.

See Gaol and Gaoler.

JAY'S TREATY.

Construction of, as to rights of aliens to inherit. See *Doe* d. *Hay* v. *Hunt*, 11 Q. B. 367.

JOINDER OF COUNTS.

See Pleading at Law.

JOINDER OF PARTIES.

See Pleading at Law—Pleading in Equity.

JOINT DUTY.

Semble, per Draper, C. J., that when the tort sued for is the non-performance of a joint duty; if the joint duty be not proved, the plaintiff must fail in toto. *Woods* v. *Municipality of Wentworth and the Corporation of Hamilton*, 6 C. P. 101.

JOINT STOCK COMPANY.

See Corporation.

JOINT TENANTS.

I. Realty—*See* Estate.

II. Injunction between—*See* Injunction.

III. Tenants in Common — *See* Tenants in Common.

JUDGE.

I. Of County Courts—*See* County Courts.

II. Of Division Courts—*See* Division Courts.

III. In Chambers—*See* Practice at Law—Practice in Equity.

The 16 Car. I. c. 10, was intended only to apply to the Court of Star Chamber and other courts therein mentioned, and not to such tribunals as the Recorder's Court for the city of Hamilton. Therefore an action against the mayor, acting as president of such court, charging that he falsely and knowingly caused a verdict of guilty to be recorded against the defendant on his trial for larceny, and claiming to recover therefor the penalty of £500 stg., imposed by the 6th clause of the statute, was held not sustainable, and, at all events, the record being unreversed, would have protected the defendant. *Stark* v. *Ford*, 11 Q. B. 363.

A garnishee summons having issued in a County Court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claims, an affidavit was filed from which it would appear that the judge was interested with H. in his claim. He then declined to act further in the matter; and after several subsequent meetings, signed a memorandum, stating as an additional reason for refusing to proceed, the fact that H. was his brother-in-law. The court, under these circumstances, refused a mandamus to compel the judge to dispose of the case. *In re the Judge of the County of Elgin*, 20 Q. B. 588.

A rule to enter a nonsuit having been granted in the County Court in April term, was duly enlarged until the following term. The judge died before the term began, and no successor was appointed till after its expiration, but the clerk of the court granted a rule to enlarge it. It was argued in October term before the new judge, who treated it as still pending, and gave judgment:—Held, that he was right. *Leslie* v. *Emmons*, 25 Q. B. 243.

Held, that the fact of a defendant being a county judge, where the plaintiff might otherwise have proceeded under the Overholding Tenants Act of 1868, and thereby have obtained a more summary remedy, is a sufficient reason to change the place of trial in an action of ejectment. *Anonymous*, 4 P. R. 310—C. L. Chamb. —Draper.

Quære, whether the circumstance of defendant being a county judge is not in itself sufficient to give a plaintiff the right to have the place of trial changed on grounds of public policy. *Ib.*

As to the right of action against a coroner for acts done when acting judicially. See *Garner* v. *Coleman*, 19 C. P. 106.

Three of the judges in appeal being members of the church society, they held themselves disqualified to sit as judges, except ex necessitate, though no objection to their sitting was taken at the bar; but there not being a quorum without them, they heard the case with the other judges, in order that a judgment, legal in point of form, might be given by the court. *Boulton* v. *Church Society*, 15 Chy. 450.

JUDGMENT.

I. Signing and Entering up.

1. *Generally*, 1913.
2. *Nunc pro tunc*, 1916.

II. Judgment in Default of Appearance

1. *In Ejectment*—*See* Ejectment.
2. *In Other Actions*—*See* Practice at Law.
3. *When Fraudulent* — *See* Fraudulent Judgment.

III. Judgment in Default of Plea—*See* Pleading at Law.

IV. Judgment of Non Pros., 1917.

V. Judgment as in Case of Nonsuit.

1. *When allowed*, 1918.
2. *Practice in Moving or Supporting the Rule*, 1921.
3. *Application to Discharge Rule on Peremptory Undertaking*, 1921.
4. *Proceedings after Peremptory Undertaking*, 1923.

VI. Arrest of Judgment, 1924.

VII. Judgment Non Obstante Veredicto, 1925.

VIII. Judgment on Demurrer—*See* Pleading at Law.

IX. Registration of Judgment, 1927.

1. *Vendor's Lien as against Registered Judgments*—*See* Sale of Lands.

X. Setting Aside Judgment.

1. *Power of Judge in Chambers*, 1931.
2. *Delay in Application*, 1931.
3. *Affidavit of Merits*, 1932.
4. *Other Cases*, 1933.
5. *In Ejectment*—*See* Ejectment.
6. *Second Application*—*See* Practice at Law.

XI. Computation of Amount Due, 1935.

XII. Satisfaction and Discharge.

1. *Satisfaction Piece*, 1936.
2. *Other Cases*, 1937.
3. *Release of one of several Judgment Debtors*—*See* Release.

XIII. Estoppel by Former Verdict or Judgment.

1. *Generally*, 1938.
2. *Actions of Contract.*
   (a) *Sale of Goods*, 1939.
   (b) *Actions of Covenant against Sheriff or Division Court Clerk, or Bonds and Sureties*, 1940.
   (c) *Other Cases*, 1941.
3. *Actions of Ejectment or Tort*, 1942.

4. *Other Cases*, 1949.
5. *Effect of Judgment in Ejectment*—*See* EJECTMENT.
6. *As a Defence to Actions on Bills or Notes*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

XIV. ASSIGNMENT OF JUDGMENTS, 1950.

XV. FOREIGN JUDGMENTS OR ORDERS.
1. *Validity and effect of*, 1950.
2. *Other Cases*, 1956.
3. *Proof of*—*See* EVIDENCE.

XVI. NUL TIEL RECORD, 1957.

XVII. ACTIONS ON JUDGMENTS, 1958.

XVIII. MISCELLANEOUS CASES, 1958.

XIX. IN PARTICULAR ACTIONS.
1. *Ejectment*—*See* EJECTMENT.
2. *Replevin*—*See* REPLEVIN.

XX. IN CRIMINAL CASES—*See* CRIMINAL LAW.

XXI. AMENDMENT OF JUDGMENTS AND JUDGMENT ROLLS—*See* AMENDMENT AT LAW.

XXII. ON COGNOVITS—*See* COGNOVIT.

XXIII. TRANSCRIPT OF JUDGMENT—*See* DIVISION COURTS.

XXIV. FRAUDULENT JUDGMENT—*See* FRAUDULENT JUDGMENT.

XXV. PROOF OF, IN EVIDENCE—*See* EVIDENCE.

XXVI. WHEN JUDGMENT WILL BIND LANDS OF TESTATOR OR INTESTATE—*See* EXECUTORS AND ADMINISTRATORS.

XXVII. STAYING PROCEEDINGS ON—*See* INJUNCTION.

XXVIII. MALICIOUSLY ISSUING EXECUTION ON—*See* MALICIOUS ARREST, PROSECUTION, AND OTHER PROCEEDINGS.

XXIX. SET-OFF OF JUDGMENTS—*See* SET-OFF.

XXX. REVIVING JUDGMENTS—*See* SCIRE FACIAS AND REVIVOR.

I. SIGNING AND ENTERING UP.

1. *Generally.*

Interlocutory Judgments.]—Where a bill was filed against an attorney in term, but the copy of demand of plea were delivered in vacation, and the plaintiff signed interlocutory judgment, and assessed damages before the succeeding term, the court held the proceeding irregular. *Frazer* v. *Boulton*, 2 O. S. 210.

It is sufficient if pleas be filed in the proper office, to prevent a plaintiff signing judgment, though they have not been served. *Mackinnon* v. *Robinson*, 3 O. S. 169.

An interlocutory judgment in which the cause of action is properly styled is insufficient to sustain the notice of assessment; but if a notice of intention to move to set aside the proceedings be not given before assessment of damages, the proceedings will be set aside without costs. *Allan* v. *Johnson*, 4 O. S. 323.

It is not irregular to sign an interlocutory judgment in the office of a deputy clerk of the crown in the country, when by rule of court the principal office in town is not open. *Hall* v. *Hunter*, 5 O. S. 705.

When a month's time to plead had been given, and the plaintiff signed interlocutory judgment before the month had expired, but afterwards entered a waiver in the interlocutory judgment book in the crown office, but gave no notice of the waiver to defendant's attorney, and after the month had expired, no plea having been filed, signed interlocutory judgment again, and assessed damages, his proceedings were held regular, the entry of the waiver in the book being a sufficient notice; but the interlocutory judgment was set aside on the merits, on payment of costs. *Wynn* v. *Palmer*, E. T. 3 Vict.

Where defendant obtained time to plead on the usual terms, and the plaintiff took issue upon some pleas, and demurred to others, and defendant obtained an order to amend his pleas or join in demurrer, with further time to rejoin "upon the usual terms," and served both his orders, but afterwards, and within the time in which he would have been entitled to rejoin, without any order for further time, filed a special demurrer to the plaintiff's replication, upon which the plaintiff signed interlocutory judgment:—Held, that the interlocutory judgment was regular, the defendant being bound by his order for further time to rejoin after having served it, and the special demurrer being in contravention of the undertaking to rejoin upon the usual terms. *Strathy* v. *Crooks*, 1 Q. B. 400.—P. C.—Jones.

Interlocutory judgment set aside for variance between the declaration and the incipitur on the judgment roll. *Pace* v. *Meyers*, 8 Q. B. 70.

Form of interlocutory judgment for want of a plea to one of two counts given. *Johnstone* v. *Johnstone*, 8 L. J. 46.—C. L. Chamb.—Draper.

Interlocutory judgments cannot be signed against an infant till after prochein amy appointed. *Fountain* v. *McSween*, 4 P. R. 240.—C. L. Chamb.—Hagarty.

Held, that under sec. 56 of C. L. P. Act, taken in connection with secs. 91, 92, and rule 132, it is not a valid objection to an interlocutory judgment, that the copy of declaration filed was not endorsed with a notice to plead. *Corrigan* v. *Doyle*, 4 P. R. 238.—C. L. Chamb.—Hagarty.

Other Cases.]—The court will give leave to enter judgment on a cognovit against one defendant only, the other being dead. *Nichall* v. *Cartwright et al.*, Tay. 464.

A final judgment by default for want of a plea, signed generally in a cause in which part of the claim is liquidated and part not, is irregular, though the amount of the judgment be confined to the liquidated demand. *Westlake* v. *Abbott*, 4 L. J. 46.—C. L. Chamb.—Robinson.

Where plaintiff specially endorsed his writ for $266.62½, and afterwards declared on the common counts, claiming £100, and then signed final judgment for £100, the judgment was set aside, and leave to amend was refused. *Anderton* v. *Johnston*, 8 L. J. 46.—C. L. Chamb.—Draper.

A recognizance of bail to the limits is not within the 8 & 9 Will. III. c. 11; and when

there is no plea, but a breach is assigned in the declaration, the plaintiff may enter final judgment without any assessment of damages. *McNamee* v. *Reilly*, 13 Q. B. 197.

The failing to mark the judgment paper "Inferior jurisdiction," was an irregularity which might be waived. *Scadding* v. *Welch*, 2 C. L. Chamb. 105.—Burns.

Where a verdict was rendered against four defendants, but one afterwards had judgment on demurrer for mispleading, not on the merits, given in his favour:—Held, that plaintiff could enter judgment against three defendants, omitting that one. *Corbett* v. *Shepard*, 4 C. P. 68.

Where judgment was entered and execution issued in Toronto, the original papers being filed in an outer county, the non-transmission of such papers was held no irregularity. *Felton* v. *Executors of Conley*, 1 P. R. 319.—C. L. Chamb.—Robinson.

If a plaintiff refuse to enter his judgment where defendant is entitled to set-off his costs, a judge in chambers will limit a time to enter the judgment, and in default allow defendant to enter it for plaintiff. *Sinclair* v. *Barrow*, 3 L. J. 49.—C. L. Chamb.—Richards.

Where all the proceedings in an action previous to final judgment have been taken in an outer county, a judgment signed and taxation of costs in Toronto:—Held, not irregular. *Overholt* v. *Paris and Dundas Road Co.*, 7 C. P. 293.

The crown offices should not be open for business on Easter Monday, and a judgment entered on that day was set aside for irregularity with costs. *Trust and Loan Co.* v. *Dickson*, 2 L. J. N. S. 166.—C. L. Chamb.—Draper.

On error from the County Court, it appeared by the record that after issue joined a ven. fac. was awarded, and then the postea stated an agreement by the parties to leave the case to the judge, the decision to be looked upon as the verdict of a jury. Afterwards it was entered that "the said judge has determined, and the court is of opinion and has ordered," that the defendant should pay to the plaintiff a sum named. Then followed an entry of judgment for that sum and costs:—Held, that the judgment was erroneous, for no verdict was directed or entered to support it. Quære, whether the judge had power to direct a verdict. *Jones* v. *Smith*, 23 Q. B. 485.

Quære, as to the proper mode of entering judgment on a verdict in trespass against two defendants, but finding $800 against one defendant, and $400 against another. *Clissold* v. *Machell et al.*, 26 Q. B. 422; 25 Q. B. 80.

Defendant in the County Court obtained a rule nisi to enter a nonsuit, with stay of proceedings; it was not signed by the clerk, but had at the side the words, "Rule nisi granted: W. Salmon, judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff:—Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed. *Brown* v. *Cline*, 27 Q. B. 87.

An order gave a plaintiff leave to sign judgment as on default of plea, and gave defendant leave to plead by a certain day:—Held, that t plaintiff after that day could sign judgme unless the plea was in by the time limited, ev though it actually was on the files when jud ment entered. *Cousins* v. *Bullen*, 6 P. R. 72.— C. L. Chamb.—Dalton, *C. C.* & *P.*—Hagarty,

A judgment may be regularly signed on a r lictâ verificatione without a judge's order, an without the signature to the relinquishment b ing verified by affidavit. It is proper on enterin judgment in such a case to set out the ples joinder of issue, and relictâ upon the roll. *Eatin* v. *Fraser et. al.*, 6 P. R. 297.—C. L. Chamb.— Dalton, *C. C.* & *P.*

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2. *Nunc pro tunc.*

Where a cause had been pending for severa terms, the court refused, after discharging th rule for a new trial, to allow the plaintiff t enter judgment as of the term in which th motion was made, in order to obtain interest o his verdict pending the motion. *Powell* v. *Bou ton*, 3 Q. B. 53.

The words charged were spoken at an ele tion, with reference to plaintiff's qualification, matter in which defendant had an interest, an on which it is of consequence to encourage fre dom of discussion. The evidence was doubtfu as to the sense in which they were used, and th damages large. The court, under the circum stances, granted a new trial on payment of cost The plaintiff having died before the return o the rule nisi, it was made a condition that in th event of a second verdict for the plaintiff, jud ment should be entered as if such verdict had be rendered at the time of the first trial; and th defendant should undertake not to assign erro *Swan* v. *Clelland*, 13 Q. B. 335.

In dower judgment was given for the tena in June, 1856. In August the tenant died, a the entry of judgment was delayed by the di culty in procuring the affidavit of disbursement &c. Demandant brought another action again the heirs of the tenant for dower in the sa land, and in April, 1857, an application w made to allow the judgment given in June to entered nunc pro tunc:—Held, too late. *Sh ford* v. *Trueman*, 2 P. R. 154.—C. L. Chamb Robinson.

The trial in ejectment took place in May, 18 and a verdict was rendered for the plaintiff. Easter Term following, a rule nisi was obtai for a new trial, but no cause was shewn u Easter Term, 1856, and in the meantime pl tiff died. Semble, per Robinson, C. J., judgment could not be entered nunc pro tu and at all events no writ of possession could issued. Per McLean and Burns, JJ., that ju ment might be so entered. *Davy* v. *Camer* 14 Q. B. 483.

The court on a subsequent application, allo judgment to be entered nunc pro tunc, a suggestion to be entered of the death, leavi to be afterwards determined whether the C P. Act, s. 248, would apply retrospectively. *C.* 15 Q. B. 175.

The plaintiff, on 22nd March, 1866, obt a verdict, and died on the 26th June, havi April previous assigned the verdict to o On the 24th September a rule nisi for a

trial was discharged, and in October C. proceeded to enter judgment. The master refused to tax full costs, and on application to the judge who tried the case he desired to hear defendant's attorney. Notice of an appointment to argue the matter was given, but owing to engagement or to the absence of the judge from chambers it was not argued until February, and a certificate was granted in April. Application was then made in chambers to enter judgment nunc pro tunc, but the summons stood over by consent, and in August, 1867, C., having been appointed the plaintiff's administrator, renewed the application in chambers, which was refused on the 2nd October. The court, under the circumstance, made absolute a rule to enter such judgment, without costs. *Neil* v. *McMillan*, 27 Q. B. 237. The application in chambers reported, 4 P. R. 145.

IV. Judgment of Non Pros.

The declaration at the suit of a corporation named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only. The court held, that a judgment of non pros. might be signed and execution issue against them in their private capacities. *Markland et al.* v. *Dalton*, Tay. 125.

It is irregular to sign judgment of non pros. without filing the original papers. *Lyman* v. *Cutler*, *Lyman* v. *Lovejoy*, 4 O. S. 15.

A judge in chambers has power to set aside such judgment. *Hart* v. *Boyle*, 6 O. S. 168.

A defendant cannot sign judgment of non pros. for not declaring when the plaintiffs have in fact declared, but a mistake has been made in the name of one of them; the proper course being to move to amend the declaration, or to set it aside. *Ib.*

Where in assumpsit against several defendants, one defendant had obtained an order for particulars, which, after several months, had not been delivered, the court refused to order delivery of particulars by a certain day, or that he might sign judgment of non pros., on the plaintiff shewing that all the defendants had not appeared. *Shore* v. *Bradley*, 1 Q. B. 39?.—P. C.—Macaulay.

Judgment of non pros. set aside for an irregularity in the service of the demand of replication. *Williams* v. *Smith*, 1 C. L. Chamb. 12.—Macaulay.

Replying after non pros. signed, is a waiver of such irregularity. *Ib.*

After a lapse of four terms without any proceedings, a defendant must give a term's notice of his intention to proceed before signing judgment of non pros. *Bain* v. *Bolton*, 1 P. R. 14. —C. L. Chamb.—Draper. See, contra, *Culver* v. *Moore*, Tay. 451.

The plaintiff after having arrested defendant, obtained a verdict. The plaintiff then obtained an order to set aside the recognizance of bail, and to take the same off the files, on account of an alteration made after filing. The plaintiff had also taken an assignment of the bail bond from the sheriff, and sued upon it as well; and the defendant in this action pleaded that special bail had been entered in the original action, and demanded a replication, and defendant not replying, signed judgment of non pros.:—Held, regular. *Caspar* v. *Herschberg*, 1 P. R. 175.—C. L. Chamb.—Burns.

In an action on a bill, defendant denied the drawing and endorsing, and alleged payment. On the 18th of March judgment of non pros. was signed for want of a replication, and on the 25th the plaintiff's attorney joined issue, and took the issue book with notice of trial to serve, when he was informed of the judgment signed. Some understanding was come to as to the waiver of this judgment, but was not put in writing, and the affidavits were contradictory. The plaintiff took a verdict, which defendant moved to set aside; and a cross rule was obtained to set aside the judgment:—Held, that the judgment was regular, because the plea of payment required an answer; but that in fairness it ought not to have been signed, and defendants should have moved to set aside the notice of trial, being the first irregularity. The plaintiff's verdict and defendant's judgment were therefore both set aside, without costs. *McDonell* v. *Ketchum*, 2 P. R. 326.—Q. B.

In cases where judgment of non pros. is authorized by C. S. U. C. c. 13, s. 39, it is not necessary to obtain leave of the court to sign it. *Rowe* v. *Jarvis*, 14 C. P. 244.

Semble, on the authority of Baker *v.* Jupp, 3 D. & L. 474, that issue in this case having been joined, there could not properly have been a judgment of non pros. *Miller* v. *Corporation of Hamilton*, 17 C. P. 514.

A judgment of non pros. regularly signed in an action by a common informer for a penalty will not be set aside. *McClenaghan* v. *McLeod*, 3 P. R. 13.—Q. B.

Defendant on 26th March, 1866, signed judgment of non pros. against plaintiff for costs for not proceeding to trial pursuant to a notice for that purpose. Plaintiff on the 3rd April, 1866, obtained a summons to set the judgment aside, which was made absolute on the 16th June, but the order was not taken out until 22nd October following, nor served until the 29th. This order was afterwards set aside by the full court as having been waived by delay, whether the judgment was void or only irregular. The plaintiff obtained a second summons to set aside the judgment, &c., upon the ground that there was nothing to warrant defendant in entering it; but—Held, that the judgment was not a nullity, and the objection to it could be waived, and that it was waived by the delay. *Herr* v. *Douglas*, 4 P. R. 102.—C. L. Chamb.—Richards.—*S. C.* 26 Q. B. 357.

Held, that section 81 of C. L. P. Act prohibits the defendant from signing judgment of non pros. after the expiration of a year from the return day of the writ, and that he, as well as the plaintiff, is prohibited from taking any step after that time. *Page* v. *Foster*, 12 L. J. 183.—C. L. Chamb.—Dalton, *C. C. & P.*; affirmed on appeal by Harrison, C. J.

V. Judgment as in case of Nonsuit.

1. *When allowed.*

[*By C. L. P. Act, sec. 223, judgment as in case of nonsuit is abolished, and by sec. 227 a new prac-*

tice is established, by which, in case the plaintiff neglect to bring the case to trial within the times specified, defendant may give him 20 days' notice to bring it on, and on default may enter a suggestion and sign judgment for his costs; but the court or a judge may extend the time for proceeding to trial with or without terms. The decisions under the former practice are still of use as bearing upon that substituted for it: See Chitty's Archbold, 12th ed., vol. II. c. 24, where the old practice is explained.]

The defendant was held not entitled to judgment as in case of nonsuit, where a cause came on to be tried in its turn, and the plaintiff not being ready, defendant consented that it should be put at the foot of the docket, and it could not afterwards be tried for want of time. *Bank of U. C.* v. *Covert*, 4 O. S. 324; *Bank of U. C.* v. *Bethune*. *Ib.*, 330.

Nor where there had been a trial. *Warren* v. *Smith*, 5 O. S. 728; *Archibald* v. *Cameron*, 1 P. R. 138.—P. C.—Burns.

Nor where the judge refused to try a cause upon an immaterial issue. *Hodson* v. *Stevens*, 5 Q. B. 625.—P. C.—McLean.

Nor where the plaintiff made a mistake in his notice of trial, and defendant, when he was too late to give a fresh notice, pointed out the error and refused to waive the objection. *Watson* v. *Strong*, 8 Q. B. 180.

Nor when a record was entered and the plaintiff's attorney forebore trying it at defendant's particular request. *Jones* v. *Green*, 1 P. R. 19.—P. C.—Draper.

Nor in an action of replevin. *Arnold* v. *Higgins*, 1 P. R. 139.—P. C.—Draper. See, also, *Brown* v. *Simmons*, 1 Q. B. 336.—C. P.—McLean.

Nor where a cause had once been made a remanet. *Doe* d. *Dodge* v. *Rose*, 4 Q. B. 174.—P. C.—Macaulay. *Rea* v. *Miller*, 2 P. R. 67.—P. C.—Richards.

Nor where the cause was not at issue for want of a similiter or otherwise, or where it was not shewn by affidavit to be at issue. *Wilson* v. *Westbrooke*, E. T. 4 Vict. R. & H. Dig. 253; *McLellan* v. *Smith*, T. T. 4 Vict.; R. & H. Dig. 255, *Davidson* v. *Lowry*, 1 P. R. 3.—McLean; *Gibson* v. *Washington*, 1 Q. B. 410.—P. C.—Hagerman; *McCague* v. *Clothier*, 1 Q. B. 517.—P. C.—Hagerman; *Price* v. *Brown*, 3 Q. B. 127.—P. C.—Hagerman; *Jones* v. *Martin*, 2 P. R. 68.—P. C.—Richards.

Nor where no formal notice of trial had been given, but defendant prepared for trial, and incurred expense, believing himself bound to do so by his understanding with plaintiff's attorney. This understanding, however, was not fully admitted. *Jones* v. *Martin*, 2 P. R. 68.—Richards.

Nor where, after the cause had been entered for trial, two of the defendants gave a cognovit for debt and costs, and the record was withdrawn. *Bank of U. C.* v. *Ward et al.*, 2 P. R. 206.—Richards.

Notice of trial having been given and countermanded, a rule for the judgment was obtained, and the plaintiff objected that the cause was not at issue, inasmuch as no similiter had been added, made up and delivered:—Held, that the plaintiff having given notice of trial, could not say that the cause was not at issue for want of a similiter which he himself might have added. *Wilkes* v. *Wilkins*, 1 P. R. 90.—P. C.—Draper. See, also, *Elvige* v. *Boynton*, 1 Q. B. 279.—P. C.—Jones.

Where a plaintiff had given notice of trial and countermand, the defendant might obtain a rule for judgment without stating in his affidavit that issue was joined. *Clute* v. *Badgely*, 1 Q. B. 417.—P. C.—McLean.

Where there were two defendants this judgment, for not going to trial pursuant to notice, would not be granted to one. *Spafford* v. *Buchanan et al.*, 4 O. S. 326.

Under peculiar circumstances the court would refuse to grant judgment as in case of nonsuit for not going to trial pursuant to notice. *Dow* v. *McDougall*, 5 O. S. 342.

Where the clerk of assize refused to receive the record because it had been altered after it had been passed at the crown office by the plaintiff's adding a similiter to the defendant's plea, and entering in the margin the venire facias:—Held, that defendant was entitled to judgment as in case of a nonsuit. *Doe* d. *Wilcox* v. *Jacobs*, 1 Q. B. 1.—P. C.—Draper.

After the jury had been sworn, it appeared that the notice to examine defendant had been served too late, and the plaintiff having no evidence was unable to go on. The judge dismissed the jury, telling the plaintiff's attorney that they might be called together when convenient, at any time during the assizes, and the case taken. The plaintiff was afterwards ready to go on, but defendant's attorney refused to allow the case to be taken out of its order, and it was not tried.—Held, that defendant could not move for judgment as in case of nonsuit; but as the plaintiff's laches had rendered it necessary to dismiss the jury, the rule was discharged without costs. *Taylor et al.* v. *Smith*, 2 P. R. 213.—P. C.—Richards.

The rule for this judgment was discharged without costs, the plaintiff having been led by defendant to rely upon him for the procurement of some evidence in the cause, and which defendant subsequently, and after the record had been entered, determined not to send. *Doe* d. *Rees* v. *Dick*, 6 Q. B. 621.—P. C.—Draper.

It is no sufficient ground for refusing the judgment that there are issues in law undisposed of. *Leach* v. *Dulmage*, E. T. 3 Vict.

The rule for judgment as in case of a nonsuit discharged unconditionally, when it appears that after notice of trial was given, but within time for countermanding, an injunction was granted in Chancery to stay execution in the cause. *Doe* d. *Burnside* v. *Hector*, T. T. 4 Vict.—P. C.—Macaulay.

Where the venue was laid in the county, rule for such judgment would be granted when two assizes had passed without plaintiff proceeding to trial. *Start* v. *Bullen*, E. T. 2 Vict.

When there were issues in law and in fact, plaintiff must go to trial within two assizes as to the issues in fact joined, and not after the determination of the demurrer. *Brown* v. *Taylor*, 1 P. R. 212.—P. C.—Draper.

The court would sometimes make absolute rule for such judgment unless the costs of

day be paid within a certain time. *Warren* v. *Grant et al.*, E. T. 2 Vict.

Where the jury were discharged without giving any verdict, and the plaintiff did not afterwards proceed :—Held, that defendant could not move for such judgment because the plaintiff had not proceeded to trial according to the practice of the court, within two assizes after issue joined. *Bradbury* v. *Flint*, M. T. 4 Vict.

Where there are two defendants, and one pleads to issue, and the other allows judgment by default, and the plaintiff does not proceed to trial pursuant to notice, the application for this judgment cannot be made by both defendants, but only by the one who had pleaded. *Brunskill* v. *Chamavero et al.*, 5 Q. B. 270.

Semble, that even in a joint action of assumpsit one of several defendants jointly sued might move for judgment as in case of a nonsuit. *Th.* But, see *Spafford* v. *Buchanan et al.*, 4 O. S. 326.

When issue was not joined till about the middle of August, and the plaintiff not having given notice of trial for the October assizes following, defendant moved in the November term for the judgment :—Held, too soon. *Cuvillier* v. *Prior*, 5 Q. B. 643.

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2 *Practice in Moving or Supporting the Rule.*

The filing the roll with the clerk of the crown or his deputy, was a sufficient entry of the issue upon record to enable a plaintiff to move for judgment as in case of nonsuit. *McLaughlin* v. *McDougal*, Tay. 199.

So was the entry of the incipitur upon the roll. *Brown* v. *Stuart*, Tay. 144.

A notice of intended motion for judgment would not supply the place of a rule nisi. *Smith* v. *Kennett*, Tay. 463.

Where in answer to a rule for the judgment the plaintiff filed affidavits alleging an agreement with defendant to refer the cause to arbitration, which was the cause of his not proceeding, time was given to defendant to answer those affidavits. *Skae* v. *Ackland*, H. T. 4 Vict.

On a rule for the judgment time was given to obtain an affidavit from the plaintiff, who lived at a distance, that the suit was settled. *Gibb et al.* v. *Keegan*, 2 C. L. Chamb. 4.—Draper.

A defendant may move for judgment as in case of nonsuit without giving a term's notice of proceeding, although nothing has been done in the cause within four terms. *McCormick* v. *McCrea*, 1 P. R. 358.—P. C.—Richards.

Applications to Discharge Rule on Peremptory Undertaking.

Generally.]—The motion must be made in open court, and be supported by affidavit. *Hollister* v. *Barnhart*, 5 O. S. 719.

Where a plaintiff shewed cause against a rule for judgment as in case of a nonsuit, and filed affidavits entitling him to enter into the peremptory undertaking, and also urged relief from the rule of the day, defendant was allowed to file affidavits in answer, the court ruling that he was to be considered in the same position as if the costs had been demanded on a separate motion. *Burr* v. *Bernard*, T. T. 3 & 4 Vict.—P. C.—Macaulay.

The rule containing the peremptory undertaking might be taken out by defendant after term, though moved for by plaintiff in term, and after the time therein limited for the plaintiff taking the cause down for trial. *Rose* v. *Meyers*, 6 Q. B. 622.

The application was granted without costs.]—When owing to delay occasioned by an application of defendant, the plaintiff had been prevented from entering his record for trial on the commission day, and the defendant refused to consent to its being afterwards entered until the plaintiff's witnesses had gone home. *Penniman* v. *Wince*, 4 O. S. 335.

Semble, also, where a plaintiff had been prevented by defendant from proceeding to trial. *Doe* d. *Anderson* v. *Todd*, 1 Q. B. 279.

So where a witness attending the assizes for the plaintiff was seen to converse with defendant, and afterwards shewed an unwillingness to remain, and left the assizes. *Bates* v. *O'Donahoe*, 3 Q. B. 178.

Where a plaintiff did not proceed to trial pursuant to notice, owing to the absence of a material witness, and before the term requested defendant's attorney not to put him to the expense of moving for judgment as in case of a nonsuit, offering to enter into a peremptory undertaking to pay the costs for not proceeding to trial, and to satisfy the defendant that he would be able to discharge a rule for a nonsuit, the rule was discharged on the peremptory undertaking, the plaintiff paying no costs, except those of not proceeding to trial. *Doe* d. *De Reimer* v. *Glass*, 4 Q. B. 255.

The application was granted on payment of costs.]—When the cause was called on for trial the plaintiff was unable to proceed, his witnesses being absent, and the case was struck out. Neither defendant nor his witnesses were then present. On the return of his witnesses, the plaintiff moved to restore the case to the docket, having previously notified defendant of his intention to do so, but defendant refused to consent. It was not shewn that defendant's witnesses were in attendance at the time of such refusal, and defendant swore that he believed some of them had returned home :—Held, that the rule could only be discharged on payment of costs. *Finn* v. *Perry*, 1 P. R. 126.—P. C.—McLean.

So where a cause having been called on for trial, the parties not being ready, was placed at the foot of the docket, and several other persons were similarly treated at the same time, the learned judge stating that if they were not afterwards disposed of for want of time they should not be made remanets. *White* v. *Brown*, 1 P. R. 270; *Ketchum* v. *Vollick*, 1 P. R. 262.—P. C.—Richards.

So where the plaintiff withdrew his record in consequence of the ruling of the judge at nisi prius in the case standing next before it, and involving similar points. And the court refused to annex as a condition that the evidence of a witness in that case, who would be required in this for the same purpose, and was about to go

abroad, should be read from the judge's notes. *Gooderham et al.* v. *Taylor et al.*, 1 P. R. 376.—P. C.—Richards.

So where it appeared on affidavit that on some special circumstances the plaintiff withdrew the record, acting bonâ fide on counsel's opinion, without any statement of the circumstances. *Armstrong* v. *Benjamin*, 1 Q. B. 414.

Payment of the costs of the day, and of the application for judgment, may be made a condition precedent to the plaintiff's being allowed to discharge the rule for judgment, and to go to trial at the next assizes. If no costs of the day have been incurred, that portion of the rule may be considered as surplusage; the rule need not be amended. *Ross* q. t. v. *Meyers*, 6 Q. B. 622.

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4. *Proceedings after Peremptory Undertaking.*

A rule for judgment having been discharged on entering into a peremptory undertaking, and paying costs, the court in the following term, on affidavit that the costs were not paid, made the original rule absolute in the first instance. *Bergin* v. *Whitehead*, Dra. 508.

The rule for judgment after peremptory undertaking and default was absolute in the first instance. *Benham* v. *Shaw*, Dra. 113; *Mastin* v. *Garrow*, M. T. 2 Vict., R. & H. Dig. 258.

And the court would not, unless under very special circumstances, set aside such rule. *Matthewson* v. *Glass*, 1 Q. B. 516.

It was not necessary that the rule absolute should be served. *Ib.*

The plaintiff could take no further steps until payment of the costs ordered to be paid; and if he did proceed, as by giving notice of trial, the defendant might treat such notice as a nullity. *Doe* d. *McMillan* v. *Brock*, 1 Q. B. 482.

Where after the rule had been discharged upon the peremptory undertaking and payment of costs, the plaintiff afterwards obtained an order to amend his declaration on payment of costs, and without paying the costs in both cases served the amended declaration, the court set aside the filing of the amended declaration with costs. *Maddock* v. *Corbet*, 4 Q. B. 257.

Where the plaintiff, though he had given notice of countermand, discharged the rule for judgment on the peremptory undertaking, on paying not only the costs of the application but the costs of the day, and without paying any costs, treating his own rule as a nullity, proceeded to trial, the court set aside the verdict without costs, on the ground that though the plaintiff could not be compelled, where he had countermanded his notice of trial, to pay the costs of the day, and that the rule so far was insensible, yet that the conditions as to the costs of the application being good, the whole rule, granted on the plaintiff's own motion, could not be disregarded by him afterwards as a nullity. *Ross* q. t. v. *Meyers*, 7 Q. B. 374.

If the costs are not paid before the ensuing term, the original rule nisi will be made absolute, though the rule for the peremptory undertaking has not been taken out by either party, or any costs taxed, or allocatur served by defendant. *Proudfoot* v. *Holden*, 1 C. L. Chamb. 22.—Macaulay.

The plaintiff having failed to proceed to t upon a peremptory undertaking, defendant mov to make absolute the original motion for ju ment as in case of nonsuit. The plaintiff th obtained an order to discontinue on payment costs, but did not take out an appointment tax. Defendant gave notice of taxation, b not attending the costs were not taxed. T plaintiff on this ground opposed the applicat for judgment, &c.; but—Held, by McLean, that the plaintiff should have taxed and paid costs whether defendant attended or not; a that defendant was entitled to judgment as case of nonsuit. *Doe Meyers* v. *Robertson*, 1 L. Chamb. 150.

On motion to discharge the peremptory und taking and make absolute the rule for judgme the court thought that the plaintiff had she a sufficient excuse for not going to trial; but the plaintiff had not applied in due time to enla his undertaking, the motion was granted o on payment of costs, and on plaintiff's giving new undertaking to try at the next assiz *Collman et al.* v. *Brown*, 1 P. R. 383.—Richar

Such a motion may be met by shewing th the absence of necessary and material witness whose testimony the plaintiff could not procu prevented his going to trial. *Maitland* v. *Bro* 3 L. J. 48.—C. L. Chamb.—Burns.

Where the plaintiff had not paid the costs, b explained satisfactorily the neglect to go to tr in pursuance of his undertaking, the court fused to make absolute the rule for judgme the plaintiff paying all costs and entering into new undertaking. *Caspar* v. *McDonald*, 2 R. 71.—Richards.

VI. Arrest of Judgment.

[*See C. L. P. Act, secs. 234, 235, 319.*]

The court will not make absolute a rule n to arrest judgment, though no cause be shew unless the party moving shew some substant objection to the record. *Moffat et al* v. *McC et al.*, Dra. 11.

Judgment cannot be arrested after judgme has been given for the plaintiff on a demurr *Wragg* v. *Jarvis*, 5 O. S. 290.

In an action by husband and wife, judgm was arrested after judgment by default, a damages assessed on the declaration general some of the counts being bad. *Shubery et ux.* *Cornwall*, 6 O. S. 253.

Case by husband alone for negligent and skilful treatment of his wife in child-birth. T first count was bad, for merely stating negligen without averring any damage accruing th from. The second count alleged that by rea of the defendant's improper treatment of plaintiff's wife, her life was endangered, and was much injured, being a ground of action which the husband could not sue alone. third count combined different causes of act some for which the husband should sue alo and others for which the wife should be joi —Held, that the proper course was to arrest judgment, not to award a venire de novo. S v. *Carder*, 11 Q. B. 77.

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is bad, but to order a venire de novo. *Manning* v. *Rosein et al.*, 3 C. P. 89; *Owens* v. *Purcell*, 11 Q. B. 390; *Stephens* v. *Stephens*, 24 C. P. 69.

Action by husband and wife. First count, for injury to the wife by falling over a bridge. Second count, for injury to the husband by loss of the wife's society, expense of her cure, and alleging also the loss of the horse and cutter in which they were driving:—Held, that the defendants were not entitled to arrest the judgment on the ground that the damages had not been separately assessed upon each count. *Campbell et ux.* v. *Great Western R. W. Co.*, 20 C. P. 345.

A rule to arrest the judgment because the declaration commenced in trespass on the case, the action being trespass, was refused. *Bacchus* v. *McCann*, T. T. 3 & 4 Vict.

Held, no ground to arrest judgment that the jury found the goods liable to forfeiture for non payment of duties on several counts, some of which were bad. *Regina ex rel. Attorney-General* v. *Brunskill*, 8 Q. B. 546.

Words imputing to the plaintiff the having taken a false oath, but not in any judicial proceeding, or on any occasion where it would be an offence in law, are not actionable. But where a jury on such a charge gave £2 10s. damages, the court refused a new trial in order to give defendant his costs, but arrested the judgment. *Hoyle* v. *Hoyle*, 16 Q. B. 518.

The judgment was ordered to be arrested, unless the plaintiff was allowed within one month, in chambers, to add the necessary suggestions to the declaration under the 217th sec. of the C. L. P. Act. Such amendment is not allowed unless the plaintiff, on affidavit, shew reasonable ground for believing that the final decision of the question will be in his favour. *Kirchoffer* v. *Shaw et ux.*, 11 C. P. 467.

Held, under the Law Reform Act, 1868, sec. 1, sub-ss. 4 & 5, as amended by 33 Vict. c. 9, s. 3, this being a County Court case tried at the assizes, that the motion to arrest judgment was properly made in this court. *Edmunds* q. t. v. *Alley*, 35 Q. B. 495.

Held, that defendants were not entitled either to nonsuit the plaintiffs or arrest judgment, on the ground that the venue was improperly laid; but that they should have demurred to the declaration. *Irwin* v. *Corporation of Bradford*, 22 C. P. 15.

VII. Judgment non Obstante Veredicto.

Neither the declaration nor replication in trespass q. c. f. against a sheriff charged as an injury "the breaking of the outer door," and the plea justifying under a writ of fi. fa., on grounds sustained at the trial, contained no allegation that the outer door was open:"—Held, that the plaintiff could not for want of such allegation move for judgment non obstante. *Evans* v. *Powell*, 3 Q. B. 118.

Applications for judgment non obstante or to set judgment were not limited with us as in England to the first four days of the term next after the assizes. *Perry* v. *Richmond*, 6 Q. B. 1. But now they are, by rule 40 of T. T. 1856

A. was in possession of the premises in question, without title thereto. B. came to him and represented himself as owner of said premises, when in fact he was not. A., by writing, agreed to lease from B. for five years at a rental of £4 10s. This writing was signed by A. alone:—Held, that under the circumstances A. could dispute B.'s title to said premises on the grounds of fraud and misrepresentation. Held, also, in such a case, when the jury found for the plaintiff upon a special plea setting up fraud in procuring such lease to be signed, and also for the defendant upon the issue of non tenuit, that the defendant was not entitled to judgment non obstante. *Lynett* v. *Parkinson*, 1 C. P. 144.

In an action by a payee against the maker of a note the defendant pleaded an equitable plea, which formed no defence to the action. The plaintiff, instead of demurring, took issue upon this and other pleas, and three perverse verdicts had been rendered for defendant in the court below, the last verdict being general, though upon the other issues the plaintiff was clearly entitled to succeed under the evidence. On appeal this court ordered a new trial, Burns, J., remarking that, to avoid expense, the defendant might, if he desired it, consent to a verdict for the plaintiff on the other issues, and allow him to move for judgment non obstante on this. *Vidal* v. *Ford*, 19 Q. P. 88.

One L. was arrested under an attachment for certain interlocutory costs, and gave the usual bond to the limits. He had never left the limits, but neglected to get the bond allowed within thirty days, and the plaintiffs thereupon called upon the sheriff to assign the bond. Having lost it, the sheriff was unable to assign by endorsement in the usual form, but he offered to prove the loss, and execute a separate assignment, or to give the plaintiffs authority to sue in his name. The plaintiffs declined this, and brought an action against him, alleging in one count refusal to assign, and in another charging an escape. Defendant pleaded to the first count that he was always ready to assign, but that the plaintiffs never required or tendered to him any assignment for execution, and that he gave them notice that they might sue on the bond in his name; and to the other count, not guilty. On leave reserved to move to enter a verdict for the plaintiffs, if the court, drawing the same inferences as a jury, should think them entitled to recover:—Held, that defendant was entitled to a verdict on the first count, for though the plea might be immaterial, because the sheriff is bound to prepare the assignment himself, yet the plaintiffs had not demurred, but taken issue; and the action being without merits, if the jury had found for defendant judgment non obstante would not have been granted. Burns, J., dissenting, on the ground that the plea being no answer to the first count, the plaintiffs, as the case was left, were entitled to have a verdict entered for them upon it. *Dougall et al.* v. *Moodie*, 19 Q. B. 568.

Semble, that there may be judgment non obstante where there is a general verdict for defendant, and the plaintiff may then have his writ of enquiry to assess the damages. *Britton et al.* v. *Fisher*, 26 Q. B. 268; contra, *Kerr* v. *Straat et al.*, 8 Q. B. 82.

A policy was made subject to the conditions endorsed thereon, one of which was,

"Insurance subsisting or effected with other companies must be notified to the board, and if approved of to be endorsed on the policy, and signed by the secretary." The defendants having proved their pleas under this condition, the plaintiff contended that it did not bar the action. Leave was reserved to move for a nonsuit on this ground, and the plaintiff had a verdict, there being another issue on the record. Semble, that a verdict should have been entered for defendants on the plea, and the plaintiff left to move for judgment non obstante, for that there cannot be a nonsuit while another issue stands in favour of the plaintiff on the record. *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 Q. B. 451.

IX. Registration of Judgment.

[*By 24 Vic. c. 41, the registration of judgments was abolished. Most of the decisions therefore are only referred to. The following digests may perhaps be found useful as bearing upon other subjects.*]

A conveyance from an execution debtor made prior to the 1st January, 1851, and to the registry of a judgment upon which a fi. fa. lands issued, was held to prevail against a deed from the sheriff under such fi. fa., although such conveyance was not registered till after such judgment, but before the delivery of the fi. fa. to the sheriff. *Broyden* v. *Collins et al.*, 7 C. P. 61.

The certificate of judgment registered was entitled "In the Queen's Bench," not "In the Court of Queen's Bench," and concluded with "Given under my hand and seal," &c., instead of "Given under my hand and the seal of the said court," &c., and omitted any form of action in which the judgment was recovered:—Held, sufficient. *Bank of Montreal* v. *Thompson*, 9 Chy. 51.

A judgment was recovered against Charles *Westley* Lount, the correct name of defendant. The registration was of a judgment against Charles *Wesley* Lount:—Held, sufficient. *Proudfoot* v. *Lount*, 9 Chy. 70.

A confession of judgment was executed in the name of Matthew *Rodyer*. The certificate was of a judgment against Matthew *Rodyers*:—Held, registration bad. *McDonald* v. *Rodyer*, 9 Chy. 75.

Semble, it is enough to state the amount of the true debt in the certificate. *Ib.*

A certificate of the entry of judgment, signed by the deputy-clerk of the crown, Held, sufficient. *Gardiner* v. *Juson*, 2 E. & A. 168.

As to the effect, under 9 Vict. c. 34, s. 13, and 24 Vict. c. 41, s. 12, of delaying to place execution in the sheriff's hands for more than a year after the entry of a registered judgment. See *Commercial Bank of Canada* v. *Bank of Upper Canada*, 21 Q. B. 91; *Rowe* v. *Jarvis*, 13 C. P. 495; *Morland* v. *Monro*, 12 C. P. 232; *Conch* v. *Monro*, 23 Q. B. 410; *Bank of Montreal* v. *Taylor*, 15 C. P. 107; *Moffatt* v. *March*, 3 Chy. 623; *Kerr* v. *Amsden*, 2 E. & A. 446.

The words "suit" or "action," in stat. 24 Vict. c. 41, s. 11, mean suit or action to which a judgment creditor is a party, not the original action or suit in which the judgment is recovered. *Buckley* v. *Ryan*, 7 L. J. 322.—Chy.

The lien of registered judgment creditors not preserved by a bill filed before the 18th May, 1861, but to which they were not ma parties until after that date. The Bank of Mo treal *v.* Woodcock, 9 Chy. 141, over-ruled. *Sha* v. *Cunningham*, 12 Chy. 101.

A bill was filed to enforce a registered jud ment while the law for such registration was force. After the registration, the debtor exec ted a mortgage on his land, and then assign his estate for the benefit of his creditors. T bill was against the debtor only, and the mor gagee and assignees for creditors were not ma defendants until after decree, nor until after t time limited for bringing suits by the Act ab ishing registration of judgments:—Held, th the registration of the judgment did not affe the mortgagee or the creditors entitled und the deed of trust; and that the mortgagee w entitled to priority over the plaintiff. *McDo ald* v. *Wright*, 14 Chy. 284.

Land was conveyed in trust to pay (firs mortgages, and (secondly) registered judgment A creditor whose judgment was registered b fore the date of a mortgage given by the debt to another creditor, assented to the deed, a his assignee afterwards filed a bill stating su assignment and praying for the administrati of the estate:—Held, that the judgment cred tor had submitted to be paid according order provided by the deed. *Ib.*

In September, 1855, one G. entered into contract (which was never registered) with M., for the sale to him of a lot of land. In O tober, 1857, the plaintiffs recovered and reg tered a judgment against G., and thereby quired priority over M. on the lot sold by hi and in March, 1861, filed a bill against G., enforce their judgment against the lot contract to be sold to M., as well as against other la of G., to which bill the plaintiffs (having no tice of the contract) did not make M. a party certificate of lis pendens being however register In March, 1862, M. obtained from G., under contract, a conveyance of the lot, which registered in September, 186?, and the plaint becoming aware thereof applied ex parte on 10th June, 1864, under the order of 29th Ju 1861, for, and obtained, an order to make M party in the master's office:—Held, on appea the full court, (VanKoughnet, C., diss.), t under the facts in this case, the lien created the registration of the plaintiffs' judgment aga the lot, the subject of the contract, was g notwithstanding sec. 11 of 24 Vict. c. 41. J v. *Gardiner*, 11 Chy. 23.

The judgment of a District Court cannot b lands for want of a docket. *Doe* d. *McIntos McDonnell*, 4 O. S. 195.

Under sec. 13 of our Registry Act, 9 Vict. c lands were bound upon the registry of the j ment, the mistaken reference in the clause t docketing of judgments in England being sidered a mere false illustration of what plainly provided for before. *Doe* d. *Dougal Fanning*, 8 Q. B. 166.

Where lands were conveyed to a purch against whom judgments were then regist and executions against lands in the she hands, and a mortgage was taken back o same day for a balance of purchase money

judgments and executions attached before the mortgage. *Ruttan* v. *Levisconte*, 16 Q. B. 495.

Semble, if a vendor convey land to a purchaser under an agreement that he will execute a mortgage to secure the purchase money, which agreement the vendor neglects to register; and judgments are subsequently registered against the purchaser, they will prevail over the agreement. *Bull* v. *Bush*, 8 Chy. 360.

A person equitably interested in land under an agreement for purchase, agreed to convey portions thereof to purchasers for value, and subsequently a judgment was recovered against him which was duly registered. Afterwards a party advanced money to complete the purchase, and the owner conveyed to the vendee, who conveyed to the person advancing the money, for the benefit of himself and the other purchasers: —Held, that the purchasers had not thereby waived their priority over the judgment, and that the judgment held the land subject also to the sum so advanced. *McQuestien* v. *Campbell*, 8 Chy. 242.

A mortgagee of unpatented land, after certain judgments were registered against him, assigned all his estate for the benefit of his creditors. The trustee paid to the Government out of the trust estate the balance of the purchase money: —Held, that in respect of the sum so paid he was entitled to priority over the judgment creditors. *McIntyre* v. *Shaw*, 12 Chy. 295.

According to the form of decree to enforce by sale the lien of a registered judgment creditor, and the practice under it, as sanctioned by the judges while the law for the registration of judgments was in force, the debtor had a day to redeem, and, unless he made default, no inquiry as to other incumbrances was made; but in case of default, and an order for sale thereon, the master then enquired as to other incumbrances, in order to the distribution of the proceeds under the decree. *Crawford* v. *Bingle*, 12 Chy. 450.

Where a judgment was registered and a fi. fa. against lands was delivered to the sheriff before the expiration of three years, but the sale did not take place until after the three years had elapsed, and the judgment had not been re-registered:—Held, that the sheriff could only sell any land the debtor had at the time the fi. fa. was placed in his hands: and that a conveyance made by the debtor before the judgment was obtained, but not registered till after the registration of the judgments, took precedence of the sheriff's deed. *Chesley* v. *Coupe*, 15 Chy. 1.

The deed from J. M. to J., under which the sheriff in ejectment claimed, was made on the 6th February, 1857. C.'s judgment against M. was entered on the 21st June, 1855, and registered on the 22nd in the Registry office. On the 6th July, 1859, the sheriff sold the land under a pluries fi. fa. tested on 31st March, 1855:—Held, that the sheriff's deed could not transfer the estate previously vested in J. *Morrow* v. *Steer*, 32 Q. B. 189.

Quære, whether the enactments relating to the delivery of judgments so as to bind lands apply to judgments recovered against executors. *Commercial Bank of Canada* v. *Bank of Upper Canada*, 21 Q. B. 91.

The 13 & 14 Vict. c. 63, s. 2, making a registered judgment a lien upon the lands of the debtor, did not apply to judgments obtained against the personal representative of a debtor. *Hamilton* v. *Beardmore*, 7 Chy. 286. See also *Bank of Montreal* v. *Taylor*, 15 C. P. 107.

The provisions of the 13 & 14 Vict. c. 63, apply only to judgment creditors whose judgments have been entered up since the 1st of January, 1851. Where therefore creditors whose judgment was entered up in the year 1836, and registered in 1854, filed a bill in 1856 to set aside a deed executed by their debtor to his son in 1835, as having been done to defraud creditors, or as being voluntary, and therefore void as against purchasers for value, the court refused this relief, but gave the plaintiffs liberty to amend by making the bill a bill on behalf of all creditors, and praying for an administration of the debtor's estate. *Gillespie* v. *VanLymondt*, 6 Chy. 533.

A registered judgment upon which a bill was filed in this court stood on the same footing as a mortgage, and the incumbrancer could hold his incumbrance, be it mortgage or judgment, only for the sum actually advanced and interest. *Proudfoot* v. *Bush*, *Bush* v. *Proudfoot*, 7 Chy. 518.

Where the judgment creditor of A., who had registered his judgment, claimed the benefit of a judgment subsequently registered by A. against B.:—Held, that A. having actually assigned his interest in his judgment before registration thereof, was a good answer to the application. *Lowis* v. *Jones*, 8 Chy. 571.

While the law respecting the registration of judgments was in force, two judgment creditors registered their judgments; the second in point of time proceeded with a suit in this court to enforce his lien, the other did not, although he had also filed a bill in time, but he proved his claim in the master's office in the suit instituted by the other creditor, and who in that proceeding had sued out a sequestration, under which proceedings had been taken to obtain payment of his claim:—Held, on re-hearing, (affirming the judgment reported 20 Chy. 185,) that the creditor who had first registered, had not, by refraining from proceeding with his suit, lost the priority obtained by him, by virtue of his prior registration; that to enforce such claim it was not, under the circumstances, necessary for him to revive his own suit in this court, which had abated meantime by reason of the death of some of the parties; and that the plaintiff in the suit in which he had proved his claim, having sued out a writ of sequestration, under which the sheriff had acted, had not the effect of changing the rights of the parties under their registered judgments. *Meyers* v. *Meyers*, 21 Chy. 214.

See, also, *Doe* d. *Dempsey* v. *Boulton*, 9 Q. B. 532; *Thirkell* v. *Patterson et. al*, 18 Q. B. 75; *Wales* v. *Bullock*, 10 C. P. 155; *Fraser* v. *Anderson et al.*, 21 Q. B. 634; *Chambers* v. *Dollar et al.*, 29 Q. B. 599; *Bethune* v. *Caulcutt*, 1 Chy. 81; *McMaster* v. *Phipps*, 5 Chy. 253; *Pegge* v. *Metcalfe*, 5 Chy. 628; *Bank of Montreal* v. *Thompson*, 9 Chy. 51, *S. C.* 3 E. & A. 239; *Donovan* v. *Lee*, 5 Chy. 345; *Warren* v. *Taylor*, 9 Chy. 59; *Ferrie* v. *Kelly*, 9 Chy. 262; *Bank of Upper Canada* v. *Beatty*, 9

Chy. 321; *Freeman* v. *Bank of Upper Canada*, 2 E. & A. 362; *Montgomery* v. *Shortis*, 3 Chy. Chamb. 69; *Meyers* v. *Meyers*, 19 Chy. 541.

X. Setting Aside Judgments.

1. *Power of Judge in Chambers.*

A judge in chambers has power to set aside a judgment in ejectment, and the hab. fac. poss. issued thereon. *Popplewell* d. *Capreol* v. *Abbott*, 5 O. S. 245.

A judge in chambers has power to set aside a judgment of non pros. *Hart* v. *Boyle*, 6 O. S. 168.

A judge in chambers will not set aside a final judgment regularly signed. *Richmond et al.* v. *Proctor et al.*, 3 L. J. 202.—C. L. Chamb.—Robinson.

Final judgment by default under sec. 60 of the C. L. P. Act, 1856, may be set aside by a judge in chambers, on the defendant's satisfactorily accounting for the default, and disclosing a good defence on the merits. *Dexter* v. *Fitzgibbon*, 4 L. J. 43.—C. L. Cham[illegible].—Robinson.

A judge in chambers [illegible]wer to set aside a final judgment, on the m[illegible]er the C. L. P. Act. *Mearns* v. *Grand T[illegible] R. W. Co.*, 6 L. J. 62.—C. L. Chamb.—Dra[illegible]

But not a judgment on demurrer regularly signed after argument. *Ross et al.* v. *Grange*, 27 Q. B. 306.

A judge in chambers has power to set aside on the merits a final judgment signed on default of plea. *Escott* v. *Escott*, 6 P. R. 10.—C. L. Chamb.—Dalton, *C. C. & P.*

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2. *Delay in Application.*

In an action against an attorney, he should have four full days in term to plead, but he is too late to set aside an interlocutory judgment signed before the four days had expired, two months after such judgment, and after notice of assessment served. *Monroe* v. *King*, *White* v. *King*, 4 O. S. 189.

The court will not set aside proceedings three months after the entry of final judgment, to let defendant in to plead on affidavit of merits, where no satisfactory reason is shewn for the delay. *Billings* v. *Rapelje et al.*, E. T. 3 Vict.

If an interlocutory judgment be irregularly signed, and defendant has time to move against it in vacation before damages are assessed, he must move. *Ketchum* v. *McDonnell et al.*, 2 Q. B. 378.

Where a rule to set aside a judgment was enlarged from Practice Court to a day after term in chambers, to afford an opportunity of correcting a defect in the service, and was not then disposed of, as the service could not be completed in time:—Held, that the defendant might apply again in the following term. *Huff* v. *Cameron et al.*, 1 P. R. 255.—Burns.

A judgment will not in general be set aside for irregularity after long delay or acquiescence on the part of the plaintiff. *Kerr et al.* v. *Bowie*, 3 L. J. 150.—C. L. Chamb.—Robinson.

Great delay on the part of a defendant m[illegible] precludes his right to have judgment against hi[illegible] set aside. *Richmond et al.* v. *Proctor et al.*, [illegible] L. J. 202.—C. L. Chamb.—Robinson.

Where an appearance is entered in due tim[illegible] judgment signed as for want of an appearance [illegible] irregular only, and where defendant is guilty [illegible] laches, and no affidavit of merits filed, it w[illegible] not be set aside. In this case judgment was sign[illegible] on the 19th December, of which the plaint[illegible] was aware in January, but he did not apply unt[illegible] the 15th March. The application was discharg[illegible] without costs. *Bank of Upper Canada* v. *[illegible] voorish*, 4 L. J. 232.—C. L. Chamb.—Richard[illegible]

Where final judgment in default of an appea[illegible] ance to a specially indorsed writ was entered [illegible] 23rd January, and execution issued on the 30t[illegible] and a writ of attachment under the Bankrupt[illegible] Act issued on 3rd of February, an applicati[illegible] on 28th March, at the instance of the offici[illegible] assignee, to set aside the judgment as irregul[illegible] for a defect in the affidavit of service, was He[illegible] too late. *Dunn* v. *Dunn*, 1 L. J. N. S. 239. [illegible] C. L. Chamb.—Richards.

Leave to the official assignee to defend [illegible] the merits, which if granted would have h[illegible] the effect of destroying plaintiff's priority [illegible] against the attaching creditors, was refused. [illegible] the official assignee left to his remedy, if any, [illegible] term, as against the judgment on the ground [illegible] fraud. *Ib.*

A summons was served on the 19th Februa[illegible] 1859, and final judgment signed for want of [illegible] pearance on the 24th of December, 1860, [illegible] execution issued. Defendants on the 21st J[illegible] uary, 1861, moved to set aside the judgment [illegible] the ground that it had been signed more tha[illegible] year after the summons was returnable, [illegible] without a term's notice:—Held, too late. [illegible] *Kenzie et al.* v. *McNaughton et al.*, 3 P. R. 33[illegible] C. L. Chamb.—Robinson.

A judgment [illegible] non pros. having been ente[illegible] on 26th March, 1866, of which the plaintiff [illegible] immediate notice:—Held, that the delay u[illegible] the 16th of March, 1867, in making this ap[illegible] cation to set it aside, was a waiver of any irr[illegible] larity. *Herr* v. *Douglass*, 4 P. R. 102.—C. [illegible] Chamb.—Robinson. See *S. C.*, p. 1918.

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3. *Affidavit of Merits.*

On setting aside an interlocutory judgm[illegible] the affidavit must assert that defendant h[illegible] good defence to the action on the merits. *M[illegible] et al.* v. *McLean*, 1 C. L. Chamb. 6.—Macau[illegible]

Where the partner of the lessor of plain[illegible] attorney swore that the lessor of plaintiff h[illegible] good cause of action in this cause on the m[illegible] it was Held sufficient. *Doe* d. *King's C[illegible]* v. *Roe*, 1 C. L. Chamb. 111.—Macaulay.

Semble, it would not be if made by a cle[illegible] the attorney's office. *Ib.*

Where a defendant set out certain facts, [illegible] then swore that he was advised (not that h[illegible] lieved) that he had a good defence to said a[illegible] on the merits:—Held, sufficient. *Perry* v. [illegible] *less*, 1 C. L. Chamb. 168.—Robinson.

An interlocutory judgment will in some [illegible] be set aside upon an affidavit disclosing a

defence upon the merits, though not distinctly swearing, "that defendant has a good defence to the action upon the merits." *Bouchier et al. v. Patton et al.*, 3 L. J. 48.—C. L. Chamb.—McLean.

An affidavit disclosing a set-off merely is not an affidavit of merits. In order to set aside a judgment entered on a specially endorsed writ, an ordinary affidavit of merits is not sufficient. *Anderton* v. *Johnson*, 8 L. J. 46.—C. L. Chamb. —Draper.

A summons will not be granted to set aside a judgment regularly signed on a specially endorsed writ, without an affidavit disclosing merits. *The Wooster Coal Co.* v. *Nelson et al.*, 17 U. R. 343.—C. L. Chamb.—Gwynne.

Affidavits filed in reply to such an application contradicting the merits disclosed are inadmissible, at least so far as they are so contradictory, if the merits disclosed shew a bar to the demand sought to be recovered. *Ib.*

It is not an inflexible rule, that on motion to set aside an interlocutory judgment, the court will not receive affidavits in contradiction of the general affidavit of merits. *Wilson* v. *Municipal Council of the Town of Port Hope*, 10 Q. B. 405.

In an action by bearer of a promissory note against maker, defendant cannot plead denying that the plaintiff is the bearer, and also in confession and avoidance, without leave, under the 27th sec. of C. L. P. Act, 1856; and if defendant so plead, plaintiff may sign judgment under sec. 135; and where, after execution issued, judgment regularly signed is set aside upon the merits, defendant will be ordered to pay into court the amount for which judgment was signed. *Every* v. *Wheeler*, 3 L. J. 11.—C. L. Chamb.—Hagarty.

Wiley *v.* Wiley, 6 W. R. 649, followed in interpreting the words, "disclosing a defence on the merits," to mean "opening out the defence." *McDonald et al.* v. *Burton et al.*, 2 L. J. N. S. 190.—C. L. Chamb.—Draper.

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4. *Other Cases.*

An interlocutory judgment in which the cause of action not properly styled, is insufficient to sustain a writ of assessment; but if a notice of intention to move to set aside the proceedings be not given before assessment of damages, the proceedings will be set aside without costs. *Allanson* v. *Mahow*, 4 O. S. 323.

Where a plaintiff declared on several counts, and defendants demurred to one count and pleaded to the others, and in the same term the plaintiff amended the count demurred to, and within four days after the service of the amended declaration signed interlocutory judgment on the whole record and assessed damages, having previously received notice from defendant of an intention to move to set aside the judgment as signed and soon, the court would not afterwards allow the objection that the judgment to the whole declaration was wrong, as pleas were filed to part. *Bird* v. *Macaulay et al.*, 1 Q. B. 411.—P. C.—Macaulay.

A plaintiff, apprehensive that he may have signed interlocutory judgment too soon, cannot cure his irregularity by filing and serving a replication and notice of trial conditionally, to take effect in case the judgment should be set aside. *McPherson* v. *Dickson*, 5 Q. B. 476.

Semble, however, that the defendant, by arguing the conditional replication on a demurrer, may waive its irregularity. *Ib.*

The omission to give notice of taxation is not in all cases a sufficient reason for setting aside the judgment. *Riach et al.* v. *Hall et al.*, 11 Q. B. 356.

Where a defendant has allowed judgment to go by default, where he had a full opportunity of defence:—Held, that the court will not interfere, unless fraud is shewn. *Morrison* v. *Rees*, 1 P. R. 25.—P. C.—Draper.

Plaintiffs sued defendants, H., M., and S., as joint makers of a note. H. and M. did not appear and judgment was signed by mistake against all, but afterwards set aside as against S. who pleaded:—Held, that if by taking judgment against the defendants not appearing, the plaintiffs, under C. L. P. Act, sec. 66, had lost their remedy against S., that objection could not be taken at the trial, but the proper course was to move to stay proceedings. Semble, however, that the plaintiff had not elected, within the meaning of that clause to proceed against the others separately, the judgment against S. having been set aside. *Kerr et al.* v. *Hereford et al.*, 17 Q. B. 158.

Where a defendant served abroad appears to the writ, the plaintiff need not prove his claim under C. L. P. Act, 1856, sec. 35, but may sign final judgment by default as in other cases. *Caird et al.* v. *Fitzell*, 2 P. R. 262.—C. L. Chamb.—Burns.

Defendant files without serving a defence, and at the same time obtains a summons to amend the declaration, which was made absolute. On the amendment being made, plaintiff signs interlocutory judgment for want of plea served, but afterwards serves notice of trial. Interlocutory judgment set aside on application of defendant, but without costs, as the defendant should have treated it as waived upon notice of trial served. *Moberly* v. *Baines*, 2 L. J. 212.— C. L. Chamb. —Burns.

In applications to set aside a final judgment signed on writs not specially endorsed, or endorsed so improperly, on the ground that the judgment should have been interlocutory, defendant should produce the writ or copy. *Kerr et al.* v. *Bowie*, 3 L. J. 150.—C. L. Chamb.—Robinson.

An interlocutory judgment will not be set aside to enable a defendant to plead matters arising subsequent thereto. *Schofield* v. *Bull*, 3 L. J. 204.—C. L. Chamb.—Burns.

The court will set aside a final judgment by default regularly signed on payment of costs, if defendant shew merits. *Westlake* v. *Abbott*, 4 L. J. 46.—C. L. Chamb.—Robinson.

Under very special circumstances judgment may be set aside after a trial has been lost. *Arnold* v. *Robertson*, 4 L. J. 69.—C. L. Chamb. —Robinson.

In such case a very strong case must be shewn, and the delay should be satisfactorily explained. *Ib.*

A claim for interest on a demand for specific goods and chattels sold, endorsed on a writ of summons, is good, and cannot be disputed after judgment signed in default of appearance; but if a claim for interest is endorsed in order to gain an improper advantage, and judgment be signed for a larger amount than a plaintiff is really entitled to, such judgment will be set aside. *Mearns* v. *Grand Trunk Railway Co.*, 6 L. J. 62.—C. L. Chamb.—Draper.

A judgment will be set aside on the motion of a subsequent judgment creditor only when it has been procured by fraud, and the process of the court thus abused. If a nullity upon any other ground, a stranger cannot be prejudiced by it; and if irregular only, he has no right to complain. *Balfour* v. *Ellison et al.*, 8 L. J. 330.—C. L. Chamb.—Burns.

On the 1st March an order was made setting aside a judgment on payment of costs within a week. On the 8th March the costs were tendered, and through error refused; on the same day the defendant, treating the judgment as set aside, filed and served his pleas together with a demand of replication. Plaintiff afterwards demanded the costs, and on non-payment issued execution:—Held, that the effect of the order followed by the tender was to set aside the judgment and execution so as to make the filing and service of the pleas regular. *Gore District Mutual Fire Ins. Co* v. *Webster*, 10 L. J. 190.—C. L. Chamb.—Draper.

Defendant in the County Court obtained a rule nisi to enter a nonsuit, with stay of proceedings; it was not signed by the clerk, but had at the side the words, "Rule nisi granted: W. Salmon, judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff:—Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken. *Brown* v. *Cline*, 27 Q. B. 87.

Judgment on default of appearance was set aside for irregularity on the ground that the affidavit of service of the writ was entitled in the County Court instead of the Queen's Bench. *Levy* v. *Wilson*, 9 L. J. N. S. 191.—C. L. Chamb.—Dalton, *C. C. & P.*

So long as a judgment at law, although irregularly entered up, remains a record of the court, and neither fraud nor collusion in obtaining it is alleged, a bill to impeach it in Chancery on the ground of the irregularities will not lie. *Tait* v. *Harrison*, 17 Chy. 458.

See *Wynn* v. *Palmer*, E. T. 3 Vict. p. 1914; *Watkins* v. *Fenton*, 8 C. P. 289, p. 1958.

XI. Computation of Amount Due.

The court refused a rule to compute interest before the master in an action upon a judgment, there being doubt as to the plaintiff's right to such interest, and defendant resisting the application. *Eberts* v. *Traveller*, 9 Q. B. 355.

Quære, whether, under 2 Geo. IV. c. 1, a plaintiff is entitled to interest from the time of entering judgment, where he does not enforce such judgment by execution, but brings a second action upon it after several months. *Ib.*

Judgment must be actually signed before reference to the master to compute can ordered. *Gillespie* v. *Marsh*, 2 C. L. Chamb. —Burns.

Where in an action on the common counts f goods sold, interlocutory judgment having be signed, the plaintiff desires a reference to t master under sec. 143, C. L. P. Act, 1856, it mu be shewn that no dispute is likely to arise eith as to quality or price. *Hutchison* v. *Sideaway* 14 Q. B. 472.

When a writ of attachment has been serve upon the wife of an absconding debtor, who h fled to parts where personal service cannot effected, the plaintiff's damages may be asce tained by the clerk of the court under this se tion. *Chapman* v. *DeLorme*, 5 L. J. 138.— L. Chamb.—Burns.

Held, under C. S. U. C. c. 22 s. 161, that t master is empowered to ascertain the amount f which final judgment is to be entered, not onl in cases in which he could, but in cases in whic he could not, before that Act have compute what was due; and that the fact of the defe dant being resident out of the jurisdiction, is n objection to a reference being directed for suc purpose. *Crooks* v. *Dickson*, 15 C. P. 523.

The master, to ascertain what sum, if an remained due upon a judgment against defen ants, calculated the judgment and interest fro its entry, on the 26th of June, 1841, and tha with the sums due for executions issued, ma the plaintiff's claim £185 12s. 3d. To this added the sheriff 's fees, and interest there £25 11s. 4d., making the total amount £211 7d. He then gave defendants credit for vario sums paid on account, and sums levied by t sheriff on different writs, calculating interest each sum from its payment or being got the sheriff, amounting in the whole to £250 1 3d.; so that the plaintiff appeared to have b overpaid £39 12s. 8d:—Held, per Draper, J., th the sheriff 's fees, poundage, &c., should have be deducted from the gross amount made by him each writ, and the balance only be brought account between the plaintiff and defend *Cummings* v. *Usher et al.*, 1 P. R. 15.—P. C Draper.

Explanation as to the mode of computing interest, &c., where under an execution part is p and a new writ issued for the balance. *Ib.*

See *Powell* v. *Boulton*, 3 Q. B. 53, p. 1916.

XII. Satisfaction and Discharge.

1. *Satisfaction Piece.*

The court will not order satisfaction to be tered upon a judgment, without payment interest. *Logan* v. *Secord*, Tay. 225.

Plaintiff's signature to the satisfaction p as required by rule 64 T. T. 1856, will be pensed with, and his attorney in the cau authorized to acknowledge satisfaction, upo being shewn that the attorney is authorize plaintiff to arrange the claim, and that the d in obtaining plaintiff's signature will be pre cial. *Rudall* v. *Hurd et al.*, 3 L. J. 14.— Chamb.—Hagarty. *Pawson et al.* v. *Wight* 2 L. J. 184.—C. L. Chamb.—Burns.

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SATISFACTION AND DISCHARGE.

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—C. L. Chamb.—Burns.

So also where the amount of the judgment is small and plaintiff resides without the jurisdiction. *Bank of Montreal* v. *Cronk et al.*, 3 L. J. 2—C. L. Chamb.—Robinson.

So also where plaintiff resides abroad, and has given a written authority to an attorney to acknowledge satisfaction for him. *Darling* v. *Wright*, 3 L. J. 50.—C. L. Chamb.—Robinson.

Where the satisfaction piece had been executed before an attorney of Lower Canada a certificate of his due admission as an attorney must be produced, and his signature duly verified. *Moss* v. *Dooly*, 3 L. J. 74.—C. L. Chamb.—McLean.

Held, that signing a satisfaction piece before a practising attorney in the United States, as attorney for the party signing, is a sufficient compliance with the rule of court, No. 64. *Aberdeen* v. *Beddome*, 6 P. R. 162.—C. L. Chamb.—Burton, *C. C. & P.*

An order to enter satisfaction on a judgment roll will not be granted, though defendant swears that the judgment is satisfied, if plaintiffs deny it and it be not otherwise clear. *Lewine et al.* v. *Savage*, 3 L. J. 89.—C. L. Chamb.—Robinson.

The plaintiff's attorney, after the judgment has been paid, cannot be called upon by defendant to procure a certificate of satisfaction for entry, or a satisfaction piece to be entered; but he may be ordered to disclose the plaintiff's place of residence, so that defendant may tender such satisfaction piece for execution, and the Court will order it to be executed. *Carr* v. *Fuller et al.*, 2 P. R. 226.—P. C.—Burns.

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2. *Other Cases.*

Held, that the arrest of one of several defendants under a ca. sa. and his subsequent discharge, with the consent of plaintiff, operates as satisfaction of the judgment by all the defendants; and this, although the plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired by the discharge. *Hamilton et al.* v. *Crombie et al.*, 7 L. J. 40.—C. L. Chamb.—Burns.

Debt on judgment. Plea, in effect, that the judgment was entered upon a cognovit, in which, though the nominal debt was admitted to be £200 as sued for, the true debt was only £79, which sum was paid in satisfaction of the judgment:—Held, bad. *Crooks* v. *Wilson*, 8 Q. B. 114.

Defendant in such a case should apply to have satisfaction entered on the judgment, or to stay proceedings. *Ib.*

The sheriff held an execution against A., B., and C., upon a note on which O. was the last indorser, and the others therefore liable over to him. Goods belonging to A. having been seized, and the bailiff £100, part of the debt, and the sheriff accepted and paid a draft by the bailiffs' attorney for the whole. On the same day that this draft was accepted, the bailiff took an assignment of the judgment, and afterwards sold the goods under a ven. ex., when they were bought by C., and out of the purchase money the bailiff paid the balance due to the sheriff:—Held, that the payment made by the sheriff had satisfied the judgment, and that the sale thereafter was illegal. *McLeod et al.* v. *Fortune et al.*, 1 P. R. 100.

Sci. fa. upon a judgment for $2,000, against defendant as administrator of M., on a bond in that sum, conditioned for the payment of $1,200 by instalments, with a suggestion that two instalments were due and unpaid. Plea, on equitable grounds, that before the sci. fa. issued, it was agreed between the plaintiff and the defendant, with several others, the heirs-at-law of M., that they should convey to the plaintiff their interest in certain land, of which as such heirs they were seised in fee: that the consideration therefor should be $2,000, and their interest should be treated as so much in cash, which sum should be applied as a payment by the estate of M. to the plaintiff: that the defendant and the others accordingly conveyed their interest in the land to the plaintiff, and the plaintiff accepted such conveyance as representing $2,000, and credited the estate of M. with that sum; that the only debt then due by the estate to the plaintiff was the said judgment, on which the total amount then due and accruing due was less than $2,000, whereby said judgment was satisfied; and such credit was the only consideration for the conveyance:—Held, on demurrer, that the plea shewed a good defence. *Whiteford* v. *McLeod*, 28 Q. B. 349.

A judgment creditor having accepted a mortgage, does not lose his rights as a judgment creditor. *Warren* v. *Taylor*, 9 Chy. 59.

The vendor recovered a judgment against his vendee for a portion of the purchase money. Afterwards he wrote the vendee a letter cancelling the agreement:—Held, that having cancelled the contract, he could not afterwards enforce his judgment. *Cameron* v. *Bradbury*, 9 Chy. 67.

XIII. ESTOPPEL BY FORMER VERDICT OR JUDGMENT.

1. *Generally.*

A judgment recovered for a defect in pleading, and not on the merits, is no bar to another action. *Baker* v. *Booth*, 2 O. S. 373.

A plea of a foreign judgment pleaded puis darrein continuance, must shew that the cause arose since the last continuance, and that the judgment was on the merits and conclusive between the parties where it was given; and semble, such a judgment properly pleaded would be a bar. *McPheidran* v. *Lusher*, 3 O. S. 602.

When a former recovery is pleaded, and the action is such that it cannot be discovered from the record whether the same demand was in question, the plaintiff need not new assign, but may deny the identity of the cause of action. *Beasley* v. *Beasley*, 10 Q. B. 367.

If a plaintiff could have given in evidence at a former trial the self-same matters which he subsequently sues for, but withholds it altogether, he is not absolutely barred from recovering afterwards. *Deacon* v. *Great Western R. W. Co.*, 6 C. P. 241.

A plaintiff having failed upon a trial for a portion of his claim (goods sold) because the term of credit had not expired when he sued:—Held, that the judgment recovered in the suit was no bar to a subsequent action for the same goods. *Chisholm et al.* v. *Morse*, 11 C. P. 589.

2. *Actions of Contract.*

(a). *Sale of Goods.*

The first count was for non-delivery of a certain quantity of oats sold by defendant to the plaintiff. The second count alleged an agreement between plaintiff and defendant, that plaintiff should buy of defendant a certain quantity of Canada oats, and that defendant should deliver the same to plaintiff at a certain place, yet defendant delivered to plaintiff as and for the said Canada oats the same quantity of a heterogeneous mixture of burnt wheat and oats, greatly inferior in value to Canada oats, and the defendant never delivered the plaintiff the Canada oats, and that the mixture so delivered was wholly valueless to and unsaleable by plaintiff, &c. The defendant pleaded, that the oats mentioned in the first and second counts were one and the same lot of oats, and that theretofore, on the 18th August, 1864, in an action brought against the plaintiff for the recovery of the price of the same oats, in which the now plaintiff pleaded that the debt thereby claimed from him was contracted by and through the fraud of the now defendant, upon issue joined in said action, which involved the identical facts alleged as breaches of contract in the plaintiff's declaration in this action, a verdict was rendered for the now defendant:—Held, on demurrer, plea bad, as not alleging that judgment had been entered on the verdict:—Held, also, that the second count of the declaration was good. *Twohy* v. *Armstrong*, 15 C. P. 269.

Action on a contract to make and deliver tweeds of a good merchantable quality. Plea, a former action by defendant for the price of the goods, in which the defective quality of the goods was set up and considered by the jury in their verdict in reduction of damages:—Held, on demurrer, that to the extent to which the now plaintiff obtained an abatement from the price he was precluded from recovering in another action: that the plea shewed sufficiently that the subject matter complained of herein was submitted to the jury, in abatement of the price to be allowed the now plaintiff in that action, and that they found for the plaintiff: that if the now plaintiffs were allowed damages in the former action, in abatement of price of the cloth, they would be precluded from recovering them again; and that if they were not allowed them, because the cloth was not inferior, it was likewise against public policy that the matter should be again litigated:—Held, also, that the claim for loss of profits, which could not have been considered in the other action, was not laid in the declaration as a substantive ground of action, but introduced incidentally at its conclusion:—Held, further, that the verdict in the former action was not conclusive until judgment, and therefore the plaintiff was not precluded from maintaining this action. *Gordon et al.* v. *Robinson*, 14 C. P. 566.

A. wishing to procure a water-wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, C. undertook to put in a "Four-foot Sampson Turbine Wheel," which he warranted would be sufficient for the purpose. The wheel was subsequently put in, but proving insufficient A. sued C. for breach of the warranty, and recovered $438 damages. C. having subsequently sued A. for the price, A. offered to give evidence in mitigation of damages that the wheel worthless and of no value to him:—Held appeal, reversing the judgment of the Com Common Pleas, Moss, J., dissenting, that evidence was inadmissible, for that the offered in mitigation might have, and fo that appeared had formed a ground for recovery of damages in the action on the ranty, and therefore could not be set up in action. *Abell* v. *Church*, 26 C. P. 338. decision was reversed in the Superior Cour the 15th January, 1877, Strong, J., diss.

(b) *Actions of Covenant against Sheriff or sion Court Clerk, or Bailiff and Sureties.*

Declaration against a bailiff of a Division C and his sureties on their covenant, under C U. C. c. 19, s. 25, alleging that the bailiff u an execution against B., wrongfully seized sold the plaintiff's goods, and received the ceeds; that the plaintiff having sued the b in the County Court, the bailiff issued an in pleader summons, on which the judge of Division Court determined that the plai owned the goods and was entitled to the mo received by defendant, with the costs; that bailiff still refused to pay the money to the pl tiff, whereupon the plaintiff proceeded with suit in the County Court, and issued execut thereon, which was returned nulla bona. A so the plaintiff alleged that the bailiff had n lected to pay said money so received by him such bailiff to the plaintiff, being the party titled thereto, and had misconducted himself his office to the plaintiff's damage. Plea, the sureties, that the said bailiff did pay to plaintiff all the money he had received by vi of his office, to which the plaintiff was entit and had not misconducted himself, &c:—Held, demurrer to the declaration, McLean, J. diss. no cause of action upon the covenant was she that the wrongful act of the bailiff, in seizing mistake the goods of a stranger, was not conduct or neglect of duty for which his sur were liable: that the money received by though not received for the plaintiff at first came the plaintiff's by virtue of the interple order, but (McLean, J., diss. on this point that the plaintiff had lost his right to sue upon the covenant by proceeding with the action, and obtaining judgment there. *McA* v. *Cool*, *Nixon* v. *Stafford*, 19 Q. B. 476.

An action against the sureties of a Div Court clerk for moneys received by him fo plaintiff having been referred to arbitration, arbitrator submitted a special case, stating in 1858, the plaintiff sued the clerk for sold to him: that the clerk then produ memorandum of settlement between them, s by the plaintiff, relating to suits in the Div Court, which shewed a sum of £30 0s. 8d to the clerk; and that the judge there against the clerk's wish, and without any ticulars of set-off having been given, t this as a set-off and deducted it from the tiff's claim. The sureties, defendants in t referred contended that the plaintiff's cl then sued for being a private account a the clerk, that sum was improperly s and they claimed to have it credited to in this action against moneys since receiv the plaintiff:—Held, that what had been

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v. *Church*, 26 C. P. 338. This
reversed in the Superior Court on
ary, 1877, Strong, J., diss.

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*Covenant against Sheriff or Deputy
Clerk, or Bailiff and Sureties.*

against a bailiff of a Division Court
ies on their covenant, under C. S.
. 25, alleging that the bailiff unla-
against B., wrongfully seized and
tiff's goods, and received the pro-
the plaintiff having sued the bailiff
y Court, the bailiff issued an inter-
mons, on which the judge of the
rt determined that the plaintiff
ods and was entitled to the mo-
defendant, with the costs; that th
fused to pay the money to the plai
on the plaintiff proceeded with h
County Court, and issued execution
ch was returned nulla bona. A
iff alleged that the bailiff had re-
said money so received by him
to the plaintiff, being the party e
o, and had misconducted himself
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that the said bailiff did pay to t
the money he had received by vir
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misconducted himself, &c:—Held,
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ff:—Held, that what had been

in the former suit could not be thus reviewed, and that as the clerk could not take credit a second time for this sum as against the plaintiff, neither could his sureties. *Franklin* v. *Gream*, 20 Q. B. 84.

The plaintiff sued C., a Division Court bailiff, and his sureties, on their covenant, alleging a judgment recovered by himself against C., for selling his goods under execution, contrary to the orders of the plaintiff in the suit:—Held, declaration bad; for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause. *Nixon* v. *Creasor et al.*, 22 Q. B. 127.

Action on a bond from one A. C., defendant, to S., (sheriff,) indemnifying him, &c., by reason of his paying over to A. C., $390, alleged to be due to defendant for rent of the premises on which the goods out of which the money was made were seized, (the rent not having accrued due at the time of seizure,) assigning as a breach that defendant did not indemnify, &c., but permitted one J., an execution creditor, (whose writ of fi. fa. was in S.'s hands at the time of the seizure,) to recover a judgment against him S., (which he had to pay) for not paying over the amount paid to defendant A. C.:—Held, that J.'s judgment (of which an exemplification was put in) was an estoppel upon the defendants, and that defendants were rightly prohibited at the trial from giving evidence of the time at which the rent accrued due. *Smith* v. *Cheyborn*, 10 C. P. 520.

Recovery against the sheriff for a false return of nulla bona after money made:—Held, a bar to an action against the sheriff and his sureties on their covenant, for not paying over such money. *Miller* v. *Corbett et al.*, 26 Q. B. 478.

See *McIntosh* v. *Jarvis et al.*, 8 Q. B. 535, p. 546.

(c) *Other Cases.*

Where the payee of a note endorsed the same to A. upon a usurious consideration, and A. afterwards failed in an action against the maker upon the ground of usury:—Held, that the payee might still recover against the endorser; and, semble, that the ground of the failure, in the former action, might be proved by any person present at the trial; and it was not necessary to prove a re-endorsement by the endorsee to the payee. *Bidwell* v. *Stanton*, Tay. 1.

Where two masons recovered a verdict for work and labour against their employer for which it was held that the employer could not afterwards sue them for money paid them on account, and which he had attempted to prove in the former action. *Hunt* v. *McCarthy et al.*, 6 O. S. 434.

Where A. is sued by B., and is seeking to set-off a demand for which he has already obtained a verdict against B.:—Held, that he is estopped from such verdict from bringing the same identical demand a second time before the jury by way of set-off. *Russell* v. *Rowe*, 7 Q. B. 484.

Where a plaintiff goes to a jury upon certain items of account and fails in recovering those items, he is concluded by the verdict, and cannot bring a second action for the same demand. *Proudfoot* v. *Lawrence*, 8 Q. B. 269.

Debt on bond. Defendant pleaded that the plaintiff had sued him in a County Court for the same cause of action as in this suit; and set out the proceedings there, which shewed that a plea in substance the same as the plea in this case was pleaded, and another precisely the same: that the plaintiff replied to the first of these pleas and demurred to the second; and that the defendant demurred to the plaintiff's replication, and had judgment on both demurrers. To this plea the plaintiff replied, that the judgment recovered in the County Court was upon points of form, and not on the merits, and offered to verify this by the record. The defendant demurred to this replication, and it was held bad; the effect of the judgment against the plaintiff's demurrer being to shew that the plea was a good defence. *Stinson* v. *Branigan*, 10 Q. B. 210.

Debt on bond. Plea, a former action on the same bond in a County Court, in which defendant obtained judgment. Replication, that the breaches in this action and the damages claimed are different from those in the former action. In the first suit, as appeared from this plea, no breach was assigned but the nonpayment of the penalty:—Held, on demurrer, replication bad; for the plaintiff, having had judgment against him that he should be barred in his action on the bond, was precluded from suing again on it. *Stinson* v. *Branigan*, 10 Q. B. 402.

Covenant against the executors of a lessor for not re-building after loss by fire. Second plea, that after said fire defendants, as executors, were sued in a former action by the plaintiff on the covenant, who then claimed to recover prospective damages for the whole term: that defendants, not intending to re-build, assented: that the jury were therefore directed to give and did give damages accordingly; and that defendants, in consequence of the understanding at the trial, made no attempt to disturb the verdict, but allowed judgment to be entered, and considering that full damages had been given, did not rebuild: that the damages then given far exceeded all damages sustained up to the time of that action; and that, in consequence of the matters above mentioned, this action is prosecuted fraudulently and wrongfully against defendants:—Held, bad, at least in point of form. *Proudfoot* v. *Trotter et al.*, 12 Q. B. 226.

A covenant to erect a crossing over a railway for the use of the plaintiff will not sustain several successive actions, the breach being entire and perfect in the first instance, and a recovery for such breach being a bar to a future action. *Smith* v. *Great Western R. W. Co.*, 6 C. P. 151.

The plaintiff having sued one of two joint contractors, the other being out of the jurisdiction, and having recovered judgment against him, cannot afterwards sue the other. *Harris et al.* v. *Dunn*, 18 Q. B. 352.

Plaintiff sued defendant as maker and A. as endorser of two notes, adding a count for interest, and at the trial, to support this count, he offered in evidence a written undertaking signed by defendant, and a similar one by A., to allow him interest at the rate of thirty per cent., until payment, in consideration of the plaintiff allowing three months' time. The learned judge

ruled that the action being joint, evidence of a separate liability against either defendant could not be received, and the plaintiff then took a verdict against both defendants for the amount of the notes and interest at six per cent. After judgment had been entered upon this and satisfied, he sued defendant on his undertaking, to recover twenty-four per cent., the balance of interest agreed to be paid by it:—Held, that the judgment recovered was a bar to any further claim for interest upon the same notes. *McKay* v. *Fee*, 20 Q. B. 268.

Declaration, that in consideration that the plaintiff, for the accommodation of the defendant, would sign a certain note made by C., payable to the defendant, for $100, defendant promised to obtain and deliver to the plaintiff accounts due to C. by different persons to that amount, as security: that the plaintiff signed the note, but the defendant did not obtain the accounts; by reason whereof the plaintiff was obliged to pay the note with interest, and the costs of a suit brought by the defendant thereon. Defendant pleaded, by way of estoppel, that in the suit by him on the note this plaintiff pleaded as a defence the same agreement now declared upon; that issue having been taken thereon the jury found that no such agreement was made, and that judgment entered on that verdict still remained in force:—Held, on demurrer, a good defence. McLean, J., diss., on the ground that, as the agreement could have formed no defence to the action on a note, the verdict on an immaterial plea formed no estoppel; and that the declaration was bad, for the damages alleged did not arise from the non-delivery of the accounts promised, but from the non-payment of the note. *Campbell* v. *Holmes*, 21 Q. B. 465.

To an action for use and occupation defendant pleaded, by way of estoppel, that one C. sued the plaintiff for taking his goods on the same premises: that the plaintiff avowed under a demise to the present defendants for twelve months' rent in arrear: that issue was taken on such avowry, and C. recovered judgment against the now plaintiffs for £28, for such wrongful taking and costs: that C. was in possession at the time of said taking under and from the now defendant, and with his privity; and that the alleged arrears of rent distrained for was the same claim now made for use and occupation:—Held, on demurrer, plea bad, as shewing no estoppel, for the judgment pleaded did not necessarily shew that no rent was due at the time of the distress mentioned, but might have been obtained on some other ground. *Crooks* v. *Bowes*, 22 Q. B. 219.

Quære, whether judgment in replevin could be a bar to an action for use and occupation. *Ib.*

Quære, also, whether defendant in this case could plead the judgment recovered by C. as an estoppel in his favour. *Ib.*

The plaintiff, on the 4th April, 1864, mortgaged land to L., who covenanted thereby for quiet enjoyment by the plaintiff until default. To an action against L.'s administrator on this covenant, alleging an eviction by persons claiming under L., defendant pleaded that L. conveyed the land to the plaintiff on the 31st March, 1864, which was the plaintiff's only title to the land: that the mortgage sued on was to secure the purchase money, and was executed immediately after the deed, and as a part of the same tr
action: that the plaintiff by the mortgage c
nanted that he was seised in fee, and had
right to convey, and that the eviction compla
of was an action of ejectment brought by
heirs of L. on the ground that L. was of unso
mind when he executed the deed on the
March, 1864, which was proved at the trial,
the jury thereupon found for the heirs:—H
that the plea was bad; for the avoidance of
deed for insanity did not necessarily involve
avoidance of the mortgage; nor did the estop
applicable to the deed, extend to the mortg
that defendant should have pleaded L.'s insa
directly to the mortgage if he wished to tes
validity; and moreover the parties here were
the same as in the ejectment suit, nor was it
tain from the record in ejectment that the
covery therein was on the ground alleged. *E*
v. *Lowry*, 32 Q. B. 635.

Declaration by plaintiff, as assignee in in
vency of McM., on the common counts. P
that McM. was not a trader within the mean
of the Insolvent Act of 1869. Replication
way of estoppel, setting out in full the proce
ings and adjudication in the Insolvent Co
shewing that an attachment in insolvency iss
against McM., that he petitioned the judge
set it aside on the ground, among others, t
he was not a trader within the act, that
judge decided that he was a trader, and t
such decision was affirmed on appeal by one
the judges of the Common Pleas:—Held, on d
murrer, replication bad, as such adjudicati
and proceedings were not conclusive, at
events as against a debtor of McM., but w
subject to question in this court. *Grove* v. *T*
Ardle, 33 Q. B. 252.

Action on defendant's covenant to pay re
contained in a lease to him by plaintiff of a m
for nine years from 15th December, 1868, a
yearly rent, payable half-yearly in advance
the 15th June and December in each year, all
ing non-payment of three half yearly instalme
of rent reserved. Plea, by way of estoppel,
previous to this action the lessee (now de
dant) sued the lessor (the now plaintiff) in
County Court, alleging in his declaration
by the lease, in the event of total destructio
the mill by accidental fire the term should c
and the rent be apportioned: that upon
destruction on the 30th October, 1869, the
term ceased, and the lessor became liable t
fund to the lessee such part of the rent pa
advance as on the apportionment should
found due, and the lessee alleged in such a
that $137.50 thus became due to him, for w
he sued therein: that the lessor pleaded in
action that the said lease was not his deed
issue being joined thereon, the lessee reco
judgment for the said sum of $137.50. The
then alleged that the judgment remains
force, and that the rent sued for in this
was rent accruing due after the said 30th
ber, 1869. To this the plaintiff replied,
after such fire the defendant continued to
and occupy, and still holds and occupi
premises under and by virtue of the lea
would not and did not put an end to said
or surrender said premises:—Held, a good
for though the plea of non est factum d
put in issue the destruction of the mill an
sequent determination of the term, yet

facts being necessarily averred in that action, and not denied, were admitted for the purpose of such action, and the lessor was now estopped from disputing them. *Taylor* v. *Hortop*, 33 Q. B. 462.

See, also, *Taylor* v. *Hortop*, 22 C. P. 542, an action against the surety of the lessee, in which it was held that the judgment recovered, being similar to the recovery against the principal, was a good defence for the surety.

In a suit by a creditor, A., and his assignee, B., to enforce payment of a debt due by C. out of the proceeds of certain property assigned by C. to B., it had been declared that the assignments were fraudulent and void against the plaintiffs in the suit:—Held, in another suit by B. and the assignee against D. and C.'s representatives in respect of another debt due by C. to B., that, notwithstanding the difference of parties, the decree in the first suit was binding in the second as to the question of fraud. *Gillies* v. *How*, 19 Gr. 32.

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3. *Actions of Ejectment or Tort.*

Ejectment.]—In ejectment, it appeared that the defendant had sued D. & B. for trespass to the same land; that they had defended under a lease made by said defendant to the present plaintiff; that the replication was, that such lease had not been surrendered, and the jury found that it had not been:—Held, that the judgment in that case was not conclusive nor even admissible evidence for the plaintiff in ejectment. *Doe* d. *Burr* v. *Wilson*, 8 Q. B. 610.

The lessor of the plaintiff having previously recovered judgment against defendant, in an action on the covenants for the payment of money contained in two several mortgages on which this action of ejectment was brought, in which prior action the defendant had pleaded usury, and the issue thereon having been found for the plaintiff, an execution issued against the lands of the defendant, and the premises contained in the mortgage were, under 12 Vict. c. 73, sold to defendant, who at the time of the trial of this action was in possession, claiming to hold under a deed from the sheriff:—Held, that there was a sufficient privity of estate between the purchaser at the sheriff's sale, (the defendant in this suit,) and the execution against the judgment debtor, to enable the lessor of the plaintiff to estop the defendants from setting up the same defence of usury unsuccessfully set up by the judgment debtor, under which the defendant claims. *Doe* d. *Gillis* v. *Kelly*, 2 C. P. 1.

Held, that the recovery of a judgment in an action of covenant upon a mortgage, on pleas of "non est factum," and that the defendant was not indebted as alleged, and payment before action, did not estop defendant from impeaching the same mortgage in ejectment subsequently brought between them, on the ground of usury. *Edinburgh Life Assurance Co.*, v. *Clark*, 10 C. P. 351.

Usury having been set up as a defence to ejectment on a mortgage, the plaintiff gave in evidence a decree between him and defendant in a foreclosure suit on the same mortgage, which upheld the mortgage, and in effect declared that it was untainted with usury:—Held, conclusive in plaintiff's favour. *Scripture* v. *Curtis*, 11 C. P.

In ejectment, where the defendant claimed through a purchase at sheriff's sale, it appeared that the purchaser had sued the present plaintiff in trespass, and obtained a verdict and judgment on a plea that the land was not his, the purchaser's:—Held, the court being left to draw inferences of fact, that though the freehold on such plea was not necessarily in issue, yet in the absence of proof to the contrary it might be assumed to have been, and the plaintiff in this suit was therefore estopped by the judgment. *Chambers* v. *Dollar et al.*, 29 Q. B. 599.

In ejectment the plaintiff claimed under a mortgage made by defendant, and defendant under a deed from the plaintiff, the mortgage having been given to secure part of the purchase money. Defendant proved a judgment in an action of covenant brought by the plaintiff against defendant on this mortgage to recover the money secured thereby, in which defendant pleaded that the mortgage had been obtained by fraud, and judgment was given in his favour on that issue:—Held, that the defendant could not set up the judgment as a defence to this action, not having placed the plaintiff in statu quo by restoring to him possession of the premises. *Puertell* v. *Boilan*, 23 C. P. 175.

In ejectment, where defendant claimed under a sheriff's deed to S. made upon a sale under an execution against lands, it appeared that the purchaser from S. had sued the present plaintiff in trespass, to which the present plaintiff pleaded not guilty, and that the land was not his (the plaintiff's), and had in 1862 obtained a verdict and judgment on the issue joined on these pleas:—Held, that the plaintiff was not estopped by the judgment, for the record alone would not shew that the title set up by the plaintiff here was set up and determined upon there, which it was for the defendant, relying upon the estoppel, to prove; and the plaintiff's evidence in this action shewed that in that case he did not attempt to dispute this defendant's right to possession, because the title was then in another person. *Chambers* v. Dollar, 29 Q. B. 599, distinguished, because the inference drawn there from the evidence had been displaced by the evidence here. *Chambers* v. *Unger*, 25 C. P. 180.

In ejectment, against two defendants, where the plaintiff claimed under a conveyance from H., the defendants put in an exemplification of a judgment recovered by one defendant, in an action against two sons of H. for trespass to the same land, in which defendants pleaded that it was the freehold of H., under whom they entered; but there was no evidence to connect H. with the trespass or the suit:—Held, that the plaintiff was not estopped by such judgment. *Cassidy* v. *Ingoldsby et al.*, 36 Q. B. 339.

Actions of Tort.]—In an action against the sheriff and his sureties for not arresting a party at the plaintiff's suit:—Held, that defendant's were not concluded by the decision in that suit in the County Court, with regard to the fact of the arrest being made, no estoppel being pleaded, nor could such decision act as an estoppel, being res inter alios acta. *McIntosh* v. *Jarvis et al.*, 8 Q. B. 535.

In an action for obstructing a right of way, the defendant denied the right of way claimed, and the plaintiff replied, by way of estoppel, a judg-

ment in his favour in a former suit with the plaintiff, in which the same right was in question, averring the way claimed to be the same in both actions:—Held, a good replication, for if the right had been lost by any thing occurring since the former action, the defendant should have shewn it. *Johnson* v. *Boyle*, 11 Q. B. 101.

The third and fourth counts charged defendant with obstructing the plaintiff's right of way from his land over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land. To a plea denying plaintiff's right to the way, the plaintiff replied, by way of estoppel, a former recovery against defendant for obstructing a right of way then claimed by the plaintiff from her said land "over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land;"—Held, on demurrer, replication good, for that the issue was as to the existence of *any* right of way in plaintiff over lot 14, and *that* was determined by the former recovery. *Dean* v. *Grey*, 22 C. P. 202.

Case for libel in publishing a printed notice denying the plaintiff's title to certain land, of which the declaration alleged that he was seized in fee, and which he had advertised for sale, and stating that one C. J. had the title, and that a suit was pending in Chancery to establish her undoubted right. The fifth plea alleged that the plaintiff's only title was by virtue of an indenture of mortgage executed to him by one K., who was then seized in fee: that the said indenture was given to secure usurious interest: that the said K. died intestate, and his heir gave to the said C. J. full license to enter on and occupy the said land during her life; and thereupon the defendant, as her agent, published, &c., (as in the fourth plea.) The plaintiff replied, by way of estoppel, a verdict and judgment in an action of ejectment brought by him against the defendant and one E. Y., to recover possession of this land, in which it was found by the jury that the said indenture was not illegal or usurious:—Held, on demurrer, plea bad, for omitting to justify the statement that a Chancery suit was pending, that being a very material part of the libel. Semble, that the replication to the fifth plea shewed an estoppel. *Mair* v. *Culy*, 12 Q. B. 71.

Trespass q. c. f. to the west half of lot twenty-three, 3rd con. of East Gwillimbury. The defendant pleaded, by way of estoppel, a recovery in a former action of the same nature, brought by him against the plaintiff, setting out the pleadings there, from which it appeared that the declaration contained three counts, and in the first the locus in quo was described only by metes and bounds, and by reference to visible boundaries; in the second, as the west half of twenty-two; and in the third, as part of the west half of twenty-three, setting it out by metes and bounds. The plea averred the identity of the premises in that action with the close in this:—Held, on demurrer, that there was no real or apparent repugnancy in this assertion, and that the plea was good. *Doan* v. *Richardson*, 13 Q. B. 527.

In a case against the defendants as common carriers defendants pleaded that plaintiff sued defendants in the Queen's Bench for the same identical causes of action and obtained a verdict, which verdict remains unreversed, to which plaintiff replied denying that the verdict was for the same identical causes of action. The fir two counts in this action charged defendants common carriers, the third charged them bailees, and the fourth was in trover. T declaration in the former case contained on counts against them as common carriers and count in trover:—Held, that the plea was n sustained, for the evidence necessary to susta counts against defendants as common carrie would be different from that required to char them as bailees; and moreover, the identity the goods in question in this and the form action was not proved. *Deacon* v. *The Gre Western R. W. Co.*, 6 C. P. 241.

Action for penning back water by a dam. Pl by way of estoppel, a verdict on the plea of n guilty in an action brought by the plaintiff a tenant for years under a predecesso defendant in title, for erecting the said dam Held, on demurrer, that such plea shewed estoppel, since, had the verdict been the oth way, there would have been no estoppel, an estoppels must be mutual. *Smith* v. *Wallbrid* 6 C. P. 324.

Held, that after the 18 Vict. c. 176, the pla tiff could not maintain an action against defe dants for unlawfully and wrongfully erecting bridge across the Twenty Mile Creek, a impeding the navigation, for the statute expre authorizes such erection, and gives only a ri to compensation for damage sustained. Per Bur J.—A prior recovery for injury sustained by erection of the bridge was a bar to this actio *Wismer* v. *Great Western R. W. Co.*, 17 Q. B. 3

Declaration, first and second counts for p ning back water on plaintiff's land. The fendant by his plea set up the consent and escence of the plaintiff's ancestor und the plaintiff claimed. The plaintiff repl former action had been brought by h defendant for a similar penning back of water: that defendant had filed his bill restrain that action, and had in that bill alle the same matters now alleged in the plea, wh bill was dismissed. Rejoinder, that the C of Chancery gave no judgment in respect of m ters alleged in the plea, but dismissed the bill respect of other matters:—Held, on demur rejoinder good. *Dean* v. *Gray*, 22 C. P. 20

Action against one of two convicting ma trates for not returning a conviction. An act against the other magistrate for not return the same conviction was tried at the s assizes, on the same day and resulted in a dict for defendant, the jury finding that the re was "immediate," as required by the stat On the trial of this case the defendant offere put in as evidence the record of the other ac with the verdict endorsed thereon, the obje which appeared to be to shew the return of conviction by himself, and so indirectly to m him a witness on his own behalf:—Held, the penalty not being a joint one as against two magistrates, but several, each being vidually liable for not making the proper re the record and verdict in favour of defenda the former case could not be evidence of return made by the defendant in this *McLellan* q. t. v. *McIntyre*, 12 C. P. 546.

Plaintiff being indebted to defendant promissory note for $106 and book debts,

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e fourth was in trover. The
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:—Held, that the plea was
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t. v. *McIntyre*, 12 C. P. 546.

being indebted to defendant
ote for $106 and book debts,

1949

ted a mortgage to him for £50. The land in
nd mortgage comprised was sold by plaintiff,
nd after payment of the prior encumbrances
ereon there was left the sum of $90 to be ap-
lied on defendant's mortgage, on payment of
which sum defendant executed a discharge
hereof. Defendant subsequently sued the
laintiff in the Division Court for a balance on
nd note and book debts, and recovered the sum
f—. Plaintiff now sued for fraud in defend-
nt having sued him for said note, alleging that
when said mortgage was given defendant agreed
o give up said note when the mortgage was
atisfied:—Held, that the plaintiff could not,
fter failing in the Division Court suit, maintain
he action. *Bigelow* v. *Staley*, 14 C. P. 276.

Trespass for breaking and entering the south
orty acres of the east half of lot twenty-two.
lea, judgment recovered by the now defendant
gainst the now plaintiff and another in a former
ction of trespass brought by the now defendant
or breaking and entering that part of the half
ot lying north of the south forty acres, and
hewing that the trespass now complained of and
he trespass complained of in the former action
were committed on the same piece of ground;
which piece the now plaintiff had contended in
he former action formed part of the south forty
cres, but which the jury in that action had
ound to lie north of the south forty acres:—
Held, a good plea by way of estoppel. *Leinster*
. *Stubbs*, 17 C. P. 532.

In an action by husband and wife, for slander
f the wife in accusing her of adultery, it appeared
hat the husband had sued the person accused of
he adultery for charging which this action was
rought, and recovered a judgment against him
n an action of crim. con., and judgment had
een given in Chancery against the wife on the
ssue of adultery, in a suit brought by her
gainst the husband for alimony:—Held, that
nder the circumstances the verdict entered for
he plaintiff must be set aside when the hus-
and, if so advised, might raise the question
whether he was not dominus litis. *Campbell* v.
Campbell, 25 C. P. 368.

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4. *Other Cases.*

An award upon a question respecting real
roperty, *expressly referred*, is binding upon the
arties so far as respects the rights of either
o bring or defend an ejectment against the
ther. *Doe* d. *McDonald* v. *Long*, 4 Q. B. 146.

On application to compel a railway company
o arbitrate, the question whether the plaintiff's
and was injuriously affected, under the admit-
ed facts, was raised by return to the mandamus,
nd formally decided in the plaintiff's favour.
n arbitration then took place, and an award
as made, on which the plaintiff sued, and a
erdict was had resulting in a verdict for defen-
ants, which was set aside after having gone to
he Court of Appeal. Defendants then applied
o add a plea that the land was not injuriously
ffected, urging that when the mandamus was
ordered there was no right of appeal in such a
matter, and that they should be allowed to re-
pen the question by plea in order to obtain such
ight. The court, under the circumstances, re-
used the application. Quære, if the plea had
een allowed, whether the decision on the man-

1950

damus could have been replied by way of estop-
pel. Ricket *v.* Metropolitan Railway Co., L. R.
2 H. L. 175, and Beckett *v.* Midland Railway
Co., L. R. 3 C. P. 82, commented upon. *Wilder*
v. *Buffalo & Lake Huron R. W. Co.*, 29 Q. B. 154.

XIV. Assignment of Judgments.

Semble, that any defendant or co-surety cannot
compel an assignment to be made to him of the
judgment by the plaintiff, unless such defendant
or surety has paid the whole of the debt. *In re*
McLean v. *Jones*, 2 L. J. N. S. 206.—P. C.—A.
Wilson.

Held, that under 26 Vict. c. 45, secs. 2 and
3, the absence of a formal assignment will not
prevent a surety from enforcing a remedy which
he would have if an assignment had been execu-
ted. *Chichester* v. *Gordon et al.*, 4 P. R. 92.—
C. L. Chamb.—Richards.

G. made a note to S., who endorsed it. DeG.,
D. and W., also endorsed it. B. discounted the
note, which was sued on, and judgment and exe-
cution obtained against all the parties to it. W.
satisfied the execution, whereupon G. and D.
paid him (he having been a mere accommodation
endorser), S. and DeG. contributing nothing
towards the payment. G. and D. thereupon
applied to B., under 26 Vict. c. 45, ss. 2, 3, for
an assignment to them of the judgment so ob-
tained by him, in order to levy from S. and
DeG. their share of the liability. This B. re-
fused, S. and DeG. having informed him that
by agreement they were to be relieved of liabil-
ity:—Held, on application by G. and D. for an
order to compel B. to assign to them the judg-
ment, that on the authority of Phillips *v.* Dick-
son, 29 L. J. C. P. 223, decided under the
Imperial Act, 19 & 20 Vict. c. 97, s. 5, which in
this respect is the same as Canada Act, 26 Vict.
c. 45, ss. 2, 3, the court had no power to grant
the order. *Brown* v. *Gassage*, 15 C. P. 20.

An action having been brought and a judg-
ment recovered against two defendants on a
contract by them to carry certain lumber, the
verdict and costs were paid by one defendant,
who thereupon, without applying to the plaintiff
or tendering him any indemnity, issued an exe-
cution in the plaintiff's name against the other
defendant for one-half of the debt and costs:—
Held, clearly not warranted by the 26 Vict. c.
45, and the execution was set aside. *Potts* v.
Leask et al., 36 Q. B. 476.

Where a surety pays a debt, and claims an
assignment of a judgment by the creditor recov-
ered against the debtor, and it is doubtful
whether the payment is a satisfaction of the
judgment, the creditor may properly make the
assignment, and leave the debtor to set up that
defence if proceedings are taken on the judg-
ment. *Cockburn* v. *Gillespie*, 11 Chy. 465.

To a suit by a surety against the creditor for
an assignment by him of a judgment against the
debtor, the debtor is a necessary party. *Ib.*

XV. Foreign Judgments or Orders.

1. *Validity and Effect of.*

[*By 23 Vict. c. 24, s. 1, in a suit brought in Upper or Lower Canada, on a judgment or decree not*

obtained in the other section of the province, except as thereinafter mentioned, any defence set up, or that might have been set up to the original suit, may be pleaded to the suit on the judgment or decree. But this has been repealed by 39 Vict. c. 7, s. 1, O. See also ss. 2, 3 and 4, of 23 Vict. c. 24.

Where a foreign judgment awards a certain debt and costs to be taxed :- Held, that such costs were recoverable in an action on the judgment, on proving the amount at which they were afterwards taxed. *Hall* v. *Armour*, 5 O. S. 3.

In an action on a foreign judgment, the defendant cannot go into evidence to shew that on the merits in the foreign court, the judgment should have been for a less amount than the sum decreed. *Racy* v. *Goodman*, E. T. 3 Vict.

If a foreign judgment against two defendants be several in its terms, the court here will hold it good as according to the law of the foreign country until the contrary be shewn ; and the executor of one defendant may be sued, although the other defendant survive. *Ib.*

In debt on a judgment of the Court of Queen's Bench at Montreal, defendant pleaded that that court had no jurisdiction, in the matter in which the judgment was rendered ; and also that defendant was never served with any process whereby he could be or was notified of the action, and that the judgment was obtained without his knowledge and contrary to reason and justice :— Held, bad on demurrer. *McPherson et al.* v. *McMillan*, 3 Q. B. 30.

Declaration on a judgment of the Superior Court of Montreal. Plea, that defendant was not at any time served with any process issuing out of the said court at the suit of the plaintiffs for the causes of action for which the said judgment was obtained ; nor had he at any time notice of any such process ; nor did he appear in the said court to answer the said plaintiffs :— Held, bad, on demurrer, for not shewing that the proceedings were so conducted as to deprive defendant of the opportunity of defending himself. *Montreal Mining Company* v. *Cuthbertson*, 9 Q. B. 78.

To debt on a judgment of the Supreme Court of Lower Canada, defendant pleaded want of service of process, &c., want of knowledge of the proceedings of the plaintiffs in the said suit, and that at the commencement of the action in which the judgment was obtained he, the defendant, was and from thence hitherto hath been and still is resident without the jurisdiction of said court, to wit, at Toronto, in Upper Canada :—Held, bad, on demurrer, on the ground that by the plea the defendant should have denied his being formerly resident or domiciled within the jurisdiction of the court in Lower Canada, and his having real or personal property therein. *Gauthier* v. *Blight*, 5 C. P. 122.

The Respondents obtained a verdict against the appellants in a foreign court in the United States, in trespass de bonis asportatis, and sued on such judgment in assumpsit in this country. The alleged trespass was committed in this country by K., one of the defendants below, in his capacity of sheriff, and in execution of a writ of attachment sued out against one T., an absconding debtor. The eighth plea set out that defendant K. was such sheriff, &c., the warrant attachment under which, &c., that the plaint below claimed, &c., by virtue of a sale made them after *issuing and delivery* of said writ, Averment, that at the time of attaching and ing, &c., the property was by the law of Can in said T., and subject to the said attachme that defendant was then and always since been, &c., a British subject ; never resided, in the United States ; was never subject to laws of the United States for or on account said cause of action : that by the laws of Can the plaintiffs had no right of action against defendants, and that the judgment of the eign court was contrary to natural justice, & Held, on demurrer, plea bad, Robinson, C. Blake, C., and McLean, J., diss. *Kings* v. *Warrener et al.*, 13 Q. B. 18, in Appeal.

Semble, per Robinson, C. J., that comity nations does not extend so far as to render incumbent on our courts to enforce a judgm against one of their own officers, obtained i foreign court, for an act done by him under authority of their process ; and that in su case our courts may stay the action on the eign judgment, and compel the plaintiff proceed on the original cause of action. Macaulay, C. J. C. P., and Spragge, V. C.— fact of defendant's acting in his official capa makes no difference, and it would not dep the foreign court of jurisdiction, or be a re for refusing to enforce its judgment in courts. *Ib.*

Per Robinson, C. J., Blake, C., and McL J.—The statements in the plea of property b in T., that the seizure was legal accordi the law of Canada, &c., were positive ments of facts. Per Macaulay, C. J. C. P., Spragge, V. C., they merely stated appell view of the law of Upper Canada. *Ib.*

Semble, per Spragge, V. C.—Where a for judgment is attempted to be enforced in the country where the cause of action arose, the fendant may question the decision of the for court on the merits. Per McLean, J.—Wh is alleged that certain facts were offered proved in a foreign court, it will be assumed the proceedings were such as to admit of proof being received. *Ib.*

In assumpsit on a foreign judgment, the ment cannot be impeached for any alleged in the proceedings prior to judgment, unde general issue. *McPherson et al.* v. *McMil* Q. B.. 34.

Assumpsit on a foreign judgment against defendants. Defendants pleaded that o them had never been served with proces had no notice of the proceedings in the f court :—Held, bad, as setting up a defen both defendants, which applied only t *Bacon* v. *McBean et al.*, 3 Q. B. 305.

To debt on a judgment rendered in an rior Court in the United States, defen executors of the judgment debtor, pleade the testator at the time of and for twenty before the recovery against him, and un death, resided only in this province ; an the cause of action, if any, for which the ment was obtained, arose here, and not the jurisdiction of the foreign court ; an the said alleged cause of action did not

within six years before such recovery, or the commencement of that suit:—Held, bad in substance. *Kirby et al.* v. *Elliott et al.*, 13 Q. B. 123.

To an action on a judgment recovered in the Supreme Court of the state of New York, defendants pleaded that the judgment was on a policy of insurance made by them to one B., which contained a provision that it should be void in case of being assigned without their previous consent in writing; and that they never consented to any assignment to the plaintiffs, who, therefore, could not sue thereon. To this the plaintiffs replied, that after the loss on the policy had been sustained, B. assigned to the plaintiffs his right of action for the recovery of the money payable thereon, and the said B. not being a resident of the state of New York, the plaintiffs, in accordance with the laws of that state, sued there in their own names as such assignees, and recovered judgment, as by the laws of said state they had a right to do:—Held, a good replication, for defendants by their acts of incorporation being strictly designed to carry on the business abroad, and being declared liable on policies issued in the United States or elsewhere, it could not be assumed that this policy was made in Lower Canada, and if made in New York the law there would govern. Per Hagarty, J.—The assignment of the right of action after the loss was not a breach of the condition; and the right of the plaintiffs to sue in their own name by the foreign law was a question of procedure, on which the law must govern. In another plea the defendants set up a further provision in the policy, that in case of loss the same would be paid within sixty days after proof and adjustment, and alleged that no proof or adjustment was ever made. The plaintiffs replied, that when called upon to pay defendants refused, not for the want of such proof or adjustment, but for other and different reasons alleged in writing: that they thereby, according to the law of New York, waived the condition pleaded, and under said law became liable, and said judgment was recovered, upon proof of such waiver, without any evidence of proof or adjustment. Held, on demurrer, replication bad, for as the same defence could have been pleaded in the original suit it might, under 12 Vict. c. 24, be set up here; and whether the condition was waived or performed was a matter of evidence only, on which our law must prevail. *Mitchell et al.* v. *Provincial Ins. Co.*, 21 Q. B. 612.

Replevin for a schooner. The defendant avowed that the vessel was his; to which the plaintiff replied that one M., owning an interest in the schooner, which was a Canadian vessel registered there, assigned his interest by bill duly registered to the plaintiff, who bought for value, without notice of defendant's claim or proceedings: that the vessel had been laid up for the winter at Portland, in the state of Ohio, where defendant sued M. in a local court of limited jurisdiction, not an admiralty court, to recover an alleged debt, the said suit being a personal action and not a proceeding in rem: that M. not being within the jurisdiction, defendant caused the vessel to be attached, and by virtue of such attachment and of the got judgment and execution, under which he purchased the vessel, and took a bill of sale from the officer of the court. The plaintiff then set up certain facts shewing, as he also averred the fact, that M. was in truth not indebted to defendant when the judgment was obtained, which was after the plaintiff had registered his bill of sale; and he alleged that neither M. nor defendant were American citizens, or resident in the States: that M. never had been within the jurisdiction of the Ohio court, and that no process was ever served on him, nor had he any knowledge of the proceedings there—wherefore he alleged that such court had no jurisdiction, and that the proceedings were void, contrary to natural justice, and fraudulent. Defendant, besides demurring, replied that before M. assigned to the plaintiff defendant attached the vessel in the Ohio court for a debt which M. owed him, and afterwards recovered judgment and execution in the suit, under which the vessel was sold according to the law of that state to defendant: that by such law the property within the state of any person might be seized for any debt due, whether either debtor or creditor was or ever had been resident in the state or not, and seizure under an attachment was made equivalent to service of process on the debtor. To this the plaintiff demurred:—Held, plea good, for the action being in personam, the mere fact that the schooner was laid up for the winter in Ohio could not give jurisdiction over a British subject, not resident there, who had no notice of the proceedings; but Held, also, that the replication was good, for it shewed such jurisdiction according to the law of Ohio, so far at least as to sustain the judgment with regard to M.'s property within the state, whether it could be given effect to here for all purposes or not: that such law so limited could not be held to be contrary to natural justice; and that the sale there must prevail against the plaintiff's title acquired while the vessel was attached. *Burn* v. *Bletcher*, 23 Q. B. 28.

In an action on a foreign judgment, if the judgment is not impeached or denied, it is prima facie evidence against the defendant. *Manning* v. *Thompson*, 17 C. P. 606.

In an action on a judgment obtained by plaintiff against defendant in the United States, defendant pleaded, 1. That the judgment had been recovered for money alleged to have been paid by plaintiff for the use of defendant; and that he was never indebted as alleged; 2. Payment before judgment:—Held, J. Wilson, J., diss., that the onus probandi was upon defendant. *Ib.*

In an action on a judgment recovered in Scotland for breach of the defendant's agreement to deliver sewing machines to the plaintiffs, the defendant pleaded that by virtue of the agreement made between the parties the plaintiffs were to be the defendant's sole agent for the sale of his sewing machines in Great Britain, and the defendant was to be paid for all machines sent to the plaintiffs after the plaintiffs had sold and received payment for the same: that the defendant was to furnish a specified number of machines per month, and the plaintiffs were to furnish the defendant with a monthly statement of the machines sold by them, and to remit therewith the price of the machines so sold and paid for, at a certain rate, which the defendant guaranteed. And the defendant averred that he delivered the machines in accordance with the agreement, and in all things performed it, until the plaintiffs neglected and refused to furnish such statement and remit the moneys received by them as aforesaid; and that the defendant's

refusal to send any further machines was caused solely by reason of the plaintiffs' said breach of the agreement:—Held, by A. Wilson, J., and affirmed by the full court, plea bad, as not shewing either that the performance of the plaintiffs' covenant was a condition precedent to performance by the defendant, or shewing any facts from which it might be inferred that the plaintiffs' breach entitled the defendant to consider the contract so abandoned and to rescind it; and that the defendant's remedy was by cross action. Per A. Wilson, J.—There was no necessity to aver in the plea that the defence was one which might have been set up to the original suit, so long as it formed a good defence according to our law. *Auchterlonie et al.* v. *Arms*, 25 C. P. 403.

An action will lie in this country, on an order made under "The Companies Act, 1862," in England, in the winding up of a company, making a call upon defendant in respect of his shares, and directing payment thereof to one of the two official liquidators appointed; and such action may be brought in the name of the company. The statute enacts that such order, subject to the provisions in the act contained for appealing against it, shall be conclusive evidence that the moneys thereby ordered to be paid are due; and that all other pertinent matters stated in such order shall be taken to be truly stated, &c.:—Held, that the provision for appeal did not prevent the order from being final so long as it remained unaltered; and that an allegation that the order was still in force sufficiently negatived an appeal. Held, also unnecessary to allege in the declaration that the shares were not paid up, or that defendant was a member when the call was made. A plea alleging that the order was not final, but could be varied, rescinded, or set aside, was held good; and a replication thereto, that by the act there could be no appeal from the order, except on notice given within three weeks after it had been made, and that no such notice was given, was also Held good. The statute makes the liability a debt, "in England and Ireland of the nature of a speciality:" Held, that this did not make it a speciality debt in this country; and that pleas of never indebted, and that the debt did not accrue within six years, were therefore good. Held, also, that under our act 23 Vict. c. 24, the order, notwithstanding the enactment above mentioned, was not conclusive, but that defendant might plead to this action on the order any defence which he might have set up to the original proceedings. Pleas, denying, 1, That defendant was the holder of shares or a member of the company; 2, That the company was unable to pay its debt; 3, That the court making the order was of opinion that the company should be wound up; and pleas setting up that the defendant was only a past member, and that the call was made in respect of debts contracted after he ceased to be a member—that the existing members were able to satisfy the contributions required—and that no amount was unpaid on the shares—were therefore held good. Held, also, that the general averment that all things happened, &c., necessary to render defendant liable to pay and entitle the plaintiffs to maintain this action, sufficiently alleged, if defendant could be considered as being charged as a past member, that the court was of opinion the present members were unable to pay, and that the call was for a debt accrued before defendant ceased member; but, Held, also, that the dec charging him as a member must be co as charging him as a present member plea showing him to be a past member a traverse of his being a member as alleg that there would be a variance therefore plea were proved. *Barned's Banking Reynolds*, 36 Q. B. 256.

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2. *Other Cases.*

A plea of a foreign judgment pleade darrein continuance, must shew that th arose since the last continuance, and t judgment was on the merits and conclu tween the parties where it was given; an ble, such a judgment properly pleaded w a bar. *McPhedran* v. *Lusher*, 3 O. S. 60

Where a foreign judgment awards a debt and costs to be taxed:—Held, th costs were recoverable in an action on th ment, on proving the amount at which the afterwards taxed. *Hall* v. *Armour*, 5 O.

An action will [illegible]e upon a decree o ment of a foreign [illegible]rt which is not fina nature, but merely to do some act, as to party harmless and indemnified. *Gaud Routh*, 6 O. S. 602.

In an action on a foreign judgment, ref may be made to the evidence filed of recor the judgment according to the course of th eign court, on proof by examined copies, t the grounds of the judgment; but whe cause in the foreign court was undefended the plaintiff admitted a set-off there, the dant here is not bound by such admission. *ster* v. *Thomas*, E. T. 3 Vict.

In an action upon a foreign judgment ren in an inferior court, it is not necessary to that the cause of action arose within the diction of that court. *Prentiss* v. *Beemer*, B. 270.

All judgments are foreign judgments are given by courts whose jurisdiction do extend to the territories governed by our *McFarlane* v. *Derbishire*, 8 Q. B. 12.

A declaration on a foreign judgment, all the recovery of £20 13s 8d debt, and £38 costs, amounting in all to £58 17s sterlin $286 41 lawful money of Canada; that the was a superior court of record, and that judgment was in full force and unpaid:— sufficient, and not open to the objection tak Place *v.* Potts, 8 Ex. 704. *Kelly* v. *McDe* 10 C. P. 490.

A steamboat said to belong to one M., i country, against whom defendant had obt an execution, was sold at Detroit while th was in the sheriff's hands, under a judgm condemnation and sale in the admiralty there, for certain claims, which by the formed a lien upon her. In an interpleader between the plaintiff, claiming under that and defendant, the jury found that the was not the property of M., the execution d The court Held that the evidence supported verdict; and Held, also, that at all even plaintiffs' title under the sale made upo judgment in rem must have prevailed *Every et al.* v. *Grant*, 21 Q. B. 542.

XVI. Nul tiel Record.

A plea of nul tiel record to the judgment on a ca. sa., in debt on a recognizance of bail, the judgment varying in the term from that stated in the declaration, and a ca. sa. in a form of action different from that stated in the replication, constitute a fatal variance. *Burns* v. *Grier et al.*, 5 O. S. 500.

Costs were refused to the plaintiff in an action on a judgment, although defendant had pleaded falsely the plea of nul tiel record. *McDonald* v. *Clark*, 1 Q. B. 527.

Where a record pleaded is of another court, the practice is to take out a rule appointing a day to bring the record into this court. But where it is of the same court, a mere notice will be sufficient. *Hamilton* v. *Shears et al.*, 5 O. S. 306.

The declaration alleged that the defendant by his recognizance became bail for C. to the limits &c. Plea, nul tiel record. On the recognizance roll, it appeared that C. had also joined two other defendants, which was objected to as a variance:—Held, that the objection, if any, should have been taken by plea in abatement. *Harlane* v. *Allen*, 6 C. P. 143.

Upon this plea being pleaded, the issue is complete, and the plaintiff need not reply; but he should do so and pray an inspection, and defendant should demur for informality, though the replication be unnecessary, defendant might have judgment on demurrer. The demurrer was held bad, the grounds taken being insufficient. *Grantham* v. *Jarvis*, 6 Q. B. 511. See also, *Jones* v. *Ruttan*, 12 Q. B. 202.

In an action for assault and battery, defendant pleaded that he had been convicted of the trespass complained of before a justice of the peace, and so released from this action. The plaintiff replied "nul tiel record" of the conviction:—Held, replication good. *Thompson* v. *Wells*, 9 Q. B. 360.

A defendant in assumpsit pleaded in abatement a former action pending, and the plaintiff filed nul tiel record. The declaration in the first action contained only a count for money had and received: in the second, a count on an account stated was added:—Held, that the replication was not supported, and that defendant was entitled to judgment. *Bain* v. *Bain*, 10 Q. B. 572.

Where in sci. fa. the judgment was set out as recovered in assumpsit against defendant, as executrix, for the non-performance of promises made by testator, and the record of judgment when produced shewed that in the declaration the promise was averred, but that judgment was entered as upon defendant's confession of a promise:—Held, that on nul tiel record the plaintiff was entitled to judgment. *Caughell* v. *Teal*, 14 U. C. R. 494.

Debt on bail bond. Plea, that the principal was in bail to the action according to the condition. Replication, that he did not cause special bail to be put in for him in said action:—Held, issue of nul tiel record, which could not be tried by a jury. *Dusolme* v. *Hamilton*, 15 Q. B. 63.

In an action by a creditor of the Buffalo, Brantford, and Goderich R. W. Co. against a shareholder, defendant pleaded, among other pleas, nul tiel record as to the judgment obtained against the company, and issue was joined thereon. It did not appear at the trial that this issue had been disposed of, and Held, therefore, that the plaintiff not being shewn to be a creditor of the company could not recover. *Tyre* v. *Wilkes*, 18 Q. B. 46.

XVII. Actions on Judgments.

The court refused plaintiff costs in an action on a judgment, where it appeared that after execution he had proceeded under the Absconding Debtor's Act. *Keeler* v. *Brouse*, 1 Q. B. 348.

An action is not maintainable in this court on a judgment obtained in the Division Court under 13 & 14 Vict. c. 53. *McPherson* v. *Forrester*, 11 Q. B. 362.

Held, affirming the judgment of the County Court, and following McPherson *v.* Forrester, 11 Q. B. 362, that an action would not lie in a County Court upon a Division Court judgment. *Donnelly et al.* v. *Stewart*, 25 Q. B. 398.

XVIII. Miscellaneous Cases.

Lands are bound only from the delivery of the writ against them to the sheriff, and a judgment is no lien upon them. *Doe* d. *Aubijo* v. *Hollister*, 5 O. S. 739.

Where a party purchases land upon which a judgment had attached, he holds the land subject to a right of sale under a fi. fa. by the judgment creditor. *Doe* d. *McPherson* v. *Hunter*, 4 Q. B. 449.

A judgment is not a lien upon lands for the purpose of an elegit, so as to avoid the effect of a fi. fa. against lands issued on a subsequent judgment, but placed in the sheriff's hands prior to the elegit. *Doe* d. *Henderson* v. *Burtch*, 2 O. S. 514.

Held, that the filing a plea without the service of a copy is not a nullity, but an irregularity; and a judgment signed in such a case without a prior application to the court was held irregular. *Watkins* v. *Fenton*, 8 C. P. 289; *McKay* v. *McDearmid*, 2 C. L. Chamb. 1.—Draper.

"Every judgment entered" in the tariff of fees, 9 Vict. c. 7, refers to a final and not to an interlocutory judgment. *McIntosh* v. *Pollock*, 2 C. L. Chamb. 209.—Burns.

Where the assignee of a judgment against the defendant accepted and retained a conveyance of a piece of land, for which £55 was the stated consideration, although he represented that he allowed this sum for the land, in consideration and as part of the general settlement between them, still, having elected to take the benefit of the conveyance, he must allow the consideration money in reduction of the execution. *Morrison* v. *Rees*, 1 P. R. 25.—P. C.—Draper.

A person is entitled to search at the crown office for judgments against any number of persons named, and the clerk of the crown should allow him to make such search, if a long one, at whatever time is most convenient with respect

to the other business of the office. He is not entitled to search the judgments entered, during a particular period, without reference to any named parties. *In re Canada Trade Assn.*, 17 Q.B. 542.

Plaintiff and others took out attachments against an absconding debtor, and the goods seized being claimed, the plaintiff indemnified the bailiff, who sold and paid over the money to defendant, the clerk of the Division Court. The claimants sued the plaintiff and the purchasers, and recovered from them the value of the goods, after which defendant distributed the money among the attaching creditors, of whom he himself was one, pro ratâ. Plaintiff thereupon sued defendant and his sureties as for money received to his use :—Held, reversing the judgment of the County Court, that he could not recover, for the money was not received by defendant in his official capacity as the plaintiff's, and the recovery against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quere, per Hagarty, J., whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 Q. B. 348.

A transcript of a judgment in the Division Court for $63, having been filed in the County Court :—Held, that it thereby became a judgment of the County Court, so that under C. S. U. C. c. 24, s. 41, defendant could be examined under it. *Kehoe* v. *Brown*, 13 C. P. 549.

Where a Division Court judge, at the close of the hearing of a cause, said he would take time to consider, and deliver judgment at his chambers on a subsequent day, without naming an hour, and before that day sent a written judgment to the clerk of the court, who read it in his office to the agents of both parties on that day :—Held, a sufficient delivery of a written judgment, within section 106 of the Division Court Act. *In re Burrowes*, 18 C. P. 493.

Where an action is brought against the personal representative of a testator or intestate, the estate, as an estate, is bound by the result of the action brought, just as the deceased would have been bound if in his lifetime it had been prosecuted against himself; and the judgment stands at law as conclusive against all the property of the deceased, whether it be ultimately realized out of the goods or lands; as against the heirs, however, it is only prima facie evidence. Where, therefore, in an action at law upon the covenant of the intestate against his administrator, judgment had been entered in favour of the plaintiff, who subsequently proceeded in this court to realize his judgment, the court held that it was not necessary for him to give any evidence as to the consideration upon which the judgment was founded; and the defendants, the heirs-at-law, having refrained from calling witnesses to impeach the judgment, resting on their objection that the plaintiff was bound to give evidence of the bona fides of the judgment, in consequence of which a decree was pronounced against them, the court on rehearing ordered a new hearing to take place with a view to affording the defendants an opportunity of disputing the validity of the judgment, upon payment by them of the costs of the hearing and rehearing. *Eccles* v. *Lowry*, 23 Chy. 167.

JUDGMENT CREDITOR.

See JUDGMENT.

The declaration set out that the p
being a judgment debtor of the defe
admitted on his examination before a
Court judge that he had in his possession
promissory notes, which the judge, on
fendants' application, ordered him to de
the defendants, to be collected by the
applied upon the judgment: that afterw
judge, on defendants' application, issued
mons to commit the plaintiff for not havi
this, whereupon, on the demand of th
defendants, in obedience to the judge's d
and to avoid committal, the plaintiff d
such notes to the clerk of the County C
the use of the defendants, to be so collec
applied, and the surplus, if any, to be
the plaintiff. It was then alleged that it
upon became the defendants' duty to use
able care and diligence in collecting these
but that they wholly neglected to do so, w
several of the notes were barred by the
of Limitations, some of the parties becam
vent, and the plaintiff lost the amount th
Held, on demurrer, that a good cause of
was shewn, for the delivery to the cler
under the circumstances a delivery to the
dants themselves, and the inference fr
facts was that they undertook the duty
Hagarty, J., diss., on the ground that the
no delivery to the defendants, and if
agreed to undertake the collection it shoul
been expressly so averred. *Hall* v. *Mo*
25 Q. B. 263.

In suits by judgment creditors for the
the debtor's property, the debtor is entitle
a mortgagor, to six months to redeem be
sale. The rule prescribed by 43 Geo. III
is not applicable to the practice of this
White v. *Beasley*, 2 Chy. 660.

A judgment creditor is not a purcha
value within the meaning of 27 Eliz,
Goodwin v. *Williams*, 5 Chy. 539; *Gill*
VanEgmondt, 6 Chy. 533.

Where a mortgagee against whom jud
are registered exercises a power of sale h
ment creditors have such an interest in t
exercise of the power that the court wil
them relief against the mortgagee exer
to their disadvantage. *Commercial B*
Watson, 5 L. J. 163.—Chy.

A judgment creditor coming in to re
mortgage incumbrancer is entitled, upo
ment of the amount due to the mortgag
assignment not only of the mortgaged pr
but of all collateral securities, whether t
be subject to the lien of the creditor un
judgment or not. *Gilmour* v. *Cameron*,
290.

H. obtained from his debtor an assign
his books of account, notes, bills, and ot
dences of debt by way of security aga
consequence of his becoming a party to n
the accommodation of the debtor, and
conveyance of real estate from the fathe
debtor for the same purpose. Having be
pelled to pay a large sum of money by r
his being a party to such notes, H. re

ment against the debtor, and sued out execution thereon, which was the first placed in the hands of the sheriff against the debtor, and the lands of the debtor were afterwards sold under this and other executions subsequently placed in the hands of the sheriff; upon which sale sufficient was realized to satisfy the execution of H. and leave a balance in the hands of the sheriff, after H.'s claim was accordingly paid, and the statement of account and other securities held by him were delivered up to the debtor after notice given to a later judgment creditor not to part with the land and the father's land was re-conveyed to him. The execution creditor who gave the notice claimed in consequence priority over the immediate execution creditors, and also a right to compel H. to make good the amount of his claim in consequence of having parted with the securities:—Held, that a subsequent execution creditor had not any equity to compel the first execution to recover payment of his claim out of the property held by him in security, so as to reach the goods of the debtor to satisfy the subsequent executions, nor had he any right to call upon H. to assign the lands conveyed to him by the debtor's father: that H. was not rendered personally liable in the first instance to the subsequent execution creditors, but that he had no right to deliver up the securities held by him to the debtor, on being paid the amount of his claim, and was therefore liable for any loss thereby occasioned. *Joseph* v. *Heaton*, 5 Chy. 636.

In this country a judgment creditor is entitled, at his option, to a decree either to sell or foreclose the estate on his debtor. *McMaster* v. *Ball*, 6 Chy. 581.

A judgment creditor offers to redeem a prior judgment creditor whose ven. ex. was in the sheriff's hands, and made an assignment of the judgment; but the prior judgment creditor (who was also the holder of a mortgage subsequent to the second judgment creditor,) refused to receive the money otherwise than in satisfaction of the judgment, and refused to assign, whereupon the second judgment creditor filed his bill to redeem and for an injunction to restrain the sale. On a motion for the injunction, it was Held, that he was entitled to redeem and to an assignment of the judgment, and an injunction was accordingly granted. *Bank of British North America* v. *Moore*, 6 L. J. 255.—Chy.

Held, that a prior judgment creditor is bound by a limit to be redeemed by a subsequent judgment creditor, and to assign the judgment. *The Bank of British North America* v. *Moore*, 8 Chy.

Where a party made defendant as incumbrancer put in an answer, setting up that he had purchased the judgment in respect of which he was made a party, notwithstanding which he was examined as a party to the hearing, when it did not distinctly appear that any effectual assignment had ever been made, the court refused him costs, otherwise than as an incumbrancer. *Ib.*

The court will not decree a foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out, and the value thereof is stated in the bill. *Glass* v. *Freckelton*, 10 Chy. 522.

Judgments recovered against two out of three members of a firm for a partnership debt, are available only against what may appear upon winding up the partnership to belong to the two judgment debtors. *Stanbury* v. *Milliken*, 8 L. J. 134.—Chy.

A second mortgagee, as such, cannot impeach a prior registered mortgage as fraudulent and void against creditors, but a judgment creditor, having accepted a mortgage, does not lose his rights as a judgment creditor. *Warren* v. *Taylor*, 8 L. J. 243.—Chy.

When a judgment creditor files a bill to enforce his judgment against lands, it must be shewn that he has sued out execution. *Bank of Upper Canada* v. *Beatty*, 9 Chy. 321.

When a judgment has been recovered pendente lite it is not necessary to make the judgment creditor a party. *Wallbridge* v. *Martin*, 2 Chy. Chamb. 275.—Spragge.

Where a conveyance absolute in form was executed as a security only, upon a verbal undertaking of the grantee to reconvey upon payment of his demand:—Held, that a judgment creditor of such grantee could not enforce his judgment beyond the amount of principal and interest due the grantee. *Glass* v. *Freckleton*, 10 Chy. 470.

A. obtained a judgment against B. and registered same, and issued fi. fas. against lands, kept them in force, and filed a bill on the judgment before the act abolishing registration of judgments. C. had obtained judgment against B. and registered it, but subsequent to A. C. filed his bill to set aside a prior sale made by B. to D. not making A a party. A decree was pronounced in his favour, sustaining the sale, but giving him a lien on the purchase money. A. applied by petition to be made a party and have his priority declared in such suit:—Held, that he could not by petition make himself a party to that suit, and that his remedy if at all, was by bill. Quære, had he any remedy at all. *City Bank* v. *McConkey*, 3 L. J. N. S. 125—Chy.

A judgment creditor had attached a debt due to the defendant, as a security for which land had been conveyed to the defendant, and a suit for redemption was pending. The bill in that suit was afterwards dismissed for default in paying the money, in pursuance of the report therein:—Held, that, the property having thereby in effect become substituted for the debt, the creditor was entitled to a sale thereof in this court. *Bank of Elgin* v. *Hutchinson*, 13 Chy. 59.

A judgment debtor having died intestate, the creditor administered to his estate, and thereupon, without suing out execution against lands, filed a bill against the real representatives of the intestate for relief under 13 Eliz.:—Held, that the peculiarity of his position as both creditor and personal representative, did not entitle him to relief in this court, without first suing out execution on his judgment. But the pleadings being sufficient to warrant it, the decree for administration was made on terms as to costs. *Duffy* v. *Graham*, 15 Chy. 547.

The plaintiff and another bought from a testator's executors and trustees certain real and personal estate; the real estate was subject to a mortgage which the vendors agreed to pay; the purchasers paid the purchase money, but the vendors applied the same to pay other debts of the testator, and left the mortgage in part un-

paid; the plaintiff having bought out his co-purchaser filed a bill against the executors; a decree by consent was made, giving the plaintiff a lien on the testator's assets, ordering defendants to pay personally what the plaintiff should fail to realize from the assets, and directing the accounts and enquiries usual in an administration suit; the estate was insufficient to pay all creditors: before the making of the decree a creditor of the estate had obtained judgment against the executors, and the sheriff seized and sold goods of the testator in their hands:—Held, that the plaintiff had no right to prevent the creditor from receiving the money. *Henry* v. *Sharp*, 18 Chy. 16.

JURAT.

See AFFIDAVIT.

JURISDICTION.

I. OF COURTS—*See* THEIR SEVERAL TITLES.

II. OF FOREIGN COURTS—*See* JUDGMENT.

III. OF JUDGE IN CHAMBERS—*See* PRACTICE AT LAW—PRACTICE IN EQUITY.

IV. OF MASTER—*See* PRACTICE IN EQUITY.

V. PROHIBITION—*See* PROHIBITION.

JURY.

I. COMMON JURY.

1. *Selecting and Drafting*, 1964.
2. *Summoning.*
   (a) *In Civil Cases*, 1964.
   (b) *In Criminal Cases*—*See* CRIMINAL LAW.

II. SPECIAL JURY.

1. *Application for*, 1965.
2. *Striking*, 1965.
3. *Costs*, 1966.

III. DECISIONS UNDER LAW REFORM ACT, 1868, AND ADMINISTRATION OF JUSTICE ACT, 1873, 1966.

IV. JURORS' EXPENSES AS BETWEEN COUNTY AND CITY, 1967.

V. FINING JURORS, 1967.

VI. MISCELLANEOUS CASES, 1968.

VII. ASSESSMENT OF DAMAGES BY—*See* DAMAGES.

VIII. CHALLENGING—*See* CRIMINAL LAW.

IX. WRONGLY IMPANNELLED, WHEN GROUND FOR NEW TRIAL—*See* NEW TRIAL.

X. MISCONDUCT OF, WHEN GROUND FOR NEW TRIAL—*See* NEW TRIAL.

XI. SHERIFF'S FEES FOR SUMMONING—*See* SHERIFF.

I. COMMON JURY.

1. *Selecting and Drafting.*

A municipal council, in 1850, assigned ... clerk of the peace a fixed salary for that ... "in lieu of all fees:"—Held, (the Jury Act ... 14 Vict. c. 55, having been subsequently pa... that he could still claim the fees allowed by ... statute for preparing the jury books for ... following year. *Pringle* v. *McDonald*, 1... B. 254.

It was held that a deputy reeve, might ... one of the selectors of jurors under the 49th ... tion of 22 Vict. c. 100, but not the de... sheriff. *Regina* v. *F. J. L.*, 5 L. J. 19.—... —Campbell.

Drafting the panel from the jury list u... C. S. U. C. c. 78, is not a special session of ... peace, and the clerk therefore is not entitle... charge for it under No. 66 of the tariff. ... *Pousett Clark* v. *The Court of General Q... Sessions for the County Lambton*, 22 Q. B. 4...

Semble, that under the Jury Act, the Mu... pal Act, and the act separating the city fro... counties, the duty of selecting and drafting ... for the city, now belongs to the clerk of ... Recorder's Court, and not to the clerk of ... peace for the counties. *In re McNab, C... the Peace for York and Peel, and Daly, ... of the Council of the City of Toronto*, 22 Q. B...

Held, that since the act separating the ci... Toronto from York and Peel, 24 Vict. c. 3... sheriff of the county of the city of Toronto ... the high bailiff, is entitled to be selector of ... to ballot for, and summon the jurors for ... held in the city. Morrison, J., doubting ... the first point. *In re the Sheriff of the C... Toronto and the Recorder of the City of To...* 26 Q. B. 346.

2. *Summoning.*

(a) *In Civil Cases.*

The court refused to set aside a verdict ag... a sheriff, upon the ground that the coroner ... who tried the cause was the same as the ... turned by the sheriff. *Payne* v. *McLean*, ... 325.

It is no objection on the part of a sheriff ... action against him that the jury have been ... moned by himself, and not by the co... *Ainslie* v. *Rapelje*, 3 Q. B. 275.

In ordinary cases the plaintiff need not ... writs of venire facias and habere corpora ... torum. *Boulton* v. *Fitzgerald*, 1 Q. B. 476.

The coroner, under a special writ of v... is not required to return a panel of thir... jurors: the 36 Geo. III. c. 2, and the g... jury law, being applicable only to the ... and not to the coroner. *Fraser* v. *Dic...* Q. B. 231.

Held, that the fact of a jury being una... agree, and so discharged, in an overholding ... ancy case, does not determine the author... the commissioner to summon a second jury. ... *re Babcock et al.*, 9 L. J. 185.—C. L. Cha... Wilson.

The fact of the jury having been disch... by consent of parties, does not prevent the ... being still proceeded upon. *Ib.*

an application in lunacy, the court ordered sheriff to empannel a jury for the then next ...g of the court. The matter was not pro... with until the sittings succeeding the ... and the matter then coming on:—Held, that ...anel was not properly constituted: that the ...'s authority to summon a jury was con... to the first sittings after the date of the ... *In re McNulty*, 13 Chy. 463.

II. Special Jury.

1. *Application for.*

An application for a certificate for a special ... must be made immediately after the trial. ...ley v. *Dejardine*, Tay. 177.

Where a defendant applies for a special jury, ... must do so in time to permit of the jurors ... summoned, otherwise the common jury ... not be held to be superseded. *Clandinan* v. ..., 8 Q. B. 281.

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2. *Striking.*

A special jury cannot be struck after the com... day of the assizes; but it is no objection ... a jury that the sheriff has not summoned ... jurors, if a sufficient number attend to ... the cause. Quære, should not a venire and ...ings issue in such a case. *Morvey* v. *May*... 10 S. 323.

If a special jury be struck previous to an ... and the cause is irregularly tried at that ... by a common jury, and the verdict after... set aside, it is irregular to try the cause a ... time by a common jury, no new special ... being struck. *McMartin* v. *Powell*, T. T. ... Vict.

There must be four clear days' notice of strik... a special jury; therefore a notice given after ... on Saturday, for 11 a.m. on Tuesday, is ... sufficient. *Bell* v. *Flintoft*, 3 Q. B. 122.

R. S. U. C. c. 31, s. 111, requires four full ...]

The 48 Geo. III. c. 13, s. 5, gave no authority ... coroner to summon a special jury. *Clan... v. Dickson*, 8 Q. B. 281.

Sec. 148 of the Insolvent Act of 1869, provided ... all offences punishable under that act ... be tried by a special jury. Sec. 141 of ... act of 1875, directed that all offences pun... able under that act should be tried as other ... of the same degree; and by sec. 149, as ... matters of procedure merely, the provi... of that act should supersede the act of 1869. ... case, before the trial, the crown gave ... and struck a special jury, who were in ...dance at the trial, but the crown, notwith...ing, elected to call and try the case by a ... jury. The prisoner's counsel objected ..., and the case proceeded, the prisoners ...ing into a full defence, but subject to such ..., which was renewed at the close of the ... with the further objection that there had ... a mistrial:—Held, that the case should ... been tried by a special jury, for the offence ... punishable under the act of 1875, and ... matter was not one of procedure within sec. ... that there had therefore been a mistrial which the prisoners under the circumstances had not waived their right to insist upon; and that this was a "question of law which arose on the trial," which might properly be reserved, and not an objection to be raised by challenge to the jury. *Regina* v. *Kerr et al.*, 26 C. P. 214.

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3. *Costs.*

The costs of a special jury—Held costs in the cause, not costs of the day. *Whitehead* v. *Brown*, 2 O. S. 343.

The clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. *Hooker* v. *Gurnett*, 16 Q. B. 180.

III. Decisions under Law Reform Act, 1868, and Administration of Justice Act, 1873.

A defendant can, under the Law Reform Act, 1868, sec. 18, give a notice for a jury with a pleading which joins issue on a replication, taking issue on the defendant's plea. *Quebec Bank* v. *Gray*, 5 P. R. 31.—C. L. Chamb.—Hagarty.

Where joinder of issue had been filed before the act came into force, the plaintiff was allowed to withdraw it, and file another with a notice requiring a jury. *Synge* v. *Aldwell*, 5 P. R. 94. C. L. Chamb.—Gwynne.

The Law Reform Act of 1868, sec. 18, sub-s. 3, enacts that it shall be competent for the parties at a trial to consent that the notice for a jury shall be waived, and the case tried by the judge, "and to endorse a memorandum of such consent on the record; and thereupon" the judge shall try, &c. The plaintiff had given notice for a jury, but at the trial the counsel on both sides waived it, and requested the judge to try the case, which he did, and found for the plaintiff; but no memorandum was endorsed. On objection by the plaintiff to the judge's authority to try:—Held, that the record might be amended by the judge's notes, which stated the waiver and consent, and the endorsement of the memorandum made nunc pro tunc. *Wycott* v. *Campbell*, 31 Q. B. 584.

Held, that the action of ejectment is within section 18th of the Law Reform Act. and Semble, such action must be tried, without the intervention of a jury, subject only to the judge's discretion and direction. *Humphreys* v. *Hunter*, 20 C. P. 456.

An order was made to send a case for trial by a judge without a jury, under the Administration of Justice Act, 1873, 36 Vict. c. 8, s. 18, in an action against a railway company for negligence in killing horses by a train at a road crossing, where, on the first trial the jury had disagreed; and on a second trial had found a verdict for the plaintiff, which had been set aside as contrary to law and evidence. *McGunnigal* v. *Grand Trunk R. W. Co.*, 6 P. R. 209.—C. L. Chamb.—Dalton, *C. C. & P.*

Semble, that the notice for jury which, by 35 Vict. c. 19, s. 1, must be annexed to the issue books in ejectment, may now be served at any time when the issue book could have been served under the old practice. *Harris* v. *Peck*, 12 L. J. 279.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, 1. That a plea added after issue joined refers back to the date of the original pleas, and should not be dated as of the day when it is filed. 2. That such plea is a "last pleading" within the meaning of the Law Reform Act, s. 18, sub-s. 1, and may have a jury notice filed with it. *Claxton* v. *Dickson*, 12 L. J. 310. —C. L. Chamb.—Dalton, *C. C. & P.*

IV. Jurors' Expenses as between County and City.

Mode of computing the proportion of jury expenses payable by a city and county respectively, under the 18 Vict. c. 130, and the Jurors' Act, C. S. U. C. c. 31—Duty of the county to ascertain and demand their proportion yearly—Mode of ascertaining the assessed value of the city property in order to arrive at their proportion—Mode of enforcing payment—Right of the county to recover for years in which the sums were not duly ascertained and demanded—See *Corporation of the County of Middlesex* v. *Corporation of the City of London*, 22 Q. B. 196; *Corporation of Frontenac* v. *Corporation of Kingston*, 20 C. P. 49; 30 Q. B. 584; 32 Q. B. 348.

The 18 Vict. c. 130, enacted that any county of which a city formed part for judicial purposes, should be entitled to demand and receive from the city a portion of the expenses incurred by the county for the payment of jurors in any year, to be determined in the manner provided, and that such portion should be payable to the county immediately after the close of each year:—Held, on demurrer to the declaration, that an action would lie by the county against the city for its portion of such expenses; and, this being so, that the plaintiffs were entitled to recover a judgment, although as to some of the years the defendants might be unable to enforce payment, because a retrospective rate would be required, which might be a conclusive objection to an application for a mandamus to levy. *The Corporation of the County of Frontenac* v. *The Corporation of the City of Kingston*, 30 Q. B. 584; *S. C.* 20 C. P. 49.

Plaintiffs sued defendants under 18 Vict. c. 130, and C. S. U. C. c. 31, ss. 155, 157, for the proportion of jury expenses payable by defendants, from 1855 to 1869, inclusive. As to 1859, an account of the sum due was made up by the plaintiffs. There was no proof that it had been demanded, but defendants had levied the sum claimed for that year in 1860:—Held, recoverable. *S. C.*, 32 Q. B. 348.

As to 1867 and 1868, defendants in 1868 levied the sum due for 1867, but applied it to other purposes. In 1869 they levied the sums due for 1867 and 1868, and paid it in September, 1869, but without interest, which the plaintiffs demanded:—Held, that such interest was recoverable. *Ib.*

V. Fining Jurors.

By a liberal construction of the Estreat Act, 7 Will. IV. c. 10, the court will in certain cases relieve jurors from fines imposed on them at nisi prius, after the fine has been levied by the sheriff. *In re Cole et al.*, 6 O. S. 425.

VI. Miscellaneous Cases.

A person who, having attended as a g
juror at a court which adjourned for a few d
went into another district on private busi
was held not to be privileged from arrest
during such adjournment. *Mittleberger* v. *C*
5 O. S. 718.

Defendant was convicted under 8 Vict. c
"for that he, H., of the village of Preston,
did on Sunday the 26th day of July last pa
the township of Waterloo, work at his ordi
calling, inasmuch as he and his men did
and haul in hay on the said day." He appe
to the Quarter Sessions, where the question
tried before a jury, and the conviction affir
The proceedings having been removed by c
orari to this court:—Held, 1. That the st
13 & 14 Vict. c. 45, extended to this case,
authorized the trial by jury, though in
Vict. c. 45, there is a provision for appeal t
sessions, but not for such trial. *Respe*
Shaw, 16 Q. B. 104.

Under the Tavern and Shop License Act,
32 Vict. c. 32, s. 23, it is irregular for the
who tries an appeal from a conviction unde
act to call a jury or receive depositions of
nesses as evidence, but this is not ground
prohibition. *In re Brown et al.*, 8 L. J. N.,
—C. L. Chamb.—Galt, Hagarty.

Where upon a commission issued again
overholding tenant, the first jury summ
could not agree, and were discharged:—
that the authority of the commissioner w
determined, but that another jury might b
moned and an effectual inquisition held.
Woodbury and Marshall, 19 Q. B. 597.

JUS TERTII.

I. Right of Defendant in Ejectment t
up outstanding Mortgages or Tr
Strangers—*See* Ejectment.

A person receiving money from an agen
promise to return it to him cannot, in an
by the agent to recover it back, set up as
fence that the money really belonged to a
party. *Lister* v. *Burnham*, 1 Q. B. 419.

Semble, that the wife of an attainted t
cannot defeat the recovery in ejectment
purchaser at sheriff's sale, in an action a
the traitor on a bond entered into befo
attainder, by setting up the title by forfei
the crown, which the crown had forebo
assert. *Doe* d. *Gillespie* v. *Wixon*, 5 Q. B

A., a private banker, exchanged cheque
B. for mutual accommodation. A. use
cheques. A cheque of A.'s had been d'sho
and the holder called at A.'s office on th
day, and a clerk in the ordinary course o
ness gave the holder B.'s cheque to p
dishonoured cheque. Next day A. stopp
ment:—Held, that the holder could
against B. on his cheque:—Held, als
under a plea of not the holder, B. could
up any supposed right in A.'s assign
possibly under any pleading on these fac
Bank v. *Smith*, 20 C. P. 93.

MISCELLANEOUS CASES.

...o, having attended as a ... which adjourned for a few ... ther district on private busi... be privileged from arrest ... journment. *Mittlebergerv.* ...

...as convicted under 8 Vict. ... H., of the village of Preston, ... the 26th day of July last pa... of Waterloo, work at his ordi... ich as he and his men did ... y on the said day." He app... Sessions, where the question ... jury, and the conviction affir... gs having been removed by ... court :—Held, 1. That the st... c. 45, extended to this case, ... ie trial by jury, though in ... here is a provision for appeal t... not for such trial. *Respe...* B. 104.

...Tavern and Shop License Act, ...2, s. 23, it is irregular for the ... appeal from a conviction unde... jury or receive depositions of ...idence, but this is not ground ... *In re Brown et al.*, 8 L. J. N. ...mb.—Galt, Hagarty.

...pon a commission issued again... tenant, the first jury summ... agree, and were discharged :— ...thority of the commissioner wa... but that another jury might be ... an effectual inquisition held. ...*and Marshall*, 19 Q. B. 597.

JUS TERTII.

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...that the wife of an attainted ... at the recovery in ejectment ... at sheriff's sale, in an action ... on a bond entered into befo... by setting up the title by forfei... which the crown had forebo... e d. *Gillespie* v. *Wixon*, 5 Q. ...

...vate banker, exchanged cheq... ual accommodation. A. use... cheque of A.'s had been d'shon... der called at A.'s office on th... clerk in the ordinary course ... the holder B.'s cheque to p... l cheque. Next day A. stopp... ld, that the holder could ... on his cheque :—Held, als... a of not the holder, B. could ... pposed right in A.'s assign... der any pleading on these fact... *ith*, 20 C. P. 93.

...the plaintiff mortgaged his goods to A. to ... the defendant was administratrix. The ...came into the possession of the defendant, ...nder what circumstances did not appear. ...rtgage contained an agreement that on de... the mortgagee might take possession, and a ...ment that a delivery of possession was given ...e time of executing the mortgage. There ...o evidence that the mortgage money had ...n paid. The plaintiff afterwards executed ...other mortgages of the same goods to other ...s, each containing a similar agreement ...default, and a similar statement as to de... of possession :—Held, that under these ...mstances the plaintiff could not recover ...e trover or detinue, and that the defend... might, as against him, set up the right of the ...e mortgagees. *Ruttan* v. *Beamish*, 10 C. ...0.

...a trespass for taking goods it appeared that ...goods came to the plaintiffs' warehouse at ...ilton, consigned to one P., and were seized ...e by defendant under a writ of replevin ...ed out against P. by one H.: P. asserted that ...had bought the goods from H., which H. ...sted, and the Judge before whom the case ...ried, without a jury, found that the goods ...nged to H. :—Held, that the defendant, not ...g a mere wrongdoer, was at liberty to dis... the plaintiffs' title and set up the title of ...rd under a plea of not possessed ; and that he ...s therefore entitled to a verdict on the find... *Great Western R. W. Co.* v. *McEwan*, 30 ...R. 559.

...In trespass and trover for saw logs it appeared ...t they were cut in 1868 by one F., and sold ...ver to the plaintiffs in 1869. The land on ...ch they were cut had been sold in 1864 by ...own to R., who made a payment then and ...ve a receipt. In 1866 R. transferred his in...est to the defendant, who marked the logs ...h his mark before they left the land. In ...ec. 1869, defendant obtained a patent for the ...d, and in April he seized the logs, which ...e in the plaintiffs' possession :—Held, that ...e plaintiffs were entitled to recover ; for ...gh the logs when cut were the property of ...own, the plaintiffs were in possession when ...dant took them, and the defendant being a ...ger could not set up the jus tertii. ...*ell et al.* v. *Smith et al.*, 30 Q. B. 607.

...Plaintiff had sold certain goods to M., which ...ed at the time lying at defendants' railway ..., *and defendants were fully aware of the* ...act notwithstanding they contracted with ...iff to carry and deliver them for him as ...ed, and gave him a shipping bill according... In an action by plaintiff against defendants ...the non-delivery :—Held, that defendants ...not set up M.'s title to the goods as against ...plaintiff. It further appeared that though ...had notified defendants of his claim, and ...a demand for the goods, he had but in fact ...e plaintiff and recovered his whole claim ...im. Held, also, that the case could not be ...ght within the principle of a bailee setting ...e jus tertii against the plaintiff, for they ...not bonâ fide defending in right of such ...person. *Brill* v. *Grand Trunk R. W. Co.*, ...P. 440.

...old to plaintiff 2,000 out of 3,000 bushels ...heat owned by him and lying in two bins in the warehouse of S., whose receipts he held for the same, and which he endorsed to plaintiffs, who paid him for the quantity sold to him. The wheat remained in the warehouse for some time. T. and S. left the country, when defendants seized and converted the whole quantity to their own use, and plaintiff sued them in trover and detinue. The evidence of T., so far from shewing that he repudiated the sale, fully upheld it, and proved that he had told S. to appropriate all the wheat in one of the bins to plaintiff, and S. stated that he would not, after the notice of the sale to plaintiff, have delivered any of the wheat in the two bins to any one but plaintiffs, without retaining enough to satisfy plaintiffs' 2,000 bushels. Quære, whether defendants, as wrong-doers, could set up the objection of the property not passing by reason of non-appropriation or non-severance. *Coffey et al.* v. *The Quebec Bank*, 20 C. P. 110.—Affirmed in appeal, Spragge, C., and Strong, V. C., dissenting. *Ib.* 555

M. & Co., at Guelph, bought a car load of wheat on commission for C. They paid for it themselves, and shipped it by defendant's railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C., at Waterdown ; M. & Co., being aware that it was to be ground there for C. The receipt was endorsed by them to the order of the Canadian Bank of Commerce. Through this Bank they drew upon C. at fifteen days sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown, the wheat was delivered by defendants upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, was delivered by him to defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-endorsed to them. C.'s assignee having sued the defendants in trover and detinue for the flour, they in privity with M. & Co., denied the plaintiff's right to it, and set up the title of M. & Co. The case having been tried without a jury :—Held, that the defendants were entitled to set up the title of M. & Co. as a defence. *Mason* v. *Great Western R. W. Co.*, 31 Q. B. 73.

JUSTICE OF THE PEACE.

I. QUALIFICATION OF, 1971.

II. JURISDICTION AND DUTY.

1. *Disqualification by reason of Interest*, 1972.
2. *Locality of Exercising Jurisdiction*, 1973.
3. *Breach of the Peace*, 1974.
4. *Contempts*, 1974.
5. *Assaults*, 1975.
6. *Ousting Jurisdiction by Claim of Title or Right*, 1976.
7. *In Other Cases*, 1976.
   (a) *Bail in Criminal Cases*—*See* CRIMINAL LAW.
   (b) *Bawdy House*—*See* BAWDY HOUSE.

(c) *Extradition Cases—See* EXTRADITION.
(d) *Master and Servant—See* MASTER AND SERVANT.
(e) *Taverns and Shops—See* TAVERNS AND SHOPS.
(f) *Tolls—See* WAY.

III. PROCEDURE.
1. *Informations and Complaints*, 1977.
2. *Limitation of Time for Making or Laying*, 1978.
3. *Course of Proceeding*, 1978.

IV. CONVICTIONS.
1. *Form and Requisites of.*
(a) *Generally*, 1979.
(b) *In Particular Cases*, 1980.
2. *Quashing.*
(a) *Practice*, 1982.
(b) *Other Cases*, 1983.
3. *Other Cases*, 1984.
4. *Appeal from—See* SESSIONS.
5. *Certiorari to bring up Convictions—See* CERTIORARI.

V. ACTIONS FOR NOT RETURNING CONVICTIONS, 1984.

VI. COMMITMENTS.
1. *Validity, Form, and Requisites of*, 1988.

VII. WARRANT OF DISTRESS, 1992.

VIII. PROTECTION IN EXECUTION OF DUTY.
1. *Principles of Immunity*, 1993.
2. *Acting Within Jurisdiction*, 1993.
3. *Acting Without, or in Excess of Jurisdiction*, 1996.
4. *Tender of Amends*, 1998.
5. *Damages*, 1998.
6. *Costs*, 1999.

IX. ACTIONS AGAINST MAGISTRATES, 2000.
1. *Notice of Action to—See* ACTION AND SUIT.

X. MISCELLANEOUS CASES, 2001.

XI. CORONER—*See* CORONER.

XII. CRIMINAL INFORMATION AGAINST—*See* CRIMINAL INFORMATION.

XIII. CERTIFICATE OF NOTICE OF LOSS UNDER POLICY—*See* INSURANCE.

XIV. EXTORTION BY—*See* CRIMINAL LAW.

XV. MANDAMUS TO—*See* MANDAMUS.

XVI. POLICE MAGISTRATE—*See* POLICE MAGISTRATE.

XVII. SESSIONS—*See* SESSIONS.

I. QUALIFICATION OF.

In a qui tam action against the defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises on which defendant q fied was vague, speculative, and inconclu one of the witnesses, in fact, having afterw recalled his testimony as to the value of a po of the premises, and placed a higher esti upon it; while the evidence tendered by th fendant was positive, and based upon t ma data:—Held, (A. Wilson, J., diss.,) that jury were rightly directed, "that they ough be fully satisfied as to the value of defend property before finding for the plaintiff; they should not weigh the matter in scale nicely balanced; and that any reasonable d should be in favour of the defendant." Ob tions on the principle of the valuation of with a view to determining the property qu cation of justices. *Squire* q. t. v. *Wils* C. P. 284.

Under C. S. U. C. c. 100, s. 3, the on qualification by a J. P. must be taken b some J. P. of the county for which he inten act. It cannot be administered by the cle the peace for such county, under the wr dedimus potestatem issued with the commi of the peace. *Herbert* q. t. v. *Dowse* Q. B. 427. See 29 Vict. c. 12, since passed

C. S. U. C. c. 100, s. 3, prescribing the q fication of justices, does not require them to a legal estate; it is sufficient if the land, th mortgaged in fee, exceed by $1,200 the am of the mortgage money. *Fraser* q. t. v. *Mc zie*, 28 Q. B. 255.

Under the Municipal Act of 1866, as am by 31 Vict. c. 30, O., an alderman is n officio authorized to act as a J. P. until h taken the oath of qualification as such. *R* v. *Boyle*, 4 P. R. 256.—C. L. Chamb.—*Y* son.

A warrant of commitment under 31 Vi 16, D., signed by one qualified justice o peace, and by an alderman who had not the necessary oath, is invalid to uphold th tention of a prisoner confined under it, tho might be a justification to a person acting it on an action against him. *Ib.*

II. JURISDICTION AND DUTY.

1. *Disqualification by reason of Interest.*

Attachment lies against commissione Courts of Requests who try causes in which have an interest, though remote. *Rex* v. *tyre*, Tay. 22.

Disqualification of magistrate giving a ficate of loss under fire policy, as bein cerned in the loss. See *McRossie* v. *Pro Ins. Co.*, 34 Q. B. 55.

The solicitor of the husband being city der, was Held not to be disqualified to ta magistrate the examination of a married w for the conveyance of her lands. Sprag dubitante. *Romanes* v. *Fraser*, 17 Chy *S. C.*, 16 Chy. 97.

Magistrates interested in the transacti not competent to take the examination of ried woman for the conveyance of her la

The solicitor of the husband is not a disqualified. *Ib.*

2. *Locality of Exercising Jurisdiction.*

affidavit of the returning officer verifying ll was sworn, on the 2nd of January, be- A, who held a commission as justice of the for the united counties of York, Ontario, Peel. Ontario had been separated from and Peel by proclamation issued at Que- on the 31st of December, but it was not en that any one in Ontario knew of this lamation until after the election:—Held, A. had authority to take the affidavit. *ex rel. Ritson* v. *Perry et al.*, 1 P. R. 237. L. Chamb.—Robinson.

ere, whether A., notwithstanding the sep- n, would not still continue a justice of the for the three counties, and authorized to for any one while he was in it, or at least at in which he was resident. *Ib.*

ere, have the aldermen of a city, as ex- justices of the peace, any jurisdiction be- the city limits. *Regina ex rel. Blasdell* v. *der*, 7 L. J. 102.—C. C.—Armstrong.

an action for causing defendant to be t before a magistrate with misdemeanour, hich the magistrate issued his warrant and iff was arrested, it appeared that the e was alleged to have been committed by laintiff in the county of Middlesex, but the e was made and the warrant issued in the of London, by a justice of the peace for the y only, not for the city:—Held, that as magistrate, acting out of his jurisdiction, no authority whatever, the action was mis- ed: that it was as if defendant had him- directed the arrest; and that trespass, ere, not case, was the proper remedy. v. *McArthur*, 24 Q. B. 254.

prisoner being indicted for perjury in evidence upon a charge of felony against G., it appeared that the felony was com- d in the county of Middlesex, if at all. justices before whom the examination took entertained the charge and examined the ses within the city of London. Defen- counsel objected at the trial that the s, being justices of the county of Middle- had no jurisdiction, sitting in London, to ne into an offence committed outside the limits:—Held, that the conviction was l. *Regina* v. *Row*, 14 C. P. 307.

d, that Imperial statute 28 Geo. III. c. 49, s local in its character, and not in force *Ib.*

d, that the great inland lakes of Canada within the admiralty jurisdiction, and offen- committed on them are as though committed e high seas; and therefore any magistrate province has authority to enquire into committed on said lakes, although in an waters. *Regina* v. *Sharp*, 5 P. R. 135. L. Chamb.—Wilson.

ion 8 of 32 & 33 Vict. c. 23, D., applies cases of perjury, not merely to "perjuries ance cases," which is the heading under sec. 4 to 12 are placed in the act:— herefore, that a magistrate in the county ton had jurisdiction to take an informa- nd to apprehend and bind over a person ed with perjury committed in the county ellington. *Regina* v. *Currie*, 31 Q. B. 582.

3. *Breach of the Peace.*

In a commitment for want of finding sureties for the peace, is it necessary to state that the justice had information on oath which would justify him in binding the prisoner to keep the peace. *Dawson* v. *Fraser*, 7 Q. B. 391.

A commitment in default of sureties to keep the peace should shew the date on which the words were alleged to have been spoken, and contain a statement to the effect that complainant is apprehensive of bodily injury. *In re Ross*, 3 P. R. 301.—C. L. Chamb.—Wilson.

Where an information contained every material averment necessary to give a magistrate jurisdiction to make an order upon the plaintiff to find sureties to the peace, but contained also additional matter, which it was contended so qualified and explained these averments as to render them nugatory;—Held, that this was a judicial question for the magistrate to decide, and therefore that in issuing his warrant for the appearance of the accused he was not acting without jurisdiction, even although a superior court might quash his order to find sureties. *Sprung* v. *Anderson*, 23 C. P. 152.

4. *Contempts.*

A justice may commit for contempt while in the execution of his office, out of sessions, but it must be by a warrant in writing, and for a specified period. *Jones* v. *Glasford*, M. T. 2 Vict.

Where in an investigation of a charge under the Petty Trespass Act, 4 Will. IV. c. 4, before magistrates, the plaintiff was guilty of a contempt, for which the magistrates convicted him, but without warrant, and the plaintiff brought an action for false imprisonment against them and recovered:—Held, that the action did not arise in consequence of anything done by the magistrates under the Petty Trespass Act, and that therefore it was not necessary for the judge, under the 21st sec. of that act, to certify his approval of the verdict to entitle the plaintiff to his costs. *Armour* v. *Boswell*, 6 O. S. 450.

A commitment by a magistrate for contempt, if there be no recorded conviction, should shew that the party was convicted of the contempt; stating that he was charged with it, is insufficient. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Quære, whether a justice of the peace executing his duty in his own house, and not presiding in any court, can legally punish for a contempt committed there. *Ib.*

While a power resides in any court or judge to commit for contempt, it is in the privilege of such court or judge to determine on the facts, and it does not belong to any higher tribunal to examine into the truth of the case. *In re Clarke et al.*, 7 Q. B. 223.

A justice of the peace, while sitting in the discharge of his duty, has the power, without any formal proceeding, to order at once into custody, and cause the removal of any party who by his indecent behaviour or insulting language is obstructing the administration of justice; but he has no power either at the time of misconduct much less on the next day to make

out a warrant to a constable and to commit the offending party to goal for any certain time by way of punishment, without adjudging him formally, after a summons to appear for hearing, to such punishment on account of his contempt, and making a minute of such sentence. *Ib.*

A warrant to a constable to commit for contempt, containing a direction to *detain the party* for the space of two weeks, and until he shall pay the costs of his apprehension and conveyance to gaol, is defective. *Ib.*

A prisoner was convicted three times the same day for insolent conduct to a magistrate on the bench, and detained in prison under three several warrants, all dated the same day, the periods of imprisonment in the two last commencing from the expiration of the one preceding it, but the first to be computed "from the time of his arrival and delivery by the bailiff into your, the gaoler's, custody thenceforward;"—Held, that the magistrate had a right to convict and to sentence for continuing periods, but that the periods of imprisonment, depending on the will of the officer, who was to deliver him to the gaoler, were uncertain, and the prisoner was therefore entitled to his discharge. *Regina* v. *Scott*, 2 L. J. N. S. 323.—C. L. Chamb.—J. Wilson. See, also, *In re Crow*, 1 L. J. N. S. 302.—C. L. Chamb.—A. Wilson.

5. *Assaults.*

A plea of conviction under the Petty Trespass Act, 4 Will. IV. c. 4, to an action for an assault and battery, is not supported by a proof of a conviction for an assault alone. *DeLong* v. *McDonell*, E. T. 2 Vict.

At common law magistrates have no summary jurisdiction to try complaints for assaults. The jurisdiction is derived solely from C. S. C. c. 91, and can only be exercised where prayed under that statute. *In re Switzer et al.*, 9 L. J. [illegible] —Q. S.—Harrison.

In an action for assault and battery defendants pleaded that, under C. S. C. c. 8, s. 7, they were convicted of the same assault by two J. P.s, and on appeal to the sessions were acquitted, and the justices then presiding, upon request, gave, each of them a certificate of such acquittal, in accordance with sec. 42. Upon exception to the pleas:—Held, 1. That the certificate must be obtained from the convicting justice on the first hearing of the case, and that this certificate, therefore, was no bar. 2. That the plea should allege that the party aggrieved prayed the magistrate to proceed summarily under the act. *Westbrook* v. *Calaghan*, 12 C. P. 616.

It appeared, on an application for a habeas corpus, that the information laid before a police magistrate and warrant to apprehend were for an assaulting and beating, but it was disputed whether upon the examination and trial this was all the charge made, or whether he was not then charged with an aggravated assault; and whether, when he pleaded guilty, he did so to the former or the latter charge; numerous contradictory affidavits were filed. Four several warrants of commitment were in the gaoler's hands, upon one at least of which the prisoner was detained in custody. They were all for the same offence, one having been from time to time [illegible] stituted for the other. Quære, whether, or far or for what purpose, affidavits can be rec against a conviction or warrant of commit valid on the face of it. A judge cannot en into the conclusions at which the magis arrived if he had jurisdiction over the o charged and issued a proper warrant upon charge, but may enquire into what that c was, or whether there was a charge at all. S. C. c. 9 probably applies only to comm saults, &c. A charge of assaulting and b is not a charge of aggravated assault, and a plaint of the former will not sustain a conv of the latter, though when the party is b the magistrate, the charge of aggravated a may be made in writing and followed by a viction therefor. *In re McKinnon*, 2 L.J. 324.—C. L. Chamb.—A. Wilson.

See *In re Conklin*, 31 Q. B. 160, p. 1978.

6. *Ousting Jurisdiction by Claim of Title or*

Held, that the defendant appearing o evidence returned to have been bona fide asser claim to the land which he had enclosed, i not a proper case for the adjudication mayor (of Pelleville) under the 72nd or clause of 12 Vict. c. 82; and that the sum conviction of defendant under that act fo structing a street, might be quashed by orari. *Regina* v. *Taylor*, 8 Q. B. 257.

7. *In Other Cases.*

The seller of flour in barrels not mark branded under 4 & 5 Vict. c. 89, s. 23, w liable to the penalty imposed, only the ma turer or packer; and magistrates had no mary jurisdiction where the accumulated ties were more than £10. *Regina* v. *Be* 2 Q. B. 57.

Under 1 Vict. c. 21, s. 27, a magistrate cause the arrest of a party in the first insta a charge of neglect to perform statute labo must be first summoned before him. *Cr* v. *Sommerville*, 3 Q. B. 129.

Conviction by a magistrate for obstruct highway, and order to pay a continuin until the removal of such obstruction;— bad. *Regina* v. *Huber*, 15 Q. B. 589.

It was stated in an affidavit in support rule for a new trial in an action for sed that the plaintiff had sworn before a mag that defendant never had criminal con with her. The magistrate, in an affida on shewing cause, stated that t brother, S., with the girl seduced, and her moth saying that the brother, that his rumour was affecti the magistrate, wish the old lady die easy, and at th let the girl have a chance to sw S., inserted in the affidavit taken words "criminal connection," instead nal connection." Such conduct very censured. *McIlroy* v. *Hall*, 25 Q. B. 3

...ing been from time to time ...other. Quære, whether, or ...urpose, affidavits can be rece... ...tion or warrant of commit... ...e of it. A judge cannot ... ...sions at which the magis... ...nd jurisdiction over the off... ...sued a proper warrant upon ...y enquire into what that ch... ...r there was a charge at all. ...ably applies only to common ... charge of assaulting and be... ...of aggravated assault, and a ...rmer will not sustain a convic... ...though when the party is b... ..., the charge of aggravated as... ...in writing and followed by a ...or. *In re McKinnon*, 2 L. J. ... ...hamb. - A. Wilson.

...*nklin*, 31 Q. B. 160, p. 1978.

...*risdiction by Claim of Title or P...*

... the defendant appearing o... ...rned to have bonâ fide asser... ...and which he had enclosed, it ... case for the adjudication o... ...elleville) under the 72nd or ... Vict. c. 82; and that the sum... ...f defendant under that act f... ...street, might be quashed by ... *...e* v. *Taylor*, 8 Q. B. 257.

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7. *In Other Cases.*

... of flour in barrels not marke... ...ler 4 & 5 Vict. c. 89, s. 23, wa... ... penalty imposed, only the ma... ...ker; and magistrates had no... ...ction where the accumulated ... ...ore than £10. *Regina* v. *Bee...*

...ict. c. 21, s. 27, a magistrate c... ...est of a party in the first instan... ...eglect to perform statute labou... ... summoned before him. *Cro... ...lle*, 3 Q. B. 129.

...n by a magistrate for obstruct... ...d order to pay a continuin... ...moval of such obstruction:— ...*a* v. *Huber*, 15 Q. B. 589.

...ted in an affidavit in support ... ...w trial in an action for sedu... ...ntiff had sworn before a mag... ...nt never had criminal conv... ...The magistrate, in an affidavi... ...cause, stated that t... ... with the ... ...l her mot... ... the g... ...t his w... ... very ill, ... affecti... very much: th... ...te, wis... ...do so... ...- die ea... ...have a chance to s... ...in the affidavit taken before ...minal connection," instead o... ...on." Such conduct very s... *McIlroy* v. *Hall*, 25 Q. B. 3...

The prisoner had been convicted by one jus... of the peace of being a vagrant under 32 & 33 ... c. 28, D., which requires the conviction to ... before any stipendiary or police magistrate, ... or warden, or any two justices of the ...:—Held, that the conviction was bad, as ... not appear that the justice was a police ...strate. *Regina* v. *Clancey*, 7 P. R.—C. L. ...—A. Wilson. Not yet reported.

...re, whether the conviction would have ...ed if it had appeared in the warrant that ...as acting for the police magistrate under 36 ... c. 48, s. 308, or whether two justices would ...ave been required. *Ib.*

III. Procedure.

1. *Informations and Complaints.*

...ere, would a complaint against A. that he ...as seen in the act of destroying or injuring ...is property," without alleging that it be... ...ed to another person, or that the act was ...ully or maliciously done, authorize a warrant ...r a malicious injury to property under 4 & ... c. 26. *Powell* v. *Williamson*, 1 Q. B. 154.

The court refused a mandamus to two justices ...ize execution upon a conviction, under 6 ... IV. c. 4, s. 2, for selling spirituous liquors ...out license, the conviction having been ...ased upon the written statement of the in... ...r, and the oath of one other witness; there ...s a doubt, under the statute, whether the ...rmation ought not also to be on oath. *Regina* ...*Connell*, 6 O. S. 629.

The warrant of a magistrate is only primâ ... not conclusive evidence of its contents, as, ...nstance, of an information on oath and in ...ing having been laid before him. Such in... ...ation must be, under C. S. U. C. c. 102, s. ... not only on oath but in writing, and except ... information thus laid there is no authority ...or the warrant. *Friel* v. *Ferguson*, 15 C. P. ... See, also, *Appleton* v. *Lepper*, 20 C. P. 138.

The information stated that the informant had ...ad reason to believe that the death of F. S. ...aused by the administration of some poison... ...ous drug by J. S., his wife, on or before the 15th ... inst.," and on this charge a warrant was ...ued for the apprehension of J. S:—Held, ...at no felony was charged, for the administra... ...n of the drug might have been either acciden... ...ly or as a medicine; and that there was nothing ...ere on which to found the magistrate's ...isdiction. *Stephens* v. *Stephens*, 24 C. P. 424.

The information, produced at the trial of an ...on for malicious prosecution, was, that the ...dant's premises were set on fire; that he ...had reason to believe they were set on fire ... the plaintiff, and prayed that the plaintiff ...ght be held to answer "the said charge." The ...ration alleged that defendant charged the ...ff with having unlawfully and maliciously ... the defendant's premises:—Held, ...ubject for the plaintiff, that the declara... ...though not sufficiently precise, might be ...ld to import a crime; but that there was a ...ance between the declaration and evidence, ...e information not charging any crime. *Man... ...Abbot*, 39 Q. B. 78.

The information charged the plaintiff in this ... with having obtained "by false pretences from the complainant, the sum of $5, contrary to law," omitting the words "with intent to defraud," which by the statute 32 & 33 Vict. c. 21, s. 93, is made part of the offence:—Held, that defendant had jurisdiction, and was not liable in trespass, for the information might by intendment be read as charging the statutable offence; and if not, the plaintiff should have taken the objection before the magistrate, when the information might have been amended and resworn, and he was precluded from raising it in this action. *Crawford* v. *Beattie*, 39 Q. B. 13.

See *In re Conklin*, 31 Q. B. 160, infra.

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2. *Limitation of Time for Making or Laying.*

Laying the information is the commencement of a prosecution before a magistrate. Sec. 25 of 33 Vict. c. 32, O., provides that "all prosecutions under this section, shall be commenced within twenty days after the commission of the offence, or after the cause of action arose, and not afterwards." The information against defendant was taken on the 30th December, 1872, laying the offence on the 16th December. On the 15th January, 1873, a summons was issued on the information, and on the 30th the defendant was tried and convicted:—Held, that the prosecution was commenced in time. When the delay in proceeding after laying the information is great and defendant seriously prejudiced thereby, he might perhaps obtain relief from the court. *Regina* v. *Lennox*, 34 Q. B. 28.

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3 *Course of Proceeding.*

Semble, that after a first conviction has been returned to the Quarter Sessions and filed, the justice, if he think it defective, may file a second. *Wilson* v. *Graybiel*, 5 Q. B. 227.

The applicant, C., having appeared to an information charging him with an assault, and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words, "falsely imprison." This being refused, H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information, "case withdrawn by permission of the court, with the view of having a new information laid:"—Held, that the complainant could not, even with the magistrate's consent, withdraw the charge, the defendant being entitled to have it disposed of:—Held, also, that an information may be amended, but if on oath, it must be re-sworn; and that the amendment might have been made here. Semble, that the more correct course would have been to go on with the original case, and, under 32 & 33 Vict. c. 20, s. 46, to refrain from adjudicating. A mandamus to hear and determine the first charge, and, if dismissed, to grant a certificate of dismissal, was however refused; for the withdrawal was equivalent to a dismissal, and the magistrate might, under sec. 46. refrain from adjudicating, and if it were dismissed without a hearing on the merits, there would be no certificate. *In re Conklin*, 31 Q. B. 160.

Semble, that it is the duty of a magistrate at a trial under his summary jurisdiction, to take the examination and evidence in writing. *Regina* v. *Flannigan*, 32 Q. B. 593.

S., a justice of the peace, upon an information laid before him, issued a summons for nonpayment of wages under C. S. U. C. c. 75, sec. 12, returnable before himself or such other justices as might then be present. On the return two other justices were present who, without any objection from S., heard the complaint with him. At the conclusion of the case, these two thought the complaint should be dismissed, while S. was in favour of the claimant, and against the protest of the other two, S. made an order requiring the defendants to pay the claim and costs, and in default that a distress should issue; the two other justices made an order dismissing the complaint. Subsequently a formal conviction was drawn up, and signed and sealed by S., the whole proceedings being set out as before him alone, and afterwards a distress warrant was issued by him. The minutes of the evidence taken down by the magistrates' clerk, were headed as in a cause before the three justices:—Held, that the conviction was clearly bad, and must be quashed, S. having no exclusive right to deal with the case merely because he had issued the summons. *Regina* v. *Milne et al.*, 25 C. P. 94.—Hagarty, sitting in vacation.

The defendant was convicted in July, 1874, under the Public Health Act, 36 Vict. c. 43, O., of creating a nuisance; the magistrates refusing to hear witnesses for the defence, on the ground that the statute made no provision for such witnesses being called:—Held, that an application in May, 1875, for a mandamus to re-open the complaint, was not too late, and the writ was granted; the refusal to hear one side being the same as if the case had not been heard at all. Semble, that a certiorari might issue in such a case, notwithstanding sec. 35 of the act. *Re Holland*, 37 Q. B. 214.

See *Regina* v. *Munro*, 24 Q. B. 44, p. 1991; *In re McKinnon*, 2 L. J. N. S. 324, p. 1976. *Cross* v. *Wilcox*, 39 Q. B. 187, p. 1998.

IV. Convictions.

1. *Form and Requisites of.*

(a) *Generally.*

A conviction under a by-law must shew the by-law, that the court may judge of its sufficiency. *Regina* v. *Ross*, M. T. 3 Vict.

And it must shew by what municipality the by-law was passed. *Regina* v. *Osler*, 32 Q. B. 324.

Quære, whether it is essential to state the date or title of the by-law. *Ib.*

As to certain objections suggested to a conviction, it was held a sufficient answer that the conviction followed the form prescribed by the act, C. S. C. c. 103, which was intended as a guide to magistrates, and to prevent failure of justice from trivial objections. *Reid* v. *McWhinnie, et al.*, 27 Q. B. 289.

Where a form of conviction is not sanctioned by any statute, it must be legal according to the principles of the common law; and in that case a conviction, which does not express that th had been summoned, nor that he appea that the evidence was given in his presen not be supported. *Moore* v. *Jarron*, 9 Q

In a conviction for non-payment of general form prescribed by C. S. C. c. 50, schedule I. (1) being used:—Held, was clearly not requisite to shew that de was summoned or heard, or any evidenc *Regina* v. *Caister*, 30 Q. B. 247.

Under the statute for repressing riots tions, no power is given to magistrates to summarily: the offenders must be tri jury. *Ferguson* v. *Adams et al.*, 5 Q. B.

The name of the informant or com must in some form or other appear on of a conviction. *In re Hennesy et al.*, 8 L —Q. S.—McKenzie.

A conviction by two justices for taking timber feloniously *or* unlawfully,—fi for it should not have been in the alter if the taking was unlawful only, not fe it should have shewn how unlawful; a that the offence came under some statut gave the justices power to convict. *R Craig*, 21 Q. B. 552.

Where a statute empowers two jus convict, a conviction by one is void. *In* 1 L. J. N. S. 302.—C. L. Chamb.—A. See also *Graham* v. *McArthur*, 25 Q. B.

The charge in a conviction must be and so stated as to be pleadable in the a second prosecution for the same offence. v. *Haggard*, 30 Q. B. 152.

A conviction for keeping a house of on the 11th of October, and on other d times before that day:—Held, sufficien tain as to the time. The information d the parties as of the township of East and had "County of Ontario" in the mar charged that they kept a house of ill-fa did not expressly allege that they did so township or county. The evidence, h shewed that their place, at which suc was kept, was in East Whitby, in wh justices had jurisdiction:—Held, suffici certiorari to remove the conviction was t refused. *Regina* v. *Williams et al.*, 37 Q —A. Wilson, sitting in vacation.

(b) *In Particular Cases.*

The court refused to grant a mand compel two justices of the peace to issue tion upon a conviction under 6 Will. IV. 2, for selling spirituous liquors without the conviction having been founded u written statements of the informer, and t of one other witness; there being a doub the statute, whether the information ou also to be on oath. *Regina* v. *McCon* S. 629.

Semble, that a conviction under 4 W c. 4, for an act against the public peace, d deprive the party injured of his right to remedy. *Delong* v. *McDonnell*, E. T. 2

A magistrate, in order to have a good cation under a conviction and warrant, give in evidence a conviction not illegal

of it, and a warrant of distress supported that conviction, and not on the face of it an al warrant. *Eastman* v. *Reid*, 6 Q. B.

ld, that a magistrate's conviction "for wil- damaging, spoiling, taking, and carrying six bushels of apples of the said R., where- the defendant committed an injury to the goods and chattels of the said R.," did not rt a warrant which recited "that whereas plaint was given against E., of, &c., in a suit Rogers v. Eastman, for a misdemeanour in ing apples by force and violence off and from premises of the said R., &c., these are there- to authorize, &c.;" and also that neither conviction nor the warrant contained *a ment of an offence* for which such convic- could take place. *Ib.*

motion to quash a conviction by two jus- of the county of Norfolk for an assault— l. That stating the offence to have been itted at defendant's place in the township wnsend was sufficient, for C. S. U. C. c. 3, sub-s. 37, shews that township to be within unty. *Regina* v. *Shaw*, 23 Q. B. 616.

a conviction for assault it was held un- ary to shew on the face of the conviction complainant prayed the magistrates to pro- summarily, for the form allowed by C. S. 103, s. 50, was followed; and if there was ch request, and therefore no jurisdiction, it ld have been shewn by affidavit:—Held, that it was clearly no objection that the lt was ...ged to be unlawful. *Ib.* See ... *Switzer et al.*, 9 L. J. 266. — Q. S. rison; *Bagley* q. t. v. *Curtis*, 15 C. P.

here a statute empowers two justices to ct a conviction by one is void. *In re Crow*, J. N. S. 302.—C. L. Chamb.—A. Wilson. lso *Graham* v. *McArthur*, 25 Q. B. 478.

conviction by a magistrate stated that de- nt did on, &c., at &c., being a public high- use blasphemous language, contrary to a n by-law, which was passed almost in the s of C. S. U. C. c. 54, s. 282, sub-s. 4; but was no statement of the words used:— bad. Semble, also, that there was nothing evidence set out giving the magistrate diction to act. *In re Donelly*, 20 C. P.

conviction, purporting to be under C. S. 06, s. 28, charging that defendant, at a time lace named, wilfully and maliciously took arried away the window sashes out of a g owned by one C., against the form of tute, &c., without alleging damage to any ry, real or personal, and without finding e to any amount, was Held bad, and d. *Regina* v. *Caswell*, 20 C. P. 275.

not necessary, in a conviction for selling without a license, to mention the statute which the conviction took place, nor that ld appear on the face of the conviction e prosecution commenced within twenty f the commission of the offence, nor to that it is a first or second offence, nor to the liquor was sold; neither is it illegal rd imprisonment in default of distress, Regina v. *Strachan*, 20 C. P. 182. See v. *McWhinnie*, 27 Q. B. 289.

A conviction under C. S. U. C. c. 49, s. 95, stating that defendant wilfully passed a gate without paying, and refusing to pay toll:—Held, good. Quære, whether it would be sufficient to allege only that he wilfully passed without paying, without in any way shewing a demand. *Regina* v. *Caister*, 30 Q. B. 247.

Held, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction. *Ib.*

Held, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith. *Ib.*

A conviction under 32 & 33 Vict. c. 28, D., for that V. L. was, in the night time of the 24th February, 1870, a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself, contrary to this statute:—Held, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself, and did not do so satisfactorily. *Regina* v. *Levecque*, 30 Q. B. 509.

Semble, proceedings having been taken under 29 & 30 Vict. c. 45, D., that the evidence might be looked at; and if so, it was plainly insufficient, in not shewing that the place in which she was found was within the statute, or that she was a common prostitute. *Ib.*

On a motion to set aside a conviction and warrant of commitment on the grounds, 1. That the conviction was not in the magistrate's office, but in that of the clerk of the peace; 2. That the conviction did not contain a clause of distress: and 3. That the conviction only warranted the imprisonment without hard labour, whereas the prisoner had been committed with hard labour:—Held, that the prisoner must be discharged, but on the last ground only. *Regina* v. *Yeomans*, 6 P. R. 66.—C. L. Chamb.—Morrison.

See *Regina* v. *Munro*, 24 Q. B. 44. p. 1991.

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2. *Quashing.*

(a) *Practice.*

Defendant, in a private carriage, refused to pay toll, on the ground that he was in uniform, and adjutant of the military train, and therefore exempt:—Held, that the conviction could not be quashed on the ground of his being on duty, as the exemption had not been claimed on that account. *Regina* v. *Dawes*, 22 Q. B. 333.

On application to quash a conviction, as soon as the return to the certiorari has been filed the cause is in this court, and the motion paper and rule nisi must be entitled in the cause. Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs; and under the circumstances an amendment was not allowed. *Regina* v. *Mortson*, 27 Q. B. 132.

On applications to quash, the convicting justice must be made a party to the rule. *Regina* v. *Law et al.*, 27 Q. B. 260.

The court will not quash a conviction upon th weight or upon a conflict of evidence, but there must be reasonable evidence to support it, such as would be sufficient to go to the jury upon a trial. The extreme severity of the fine, under

the circumstances of the case, remarked upon. *Regina* v. *Howarth*, 33 Q. B. 537.

It is not the practice to give costs in quashing a conviction. *Regina* v. *Johnston*, 38 Q. B. 549.

(b) *Other Cases.*

A conviction should be quashed where there was no jurisdiction. *Reg.* v. *Taylor*, 8 Q. B. 257.

To prove the quashing of a conviction by the Court of Queen's Bench a rule of court was put in, in which the offence, the name of the complainant, and of the magistrate, were mentioned: —Held, sufficient, without further identifying the conviction mentioned in the rule with that on which the warrant issued, for the court would not presume another conviction similar in all these respects. *Bross* v. *Huber*, 15 Q. B. 625.

To prove the quashing of a conviction on appeal to the Quarter Sessions, it is sufficient to prove an order of that court directing that the conviction shall be quashed, the conviction itself being in evidence, and the connection between it and the order shewn. It is not necessary to make up a formal record, for the statute C. S. U. C. c. 114, enables the Court of Quarter Sessions to dispose of the conviction by order. *Neill* v. *McMillan*, 25 Q. B. 485.

A certiorari issued on 12th April, 1872, on motion of defendant, to a police magistrate, to return a conviction for selling liquor without license. This writ was returned on 21st May, in Easter Term, with conviction and recognizance, and both defendants appeared to it by taking out rules. The prosecutor then obtained a rule nisi to quash the certiorari and for a procedendo to the police magistrate. But up to this time there had been no motion to quash the conviction. It was urged by defendant that he had all the term within which to move against the conviction, and that as the proceedings were removed into the Queen's Bench they must be finally dealt with there:—Held, 1. That the proper practice is, that an appearance to the certiorari should be filed in the crown office, and the case set down on the paper, so that either party might move for a concilium; 2. That the defendant was in default in not having moved to quash the conviction, or set down the case on paper. Semble, that an affirmance of the conviction by the prosecutor is necessary to obtain the costs, and further, as this was not done, the court declined to estreat the recognizance. A procedendo was awarded, it being thought more advisable that the police magistrate should enforce the conviction than the court above. *Regina* v. *Flannigan*, 9 L. J. N. S. 237.—P. C. —A. Wilson.

A conviction which has never been valid, need not be quashed before action for anything done under it, for it is in law no conviction. *Haacke* v. *Adamson*, 14 C. P. 201.

Held, following the last case, that an order or conviction not under seal need not be quashed before action brought, for anything done under it. *McDonald* v. *Stuckey*, 31 Q. B. 577.

But a conviction made by one magistrate, in a matter in which jurisdiction was given to two only, must be quashed, though wholly void. *Graham* v. *McArthur*, 25 Q. B. 478.

The plaintiff produced a warrant issued fo arrest for not finding sureties for the peac pursuance of an order to that affect recit the warrant:—Held, that such warrant prima facie evidence of the order:—Held, that under C. S. U. C. c. 126, s. 3, no would lie against the magistrate for anyth done under the order or under the warra procure the appearance of the accused, until same was quashed. *Sprung* v. *Anderson*, P. 152.

See *In re Joice*, 19 Q. B. 197, p. 993; v. *Holden*, 13 L. J. 19, p. 2001.

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3. *Other Cases.*

A conviction, substantially defective, can be amended. *Regina* v. *Ross*, H. T. 3 Vict.

Semble, that a conviction returned under statute to the Quarter Sessions and filed by clerk of the peace, becomes a record of court, and may be proved by a certified co *Graham* v. *McArthur*, 25 Q. B. 478.

V. Actions for not Returning Convictio

Justices before whom a conviction is ma are not jointly liable, under 4 & 5 Vict. c. 12, not returning the same. A declaration char that the return was not made to the next ens Quarter Sessions, is bad; the statute requi a return to the next ensuing general Qua Sessions. *Metcalf* q. t. v. *Reeve et al.*, 9 Q 263.

The defendant, with two other justices, c victed one D. S. of having refused to serv returning officer at an election, and fined $20. It was afterwards discovered that this not the first election for the ward, and there that the conviction was illegal. The convict was not returned to the next Quarter Sessio and thereupon, though after the return ma this action was brought for the penalty awar by 4 & 5 Vict. c. 12:—Held, on motion fo nonsuit, that the illegality of the conviction no defence; but that if on that account fine had not been levied, a return should h been made explaining the circumstances: Qu whether the declaration would not have b bad on motion in arrest of judgment for ch ing the offence to be that the defendant not make return to the next ensuing Court General Quarter Sessions, instead of an im diate return as the statute requires. Quære, whether the court, if promptly applied to, w have stayed the proceedings, the action b brought after the defendant had returned conviction. *O'Reilly* q. t. v. *Allan*, 11 Q. B.

Declaration, that on, &c., an information oath was laid before M., J. P., against J., for having within six months sold spi uous liquors to persons therein named, cont to the statute: that said M. summoned the J., who appeared before said M., defendant, other named justices; and that said justi having jurisdiction in the premises, convi him of said offence, whereupon it became t duty to return such conviction to the then n ensuing general Quarter Sessions of the peac and for, &c.; yet defendant did not make return:—Held, that proof of an offence ag

law of the municipality, and a conviction such by-law, was not sufficient proof of declaration. *Spillane* v. *Wilton*, 4 C. P. 236.

ld, that a justice is liable, under the statute, separate penalty of £20 for each conviction, which a return is not properly made to the ter sessions; and that an action for the lty would lie, on proof of the conviction fine imposed, although no record thereof been made by the justice. *Donogh* q. t. v. *rath*, 8 C. P. 437.

fendant committed and fined the plaintiff rrying away some cordwood. After no- of appeal the prosecutor, finding that the iction was improper, went to the defendant, drew for him a notice of discontinuance, h was served on the person acting as attor- for the plaintiff, before the meeting of the Quarter Sessions. The defendant sent a rn return to that court, including this and ther conviction, but ran his pen through the of this conviction, leaving the writing, ever, quite legible, and wrote at the end of "This case withdrawn by the plaintiff:"— l a sufficient return, within the 4 & 5 Vict. *Ball* q. t. v. *Fraser*, 18 Q. B. 100.

ere to a qui. tam. action for not returning a rtion, defendant pleads another action for me cause, it is sufficient to prevent that from being a bar to shew that it was not ght to recover the penalty, but to prevent lant from being obliged to pay it to others; is not essential to shew collusion between fendant and the plaintiff in such action:— the court being left to draw inferences as r, that the evidence in this case supported ction that the first action was commenced raud and covin. *Kelly* q. t. v. *Cowan*, 18 . 104.

ere, whether the 4 Hen. VII. c. 20, applies t when judgment has been recovered in the plevied. The fact of defendant having ied, and the fine therefore not having been ed, forms no excuse for not returning the rtion; but, Semble, that if under such cir- ances the justice returns the conviction without the return prescribed by the act, ould not be liable. *Ib.*

conviction of *two or more* justices being ed from did not relieve them from making mediate return under 4 & 5 Vict. c. 12. *ley* q. t. v. *Harvey*, 9 C. P. 528.

order for the payment of money under the ter and Servant Act, is not a conviction it is necessary to return to the sessions. *ey* q. t. v. *Jones*, 21 Q. B. 370.

conviction was had before defendant and nother justice, on the 25th of September, M. proved a return, with the convic- himself, made by him for himself and on of defendant, on the 6th of December, and signed by him in defendant's name, as for himself, the defendant having au- ed and requested him to sign it. The left it to the jury whether the return "immediate," as required by the statute, them that the word should be construed within a reasonable time; and they for defendant:—Held, 1. That the fact properly left to the jury, and their decision upon a matter of fact in a penal action was final; 2. That although the statute requires the return to be made by the convicting justices under their hands, yet it was sufficient. Quære, per Draper, C. J., whether the return came within the term "immediate" under the statute. *McLellan* q. t. v. *Brown*, 12 C. P. 542.

This action was similar to the last case, and was tried on the same day, being brought against M., one of the justices, who was the principal witness for the defence in the last case. The defendant offered as evidence the record of that action with the verdict endorsed thereon, the object being to shew the return of the conviction by himself, and so indirectly to make him a witness in his own behalf:—Held, that the penalty not being a joint one but several, each justice being individually liable, such evidence was immaterial. Held, also, that the transmission of the conviction itself is not sufficient, without a return thereof. *McLennan* q. t. v. *McIntyre*, 12 C. P. 546.

The law as to the return of convictions is unchanged since the 4 & 5 Vict. c. 12, and a conviction made by an alderman in a city must therefore still be returned to the next ensuing general Quarter Sessions for the county, and not to the Recorder's Court for such city. *Keenahan* q. t. v. *Egleson*, 22 Q. B. 626.

Held, in an action for not returning a conviction, no objection in arrest of judgment that the declaration shewed no law under which defendant could convict for the offence mentioned, or that it charged him with not making a return of the conviction and of the receipt and application of the moneys received under it, when if he had not received the money he would have only to return the conviction. *Ib.*

Held, no objection to the declaration that the plaintiff sued for the receiver-general, and not for her majesty, inasmuch as suing for a penalty for the receiver-general, for the public uses of the province, is in fact suing for the Queen. Besides, C. S. U. C. c. 124, authorizes a party to sue qui tam for the receiver-general. Held, also, that the defendant having actually convicted and imposed a fine, could not object that the declaration did not shew that he had jurisdiction to convict. *Bayley* q. t. v. *Curtis*, 15 C. P. 366.

A plaintiff suing a justice under C. S. U. C. c. 124, s. 2, for the penalty of $80 for not returning a conviction, is entitled to full costs without a certificate. *Stinson* q. t. v. *Guess*, 1 L. J. N. S. 19.—C. L. Chamb.—A. Wilson. But see *Brash* q. t. v. *Taggart*, 16 C. P. 415.

Held, that a penal action for not returning a conviction, is founded on tort, and for that reason cannot be brought in a Division Court. *Corsant* q. t. v. *Taylor*, 10 L. J. N. S. 320.—C. C.—Elliot.

C. S. U. C. c. 124, requires justices, under a penalty, to return convictions made by them to the next ensuing general Quarter Sessions. 29 & 30 Vict. c. 50, provides that it shall not be necessary to make such return until the Quarter Sessions to which the party complaining can appeal. 32 Vict. c. 6, (the Law Reform Act of 1868) enacts that the sessions shall be held only twice a year, and that such returns shall be made to the clerk of the peace, quarterly, on or before the second Tuesday in March, June, Sep-

tember, and December, in each year, and shall embrace all convictions not embraced in some previous returns. This act came into force on the 1st of February, 1869, and makes no mention of the 29 & 30 Vict. c. 50. The plaintiff in his declaration charged defendant with not returning convictions made in December, 1868, and January, 1869, to the clerk of the peace before the second Tuesday in March following:—Held, insufficient, for when the convictions were made it was defendant's duty to return them to the Quarter Sessions, which for all that appeared he might have done; and it should have been averred that he did not so return them before the 1st of February, 1869, or after that day to the clerk of the peace. Quære, as to the effect of the last act upon the 29 & 30 Vict. c. 50. *Ollard* q. t. v. *Owens*, 29 Q. B. 515.

Returns of convictions and fines for criminal offences being governed by the Dominion statute 32 & 33 Vict. c. 31, s. 76, and not by the Law Reform Act of 1868, are only required to be made semi-annually to the general sessions of the peace. *Clemens* q. t. v. *Bemer*, 7 L. J. N. S. 126.—C. C.—Hughes.

Declaration, that defendant and W. C., then being two justices of the peace for, &c., on the 30th December, 1872, convicted the plaintiff and J. & D. of an offence of which they stood charged by E. C., and adjudged each of them for the said offence to pay $1, to be paid and applied according to law and costs; and thereupon it became the duty of defendant and W. C. as such justices, to make a joint return in writing of the said conviction, to the clerk of the peace for, &c., on or before the 2nd Tuesday in March, 1873, according to the form of the statute in such case made and provided, yet they did not, nor did either of them, as by the said statute in that behalf required, make any return of the said conviction to the said clerk of the peace, on, &c., "contrary to the said statute," whereby and "by force of the statute in that behalf," the defendant forfeited $80, and an action has accrued to the plaintiff, who sues for the same "under the said statute," to demand and have from the defendant the sum of $80:—Held, on demurrer, declaration bad; for it should have alleged defendant's neglect to have been contrary to the statutes, not merely the statute, there being two statutes upon the subject, each requiring a different return:—Held, also, that the plaintiff might sue for himself only, and need not sue qui tam:—Held, also, that an action would lie against each magistrate for the penalty, for though in form in debt, the action was in fact ex delicto. Quære, there being now some offences under the jurisdiction of the Dominion, and some under that of Ontario, and a different return required, and a different penalty imposed, as regards each class, whether the declaration should not state the nature of the offence, and that it was within the magistrate's jurisdiction, though formerly this was not requisite. *Drake* q. t. v. *Preston*, 34 Q. B. 257.

Held, that justices of the peace must now return all convictions made by them to the clerk of the peace, on or before the second Tuesday in March, June, September, and December, respectively, following the date of the conviction. The several statutes on the subject referred to. *Corsant* q. t. v. *Taylor*, 23 C. P. 607.

Held, that the neglect of a justice of peace to return convictions made by him as scribed, renders him liable under 32 & 33 c. 31, D., as well as under the C. S. U. C. c. to a separate penalty for each conviction returned, and not merely to one penalty for making a general return of such convict The various statutes on the subject revie *Darragh* q. t. v. *Paterson*, 25 C. P. 529.

VI. Commitments.

1. *Validity, Form, and Requisites of.*

Omitting to state the conviction of a defen in his warrant of commitment will not su a justice to an action for false imprisonm provided the actual conviction is proved his defence. *Whelan* v. *Stevens*, Tay. 245.

Where, in trespass for false imprison defendant justified under a warrant from president and board of police at Cobourg, the Cobourg Police Act, for the non-perform of statute labour by the plaintiff, the justifi was held bad because the plaintiff was imp oned after part of the fine had been paid; the warrant to imprison being for an abs time, without any reference to the earlier ment of fine and costs, was illegal and *Trigerson* v. *Board of Police of Cobourg*, S. 405.

Under C. S. U. C. c. 55, s. 86, a warrant issue to imprison a person for non-paym statute labour tax, without first summonin to answer or making a conviction. It i necessary, under C. S. U. C. c. 126, to set such warrant before an action can be br against the justice. The point decided new, the court discharged without costs nisi obtained to quash the conviction. *R* v. *Morris*, 21 Q. B. 392.

Where a person was brought before a m trate on a charge of a threatened assault, was ordered by the magistrate to find sureti keep the peace, which not being immedi able to do, he remained in the custody of a p constable for three hours, during which tim magistrate frequently visited him to ascert he had found bail, and at night, not h found bail, he was taken to gaol, where h mained until the following morning, whe was discharged on bail being procured:—H that the order for commitment was good wit being in writing, and that the magistrate therefore not liable to trespass. *Lynden* v. 6 O. S. 566.

When a magistrate allows a prisoner to d without examining into the charges against with a direction to appear next morning a police office; and in the meantime, on ground that he was assaulted by the pri when in custody before him, gives a verbal to a constable to apprehend him, and tak to the station house or gaol, such imprison is illegal, and the magistrate cannot justi arrest. *Powell* v. *Williamson*, 1 Q. B. 15

Under the Summary Punishment Act magistrates cannot issue their warrant to imp absolutely for so many days, but only to im for so many days unless the fine and co sooner paid. *Ferguson* v. *Adams et al.*, 5 194.

...ere, where a magistrate has, under the ...ary Punishment Act, committed a party ...ditionally when it should have been con... upon his not paying a fine, can his war... be a justification to the gaoler. *Ib.*

...agistrate, justifying under a conviction ...warrant, must prove a conviction not illegal ...face, and a warrant of distress supported ... and not on the face of it, illegal:—Held, ...fore, that a conviction "for wilfully dam... spoiling, and carrying away six bushels of ... of the said R.'s," did not support a war... which recited "that whereas judgment was ... against E., of, &c., in a suit, R. *v.* E., for ...emeanour, in taking apples by force and ...ve off and from the premises of the said ...: these are therefore to authorize, &c.;" ...ss, that neither the conviction nor the ...nt stated an offence for which such a con... could take place. *Eastman* v. *Reid*, 6 ... 611.

...warrant of commitment for an indefinite ..., or which directs the prisoner to be kept in ...ly till the costs are paid, without stating ...mount, is bad. *Dawson* v. *Fraser*, 7 Q. ...

...ere, in a commitment for want of finding ...ties for the peace, is it necessary to state ...the justice had information on oath which ...ld justify him in binding the prisoner to ...the peace. *Ib.*

...ible, this would not be necessary in respect ...rants committing prisoners upon charges ...fences committed. *Ib.*

...warrant of commitment recited that M. ...charged on the oath of W., "for that he, ...as this day charged with enlisting men for ...United States army, offering them $350 each ...ently," without charging any offence with ...ity, without stating that the men enlisted ...subjects of her majesty, and without shew... that W. was unauthorized by license of her ...sty to enlist, was held bad. *In re Martin*, ... J. 130.—C. L. Chamb.—J. Wilson.

...ld, 1. That to charge a prisoner in a war... of commitment issued under 59 Geo. III. ... with attempting *or* endeavouring to hire, ..., engage, *or* prevail on to enlist, a soldier ...e land *or* sea service, for *or* under *or* in aid ...Abraham Lincoln, President of the United ...s of America, and in the service of the ...ed States of America," is sufficiently cer...; 2. that the foreign power was sufficiently ...ed in the warrant, and one whose existence ...ourt is bound judicially to notice, viz.: ...e President of the United States of Amer...—the words relating to the Federal States ...e rejected as surplusage; 3. that in such a ...t it is unnecessary to allege that the ac... is a British subject, the law presuming him ...such till the contrary appears; 4. that it ...unnecessary in the warrant to negative ...ence from her majesty to do the act ...acts complained of; 5. that the direction ...e gaoler to keep the prisoner in the common ... until he shall thence be discharged by due ...se of law, or good and sufficient sureties be ...ed for his appearance," &c., was sufficient, ...other words being read as surplusage; 6. ..."I," in the text of the warrant, might be ...ad "I and I," so as to read "Given under my and my" hand and seal, &c., it being presumed that both magistrates used one and the same seal. *In re Smith*, 10 L. J. 247.—C. L. Chamb.—J. Wilson.

Held, that a warrant reciting a coroner's inquisition, and stating the offence as follows: that C. "stands charged with having inflicted blows on the body of the said F.," and not shewing the place where the blows, if any, were inflicted, or the offence, if any, was committed, is bad. *In re Carmichael*, 10 L. J. 325.—C. L. Chamb.—Draper, Morrison.

A warrant of commitment under the foreign Enlistment Act, 59 Geo. III. c. 69, s. 4, reciting that T. K. C. "was this day charged" (not saying upon oath) "before us," and without shewing any examination by the magistrates, upon oath or otherwise, into the nature of the offence, and commanding the constables or peace officers of the county of Welland to take the said T. K. C. into custody:—Held, sufficient. *In re Clarke*, 10 L. J. 331.—C. L. Chamb.—J. Wilson.

A warrant of commitment under the statute, committing the prisoner until "discharged by due course of law," sufficiently complies with the statute, which provides for a committal until delivered by due course of law. *Ib.*

A warrant of commitment executed by two parties, and concluding, "given under our hand and seal:"—Held, sufficient. *Ib.*

Held, that a warrant of commitment in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one H., a soldier in her majesty's service, to desert, was bad, for it was impossible to say upon reading the warrant how many offences he had committed, or how the punishment was awarded. *In re McGinnes*, 1 L. J. N. S. 15.—C. L. Chamb.—J. Wilson.

The warrant of a magistrate to arrest, issued in the first instance, is only primâ facie, not conclusive evidence of its contents; as, for instance, of an information on oath and in writing having been laid before him. *Friel* v. *Ferguson*, 15 C. P. 584. See *Sprung* v. *Anderson*, 23 C. P. 152, p. 1984.

The prisoner was convicted by the police magistrate for the city of Toronto, for that she "did on," &c., "at the said city of Toronto, keep a common disorderly bawdy house on Queen Street, in the said city," &c., and committed to gaol at hard labour for six months. A habeas corpus and certiorari issued; in return to which the commitment, conviction, information, and depositions were brought up. On application for her discharge:—Held, 1. No objection that the commitment stated the offence to have been committed on the 10th of August, instead of the 11th, as in the conviction, the variance not being material to the merits; 2. Nor that the commitment charged that the prisoner "was the keeper of," &c., and the conviction "that she did keep," both differing from the statute, which designates the offence as "keeping any disorderly house," &c., for all these expressions convey the same idea; 3. Nor that the commitment did not shew that the offence was committed within the police limits of the city, the words used in the act C. S. U. C. c. 105, s. 14, for there was no ground for supposing any difference between

these and the ordinary city limits ; 4. Nor that there was nothing in the commitment to shew whether the prisoner pleaded to the charge or confessed it ; 5. It was held no objection that the conviction was not sustained by the information, the latter being that defendant was the keeper of a disorderly house, and the former for keeping a common disorderly bawdy house ; for the commitment would not be void because of a variance between the original information and the conviction made after hearing evidence ; 6. Nor that no notice had been put up as required by sec. 25 of the same act, to shew that the court was that of the police magistrate, not of an ordinary justice of the peace ; for the jurisdiction, in the absence of express enactment, could not be made to depend on the omission of the clerk to post up such notice ; 7. Nor that there was no evidence to warrant the conviction ; for when a proper commitment is returned to a habeas corpus, and there was evidence, the court will never enter into the question whether the magistrate has drawn the right conclusion from it ; 8. Nor that the offence stated in the commitment, of keeping a common disorderly bawdy house, was not sufficiently certain ; for the legal meaning of the last two words is clear, and if keeping a disorderly house be no offence, the addition of that would be only surplusage. Semble, that on an application like this, affidavits cannot be received to sustain objections to the conduct of a magistrate in dealing with the case before him ; but that such conduct may furnish ground for a criminal information. Quære, with regard to some of the objections, whether the court on such an application, can go behind the warrant of commitment. *Regina* v. *Munro*, 24 Q. B. 44.

It lies on a party alleging that there is a valid conviction to sustain the commitment, to produce the conviction. *In re Crow*, 1 L. J. N. S. 302.—C. L. Chamb.—A. Wilson.

The warrant of commitment should shew before whom the conviction was had. *Ib.*

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants, each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants, shall commence at the expiration of the time mentioned in the warrant immediately preceding, is valid. If the portions in the margin of the second and third warrants could not be read as portions of the warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time, instead of counting consecutively. *Ib.*

A warrant of commitment which omits to state the place where the alleged crime was committed is defective. *In re Beebe*, 3 P. R. 270.—C. L. Chamb.—Hagarty.

In favour of liberty, it is the duty of a judge on an habeas corpus, when doubting the sufficiency of a commitment, to discharge the prisoner. *Ib.*

A commitment under 31 Vict c. 16, signed by one qualified justice of the peace, and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting under it, on an action against him. *Regina* v. *Boyle*, 4 P. R. 256.—L. Chamb.—Morrison.

The issuing of a warrant of commitment non-payment of costs of an appeal, under 33 Vict. c. 31, s. 75, is discretionary, not pulsory upon a justice ; and the court will th fore on this ground, as well as upon the gro that the party sought to be committed has been made a party to the application, ref mandamus to issue it, if this be the p remedy, which in this case it was held not t but that the application should have been m C. S. U. C. c. 126, s. 8. *Re Delaney* v. *nabb*, 21 C. P. 563.

On a motion to set aside a conviction and rant of commitment on the grounds : 1. the conviction was not in the magistrate's o but in that of the clerk of the peace ; 2. the conviction did not contain a clause of tress ; and, 3. That the conviction only ranted the imprisonment without hard lab whereas the prisoner had been committed hard labour :—Held, that the prisoner mu discharged, but on the last ground only. *Re* v. *Yeomans*, 6 P. R. 66.—C. L. Chamb.—M rison.

The plaintiff produced a warrant issued his arrest for not finding sureties to the p in pursuance of an order to that effect, re in the warrant :—Held, that such warrant prima facie evidence of the order. *Spra Anderson*, 23 C. P. 152.

See *In re McKinnon*, 2 L. J. N. S. 324, p.

VII. Warrant of Distress.

Where a statute gives justices of the p power to make by-laws and impose penalti their infraction, they cannot, unless they expressly authorized by the statute, levy penalties by distress. *Kirkpatrick* v. *Ack* T. 7 Will. IV.

On a demurrer to an avowry in replevin fying under a conviction for selling spiri liquors without license, and a distress wa issued thereon :—Held, unnecessary to a that the warrant was under seal, or that it directed to any one, it being averred to have duly issued and delivered for execution to d dant M., the constable :—Held, also, tha avowry set out in the case, sufficiently sh that defendant, M., was a constable, and th was delivered to him for execution. *Re Mc Whinnie*, 27 Q. B. 289.

It was held no objection to a warrant of tress under a conviction, that the cost conveying the defendants to gaol, in the of imprisonment in default of distress, specified. *Ib.*

Held, also, that the mention in the warra the $1 costs of conveying defendants to could not vitiate, for it authorized a d only for the penalty and costs of conviction

Held, That under 36 Vict. c. 48, s. where a person is ordered to pay a fine, default to be imprisoned, a distress must for the fine and be returned unsatisfied he can be imprisoned. *Regina* v. *Blakley* R. 244.—C. L. Chamb.—Galt.

See *Moffat* v. *Barnard*, 24 Q. B. 498, p.

...TIL PROTECTION IN EXECUTION OF DUTY.

1. *Principles of Immunity.*

...he plaintiff was arrested upon a warrant is-...d by defendant, a magistrate, and brought ...e him. Defendant examined the plaintiff, ...took no evidence, said he could not bail, and ...mitted the plaintiff to gaol, on a warrant ...ing that he was charged before him on the ...of W. H. with stealing. The plaintiff did ...k to be heard or to give evidence:—Held, ...defendant was liable in trespass; for, as-...g that the plaintiff was properly brought ...e him, yet the commitment without ap-...ance of the prosecentor, or examination of ...witness, or of the plaintiff according to the ...or any legal confession, was an act either ...without or in excess of jurisdiction, and ...e within the second clause of C. S. U. ...126. That section is to be confined to cases ...*which the act by which the plaintiff is injured* ...act in excess of jurisdiction; but the magis-...'s protection depends not on jurisdiction ...the subject matter, but over the individual ...ested. *Connors* v. *Darling*, 23 Q. B. 541.

...falsity of a charge cannot give a cause of ...against a magistrate who acts upon the ...ption and belief of its truth; and an alle-...that he acted without any just cause upon ...charge, but not charging malice, means ...that the charge being false he had no just ... *Sprung* v. *Anderson*, 23 C. P. 152.

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2. *Acting Within Jurisdiction.*

...e a conviction is quashed, case will not ...against a magistrate without proof of want of ...able or probable cause and malice. *Bur-...v. Gorham*, 1 C. P. 358.

...e A. went before the defendants, two jus-...and swore that from circumstances men-...d he was afraid that the plaintiff would ...w his property; and he therefore prayed ...e might be bound over to keep the peace. ...dants thereupon, on plaintiff's refusal to ...sureties, committed him to gaol:—Held, ...the 16 Vict. c. 180, clearly applied, and ...ore only a special action on the case could ...ntained. *Fullarton* v. *Switzer et al*, 13 Q. ...

...wing to a mistake in the crown office, a rule ...turn the writ of certiorari, and afterwards ...h for an attachment, issued, although a re-...had in fact been filed. The conviction was ...ed, but more than six months having thus ...sed since the conviction, the court were ...d to allow process to issue against the justice ...e illegal conviction as of a previous term, ...e application was refused. Quære, whether ...ix months could be held to run only from ...me of quashing the conviction. *In re Joice*, ... B. 197.

...ion for malicious prosecution. Defendant ...J. P., and as such acquired his knowledge ...e circumstances on which he preferred the ...e against defendant:—Held, clearly no ...d for requiring that express malice should ...ved against him. *Orr* v. *Spooner*, 19 Q. ...

...fendant, as a justice, issued a warrant ...t the plaintiff, upon a complaint for de-taining the clothes of one K. The plaintiff, on being told by the constable that he had the warrant, went alone to defendant, heard the evidence, was allowed to go away without giving bail, and returned the next day, when he was discharged:—Held, that no imprisonment was proved; and that defendant, having jurisdiction over the subject matter of the complaint, was not liable in trespass, even if the information were insufficient in point of form. *Thorpe* v. *Oliver*, 20 Q. B. 264.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling spirituous liquors without license:—Held, 1. that under C. S. U. C. c. 126, s. 3, trespass will not lie against a magistrate until the conviction complained of has been quashed; 2. That the conviction never having been sealed, it was not necessary to have it quashed before action; 4. That as only one wrong was complained of by plaintiff, he could not recover on the two separate counts in trespass and case, but must elect on which to enter his verdict. Semble, that he could not recover on the first count because the magistrate had jurisdiction, &c., and by the statute the action should be in case. *Haacke* v. *Adamson*, 14 C. P. 201.

Defendant, a justice, issued his warrant under C. S. C. c. 103, s. 67, to commit the plaintiff for thirty days for nonpayment of the costs of an appeal to the Quarter Sessions, unless such sum and all costs of the distress and commitment and conveying the plaintiff to gaol should be sooner paid, but he omitted to state in the warrant the amount of costs of the distress and commitment. The plaintiff having been committed on this warrant, sued defendant for false imprisonment:—Held, that though it was the duty of the justice to ascertain and state such amount, yet the omission to do so, though it might have occasioned the plaintiff's discharge, did not shew either a want or an excess of jurisdiction, but rather an irregular exercise of it; and that defendant therefore was not liable in trespass. Held, also, that the determination as to these costs was clearly a judicial, and not merely a ministerial act. *Dickson* v. *Crabb*, 24 Q. B. 494.

Defendant, a justice of the peace, convicted the plaintiff under C. S. U. C. c. 92, s. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to the defendant, and a boy living with his parents, and having no property:—Held, that the action would not lie, for defendant was authorized by C. S. C. c. 103, s. 59, to commit in the first instance, that statute applying to this conviction, and the warrant was sufficient, as it follows the form given by the act, which contains no recital of the ground for not first issuing a distress. Quære, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress. *Moffat* v. *Barnard*, 24 Q. B. 498.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount:—Held, following Dickson *v.* Crabb, 24 Q. B. 494, that this would not make defendant a trespasser. *Ib.*

Where the defendant, a justice of the peace, had laid an information before another magistrate, by whom the plaintiff was arrested on a warrant which turned out to have been illegal or void, and imprisoned, the defendant and the other magistrate having refused to admit him to bail :—Held, in trespass by the plaintiff against defendant, charging him with the arrest and imprisonment, that in the absence of any other evidence, the mere refusal by defendant to admit the plaintiff to bail was no evidence that the defendant authorized the illegal arrest and imprisonment of the plaintiff, and a nonsuit was ordered. *McKinley* v. *Munsie*, 15 C. P. 230.

The plaintiff was brought before defendant and another, a magistrate, on the 2nd of January, 1875, under a summons issued by defendant, on an information that he did, on, &c., "obtain by false pretences from complainant the sum of five dollars contrary to law," omitting the words "with intent to defraud," which by the statute is made part of the offence—32 & 33 Vict. c. 21, s. 93, D. The prosecutor and another witness, T., were examined, and their statements shewed that the plaintiff sold some wood to the prosecutor on a certain lot, telling him that some other parties had drawn it out, but that it was his, and if there was any trouble about it he would stand between the prosecutor and all danger : that the prosecutor paid him $5 on account, and was afterwards prevented from drawing away the wood by one W., to whom T. swore it belonged ; and that the plaintiff had offered to return the $5, which the prosecutor refused because the plaintiff would allow nothing for the use of his team. W. was absent, and the prosecutor asked for an adjournment, which was granted until the 5th. Defendant offered to take bail for plaintiff's appearance then, but the paintiff refused to give it, saying "Send me to gaol," and defendant ordered the constable to take him into custody. The constable thereupon put him in the lock-up, which was not a proper place for the purpose, being very cold and uncomfortable, where he remained until the 5th. This constable, who acted as keeper of the lock up, said defendant knew that prisoners remanded were confined there. On the 5th, W. appeared and was examined as a witness. The case was adjourned until the 7th, the plaintiff giving bail for his appearance then ; and on that day the magistrate, having in the meantime consulted the county attorney, dismissed the charge. The plaintiff having sued defendant for malicious arrest and for false imprisonment :—Held, that there was no cause of action on either ground, and a nonsuit was ordered ; for 1. The defendant had jurisdiction, for the information might by intendment be read as charging the statutable offence; and if not, the plaintiff should have taken the objection before the magistrate, when the information might have been amended and re-sworn ; and he was precluded from raising it in this action. 2. There was, upon the evidence, no want of reasonable and probable cause for what defendant had done ; for though what the prosecutor complained of was a breach of contract and the subject of an action, it might also support a criminal charge, and the remand under the circumstances was authorized ; and that there was no proof of malice :—Held, also, that the defendant could not be held liable for the plaintiff's sufferings, caused by the cond of the lock-up, for he had remanded him a giving no express directions to put him th *Crawford* v. *Beattie*, 39 Q. B. 13.

A count alleging that defendants were jus of the peace, &c., and assuming to act as justices, but without any jurisdiction or au rity in that behalf, caused a distress warra be issued against the plaintiff's goods for which they had adjudged the plaintiff to under and by virtue of a certain convi made by them without any jurisdiction, caused the plaintiff's goods to be sold th under ; which conviction was afterwards quashed on application of the plaintiff to court, whereby the plaintiff lost the use value of his goods, and was put to costs in ting the conviction quashed :—Held, a com trespass ; and that the plaintiff was pro nonsuited, the cause of action being an act by defendants in the execution of their with respect to matters within their jurisdic Quære, if the plaintiff had been entitled to ceed in trespass, whether he could have recov the costs of quashing the conviction as dam *Hallett* v. *Wilmot et al.*, Q. B. M. T. 1876. yet reported.

3. *Acting Without or in Excess of Jurisdict*

When magistrates commit a person up general charge of felony given upon oath, the not be liable to an action of trespass, althou facts sworn to in order to substantiate that c may not in point of law support it. *Gard Burwell*, Tay. 189.

A conviction, bad on the face of it, alth not quashed:—Held, no defence to an actio trespass. *Briggs* v. *Spilsbury*, Tay. 440.

Omitting to state the conviction in his wa of commitment will not subject a justice action for false imprisonment, provided the viction be proved. *Whelan* v. *Stevens*, Tay.

It is a good count in trespass against a ju on motion in arrest of judgment, that he force and arms issued his warrant, where caused the plaintiff to be wrongfully impri without any reasonable cause, until the pl gave his note to A. to obtain his disch *Brennan* v. *Hatelie*, 6 O. S. 308.

Where an act passed by the prov legislature, was subsequently disallowed, while in force the plaintiff had been conv under it by defendants, and a warrant wa perly issued by defendants for his arrest imprisonment, which, however, was not exe until after the disallowance of the act was lished in the *Gazette* :—Held, that as the co tion and warrant were legal, the defen could not be considered as trespassers. *G* v. *Lawrason*, 6 O. S. 319.

A conviction not set aside protects a trate against an action of trespass. *G Devenish*, 6 Q. B. 260.

One R. laid an information before G., a magistrate, stating that one P. G., the ke a tavern duly licensed, kept a disorderly &c., and prayed for a warrant against th P. G., and all others found and concerned house. A warrant was accordingly gran

directed to all constables, commanding them apprehend P. G. "and all others found and harmed in her house to answer," &c. Under the defendants, except R. and G., went to house and arrested P. G. and several others, them the plaintiff, a traveller and a guest the house, there being then no disturbance in house:—Held, that the arrest of the plaintiff illegal, there being no charge against him; that R., having prayed process only against , was not liable; and a nonsuit was set aside all the other defendants. *Cleland* v. *Robin- et al.*, 11 C. P. 416.

ttle supposed to have been stolen are taken , a constable, to B.; an innkeeper, to take d. After some time B., wishing to be paid e keep, applies to C., a magistrate, who nothing to do with the original caption, for ctions. C. tells him to sell the cattle and fy his claim, which B. does. The owner of cattle sues C. in trespass:—Held, that ot, and not trespass, should have been the n. Semble, that under the circumstance B., nkeeper, would not be liable to the owner espass. *Marsh* v. *Boulton*, 4 Q. B. 354.

here justices have a general jurisdiction over ubject matter upon which they have issued rrant of commitment to the gaoler, though proceedings be erroneous, the gaoler is not ble. Secus, if the proceedings be wholly void. *ason* v. *Adams*, 5 Q. B. 194.

efendant M., a magistrate, gave a warrant defendant K., a constable, on the 23rd of mber, under sec. 200 of the Division Courts to attach the goods of G. in the possession the plaintiff and others, who were about to ve. Under this certain goods were seized, n action was brought against the constable, magistrate, and the creditor. The magis- having issued such warrant without the rit required:—Held, that he had no juris- tion whatever, and was therefore a trespasser. first seizure took place on the 23rd of Sep- er, but the goods were then left with the ni, on his giving a receipt, and on the 25th were taken away by defendants K. and reditor. The notice of action was for the on the 25th. It was left to the jury to when the actual seizure took place, and they d that it was on the 25th:—Held, that this new trespass, for which the magistrate was le and a verdict against him was upheld. *v. McCarty et al.*, 22 Q. B. 568.

e warrant committed the plaintiff also for harges of conveying him to gaol, but omit- to state the amount:—Held, following Dick- n Crabb, 24 Q. B. 494, that this would not e defendant a trespasser. *Moffat* v. *Bar-* 24 Q. B. 498.

here defendant, sitting alone as a magis- convicted the plaintiff for selling liquor out a license in a township where a temper- nce by-law was in operation:—Held, that he liable in trespass, for the temperance act jurisdiction only to two justices:—Held, ever, that the conviction, though void, must ashed under C. S. U. C. c. 126, s. 3, before action would lie. *Graham* v. *McArthur*, B. 478.

efendant, a justice on the 5th May, 1869, is- his warrant against the plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant the plaintiff was arrested and brought before him:—Held, that defendant was liable in trespass, as without information on oath he had no jurisdiction over the person of plaintiff. Defendant, on 11th May, caused plaintiff to be brought before him a second time on said warrant, when there was no prosecutor, no examination of witnesses, and no confession, and committed plaintiff for trial: Held, following Connors *v.* Darling, 23 Q. B. 541, that it was a new act of trespass, for which a second count was well laid in the declaration. At the sessions defendant appeared as prosecutor, when plaintiff was tried and acquitted:—Held, that a count for malicious prosecution could be added for this:—Held, also, that a warrant, though good on its face, will not protect a justice under C. S. U. C. c. 126, s. 2, unless issued upon a proper information. *Appleton* v. *Lepper*, 20 C. P. 138.

A magistrate having entertained a case under the Master and Servant's Act, C. S. U. C. c. 75, as amended by 29 Vict. c. 33, D., and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute:—Held, that the jury were warranted in finding that he did not bonâ fide believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action. *Cummins* v. *Moore*, 37 Q. B. 130.

The plaintiff had laid information before the defendant, a magistrate, against G., for an assault, but afterwards decided not to proceed further. Defendant issued a summons, addressed to her, reciting the information, and requiring her presence on a day named, then and there to testify, &c., but she said she did not wish to go on; and on the same day she was arrested under a warrant issued by defendant, which recited that she had refused to appear before him, and commanded her arrest "to answer to the charge, and to be further dealt with according to law." She was brought before defendant but refused to go on with the charge, and a friend paid the costs for her, when she was discharged. These proceedings were taken, the defendant said, in order to get the constable's fees:—Held, that defendant was liable in trespass, for the plaintiff was not bound to proceed with the charge; and defendant had no right to issue the summons under s. 16 of 32 & 33 Vict. c. 31, or the warrant under sec. 17. *Cross* v. *Wilcox*, 39 Q. B. 187.

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4. *Tender of Amends.*

Where a magistrate is sued in trespass for an alleged illegal proceeding, under the 4 & 5 Vict. c. 26, he may give in evidence a tender of amends, under the plea of the general issue. *Moore* v. *Holditch et al.*, 7 Q. B. 207.

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5. *Damages.*

Trespass against a magistrate for seizing and selling plaintiff's goods. At the trial evidence was given to shew that the plaintiff had been

guilty of the offence, but such evidence was offered and received only in mitigation of damages. The provisions of 16 Vict. c. 180, s. 12, which in such a case limits the damages to two pence, and deprives the plaintiff of costs, were overlooked, and the plaintiff obtained a verdict for full damages:—Held, that there must be a new trial without costs. Held, also, that the section is not confined to actions in which the justices had jurisdiction. *Bross* v. *Huber*, 15 Q. B. 625.

Action against a magistrate for wrongful arrest and imprisonment, upon a conviction for selling liquors without license. The first count was in trespass, the second in case. At the trial the offence of which the plaintiff was convicted, was fully proved:—Held, that on either count the damages must be reduced to three cents, under C. S. U. C. c. 126, s. 17, as plaintiff was proved "guilty of the offence of which he was convicted," and this applies as well to trespass as to case. *Haxcke* v. *Adamson*, 14 C. P. 201.

The warrant of commitment directed the plaintiff to be kept at hard labour, which the temperance act, under which the conviction took place, does not authorize. The turnkey swore that the plaintiff "did no hard work in gaol:" —Held, not sufficient to negative that he was put to some compulsory work, so as to bring defendant within section 17 of C. S. U. C. c. 126, which requires it be proved that defendant had undergone no greater punishment than that assigned by law, to the offence of which he was convicted. *Graham* v. *McArthur*, 25 Q. B. 478.

In an action against two justices for one act of imprisonment, charged in one count as a trespass, and in another as done maliciously, the jury found $800 against one defendant, and $400 against the other. Semble, that the damages could not be thus severed; but Held, no ground for a new trial, as the finding might be treated as a verdict for $800 against one defendant, the other being let go free by the plaintiff. Quære, as to the proper mode of entering the judgment. One of the defendants having used insulting expressions to the plaintiff during the examination:—Held, no misdirection to tell the jury that they were at liberty to give exemplary or vindictive damages; and that the verdict was not excessive. *Clissold* v. *Machell et al.*, 25 Q. B. 80; *S. C.*, in appeal, 26 Q. B. 422.

Held, that upon the evidence given in this case, a jury might assess several damages on each of the three counts, the two first being for assault and imprisonment on different days, and the third for malicious prosecution. *Appleton* v. *Lepper*, 20 C. P. 138.

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6. *Costs.*

On the investigation of a charge under the Petty Trespass Act, 4 Will. IV. c. 4, before magistrates, they committed the plaintiff for contempt, and the plaintiff having sued them for false imprisonment recovered:—Held, that the action did not arise in consequence of anything done by the magistrates under the act, and therefore a certificate under the 21st section was not necessary to entitle the plaintiff to his costs. *Armour* v. *Boswell et al.*, 6 O. S. 450.

Held, that the facts of this case were suc
to entitle defendant to the protection affo
by 4 & 5 Vict. c. 26; and that the privile
tended by that statute to justices, as reg
exemption from costs, are not cancelled by
later act 14 & 15 Vict. c. 54. *Keeley et a
Raile, Finlay* v. *Raile*, 9 Q. B. 666.

Two actions were brought against a justi
trespass and false imprisonment. On the
of August, 1851, a verdict for the plaintiff
found in one case of £2 10s., and in the oth
1s:—Held, that the 14 & 15 Vict. c. 54, ap
and that the plaintiff was entitled to his full
in both suits. *Krely* v. *Raile, Finlay* v.
2 C. L. Chamb. 155.—Draper.

Where a plaintiff was restricted to the r
ery of only three cents damages, he was Hel
to be entitled to any costs. Held, also, th
18th and 19th sections of C. S. U. C. c.
taken together, must be limited "to any
action" not provided for in section 17 of the
act. Held, also, that no one can have
taxed to him who did not incur costs. *H
v. Adamson*, 10 L. J. 270.—C. L. Cha
Draper.

The issuing of a warrant of commitme
non-payment of costs of an appeal, under
33 Vict. c. 31, s. 75, is discretionary, not
pulsory upon a justice; and the court will
fore on this ground, as well as upon the g
that the party sought to be committed ha
been made a party to the application, re
mandamus to issue it, if this be the proper
dy, which in this case it was held not
but that the application should have been
C. S. U. C. c. 126, s. 8. *Re Delaney* v.
nabb, 21 C. P. 563.—C. L. Chamb.—Drap

IX. Actions against Magistrates.

In trespass against a magistrate for fal
prisonment and seizing and selling good
chattels, where he suffers judgment by d
it is unnecessary for the plaintiff to prov
he gave notice of action or commence
suit within six months. *Mills* v. *Mon*
O. S. 383.

The admission by a constable, sued in tr
with two justices, that a paper produced
trial was a copy of the warrant under wh
committed the trespass, is not sufficient ev
as against the justice to entitle the const
claim an acquittal under the sixth section
24 Geo. III. c. 44. *Kalar* v. *Cornwall a*
Q. B. 168.

Held, before the 16 Vict. c. 179, that
trates were not liable for refusing to a
bail on a charge of misdemeanour, withou
of malice. *Conroy* v. *McKenny*, 11 Q. B.

Where in an application to set aside p
ings (as in the case of an action against a
of the peace, for acts done under a co
which has not been quashed) the fact
upon would be a pleadable bar to the
laches will not be imputed to defendant
he does not apply before entering an appe
though it might if he waited until a
expiration of the time for pleading had e
Donelly v. *Tegart*, 5 P. R. 225.—C. L.
—Dalton, *C. C. & P.*

plaintiff produced a warrant for his arrest, by defendant, a J. P., for not finding to the peace, in pursuance of an order by defendant:—Held, that under C. S. U. 126, sec. 3, no action would lie against the strate for anything done under the order, or the warrant to procure the appearance of until the same was quashed. *Sprung Jackson*, 23 C. P. 152.

to quashing conviction or order before See *McDonald* v. *Stuckey*, 31 Q. B. 577.

espass against a justice of the peace. The ntiff in a case brought before him by a plainant who alleged that the plaintiff had a sheep of his off the road and sheared it, kept the wool, made an order which was ently embodied in a document purport- be a conviction, which stated that the "unlawfully took a certain ewe from , a flock on the 4th of June last, at Picker- nal having heard the matter of the said plaint, I do adjudge that the said ewe and is the property of the said W., and I order dge the said Jones be discharged there- upon giving up the said ewe and fleece to said W. and paying the costs of this suit." osts were fixed at $20, and the paper con- the usual distress clause, but the warrant mit in case of default, was struck out:— on motion for nonsuit, that, although the ashed conviction was clearly unsustainable, said nevertheless have been quashed before e brought. *Jones* v. *Holden*, 13 L. J. 19—Hartnell.

X. Miscellaneous Cases.

party suspected of stealing a horse was ght up on a warrant before a magistrate, estigated and dismissed the charge. The ebel individual pretended no right to the and the magistrate, after dismissing the restored the horse to its supposed owner prosecutor), but before doing so, took a of indemnity from the owner:—Held, that bond was not necessarily void, as contrary e general policy of the law. *Ballard* v. 3 Q. B. 317.

an action for assault and battery, a convic- the same assault under the Petty Tres- ct must be pleaded, and cannot be given dence under the general issue. *Heney* v. See T. T. 1 & 2 Vict.

JUSTIFICATION.

For Bail—*See* Bail.

For Libel and Slander—*See* Defamation.

For Trespasses—*See* Trespass.

For Conversion—*See* Trover.

Under Municipal By-Laws Regarding Highways—*See* Way.

KIDNAPPING.

See Criminal Law.

KILLING.

See Criminal Law.

KING'S BENCH.

See Queen's Bench.

KING'S COLLEGE.

Right of King's College to recover for tuition given in "Upper Canada College" before and after the passing of 7 Will. IV. c. 16, 1837. *King's College* v. *Denison*, 5 Q. B. 203.

It is no objection to the right of King's College to sue for tuition given after the passing of the act 7 Will. IV. c. 16, in "Upper Canada College," that professors to "King's College" had not, during the time sued for, been appointed. *Ib.*

The plaintiffs, by the name of the Upper Canada College and Royal Grammar School, declared in covenant on an indenture made between the chancellor, president, and scholars of King's College and the defendant:—Held, on demurrer to the declaration, that the effect of the statutes 12 Vict. c. 82, and 13 & 14 Vict. c. 49, was to transfer the covenant from the University of King's College to the plaintiffs; and consequently gave them the right of property in the indenture declared on, and entitled them to recover thereon in the name used; and that proof that the covenant was made on behalf and for the benefit of the plaintiffs, would not be contradicting the deed or covenant. *The Principal of U. C. College and Royal Grammar School* v. *Boulton*, 2 C. P. 326.

KINGSTON BANK COMMISSIONERS.

Where in debt on an award made in favour of the Kingston Bank Commissioners, under the 10 Geo. IV. c. 7, the plaintiffs in their declaration set out an award that the defendant should pay £900, in bills or notes of the bank, or bank certificates, or orders for stock by a certain day; and assigned as a breach that the defendant had not paid in the terms of the award, but did not negative payment in money; the declaration was held bad on general demurrer. *Kingston Bank Commissioners* v. *Dalton*, E. T. 3 Vict.

KINGSTON, (CITY OF.)

Although the 9 Vict. c. 75, incorporating the city of Kingston, had been repealed, yet so long as no new assessment law was passed the same residence was a necessary qualification for an alderman of Kingston as formerly. *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 Q. B. 617; *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Chamb. 18.—Draper. *Regina ex rel. Bartliffe* v. *Shaw*, 2 C. L. Chamb. 153.—McLean.

KINGSTON MARINE RAILWAY COMPANY.

Under 1 Vict. c. 30, and 7 Vict. c. 16, the Kingston Marine R. W. Co. may give and re-

ceive promissory notes in the course of transacting their legitimate business. *Kingston Marine R. W. Co.* v. *Gwan*, 3 Q. B. 368.

In declaring upon such notes, the plaintiffs need not aver the consideration upon which they were received. *Ib.*

The omission of the words "value received" in a note, or the fact that a note is made payable at a certain time after date, affords no inference that such notes were taken in violation of the clause of the charter prohibiting the company from banking operations. *Ib.*

KINGSTON, (TOWNSHIP OF.)

Semble, that the eastern boundary line of lot 25 in the first concession of the township of Kingston, is a line drawn from the north-west to the south-east angle of said lot. Award of the boundary line commissioners set aside. *Murney* v. *Markland et al.*, 6 O. S. 220.

The eastern side line of lot 24 in the front or first concession of this township, cannot be run as it is described in the patent, or parallel to the western limit of the township, according to 59 Geo. III. ch. 14, because that would carry the concession beyond the line which was originally run as its eastern boundary. *Doe* d. *Stuart* v. *Forsyth*, 1 Q. B. 324.

LABOURERS.

A person hiring himself to work with his own team of oxen, is not within the British statutes for punishing labourers deserting their service. *Whelan* v. *Stevens*, Tay. 439.

LACHES.

I. In Application to refer Attorneys Bill—*See* Attorney and Solicitor.

II. In Presentment or Notice of Dishonour of Bills or Notes—*See* Bills of Exchange and Promissory Notes.

III. In Applying for Security for Costs—*See* Costs.

IV. In Appealing.

1. *From Superior Courts*—*See* Error and Appeal.
2. *From Master*—*See* Practice in Equity.

V. In Applications for Injunctions—*See* Injunction.

VI. In Applications to Set aside Judgments—*See* Judgment.

VII. In Applications to Redeem Mortgages *See* Mortgage.

VIII. In Applications to quash By-laws—*See* Municipal Corporations — Public Schools.

IX. In Performance of Conditions for New Trial—*See* New Trial.

X. Effect of, on applications for New Trial—*See* New Trial.

XI. In Moving against Irregularity—*See* Practice at Law.

XII. In Prosecution of Bill in Equity—Practice in Equity.

XIII. On Part of Principal, Entitling Surety to Discharge—*See* Principal and Surety.

XIV. In Executing Writs—*See* Sheriff.

XV. In Enforcing Specific Performance of Sale of Land—*See* Specific Performance.

Plaintiff in ejectment, though an infant, in person. Defendant became aware of the fancy at the first trial, but took no objection until after the second trial, when a verdict given against him for non-appearance, then moved to set aside the proceeding on ground, and for want of proper notice of —Held, that defendant was precluded by delay, and the court refused to interfere. v. *Eagan*, 3 P. R. 16—Q. B.

Some nine years after defendant had obtained his discharge in insolvency, the plaintiff scheduled creditor, issued a fi. fa. against fendant's goods on a judgment recovered before the discharge, contending that the discharge void, because defendant had, previous to assignment, fraudulently allowed a judgment be recovered against him and his assets to and also because, his assets being so taken, was nothing at the time of the assignment which it could operate. It appeared, however that the plaintiff consented to the assignment and did not appeal from the order of discharge nor did he, when the discharge was being ted, raise the objection of no assets:—Held the fi. fa. goods must be set aside; and the plaintiffs remedy, if any, was by action on judgment. Semble, however, that the plaintiff by his conduct and the lapse of time, was cluded. *Parke* v *Day*, 24 C. P. 619.

The delay in moving to have an award ted back for correction from the 21st of April when the award was made, until the 4th December, was held sufficiently accounted for by loss of the nisi prius record and subsequent *Stewart* v. *Beattie*, 37 Q. B. 538.—A. Wilson ting in vacation.

Delay in filing a bill to enforce a dissolved agreement for a partnership, was considered sufficiently accounted for by evidence of the answered proposal for an arbitration, and correspondence between the plaintiff and his tors before suit. *Haggart* v. *Allan*, 4 Ch.

A defendant in ejectment filed a bill to the action, alleging that the deed under the plaintiff claimed was a forgery. The was dated about fifty years before the filed, and the four witnesses to it were dead fore the validity was impeached in any The court dismissed the bill with costs. *McMichael*, 5 Chy. 646.

A creditor brought an action against debtor to recover his demand, which was by an arrangement made in October, 18

assigned to the creditor the house and occupied by the debtor, in satisfaction debt, and in consideration of a further sum him, and for two years he continued to the rent of the premises, when the credi- obtained possession by ejectment. In De- 1855, the debtor filed his bill setting up the transaction was a mortgage, alleging poverty had, in the meantime, prevent- from enforcing his claim. The court, inclining to dismiss the bill, directed an to the question of mortgage or no mort- *Watson* v. *Munro*, 5 Chy. 662.

defendants set up a defence to a bill, if tenable, would have formed sufficient for their having taken steps to set aside transaction, which it was now sought to en- but had not done so, although twelve years elapsed since the act was done which they knew, and which it was shewn they had all been aware of, the court ordered them the costs of the suit. *Miller* v. *Ostrander*, 349.

nty is no excuse for delay in making an ation to the court, as in such a case the an apply in forma pauperis. *Harris* v. 1 Chy. Chamb. 229.—VanKoughnet.

court in this case held the plaintiff en- to redeem certain land, on payment of the of the defendant's advances, although years had elapsed before the plaintiff filed impeaching the transaction—the excuse for the delay being his poverty: it ap- that the parties could be restored to their positions without loss to the defendants. v. *Keenan*, 14 Chy. 214.

incorporated trading companies agreed by under their corporate seals, the one to con- certain works for the other, which on were to be inspected by engineers on each of the contracting parties, and engineers approving of the works and them as completed, they were to be as soon as completed by the party for they were done, who were to be for ever from denying or contesting the due and execution, completion, and acceptance of The parties to perform the work as they alleged, completed it, notified thereof, calling upon them to appoint neer, as stipulated for, which request was with, and subsequently a portion works contracted for (a bridge) was de- On a bill filed for the purpose of com- an acceptance of the works, the Court that the delay of one of the contracting until after such destruction, to name an as had been stipulated for by the agree- did not preclude the other from obtaining ction of the works; but that such in- and approval must, under the circum- be had by a reference to the master.— chinet, C., dubitante. *The Great Western* v. *The Desjardins Canal Co.*, 9 Chy. & A. 330.

delay of a party to enforce his claim at affords no ground for this court interfering legal right, although it might be a good were he seeking specific performance of a here. *Allan* v. *Newman*, 13 Chy. 364.

was a lapse of fourteen years after the conveyance before the bill for compen- sation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own arrangement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit. *Forsyth* v. *Johnson*, 14 Chy. 639.

A purchaser at a sale under order of this court was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he was in no way responsible, such delay however not being caused by any fault of the vendors, the condition of sale stipulating for the payment of interest from the day of sale. *In re Thompson—Biggar* v. *Dickson*, 2 Chy. Chamb. 196.—Mowat.

Semble, in the absence of such stipulation in the conditions of sale the court would relieve the purchaser from the payment of interest when the delay was not of his causing. Such stipulation in the conditions of sale is not to be approved of. *Ib.*

Three months before the filing of a bill respecting partnership accounts, the accounts had been furnished, in which interest and commission had been charged, and none of the partners had before suit suggested their objections to these charges:—Held, that they were not precluded by the delay from objecting thereto in the suit. *Jardine* v. *Hope*, 19 Chy. 76.

The goods of the testator were, by arrangement between the executors, allowed to be taken by one of themselves at the price of $515, after the same had been valued by appraisers at $733.69. On an appeal from the master's report, charging the executors with the lesser sum, it was shewn that the appraised value was reasonable, and the court in 1874, ordered the executors to be charged with that amount, and with interest from the time of the appraisement in 1857; the lapse of time not being considered sufficient to bar the right to interest. *Cudney* v. *Cudney*, 21 Chy. 153.

Executors with a discretionary power to sell their testator's real estate:—Held, not liable, under the circumstances, for loss arising from deferring a sale. But where they kept the proceeds of a sale in their hands, without paying it into court, pending the suit, they were charged with interest. *McMillan* v. *McMillan*, 21 Chy. 369.

Executors were empowered to sell the real estate, but the widow refused to bar her dower, which the executors were advised by counsel she was entitled to claim. In fact, according to the terms of will, she was bound to elect, but the executors honestly believed she was entitled to dower as well as the provision under the will, and refrained from selling when they could have done so to advantage:—Held, that the executors were not responsible for any loss sustained by reason of the delay in selling. *Ib.*

By a deed of gift from a father to his daughter it was intended to convey a life estate to the daughter with remainder to her issue, but through the want of skill of the person preparing the deed, the same conveyed the fee simple to the daughter, whose interest was afterwards sold under execution, the sheriff at the time of sale distinctly stating in the presence and hearing of the purchaser that the interest he was selling was only an estate for life of the defendant in

the writ. The purchaser afterwards claimed the fee in the lands under the terms of the deed of gift and conveyance from the sheriff; whereupon, and upwards of fifteen years after the sheriff's sale, a bill was filed by the children of the daughter, seeking to have both the deeds rectified in accordance with the true intention of the grantor, to which the defendant demurred, on the ground that the plaintiffs had not shewn any interest in the land:—Held, that the plaintiffs, though volunteers, had such an interest as entitled them to have the deeds rectified; and that their delay in filing the bill was not such as, under the circumstances, should deprive them of their right to relief on the ground of laches. *Calvert* v. *Linley*, 21 Chy. 470.

LADING (BILLS OF).

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

LAKE SUPERIOR NAVIGATION COMPANY.

Defendant subscribed for certain shares of plaintiffs' stock, an incorporated company under 27 & 28 Vict. c. 23, and bound himself to pay as required by the board of directors. Somewhat over half the capital stock was subscribed for in this way:—Held, no answer to plaintiffs' call on defendant for the amount of his stock, that there had been no allotment of shares, and defendant was not therefore a shareholder: Held, also, that plaintiffs were entitled to call in all the unpaid stock at one time, as the Act did not prevent their so doing. *Lake Superior Navigation Co.* v. *Morrison*, 22 C. P. 217.

The statute provided for the issue of letters patent on half the capital being subscribed, though no express provision was made as to when the company should commence business; but the plaintiffs had commenced business with defendant's full knowledge, and he was, in fact, elected and acted as a director and never resigned his position as such:—Held, that he could not deny his liability to pay his stock on the ground that all the stock must be subscribed before calls could be made; and that the directors were warranted by the act in commencing business, one-half the stock being subscribed, and in making the necessary calls therefor. *Ib.*

LAND.

I. AWARDS RELATING TO—*See* ARBITRATION AND AWARD.

II. DESCRIPTION OF—*See* DEED—WILL.

III. EXECUTION AGAINST—*See* EXECUTION.

IV. EXECUTORS AND ADMINISTRATORS DEALING WITH—*See* EXECUTORS AND ADMINISTRATORS.

V. EFFECT OF JUDGMENTS—*See* JUDGMENT.

VI. SALE OF—*See* SALE OF LAND.

LANDLORD AND TENANT.

I. CONTRACTS FOR LEASES.
1. *Generally*, 2010.
2. *Creation of Relationship*, 2011.
3. *Alteration and Cancellation* DEED.
4. *Tenancy of Mortgagor before default*—*See* MORTGAGE.
5. *Specific Performance of*—*See* SPECIFIC PERFORMANCE.

II. LEASES OR AGREEMENTS MERELY
1. *Generally*, 2014.
2. *Under 12 Vict. c. 74, s. 4*, 201
3. *Under 14 & 15 Vict. c. 3, C. S. C. c. 90*, 2017.

III. OPERATION OF THE STATUTE OF FRA 2017.

IV. CONSTRUCTION & OPERATION OF LEA
1. *Leases under the Short Forms* 2019.
2. *Particular Words*, 2020.
3. *Right to Possession* 2020
4. *Commencement and Duratio Term*, 2022.
5. *Option to Purchase*, 2025.
6. *Covenant for Quiet Enjoyment*,
7. *Covenant to give up Possession*,
8. *Implied Covenants*, 2030.
9. *Parol Explanation of Le* EVIDENCE.
10. *Ferries*—*See* FERRY.
11. *Oil lands*—*See* OIL LANDS.
12. *Mines*—*See* MINES AND MI LANDS.
13. *Rectory and Glebe Lands* CHURCHES.

V. LEASES FOR LIFE *See* ESTATE.

VI. LEASES BY PARTICULAR PERSONS.
1. *Tenants in Tail*, 2030.
2. *Corporations*—*See* CORPORA
3. *Clergy*—*See* CHURCHES.
4. *Husband and Wife*—*See* HU AND WIFE.
5. *Infants*—*See* INFANTS.
6. *Mortgagors and Mortgage* MORTGAGE.
7. *Sequestrators*—*See* SEQUE TION.

VII. ENTRY OF LESSEE, 2030.

VIII. ASSIGNMENT.
1. *Liability of Assignee*, 2030.
2. *Liability of Lessee*, 2033.
3. *Rights of Assignee*, 2033.
4. *Other Cases*, 2033.

IX. FORFEITURE.
1. *By Disclaimer*, 2034.
2. *By Non-payment of Rent*,
3. *Waiver*, 2037.
4. *Other Cases*, 2038.

X. Surrender.
1. *By Operation of Law*, 2040.
2. *Other Cases*, 2045.
XI. Tenances from Year to Year, 2045.
XII. Monthly Tenancies, 2047.
XIII. Tenancy at Will—*See* Estate.
XIV. Renewal of Leases, 2048.
XV. Rent.
1. *Time for Payment*, 2051.
2. *Payment in Advance*, 2054.
3. *Payable in Kind*, 2054.
4. *Apportionment*, 2056.
5. *Abatement*, 2056.
6. *Premises Uninhabitable*, 2058.
7. *Premises Burnt*, 2058.
8. *Eviction or Expulsion*, 2061.
9. *Payment or Tender of Rent*, 2064.
10. *Set-off against Rent*, 2065.
11. *Other Cases*, 2065.
12. *Attachment of*—*See* Attachment of Debts.
13. *Preferential claim for in Insolvency*—*See* Bankruptcy and Insolvency.
14. *Rights of Mortgagees to Receive and Liability to Account for*—*See* Mortgage.
15. *Rent Charge*—*See* Rent Charge.
16. *Actions against Sheriff for Selling without Paying Rent*—*See* Sheriff.
XVI. Rates and Taxes, 2067.
XVII. Contracts Relative to Repairs or Building, 2069.
XVIII. Compensation for Improvements, 2074.
XIX. Crops and Emblements, 2075.
XX. Contracts against Assignment, 2076.
XXI. Other Conditions and Agreements in Leases, 2078.
XXII. Right of Tenants to Cut Wood, Land, 2080.
XXIII. Fixtures—*See* Fixtures.
XXIV. Notice to Quit and Demand of Possession, 2080.
XXV. Actions and Proceedings by Landlord.
1. *Covenant.*
(a) *Pleading*, 2081.
(b) *Damages*, 2083.
2. *Trespass*, 2084.
3. *Overholding Tenants.*
(a) *Under 4 Will. IV. c. 1, C. S. U. C. c. 27*, 2084.
(b) *Under 27 & 28 Vict. c. 30*, 2086.
(c) *Under 31 Vict. c. 26, O.*, 2086.
4. *Other Cases*, 2087.
5. *Distress*—*See* Distress.
6. *Fraudulent Removal*—*See* Distress.
7. *Ejectment*—*See* Ejectment.
8. *Mesne Profits*—*See* Ejectment.
9. *Pleas to Avowries of Distress for Rent*—*See* Replevin.
10. *Use and Occupation*—*See* Use and Occupation.
XXVI. Tenant's Power to Dispute Title, 2087.
XXVII. Actions against Landlord.
1. *Trespass*, 2091.
2. *Appearance and Defence by Landlord in Ejectment*—*See* Ejectment.
3. *Other Actions*, 2092.
XXVIII. Liability for Nuisances, 2093.
XXIX. Lease of Chattels, 2094.
XXX. Lease of Railways—*See* Railways and Railway Companies.
XXXI. Licenses—*See* Licenses.
XXXII. Miscellaneous Cases, 2096.
XXXIII. Sale of Leases under Execution—*See* Execution.
XXXIV. Compensation to Tenants for Lands taken by Railways—*See* Railways and Railway Companies.
XXXV. Effect of Sequestration as to Tenants—*See* Sequestration.

I. Contracts for Leases.

1. *Generally.*

A. by deed, in consideration of the rents, &c., on the part of B., to be paid and performed, agrees with B. that he would on or before the 1st day of October, upon request to him in writing by B., grant unto him a lease to be prepared or approved by B.'s counsel of certain premises, to hold for five years at a rent named; the said lease to contain certain covenants; and said A. thereby agreed to deliver to said B. on the 1st of October, 200,000 staves at the above premises, at a price specified, for which B. agreed to pay said A. on certain days; and it was thereby agreed that said lease should contain a covenant by said A. that he would deliver to said B. in each of the two succeeding years, staves, &c.; and further, that B. should furnish securities for the due performance of the above agreement on or before the 20th day of July:—Held, that a request by B. for, or the granting by A. of such lease, was not a condition precedent to the right of B. to have the staves delivered, the covenants to grant the lease and to deliver the staves being independent. *Leonard* v. *Wall*, 5 C. P. 9.

Declaration on an agreement, whereby defendant agreed to give and plaintiff to take a lease of an hotel in Toronto, in the occupation of the defendant, for ten years, from the 29th September, 1873, when possession was to be given; that defendant's license to sell liquors in the hotel was to be transferred at or before possession was given to plaintiff, who was to pay a proportionate part of the cost thereof for the unexpired part of

the year; and that all the furniture then in use in the hotel, and the stock of liquors, &c., were to be taken at a valuation, including the omnibus, &c., as well as certain other articles mentioned. The valuation to commence and be finished on or before the 29th September instant, a lease containing the usual covenants to be prepared and executed by both parties; and that for the due performance of the agreement the parties became bound to each other in $1000, to be paid by the party in default, as liquidated damages. The third and fourth counts, after setting out the agreement, averred that all conditions were fulfilled, (except the tender of the lease, which defendant waived by tendering a lease to plaintiff for execution, and except the valuation of the furniture and liquors, &c., which defendant wrongfully prevented; and that all things happened, &c., to entitle plaintiff to have said agreement performed, and the premises let to him as aforesaid; and the plaintiff has always been ready and willing to perform, and has performed his part of the said agreement, yet the defendant did not perform said agreement, nor (as stated in third count) pay the $1000, nor (as stated in the fourth count) let plaintiff into possession:—Held, both counts bad, for, among other reasons, no breach was specifically alleged; and it appeared that defendant tendered a lease for execution, to which no objection appeared, so that the plaintiff was in default in not executing it. Fifth plea, that the valuation of the furniture, &c., was not finished on or before the 29th of September, nor yet finished. The plaintiff replied that this was caused solely by the acts and misconduct of the defendant:—Held, plea, good, as the valuation was a condition precedent to the granting of the lease; and replication as a departure from the declaration. Sixth plea; that the plaintiff did not tender to the defendant any lease for execution, &c. Held, bad, as this was not incumbent on the plaintiff. Eighth plea, that the plaintiff did not execute the lease when tendered to him by defendant. Replication: that the plaintiff was ready and willing to do so, but was prevented by the acts and misconduct of defendant, &c. Held, bad, for not shewing how the plaintiff was thus hindered and prevented from executing a lease expressly tendered to him for execution. *Walker* v. *Kelly*, 24 C. P. 174.

The owner of an oil well lot, on which was also situate a blacksmith's shop, which was known not to be the property of the owner of the land, agreed to lease the oil well and lot for a term of years without any express reservation of the blacksmith's shop; the intended lessee insisted on obtaining a lease without any reservation of such shop, and filed a bill for that purpose. At the hearing the bill was dismissed, with costs. *Morris* v. *Kemp*, 13 Chy. 487.

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2. *Creation of Relationship.*

In trespass q. c. f. where the possession was disputed, defendant proved that the plaintiff's brother was in possession of the close to work it for the plaintiff on shares:—Held, that the agreement did not conclusively establish the relation of landlord and tenant, and shew the brother entitled to the exclusive possession, so as to prevent the plaintiff from maintaining trespass. *Ducksteder* v. *Baird*, 5 Q. B. 591.

A lease having been granted by plaint
one T., the defendant, before the ex
the term, without the plaintiff's know
struck out T.'s name and put his own op
to the seal, and entered and paid rent:—
that the plaintiff could not maintain cov
against the defendant on such lease. *La*
May, 14 Q. B. 47.

Where a party entered into possession
sowed a crop upon a verbal understanding th
should have the products thereof, but no
time for occupation was mentioned: Held
a sufficient tenancy was created to entitl
to such crop. *Mulherne* v. *Fortune*, 8 C. P

P., owning land, agreed with M. & B. t
should furnish a team of horses and the fa
implements required, together with the
and they agreed to do the work as he
direct, and harvest the grain raised; each
was to pay for the threshing of their resp
share of the grain; M. & B. were to keep
fences, and to draw and sow the plaster re
which P. was to furnish: they also agr
board all threshers engaged on the place,
all the root crops, and to house P.'s shar
to do the haying, and put two-thirds of
produce in the barn for P., and not to lea
place while their labour was required
the bargain to be for the summer and fa
cease when the fall work was done. F
next year there was a parol agreement, va
this, that P. was not to find the horses, an
were to have one-half instead of one-third
crops: Held, not a letting of the land on
giving to M. & B. a term and possession,
contract for remuneration for their care
bour, to be performed as P. directed. P
Humphrey, 14 C. P. 209.

The lessee left the premises and put on
possession, who subsequently put defend
possession. In ejectment by the lessee t
were asked to find whether the plaintiff
premises to D., so that he had an inte
them, which he transferred to defend
whether D. was a mere caretaker, and
was no letting, to find for plaintiff. Th
found for defendant, and a new trial was r
Reynolds v. *Metcalf*, 13 C. P. 382.

The plaintiff's agent offered to lease
to defendant at £100 a year, payable qu
and defendant assented to the terms, bu
occupied:—Held, that he was not liable
rent. It was alleged that after the d
had been told what the rent would be,
the key by the agent's directions, and
examine the house, and leaving the key
door returned and said he would take it.
that this would not have altered the d
Bank of U. C. v. *Tarrant*, 19 Q. B. 423.

Defendant signed the following memor
"I agree to pay F." (the plaintiff) "£50
his right to the house I live in, the farm
sent occupied by me, known as the
Farm, and the stables now used by me,
months from the 1st April next:"—H
dence of a letting by plaintiff to defend
of a sale. *Fairbairn* v. *Hilliard*, 27 Q. B.

A municipal corporation by by-law gr
the defendant, upon certain conditions,
build a dam and bridge across a river,
sideration of which he agreed to keep it
for forty years at his own expense, b

...ld make default the privilege granted by the ...ation was to cease. The dam and bridge ...built and kept in repair by the defendant: ...held, that the contract amounted to a lease ...the corporation of upwards of twenty-one ... *Regina ex rel Patterson* v. *Clarke*, 5 P. R. ... C. L. Chamb.—Dalton, *C. C. & P.*

...fendant let to plaintiff certain premises "for ...term of one year, to be computed from the ...ember, 1863, and so on from year to year, ...notice is given to the contrary, or equitable ...dings taken on mortgage hereinafter men... Plaintiff continued to occupy under this ...and in May, 1867, sub-let to one P. for one ...with right to P. to pay his rent to defen... On 10th January, 1868, a bill in Chancery ...filed on the mortgage. In May following ...paid rent to defendant up to the expiration of ...ear, and on the ensuing 25th July or August ...fendant distrained upon plaintiff for arrears of ...before the demise to P., and for rent from ...ration to 1st July, 1868:—Held, that there ...no tenancy subsisting at the time of the ...ss to justify the same, for that it was ...ninated by filing the bill in Chancery, and ...the payment of rent by P. after that did ...ate a new tenancy, as there was no evi... that P. had paid at plaintiff's request. ...v. *Langford*, 21 C. P. 254.

...ame a tenant after the determination of a ...for a specific term, held possession for five ...s paying by agreement £75 for the first ...paid the same amount for the last two ...rs (£150 in all) and afterwards occupied ...r any specific agreement:—Held, that no ...ncy was created by the last over... *Innes* v. *Stinson*, 8 C. P. 34.

...B. living at Collingwood, wrote to B. at ...ton on the 5th of July, 1859, to the effect ...he would give £40 a year for his house, and ...ises, adding, if you agree telegraph at once ...ediately, and I will take it. On the 6th B. ...graphed: "You may have the store for one ...the terms of your letter." A. obtained the ...ion from the former tenant on the 11th, and ...ied on that day:—Held, that there was ...contract; that the rent commenced from ...ion by B. of A.'s offer, not from the time ...A. entered; and that B. was therefore ...ed to distrain for a year's rent on the 7th ...ber, 1860. *Prosser* v. *Henderson*, 20 Q. B. 438.

...The first and second counts of the declaration ...respectively for distraining where no rent ...due, and for excessive distress for rent. It ...ed that defendant had leased to plaintiff, ...term of years, certain premises, portions of ...were at the time in the possession of other ...s, and that these parties retained posses... against the plaintiff, and refused to give ...ession to him. In consequence of this defen... *after the expiration* of the first year agreed ...plaintiff to an abatement in the rent for ...year, and gave him a receipt for the balance, ...the plaintiff paid as the amount of rent ...upon the premises. Defendant, however, ...subsequently distrained for the sum agreed to be ...due:—Held, on the authority of *Neale* v. ...*Wynne*, 1 M. & W. 763, that at the time of ...making the lease, and during the whole period ...that was claimed for, no legal term was cre... by the instrument of lease between the ...ies in consequence of the adverse holding of parts of the premises and the plaintiff's ex... clusion therefrom, and that no right to any rent in respect of such parts had ever arisen, and that therefore the rent could not properly be appor... tioned, because the tenant had never been sub... ject to the entire rent by virtue of the demise: —Held, also, distinguishing Watson *v.* Wand, 8 Ex. 335, that the agreement between plaintiff and defendant, as to the abatement of the rent, did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor; because the agreement was not made *until after the expiration* of the year to which it alone had reference, so that the relation... ship of landlord and tenant could not have been created for that year, and the sum agreed to be paid, could not have been rent, but a mere sum in gross, and could not, consequently, have been distrained for; and, therefore, Held, that plaintiff could not recover on the first and second counts, which were framed upon the assumption that plaintiff was tenant to defendant at a cer... tain rent. *Kelly* v. *Irwin*, 17 C. P. 351.

The defendant who owned the farm agreed with the plaintiff to work it on shares, each of them supplying one half of the seed and labour and to have half the profits, the plaintiff to pay $60 for implements and $160 annually; but the plaintiff was not placed in possession of any dis... tinct portion of the farm, the parties being equally in possession of the whole:—Held, that there was no lease created between the parties, and that the $160 was not rent for which the defendant could distrain. *Oberlin* v. *McGregor*, 26 C. P. 460.

A person assuming to have an interest in pro... perty, though he had none, executed a lease or an agreement for a lease to a tenant; one of the true owners shortly afterwards took an assign... ment of the instrument, and gave to the tenant notice of the assignment; and successive owners demanded and received rent reserved by the instrument, insisted on the building of a barn which the agreement provided for, and otherwise recognized the existence of the agreement: Held, that the agreement was thereby confirmed and adopted, and was binding on the estate. *Simmons* v. *Campbell*, 17 Chy. 612.

See *Cartwright et al.* v. *McPherson*, 20 Q. B. 251, p. 2081; *Kelly* v. *Irwin*, 17 C. P. 351, p. 2058; *Reid* v. *Garden*, 23 C. P. 59, p. 2051.

II. Leases or Agreements merely.

1. *Generally.*

The words "agrees to let or hire," are words of a present demise, where the contrary does not appear to be the intention in the instrument in which they are contained. *Cumming* v. *Hill*, 6 O. S. 303.

Memoranda or heads of agreement, ascertain... ing no certain amount of rent, being preparatory to a letting, and under which no rent had been paid before the distress:—Held, not to constitute present demise, entitling the landlord to distrain. *Chaney* v. *Taylor*, 1 Q. B. 166.

Memorandum of agreement for lease: "M., for the consideration hereinafter named, agrees to demise and lease to H. these premises, &c., for the period of three years certain at 10s. cy.

per day, payable monthly in advance during said term, and with the privilege to said H. to hold the same for a further period of two years at the same rent, payable as aforesaid. The said H. agrees to take the said premises from said M. for the price and terms aforesaid, and to pay all taxes upon the said premises, possession to be given whenever the first monthly payment of rent is made." Quære, whether the above writing (not under seal) could be in any case construed as more than an agreement for a lease. *Hurley* v. *McDonell*, 11 Q. B. 208.

A. agreed in writing as follows: "In consideration of £70 paid in hand by B., I hereby agree to sign a lease of lot No. 32 in the 2nd con. of Etobicoke, directly the same is drawn up by the solicitor, in the following terms, viz., to let B. have the farm for seven years, commencing from the 1st April, 1848, at £70 per annum; the first payment having been this day paid by the said B., (the receipt being acknowledged) and the next payment on the 1st of April, 1850, and so on. If B. wants to give up the farm before the expiration of four years, he is to pay £140 to me; if after four years, then £70. If I want to sell the farm, then I am to pay B. on the same terms. Six months' notice to be given to either party. I am to put up a frame barn, to be completed by 1st August, 1848, &c., also a house, &c., by 1st July, 1848; also to split 4000 rails, and have them ready for hauling by 1st January, 1848; and to secure whatever wheat B. puts in this fall by fence. B. is to have his firewood, &c.; and if he puts in fifteen acres of wheat at the expiration of his term, he is to have the privilege of taking it off:"—Held, not a lease creating a term of years, but only an executory agreement. *McLean* v. *Young*, 1 C. P. 62.

An agreement in writing, whereby A. agreed to rent to B. for three years from date, for £50 per annum, with taxes, payable quarterly during occupation, B. to spend £25 in improvements:—Held, a lease and not a mere agreement for a lease. *Grant* v. *Lynch*, 6 C. P. 178; *S. C.* 14 Q. B. 148.

Held, that the document set out in this case was a lease, and not merely an agreement for one. *Becher* v. *Woods*, 16 C. P. 29.

Quære, whether the instrument in question set out in this case amounted to a lease, or was a mere license to bore for oil, salt, or minerals. *Burnside* v. *Marcus*, 17 C. P. 439.

Ejectment. As to a portion of the property, a saw-mill, one B. said that on a Saturday he rented it verbally from the plaintiff for a year, and it was intended to have a written lease, but on Monday the defendant put some one else in possession, and refused to let him in, after which he had nothing further to do with it. It was not shewn that either the rent or the terms of the tenancy had been agreed upon:—Held, not a lease, but an agreement only, and that the defendant could not set it up to defeat the plaintiff's title. *Kyle* v. *Stocks*, 31 Q. B. 47.

Where, under a parol agreement for a lease, for ten years, made between defendant and plaintiff on the terms of the plaintiff clearing, or paying a rental either in clearing or in money, the plaintiff entered into possession, and after clearing a certain number of acres, the defendant sold the lot, and the purchaser ejected the plaintiff:—Held, that the plaintiff could not rec under the agreement, not being in writing under the common counts for the value of services, for the clearing of the land was not primary service for which the lease was, the performance of the work, to be given mode of compensation; but the lease was primary thing contracted for, and the work reserved as a rent from year to year. Se that the plaintiff's remedy, if any, was for cific performance of the agreement against purchaser, who had purchased with notice the plaintiff being in possession. Semble Hagarty, C. J., that if the bargain had be work to be done by plaintiff in clearing the l to be paid for by allowing him to occupy defendant had prevented the occupation, plaintiff might have recovered the value of work. *Draper* v. *Holborn*, 24 C. P. 122.

On the 1st October, 1875, plaintiff w the owner of certain land in the townsh Caledon, that he understood that one M., had had a written lease from D., which expired, but who had remained on on the of the lease, was going to leave, and that farm was for rent he would give D. $ year, and pay all taxes, &c., and requ an answer by return mail, as he wished to mence ploughing. D., who was then in United States, replied that he had no o to plaintiff's terms as to renting the farm that he might commence to plough on the fo ing conditions: "I rent to you for one with right to sell the farm at any time giving up possession thereof when requir your being paid for labour and seed at valu should the purchaser wish possession. I w up at Caledon as soon as I get home, and final arrangements as to payment and se The plaintiff entered and did the ploughing without M. having given up possession, or all the arrangements as to payment and se being perfected. Subsequently D. sold t defendant, who thereupon took possessio appeared that D. offered to pay the plaint his fall ploughing, but that he did not send claim. Evidence was also given of expr made use of by D. to intending purch referring to plaintiff as the tenant who h place for a year, but would give up possess being paid for his ploughing, and as the ou tenant who would have to be paid for the p ing:—Held, that there was no present d but that the plaintiff merely had a license t and plough, pending the conclusion of the posed bargain, which license was revoked entry of defendant, the owner of the fee, marks as to plaintiff's conduct in bringing of trespass and ejectment on the same *Stubbs* v. *Braddy et al.*, 27 C. P. 234.

See *Leys* v. *Baldwin*, 2 C. P. 488, p. *Taylor* v. *Sutton*, 18 Q. B. 615, p. 2034; *P* v. *Henderson*, 20 Q. B. 438, p. 2013.

2. *Under 13 Vict. c. 24, s. 1*

"Memorandum of agreement for lease for the consideration hereinafter named, to demise and lease to H. those premises "for the period of three years certain, cy. per day, payable monthly in advance, said term, and with the privilege to said

the same for a further period of two years, ... same rent, payable as aforesaid. The said ... agrees to take the said premises from said ... for the price and terms aforesaid, and to pay ... taxes upon the said premises; possession to ... given whenever the first monthly payment of ... is made:"—Held, that H. could not maintain ... ejectment to obtain possession, for admitted ... to be a lease, it could not be regarded as ... for a term not exceeding three years from ... making thereof, and so by the statute of ... would require to be in writing; and therefore ... without doubt, by the statute 12 Vict. c. ... could, for want of a seal, take effect only ... agreement to let. *Harley* v. *McDowell*, 11 ... 208.

... however, whether the writing could ... now be construed as more than an agreement for a lease. *Ib.*

... as to the effect of 12 Vict. c. 71, s. 4 ... every lease in writing must not be under ... though not required to be written; so that ... oral lease for a year would be good, but a ... lease for the same period void, if not ... seal. *Ib.*

... 12 Vict. c. 71, s. 4, was repealed by 14 ... Vict. c. 7.]

... *October 13th, 15 Vict. c. 7; C. S. U. C. c. 90.*

... held, that an agreement not under seal in the ... following form: "This indenture witnesseth ... O., agree to let to McK. the blacksmith's ... and lot, house and lot known as Milligan's ... for one, three, or five years, for the sum ... dollars, or $56, to be paid twelve months ... from date the first year, and so on to the ... end of the agreement; all improvements to be ... paid; O. sells the place before three years ... then six months notice to be given if O. sells ... or McK. wants to leave," was void under C. S. ... c. 90, s. 4, as a lease for five years, not ... under seal, but was good for three years; ... that no notice to quit was necessary to terminate it at that period. *Osborne* v. *Earnshaw*, ... P. 267.

... held, by an instrument not under seal, dated ... October, 1857, leased to O., one of the ... tenants, for five years. On the 31st of March, ... mortgaged the premises to the plaintiffs, ... assignable as therein set forth, and on the 8th ... June, 1858, by indenture, he again leased the ... premises for five years to O. Upon ejectment ... brought by the mortgagees:—Held, that ... indenture of the 31st of October, 1857, not ... being under seal, did not operate since the 14 & ... Vict. c. 7, s. 4, as a lease for five years, but ... as a yearly tenancy; and the plaintiffs ... were not entitled to succeed without notice to ... *Churchill* v. *Orvis*, 12 C. P. 392.

... *Kratz* v. *White et al.* 19 C. P. 36, p. 2018.

... OPERATION OF THE STATUTE OF FRAUDS.

... defendant had agreed verbally to let ... plaintiff certain premises for a year, to ... at a future day, and on the day defendant put the plaintiff into part of the demised ... but could not give him the possession ... residue, in consequence of which the plaintiff suffered loss, and sued defendant on the agreement:—Held, that he was entitled to recover, and the defendant could not successfully object that the agreement was void under the statute. *Clark* v. *Serricks*, 2 Q. B. 535.

Upon the following writing not under seal: "Memorandum of agreement for lease. M. for the consideration hereinafter named, agrees to demise and lease to H. the premises, &c., for three years certain, at 10s. cy. per day, payable monthly in advance during said term, and with the privilege to said H. to hold the same for a further period of two years at the same rent, payable as aforesaid. The said H. agrees to take the said premises from the said M. for the price and terms aforesaid, and to pay all taxes upon the said premises; *possession to be given whenever the first monthly payment of rent is made*:"—Held, to be for a term exceeding three years from the *making* thereof, and so required to be in writing. *Harley* v. *McDowell*, 11 Q. B. 208.

A lease void for the creation of a term (not being executed according to law) may be looked at to ascertain the conditions of occupation. *Galbraith* v. *Fortune*, 10 C. P. 109; *Lyman* v. *Sharr*, 10 C. P. 462.

Plaintiff by deed leased land from one S. for five years from 1st October, 1862, agreeing thereby to give up possession on the expiration of the term created. On the lease was endorsed an unsigned memorandum, that if the plaintiff cleared any more land he was to have the same rent free for the first three years. No land was cleared by plaintiff until the fall of 1865, and in the fall of 1867 he put in a crop of wheat. After the expiration of his term, S. permitted him to remain on the premises, and in the following April he left, giving up to S. the place with all on it. In June following S. by deed leased the land and crops thereon to two of the defendants for five years from the 7th January previous, and subsequently when the wheat had ripened, the plaintiff entered upon the land then in defendants' possession, under S., and cut the crops. Defendants took possession of the wheat in shocks on the land, and plaintiff brought trover:—Held, that the memorandum, if not part of the lease, not being by deed, was void, because the three years were to commence from a future time, viz., from the clearing of the land, and it required, therefore, to be in writing. *Kratz* v. *White et al.*, 19 C. P. 36.

Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was verbally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:

Held, that the plea was good, for the independent verbal agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant by the 4th sec. of the Statute of Frauds, might be prevented from

suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 Q. B. 93.

See *Gibkoney* v. *Gibboney*, 36 Q. B. 236, p. 2047.

IV. Construction and Operation of Leases.

1. *Leases under the Short Forms Act.*

An ordinary lease under the Short Forms Act, containing the words "and to pay taxes," covers a special rate created by a corporation by-law as well as all other taxes. *In re Michie and the Corporation of the City of Toronto*, 11 C. P. 379.

A lease made in 1870, purported to be made "in pursuance of the act to facilitate the leasing of lands and tenements," being the title of the 14 & 15 Vict. c. 8, consolidated in C. S. U. C. c. 92, instead of "in pursuance of an act respecting short forms of leases," which is the title of the consolidated act:—Held, nevertheless, a sufficient reference to the consolidated act, so as to bring the lease within its provisions. Where, therefore, the plaintiff (the lessee) was evicted by title paramount to the lessor:—Held, that he could not recover as for a breach of the covenant for quiet enjoyment, which is limited by the statute to the acts of the lessor and those claiming under him, nor under an implied covenant contained in the word "demise," as it is controlled by the express covenant for quiet enjoyment. *Davis* v. *Pitchers*, 24 C. P. 516.

A lease dated 1st July, 1868, purported to be made "in pursuance of an act to facilitate the leasing of lands and tenements," the proper title of the statute then in force, C. S. U. C. c. 92, being "An act respecting short forms of leases;" and it contained the following covenant, "and the said lessee, *for himself, his heirs, executors, administrators, and assigns*, hereby covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sub-let without leave." Then followed "proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee:—Held, 1, that the reference to the statute was sufficient, notwithstanding the misdescription of its title; 2, that the covenant could not take effect under the statute, the short form given there omitting the words above italicised; 3, that the proviso for re-entry, applied only to the non-performance of positive, not negative covenants; and that there was, therefore, no right of re-entry here; 4, that there was no material difference between "re-entering," the word used in the lease, and "re-entry," the word used in the statute. *Lee et al.* v. *Lorsch*, 37 Q. B. 262.

A lease, purporting to be made in pursuance of the act respecting short forms of leases, contained this proviso: "Proviso for re-entry *by the said lessor*, on non-payment of rent, *whether lawfully demanded or not*, or on non-performance of [illegible] enants, *or seizure, or forfeiture of the said [illegible] for any of the causes aforesaid*," the word[s] italics not being in the short form given by [illegible] statute:—Held, that the addition of these w[ords] did not exclude the application of the stat[ute] and that the proviso extended to covenants [in] as well as before it in the lease. *Crozier* v. [illegible] *et al.*, 38 Q. B. 54.

See also "Deed," IV. 5, p. 1040.

2. *Particular Words.*

The words "agrees to let or hire" are w[ords] of a present demise, where the contrary do[es] appear to be the intention in the instrument [in] which they are contained. *Cumming* v. *H[ill]* O. S. 303.

Where the plaintiff declared on an indentu[re] lease, not setting out any covenant for quiet e[n]joyment (the lease itself in fact containing none), assigned as a breach that defendant had him[self] the plaintiff from entering on the demised [pre]mises at the time when the term commenced, [and] continually since kept him out; to which d[e]fendant pleaded merely a denial of having him[self] the plaintiff from entering and enjoying; [and] the jury on this issue found for the plaintiff. [The] court refused to set aside the verdict, [on] that there was an implied covenant for [quiet] enjoyment, and that proof of the defendant's [re]fusing to give possession to the plaintiff amo[unted] to a breach of it. *Smart* v. *Stuart*, 5 O. S.

Quære, whether the words "lease and to [de]let" imply a covenant to give possession o[n] day when the term is to commence. *Har[ris]* *Fergusson*, 9 Q. B. 431.

Semble, that the word "demise" in a [lease] raises an implied covenant to give posse[ssion] *Saunders* v. *Roe*, 17 C. P. 344.

The word "lease," differing from "gran[t]" "demise," implies no contract for entry [or] quiet possession. *Ross* v. *Massingberd*, [illegible] P. 62.

Plaintiff demised to defendant, covena[nting] that it should be "competent" for the defe[ndant] to make certain specified repairs, and the [lease] was declared to be on the express understa[nding] that such repairs should be made within [a] year from the date of the said lease: Held, notwithstanding the word "competent," th[at] fendant covenanted to do the work spe[cified] *McDonald* v. *Cochrane*, 6 C. P. 134.

3. *Right to Possession.*

Covenant on an indenture, whereby defe[ndant] leased and to farm let to plaintiff at a [certain] rent the crops in the ground, and the stock, implements of husbandry, to be valued on [the] day of entry, and to be taken by the plain[tiff] such valuation. The plaintiff demanded p[ossession] sion of defendant at a tavern not on the pre[mises] but defendant refused to give it unless h[e was] paid or received security for the value [of the] crop and stock, &c.:—Held, that defendant [was] justified in such refusal under the terms [of the] lease: and Quære, whether, if the lease ha[d been] without any stipulation, the demand of p[ossession] sion made would have been sufficient. *[Harris]* v. *Fergusson*, 9 Q. B. 431.

...ssere, whether the words "lease and to farm ... imply a covenant to give possession on the ... when the term is to commence. *Ib.*

...efendant leased to the plaintiff for three years ... the 1st of May; and the plaintiff cove... that, on or before said 1st of May he ...ld give to defendant two sufficient securities ... the performance of his covenants in the lease: ...eld, that the giving such security was a con... precedent to the plaintiff's right of posses... under the lease. *Murphy* v. *Scarth*, 16 Q. ...

...efendant leased to plaintiff "Sutherland's ..., being the west part of lot No. 15, in the ... of West Zorra, as at present occupied ... the said Sutherland," for eight years, at a ...ly rent. The lease provided that the plain... should not cut down timber for the purpose ...learing outside the brush fence, but might ...r all within, and might use all the woodland ...the said leased premises for pasture, and "that ...said Sutherland (defendant) shall be at liberty ...y time to build and make any improvements ...ay think proper upon any portion of the said ...ed premises lying outside the said brush fence ...present upon the said premises, without any ...ention of rent or any consideration there... —Held, that the defendant having improved ... built upon a portion of the land outside of ...brush fence during the term, was entitled ...ntain possession thereof. *Leonard* v. *Suther...* 19 Q. B. 301.

...tion on the following covenant in a lease to ...plaintiff, executed by L. in his lifetime, on ...d April, 1862, for twelve years from 1st ...l 1863: "And the said lessor covenants with ...said lessee for quiet enjoyment. And it is ...y agreed between the parties hereto, that ...said L. (notwithstanding anything heretofore ...-contrary) shall be at liberty to take posses... of the said premises, and every part thereof, ...t thirty acres for crop this fall, reserved to ...se of the said lessor,) on the 20th day of Oc... next," (1862.) Before that day the lessor ...d. The plaintiff, on 20th October, went to ...premises and found the lessor's widow there, ...claimed her right to dower, and refused ...session. He then demanded possession of the ...ants, executors of L., and brought this ...n:—Held, that the covenant for possession ...the 20th of October was independent of the ...for twelve years, which commenced in April, ...and that, though the plaintiff might have ...tained ejectment, he was also entitled to ...damages for breach of the covenant. ...son v. *Crawford et al.*, 13 C. P. 53.

...declaration set out a deed made between ...tiffs and defendant, by which defendant ...ed to plaintiffs certain land for a term of ...s from a day passed, and assigned as a breach ...defendant had not given plaintiffs posses... ...enabled them to enter, and they had been ...ly unable to obtain possession. Plea, that ...making said deed defendant had enabled ...tiffs to enter into and obtain possession: ...ld, on demurrer, that the breach assigned in ...declaration was sufficient, but that it could ...e sustained by proof only that defendant ...not given actual possession, for it would be ...ssary to shew that plaintiffs had attempted ...n possession, and had been prevented by ...e of some adverse occupation, not with their consent, or by some physical impediment or hindrance placed in the way by defendant, or caused in some way to be done by his means with intent to prevent possession being taken. Held, also, plea bad, for that defendant was bound to do more than simply deliver the lease to the plaintiffs. Where the demise is by deed, an action may be maintained on an implied covenant to give possession, when there is any proper words to create a covenant by implication; and Semble, that the word "demise," will have that effect. *Saunders et al.* v. *Roe*, 17 C. P. 344.

See *Doe d. Somers* v. *Bullen*, 5 Q. B. 369, p. 2092.

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4. *Commencement and Duration of Term.*

Plaintiff leased to the defendant for one year, with the privilege of holding for an indefinite time, on condition that three months' notice in writing should be given prior to leaving the premises, and prior to the termination of a full year, by either party so inclined:—Held, that defendant was bound to give three months' notice of his intention to quit at the end of the first year. *Counter* v. *Morton*, 9 Q. B. 253.

Defendant leased to the plaintiff "that certain frame house now standing and being on lot No. 10," &c., "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows, from the 1st day of November now next ensuing for and until the 1st day of April following, a period of five months," at a monthly rent of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold possession of said premises, and should remain longer than the 1st of April, he should pay at the rate of £50 per annum as rent, to be paid monthly:—Held, that the lease was a demise till the 1st of April, with an option to the lessee to remain afterwards as a monthly tenant (not from year to year) at the rate of £50 a year; and that it was not a demise of the whole of lot 10, as alleged. *McPherson* v. *Norris*, 13 Q. B. 472.

Defendant on 13th October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for twenty-one years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants the lease and the term thereby granted should cease and be utterly null and void:

Held, that by the lease S. took a life estate, in which the term merged. *Dalye* v. *Robertson*, 19 Q. B. 411.

Under a lease dated 1st October, 1857, habendum for five years from the date thereof "yielding and paying therefor on every first day of October during the said term," it was proved that the first year's rent had been paid in advance:—Held, that the term included the whole of the 1st October, 1862. *McCallum* v. *Snyder*, 10 C. P. 191.

Plaintiff, E., on 1st April, 1858, leased to defendant, R., for five years at £100 a year, payable

half-yearly, on the 1st of April and October in advance, and by the lease it was agreed that "if E. (the lessor) require the premises before the term expires, he is to pay £50 to R. (the lessee) for possession; otherwise should R. require to leave before the term, he has to pay E. £50." On the 6th of September, 1860, the plaintiff notified defendant that he would require the premises on the 10th of October following, and on that day he tendered the £50, which defendant refused:—Held, that he was entitled to maintain ejectment. It was not proved at the trial whether the rent due on the 1st of October for the next six months in advance had been paid or not. Quære, whether, if it had been shewn that the plaintiff received it, this would affect his right. *Eckhardt* v. *Ruby*, 20 Q. B. 458.

Ejectment for lots 15, 13, and north half of 12, in the 2nd con. Sandwich. Defendant, in his notice of title, besides denying the claimant's title, claimed title in himself as their tenant. The plaintiffs, under this notice of defence, claimed that the defendant was thereby debarred from disputing their title as landlord, and proved a receipt for rent in full to the 31st of March, 1861. This action was commenced on the 12th October, 1861. The defendant, in reply, proved that his tenancy commenced in May, and that one of the plaintiffs in April, 1861, while visiting the farm, expressed his satisfaction as to its state, and told him he wished him to remain on. The jury having found for the plaintiffs, and that the defendant was their agent on the premises—on motion for a new trial:—Held, that the direct evidence of the commencement of the tenancy in May was entitled to greater weight than a receipt dated the 30th of March for rent up to date. *Colby* v. *Wall*, 12 C. P. 95.

The plaintiff leased to one B. a mill for three years from the 9th of March, 1860, adding this proviso: "Provided the lessee shall within three months previous to the 9th day of March next, which will be in the year 1861, give the lessor a notice in writing, that he will keep the mill on the terms hereinafter set forth." Notice was given by the lessee between the 9th of December, 1860, and the 9th March, 1861, of his intention to continue the lease for the three years. In an action against the sureties of the lessee for rent, the defendants contended that by the terms of the lease the notice should have been given previous to the commencement of the three months; but Held, that although the intention of the parties might have been to give and receive three clear months' notice, yet by the proviso the notice was to be given within three months prior to the 9th of March, 1861; and the plaintiffs were entitled to succeed. *Shipman* v. *Grant et al.*, 12 C. P. 395.

The plaintiff, by lease, consisting of seven sheets, and bearing date March 15th, 1862, demised certain premises to W. On the 21st of July following, this lease was cancelled by an instrument under seal; the second and fourth sheets were taken out and re-placed by others, and it was re-executed and re-delivered without any other alteration. As it then stood, it was dated as before, to hold "from the first day of April now next," for nine years, "from thence next ensuing," at a yearly rent, payable "in advance, that is to say, on the 1st of April, 1862, and on the 1st of April in each year during the term;" the conclusion being that the parties had thereunto set their hands and seals, "day and year first above written." In an ac against the sheriff for taking W's good August, 1862, without satisfying a year's alleged to be then due:—Held, that the took effect from the delivery, on the 21st J 1862, not from the date: that the term b on the 1st of April, 1863: that the first y rent payable "in advance," was not due that day, the words, "that is to say, on the of April, 1862," being merely false demon tio; and that the plaintiff therefore was prop nonsuited. *Bell* v. *McKindsey*, 23 Q. B. 16

Held, affirming the above judgment that lease spoke from the day of re-execution from its date; and that the provisions of lease, in connection with the surrounding cumstances, did not afford sufficient evidence contrary intention to justify a different cons tion. Spragge, V. C., A. Wilson, J., and Mo V. C., diss. *S. C.* 3 E. & A. 9.

A., by indenture, in 1826, in consideratio the rents and covenants by M., to be paid performed, "granted, demised, and to farm to M., his heirs and assigns," certain land bendum, "unto the said M., his heirs an signs, from the day of the date hereof, for during the term of twenty-one years," yie and paying yearly during said term to M., his and assigns, 7s. 6d. There was a covenant to pay rent, and by A. for quiet enjoyment d the term. At the end of the term, M. ga the lease to A., saying he had no further c but he was allowed to continue in poss upon no definite understanding, and defe went in after him. Upon ejectment brou the devisee of A.:—Held, that without l of seisin the fee simple granted in the pre could not take effect, and the habendu twenty-one years would stand; but a new was granted to determine the fact of l *McDonald* v. *McGillis*, 26 Q. B. 458.

Plaintiff, by deed, leased land from one five years from 1st October, 1862, agreeing by to give up possession on the expiration term. On the lease was endorsed an una memorandum, that if plaintiff cleared any land he was to have the same rent free fo first three years. No land was cleared by tiff until the fall of 1865, and in the fall of he put in a crop of wheat. After the expi of his term S. permitted him to remain o premises, and in the following April he giving to S. the place with all on it. In following, S., by deed, leased the land and thereon to two of the defendants for five from the 7th January previously, and quently, when the wheat had ripened, p entered upon the land, then in defendant session under S., and cut the crops. Defe took possession of the wheat, in shocks land, and plaintiff brought trover:—Held the memorandum if not part of the lease, no by deed, was void, because the three year to commence from a time future, viz., fr clearing of the land, and it required, the to be in writing; and if part of the lease, be construed as co-extensive only with th and not as extending its duration beyo October, 1867. *Kautz* v. *White et al.*, 19

Declaration for overflowing the pl land, by maintaining a dam on a stre

through it, and thus penning back the
s. Plea: That one K. had purchased
the crown, and paid part of the purchase
, and got his receipt therefor from the crown
agent, and thereby was the owner of the
mentioned in the declaration, and (before
veyed to the plaintiff, who claims under
by indenture demised to defendant and one
the part of said land then liable to be over-
by the mill-pond of defendant and H. by
him then erected, to hold so long as the land
be thenceforth occupied and overflowed
mill pond; and that defendant has ever since
the water penned back, and has occupied
said land as a mill-pond, and has kept the dam
erected of the same height as it then was, but
igher, which are the trespasses complained
Held, on demurrer, a good plea: that the
t out in the lease pleaded, was sufficiently
n, and K.'s estate to enable him to make
ease, was sufficiently pleaded. *Kerr* v.
ge, 29 Q. B. 340.

laration, that J. M., being seized in fee of
s land, let it by deed to defendant for ten
, and the defendant thereby promised to
him the yearly rent specified; and after-
s during said term, J. M., by deed granted
plaintiff all his reversion in the said land;
ase year's rent became due, and remains un-
Plea, that it was provided by said deed,
J. M. should at any time have an oppor-
y to sell the said lot, then the said deed
d be cancelled, and defendant should give
place; that before any rent became due,
had an opportunity of selling and did sell
it to the plaintiff, and by deed granted all
eversion therein to the plaintiff, as alleged;
said J. M., with plaintiff's concurrence,
e said rent became due, gave notice to
ndant that he had sold the said lot to the
ff, and that he then put an end to the
, and said term was then put an end to be-
the rent accrued due:—Held, plea bad, per
ark, C. J., because the notice could not be
n by J. M. after he had assigned his rever-
, and it did not appear that the lease had
cancelled, or the term put an end to, or
defendant had given up the place. Per
on, J., because the sale alleged was not
n the provision, being a sale of the rever-
subject to the lease, not of the land with
mediate right of entry. *Pepper* v. *Butler*,
4 B. 253.

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5. *Option to Purchase.*

murrer. Bill sets forth an indenture pur-
ng to be a lease, with a covenant for leave
ntee to become purchaser of the demised
ses upon certain stipulated terms, but alleges
before and at the time of the execution of
said indenture it was expressed and under-
d by the parties thereto that it should, and
in fact it did, operate and take effect as an
ute conveyance and mortgage of the prem-
therein mentioned, and that the amount of
h reserved was determined by the interest of
purchase money, £1,000, and that the rent
in fact paid as interest thereon; and the bill
ged, amongst other things, an account of
was due for principal and interest in re-
of the purchase money, and a specific per-
ance of the covenant for purchase. Defen-
dant demurred to the bill, and the demurrer was allowed. *Cullen* v. *Price*, 1 O. S. 302.

A. leased to B. a house for fifteen years, and during the term, by agreement, A. therein assented to an assignment by B. to C., and gave C. the option to purchase the fee within one year, at a given sum, payable by instalments; and C. at the time of the agreement, paid A. £50, to be on account of purchase money, in case he elected to purchase, otherwise to go for rent. There was a proviso in the original lease to B. that, should the house be burnt, the rent should cease. C. did not purchase, and the premises were afterwards burned, at which time, long before the expiration of the lease, the rent due was £12 10s:—Held, that, notwithstanding this proviso, A. was entitled to rent until the £50 was absorbed. *Pulver* v. *Williams*, 3 C. P. 56.

By an indorsement under seal upon a lease, it was agreed that the lease was to be cancelled on payment of the second instalment of purchase money under an agreement for purchase of the premises leased; but that, if the agreement became void by non-fulfilment of its terms by the time for payment of the second instalment, the lease was to remain in force; and in case of the lease being cancelled, no rent *to be paid* after 3rd February, 1863, the date of the agreement to purchase. Under the lease the rent was payable in advance, and at the date of the agreement to purchase a quarter's rent was overdue, having matured on 1st February previously. The second instalment of purchase money was duly paid and the interest also, according to the tenant's evidence, but according to the landlord's it was not paid at the time, though he admitted that he had agreed to allow the interest to stand for some months afterwards:—Held, that by the memorandum indorsed on the lease the rent payable in advance was not to be paid in case the lease was cancelled, and that it was cancelled by payment of the second instalment without the interest, for the landlord waived payment of such interest at the day, and therefore:—Held, that the landlord could not recover the quarter's rent which fell due on 1st February, as this was either satisfied by the agreement and payment of money on the 3rd February, when the first instalment was paid, or abandoned by the memorandum with all other rent, whether accruing due before or afterwards. *Forge* v. *Reynolds*, 18 C. P. 110.

On the 9th of January, 1844, one J. W. took possession of the land in question under an indenture of lease, for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250. £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th of January in each year, the first payment to be made on the 9th of January, 1845; and if purchase carried out, in lieu of the rent, reserved a sum equal to six per cent. on the original purchase money should be paid. J. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second; but the person in whom the legal estate was vested having died, it was not paid, and nothing more was done. J. W. remained in possession until his death in 1850; when he was succeeded by his son, to whom it appeared that he had previously sold, and the

son conveyed to the defendants, who entered, and had been in possession ever since:—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that the fact of the son shewing to the defendants, when he sold to them, a letter written by C.'s attorney at the time of his father's purchase, to the person then in charge of the land, to deliver possession to his father, did not create a new tenancy at will between the defendants and C. Held, also, that the execution of a deed in 1862, by J. W.'s heir-at-law to one R., who in 1869, conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him:—Held, also, that as the entry of J. W. under whom the son and the defendants claimed, was under C., the defendant could not object to C.'s title at the time of J. W.'s entry. *Cahuac* v. *Scott, and Cahuac* v. *Erle*, 22 C. P. 551.

The lessee had the right of purchase, on his desiring to do so within the period of two years after the date of the commencement of the term, the 1st of April, 1852. On the 1st of April, 1854, the desire of purchasing was declared:—Held, in time, the day of commencement of the term, 1st of April, 1852, being exclusive. *Sutherland* v. *Buchanan*, 9 Chy. 135.

Where a lease for years contains an agreement for sale of the fee, the right to purchase goes to the heir-at-law, not to the personal representative of the lessee. *Henrihan* v. *Gallagher*, 9 Chy. 488.

Affirmed in appeal, but the decree varied by directing the vendee of the personal representative to execute a mortgage upon the property, the conveyance of which he had obtained from the lessors as assignee of the lease. *S. C.* 2 E. & A. 338.

Sampson *v.* McArthur, 8 Chy. 72, remarked upon and overruled, so far as the same decided that the right to purchase contained in a lease was personalty. *Ib.*

The owner of vacant land leased part of it for nine months at a nominal rent. The lessees covenanted to sink on the land, during the term, a test well to the depth of 1,000 feet, for the purpose of obtaining oil; and it was provided that at any time during the term the lessees should have the option of purchasing, and the lessor should convey to them, on their request, any five acres of the demised land at $12 a lot; and that at the end of the term the lessees should have the option of purchasing the residue at the same price. The lessees did set about making the well, but the machinery broke after they had reached a depth of 530 feet, and they were in consequence unable to complete the well during the term, though they expended as much as, but for the accident, the well would have cost to complete; and the work had enabled the lessor to sell a large number of his other village lots at advanced prices. There was no charge of any want of good faith or diligence or skill on the part of the lessees. They gave notice, before the end of the term, that they would take the five acres:—Held, on appeal, affirming the judgment of the court below, that the lessees were entitled to a specific performance of the covenant as to the five acres, notwithstanding the noncompletion of the well to the stipulated depth; without prejudice to any action by the lessor on the covenant. *v. Spencer*, 13 Chy. 225.

Where there is a contract between the o of lands and another person, whether less not, that if such other person shall do a ce specified act he shall be at liberty to buy th perty, in such a case, time is of the essence o contract, and until the performance of th which has been so stipulated for the relatio vendor and purchaser does not exist betwee parties. Therefore, where the Canada Co. gra the plaintiff a lease of certain lands, whe amongst other things, they agreed that i lessee duly paid certain rents and taxes, should not cut, or sell, or suffer, or permit cut or sold any timber or other trees growi the lands, except for the purposes of clearin the use of the premises, he should be at l to purchase the same at a certain named and it was admitted that default had been as well in regard to the payment of rent and as to the cutting of timber:—Held, tha right to insist upon a sale was forfeited, no standing the lessee's offer to make good th and taxes, and pay the amount of purchase agreed upon. *Ball* v. *Canada Company*, 24 281.

See *Doe* d. *Crookshank* v. *Crookshank*, M Vict. p. 2080; *Anonymous*, 3 P. R. 350, nom. *Wartell* v. *Ince*, 10 L. J. 297, p. 2086; *Lellan* v. *Rogers*, 12 Q. B. 571, p. 2035; *Gr Lynch*, 14 Q. B. 148, p. 2042.

6. *Covenant for Quiet Enjoyment.*

By letters patent, bearing date in 1840, c lands situate on the water's edge in the c Toronto, were granted to one A., the containing a condition for the erection esplanade according to a certain plan, three years. A., by indenture, demised th lands to M., of whom plaintiff was ass with full covenants against all the world M. covenanted to perform the conditi the patent. The 16 Vict. c. 219, enacted unless the owners and lessees should, twelve months, erect the esplanade, the co tion of the city of Toronto should do it impose a special rate to defray the ex thereof; and by 20 Vict. c. 80, further were granted to the corporation. The co tion entered upon the premises, and by fill the space between the water's edge an esplanade, prevented the working of the tiff's mill. For this the plaintiff brou action on the covenant against defendant assignees of the lessor:—Held, that as t of the corporation was done under su authority, (the legislature,) although the did not exist at the time of the execution lease, yet as the breach of covenant di arise from the neglect, fraud, or procure the lessor, but from the non-fulfilment lessee of his own covenants, defendant entitled to succeed. *Starr* v. *Baldwin* C. P. 353.

Defendants leased to plaintiff the mark of a wood market established in one of the of the city, covenanting against their ow ference, or that of any one by their Twenty years previously they had passe law, giving the right to deposit mate

ing purposes on the highways of the city, they subsequently demised certain premises ing the market to M., who obstructed a e of the same with building materials. laintiff thereupon sued defendants on their l covenant for undisturbed collection of ls, and charging a wrongful license to M. ract said market :—Held, that such action t maintainable. *Reynolds* v. *Corporation City of Toronto*, 15 C. P. 276.

1858 the defendants, a railway company, ing lands for their station and grounds, l it in with the consent of the proprietor, let the amount to be paid for it was for some e not agreed upon. Defendants, however, l it until 1866, when they leased a n of it to the plaintiff for the purpose of a se, and in 1868 M., not having been paid e land, put up a fence which interfered the plaintiff's enjoyment. The plaintiff on sued defendants on the covenant in ase for quiet possession :—Held, that he not recover, for M. could not have dispos- the defendants, his right to the land hav- n by the statutes converted into a claim pensation ; and the eviction, therefore, if was one, was not by title paramount. v. *Grand Trunk R. W. Co.*, 35 Q. B. 57.

laration, that defendant by deed demised land to the plaintiff for five years, at the hereby reserved, and subject to the cove- and conditions therein contained ; and defendant covenanted that the plaintiff, the quarterly rent thereby reserved, and ng his covenants therein contained, l quietly hold and enjoy the premises, &c., said term ; and all conditions were ful- &c., yet during the said term defendant l and evicted the plaintiff. Plea, that laintiff did not pay the rent by said lease k, or perform the covenants therein con- l whereby defendant became entitled to pon the demised premises :—Held, plea r no proviso for re-entry was shewn, and o way justified the eviction, but merely matters quite consistent with the right to *Power* v. *Bradburn*, 25 C. P. 108.—ry, J., sitting in vacation.

plaintiffs declared upon the covenant for njoyment in a lease to them by defen- f a flat in a building, above the flat occu- defendants, together with all passages, &c., to the said rooms belonging, alleging defendants had disturbed them in their ion. Plea, in substance, that the rooms rt of a large building, in which there her rooms used as offices, to which access ained from the street by the door and e, which were used by the other tenants mon with the tenants of the rooms leased ntiffs; that the whole building was in e of a caretaker employed by defendants re landlords of the whole and for the and convenience of all, kept the key of eet door, and locked it after the usual hours, after which the plaintiffs could at onable times get the key and have access r rooms ; that the demise was made sub- to the right to use said door by defendants her tenants ; and that the disturbance was the locking of said door by the care- ther office hours :—Held, that the plea shewed no defence. *Mackenzie et al.* v. *Royal Ins. Co.*, 37 Q. B. 284. Galt, J., sitting in vacation.

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7. *Covenant to give up Possession.*

Where a lessee took a lease of premises for two years, and covenanted to leave the premises without notice at the end of that time :—Held, that on ejectment brought by the lessor at the end of the term the lessee could not set up a former lease to him for a longer period. *Doe* d. *Wimburn* v. *Kent*, 5 O. S. 437.

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8. *Implied Covenants.*

See *Smart* v. *Stuart*, 5 O. S. 301, p. 2020 ; *Reynolds* v. *Corporation of Toronto*, 15 C. P. 276, p. 2029 ; *Saunders* v. *Roe*, 17 C. P. 344, p. 2022 ; *Davis* v. *Pitchers*, 24 C. P. 516, p. 2019 ; *Coleman* v. *Reddick*, 25 C. P. 579, p. 2064.

See, also, IV. 2, p. 2020.

VI. Leases by Particular Persons.

1. *Tenants in Tail.*

Where a tenant in tail makes a lease for lives and dies without issue, the lease is absolutely determined by his death, so that no acceptance of rent by him in remainder or reversion can make it good. The acceptance by the remainderman of a yearly nominal rent is not a confirmation of the lease, especially where a party disclaims holding as his tenant. *Doe* d. *Graham* v. *Newton*, 3 Q. B. 249.

VII. Entry of Lessee.

A defendant in ejectment relying upon a lease to a third person as shewing title out of the plaintiff, need not shew an entry by the lessee under the lease, for until some one else be shewn in possession, holding out the lessee, he must be regarded as possessed of the term. *Doe* d. *King's College* v. *Kennedy*, 5 Q. B. 577.

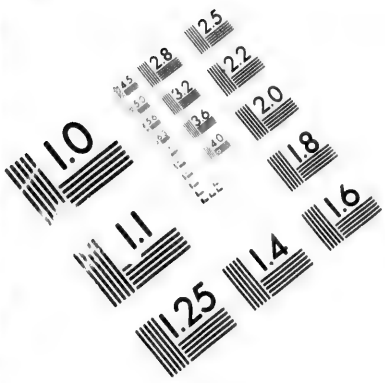
VIII. Assignment.

1. *Liability of Assignee.*

A plea to an action of covenant for rent against the assignee of a lease, that all the estate of the lessee did not come to and vest in the defendant, as the plaintiff alleges, is a good plea. *Annis* v. *Corbett*, 1 Q. B. 303.

A lessee assigns his interest, and the assignee of the assignee neglecting to pay rent and to keep the premises in repair, the lessee is sued by the lessor, and, upon being compelled to pay the rent and damages, sues the assignee of the assignee in a special action on the case for the damage he had sustained :—Held, that he was entitled to recover for the rent and damages he had been obliged to pay the lessor. *Ashford* v. *Hack*, 6 Q. B. 541.

In debt for rent on a lease, the declaration stated that the right and interest of the lessee in the demised premises came by assignment to and was vested in the defendant. It was in evidence that defendant was at most only under-lessee for



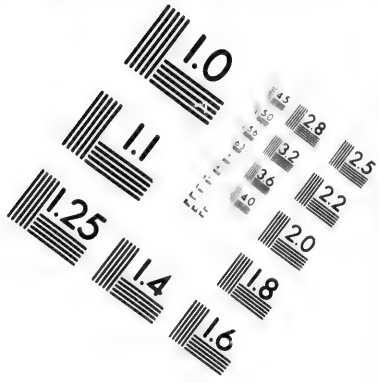
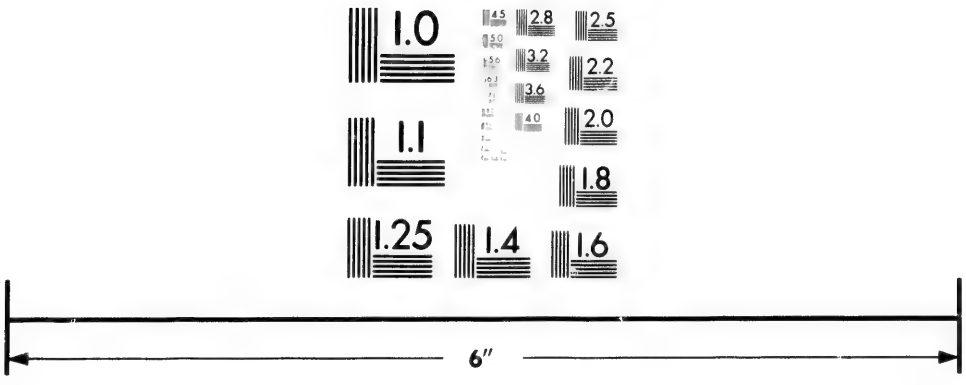
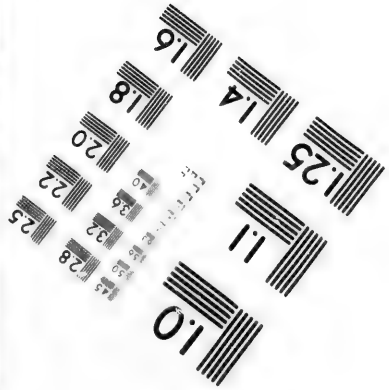
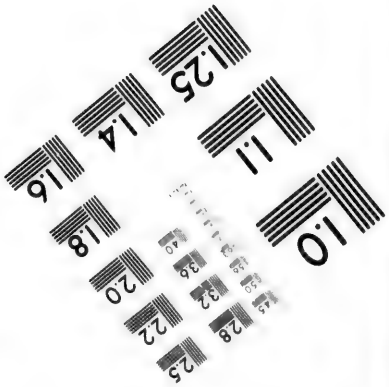


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a part of the term :—Held, that a nonsuit was rightly directed. *Lawler* v. *Sutherland*, 9 Q. B. 205.

Plaintiff sued defendants, who were the assignees *of the rent for the term which plaintiff was to enjoy*, on a covenant by his lessor to repair, as being a covenant running with the land; but—Held, that they were not liable, for they had no reversion, and the covenant would not run with the rent. *McDougall* v. *Ridout et al.*, 9 Q. B. 239.

The plaintiff, being lessee of S., assigned his term and all other property to defendants for the benefit of his creditors. Defendants took possession in March, and remained until August, disposing of the plaintiff's stock so assigned; they then quitted the premises, having paid the rent up to November following. They requested the lessor to take the premises off their hands, but he refused. In January they assigned to one B., a pauper, (the plaintiff knowing nothing of this assignment.) After the expiration of the term he was sued by the lessor, and compelled to pay two quarters' rent; for which, and for his costs so incurred, he brought assumpsit against these defendants :—Held, (the above facts being submitted for the opinion of the court,) that the assignment by the defendants could not be treated as fraudulent, and that the plaintiff could not recover. Held, also, that the interest in the lease passed to defendants under the assignment, as set out in the case. *Magill* v. *Young et al.*, 10 Q. B. 301.

Covenant by lessee to insure in the name of the lessor, the insurance money to be expended in the erection of new buildings :—Held, a covenant running with the land, and that an action would lie on it against the assignee of the lessee. *Douglass* v. *Murphy*, 16 Q. B. 113.

The tenant covenanted to leave some acres sown, to be paid for by the landlord at a valuation upon the termination of the term. The defendant purchased the reversion from the landlord, and treated for the sale of the crops at the valuation, assuming acts of ownership :—Held, that by his acts he had assumed the landlord's liability, and was responsible under the lease. *Marton* v. *Scott*, 7 C. P. 481.

S. having mortgaged certain land in fee afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words, ("bargain, sell, and release,") to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff, to secure a balance of the purchase money. This mortgage had been discharged before action, by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage :—Held, 1. That defendant, as assignee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered; and 2. That such reversion passed to the plaintiff by the first conveyance from S. (which contained apt words to pass the legal estate,) though in it the mortgage was recited; 3. That the subsequent sale and conveyance being expressly subject to the l the reversion was not merged in the legal e then derived by the plaintiff through P. & and that the plaintiff being still bound b lease, defendant was so as well; 4. That plaintiff's discharge of the mortgage did destroy his right of action for rent previ accrued; and that he was therefore entitle recover. *Cameron* v. *Todd*, 22 Q. B. 390.

Held, affirming the above judgment that T iable to pay this rent notwithstanding he eve r entered into possession of the prem the effect of the conveyances being such tha was estopped from disputing the right of reversioner to force payment thereof. E V. C., diss. *Todd* v. *Cameron*, 2 E. & A. 4

One M., being the original lessee, assigne P., who did not execute the assignment, assigned to defendant by mortgage, recitin Afterwards, on a decree in a foreclosure brought on this mortgage, the land was sol M. as the highest bidder, who entered into session, but paid nothing, and received no veyance, nor was any order made vesting property in him :—Held, that defendant bec liable on the covenants in the lease, under assignment from P., and continued so notw standing the sale. *Magrath* v. *Todd*, 26 Q. B

Where a lessee of land for five years dem the land for seven years :—Held, that the de in question operated as an assignment of original term, and conferred upon the orig lessor, in respect of the privity of estate t created, a right of action against the assigne The term for the arrears of rent due under original lease. *Selby* v. *Robinson*, 15 C. P. 3

In a lease for years of premises made to his executors and assigns, and assigned by G to the residue of the term to defendants, contained, after the usual covenants to yield the same in good repair the following provi "Provided always that nothing herein contai shall be deemed, or taken, or construed to deemed, or taken in any way to compel the s G., his executors, administrators, or assigns, give up the buildings at the expiration ther which are all wooden and liable to decay, in sound and good a state as they now are; such buildings are not to be wilfully or ne gently wasted or destroyed; necessary repa however, for the preservation of the said bui ings, to be done and performed by the said G. his own proper cost and charge :- Held, that words recited, constituted a covenant, and th such covenant ran with the land and bound assignees of the lease, though assigns were expressly mentioned in the instrument. *Pe et ux.* v. *Bank of Upper Canada*, 16 C. P. 46

A lessee, after he had taken possession un his lease, agreed verbally with the lessor to er at his own expense a rough-cast addition t brick tenement then on the premises, with privilege of selling or removing such additi The lessee accordingly built such addition, a afterwards transferred his interest to the defe dant. The lessor subsequently sold and c veyed the fee to the plaintiff, subject to t lease, and by the lessee "assigned to B," (t defendant, who was then in possession.) T defendant being about to sell and remove su addition, the plaintiff took proceedings to r

strain him from so doing, claiming the same as part of his freehold; but:—Held, that the plaintiff was bound not only by the terms of the lease, but took subject to any other rights or equities existing between the original lessor and lessee, including such verbal agreement to permit the removal of the addition. *Close* v. *Belmont*, 22 Chy. 317.

See *McGill* v. *Proudfoot*, 4 Q. B. 33 p. 2059; *Spence* v. *Hector*, 24 Q. B. 277, p. 2083.

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2. *Liability of Lessee.*

In covenant for rent, a plea relying on the plaintiff's acceptance of the assignees as his tenants, and on his receipt of prior rent (not the rent sued for) from them, as relieving defendant (the lessee) from any further liability, is a bad plea, as being no defence to an action on an express covenant. *Stinson* v. *Magill*, 8 Q. B. 271.

Covenant by lessor against lessee for not repairing or paying rent. Plea, that before breach, with the plaintiff's consent, defendant assigned to H. all his estate in the premises, and it was agreed between them that H. should hold for the residue of the term, and defendant be from that time discharged from the covenants: that defendant accordingly gave up possession to H., who held to the end of the term, and the plaintiff accepted him as tenant in discharge of defendant's liability:—Held, on demurrer, plea bad, for 1. No assignment by deed was alleged; and 2. Though an assignment of the term by a lessee, and the acceptance by lessor of the assignee, will prevent the lessor from bringing debt for the rent, he can still maintain covenant. *Montgomery* v. *Spence*, 23 Q. B. 39.

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3. *Rights of Assignees.*

The assignee of a reversion cannot recover rent accrued due before the assignment. *Wittrock* v. *Hallinan*, 13 Q. B. 135.

One of the defendants in an action for wrongful distress had assigned certain rent to a co-defendant, who gave the tenant (plaintiff) notice; Semble, that debt might have been maintained by the assignee for the rent. *Hope* v. *White et al.*, 17 C. P. 52.

Defendant, owner in fee, conveyed to D. and took back a mortgage. D. then leased to plaintiff, and afterwards, by writing, without deed, assigned to defendant, all the rent to become due under the lease:—Held, that there could be no assignment of the rent without deed. *Dore* v. *Dore*, 18 C. P. 424.

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4. *Other Cases.*

In debt on a bond conditioned to pay rent, a plea that before the rent became due the plaintiff assigned to A., to whom the defendant paid the rent, was held good on demurrer. *McDougall* v. *Young*, Dra. 111.

Articles of agreement, made on, &c., between O. of the first part, and S. of the second part, witnesseth that the said O. hath agreed to sell, and by these presents doth bargain and sell unto the said S., all and singular that certain leasehold property and premises, being composed of, &c., for the price of £250, to be paid as follows: £50 down, and the remainder in four equal annual instalments. Then followed a covenant by O. that if S. should duly pay the said sums, and should pay and save harmless said O. from the rent due by the leases under which O. held, then the said O. *would assign* and convey the aforesaid leasehold, and the appurtenances thereof, to said S.:—Held, an agreement to assign only, not an assignment of O.'s interest. *Taylor* v. *Sutton*, 18 Q. B. 615.

Held, affirming the decree of the Court of Chancery, 9 Chy. 488, that the assignment by the personal representative of a lessee for years does not carry with it a right of purchasing the fee contained in the lease. *Henrihan* v. *Gallagher*, 2 E. & A. 338.

On the 1st May, 1859, J. D. demised by lease under seal certain premises to E. B. D. for the term of five years. This lease contained a covenant that the lessee should not assign without the leave of the lessor. Subsequently to its date the lessee with the assent of the lessor assigned the lease to the defendant for the remainder of the term unexpired. Defendant then verbally assigned his right to the term as sub-let to one P., who entered into possession of the demised premises:—Held, the assignment of and by defendant to P., being by parol, and being without the knowledge of the lessor, J. D., that defendant was, notwithstanding it, properly assessed in respect of the demised premises. *Regina ex. rel. Northwood* v. *Askin*, 7 L. J. 130.—C. C.—Wells.

A lease, dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements." The proper title of the statute then in force, C. S. U. C. c. 92, being "An Act respecting short forms of leases;" and it contained the following covenant: "And the said lessee, *for himself, his heirs, executors, administrators, and assigns, hereby* covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sublet without leave." Then followed "Proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment made by the administratrix of the lessee. Richards, C. J., thought the weight of authority in favour of holding that the administratrix was not bound by the covenant not to assign, not being named in it, but that in a Court of Appeal it might properly be held otherwise. A. Wilson, J., inclined to think the covenant one concerning the land, which would bind the assigns, though not named in it; but held that the proviso for re-entry did not apply to it. *Lee et al.* v. *Lorsch*, 37 Q. B. 262.

IX. Forfeiture.

1. *By Disclaimer.*

A disclaimer by a tenant of his landlord's title, at once puts an end to an existing tenancy, and ejectment may be at once maintained without a notice to quit. *Doe* d. *Claus* v. *Stewart*, 1 Q. B. 512; *Doe* d. *Nugent* v. *Hessell*, 2 Q. B. 194.

A term is not forfeited by the tenant taking a title from a stranger, but only by his acknowledging by record that the fee is in another than in his landlord. *Doe* d. *Daniels* v. *Weese*, 5 Q. B. 589.

In ejectment it appeared that one C. B. had leased from the plaintiff part of the property, and being in possession, gave it up for $60 to defendant, who claimed that it was her own:—Held, this was clearly a fraud upon the plaintiff as landlord, by which the lease was forfeited, and that the defendant could not set up C. B.'s right under it, *Kyle* v. *Stocks*, 31 Q. B. 47.

See XXVI., p. 2087.

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2. *By Non-payment of Rent.*

In ejectment for a forfeiture for non-payment of rent, the plaintiff must prove, if proceeding under 4 Geo. II. ch. 28, that there was no sufficient distress upon the premises, and if at common law, that the rent was demanded in proper time by a person duly authorized. *Doe* d. *Cubitt et al.* v. *McLeod*, M. T. 4 Vict.

Where the lessee covenanted to pay the yearly rent, with a condition for re-entry "if the tenant should do or omit anything in breach or non-performance of any of his covenants":—Held, that the non-payment of the rent would not make the demise void ipso facto, but only void upon proper proceedings being taken for that purpose. *Doe* d. *King's College* v. *Kennedy*, 5 Q. B. 577.

Covenant, on an indenture, excusing profert, by which defendant demised land to plaintiff for five years, and covenanted to convey to him in fee if he should pay £125 on or before a day named. Breach, that although the plaintiff offered the money before the day named, and requested a conveyance, yet defendant refused. Plea, after setting out the indenture in full, which contained a proviso that in case the rent or any part thereof should be in arrear for forty days, then the indenture and every thing therein contained should be void—that before and at the time of the tender in the declaration mentioned the first year's rent was in arrear for forty days, whereby the indenture and the covenant to convey became void:—Held, plea good. *McLellan* v. *Rogers*, 12 Q. B. 571.

Where the lease expressly provides that it shall be void on non-payment of rent, whether demanded or not, the C. L. P. Act, sec. 263, does not apply, and in ejectment for the forfeiture there is no necessity to shew a want of distress:—Held, however, that if it had been otherwise, in this case, on the evidence stated, absence of distress was sufficiently shewn. *McDonald* v. *Peck*, 17 Q. B. 270.

Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S., and the heirs of his body, for 21 years, or the term of his natural life, from the 1st of April, 1853, fully to be complete and ended," but not to be underlet to any person, except to the family of the said S., for any period during the said term. A yearly rent was reserved, which S. covenanted to pay, and it was provided that on failure to perform the covenants, the lease and the term thereby granted, should cease and be void. The lessee entered, and the 1st of April, 1859, a year's rent being arrear, defendant distrained and sold the goo of S., who remained for some time on the pr mises as defendant's servant; and the sher afterwards, under executions which had been his hands since November, 1858, sold the une pired term of S. in the premises, describing as a term with 15 years yet to run, at a rent $100 a year. The plaintiff became the purchas and brought ejectment against defendant on t sheriff's deed:—Held, per McLean J., that t plaintiff's title failed, on the ground that t lease being void by the non-payment of re and S. having given up possession by arrang ment with defendant, his interest was goo *Dalye* v. *Robertson*, 19 Q. B. 411.

In an action by a tenant against his landlo for refusing to permit him to enter to take aw the emblements, it appeared that defendant ga notice, after the crops were sown, to termina the lease according to the proviso contained it, and the lease was so terminated on the 20 March. Between that day and the 30th Marc defendant brought ejectment. Defendant, his plea, set up that there was also a provisi in the lease for re-entry if any part of the re should remain in arrear for fifteen days, a though no formal demand should be made ther of; that a part of the rent was due on the 15 March, and before he could recover in his ejec ment or get possession, more than fifteen da had elapsed from that time, and he entered account of the said right of re-entry for non-pa ment of rent, as well as on account of the term nation of the lease by notice; and by reason plaintiff's default in payment of rent and defe dant's entry, plaintiff forfeited his right to t emblements, and they became defendant's, a part of his reversionary estate in the land: Held, on demurrer, plea bad: 1. because the could be no forfeiture for non-payment of ren after the term was at an end, which it was b fore the forfeiture became complete; 2. becau defendant, having terminated the lease an brought ejectment before there could have bee any forfeiture for non-payment, could not afte wards set up such non-payment as forfeitur Held, also, that the defendant, under the provi in the plea, could have brought ejectment f non-payment of rent, without a demand, thou there might have been sufficient distress on t premises. *Campbell* v. *Baxter*, 15 C. P. 42.

One G., a rector, in 1861, leased land to t plaintiff for 21 years, at an annual rent, with proviso for re-entry on non-payment. The plai tiff entered and paid rent until the summer 1865, when he went away from the county, lea ing nearly a year's rent over due, and giving t key to a person in the adjoining house. In Jul 1866, the premises being then vacant, G. we to England, leaving a power of attorney wi his son authorizing him to collect and distra for his rents, and to commence and prosecute actions and other proceedings which might expedient to be done or prosecuted about t premises as if he were present. Defendant some way got the key and went in, and afte wards obtained a lease from G.'s son for 21 yea G. on his return, in 1866, recognized this lease a received rent under it regularly from defenda until 1868, when the plaintiff brought ejectme claiming under his lease from G.:—Held, th

the facts shewed a sufficient re-entry by G. to avoid the plaintiff's lease, and that the plaintiff therefore could not recover. Quære, whether the son was authorized, under the power of attorney, to bring ejectment and enter for the forfeiture. Semble, that the lease to the plaintiff was binding on the rector and those claiming under him until forfeited. *O'Hare* v. *McCormick*, 30 Q. B. 567.

The plaintiff leased premises from defendant at a rent of $150 a year, covenanting to pay rent, &c., and it was added "this lease will be void if the said plaintiff fail to perform this agreement:"—Held, that the last clause would only make the lease voidable at the option of the lessor, not void; and that to entitle the lessor to determine the lease for non-payment of rent, a formal demand was necessary. Quære, whether the words "this agreement" would apply to the covenant to pay rent. *Faugher* v. *Burley*, 37 Q. B. 498.

See *Black* v. *Allan*, 17 C. P. 240, p. 2038; *Cornock* v. *Dodds*, 32 Q. B. 625, p. 2061.

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3. *Waiver.*

Where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the hab. fac. poss. has issued, is a waiver of the execution. *Bleecker* v. *Campbell*, 4 L. J. 136.—C. L. Chamb.—Draper.

Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent. *Ainley* v. *Balsden*, 14 Q. B. 535.

Defendant gave a note for the rent due up to the 1st December, 1856. He afterwards obtained a note of the plaintiff's for £28 15s., and being unable to pay his taxes, gave it to the bailiff before it fell due, telling him to ask the plaintiff to advance the sum required, and to credit the balance on the then current rent. The plaintiff's clerk advanced the money and took the note, but refused to credit the balance on the rent then accruing, saying that he would apply it on the previous note given by defendant, which remained unpaid:—Held, that there had been no acceptance of rent due after December, 1856, so as to waive the forfeiture. *McDonald* v. *Peck*, 17 Q. B. 270.

Plaintiff leased to defendant for twenty-one years, with a covenant by defendant to erect, within four years, a house, &c., which covenant was broken, but the lessor received rent to a period subsequent to the time of the alleged forfeiture:—Held, a waiver of the right of entry for breach of the covenant. *Roe* v. *Southard*, 10 C. P. 488.

Plaintiff, by indenture, agreed to convey to defendant certain land, the right to purchase which had been assigned by defendant to him, on payment by defendant of certain sums, and that defendant should occupy until default. After default plaintiff and defendant referred all matters in difference. The award postponed the date of payment as to which defendant had been in default, and before the date so fixed defendant tendered the amount:—Held, that the instrument executed by plaintiff created a demise, or a re-demise, in favour of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference after default either waived it, or postponed the time for payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Black* v. *Allan*, 17 C. P. 240.

Semble, that it was no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency. *Kerr* v. *Hastings*, 25 C. P. 429.

Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver, there must be some expenditure of money in improvements or some positive act of waiver, such as receipt of rent. *McLaren* v. *Kerr*, 39 Q. B. 507.

Two leases were executed between the same parties, and to the same effect, except that the first lease was for twenty acres and the second for ten acres, parcel of the twenty. It was a condition of the leases that the lessee should commence digging for oil on or before the 1st of June, 1861, which he failed to do. On the 16th of September, 1863, the lessor accepted from the lessee $50, to be kept out of his share of the first oil obtained, and a memorandum to this effect was endorsed on the twenty-acre lease by the lessor, which instrument the lessor thereby declared that he considered valid. On the 30th of November, 1864, another memorandum was endorsed on the same lease, and signed by the lessor, agreeing to extend the time of commencing work on the within lease until June, 1865. The lessor was, until after this time, beneficial owner of the property, and he subsequently sold the lot of which the ten acres were part; the purchaser having notice of the leases. On his subsequently obtaining a patent for the lot, the Court of Chancery decreed that there was waiver of the condition to commence work by a particular time; and that the ten-acre lease was binding on the patentee, and restrained him from bringing ejectment; and the decree was affirmed on appeal. *Flower* v. *Duncan*, 13 Chy. 242.

See *Roaf* v. *Garden*, 23 C. P. 59, p. 2051; *Manning* v. *Dever*, 35 Q. B. 294, p. 2047.

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4. *Other Cases.*

Upon a lease purporting to be made by "R. W." as attorney for "A. H.," reserving a right of re-entry "by the said R. W. into the demised premises," not saying as such attorney:—Held, that no right of entry was reserved, for there can be no reservation of a right of re-entry to a stranger to the legal estate. *Hyndman* v. *Williams*, 8 C. P. 293.

Plaintiff and defendant being joint owners of land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during the plaintiff's life, the plaintiff agreed to let defendant work

the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do, and each bound himself to the other in £1,000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. On ejectment brought by the plaintiff:—Held, that he had a right to recover on breach of any of the conditions, notwithstanding there was a covenant also to perform them, and a penalty attached to the breach; and that no notice to quit or demand of possession were necessary. *Sheldon* v. *Sheldon*, 22 Q. B. 621.

Action by lessee against lessor for eviction. Plea, that the plaintiffs by the lease covenanted that they would, during the term, pay all taxes, and that the nonfulfilment of their covenants, or any of them, should operate as a forfeiture of the said deed, and that the same should be considered null and void: that during the term certain taxes were unpaid on the land, amounting to $8.55 for municipal, and $9.55 for school purposes for 1863, which the plaintiffs did not pay, although the same were duly demanded, and they had no distress on the land, and such taxes in March, 1864, were returned by the collectors as due on non-resident lands, whereby the said deed and the term became forfeited and void, and the defendant afterwards peaceably entered and became possessed as in his first estate:—Held, that the plea was sufficient; that the taxes became due when demanded, and the plaintiffs had not the whole term to pay them in: and that defendant could enter without bringing ejectment. *Taylor et al.* v. *Jermyn*, 25 Q. B. 86.

In ejectment against one M., the defendants appeared and defended, by order, as landlords in lieu of M. The plaintiff claimed under a covenant in a lease from him to M., on the right of re-entry for non-payment of rent and non-performance of covenants. It appeared that the instrument set up by plaintiff as a lease was an agreement, dated 2nd April, 1867, whereby plaintiff agreed to sell the land to M., for £100, M. paying £10 each year and interest at six per cent till the whole was paid: provided that if the payments were not made within one month from the time appointed, the interest due was to be considered as rent, for which the plaintiff might enter and distrain; M. not to commit waste, &c., and to pay taxes; and in case of default in making the payments for three months, then he should surrender the premises to plaintiff; and M. agreed not to let or assign without leave. It also appeared that the plaintiff held under a lease, dated 23rd March, 1865, from defendants for 10 years, being one of the company's printed leases, which gave right of re-entry for non-payment of rent and taxes, and for assigning without leave; that four years' rent was in arrear, and that there was no written authority to the plaintiff to sell to M. The lease also contained, besides the general proviso for re-entry, a special power to determine the lease on a given notice. In February, 1872, defendants executed a lease to M. for seven years, but no evidence was given to shew when it was actually delivered:—Held, that if it had been shewn that defendants were proceeding to re-enter for the plaintiff's default, and that M. took the lease from defendants to save himself from eviction, this would be a bar to the plaintiff's right, and there would be no necessity for their putting him out of possession, and his re-entering under the new demise; but as this evidence was wanting, a verdict found in defendants' favour was set aside and a new trial granted:—Held, also, that the general proviso in defendants' lease for re-entry, was not controlled or affected by the special power given to determine the lease on a given notice:—Held, also, that under the agreement between plaintiff and M., the plaintiff had the right to re-enter and take possession on default: and the covenant to surrender possession after three months default could not alter plaintiff's right. *Hely* v. *The Canada Co.*, 23 C. P. 20.

To supply the evidence by the judgment of the Court in the last case held to be wanting at the previous trial, the defendants proved an admission by M. that he held the land for the defendants, after he had first informed them that he held under the plaintiff, and that he and the plaintiff had made improvements thereon:—Held, that the defendants, with full knowledge of these facts, granting a lease to M. with a covenant against incumbrances, shewed that they were proceeding to enforce the forfeiture against plaintiff, and that M. attorned to them to avoid eviction; also that the defendants coming in in this suit against M., and defending as M.'s landlords, contending the lease was at an end, shewed that their desire was to forfeit it. It was objected that as defendants were defending in lieu of M., they could only set up the same defence as M. could; but held, that as the defendants had really become M.'s landlords, and he their tenant, by accepting a lease utterly inconsistent with the demise to plaintiff, they could defend in their own right, and urge this lease and M.'s attornment to them, as their entry for conditions broken in plaintiff's lease. *S. C.*, 23 C. P. 597.

It was provided by a lease that in case the term should at any time be seized or taken in execution or in attachment by any creditor of the lessee, or if the lessee, becoming bankrupt or insolvent, should take the benefit of any act that might be in force for bankrupt or insolvent debtors, the term should immediately become forfeited and void. Proceedings having been taken in compulsory liquidation under the Insolvent Act of 1869, and an attachment placed in the plaintiff's hands:—Held, that the lease was forfeited, and that the clause was not limited to an attachment issued under the Absconding Debtor's Act. *Kerr* v. *Hastings*, 25 C. P. 429.

Where a covenant accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, and the tenant in good faith has done what he supposed to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant, is a special circumstance entitling the defendant to relief. *McLaren* v. *Kerr*, 39 Q. B. 507.

See *Muckleston* v. *Smith*, 17 C. P. 401, p. 2095; *McIntosh et al.* v. *Samo*, 24 C. P. 625, p. 2077.

X. Surrender.

1. *By Operation of Law.*

A tenant in fee may surrender his estate back to the crown by operation of law, as by accept-

ing a new grant for the same land, or he may surrender by matter of record; but a surrender not of record, or a surrender by record founded on an invalid title, is insufficient. *Doe* d. *McDonell et al.* v. *McDougall et al.*, 3 O. S. 177.

Where, in trespass qu. cl. fr. et de bonis asportatis, the defendant justified the seizure of goods on a distress for rent under a demise to one A., and the plaintiff replied that before the rent distrained for became due, A. died, and the defendant and A.'s executor joined in the demise of the same premises to the plaintiff, under which the plaintiff entered and occupied—the replication was held good, as the demise to A. was surrendered and determined by the new demise to the plaintiff. *Strathey* v. *Crooks*, 6 O. S. 587.

Where in trespass for taking goods, defendant having justified under a distress for rent, the plaintiff replied a new lease by which the demise by defendant was surrendered and determined by operation of law, and defendant rejoined specially traversing the surrender, it was held that the special traverse was bad, as it was matter of law. *Strathy* v. *Crooks*, 1 Q. B. 44.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors, is as between the lessor and lessee a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession. *Doe* d. *McPherson* v. *Hunter*, 4 Q. B. 449.

The mere allegation in a plea "of a surrender of a term of years to the defendant by the plaintiff," obliges the defendant to prove an actual surrender. A surrender by operation of law, must be so pleaded. *McNeil* v. *Train*, 5 Q. B. 91.

In covenant by landlord against tenant, it is a bad plea to plead a surrender by a third party (whose legal estate is not shewn to have been derived from the plaintiff) to the Queen, and that therefore the land at the expiration of the lease did not belong to the plaintiff. *Russell et ux.* v. *Graham*, 6 Q. B. 497.

The giving up and cancelling the lease by the tenant, though not of itself a surrender of the term, is yet a strong circumstance to be considered:—Held, that the subsequent conduct of the tenant in this case (as mentioned in the judgment of the court,) must be taken to be, on the principle of estoppel, an implied surrender of his lease. *Doe* d. *Burr* v. *Denison*, 8 Q. B. 185.

Where a tenant, with the knowledge and consent of his landlord, takes a lease from another person, to whom the landlord has transferred the reversion, this amounts to a surrender in law, and the right to distrain is gone. *Lewis* v. *Brooks*, 8 Q. B. 576.

The 12 Vict. c. 71, does not alter the law so far as regards a surrender in law. *Ib.*

Plaintiff held from defendant a lease of a farm unexpired. Plaintiff and defendant, with D. and M., became bound to each other by bond in £200, with a condition reciting that "the parties agreed to separate and cancel all arrangements heretofore made, and leave all controversies between them to the arbitration of T. and P.; and should they not agree, to choose an umpire, whose decision should be final." The four signed the bond, but it had only two seals, which all four touched. The two arbitrators not agreeing appointed an umpire, who awarded that defendant should release and give up to the plaintiff "the term of years, as agreed to in the submission, and also deliver up the stock of farming utensils in proper order, and without further delay, and that the lease then held by both parties of said farm be immediately cancelled":—Held, that the bond was not in itself a surrender of the term: that even if so intended by the parties, the term would not be surrendered, for the bond could not be held to be such a deed as is required by 14 & 15 Vict. c. 7, s. 4: that the award would not amount to a deed of surrender by the defendant; and therefore that the plaintiff could not eject the defendant. *O'Dougherty* v. *Fretwell*, 11 Q. B. 65.

An agreement in writing, whereby A. agreed to rent to B. for three years from date for £50 per annum, with taxes, payable quarterly during occupation; B. to expend £25 in improvements, is a lease, and not a mere agreement for a lease:—Held, also, that such lease was not surrendered by operation of law, by A. afterwards agreeing in writing to sell the premises to B. upon certain conditions to be afterwards completed; none of which were performed by B. at the time appointed by the agreement, nor was he ready to do so. *Grant* v. *Lynch*, 6 C. P. 178.

Defendant leased to F., from whom he took a note in payment of arrears of rent. F. let the plaintiff into possession of the premises, and the plaintiff made certain payments to defendant on account of rent, for which defendant gave receipts as for premises leased to F. On pleas of rien en arriere from F. and non tenuit:—Held, that there had been no surrender of the term of F. by operation of law. *McLeod* v. *Darch et al.*, 7 C. P. 35.

A rented a house to B. by lease dated September 1st, 1854. B. took possession, and on the 17th of May following, agreed with A. for purchase; "the one-fourth of the purchase money to be paid by approved endorsed notes at three months from date, the remainder to be paid in four equal annual instalments, with interest on the amount unpaid at each time of payment; agreement to be drawn and possession given on the 1st day of June next, from which time payment of instalments commences." An agreement was prepared before the 1st of June, but was not executed, owing to a misunderstanding about the note, B. not being prepared with such a note as A. would accept:—Held, that there had been no surrender by operation of law, and that A. might distrain for his rent. *Grant* v. *Lynch*, 14 Q. B. 148.

Plaintiff held certain premises, including those in dispute, under a lease for five years. After the execution of the lease, the landlord and the plaintiff agreed verbally that the latter should give up four or five acres of the land leased to him, and take other land in lieu thereof, which was pointed out, and of which the plaintiff entered into possession of four acres; the landlord sold to defendant the premises, to recover possession of which this action was brought, and defendant entered into possession thereof, and erected buildings thereon, and the plaintiff for and at the request of the defendant ploughed the land in question, and by other acts evinced

his consent to, and acquiescence in, the sale to the defendant, and the possession taken by him: —Held, in ejectment for the premises sold by the landlord to the defendant, that the facts constituted a surrender by operation of law. *Horton* v. *Macconnichy*, 9 C. P. 186.

Defendant avowed for rent under a demise to G., to which the plaintiff pleaded non tenuit. It appeared that during the term G. had left the country and assigned to one M., who sold to C., and that G. had afterwards returned, and entered under C., and was living there when the distress was made:—Held, clearly not to amount to a surrender of the term, or deprive defendant of his right to distrain. *Elsworth* v. *Brice*, 18 Q. B. 441.

One L. by an instrument *not under seal*, dated 31st October, 1857, leased to S. O., one of the defendants, for five years, On 31st March, 1858, he mortgaged the premises to the plaintiffs, redeemable as therein set forth, and on the 8th of June, 1858, by indenture, he again leased the same premises for five years to S. O. Upon ejectment brought by the mortgagees:—Held, that although the indenture of June, 1858, as between the parties to it, extinguished the tenancy from year to year created by the instrument of 31st October, 1857, yet it did not entitle the plaintiff as mortgagees to succeed, they not being parties to it. *Caverhill et al.* v. *Orvis et al.*, 12 C. P. 392.

A. & B. were partners, occupying premises as co-tenants under a yearly tenancy on the terms of an expired lease. Before the nomination day for a municipal election they dissolved partnership, B. leaving the business and premises of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from the same landlord:—Held, that B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.—C. L. Chamb.—J. Wilson.

To an avowry for rent the plaintiff pleaded that before the distress he surrendered his interest in the term to defendant, and the said tenancy was put an end to, and ceased, by the defendant entering on the said premises, by act and operation of law. A lease for five years was proved at $150 a year, under which the plaintiff entered, and it appeared that before the end of the second year, and before the distress, defendant, having offered the plaintiff $50 to allow him to take possession, went to live in the house. Defendant afterwards told a witness that he had let the place again to the plaintiff on shares, he, defendant, living on it as owner. He afterwards got the lease from this same witness, with whom it had been deposited by both parties, saying that it was of no use. The plaintiff also lived in the house, but the agreement was that defendant, and not he, should have the right of possession. These arrangements were verbal:—Held, that the facts proved clearly shewed a surrender by operation of law, and the plea, though inartificially framed, was in substance an averment that the term was thus surrendered before the distress; and that the plaintiff was entitled to recover. *Coffin* v. *Danard*, 24 Q.B. 267.

Plaintiff leased from defendant for a term of years, but having got into difficulties said to defendant, "I can do nothing here, and I am going to give the place up, as soon as I get rid of the few things I have: I am going to leave as soon as a relation of mine comes." He then asked, "To whom shall I give the key?" Defendant replied, "To Partons." Plaintiff then assented, and both then proceed to fasten the windows. Defendant expressed his desire that plaintiff should remain and offered to assist him, but plaintiff left and did not afterwards return. Defendant, after plaintiff left, placed P. in charge; but plaintiff had previously given P. the key, and had instructed him not to deliver it to defendant without an order from him. Defendant did, however, subsequently get the key and placed a man in possession of the place: —Held, that what took place constituted neither a surrender in law, nor an executed contract by which the relation of landlord and tenant was put an end to. Held, also, that neither the giving up of the key nor the abandoning possession would of itself have been a surrender in law; but, semble, that the taking possession by defendant and cultivating the farm as his own absolute property would have amounted to a complete surrender in law, or would have been evidence of it, just as would the sale of the premises by defendant, or his grant of a lease thereof to a third person. *Carpenter* v. *Hall*, 16 C. P. 90.

One C. B. had leased from the plaintiff part of the property, and being in possession gave it up for $60 to defendant, who claimed that it was her own. Semble, the plaintiff having let part of the premises held by C. B. to B. B., who went into possession, and no rent being apportioned for the remainder, that this operated as a surrender of C. B.'s lease. *Kyle* v. *Stocks*, 31 Q. B. 47.

Ejectment by H. C. and E. C. his wife. The defendant S. limited his defence to two shops erected on the land sued for, and defendant G. to one of said shops as tenant of S. It appeared that while H. C. was in prison for felony, and on the 29th October, 1869, S. leased the premises to E. C. for two years from the 1st of June, 1870, at $200 a year, and S. covenanted to erect on the premises by the 1st of June, a tavern worth at least $1000. Afterwards S. proposed to erect, and did erect without opposition from E. C., a more expensive hotel, with two shops under it, (which were the shops referred to) and made other important alterations at a total expense of $3000. Defendant G. applied to E. C. for a lease of one of the shops, and was referred to S., and S., after seeing E. C., who said she did not want the shops, leased one to G. E. C. afterwards refused to give up possession until paid for delay in getting possession of the tavern until after the 1st of June. The amount was left to arbitration, and E. C. said she would allow G. to take possession, but after he had placed some of his goods in the premises she put them out and locked the doors, which the defendants then forced open and took possession. H. C. was during these transactions still undergoing his sentence:—Held, that during her husband's imprisonment for felony E. C. could contract, at all events as to what might be regarded as goods and chattels, as a feme sole. Semble, that a married woman may execute a deed without her husband joining during the

imprisonment of the husband as a felon. Held, also, that the facts above set out, and more fully appearing in the report, constituted a surrender, by operation of law, by E. C., or at all events estopped all parties from saying that S. had not the right to lease to G. *Crocker et ux.* v. *Sowden*, 33 Q. B. 397.

An engine and boiler put into a carpenter's shop and manufactory of agricultural implements:—Held, to be trade fixtures as between landlord and tenant, and removable by the tenant. Held, also, that neither the increase nor reduction of the rent in this case, under the circumstances stated, in the report, operated as a surrender of the term and an acceptance of the new tenancy, so as to prevent the tenants from claiming the fixtures. *Pronguey* v. *Gurney et al.*, 37 Q. B. 347.

See *Hortop* v. *Taylor*, 21 C. P. 56, p. 2059.

2. *Other Cases.*

The surrender of a term must, under the Statute of Frauds, be in writing, signed by the party surrendering, or by operation of law. *Doe* d. *Barr* v. *Denison*, 8 Q. B. 185.

Quære, whether a surrender, besides necessarily discharging all undue rents, may not, also, be pleaded equitably by way of accord and satisfaction of rents overdue. *Bradfield* v. *Hopkins*, 16 C. P. 298.

The owner of land with a saw mill thereon leased the mill, with a right to cut timber during his lease. The lessee assigned the lease, and the assignee afterwards surrendered it to the proprietor of the freehold:—Held, that the right to cut timber was only commensurate with the lease itself, and the lease having been surrendered, the right of cutting timber was at an end, except for the use of the mill. *Stegman* v. *Fraser* 6 Chy. 628.

See *Wilson* v. *Wilson*, 10 C. P. 476, p. 2084.

XI. Tenancies from Year to Year.

A lease for life for a nominal rent, not under seal, although it could not pass a freehold interest, would operate as a lease from year to year. *Doe* d. *Lawson* v. *Coutts*, 5 O. S. 499.

A letting at an annual rent constitutes a yearly tenancy, which continues at the same rent for the second year as the first if the tenant remain in possession of the premises; and the landlord may distrain for the first year's rent at the end of the second year; and the Real Property Act, 4 Will. IV. c. 1, s. 20, does not determine the tenancy at the end of the first year, so as to make it necessary to distrain within six months afterwards. *McClenaghan* v. *Barker*, 1 Q. B. 26.

Plaintiff claimed under a deed from J., the patentee, dated 12th April, 1853, and proved that on the 4th of April, 1854, he served defendant with a notice to give up possession on the 30th of September then next, in failure whereof "I shall require you to pay me rent of £1 per month for the same, for every month wherein you may continue in possession of the same, until I recover possession of the same, by legal proceedings or otherwise." Defendant at the time of the deed to the plaintiff, and for some time previous, had been living on the lot, under a verbal agreement with J., that he should have it for several years, and had made improvements:—Held, that the plaintiff must recover: that the notice was not an acknowledgment of yearly tenancy, so as to entitle defendant to six months' notice; and that the agreement with J., could have no effect. *Cleland* v. *Kelly*, 13 Q. B. 442.

Defendant claimed title as tenant of the party through whom plaintiff claimed, by virtue of letters under the terms of which he (the defendant) was entitled to possession for ten years upon certain conditions, which he had performed:—Held, that he thereby obtained a yearly tenancy. *White* v. *Nelson*, 10 C. P. 158.

One L. by an instrument *not under seal*, dated 31st October, 1857, leased to S. O., one of the defendants, for five years:—Held, that S. O. became tenant from year to year for five years, determinable during the term, by half a year's notice. *Caverhill et al.* v. *Orvis et al.*, 12 C. P. 392.

Plaintiff and defendant being joint owners of land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during the plaintiff's life, the plaintiff agreed to let defendant work the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do, and each bound himself to the other in £1000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. On ejectment brought by the plaintiff:—Held, that defendant by his entry became a tenant from year to year, on the terms of the agreement. *Sheldon* v. *Sheldon*, 22 Q. B. 621.

Defendant asserted that he was a yearly tenant, while the plaintiff alleged that he was tenant only from one year's end to the other:—Held, that on the facts stated in the case, the receipts for rent set out afforded no inference as to the nature of the tenancy. *Houghton* v. *Thompson*, 25 Q. B. 557.

Held, that the receipt of rent by the wife, with the husband's assent, from a tenant of her estate after the expiration of a term, creates a tenancy from year to year. *Johnson* v. *McLellan*, 21 C. P. 304.

Where D., being tenant for life of two lots, gave M. verbal permission to occupy one lot and build upon it, on condition that he should pay the taxes on both lots; and M. accordingly went on and built, and paid the taxes for several years:—Held, that a yearly tenancy had been created, and that D. could not eject M.'s subtenant without notice to quit. *Davis* v. *McKinnon*, 31 Q. B. 564.

In ejectment the plaintiff and defendant both claimed by their notices under one P. It appeared at the trial that P. sold to the plaintiff in 1868, and that defendant had been living on the premises since 1864, having paid to P.'s agent about two years' rent in money and repairs. Defendant was not asked at the trial to

admit the plaintiff's title :—Held, that a yearly tenancy must clearly be assumed, and that, as no notice to quit was shewn, the plaintiff could not recover. *Birchall* v. *Reid*, 35 Q. B. 19.

C., on 1st May, 1866, leased to defendant for ten years at a yearly rent, payable quarterly on 1st January, April, July, and October, with a proviso, that if the lessor should sell during the term, the lessee would give up possession on six months' notice. On the 11th November, 1872, a notice to quit at the end of six months was given to defendant, signed by C. and by S., to whom C. had sold the premises, and to whom C. conveyed on the 7th of May, 1873. Defendant paid rent to C. and S. to 1st January, 1873. S. conveyed to the plaintiff on the 12th July, 1873, and on the 28th October following defendant, who had continued in possession, paid to the plaintiff the quarter's rent due on the 1st of October :—Held, that defendant was in under a yearly tenancy created by plaintiff's acceptance of rent, and could not be ejected by plaintiff without notice. Quære, whether he could not claim under the original lease, on the ground that the notice to quit by C. and S. had been waived by the acceptance of rent by S. By his notice he claimed under the original lease only; but, Held, that if necessary, this should be amended. *Manning* v. *Dever et al.*, 35 Q. B. 294.

Where the tenant enters under a verbal lease void under the statute, a tenancy from year to year may be implied, though no rent has been paid. In this case, one R. G. verbally leased a farm to the plaintiff on the 15th of April, 1873, for five years, at $100 a year. The plaintiff entered on the 17th, cleared 4½ acres, and put in peas and oats, of which the lessor was aware. R. G. died on the 5th September, having devised the land to defendant, who entered in the same month and took the crops which the plaintiff had sown :—Held, that the plaintiff was a tenant from year to year, and that defendant was a trespasser in entering upon him. *Gibboney* v. *Gibboney*, 36 Q. B. 236.

See *McPherson* v. *Norris*, 13 Q.B. 472. p. 2048.

XII. Monthly Tenancies.

The following instrument executed under seal: "This is to certify that we agree to give O. 5s. cy. per month of the use of the farm, (describing it) for so long a time as O. may let us have it; and moreover we fully bind ourselves to give up quiet and peaceable possession to said O., of said farm when he may require it :"—Held, to create a tenancy from month to month, determinable on proper notice. *Orser* v. *Vernon*, 14 C. P. 573.

Defendant leased to the plaintiff "that certain frame house now standing and being on lot No. 10," &c., "and being that house now occupied by him, also the use of half of the barn standing on said lot, for the use of his two cows, from the 1st day of November now next ensuing, for and until the 1st day of April following, a period of five months," at a monthly rent of £2. The plaintiff covenanted to keep up the fences; and it was further agreed that if the plaintiff should withhold possession of said premises, and should remain longer than the 1st of April, he should pay at the rate of £50 per annum as rent, to be paid monthly :—Held, that the lease was a de mise till the 1st of April, with an option to th lessee to remain afterwards as a monthly tenan (not from year to year) at the rate of £50 a year and that it was not a demise of the whole of th lot 10, as alleged. *McPherson* v. *Norris*, 13 Q B. 472.

XIV. Renewal of Leases.

Injunction—Lease, construction of—Assignee of lease, or part thereof, entitled pro tanto t benefit of covenant for a renewal and customary right of preemption. *McVean* v. *Woodell*, 2 O S. 33.

A. leased to B. and C. for fourteen years, giving a covenant to renew at the end of that time for a similar term, unless he should choose to pay for the improvements. The lease was registered. The lessees then assigned part of the premises, and the assignee did not register. C. devised his interest to B., who subsequently mortgaged the whole premises to the plaintiffs the mortgage was registered :—Held, that the covenant for renewal did not extend the term so as to bring the lease within 9 Vict. c. 34; that the unnecessary registration did not make it requisite to register the assignment, and therefore that the mortgage to the plaintiffs could not affect the premises assigned. *Doe* d. *Kingston Building Society* v. *Rainsford*, 10 Q. B. 236.

The declaration set out that B. by an agreement under seal leased premises to K., and alleged that it was thereby agreed that K. was to pay the annual rent of £10, and *to get a lease* of B. for twenty-one years, with a renewal or valuation at the termination thereof, said K. paying all expenses in case of a renewal; at the end of the second period K. to receive no allowance for any improvement; lease to be perfected with the usual covenants between landlord and tenant, at the request and expense of K. It then alleged that K. conveyed his interest to L., who devised to the plaintiff; that B.'s reversion passed to defendants; that after the expiration of the twenty-one years, the plaintiff applied to defendants to execute to him a further lease for a renewal term of twenty-one years at an annual rent of £10, and the defendants refused to execute the lease, or to grant to plaintiff any renewal, contrary to said agreement :—Held, on demurrer, that the memorandum of agreement contained no covenant for a renewal of the term at the expiration of twenty-one years, but to execute a lease during the term containing a covenant for a renewal or valuation. *Leys* v. *Baldwin*, 2 C. P. 488.

Quære, whether the instrument was a lease or only an agreement for one. *Ib.*

Plaintiff leased to M. for 21 years, and it was stipulated by the lease that at the expiration of the term the lessee might retain possession, on condition that within three months a new rent should be ascertained by arbitration; but that if the lessor desired to resume possession he might do so, on paying the value of the improvements, to be ascertained as therein provided for; and this arrangement was to be made at the end of each term. It was then provided, that if "at the expiration of the next or any subsequent term of 21 years, no new ground rent should be ascer-

tained as aforesaid," or if the lessor should not resume possession, then the lessee should continue, upon payment of the rent last ascertained to be payable. This lease was assigned by M. to defendant, as trustee for one F. At the expiration of the first term of 21 years no notice was given, nor new rent fixed; but after the three months had gone by arbitration bonds were entered into by F. and the plaintiff. Defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal lease at a sum more than five times the first rent, or that the lessor should pay a certain sum for the improvements. The lessor offered to renew, and notified the lessee, who refused to accept at the new rent; and he then brought ejectment:—Held, 1. That the plaintiff could not recover, for whether the arbitration was binding upon defendant or not, as to the amount of rent, he was entitled to a new term by the conditions of the lease, and there had been no forfeiture; 2. Upon the construction of the lease, that the provision last mentioned applied at the end of the *first* term of 21 years, as well as of subsequent terms, and that defendant was therefore entitled to retain possession for another term at the original rent. *McDonell* v. *Boulton*, 17 Q. B. 14.

To an action against a municipal corporation on their covenant to renew a lease, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed:—Held, on demurrer, no defence. *Wade* v. *The Corporation of the Town of Brantford*, 19 Q. B. 207.

Defendants leased lands to one W. for eight years, on which the lessee covenanted to erect a good house during the first year, and the plaintiffs covenanted to grant a renewal lease for ten years at the end of the term, at a rent to be fixed by arbitration. Defendants were unable to renew, owing to a decree in Chancery, declaring that they had no power to grant the lease. The buildings, which were of wood, were removed, and sold under execution against the plaintiff, who had purchased the term two years before it expired for $3,000. In an action against defendants on their covenant to renew:—Held, that the plaintiff was entitled to recover the value of the occupation of the premises, with the buildings, above the probable ground rent, for the term which he had lost, and that $2,500, the amount of the verdict found, was not excessive. McLean, J., dissenting, and holding that he could recover only nominal damages, on the grounds (1) that for the renewal term he would be liable to pay rent upon the buildings as well as the land, and (2) that in the absence of fraud he could not recover for the loss of his bargain. *VanBrocklin* v. *The Corporation of the Town of Brantford*, 20 Q. B. 347.

M. leased premises to E. for twenty-one years, covenanting that if E., his executors, administrators, or assigns, should desire to renew (three months notice having been first given,) the rent should be fixed by arbitration; that if M. neglected to execute a new lease upon the terms agreed on, M., his heirs and assigns, would pay at a fair valuation to E. for all buildings or improvements, except those erected at the date of the lease; and that if M. neglected to pay within one month for such improvements, the lease should be considered to be renewed for twenty-one years at the same rent as before. M. devised the premises to the plaintiffs, or some of them. E. sub-let to W., reserving a reversion, and subsequently assigned to defendant, having previously, about three months before its expiration, made a claim in writing for a renewal. Defendant notified the plaintiffs before the end of the term of his purchase, and his readiness to arbitrate as to the improvements. N., one of the plaintiffs, replied on their behalf that the devisees would not renew, and requested defendant to point out the improvements with a view to arbitration if necessary. No improvements of any kind had been made by E. prior to the sub-lease, nor by defendant since the assignment, but all had been done by W. during his subtenancy. No demand of possession was made other than that contained in the reply to defendant's notice:—Held, on ejectment, that the refusal by plaintiffs to renew discharged defendant from all necessary precedent acts for that purpose; that this discharge entitled him to compensation for improvements, and to the constructive renewal of the lease on failure of plaintiffs to pay for them; that the improvements to be paid for were not those made by E. alone, but by W. as well, who claimed under him; and that the improvements made by W. not having been paid for by the plaintiffs, the lease must be deemed to be renewed, which could only be done by its operating in favour of defendant, the assignee of E.:—Held, also, that, the lease not providing for the mode of valuation, the plaintiffs might have made it and tendered the amount to defendant, subject to determination by a jury as to its fairness and reasonableness, in case of defendant's refusal to accept it; but that the defendant's omission to have the valuation made gave the plaintiffs no right to eject:—Held, also, that during the month allowed by the lease to pay for the improvements, or at any rate until he was paid or pending negotiation respecting them, defendant could not be treated as a trespasser. Distinction between a lease of this kind and the ordinary lease, where a renewal is claimable and is claimed, observed upon. *Nudell et al.* v. *Williams*, 15 C. P. 348.

A tenant of glebe lands, under a lease containing a covenant for further renewal, continuing in possession after the death of the lessor, and after the induction of his successor, against the latter's will, has no insurable interest, the successor not being bound by the covenant. *Shaw* v. *Phœnix Ins. Co.*, 20 C. P. 170.

In a lease of 21 years, ending on the 1st September, 1872, it was covenanted that on the expiration thereof the lessor, one R., should, at his option, either pay within 30 days the value of the buildings, or renew for a further term of 21 years; such value and the rent to be determined by arbitration. On the expiration of the lease, an agreement of reference was entered into, between C., the lessee, one B., to whom C. had mortgaged his interest, and R., the award to be made by the 30th of September; but it was agreed that, should the award not be made

by that time, and R. should elect to pay for the buildings, he should pay the sum awarded within a week after the award, and the extension of time should be taken as a covenant in the lease. The parties enlarged the time for making the award until the 1st November, and on the 26th of October the umpire made his award. R. elected to pay for the buildings, but the amount awarded was not paid to the mortgagee, the person entitled to receive it, until the 5th of November, more than a week after the award was made. Defendants were tenants under C.: their terms were unexpired when this action was brought, and they had paid their rents to C. for the quarter ending on the 1st October. On the 18th September, R. leased the premises to the plaintiff, and after R. had paid for the buildings, the plaintiff demanded possession from defendants, which they refused to give, and informed plaintiff of their having paid their quarter's rent to C. The plaintiff then called on C., who paid to him the proportion of the rent which he had received for the period between the expiration of C.'s lease, and the 1st of October:—Held, that the receipt of the rents by plaintiff from C. was no evidence of a recognition of an existing tenancy between plaintiff and defendants, for there was no direct dealing with the tenants themselves, and the fact of plaintiff demanding possession, and only being paid a fractional part of the quarter's rent paid by the tenants to C., repelled the idea of any intention to recognize defendants as his tenants:—Held, also, that the fact of R. not having paid the amount awarded for the buildings within the week, did not deprive him of his right of election, and so enable C. to hold for a further term of 21 years; for B. being the proper person to receive the amount, might extend the time for paying it. The plaintiff, therefore, was held entitled to maintain ejectment against defendants. *Roaf* v. *Garden*, 23 C. P. 59.

Where the lessor covenants for a renewal of the term, or in default for payment of improvements, the option rests with the lessor either to renew or pay for the improvements; and the lessee cannot compel a specific performance of the contract to renew. *Hutchinson* v. *Boulton*, 3 Chy. 391.

A lease of land for four years, with a covenant to renew for four years more, was held not to require registration, actual possession having gone with the lease; and such a lease, though not registered, was held valid, as respects the covenanted renewal as between the lessee and the subsequent mortgagees of the lessor. *Latch* v. *Bright*, 16 Chy. 653.

XV. Rent.

1. *Time for Payment.*

A. leased to B., from the 1st of September, 1846, for six years, at a yearly rent; the first payment to be made on the first of March, 1848, and the succeeding yearly payments to be made on the first day of March during the lease. Per Robinson, C. J.—The rent for the sixth year fell due at the expiration of the last year's occupation, viz., on the 1st of September, 1852. Per Burns, J.—The last year's rent should be accelerated, and therefore two years' rent were due on the 1st of March, 1852. *Neal* v. *Scott*, 10 Q. B. 361.

Held, under the facts set out in this ca
it was properly left to the jury to say w
the rent was to be paid quarterly or yea
that they were supported by the evid
finding it payable quarterly. *Wilson* v.
mara, 12 Q. B. 446.

The plaintiff, by lease, consisting of
sheets, and bearing date March 15th, 18
mised certain premises to W. On the
July following this lease was cancelled by
strument under seal; the second and
sheets were taken out and re-placed by
and it was re-executed and re-delivered w
any other alteration. As it then stood
dated as before, to hold "from the 1st
April now next," for nine years, "from
next ensuing," at a yearly rental, payab
advance, that is to say, on the 1st of April
and on the 1st of April in each year duri
term;" the conclusion being, that the
had thereunto set their hands and seals
day and year first above written." In an
against the sheriff for taking W.'s go
August, 1862, without satisfying a year
alleged to be then due:—Held, that th
took effect from the delivery, on the 21st o
1862, not the date: that the term began
1st of April, 1863: that the first year's
payable "in advance," was not due unt
day, the words, "that is to say, on the
April, 1862," being merely falsa demonst
and that the plaintiff therefore was properl
suited. *Bell* v. *McKinlay*, 23 Q. B. 162.

Held, affirming the above case, that th
spoke from the day of re-execution, not fr
day of its date, and that the provisions
lease, in connection with the surrounding ci
stances, did not afford sufficient evidence
contrary intention to justify a different con
tion. Spragge, V. C., Wilson, J., and M
V. C., diss. *S. C.* 3 E. & A. 9.

A., by deed dated 27th of September,
leased lands to B. for ten years from the 1
of January, 1863; yielding and paying
during the said term the yearly rent of 87
first payment to begin and be made on t
day of January, 1863, next ensuing from th
of these presents. Covenant by lessee t
said yearly rent, on the said day and time
in limited and appointed for payment ther
Held, that the second year's rent was p
on the 1st of January, 1864. *Joslin* v. *Jo*
14 C. P. 260.

Lease dated 15th December, 1862, fo
years, at an annual rent, half payable on
January, and half on 1st of February follo
in each and every year during the term, w
agreement at the end that the first paym
rent should not become due until the 1st o
uary, 1864:—Held, that this agreement d
prevent any rent from falling due in 186
was limited to the first payment to be m
the 1st of January, 1863, or at most to th
for the first year; and that two years' rent
fore was due before the 17th of November.
Huskinson v. *Lawrence et al.*, 26 Q. B. 570

Plaintiff, by indenture, agreed to con
defendant certain land, the right to pu
which had been assigned by defendant t
on payment by defendant of certain sum
that defendant should occupy until de

After default, plaintiff and defendant referred all matters in difference. The award postponed the date of payment as to which defendant had been in default, and before the day so fixed defendant tendered the amount:—Held, that the instrument executed by plaintiff created a demise, or a re-demise, in favour of defendant, which could have been absolutely avoided by plaintiff on the default made by defendant; but that the reference after default, either waived it or postponed the time of payment, before the expiration of which time tender had been made; and that in either view plaintiff could not maintain ejectment against defendant. *Black* v. *Allen*, 17 C. P. 240.

In replevin defendant avowed justifying under a distress for $140 rent, due 1st of May, 1867, under an indenture of lease, by which defendant demised to plaintiff for five years, to be computed from 15th March, 1867, at the yearly rent of $280, payable 1st November and May during the term, excepting the last payment, which was to be paid on the 15th March preceding the 1st May. Plaintiff pleaded, setting out the indenture in full, and alleged that only one instalment of rent had become due before action, which he paid defendant before distress. Defendant replied that there were two instalments due before distress, on 1st May and November, 1867, and not one only as alleged:—Held, on demurrer, replication bad, as contradicting the legal effect of the lease. *Brown* v. *McCarty*, 18 C. P. 454.

Defendant leased a farm to the plaintiff for five years from the 31st March, 1866. He was to find the team and seed for the first year, "to receive one-third of the grain when cleaned, threshed, and ready for market, also one-third of the straw, turnips, and root crops, and half of the hay; for the remainder of the farm to receive one-third of all the crops, with the exception of the hay, of which one-half." Defendant having distrained on the 16th December, 1867, for the second year's rent,—Held, that the words "when cleaned," &c., applied only to the first year, and that the second year's rent did not become due until the end of the year, viz. 1st March, 1868. Wilson, J., diss., on the ground that the rent, being payable in kind, was due when the respective crops were ready for delivery. *Nowery* v. *Connolly*, 29 Q. B. 39.

Tenant agreed with landlord to make certain improvements upon the demised premises, tenant "to get the first three years' rent for said buildings and improvements, providing they are completed in the first two years":—Held, that the rent was suspended during the two years. *Ross* v. *Hunter*, 19 C. P. 391.

Under a lease, dated 21st December, 1874, for five years, to commence from the 1st of April, 1875, the rent of $80 was to be payable annually on the 1st of June in each year, but subject to a proviso that if the lessee "shall yearly and every year during the said term, or earlier, if he shall think proper, chop, clear, and fence in a proper manner six acres of the said land, then the current year's rent shall be considered as paid and satisfied." The rent not being paid on the 1st of June, 1875, and the lessee having then cleared six acres cleared, the lessor distrained:—Held, that the rent reserved, payable on the 1st June, 1875, was then due and might be distrained for, and that the effect of the proviso was not to suspend the right to distrain during the currency of the year. *Peacey* v. *Orris*, 26 C. P. 464.

See *Millmine* v. *Hart*, 4 Q. B. 525, p. 2057.

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2. *Payment in Advance.*

A tenant may by parol bind himself to pay rent in advance. *Galbraith* v. *Fortune*, 10 C. P. 109.

Under a lease dated 1st October, 1857, habendum for five years from the date thereof, yielding and paying therefor on every first day of October during the said term, it was proved that the first year's rent had been paid in advance:—Held, that the rent was not payable in advance for the subsequent years. *McCallum* v. *Snyder*, 10 C. P. 191.

Covenant, for three quarters' rent, alleged to be payable by the lease quarterly in advance. Plea, as to the rent for the last quarter, commencing on the 1st March, 1861, 1. That before the expiration of the first month of that quarter the plaintiff wrongfully evicted defendant; 2. That by a provision in the lease, in case of the mill demised being accidentally burned, the rent was thenceforth to cease, and that it was so burned on the 5th of March, 1861; 3. On equitable grounds, as to the rent subsequent to the 6th of March, 1861, the same provision in the lease, alleging the destruction of the mill by fire before the 6th:—Held, on demurrer, pleas bad, for the rent being payable in advance, was due on the 1st of March, and nothing which occurred afterwards could divest the plaintiff's right. *Ryerse* v. *Lyons*, 22 Q. B. 12.

Defendant on the 2nd September, 1872, leased land to the plaintiff for five years from the 1st October, 1872, at the yearly rent of $230, payable on the 1st of October each year, in each and every year during the continuance of the term, "the first payment of $200 to be made on the 31st December, 1872, in advance, the balance of said year's rent, amounting to $30, to be paid at the same time that the payment for 1873 is to be made." In an action against the defendant for distraining on the 9th October, 1873, for the second year's rent:—Held, that such rent was not payable in advance. *Brown* v. *Blackwell*, 35 Q. B. 239.

Evidence was tendered that the instructions to draw the lease, and the agreement of both parties, was that the rent should be paid in advance:—Held, there being no equitable plea, that such evidence was properly rejected; and that an equitable defence is not admissible under the general issue by statute. Held, also, that under the Administration of Justice Act, 1873, defendant could have pleaded an equitable plea setting out the facts relied on for altering the lease, in accordance with the agreement of the parties; and a verdict for the plaintiff was set aside, on payment of costs, to enable him to do so. *Ib.*

See *Hortop* v. *Taylor*, 21 C. P. 56, p. 2059; *Cornock* v. *Dodds*, 32 Q. B. 625, p. 2061; *Forge* v. *Reynolds*, 18 C. P. 110, p. 2026.

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3. *Payable in Kind.*

A. leased a farm to B. upon the condition that B. was to deliver to him one-half of the wheat

raised on it. B. was to harvest and thrash, and deliver the wheat to defendant's granary :—Held, that under this agreement A. and B. were not partners in the wheat while it grew in the field, but stood to each other in the relation of landlord and tenant; and that therefore no legal property in the wheat could vest in A. till B., the tenant, had thrashed it and delivered to him his portion. *Haydon* v. *Crawford*, 3 O. S. 583.

A., authorized by government to settle a township, covenanted to allot B. 100 acres therein, and procure a patent as soon as the settlement duties were performed, and B. covenanted to pay A. a bushel of wheat per annum for every acre cleared after he had been in possession for three years :—Held, that A. might sue for the rent after B. had been in possession for three years, although no patent to B. had issued. *McNab* v. *McFarlane*, 3 O. S. 287.

M. in the spring of 1852, agreed by parol with A. to work his farm on shares, and put in a crop of rye. In December, 1852, A. entered into a written agreement with G. to rent the farm to him for three years; and in January, 1853, A. died leaving a will. M. in 1853, with the assent of G., reaped the crop which he had sown in the previous year :—Held, that the share of such crop to which A. would have been entitled must go to the devisee of the land, and not to the executors. *Tubbs* v. *Morgan*, 12 Q. B. 151.

S. A., before marriage to C. R., her present husband, on the 1st of April, 1857, leased certain lands to defendant by the year, one-third of the yearly crop to be paid as rental. To a declaration claiming the non-delivery of the crop as agreed, defendant pleaded; that on 17th of April, 1860, the lands in question were sold under Chancery sale to one D., who paid his deposit and signed a memorandum, and thereby became entitled and entered into possession, and took and converted one-third of the crop to his own use, whereby he, defendant, was prevented from furnishing the same :—Held, that D. being only an inchoate purchaser, he was not entitled to the crops, and therefore that defendant was liable on his contract. *Richardson et ux.* v. *Trimber*, 11 C. P. 130.

Plaintiff demised to defendant certain land at the clear yearly rent of $1.50 per acre of cleared land, on 1st February in each year, one-half in cash and one-half in work on said land, in clearing and fencing as hereinafter mentioned, with a covenant for payment of taxes by defendant, with liberty to deduct one-half, exclusive of statute labour, from the rent, one-half from the money and one-half from the rent to be paid in labour, and defendant within the first year to make and put up in the fences on said cleared land 2,000 rails, for which he was to be allowed out of said rent $20, viz., $10 out of the money rent, and $10 out of the labour rent; with the further agreement, as to the rent to be paid in work, that defendant should be allowed at the rate of $13 per acre for the land which he should chop, log, clear, and fence, in payment of said rent. Then there was another clause, "that the portion of said lot now chopped, but not cleared, and also the portion under contract with McK. for chopping, shall be logged, cleared, and fenced, within two years from the date, by the said lessee, who, in return for his work on said portions of land, shall have two crops therefrom free of rent, and shall afterwards pay the same rent pe for said portions as for the land now cleare Held, that the tenant was not liable for re land to be chopped, cleared, and brough cultivation by him. *Jones* v. *Montgome* C. P. 157.

The defendant, who owned a farm, agree the plaintiff to work it on shares, each of supplying one half the seed and labour, a have half the profits, the plaintiff to pay $ implements, and $160 annually; but the pl was not placed in possession of any distinc tion of the farm, the parties being equa possession of the whole :—Held, that ther no lease created between the parties, and th $160 was not rent for which the defendant distrain. *Oberlin* v. *McGregor*, 26 C. P.

See *Nowery* v. *Connolly*, 29 Q. B. 39, p.

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4. *Apportionment.*

[See 37 Vict. c. 10, O.]

Where a tenant leased premises at one rent, and his landlord died, having devise premises among several persons :—Held, those persons might bring separate a against the tenant for such part of the r each would be entitled to according to spective share, without any other apportion than a jury might make in each suit. *H ux.* v. *Proudfoot*, 6 O. S. 617.

In an action of covenant between the or parties to the deed, an eviction from part premises is a good defence to the action. can be no apportionment of the rent as in *Shuttleworth* v. *Shaw*, 6 Q. B. 539.

Declaration for distraining where no ren due, and for excessive distress for rent. peared that defendant had leased to the tiff for a term of years certain premises, por of which were at the time in the possessi other parties, who retained possession ag the plaintiff. In consequence of this, defe after the first year, agreed with plaintiff abatement in the rent for that year. Defen however, subsequently distrained for the agreed to be remitted :—Held, on the auth of Neale *v.* McKenzie, 1 M. & W. 763, at the time of making the lease, and d the whole period the rent was claimed f legal term was created by the instrume lease between the parties, in consequen the adverse holding of parts of the pre and the plaintiff's exclusion therefrom an no right to any rent in respect of such part ever arisen, and that therefore the rent coul properly be apportioned, because the tenan plaintiff) had never been subject to the rent by virtue of the demise. *Kelly* v. 17 C. P. 351. This case was remarked upo not followed, in *Holland* v. *Vandone*, 27 15, p. 2063.

See *Crooks* v. *Dickson*, 15 C. P. 23, p. *Hortop* v. *Taylor*, 21 C. P. 56, p. 2059; *T* v. *Hortop*, 22 C. P. 542, p. 2060.

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5. *Abatement.*

A tenant who covenants to pay rent wi deduction thereout, for or by reason of

erwards pay the same rent per acre
ons as for the land now cleared :"—
he tenant was not liable for rent for
hopped, cleared, and brought into
by him. *Jones* v. *Montgomery*, 21

lant, who owned a farm, agreed with
to work it on shares, each of them
e half the seed and labour, and to
e profits, the plaintiff to pay $60 for
and $160 annually; but the plaintiff
ed in possession of any distinct por-
farm, the parties being equally in
the whole :—Held, that there was
ted between the parties, and that the
t rent for which the defendant could
berlin v. *McGregor*, 26 C. P. 460.

y v. *Connolly*, 29 Q. B. 39, p. 2053.

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4. *Apportionment.*

[See 37 Vict. c. 10, O.]

tenant leased premises at one entire
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nong several persons :—Held, that
ns might bring separate actions
tenant for such part of the rent as
be entitled to according to his re-
re, without any other apportionment
might make in each suit. *Hare*
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ubsequently distrained for the su
e remitted :—Held, on the author
. McKenzie, 1 M. & W. 763, th
he of making the lease, and duri
period the rent was claimed for,
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een the parties, in consequence
e holding of parts of the premis
aintiff's exclusion therefrom and t
any rent in respect of such parts
, and that therefore the rent could
e apportioned, because the tenant
ead never been subject to the en
rtue of the demise. *Kelly* v. *Ir*
51. This case was remarked upon,
d, in *Holland* v. *Vanstone*, 27 Q.
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oks v. *Dickson*, 15 C. P. 23, p. 20
Taylor, 21 C. P. 56, p. 2059; *Ta*
22 C. P. 542, p. 2060.

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5. *Abatement.*

t who covenants to pay rent wit
thereout, for or by reason of

matter or thing whatsoever, cannot claim a deduction for the amount of taxes paid by him for the house and premises demised. *Grantham* v. *Elliott*, 6 O. S. 192.

Where the landlord had covenanted to allow the tenant all reasonable improvements made by him, in the amount of his rent :—Held, that the tenant could deduct the value of the improvements from the rent due ; and that such right of reduction might be given in evidence under the plea of riens in arrear. *Wilcoxson* v. *Palmer*, T. T. 3 & 4 Vict.

To an avowry under a distress for rent, the plaintiff replied riens in arrear, and also set out specially an agreement to be allowed to make certain repairs and to deduct the amount from the rent, which he averred he had done :—Held, good. *Wheeler* v. *Sime et al.*, 3 Q. B. 143.

A landlord agreed with his tenant that if he should not paint the tavern outside, and the sheds and driving house, &c, in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint ; the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the building on the 12th of July, 1845, when the landlord distrained for a quarter's rent due on the 1st of July, 1845 :—Held, in replevin, that the distress was warranted, though the painting which had been begun, but not completed, exceeded the quarter's rent distrained for. *Millmine* v. *Hart*, 4 Q. B. 525.

An abatement of rent was sought for by the defendant upon the ground that he had been evicted from a road forming an appurtenance to the land leased ; but,—Held, that under the evidence the road could not be looked upon as an appurtenance, and that there had been consequently no eviction. *Shuttleworth* v. *Shaw*, 6 Q. B. 517.

Plaintiff leased land to defendant at a yearly rent of 15s. and the taxes, so that said taxes should not exceed £10 a year, any sum above that to be paid by the lessor ; and it was provided that the lessor might sell any part of the farm, making a reasonable deduction from the rent therefor, to be determined by arbitration in case of dispute. The G. T. R. Co. required a portion of the land, which defendant conveyed to them after an arbitration as to the price :—Held, 1. That such portion was sold by defendant within the meaning of the lease ; 2. That the abatement from the rent should not be measured by the interest of the money paid by the company, but should be determined by the jury, upon a consideration of the comparative value to the tenant of the land sold, assuming 15s. per acre as the average value of the whole ; 3. That after the sale the lessor could not distrain without first arranging or offering to arbitrate as to the deduction ; 4. That there was no ground for claiming any abatement of the taxes from the lessee on account of the sale. *Bickle* v. *Beatty*, 17 U. C. R. 465.

The first and second counts of the declaration were respectively for distraining where no rent was due and for excessive distress for rent. It appeared that defendant had leased to plaintiff a term of years certain premises, portions of which were at the time in possession of other tenants, and that these parties retained possession against the plaintiff and refused to give them up to him. In consequence of this, defendant, *after the expiration of the first year*, agreed with the plaintiff to an abatement in the rent for that year, and gave him a receipt for the balance, which plaintiff paid as the amount of rent due upon the premises. Defendant, however, subsequently distrained for the sum agreed to be remitted : — Held, distinguishing Watson *v.* Wand, 8 Ex. 335, that the agreement between plaintiff and defendant as to the abatement of the rent did not create a new tenancy between them at a new rent, entitling defendant to distrain therefor, because the agreement was not made until after the expiration of the year to which it alone had reference, so that the relationship of landlord and tenant could not have been created for that year, and the sum agreed to be paid could not have been rent, but a mere sum in gross, and could not consequently have been distrained for :—Held, also, that the plaintiff could not recover on the first and second counts, which were framed upon the assumption that plaintiff was tenant to defendant at a certain rent. *Kelly* v. *Irwin*, 17 C. P. 351.

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6. *Premises Uninhabitable*

Action for rent. Plea, that the house became unfit for habitation in consequence of the roof admitting water, and for want of sufficient drainage, whereby the said house became wet, damp, unwholesome, noisome, and offensive, of which the plaintiff had notice, and defendant thereupon quitted the same before the commencement of the time for which rent was demanded :—Held, on demurrer, no defence. *Denison* v. *Nation*, 21 Q. B. 57.

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7. *Premises Burnt*

A., the assignee of the lessor, sues B., the lessee of a grist mill, in debt for rent. The lease contains the following covenant : "The lessor, for himself, his heirs, executors, administrators, *and assigns*, covenants and agrees with the defendant, amongst other things, that he, the said John McGill, shall and will insure the grist mill demised, and the dwelling house, against loss and damage thereto by fire, and in case the grist mill should be by mistake burnt down or injured by fire, and the same happens under such circumstances as would enable the said John McGill, his executors, administrators, *and assigns*, to recover the loss from the insurance company insuring the same, or in case it be not insured then under such circumstances as would ordinarily entitle him to his loss if he had been insured, then and in that case he, the said John McGill, shall, within the ordinary and reasonable time after such fire, make good and repair or rebuild the grist mill, and during all the time the grist mill shall be unfit for working, in consequence of such damage or loss by fire under the circumstances aforesaid, a fair reduction and allowance shall be made in the rent, to be ascertained and computed by two indifferent arbitrators, one to be appointed by the said John McGill, his heirs, executors, administrators, and assigns, and the other by the said John Proudfoot, his heirs," &c. Under this covenant, B. puts in a plea containing the following averments : "That after plaintiff's

title accrued, the grist mill was accidentally burnt and destroyed by fire, under such circumstances as would ordinarily have entitled the plaintiff to recover the loss arising from the fire, if plaintiff had the grist mill insured against loss by fire; and also that the annual value of the grist mill was fully equal to £200, as the rent that ought to be due and payable annually for it; and that the sum of £200 was and is a fair annual allowance for the use of the grist mill, and is of right to be deducted from rent to be due and payable from the defendant to the plaintiff, for the destruction of the said mill by fire as aforesaid, and that after the destruction of the said grist mill by fire, neither the plaintiff nor the defendant appointed an arbitrator to estimate the reduction of rent to be allowed for the same, and that the mill has not since been of any profit or advantage whatever to him, the defendant":—Held, upon demurrer to plea, that under this covenant the assignee as well as the original lessor was bound; Held, also, that neither the landlord nor tenant having referred the deduction from the rent (which was to be made under the circumstances provided for in the covenant) to arbitration, the tenant was therefore not precluded from making the jury the medium by which a deduction was to be made. Quære, if the landlord had offered to arbitrate, and the tenant had refused, could the reduction then be referred to a jury. *McGill* v. *Proudfoot*, 4 Q. B. 33.

A. leased to B. a house for fifteen years, and during the term, by agreement, A. therein assented to an assignment by B. to C., and gave C. the option to purchase the fee within one year, at a given sum, payable by instalments; and C., at the time of the agreement, paid A. £50, to be on account of purchase money, in case he elected to purchase, otherwise to go for rent. There was a proviso in the original lease to B. that should the house be burnt the rent should cease. C. did not purchase, and the premises were afterwards burned, at which time, long before the expiration of the lease, the rent due was £12 10s.:—Held, that, notwithstanding this proviso, A. was entitled to rent until the £50 was absorbed. *Pulver* v. *Williams*, 3 C. P. 56.

It was provided by a lease that in case of the total destruction of the premises by fire the term should cease, "and the proportion of rent up to that time shall be equitably adjusted between the parties." The rent was payable half-yearly in advance on the 15th December and the 15th June, and on the 30th October the premises were burned:—Held, that the effect of the covenant was that defendant would repay to the plaintiff so much of the rent paid in advance on the 15th June preceding the fire, as ex æquo et bono it was determined he should repay: that the plaintiff might sue for such proportion, to be determined by a judge or jury, without having it first adjusted by arbitration: that the cause of action was well stated on the declaration, and that a specific averment of a surrender of the demised premises, as a condition precedent, was unnecessary. *Hortop* v. *Taylor*, 21 C. P. 56.

Action on defendant's covenant as surety of a lessee, under a lease of a mill for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging non-payment of three half-yearly instalments of the rent served. Plea, on equitable grounds, that de dant covenanted as surety only: that by lease it was agreed that in case of the destruction of the mill by accidental fire, the lease should at once cease and be at an e that the lessee paid all rent due up to the destruction of the premises by fire, including half-year's rent due on the 15th June, 1869; that the premises were so destroyed on the October, 1869, whereupon the term ceased, was at an end. To this the plaintiff replied, after such fire, the lessee, with the knowl and approval of the defendant, continued to and occupy, and still holds and occupies, premises under and by virtue of the lease, with the like knowledge and approval of the fendant, would not and did not put an en the said term, or surrender said premises:—H plea good, for defendant's covenant being stricted to the term ceased with it; and that replication was bad, as shewing at most creation of a new tenancy, to which the cove would not extend. *Taylor* v. *Hortop*, 22 C 542

Defendant also pleaded, by way of estop that previous to this action the lessee sued lessor in the County Court, alleging that the lease, in the event of the total destruct of the mill by accidental fire the term sho cease, and the rent be apportioned; that u such destruction on the 30th October, 1869, said term ceased, and the lessor became lia to refund to the lessee such part of the r paid in advance as on a just apportionm should be found due, and the lessee alleged such action that $137.50 thus became due him, for which he sued therein; that the less the now plaintiff, pleaded in such action t the said lease was not his deed, and is being joined thereon the lessee recovered ju ment for the said sum of $137.50. The then alleged that the judgment remained force, and that the rent sued for in this act was rent accruing due after the said 3 October, 1869:—Held, a good plea; that judgment recovered, if a bar to the recovery this rent against the principal, was a g defence for the surety; and that such judgm was a bar, though the plea of *non est fact* did not put in issue the destruction of the m and consequent determination of the term, these facts being necessarily averred in t action, and not denied, the lessor was n estopped from disputing them. Held, also, t the replication to this plea being the same a the first plea, was bad for the same reasons.

Plaintiff, on the 30th December, 1867, lea two mills to one T., called the Oatmeal mill the Erin new mill, for ten years, at $1,000 annum, payable half yearly in advance, on 15th of June and December, with a coven for re-entry on non-payment, and a proviso t if the Oatmeal mill was burned, there should a reduction of $400 per annum in the rent, if the new mill was burned, a reduction of $ per annum, and if both were destroyed, the should cease, and only the proportion of rent at the time of destruction be paid. The mill was burned on the 30th of October, rent up to the 15th of December of that having been paid in advance:—Held, that lessee was not entitled to the reduction of

a year for the period from the 30th of October to the 15th of December, for which he had already paid; and that having insisted upon retaining for such reduction out of the rent falling due on the 15th December, he had incurred a forfeiture by non-payment of his rent. *Cornock* v. *Dodds*, 32 Q. B. 625.

By a lease of property in the town of London the lessor agreed to erect the outside of a frame building, and bound himself in case of its being destroyed by fire to re-build *to the same extent*, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval the municipal council had by by-law prohibited the erection of frame buildings in that locality. The lessee refused to pay rent unless the lessor rebuilt, and the lessor then filed a bill to cancel the lease, as it had become impossible for him to carry out his agreement. The court refused this relief; but, on a submission in the answer, directed a reference to the master to fix a proper rent to be paid upon the lessor re-building with brick, with costs to be paid by the plaintiff. *Williams* v. *Tyas*, 4 Chy. 533.

Although a lease by an incorporated company may be void, in consequence of the same having been executed without the corporate seal, still if the lessee enter and hold thereunder he will be liable for all rents reserved thereby during the time he so holds; and where an instrument was so executed by the agent of an incorporated bank, under which the lessees entered and occupied, but, before the expiration of the term demised, the buildings on the premises were destroyed by fire, and the lessees omitted to give notice of abandonment:—Held, that they were liable for the rent during the residue of the term, which had since expired. *Finlayson* v. *Elliott*, 21 Chy. 325.

In such a case the property had been conveyed by the owner to the bank to secure an indebtedness, which had been fully paid by the proceeds of the insurance effected on the buildings, and the bank continued to hold the property simply as trustee for their assignor, and refused to take, or suffer the assignor to take, any proceedings in their name against their lessees to enforce payment of the rent. The court, under the circumstances, made a decree for payment of the amount in favour of the party beneficially entitled. *Ib.*

See *Counter* v. *McPherson et al.*, 1 O. S. 22, p. 2069; *Douglass* v. *Murphy*, 16 Q. B. 113, p. 2061; *Ryerse* v. *Lyons*, 22 Q. B. 12, p. 2054.

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8. *Eviction or Expulsion.*

Where in assumpsit for non-payment of rent according to agreement, defendant pleaded an eviction by a stranger, who he averred entered under a lawful claim derived through or under the plaintiff, the plea was held bad on general demurrer, because it did not shew that the claim might not have been under a title derived from the tenant himself. *McNab* v. *McDonell*, 2 Q. B. 169.

An abatement of rent was sought for by the defendant upon the ground that he had been evicted from a road forming an appurtenance to the land leased; but,—Held, that under the evidence the road could not be looked upon as an appurtenance, and that there had been consequently no eviction. *Shuttleworth* v. *Shaw*, 6 Q. B. 517.

In covenant for rent between the original parties to a deed, an eviction from part of the premises is a good defence; there can be no apportionment of the rent as in debt. *Ib.*

In replevin, defendants avowed under distress for one quarter's rent, due to S. B., one of them, on a demise to the plaintiffs at a quarterly rent. The plaintiffs replied—1. Non tenuerunt; 2. That S. B. had previously leased a portion of the premises demised to them to one P., for a term unexpired, and that P. evicted the plaintiffs. To the last plea, defendants rejoined, that the plaintiffs voluntarily delivered up possession of such portion to P., and elected to remain as tenants of the remainder for the time and at the rent in the avowry mentioned. It was proved that P. having a lease from S. B., including a narrow strip of land demised to the plaintiffs, and which had been used by them as a passage to the rear of their premises, began, about the middle of the quarter previous to that for which the rent was claimed, to put up a building which covered such passage; that in lieu of such entrance, another was opened on the north side of the house, on land belonging to S. B., and paved with boards taken from the old passage; that the men who did this work, were employed by the plaintiffs at P.'s request, and were sent by them to him to be paid; that this change of the passage was proposed by the plaintiffs, as they said it would answer them as well. After it was made the plaintiffs paid the rent for the following quarter, claiming no deduction. When the next quarter's rent fell due, they refused to pay, claiming an abatement for alleged injuries caused by the erection of P.'s new building, but not for the obstruction of the passage way. This was refused, as a separate action was then pending for those injuries. Defendants distrained, and thereupon this action was brought:—Held, that defendants could not support their avowry as for rent reserved, on the whole of the premises under the original letting, for no interest passed to the plaintiffs in that part which had been previously demised; that the plaintiffs were not precluded by their assent from setting up an eviction by paramount title which they could not have resisted; and that, under the pleadings, they were therefore entitled to a verdict. Robinson, C. J., diss., on the ground that the evidence of consent on the part of the plaintiffs was sufficient to warrant the jury in finding that there was no eviction; and that the arrangement between P. and the plaintiffs did not put an end to the original lease, so as to prevent the defendants from avowing under it. *Carey et al.* v. *Bostwick et al.*, 10 Q. B. 156.

Declaration on a bond conditioned for the performance by one V. of the covenants in a lease made by plaintiff to him. The defendants pleaded 4th, that at the making and during the continuance of the lease the plaintiff wrongfully retained possession of part of the demised premises and refused to allow defendant, V., possession thereof, whereby V. was prevented, &c., upon which the plaintiff took issue Upon the trial the evidence tended to shew an eviction.

rather than that the lessee never took possession, and the court, by reason of the variance and the amount at stake, granted a new trial, with costs to abide the event, giving the plaintiff leave to amend his replication to the fourth plea. *Macdonald* v. *Vanwyck et al.*, 12 C. P. 263.

Covenant for non-payment of rent on a lease by plaintiff to defendant for 21 years. Plea, on equitable grounds, setting up in substance that the plaintiff claimed title to the land under a deed from one G. : that before executing this deed, G. agreed with one H. to sell to him part of the land, and that H. should have possession of it until he had completed the contract, and H. took possession accordingly, and he and his heirs holding such possession of right under the said agreement, defendant has been wholly prevented from entering into and enjoying said portion :—Held, on demurrer, plea bad, for that at most it shewed only a parol demise, and that only as to part of the premises : that G. was merely tenant at will or at sufferance, and liable to be ejected by defendant ; and that relief, if any, would only have been apportionate, and upon terms, in a court of equity. *Crooks* v. *Dickson*, 15 C. P. 23.

Defendant leased to the plaintiff by deed for three years, there being another tenant in possession of part as a monthly tenant, who was succeeded by two others, holding under defendant :—Held, that the lease to the plaintiff, being under seal, operated as a grant of the reversion (with the rent incident thereto) as to the part thus held, and that defendant was entitled therefore to distrain for the whole rent in arrear. Kelly *v.* Irwin, 17 C. P. 357, remarked upon, and not followed. *Holland* v. *Vanstone*, 27 Q. B. 15.

To an action for the breach of covenants contained in a lease, in the non-payment of rent, and leaving the premises in an improper state of repair, the defendant pleaded on equitable grounds, setting out the demise, whereby the plaintiff demised to the defendant certain land and premises on which a mill was erected, "together with the water-wheel in said building and the right to draw water from the mill-pond adjoining the above described premises for driving the said water-wheel and machinery driven thereby," &c. The plea then averred that one D., claiming by title paramount, having proved such title by an action brought therefor, hindered and prevented defendant from using the said water so demised, whereby the demised premises were rendered useless and of no value to defendant, who delivered up possession to the plaintiff of the said premises and water rights in a perfect state of repair, and defendant had not used said premises during any portion of the time during which the rent sued for accrued due, and delivered them up as aforesaid before said time commenced. The plea then prayed that the action might be restrained, and the plaintiff ordered to pay the costs thereof, and that the demise should be delivered up to be cancelled :—Held, plea bad, as a legal defence, because the right to use the water was no part of the demised premises, but merely an easement thereof ; and even if it were, an eviction in respect of it would not authorize the tenant to abandon the residue of the premises ; and as an equitable plea, because no case was shewn for a total abandonment of the contract, defendant having paid rent for some years co not replace matters as before the lease, and had a remedy by action on the plaintiff's imp covenant to supply the water-power. *Cole* v. *Reddick*, 25 C. P. 579.—A. Wilson, sitting vacation.

It appeared that the defendant, the landl having leased certain premises to the plain had rented the outside of the fence around premises to one C. to post bills on, but the pl tiff claiming the fence, C. posted no bills, only put up a notice forbidding others to bills without his leave, which notice was pul down :—Held, no eviction. *Oliver* v. *Mon* 34 Q. B. 472.

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9. *Payment or Tender of Rent.*

Covenant for non-payment of rent due o lease made by plaintiff to defendant. Plea, t A. was seized in fee of the premises and lea to B., whose term came to the plaintiff by assi ment, and that afterwards, during the term before action, A. distrained on the occupiers the premises for rent due on the lease from and received a part of the rent from them, the residue from the defendant :—Held, on ge ral demurrer, plea good. *Leonard* v. *Buchan* 6 O. S. 407.

Defendant leased to F., from whom he took note in payment of arrears of rent. F. let t plaintiff into possession and the plaintiff ma payments to defendant on account of rent, which defendant gave receipts as for premis leased to F. :—Held, that the plaintiff cou not insist upon the taking of the note as a d charge of the rent due from F. *McLeod* v. *Dare* 7 C. P. 35.

The plaintiff declared that on the 12th D cember, 1857, one T. mortgaged certain lands defendant for £300, and defendant, by mem randum in writing, signed by said T. and d fendant, then agreed with T. to lease said lan from him, T., for two years at £40 a year, whi said rent defendant and T. then agreed shou be endorsed on and taken in part payment the mortgage, so soon as the two years shou have elapsed : that afterwards in April, 18 defendant sold and assigned said mortgage the plaintiff, and then promised the plaintiff pay him the £80 at the end of said two yea but did not pay the same. Plea, that bef said agreement T. sold and conveyed the lan to one G., who thereupon gave notice to def dant to pay said rent to him, and that aft wards defendant paid to G. the first year's re and then gave up possession of the land to hi —Held, on demurrer, that the declaration w insufficient, for the agreement between def dant and plaintiff would be without conside tion, as they could not without T.'s privity co promise his right to the rent ; and that the p shewed a good defence. *Murdiff* v. *Ware*, Q. B. 68.

The plaintiffs, two corporations, declared defendant's covenant to pay them $22,500 six months' rent, due on the 1st of June, 18 Defendants pleaded that the premises lea were situate partly in the United States : the plaintiffs had their place of business in

United States; and that on the 1st of June defendants tendered to them there $22,500 in lawful currency of the United States, which they refused; and the defendants brought into court $15,525 of lawful money of Canada, which they averred was on the said 1st of June, and is equal in value to the said $22,500 of the lawful currency of the United States. The plaintiffs replied that the deed was executed in Canada: that one of the plaintiffs was a company incorporated and having its domicile here, and the other in the United States: that the rent reserved was payable in current money of this province; and that at the execution of the deed and hitherto the said $22,500 was and had been always equal to $22,500, and not at any time to $15,525, of current money of the province; and that the tender made of the equivalent in American currency of the last mentioned sum was not valid. On demurrer to the replication:—Held, that the contract being made in Canada, and mentioning no place where the payments were to be made, must be governed by our law: that the rent must be intended from the declaration to be payable in current money of Canada: that there was nothing in the plea to displace this intendment; and that the plaintiffs therefore were entitled to judgment. *The Niagara Falls International Bridge Company and the Niagara Falls Suspension Bridge Company* v. *The Great Western R. W. Co.*, 22 Q. B. 592.

In order to constitute a legal tender, the money must be either produced and shewn to the creditor, or its production expressly or impliedly dispensed with. Where, therefore, to prove a tender of a quarter's rent, for which the defendant had distrained, the evidence shewed that the tenant, after refusing to pay some charges and costs which the landlord claimed in addition to the rent, said to the landlord: "Here is the rent," which he had, and told the landlord he had, in his right hand in a desk, but did not produce it or shew it to the landlord, who said nothing and left the premises:—Held, that there was no evidence of a tender, or of a dispensation with a tender. Per Gwynne, J.—To divest a landlord of his right to distrain a strict legal tender must be shewn. *Matheson* v. *Kelly*, 24 C. P. 598.

The mere taking of a note for rent, will not take away the right to distrain, but it is otherwise where, in consideration of receiving it, the landlord expressly agrees to wait until it has been dishonoured; and in this case, upon the evidence set out in the report, it was, Held, that such agreement was proved. *Simpson* v. *Howitt*, 39 Q. B. 610.

10. *Set-off against Rent.*

Set-off may be pleaded to an action for rent due under a demise, though not to an avowry for rent in replevin:—*McAnnany* v. *Tickell*, 23 Q. B. 122.

11. *Other Cases.*

Where in replevin, the landlord avowed for [illegible] years' rent, but proved a tenancy for only one year, although the tenant continued in possession for three years, having however paid no rent nor made any acknowledgement during the last two years:—Held, a fatal variance on the plea *de son tennit*. *Thompson* v. *Forsyth*, E. T. 3 Vict. 130

Commissioners of a turnpike trust, appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, made a demise beyond the scope of these powers; the tenant was put into possession and enjoyed his term; the commissioners, at the expiration of the term, took a promissory note from the tenant for the rent, giving time for payment:—Held, that the commissioners, by their clerk, could not sustain an action upon such note, because the promise to pay the note arose upon an illegal consideration, viz., the illegal demise.—Robinson, C. J., diss. *Ireland* v. *Guess et al.*, 3 Q. B. 220.

A. sues as clerk to commissioners exercising a public trust under an act of parliament (3 Vict. c. 53) upon an alleged demise of tolls for a year, at a rent payable every fortnight in advance, the 27th sec. of that act requiring the rent to be made payable monthly; the lease stated in the declaration is said to be subject to the provisions in the act:—Held, on demurrer to the declaration, that the plaintiff, as clerk to the commissioners, could not be permitted to recover on such a contract, because it is a contract substantially different from the one which the commissioners are expressly directed by the statute to make. *Ireland* v. *Noble*, 3 Q. B. 235.

Assumpsit for rent. Plea—that after the demise, the estate became vested in the principal officers of her Majesty's ordnance, by virtue of 7 Vict. c. 11, and thereupon the estate of the plaintiff ceased and was determined: that the said principal officers gave the defendant notice of this change in the title, and not to pay over the rent to the plaintiff; and that defendant is now liable to them for the use and occupation of the premises:—Held, not double, or bad, as amounting to the general issue. Held, also, that it was not necessary to negative in the plea any promise from the said principal officers to the plaintiff of a lease or conveyance of the premises, even if the statute required them to grant it, for that such an interest should have been replied by the plaintiff. *Cunningham* v. *Duane*, 9 Q. B. 274.

Covenant for rent due on a lease of a mill, alleging that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence. *Wilkes* v. *Steele*, 14 Q. B. 570.

The plaintiff leased to defendant land in front of the city of Toronto, with the use of the water adjacent. The corporation, in the construction of the esplanade, cut off the access to the water.—Held, that defendant was nevertheless bound to pay rent and fulfil his contract. *Lyman* v. *Snarr*, 9 C. P. 104.

The plaintiff sued defendants for non-payment by defendants of ground rent to the city of Toronto, due on a lease by the city to one B., whose executors had assigned part of the property to defendants. Defendants, in an equitable plea, set up, in substance, that the supposed frontage of the land on Front street constituted its sole value, which frontage was not included in the lease by the city, as they discovered before

taking possession, and by reason of such error they had not the land bargained for, &c.:—Held, on demurrer, reversing the judgment below, that the plea afforded no answer, for no concealment or imposition was alleged; and defendants, by calling for the lease, of which they had notice by the assignment, might have ascertained the facts at first. *Talbot* v. *Rossin, et al.*, 23 Q. B. 170.

A tenant absconded leaving rent in arrear, whereupon the landlord distrained, but before selling the tenant sent to the landlord a power of attorney, authorizing him to dispose of the property; and by letter he directed the landlord to pay himself his claim for rent, as also his claim for expenses and trouble; and after payment thereof and of the plaintiff to remit the balance to the tenant. The landlord then abandoned his warrant, and disposed of the property under the power:—Held, that the landlord by so proceeding had not waived his right to payment of the rent due, and that the plaintiff was entitled to be paid only out of the balance remaining after payment of such rent, as also of any rent due by any former tenant for which a distress could have been made, together with the landlord's expenses and charges for trouble in executing the trusts of the power. *Tyrrell* v. *Rose*, 17 Chy. 394.

A tenant in common being in actual occupation of the joint estate, is not chargeable with rent. It would be otherwise if he had been in the actual receipt of rent from third parties. *Rice* v. *George*, 20 Chy. 221.

A person who does not occupy and has no power to lease cannot be charged an occupation rent. *The Edinburgh Life Assurance Co.* v. *Allen*, 23 Chy. 230.

XVI. Rates and Taxes.

A tenant who covenants to pay rent without any deduction cannot claim a deduction for taxes paid by him. *Grantham* v. *Elliott*, 6 O. S. 192.

Certain premises in the city of Toronto which drained into a ravine were demised by defendant to one A., of whom the plaintiff in replevin was assignee. The city, in making improvements, closed up the ravine, and thereby accumulated water on the premises, rendering a drainage into the common sewer necessary. The plaintiff then drained his premises into such sewer, and paid the sewerage rate charged upon the proprietor of the property, and claimed to set it off against defendant's rent:—Held, on demurrer, that such payment was voluntary, and could not be recovered back from defendant, although it might enure to his benefit. Quære, whether the tenant was not liable under his covenant to pay taxes. *Aldwell* v. *Hesnath*, 7 C. P. 9.

Semble, that a lessee of a house in a city cannot be assessed as occupier when he no longer occupies it, although his term still continues; but,—Held, that the plaintiff in this case having omitted to appeal was liable to pay the sum assessed against him, and therefore could not replevy the goods which had been seized. *McCarrall* v. *Watkins et al.*, 19 Q. B. 248.

An ordinary lease under the Short Forms Act, containing the words, "and to pay taxes," covers a special rate created by a corporation by-law as well as all other taxes. *In re Michie and the Corporation of the City of Toronto*, 11 C. P. 379.

Defendant took a written agreement for a lease of certain premises, which was silent as to taxes, but when it was signed he verbally agreed to pay taxes. No lease was ever executed, owing to a disagreement on another point. Defendant occupied the premises for four years paying taxes for three years without objection, but when sued for rent which subsequently accrued, he claimed to set off such taxes on the ground that as the agreement made no provision for them, and could not be added to by verbal evidence, they must fall upon the landlord. Held, that having made the payment voluntarily in pursuance of his own agreement, even if it were without consideration, he could not recover back or set off such payment. *McAlpine* v. *Tickell*, 23 Q. B. 499.

A tenant occupied a house for some six years during which period he paid his landlord's taxes—Held, that he could not deduct the taxes paid out of the last quarter's rent under the 38th clause of the Assessment Act, although there was no agreement as to payment of taxes between him and his landlord. *Wade* v. *Thompson*, 1 J. 22.—C. C.—Leggatt.

Action by lessees against lessor for an eviction. Plea, that the plaintiffs by lease covenanted that they would during the term pay all taxes, and that the non-fulfilment of their covenant, or any of them, should operate as a forfeiture of the said deed, and that the same should be considered null and void: that during the term certain taxes were imposed on the land, amounting to $8.55 for municipal, and $9.55 for school purposes for 1863, which the plaintiffs did not pay, although the same were duly demanded, and they had no distress on the land; and such taxes in March, 1864, were returned by the collectors as due on non-resident lands, whereupon the said deed and the term became forfeited and void; and the defendant afterwards peaceably entered, and became possessed as in his former estate:—Held, on demurrer, that the plea was insufficient: that the taxes became due when demanded, and plaintiffs had not the whole time to pay them in; and that it was unnecessary to set out every requisite to shew a valid rate, there being a distinction in this respect between an avowry and a justification. *Taylor* v. *Jeri*, 25 Q. B. 86.

Held, affirming the judgment of the Queen's Bench, that land owned by a city, but leased by them to a tenant for his own private purposes, was liable to taxation, and that the corporation might distrain for such taxes. Morrison, J., diss., on the ground that the land was not liable. VanKoughnet, C., and Spragge, V. C., on the ground that, though the corporation might sue on the covenant to pay, they could not distrain. *Scragg* v. *Corporation of the City of London*, 20 Q. B. 457.

Where the lease contained no provision as to the taxes:—Held, that the landlord should pay them. *Dove* v. *Dove*, 18 C. P. 424.

Defendant, in 1872, (the day and month not being given) leased a farm from the plaintiff for a year from the 27th September, 1872, and did

nanted by the lease to pay during the said term "all taxes rates * * assessment * * whatsoever, whether parliamentary, municipal or otherwise, which now are or which, during the continuance of the said term, * * shall at any time be rated, charged, assessed, or imposed in respect of the said premises;" with a proviso for re-entry for breach of covenants:—Held, Wilson, J., diss., that defendant was not liable for the taxes for 1872, which had been assessed against the plaintiff: for that the words "all rates, &c., which now are," referred to the kind or character of the tax assessable against the land, and the words, "or which shall at any time," &c., to any other kind of taxes which might thereafter be imposed. *Macnaughton* v. *Wigg*, 35 Q. B. 111.

Per Wilson, J.—Defendant was liable, the sum being a tax at the making of the lease charged in respect of the land. Quære, whether he would have been liable for any taxes for previous years unpaid. *Ib.*

See *Bickle* v. *Beatty*, 17 Q. B. 465, p. 2057.

XVII. Contracts Relative to Repairs or Building.

Where appellant had entered into a contract to demise certain premises for a term to the respondents, and previously to the commencement of the term to repair the old premises and build a new warehouse; and the respondents entered accordingly at the day agreed upon, but before the appellant had completed the building and repairs and before the lease was executed, and a fire soon after destroyed the premises:—Held, on appeal to the privy council affirming the decision of the executive council of Canada; that the respondents were not bound to execute a lease and rebuild the destroyed premises, the appellant not having completed his contract, and that till such completion the premises were at his risk. *Counter* v. *McPherson et al.*, 1 O. S. 22; 5 Moore P. C. 83.

A lessee covenanted to build on the demised premises during the term, "provided always, and it is the true intent and meaning of these presents, and the parties thereunto, that at the expiration of the demise the buildings erected shall be paid for at the valuation of two indifferent persons," &c.:—Held, a covenant to pay. *McFattridge* v. *Talbert*, 2 Q. B. 156.

R. leased to C. for eight years. C. covenanted that he would at his own charge place the premises in good order, build a new stable, &c., and would repair and keep repaired the fences and houses then erected, or that might be erected during the term. On account of these improvements and additions it was agreed that no rent should be paid for the first nine months:—Held, that the lessee was not obliged to perform his covenant within the nine months relieved from rent; and Quære, whether he should have the whole term to do the work, or must do it within a reasonable time. *Castle* v. *Rohan*, 9 Q. B. 400.

Covenant for rent due on a lease of a mill, saying that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid. Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence. *Wilkes* v. *Steel*, 14 Q. B. 570.

Plaintiff demised to defendant, covenanting that it should be "competent" for the defendant to make certain specified repairs, and the lease was declared to be on the express understanding that such repairs should be made within the year from the date of the said lease:—Held, that notwithstanding the word "competent," the defendant covenanted to do the work specified. *McDonald* v. *Cochrane*, 6 C. P. 134.

In an action on a lease (having many years to run) for rent and non-repair of the premises:—Held, that the reversioner by reason of the length of lease was not restricted to nominal damages, but the measure of damages was the amount to which the reversion was injured by the want of repair. *Atkinson* v. *Beard*, 11 C. P. 245.

D. covenanted during the term to repair and keep in repair, and the said premises so repaired, with all things which at any time during the term should be fixed or fastened to or set up in or upon the premises, at the expiration of the term peaceably to yield up, with all and singular the fixtures thereto belonging, in as good condition as the same were at the execution of the indenture:—Held, to extend to a building resting on blocks of wood, not let into the ground, also to a building resting on stumps, and also to a building laid on a scantling and old posts not let into the ground, all placed on the demised premises during the term. *Allardice* v. *Disten*, 11 C. P. 278.

Defendant covenanted to repair, and that if he should fail the lessor might do it and sue for the sum expended. To an action for non-payment of money thus spent, defendant pleaded that the dilapidations so repaired were caused by the plaintiff wilfully, maliciously, and in the dead hour of the night, and the possession of the premises thus disturbed, contrary to the lease:—Held, on demurrer, no defence, but the subject of a cross action only. *Kelly* v. *Moulds*, 22 Q. B. 467.

The declaration alleged that defendant, by lease dated 1st of October, 1862, did let to the plaintiff certain premises for five years, and that it was agreed that the plaintiff should sufficiently repair the erections, buildings, gates, and fences on said premises, and that defendant would allow to the plaintiff one-half of the cost of repairing the house or tavern, and would pay the whole of the costs of repairing the fences and gates, the said repairs and erections to be paid for by defendant at the end of the first year of the said term. It then averred that the plaintiff did within the first year duly repair the house and the fences and gates, &c., and that defendant after demand and valuation refused to pay one-half of the costs of repairing the house, and the whole of the costs of repairs to the fences and gates, and to allow to the plaintiff the amount due him under the agreement out of the rent. The defendant pleaded that the covenant to repair in the lease was as follows: "And the said lessee," meaning the plaintiff, "doth hereby for himself, &c., covenant, &c. * * that he, the said lessee, his, &c., will, at the costs and charges of the said lessee, well and sufficiently repair and keep repaired the erections and buildings, fences and gates erected or to be erected upon

the said premises, and the said lessor finding or allowing one-half of the expenses of repairing the house. * * The lessee to repair fences, the amount to be valued and to be paid by the lessor at the end of the first year of the term, the rails to be taken off the premises if possible." To this the plaintiff demurred; and replied that the meaning of the lease was, that both the repairs to the house and repairs to the fence were to be paid for by the lessor:—Held, that on the pleadings as set out, defendant was bound to pay half the repairs of the house and all the repairs of the gates and fences. Quære, as to the mode in which the effect of a written instrument is to be brought before the court for their decision. *Miller* v. *Kinsley*, 14 C. P. 188.

Trespass for entering plaintiff's close. Plea, justifying under a lease from defendant to plaintiff, by which plaintiff covenanted to keep a certain fence in repair, and alleging that by reason of his default defendant's cattle strayed on to plaintiff's land. Effect of removal of fence by plaintiff, with defendant's consent or directions. *Pickard* v. *Wixon*, 24 Q. B. 416.

Plaintiff sued defendant for taking his cattle. Plea, justifying as for distress damage feasant on defendant's land. Replication, that the plaintiff demised to defendant the land mentioned in the plea, reserving a right of way along the west side thereof; and the alleged trespass was the use of such way. Rejoinder, that the trespass was beyond the right of way. Surrejoinder, that at the time of the lease there was a fence along the east side of the way, to prevent horses, &c., straying therefrom: that defendant covenanted by the lease to keep such fence in repair, but removed it, whereby the plaintiff's horses strayed from the way upon defendant's land. Rebutter, that the lease contained covenants allowing the plaintiff to enter on the land, and view the state of repair, and that defendant would repair according to notice: that the plaintiff directed the defendant to remove the fence along the east side of the way, and use the rails for other purposes, which the defendant with the plaintiff's assistance, and as the act of the plaintiff, accordingly did; and this is the removal referred to in the surrejoinder:—Held, that upon the evidence set out, the jury were justified in finding the rebutter proved by defendant, whether it was a good answer in law to the surrejoinder not being a question for them. The jury were directed, that if the removal of the fence was the plaintiff's act, he was bound, having thus thrown open the way, so to use his right over it as not to injure the defendant's land. Semble, that the question of plaintiff's duty in this respect was not really raised by the pleadings, but that the charge was correct. *Wixon* v. *Pickard*, 25 Q. B. 307.

In a lease for years of premises made to G., and assigned by G., as to the residue of the term, to defendants, was contained, after the usual covenant to yield up the same in good repair, a proviso, that nothing therein contained should in any way compel the said G. to give up the buildings at the expiration thereof, which are all wooden and liable to decay, in as sound and good a state as they then were; "but such buildings are not to be wilfully or negligently wasted or destroyed; necessary repairs, however, for the preservation of the said buildings to be done and performed by the said G. at his own proper cost and charge:"

—Held, that these words constituted a c
which covenant ran with the land and b
assignees of the lease, though *assigns*
expressly mentioned. Held, also, that
was not entitled to delay repairing unti
of the term; but that such repairs w
made as were necessary to prevent the
going to destruction, and the moment
cessity existed and the tenant failed
the covenant was broken. *Perry et ux.*
of Upper Canada, 16 C. P. 404.

The evidence shewed that the prem
been allowed to go to decay for want
sary repairs; that up to and about the
left them they were in defendant's po
proper repairs had not been made:—H
dence for the jury of a breach of cove
defendants whilst owners of the lease,
the plaintiffs were not bound to give ex
dence of the actual state of the premis
the lease was first made. *Ib.*

Marriot *v.* Cotton, 2 C. & K. 553, ref
distinguished, and doubted. Review of
authorities as to injuries to the revers
time of bringing the action therefor,
measure of damages. *Ib.*

In an action by lessor against lessee o
nant to repair fences, on or before a cert
—Held, 1. That such a covenant was n
tinuing covenant, and damages must t
be assessed once for all; 2. The proper
of damages in such a case is the amount
the beneficial occupation of the premise
the term is lessened. *Cole* v. *Buckle*, 18

Whether the cost of repairing would a
correct method of estimating the damag
depend upon the circumstances of each c

Semble, if the cost of repairing woul
large as to be out of proportion to the
interest in the premises, he would not
tied in repairing and treating the costs
repairs as his damages. *Ib.*

Defendant demised to plaintiff a y
wharf, covenanting, generally, to put t
into good and sufficient repair on or
given day. The condition of the wharf
cussed between the parties, and a mem
was drawn up by defendant and signed
"Work to be completed to put wharf
repair; two stringers, and one stringer
into place; all that part of wharf not p
be planked with new plank, and all th
plank or holes to be repaired with soun
Plaintiff signed this memorandum befor
ing the wharf, and on defendant's repre
that it was all right. These repairs were
but about a month afterwards the wha
caused, apparently, by the defective st
caps on which the stringers rested. T
no clear evidence of an agreement as t
cified amount of repairs being taken a
formance of the covenant in the leas
that the memorandum did not control
the covenant, and that the plaintiff w
to recover for the damage sustained by
not having been put into good repair.
Beard, 21 C. P. 473.

A covenant in a lease that the l
"take proper care of the fruit tre
facie only applies to the trees planted

ing on the premises at the time the lease is executed:—Semble, that it would not apply to trees planted by the lessor under a verbal agreement subsequent to the execution. If before the lease was executed it had been expressly agreed that the trees to be afterwards planted by the lessor should be included in the covenant, and upon that understanding they were planted: Semble, that the covenant might be held to apply to them; but that such agreement must be established by the lessor by undoubted testimony. *Crozier* v. *Tabb et al*, 26 C. P. 369.

By a lease of property in the town of London, the lessor agreed to erect the outside of a frame building, and bound himself, in case of its being destroyed by fire, to rebuild to the same extent, or in default the rent reserved to cease. Afterwards the house was burnt down, and in the interval the municipal council had by by-law prohibited the erection of frame buildings in that locality. The lessee refused to pay rent until the lessor re-built, and the lessor then filed a bill to cancel the lease, as it had become impossible for him to carry out his agreement. The court refused this relief; but on a submission in the answer, directed a reference to the master to fix a proper rent to be paid upon the lessor rebuilding with brick, with costs to be paid by the plaintiff. *Williams* v. *Tyas*, 4 Chy. 533.

A lessor demised property for a term of years, with a stipulation that the lessee would not carry on any business that would affect the insurance. The lessee made an under-lease, omitting any such stipulation, and the under-lessee commenced the business of rectifying high wines. Upon a bill filed by the lessor against the lessee and his lessee, the court restrained the parties from continuing to rectify high wines or carry on any other business that would interfere in any way with the insurance. *Arnold* v. *White*, 5 Chy. 371.

One of the conditions of a lease was that the lessee (the defendant) should erect a barn of certain specified dimensions, and the land whereon it was to be erected was mentioned, but the lease was silent as to the exact location or site of the barn. The lessee commenced to erect a barn on a site with which the lessor was dissatisfied, who thereupon filed a bill, alleging that such a site was unsuitable, and that it had been selected by the defendant from improper motives: that another site had been agreed on between them, and that the building itself was faulty in its construction; and prayed an injunction restraining the defendant from allowing the barn to remain in its present position; and by amendment sought to enforce specific performance of the contract. The evidence failed to establish the material allegations of the original bill:—Held, (1) That by the terms of the lease the plaintiff had not the right of selecting the site of the barn; (2) that it was not a proper case for decreeing specific performance, or to award damages in lieu thereof; but that the plaintiff must be left to his remedy at law. *Campbell* v *Simmons*, 15 Chy. 506.

Held, that the decree in the previous suit was a bar to a subsequent suit by the tenant for a specific performance of the agreement for a lease. *Simmons* v. *Campbell*, 17 Chy. 612.

See *Wheeler* v. *Sime et al.*, 3 Q. B. 143, p. 2057; *Millmine* v. *Hart*, 4 Q. B. 425, p. 2057; *McDougall* v. *Ridout et al.*, 9 Q. B. 239, p. 2031; *Darey* v. *Lewis*, 18 Q. B. 21, p. 2078.

XVIII. Compensation for Improvements.

A. and B. being partners, A. alone verbally leased certain premises for a place of business, for five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A., but never signed by the lessor. It was verbally agreed between the lessor and A., that A. should erect a granary, &c., on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved, and B. released and assigned to A. all his right to debts, &c. A. then took C. into partnership, with whom the lessor settled the account for the goods by allowing an alleged set-off. A. afterwards brought an action against his lessor for the goods sold and the value of the granary, &c.:—Held, 1. that B. should have joined in such an action; 2. That the settlement with C. was not bonâ fide as against A.; 3. That no lease having been executed, upon the facts, A. was a tenant at will, and that it might be orally agreed that he should make improvements and be paid for them, and that plaintiff might sue for them in his own name though built with partnership funds. Quære, should the action be for work, labour, and materials, or upon the special agreement. *Brougham* v. *Balfour*, 3 C. P. 72.

One E. was left in charge of the estate of N. who promised to leave the same by will to E. N. afterwards left this country, and died abroad intestate, and E. acting on the presumption that N. had died without heirs, made a building lease in his own name of a portion of the estate, and the lessee entered into possession and erected buildings thereon. Afterwards the heir of N. established his right to the estate as such, and refused to recognize the validity of the lease; whereupon a bill was filed seeking to bind the heir with this lease, or that he should pay the value of the improvements on the ground of a ratification of the lease. The court refused to grant either branch of relief asked, and the fact that the heir had instituted proceedings in this court against the lessor, calling upon him for an account of the rents, &c., received by him from the estate of the intestate, was not such a proceeding as could properly be considered a ratification of E.'s acts. *Moffatt* v. *Nicholl*, 9 Chy. 446.

The guardian of an infant, tenant for life, without the sanction of the court, executed a lease for years, during the existence of which the infant died, and an application having been made in the cause for an order on the tenant to deliver up possession, he was ordered to do so, and on payment into court of the amount of rent in arrear, he was permitted to remove the buildings and erections put by him on the property, (doing no damage to the realty), but the court refused to allow him out of such rents for any improvements made by him upon the premises. *Townsley* v. *Neil*, 10 Chy. 72.

See *Nudell et al.* v. *Williams*, 15 C. P. 348, p. 1050; *Irwin* v. *Hunter*, 19 C. P. 391, p. 2053; *Roaf* v. *Garden*, 23 C. P. 59, p. 2051; *Hutchinson* v. *Boulton*, 3 Chy. 391, p. 2051.

See XV. 5, p. 2056.

XIX. Crops and Emblements.

In trover for an away-going crop, which the plaintiff contended he was entitled to under a covenant in his lease, "that he should not sow fall grain in all fields now cleared in the first or last year of the lease," on proving that he had not sown the grain in all the fields, the court held the word *all* must be construed *any:* that the lease, therefore, did not militate against the common law rule; and that the plaintiff was precluded from claiming the away-going crop. *Gilmore* v. *Lockhart*, H. T. 6 Vict.

In trover for wheat reaped and claimed by the defendants, as of right belonging to them as an away-growing crop after the expiration of a lease for seven years, the plaintiff's witnesses proved a new lease in writing of the premises to a third party, from the expiration of the defendant's lease, but the new tenant swore that he had no right to the wheat:—Held, that it was not necessary for the plaintiff to produce the new lease. *Burrowes* v. *Cairns et al.* 2 Q. B. 288.

Where there is a stipulation in a lease for a term certain that the lessee shall deliver up all the lands at the expiration of the lease, all question as to customary right to the away-going crop is excluded; and Semble, that there is no custom of the country as to away-going crops in Upper Canada. *Ib.*

M. in the spring of 1852 agreed by parol with A. to work his farm on shares, and put in a crop of rye. In December, 1852, A. entered into a written agreement with G. to rent the farm to him for three years; and in January, 1853, A. died leaving a will. M. in 1853, with the assent of G., reaped the crop which he had sown in the previous year:—Held, that the share of such crop to which A. would have been entitled must go to the devisee of the land, and not to the executors. *Tubbs* v. *Morgan*, 12 Q. B. 151.

In a three years' lease, the words, "also to allow the said W. and J. N. (tenants) the right of leaving in fall crop the same quantity of land as is now in fall crop when they get possession," coupled with the fact that there was then a fall crop on part of the land, which had been sown by the preceding tenant, and which he was entitled to reap, were—Held to confer on the tenants the right to sow a crop during the tenancy, which they might reap afterwards. *Campbell* v. *Buchanan*, 7 C. P. 179.

When a sheriff, acting in good faith for all concerned, agreed to pay for having grain thrashed for the purpose of its better sale, the expenses of such thrashing should be allowed him. *Galbraith* v. *Fortune*, 10 C. P. 109.

Plaintiff by deed leased land from one S. for five years from the 1st October, 1862, agreeing thereby to give up possession on the expiration of the term. On the lease was endorsed an unsigned memorandum, that if plaintiff cleared any more land, he was to have the same rent free for the first three years. No land was cleared by plaintiff until the fall of 1865; and in the f 1867, he put in a crop of wheat. After th piration of his term, S. permitted him to re on the premises, and in the following Apri left, giving up to S. the place with all on it. June following, S., by deed, leased the l and crops thereon, to two of the defendant five years from the 7th January previously, subsequently, when the wheat had ripened, p tiff entered upon the land, then in defend possession under S., and cut the crops. De ants took possession of the wheat in shocks o land, and the plaintiff brought trover:—H that the memorandum could not operate so transfer to plaintiff the right of entering in on the possession of defendants, and takin crops in the ground, the property in which passed to them under the lease from S., which, moreover, the evidence shewed pla had before this expressly surrendered, with land, to S.; nor on the authority of Burr *v.* Cairns et al., 2 Q. B. 288, could the pla claim, as an outgoing tenant, the wheat, way-going crop, and that he was not, there entitled to recover against defendants. *K* v. *White et al.*, 19 C. P. 36.

The lessees covenanted "to take proper of the fruit trees." There were fruit trees on the demised premises:—Held, that the c nant did not extend to additional fruit t planted afterwards *by the lessor*, with the as of the lessees. *Crozier* v. *Tabb et al.*, 38 Q. B.

See *Marton* v. *Scott*, 7 C. P. 481, p. 20 *Campbell* v. *Baxter*, 15 C. P. 42, p. 2036.

XX. Contracts against Assignment.

Proviso for re-entry if the lessee "do, or s at any time or times during the continuanc the said term, let, set, or assign over these sents, or the term, estate or premises her granted, or otherwise part with his inte therein or thereto to any person or persons w soever," without the lessor's consent in writ The lessee, on leaving the country for a t rented the premises to one J., who was t out when required:—Held, no forfeiture. v. *Fiskin*, 12 Q. B. 604.

In ejectment for breach of covenant n assign without license against the assignee o lessee, the plaintiff's verbal assent to the as ment before defendant entered into possessi no defence. *Carter* v. *Hibblethwaite*, 5 C. P.

No notice or demand is necessary before ac upon a forfeiture, where there is a pow entry in the lease upon breach of a covena repair or not to under-let. *Connell* v. *Powe* C. P. 91.

A copy of an under-lease between defen and his under-tenant was proved in evi upon notice given to produce the origin Held, admissible, as against the under-te he having admitted it was a copy, and no o sion having been taken to it at the trial. Co v. *Power*, 13 C. P. 91.

The lessees under a lease containing a c nant not to assign without leave, in the stat form, made a voluntary assignment in insolv on the 17th May, 1869. The assignee sol stock-in-trade of the insolvents, who were goods merchants, and the purchaser took po

sion of the premises from him on the 27th May, the assignee also occupying a room there for the management of the estate:—Held, a breach of the covenant and a forfeiture, for the term passed to the assignee, under the Insolvent Act, and if his election to accept it were necessary it was shewn by his conduct. *Magee* v. *Rankin*, 29 Q. B. 257.

In a lease there was no express proviso for re-entry, but the lease was stated to be made "subject to the following stipulations." Then followed a number of clauses, one of which was that the lessee should not assign the lease without the consent in writing of the lessor:—Held, that the words "subject," &c., had not the effect of making the succeeding clauses conditions, so as to cause a forfeiture and right of entry for their breach; and therefore that ejectment would not lie for assigning the lease without the consent of the lessor. *McIntosh et al.* v. *Samo*, 24 C. P. 625.

A lease, dated 1st July, 1868, purported to be made "in pursuance of an Act to facilitate the leasing of lands and tenements," the proper title of the statute then in force, C. S. U. C. c. 92, being "An Act respecting short forms of leases," and it contained the following covenant: "And the said lessee, *for himself, his heirs, executors, administrators, and assigns, hereby* covenants with the said lessor, *his heirs and assigns*, to pay rent and to pay taxes, and will not assign or sublet without leave." Then followed "Proviso for re-entering by the said lessor on non-performance of covenants, or seizure or forfeiture of the term for any of the causes aforesaid." The plaintiffs, as assignees of the lessor, brought ejectment, claiming to re-enter for breach of the covenant not to assign, by reason of an assignment of the lease made by the administratrix of the lessee:—Held, that the proviso for re-entry applied only to the non-performance of positive, not negative, covenants, and that there was therefore no right of re-entry here *Lee et al.* v. *Lorsch*, 37 Q. B. 262.

The plaintiff leased premises for ten years to B. who covenanted for himself, his executors, administrators, and assigns, that neither he nor they would, during the term, assign, transfer, or sub-let without the written consent of the lessor, with a proviso for re-entry in case of breach. B. mortgaged to H. without the plaintiff's consent, but the plaintiff waived this forfeiture. Afterwards H. having foreclosed his mortgage, advertised the land for lease, and one W. took possession, on the understanding with H. that an agreement should be drawn up that he should have it for five years, with the privilege of remaining till the end of the year; the rent to be $330 a year. He remained ten months, and made improvements, when he gave up possession, because he was unable to get the written agreement promised, and the sum due to him for improvements, less a sum allowed to H. for rent, was settled by arbitration. While in possession, W. sub-let part of the land (a house and garden,) to one C., who was to have it for three years, with the privilege of remaining five, at $300 a year. W. notified C. not to pay any rent to any one without his authority. After W. gave up possession, C. took the whole of the premises from H., and paid some rent and made some improvements.—Held, that there had been a breach of the covenant, and that the plaintiff was entitled to recover in ejectment. *Bacon* v. *Campbell et al.*, Q. B. H. T. 1877. Not yet reported.

XXI. Other Conditions and Agreements in Leases.

A lease was made between three parties—plaintiff of first part, one B. of second part, and defendant of third part. The plaintiff leased to B. an hotel, with certain goods and chattels; and B. covenanted, among other things, at the end of the lease, to pay plaintiff the difference between £550 and the value of such goods, which value should be ascertained as provided by arbitration. The defendant covenanted with the plaintiff that B. should pay the difference between the said sum of £550 and the value of such of said goods and chattels, &c., not adding "to be ascertained as aforesaid," but—Held, that they were to be understood. *Hayes* v. *Addy*, 3 C. P. 262.

Defendant leased a farm from the plaintiff for seven years, and stipulated that he should let him have with it a horse, waggon, plough, harrow, and a set of harness, at a valuation, to be returned of equal value at the expiration of the term. Plaintiff sued for non-return, alleging that defendant had not returned the said goods, or any of them, of equal value, or otherwise:—Held, breach well assigned, and declaration sufficient. Quære, as to the meaning of the agreement. *Pew* v. *Hart*, 14 Q. B. 256.

Defendant leased a building to L., reciting in the lease that it was required to carry on the business of a miller, and that it might be necessary to erect other buildings, and to put in certain machinery and a steam engine; and it was agreed that such machinery should be the sole and absolute property of the lessee, and that he might remove it within a reasonable time after the expiration of the term, doing as little damage as possible to the freehold: that any buildings erected by him should be paid for by defendant at the expiration of the term; and further, that the lessee might, in his discretion, use the premises for any other business, and in that case the lease should stand as if originally made therefor. The lessee covenanted to repair and leave the premises in good repair. L. assigned to M. the premises demised, and all the machinery erected thereon, in trust to secure the payment by L. of certain drafts which M. had accepted for his accommodation, and for that purpose on default to sell the residue of the term, and the machinery and mill-gearing. Soon afterwards L. went away. M. obtained possession by ejectment, and sold by deed to the plaintiff all the machinery, &c., giving him authority to take down and remove it. While he was doing so defendant prevented him, and the plaintiff in consequence replevied. Defendant pleaded only that the machinery was not the plaintiff's:—Held, that the plaintiff was entitled to recover, for by the terms of the lease the machinery was expressly made chattels, and the property of the lessee, and though defendant, after it had been detached from the freehold, might have distrained upon it for his rent, yet he had not placed his defence upon that ground. *Darey* v. *Lewis*, 18 Q. B. 21.

Plaintiff leased to one M. for ten years certain premises by writing not under seal, under certain

terms, M. to furnish plaintiff with steam power to the extent of five horses. Defendant for some time carried on the business in partnership with M., and subsequently, a dissolution having taken place, continued the business himself. During the partnership a certain amount of steam power was provided for plaintiff by lessee. Plaintiff sued defendant for not furnishing the quantum of steam power since the dissolution. Defendant denied his liability, setting up a yearly tenancy not under seal, and that he was not a tenant under the agreement entered into with M. :—Held, 1. That the agreement or lease to M. was void, not being under seal, but might be referred to for the terms of the letting; 2. That a promise by defendant to furnish the power was implied by law, from the facts and situation of the parties. *Lyman et al.* v. *Snarr*, 10 C. P. 462.

The plaintiff occupied certain premises on the bank of the river Niagara, near the falls. Defendant occupied, under an assignment of a lease from the crown, premises of the same nature nearer the falls, in which lease was a condition that free access be permitted to the falls by the staircase and pathway at the foot of the rock on the defendant's premises, at all times to all persons, on payment of a sum not to exceed 25 cents. "Mr. Thomas Barnett, (the plaintiff) or any assignee of the premises now occupied by him at the falls, or regularly employed guide or guides in his service, while conducting any person or persons to, under, or from the sheet of water, to be exempted from all charge for the use of the said pathway." Defendant erected a fence across the pathway at the most northern limit of his land below the bank, and thereby shut off the plaintiff's access to the falls by means of his (plaintiff's) staircase, which was further from the falls, for which obstruction the plaintiff brought this action, claiming in his declaration a wrongful obstruction of the said staircase and pathway. Defendant pleaded that he did not obstruct the staircase and pathway reserved for the use of the plaintiff by the letters patent:—Held, that the only right claimed in the declaration being that granted by the letters patent, which, on the pleadings, was shewn not to have been obstructed, the defendant was entitled to succeed. *Barnett* v. *Caplin*, 11 C. P. 76.

The lessee covenanted to clear up and fence five acres each year, and to split and put into fences 500 rails each year to fence said land cleared by him, and there was a right of re-entry on breach. This number of rails would not nearly fence five acres:—Held, that the covenant was satisfied by clearing five acres each year, and fencing with a fence of some kind, having—in this case a brush fence—in it 500 rails:—Held, also, that the clearing need not be in blocks of five acres; and that defendant having finished clearing three acres which had been chopped by the plaintiff, part of a larger field, but was unfit for cultivation without logging, burning, &c., and fenced it one side so as to form a lane, which was required between this fence and an old fence there before, and having cleared more than two acres elsewhere, had complied with the covenant. *McLaren* v. *Kerr*, 39 Q. B. 507.

The proprietors of a house in the course of erection, which was intended to be used as an hotel, made a lease thereof for a term of five years, from the time of the completion of the building. The lease contained, amongst oth a covenant in these words: "And the said le covenants further, with the said lessors, tha will furnish the said hotel in a substantial good manner:—Held, that this was a contin covenant, and that the lessee was not at libe during the continuance of the term, to ren out of the house the furniture thereof, whic had placed in it. *Rossin* v. *Joslin*, 7 Chy.

XXII. Right of Tenants to Clear Lan

In an action by reversioner against ten for injury to the reversion, caused by cut down and carrying away trees and underw defendant pleaded his tenancy, under a de from D., for 19 years; that at the time of the mise, the land was chiefly wild and in a stat nature, and could not be used for farming poses, for which it was demised, and defen cut down and removed the trees, &c., upon a tion of the wild land, cleared and made i for cultivation, fenced and cultivated it, mak it productive and useful, and thereby impro the land in value, and did not injure plaint reversion:—Held, plea bad. *Drake et al* *Wigle*, 22 C. P. 341.

The owner of land made several lease portions thereof, wherein it was stipulated the lessees should have a right to cut timber thereon; and they on their parts c nanted to make certain improvements. By lease to the defendant it was agreed that lessee should render up all improvements, the lease did not bind him to make any:—H that the lease did not confer a right to cut timber standing on the demised premises, withstanding the same were wild, and in a st of nature. *Goulin* v. *Caldwell*, 13 Chy. 493.

A lease of rectory land by the rector c tained a covenant not to clear more than a cert portion of the land demised: that the clear should be for agricultural purposes, in contigu fields, not exceeding ten acres each, such fi to be enclosed in good lawful fences, "and s be sufficiently chopped, underbrushed, log and burned, according to the due course of fa ing and good husbandry." It appeared that lessee's cutting was not meant to be limite what "might be necessary in working reg clearings on the land," and the lessee, with lessor's consent, cut and sold the timber off acres; but the lessee having for two years d nothing towards clearing this portion of the mised land, it was held that the delay was to the objection of being contrary to "the course of farming and good husbandry," and the lessee was liable to damages in respect th of. *Lundy* v. *Tench*, 16 Chy. 597.

See *Chestnut* v. *Day*, 6 O. S. 627, p. 2084.

XXIV. Notice to Quit and Demand o Possession.

Where a tenancy from year to year exists, during its continuance the parties agree f lease for a certain term, with a power to tenant to purchase, which is never executed, tenant stands in his original situation after agreement fails, and cannot be ejected with a regular notice to quit. *Doe* d. *Crookshan* *Crookshank*, M. T. 5 Vict.

Defendant had been tenant to the plaintiff at a yearly rent, payable quarterly, for a term which expired on 1st of June, 1859. About that time a new lease was agreed upon between them at an advanced rent, but none was executed owing to objections raised by the defendant to the draft. Defendant paid a year's rent, and another quarter having fallen due the plaintiffs distrained, but they afterwards abandoned that proceeding, and on the 17th of September, 1860, the plaintiff's attorney served a written demand of possession on defendant, who told him that was just what he wanted, and that the plaintiffs might have the place. He refused, however, to go at once with the attorney and give it up, saying that he wished first to remove some things. Nothing more was done, and the plaintiffs three weeks after having brought ejectment, defendant, besides denying their title, claimed to hold as their tenant:—Held, that the plaintiffs were entitled to recover, for 1, the defendant having denied their title could not insist upon notice to quit; and 2, he was estopped by his offer to leave the place. Semble, that defendant, though he had not accepted the lease tendered, was, under the circumstances, the plaintiffs' tenant. Burns, J., dissenting on the ground that defendant being in as a yearly tenant, what took place on the 17th of September did not alter his position, and that his notice was only a denial of the plaintiffs' right to possession. *Cartwright et al.* v. *McPherson*, 20 Q. B. 251.

Plaintiff leased part of a house from defendant L. at £4 a month, and if L. sold the house he was to leave if he could get another, or, according to some of the witnesses, to leave in a month. L. sold the house and conveyed it, on the 7th August, to the vendee, W., who wanted immediate possession. L. had previously given the plaintiff verbal notice to go, and on the 7th August, after he had conveyed, he at the suggestion of W. gave the plaintiff a written notice, which W. saw L. sign. The plaintiff at first promised to go, but afterwards refused, and his property was put out by L. and the other defendant on the 9th September, on which W. took possession. The jury found that the tenancy was to terminate on a month's notice, and gave the plaintiff a verdict for $100:—Held, that the finding must be taken to mean that the plaintiff was to have a month after the sale; that if the notice was given and the entry made by L. by authority of W. it would be sufficient, and a new trial was granted to determine this point. *Matthews* v. *Lloyd et al.*, 36 Q. B. 381.

See *Doe* d. *Bouter* v. *Frazer et al.*, 4 O. S. 80, p. 287; *Doe* d. *Somers* v. *Bullen*, 6 Q. B. 369, p. 392; *Harvey* v. *Fergusson*, 9 Q. B. 431, p. 2020; *Osborne* v. *Earnshaw*, 12 C. P. 267, p. 2017; *Connell* v. *Power*, 13 C. P. 91, p. 2076; *Sheldon* v. *Sheldon*, 22 Q. B. 621, p. 2039; *Campbell* v. *Foster*, 15 C. P. 42, p. 2036; *Manning* v. *Dever et al.*, 35 Q. B. 294, p. 2047.

See, also, EJECTMENT, II. 3 (*b.*) p. 1164.

XXV. ACTIONS AND PROCEEDINGS BY LANDLORD.

1. *Covenant.*

(a) *Pleading.*

The averment of some consideration or inducement for the making of a lease other than the annual rents mentioned in the lease, is not necessarily a contradiction of the lease, and therefore bad. *McIntyre* v. *City of Kingston*, 4 Q. B. 471.

A plea averring some other consideration must shew *that* consideration passed and executed *before the giving of the lease*. *Ib.*

After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction, cannot be pleaded in bar of an action on the lease. *Ib.*

Where the lessee pleaded an assignment, and then averred the acceptance by the lessor from the assignee of the sum of £187 10s., not as the rent sued for in this action, but merely as "for the rent aforesaid, in form aforesaid, reserved and made payable":—Held, that the plea was not argumentative, as setting up indirectly payment of the rent. *McCulloch* v. *Jarvis et al.*, 8 Q. B. 267.

Covenant for rent due on a lease of a mill, alleging that although plaintiff had performed all things in the lease on his part, yet the rent remained unpaid:—Plea, that the plaintiff permitted the dam and race to be out of repair, contrary to his covenant in the lease contained; without this, that the plaintiff had performed the lease on his part as alleged:—Held, no defence: *Wilkes* v. *Steele*, 14 Q. B. 570.

To a declaration on a covenant in a lease alleging that defendant covenanted with plaintiff that he would during the term spend and employ, in a husband-like manner, upon the demised premises, all the straw which should grow thereon, and charging as a breach that the defendant drew away many waggon loads of straw which grew thereon, and used it elsewhere, defendant pleaded that the covenant in the declaration was not the whole of the covenant, but that it contained additional matter completely qualifying, as he contended, and in effect neutralizing that part of the covenant set out; the whole alleged covenant was then set out, with an averment that defendant had fulfilled it according to the true intent and meaning of the added part:—Held, on demurrer, plea bad. *Shier* v. *Shier*, 22 C. P. 147. See, also, *Miller* v. *Kinsley*, 14 C. P. 188, p. 25.

Defendant also pleaded on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended, and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, Gwynne, diss., plea bad. *Shier* v. *Shier*, 22 C. P. 147.

Action on defendant's covenant to pay rent, contained in a lease to him by plaintiff of a mill, for nine years from 15th December, 1868, at a yearly rent, payable half-yearly in advance on the 15th June and December in each year, alleging non-payment of three half-yearly instalments of rent reserved. Plea, by way of estoppel, that previous to this action the lessee (now defendant) sued the lessor (the now plaintiff) in the County Court, alleging in his declaration that by the lease, in the event of total destruction of the mill by accidental fire, the term should cease and the rent be apportioned; that upon such destruction on the 30th October, 1860, the said term ceased, and the lessor became liable to refund to

the lessee such part of the rent paid in advance as on a just apportionment should be found due, and the lessee alleged in such action that $137.50 thus became due to him, for which he sued therein: that the lessor pleaded in such action that the said lease was not his deed, and issue being joined thereon, the lessee recovered judgment for the said sum of $137.50. The plea then alleged that the judgment remained in force, and that the rent sued for in this action was rent accruing due after the said 30th October, 1869. To this the plaintiff replied, that after such fire the defendant continued to hold and occupy, and still holds and occupies the premises under and by virtue of the lease, and would not and did not put an end to said term or surrender said premises:—Held, a good plea; for though the plea of *non est factum* did not put in issue the destruction of the mill, and consequent determination of the term, yet these facts being necessarily averred in that action, and not denied, were admitted for the purposes of such action, and the lessor was now estopped from disputing them. *Taylor* v. *Hortop*, 33 Q. B. 462.

To an action for rent due on a lease defendant pleaded, that after the lease the plaintiff "did grant and convey, by way of mortgage in fee simple," the demised premises to one M., who claimed the rent: Held, sufficient, without averring that the conveyance was by deed. *Perdue* v. *Hays et al.*, 31 Q. B. 111.

(b) *Damages.*

Defendant took an assignment of a lease from the plaintiff, covenanting to perform all the covenants in it on plaintiff's part, and to indemnify him against them. The lessor sued the plaintiff for breach of the covenants to repair, &c., and recovered, defendant having notice of the action, and, according to some of the witnesses, having sanctioned the defence:—Held, that under defendant's covenant the plaintiff was entitled to recover the damages and costs in that suit, but not interest. *Spence* v. *Hector*, 24 Q. B. 277.

When there is a covenant to indemnify, and the recovery against which it was given was obtained without collusion and fairly disputed, the covenantor having an opportunity of interfering:—Quære, whether, when sued on the covenant, he can dispute the liability of the covenantee to damages so recovered. *Ib.*

Held, that the plaintiff may claim interest on a demand for money rent, made payable by the covenant contained in the lease executed by defendant. *Crooks* v. *Dickson*, 1 L. J. N. S. 211. —C. L. Chamb.—A. Wilson.

But, Quære, as to his right to recover interest on each instalment of rent as it falls due, without shewing a previous demand or other warning to defendant of an intention to demand interest in the event of non-payment. *Ib.*

In this case an order was made for the allowance of interest from the commencement of the suit. Semble, the master ought not to allow interest on computation in such a case without a judge's order to that effect. *Ib.*

Held, affirming the order in the last case, that in an action of covenant for rent, an order by a judge directing the master to allow the pla interest on the amount claimed on the w summons, not specially indorsed, from the of said writ, was properly made, althoug interest was claimed in the declaration. *S.* C. P. 523.

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2. *Trespass.*

Where a tenant holds over after the expir of his lease, his landlord has a right to take session of the premises, if he can, witho breach of the peace. *Boulton* v. *Murphy*, S. 731.

A landlord may maintain trespass against tenant for the value of trees cut down and ried away by him, and which were not den to him, though growing on the land which tenant held. *Chestnut* v. *Day*, 6 O. S. 637.

When premises have been let, and the te is in possession, the landlord cannot sue a pe for breaking and entering the premises and ing down the fences, unless that person ha some other time removed the rails and conve them to his own use. *Bleeker* v. *Colman*, B. 172.

For trespass in breaking and entering, pulling down tenements, &c., defendant just as termor of the premises, with the right t move buildings:—Held, that he should proved the existence of the term down to time of committing the grievance complaine and that a surrender in fact having taken pla release for the rent under seal was not neces *Wilson* v. *Wilson*, 10 C. P. 476.

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3. *Overholding Tenants.*

(a) *Under 4 Will. IV. c. 1., C. S. U. C. c.*

The 4 Will. IV. c. 1, sec. 53, does not au rize a writ against a mere tenant at will, th he continue to hold after notice to quit and mand of possession. The statute extends to tenants holding after the expiration of term. *Clement* v. *Shriver*, 5 O. S. 310; *A ant* v. *Shriver*, T. T. 6 & 7 Will. IV., R. Dig. 263.

This act applies only to tenants whose t have expired by lapse of time, not to cas forfeiture. *Re McNab and Dunlop*, 3 Q 135.

A tenant remaining in possession after th piration of his term, and paying two mo rent, cannot, in the middle of the third m be treated by his landlord as an overho tenant under this act. *Adams* v. *Bains*, B. 157.

Quære, does the statute apply in any cas to the plain one of a tenant overholding aft expiration of a term expressly created by tract between the parties. *Ib.*

A tenancy for an indefinite term at a mo rent, to be put an end to by a month's noti not within C. S. U. C. c. 27, s. 63; and cept to put the landlord in possession was t fore refused. The tenancy intended by th is not one which can only be put an end notice, but one which comes to an end b effluxion of a stipulated period, or perha

the happening of a particular event, as under a lease for the life of the lessor. *Patton* v. *Evans*, 22 Q. B. 606.

Where the jury, in a proceeding under this act, found in favour of the landlord, the court refused to restore the tenant to possession, on the ground that the agent of the landlord had received a month's rent after the verdict. *Wright* v. *Johnson*, 2 Q. B. 273.

The court will not grant an attachment against an over-holding tenant, under 4 Will. IV. c. 1, s. 53, for the non-payment of costs, until an order to pay the costs has been first served upon the tenant and a demand made. *In re McLachlan*, 3 Q. B. 331.

Notice of the inquisition not having been served personally, and there being evidence to shew that defendant was not resident on the premises when such notice was served, the notice and all subsequent proceedings were set aside, but without costs. *Goodler* v. *Cook*, 2 C. L. Chamb. 151—Sullivan.

Semble, that no motion on behalf of another person or owner could be received, as such person could not be bound by any proceedings against the alleged tenant. *Ib.*

A landlord proceeding under this act cannot, under 14 & 15 Vict. c. 114, s. 12, recover mesne profits, that act applying only to ejectment. *Allan* v. *Rogers*, 13 Q. B. 166.

Semble, that the court will not quash the inquisition for misconduct of the commissioner, but that they can hold him amenable for such misconduct on an independent application. *Ib.*

Where, on the expiration of a tenancy, crops remain to be valued, this should be done, and the amount tendered before applying under the Overholding Tenant Act. *In re Boyle*, 2 P. R. 134. —C. L. Chamb.—Robinson.

Where the first jury summoned could not agree, and were discharged:—Held, that another jury might be summoned, and an effectual inquisition held. Held, also, that on the evidence set out, this was a case within the act, and that the finding against defendant as an overholding tenant was warranted. *In re Woodbury et al.*, 19 Q. B. 597.

Held, that the fact of a jury being unable to agree, and so disharged, in an overholding tenancy case does not determine the authority of the commissioner to summon a second jury. *In re Babcock et al.*, 9 L. J. 187.—C. L. Chamb.—A. Wilson.

The fact of the jury having been discharged by consent of parties does not prevent the writ being still proceeded upon. *Ib.*

If a receiver has been appointed by the Court of Chancery, to whom the tenant has attorned, or if the interest of the original landlord has been sold to another, in either case the original landlord is not the proper person to take proceedings. *Ib.*

Where B. purchased at sheriff's sale, under execution, D.'s interest in a term of years, held under a third party, at a time when D. was in possession, and afterwards, upon D.'s request, allowed him to continue in possession for five days, it was held that there was no privity between the parties, so as to bring the case within the overholding tenancy clauses of the ejectment act. *Bonser* v. *Boice*, 9 L. J. 213.—C. L. Chamb. —Hagarty.

(b) *Under 27 & 28 Vict. c. 30.*

A landlord proceeding under 27 & 28 Vict. c. 30, must adduce some evidence to shew that the tenant refuses to give up the premises, and that his tenancy has expired:—Held, also, that the affidavit of the landlord himself, filed under sec. 1, with a view to proceedings under the act, is not legal evidence against the tenant. *In re O'Connell*, 1 L. J. N. S. 163.—C. C.—Leggatt.

[This act is repealed by 31 Vict. c, 26, O.]

(c) *Under 31 Vict. c. 26, O.*

This act gives jurisdiction to the county judge in cases when the tenancy has been determined by forfeiture for breach of contract. Service of the demand of possession must be personal; and service of notice of inquisition must either be personal or at the place of abode of the tenant. *Nash* v. *Sharp*, 5 L. J. N. S. 73.—C. C.—Logie.

Defendant went into possession as tenant of A. under a lease with a right to purchase at a certain sum. He elected to purchase, and remained in possession for about a year after the determination of the lease, when plaintiff, the mortgagee of the lessor, brought ejectment and demanded security for costs and damages, as against a tenant overholding, under C. S. U. C. c. 27:—Held, 1. That the plaintiff was entitled to the relief asked, as the defendant's character as tenant had not been that of a vendee; 2. That it made no difference that the plaintiff was mortgagee of the lessor. *Anonymous*, 3 P. R. 350, *S. C. nom. Wartell* v. *Ince*, 10 L. J. 297.—C. L. Chamb.—A. Wilson.

A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises, will not be permitted on the expiration of the term to proceed against the mortgagor as an overholding tenant under the above act. *In re Reeve*, 4 P. R. 27.—C. L. Chamb.—Richards.

Held, Hagarty, C. J., diss. that on the evidence set out in the report of this case, the County Court judge was justified in determining that the tenant was an overholding tenant, within the meaning of the Act, and wrongfully held over without any right or colour of right. Per Hagarty, C. J.—The intention of the act was not to empower the county judge to determine the question of right between landlord and tenant on its merits; but on its appearing that the tenant is holding under a bona fide belief of right, which the evidence in this case shewed, he should dismiss the case, and leave the right to be tried in ejectment. *Gilbert* v. *Doyle*, 24 C. P. 60.

A person put in possession of a brickyard and house thereon was dismissed by his employer, but refused to give up possession until certain accounts were adjusted: Held, that he was an "occupant" overholding without colour of right. *Fowke* v. *Turner*, 12 L. J. 140.—C. C.—Dartnell.

4. Other Cases.

Where a tenant holds over after the expiration of his term, his landlord has a right to take possession if he can, without a breach of the peace. *Boulton* v. *Murphy*, 5 O. S. 731.

Semble, that a plea of nunquam indebitatus to an action by a landlord against his tenant, for not giving notice that he had been served with a declaration in ejectment, is a material issue, upon which judgment may be entered for the defendant if the verdict be so found. *Lount* v. *Smith*, 5 Q. B. 302.

A lessee sued in debt for rent and pleading an assignment and acceptance of the rent by the lessor from the assignee need not make profert of the deed of assignment. *McCulloch* v. *Jarvis et al.*, 8 Q. B. 267.

A bailiff seized certain goods under a landlord's distress warrant for rent in arrear, but did not remain in possession, or take any further steps to execute the warrant, except that, as the jury found, the tenant was constituted the landlord's agent to take possession of the goods for him under the warrant. After the lapse of more than a month, a person having a chattel mortgage on the goods took possession under the mortgage and removed the goods, for which the landlord brought replevin:—Held, that under the circumstances, the landlord was not entitled to maintain the action. *Roe* v. *Roper*, 23 C. P. 76.

See *McInnes* v. *Stinson*, 8 C. P. 34, p. 2013.

XXVI. Tenants Power to Dispute Title.

A debtor in possession of lands which have been sold for a debt at a sheriff's sale on a judgment against him, is quasi tenant at will to the purchaser, and cannot dispute his title, and a third person defending as landlord, but shewing no privity between the debtor and himself, nor any connection with the debtor's title, stands in the same relation to the purchaser as the debtor himself. *Doe* d. *Armour* v. *McEwen*, 3 O. S. 493.

When the defendant, who went into possession under the lessor of the plaintiff, afterwards refused to acknowledge his right:—Held, that he was entitled neither to notice to quit nor a demand of possession. *Doe* d. *Bouter* v. *Frazer et al.*, 4 O. S. 80.

When a lessee took a lease for two years, and covenanted to leave the premises without notice at the end of that time.—Held, that on ejectment by the lessor at the end of the term, the lessee could not set up a former lease to himself for a longer period. *Doe* d. *Wimburn* v. *Kent*, 5 O. S. 437.

A person who makes an agreement to purchase land from another, and enters into possession of the land under the agreement which he subsequently fails to perform, cannot defend an action of ejectment brought by the heir of the vendor for breach of agreement, by shewing a title purchased over his head, he must first surrender up the possession taken under the contract of purchase. *Doe* d. *Mill* v. *Mill*, 2 Q. B. 26.

A. on the 14th of August, 1844, demised lands to B. and C. for a year from 1st January, 1845. A. afterwards, on the 23rd of August, 1844, conveyed in fee to D., taking back on the same day a mortgage for the purchase money payable on certain day, the mortgagor to remain in possession until default. On the 1st of December, 18[illegible] B., one of the lessees, let E. into possession for month, bringing the time up to the end of t term for which A. had demised to B. and C.,— refused to go out at the end of the month, up which D. brought ejectment:—Held, that E. w not estopped, as tenant of the assignee of A., fr shewing that the title the assignee had once h —and that but for a moment—had ceased reason of the mortgage back to A., under whi A., and not D., since default made, was entitl to possession; and that judgment should entered for the defendant. *Doe* d. *Marr Watson*, 4 Q. B. 398.

A., purchasing land at a sheriff's sale, havi reason to believe that he could not get possessi without legal proceedings against the executi debtor, B., to avoid this contrived by collusi with B.'s tenant, to get into possession witho the consent of B.:—Held, in ejectment by against A., that A. could not set up any title himself adverse to B.: that before he could this, however good his title may be, he mu abandon the possession obtained through C., a bring an action against B. *Doe* d. *Miller Tiffany*, 5 Q. B. 79.

A tenant in possession, will not be allowed purchase from a stranger over his landlor head. *Doe* d. *Simpson et al.* v. *Molloy et a* 6 Q. B. 302.

Quære, if A., in possession of land to which pretends no claim, taking a lease from B., wh represents himself to be the owner, is estoppe from putting B. to prove his title. *Doe Radenhurst* v. *McLean*, 6 Q. B. 550.

A. being in possession without title, B. repr sented himself to him as owner, when he w not. A., by writing, agreed to lease from B. f five years, at a rental of £4 10s. This writi was signed by A. alone:—Held, that under t circumstances A. could dispute B.'s title on t grounds of fraud and misrepresention. *Lyn* v. *Parkinson* 1 C. P. 144.

A declaration on a covenant stated that indenture between plaintiffs and defendants, t plaintiffs demised to the defendants the to authorized by law to be received upon a certa turnpike road, for one year: that the defendan covenanted to pay a certain rent therefor; a that by virtue of the said demise the defendan entered and were possessed for the term so them granted. Breach, non-payment of the re —Held, on demurrer, that the defendants w estopped from denying the demise, and w bound by their express covenant to pay the re and that the non-execution by the lessors, un such circumstances, was no defence. And t they were also estopped from alleging the w of a common seal of the plaintiffs to the lea or from pleading that they had no authority demise. Held, also, that a plea that the s indenture was not signed by the plaintiffs, or any agent of theirs authorized in writing, w bad. *Municipal Council of Frontenac, &c., Chestnut*, 9 Q. B. 365.

A stranger, whose goods have been seized the premises of a tenant, cannot, any more th the tenant himself, question the landlord's ri to demise. *Smith* v. *Aubrey*, 7 Q. B. 90.

It was proved that defendant went into possession as assignee of a person to whom the plaintiff had given a bond for a deed: that he had received indulgence as to the payments required by the bond: that he had expressly promised to go out of possession if such payments were not made; and that he was in default. This bond was in defendant's possession, and he had received notice to produce it:—Held, that defendant could not dispute the plaintiff's title; and that the bond not being produced, no secondary evidence was required of its contents. *Doe* d. *Lount* v. *Simpson*, 9 Q. B. 544.

A. conveyed land to B., who conveyed to C., but remained in possession, professing to hold as C.'s tenant. C. conveyed to the plaintiff. Defendant claimed under a purchase at sheriff's sale, on an execution against A., and to be in possession through B., as his tenant; and he offered to prove that having brought ejectment against B., the latter had agreed to become his tenant; and that the transactions between A., B. and C. were fraudulent, the property remaining in A. This evidence having been rejected on the ground that the defendant could not rely upon B.'s possession, inasmuch as he was tenant to C., and had submitted to a distress for rent at his instance:—Held, that it was admissible. *Tennery* v. *Burnham*, 10 Q. B. 298.

A. being in possession of the west half of a lot of land as assignee of the vendee of the crown (no patent having issued), assigned the same to B., one of the lessors of the plaintiff, but continued in possession of part; and having accepted from B. a written permission to occupy the same, afterwards disavowed such holding, and claimed to hold in his own right. During the period A. so claimed, B. assigned the whole west half to C., the other lessor of the plaintiff:—Held, that such disavowal by defendant A. could not create a holding so adverse to B. as to prevent B.'s assigning to C. without first obtaining possession by ejectment. *Doe* d. *Henderson* v. *McWade et al.*, 2 C. P. 8.

Ejectment. The plaintiff claimed under a lease to himself from the City of Toronto, dated 1st January, 1854. Defendant produced a deed poll, executed by the plaintiff, dated 3rd January, 1848, assigning to defendant and another all his right to the land in question, to hold to them, as joint tenants, during the time of the lease to be obtained for the same, and authorizing them to demand and receive a lease from the city on the same terms as agreed upon to be granted to himself. At the time this assignment was made the plaintiff held only an agreement for the lease, which lease, notwithstanding the assignment, he had afterwards procured in his own name:—Held, that the plaintiff was not precluded by the assignment from setting up the lease, and therefore that he was entitled to recover. *Parkinson* v. *Clendinning*, 13 Q. B. 150.

Defendant rented land from P. for five years, but paid all the rent to A., except for the last year and a half, which he paid to B. The first of the payments to B. was made with A.'s assent. The plaintiff, claiming under a deed from A. made after this payment, brought ejectment:—Held, that the payments so made to B. formed no defence to this action. *Pomeroy* v. *Dennison*, 13 Q. B. 283.

Plaintiff leased to defendant the west half of lot 2, 6th concession of Madoc, specifying the premises, with the grist-mill, saw-mill, and tavern thereon. It appeared, on a survey made, that part of the buildings were on lot 1, but that the land in dispute went with the buildings as part of the premises demised, and that defendant had entered and held possession of all as lessee. He refused, however, to give up possession, claiming to hold that portion included in lot 1 as devisee for one M., though it appeared that M. himself was unaware of the true boundary, and held all under the plaintiff by lease, and that it was through his means the plaintiff had afterwards leased to defendant:—Held, that the defendant was estopped from denying plaintiff's title. *Davy* v. *Cameron*, 14 Q. B. 483.

Quære, whether a tenant or licensee of land is estopped from disputing his landlord's or licensor's title as void on a statutable objection. *Hallock et al.* v. *Wilson*, 7 C. P. 28.

The land had been granted to plaintiff's wife, and during her lifetime he had allowed defendant to occupy. She afterwards died without having had children, and the plaintiff brought ejectment:—Held, that he could not recover, for defendant was not estopped from showing that the plaintiff's title had expired. *Robertson* v. *Bannerman*, 17 Q. B. 508.

In ejectment by the executors of B. against defendant as lessee of B. deceased, receipts given by the attorneys of B. were proved, mentioning money paid as "due the Smeathman" estate:—Held, that the rule against a tenant denying the title of his landlord did not apply, the defendants appearing to hold under the Smeathman estate, and not under the plaintiffs. *Baldwin* v. *Burd et al.*, 10 C. P. 511.

A tenant let into possession by a party claiming rent cannot dispute the title of such party; nor if let into possession by a third party, and having acknowledged the title of and agreed to pay rent to the plaintiff, can he afterwards compel him to prove his title. *Smith* v. *Modeland*, 11 C. P. 387.

The plaintiff, holding a lease under the crown, which expired in 1854, executed a lease to defendant for six years from the 1st of April, 1845. After the expiration of his term, defendant continued in possession, and paid rent as before, up to and for 1857, though, as the jury found, he was aware in 1856 that the plaintiff's term under his lease from the crown had ceased:—Held, that the plaintiff was entitled to recover in ejectment. *Couse* v. *Cline*, 19 Q. B. 58.

Declaration, that the plaintiff let to defendant a certain tenement, to be used by him as a dwelling house, for certain rent, whereby it became his duty not to remove or despoil the same, yet defendant did remove the house, which thereby became wholly lost to the plaintiff; and for that defendant converted to his own use certain goods and chattels, to wit, a building and the materials of which it was composed. Plea, that the building was situate on defendant's land, and encumbered the same, wherefore defendant gave due notice to the plaintiff to remove it, and because it was not removed in a reasonable time defendant removed it, doing as little damage as possible:—Held, on demurrer, plea bad; for

defendant having accepted a lease of the house, which would carry with it the land on which it stood, was estopped from thus denying his landlord's title. *Renalds* v. *Offitt*, 15 Q. B. 221.

Action for rent due from March, 1855, by the plaintiff as assignee of the term, the plaintiff's right to sue and defendant's liability being both disputed. As to defendant's liability, the plain- shewed that one Stanton, in 1844, leased to one March for 21 years, who, in August, 1853, assigned to one Philpotts, who assigned to defendant: —Held, that defendant, being the assignee of March, could not dispute Stanton's right to make the demise in question. *Jones* v. *Todd*, 22 Q. B. 37.

The lease under which defendant held having expired:—Held, that he could not set up a lease from plaintiff to a third party, to commence at the expiration of his lease, and contend that the lessee under that lease was entitled to possession, but that he must give up possession, in accordance with the terms of his lease, to his landlord. *Fox* v. *Macaulay*, 12 C. P. 298.

The defendant having dealt with the plaintiff as personal representative of her husband's estate, and become tenant to her as such:—Held, that he was estopped from objecting that the land was not hers, and she had no power to lease it. *Christie* v. *Clarke*, 16 C. P. 544.

One C. B. had leased from the plaintiff part of the property, and being in possession gave it up for $60 to defendant, who claimed that it was her own:—Held, that this was clearly a fraud upon the plaintiff as landlord, by which the lease was forfeited, and that the defendant could not set up C. B.'s right under it. *Kyle* v. *Stocks*, 31 Q. B. 47.

A. entered into possession under B., who verbally promised him a deed, to be executed as soon as he himself should receive a conveyance from M., whose tenant at will he was, and who had in the meantime died:—Held, that A. having entered under B., his heirs were estopped from disputing B.'s title, and could be ejected by B. *Armstrong* v. *Armstrong et al.*, 21 C. P. 4.

On the 9th January, 1844, one J. W. took possession of the land in question, under an indenture of lease for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. J. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since:—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that as the entry of J. W. under whom the son and the defendants claimed, was under C., defendants could not object to C.'s title at the time of W.'s entry. *Cahuac* v. *Scott, and Cahuac* v. *Erle*, 22 C. P. 551.

See, also, IX., 1, p. 2034.

XXVII. Actions Against Landlord.

1. *Trespass.*

A tenant at will cannot sue his landlord for ousting him from possession. *Henderson* v. *Harper*, 1 Q. B. 481.

As to the proper mode of pleading an alleged demise from the Toronto Club of certain rooms and apartments in the club house to a servant or steward of the club, who relied upon the said demise as giving him an exclusive possession upon which he could maintain trespass. *Williams* v. *Herrick*, 5 Q. B. 613.

Semble, that under the demise as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed, he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments. *Ib.*

The plaintiff sued for breaking and entering his close, the trespass being the entry of defendant's cattle. Defendant had leased land to plaintiff, and the cattle had got in owing to the removal of a fence, which separated the road from the land leased, and which was removed by the plaintiff, with defendant's assent, if not by his directions. Upon the special facts and pleadings set out, it was, Held, that the removal of the fence by plaintiff would primâ facie excuse a trespass extra viam, which the plea admitted, and that if defendant's consent to such removal would prevent him from setting it up as a wrongful act, the consent should have been replied:—Held, also, that as it was necessary to take down the north fence to use the right of way, this act justified the single act of trespass charged, and the plaintiff should have new assigned, if he relied upon excess in the quantity taken down, or in leaving the space open too long. The plaintiff, therefore, on the pleadings and evidence, was held not entitled to recover. *Pickard* v. *Wixon*, 24 Q. B. 416.

See, also, *Wixon* v. *Pickard*, 25 Q. B. 307, p. 2071.

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3. *Other Actions.*

In an action on a covenant in a lease, that the defendant had not incumbered, assigning as a breach a claim by A. and B. to certain fixtures, defendant pleaded that before the lease of the plaintiff, the defendant had leased the same premises for five years to C., who had a right, under the lease, to the fixtures:—Held, plea bad. *Cameron* v. *Tarratt*, 1 Q. B. 312.

A. leased a mill for a term of years to B., C. and D., who covenanted to pay the rent without default, otherwise the deed to be null and void, and A. covenanted for quiet possession during the term, provided they should perform all the covenants. Two quarters' rent being in arrear, A.'s agent broke into the mill, which was locked up, and afterwards obtained the key from one of the lessees, and A. distrained for rent such property as he found in the mill, which proved insufficient to pay the rent due, and refusing to give up possession the lessees brought ejectment:—Held, that the lease being void by reason of the non-payment of the rent, and the distress being equivalent to a demand, he was not liable to be treated as a trespasser for continuing in possession, and that the lessor of the plaintiff could not recover. (Macaulay, J., diss.) *Doe* d. *Somers et al.* v. *Bullen*, 5 Q. B. 369.

Assumpsit for money lent, and money had and received. On the 6th September, 1842, the wife

of the plaintiff, with his assent, in consideration of £70 paid (the money being the proceeds of the sale of her own lands), obtained from the defendant a lease of certain premises, to hold to her own use during her natural life, the defendant covenanting, at the expiration of the lease, to pay Hannah Healey, her *heirs and assigns*, the sum of £50 :—Held, that the plaintiff's remedy, if entitled to sue for the £50, must be under the lease in an action of covenant ; and that having assented to the demise to his wife, he could not now sue for the consideration money paid to the defendant for the lease, either as money lent or as money had and received to his use. *Healey* v. *Bongard*, 1 C. P. 212.

Plaintiff declared that defendant having leased to him certain premises, undertook to make certain improvements, but failed to do so. Defendant pleaded that he did not lease as alleged. The instrument when produced appeared not to be a lease, although it was so called in the writing :—Held, that the plea should be taken as being in effect a denial only of the writing as set out, and that the plaintiff was entitled to succeed on the issue. Held, also, that the plea offered defence, the existence of a term not being essential to the right of action. *Cornwall* v. *Murphy*, 15 Q. B. 263.

In an action in the Superior Court for breach of covenant for quiet enjoyment contained in a lease, the defendant pleaded non demisit. The plaintiff obtained a verdict for one shilling damages, but a certificate for costs was refused :—Held, that the plea of non demisit raised a question of title, and that the plaintiff was entitled to full costs. *Purser* v. *Bradburne*, 7 P. R. 18. —C. L. Chamb.—A. Wilson.

The plaintiff had quitted possession of defendant's farm, of which he had been the tenant, though his term had not expired, and there had been no legal surrender of it, but he had given notice of his intention to go, and defendant it appeared was willing to get rid of him. Having removed a portion of his goods he subsequently returned for some more of them which were locked up in a barn on the place, of which he had the key, and on finding the outer gate of the farm locked went to the defendant, who was close by, and requested him to open it and allow him to enter and get his goods, but defendant refused either to open the gate or allow him on the farm, and although he did not in express terms refuse to give up possession of the goods, the jury found that such was his intention and that the plaintiff so understood him :—Held, Hagarty, C. J., diss., that this was not sufficient to constitute a conversion of the goods by the defendant so as to support an action of trover, and therefore that replevin would not lie. *Bradley* v. *Gallagher*, 26 C. P. 531.

XXVIII. Liability for Nuisances.

Held, that the landlord and tenant were both liable for damages arising from a nuisance erected by the landlord in the house, and continued to be used by the tenant while occupying it. *McCallum* v. *Hutchison*, 7 C. P. 508.

If a nuisance exist at the time of letting, both tenant and owner are liable. If it arise after the tenancy is created, the tenant only is responsible. *Regina* v. *Osler*, 32 Q. B. 324.

XXIX. Lease of Chattels.

Defendants having contracted with certain companies for the manufacture by them of plant for their railway, consisting of locomotives, cars, &c., and being unable to furnish the funds as agreed upon, on the 24th of September, 1860, called upon plaintiffs, who, under an indenture entered into of that date, agreed to furnish the funds then necessary, as well as a sufficient sum to ensure the completion of the plant, &c. By the same indenture the plaintiffs acquired an absolute title to the articles in question, and therein agreed to lease the same to defendants for three years, at a weekly sum or rental of $1000, with a proviso, 1, that the payment of the sum of $105,500 at any time during the term should put an end to the same, and that it should be lawful for defendants to hold, *retain*, and possess the engines, &c., as their absolute property ; 2. That all sums by the weekly payments as aforesaid paid by defendants under said agreement, should be credited to them on account of the $105,500, and on payment of that sum, as in either proviso mentioned, the agreement should cease, &c. There was no express covenant therein for payment by defendants of the said sum, nor any mention of a debt due by defendants to plaintiffs :—Held, 1, that under the indenture above mentioned and the facts of the case, defendants were never the owners of the locomotives, &c., in question; that they held only a contract for the manufacture thereof, which by the said indenture was assigned to the plaintiffs, who thereunder paid for and became absolute owners of the property in question ; 2. That the intention of the parties as inferred from the instrument was, that said instrument should only operate as a lease to defendants, and not as a sale and mortgage back of the said property. Draper, C. J., diss. *Bank of Upper Canada* v. *Grand Trunk R. W. Co.*, 13 C. P. 304.

Where the lessee of goods covenanted to restore them to the lessor "at the expiration of the term in as good order as they then were, reasonable wear and tear only excepted." and the goods during the term were destroyed by fire, without the lessee's default :—Held, that the exception, "reasonable wear and tear excepted," referred to the order and condition of the goods so as to exclude bad repair, breakage, &c., not arising from reasonable wear and tear, but did not amount to a guarantee of the continued existence of the goods. *Chamberlen* v. *Trenouth*, 23 C. P. 497.

In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450 ; and several months afterwards, when J., had paid three months rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for rent in arrear, it was sold by the bailiff for $75, the defendant being the purchaser, and the defendant afterwards allowed J. $125 extra in settlement with him, making $200 in all :—Held, that the evidence sufficiently shewed the piano to be the plaintiff's property, and that he was entitled to maintain trover for it against defendant :—Held, also, that the sale to the defendant passed nothing, for as landlord he could not himself purchase goods sold by his bailiff, under 2 Will.

& M. sess. 1, c. 5, s. 2; and although as between J. and defendant, the defendant's claim might be complete by the subsequent arrangement with J., yet the plaintiff, (the owner) was not bound by it:—Held, also, that defendant could not set up a lien for the rent as against the plaintiff, for the distress was at an end, and the goods in no way in the custody of the law. *Williams* v. *Grey*, 23 C. P. 561.

Defendant in writing acknowledged the receipt from the plaintiff, described as assistant manager of the Howe Machine Company, of a sewing machine, on hire for nine months at $5 a month in advance. He agreed to pay $45, the value of the machine, in the event of its being injured or not returned; and in default of payment of the monthly rental, or the due fulfilment of the lease, or if the machine should be deemed by the lessors to be in jeopardy, the plaintiff or the company might resume possession of it; and defendant waived all right of action for trespass, damages, or replevin, by reason of any action taken by the plaintiff or the company in resuming such possession. The plaintiff said he had possession of the machine before it was delivered to defendant; that he was responsible to the company, a foreign corporation; and had no property in it except as their agent:—Held, reversing the judgment of the County Court, that the plaintiff under the agreement might maintain replevin in his own name for the machine, on non-fulfilment of the conditions. *Coquillard* v. *Hunter*, 36 Q. B. 316.

Where A. demised to B. for a term of years, with a clause of forfeiture in case the term should be taken in execution, and contemporaneously with the lease delivered certain chattels into B.'s possession, upon the terms contained in a memorandum attached to the lease of the premises, signed by M., stating that "he agreed to allow the use of the chattels to assist him to pay the rent and maintain his family," on an interpleader between A. and C., who had seized the chattels under an execution against B.:—Held, affirming the judgment of the County Court, 1. that the memorandum formed no part of the lease, but operated only as a license to use, which was revocable; 2. that even if the chattels had been included in the lease, the chattels themselves could not have been sold, and that A. therefore was entitled to a verdict in the interpleader issue; 3. that at the most the interest which B. had in the chattels was incidental to the term and to the enjoyment thereof by B., and that therefore neither the goods themselves nor B.'s interest therein could be sold separately from the term; 4. that if the term had been seized, such seizure, as working a forfeiture of the term, would have operated also as a forfeiture of all B.'s interest in the chattels; and therefore, Held, that upon all the grounds the verdict in favour of A. was right; 5. that if it had been intended that only the defendants' special interest in the goods should be sold by the sheriff under an execution, not the goods themselves, the interpleader should have been framed to meet such a case. *Muckleston* v. *Smith*, 17 C. P. 401.

The plaintiffs, who were piano manufacturers, offered to sell to M. a piano for $300, and to accept certain approved notes in payment. The piano was left with M., but this negotiation fell through, and it was then agreed that M. might have the piano on giving his notes at 1, 12, and 24 months for $100 each. These notes were s to M., with a "rent receipt," both of which w signed by him and returned to the plainti By the rent receipt M. was to have the piano hire at $6 per month for three months, paya in advance, and M. might purchase it on paym of the notes, with interest. But until the wh of the purchase money was paid, the piano w to remain the plaintiffs' property on hire by M the plaintiffs to have power to retake possess without demand, on non-payment of any inst ment of purchase money or rent in advance, a although part of the purchase money might ha been paid or notes given on account there The agreement for sale being conditional, a punctual payment being essential to it. Nothi was paid on the piano as purchase money or re and on the 26th January, 1874, the first n having fallen due on the 18th, it was seized und an attachment against M. as an absconding de tor:—Held, that no property in the piano pass to M., that being the intention of the parti and the legal effect of the instrument: that t arrangement was not objectionable as being co trary to the Chattel Mortgage Act, and therefo the plaintiffs were entitled to the piano as again M.'s creditors. *Stevenson et al.* v. *Rice*, 24 P. 245.

XXXII. Miscellaneous Cases.

Defendant on the 13th October, 1852, grant the land in question to one S., to hold "to t said S., and the heirs of his body, for twent one years, or the term of his natural life, fro the 1st of April, 1853, fully to be complete an ended," but not to be underlet to any perso except to the family of the said S., for any perio during the said term. A yearly rent was r served, which S. covenanted to pay, and it w provided that on the failure to perform the cov nants, the lease and the term thereby grant should cease and be void:—Held, that by th lease S. took a life estate in which the ter merged. Per Robinson, C. J., the sheriff's dee would at all events have been inoperative, owi to the misdescription of the interest which held in the land, and of the amount of re *Dalye* v. *Robertson*, 19 Q. B. 411.

The plaintiffs, in this case, though only lesse of the land, were held to be "proprietors" with the reasonable construction of "The Railw Act," and entitled to recover for damage do to the land. *Brown et al.* v. *Grand Trunk W. Co. of Canada*. 24 Q. B. 350.

In action of trespass to land, where the pla tiff is a tenant only the duration of his term m be shewn, the measure of damages being t diminished value of his interest. The trespa complained of was removing a fence in Ma 1866. The plaintiff's landlady swore that s leased the place to the plaintiff in Novemb 1865, and added, "Plaintiff was my tenant wh the rails were taken away, paying so much year, taxes and statute labour." There was further evidence as to the nature of the lease duration of the term:—Held, that the dama should not, as a matter of law, have been no nal only, but estimated on the injury the loss the fence would cause to the plaintiff during five or six months for which he then had a r to possession. *Fisher* v. *Grace*, 27 Q. B. 15

One I. leased premises for a term to B., who sub-let a portion of them to plaintiff. Afterwards by endorsement on the lease from I. to B., after reciting that they had mutually agreed to release each the other from the covenants and agreements contained therein, it was declared that said lease was therefore wholly cancelled at and from that date, and B. authorized I. to collect the rent under the lease from him to plaintiff. Subsequently I. distrained upon plaintiff for two quarters' rent under B.'s lease to him. At the time of the distress plaintiff had paid all rent due for one quarter, being the first distrained for, to one C., under an agreement with B. so to do, with the exception of a small amount still unpaid. There was a second distress for the other quarter, the time of payment of both quarters having elapsed; and there was also in arrear at this time six months' rent under the lease from I. to B. Plaintiff thereupon brought trespass against I:—Held, that the action must fail: 1, that as the term created by the lease from I. to B. continued to exist notwithstanding the cancellation of the lease, the rent which was incident to that term could be distrained for: that that rent being unpaid might be set up in this action of trespass, as shewing defendants had a right to take the goods, being on the demised premises, as a distress for the rent due, just as they might have avowed for it had the action been replevin: 2. The rent being due under the lease from B. to plaintiff, and B. having authorized I. to collect and receive it, defendants might set that up under the facts shewn as justifying the distress:—Held also, that if the cancelling of the lease by I. and B. merged the terms created by it, the right of I. to distrain was preserved by C. S. U. C. c. 90, s. 7. *Laur v. White et al.*, 18 C. P. 99.

The agent of an insurance company at Toronto negotiated for a lease to plaintiffs, who were barristers, &c., of one flat of the company's offices for three years at $600 a year, and executed the lease on the part of the company, containing the usual covenant for quiet enjoyment, and received the rent. The caretaker of the whole building, who lived at a distance, locked the outer street door at 6 p. m., thus excluding the plaintiffs after that hour; and the agent refused to let them have a key unless they got the caretaker to be present:—Held, that the company were responsible for this act of their agent, which was clearly a denial of the plaintiffs' rights under the lease. *Maclennan et al.* v. *The Royal Ins. Co.*, 39 Q. B. 515.

Held, that the mere demand of rent by the successor of the lessor, of rectory lands (after the expiration of the term) was not such an affirmance of the covenants in the lease as could estop him from disputing them. *Kirkpatrick* v. *Lyster*, 13 Chy. 323; affirmed in appeal, 16 Chy. 17.

On moving for an order for delivery of possession, it must be shewn that the defendant is in possession. No order will be made against a tenant or third party in possession, not a party to the cause. *McKenzie* v. *Wiggins*, 2 Chy. Chamb. 391.—Taylor, *Secretary*.

A mining lease for 99 years contained provisions enabling the lessor to demand, at his option, a royalty upon the proceeds of the mines, or $4,000 in lieu of such royalty; the lessor had not exercised such option:—Held, that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Chy. 541.

A railway or canal company cannot lease the concern or delegate its powers for a specified term, without the sanction of the legislature. This principle was held applicable to a railway company which had no power of taking land compulsorily, but had other special powers and privileges under its act of incorporation. *Hinckley* v. *Gildersleeve*, 19 Chy. 212.

Parties who for many years had the chief use of a canal, and had always resisted payment of tolls demanded by the lessee, were held to have such an interest as entitled them to maintain a bill (to which the attorney general was a defendant) to have the lease declared void. *Hinckley* v. *Gildersleeve*, 19 Chy. 212.

One of two tenants in common of land, leased part of it as a stone quary:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Chy. 614.

LAND SCRIP.

Land scrip was deposited with a party as collateral security, who sold the same at a discount:—Held, that if on taking an account it should appear the sale had been effected before any default in payment, he must be charged with the amount of the present value, but if after default, then with the value at the time of the sale. *Hart* v. *Bown*, 7 Chy. 97.

LARCENY.

See CRIMINAL LAW.

LAW REFORM ACT.

I. PRACTICE UNDER.

1. *Generally*—*See* PRACTICE AT LAW.
2. *Notice for Jury*—*See* JURY.
3. *Referring causes from Superior to County Courts and Vice Versa*—*See* TRIAL.

LAW SOCIETY.

I. ADMISSION OF ATTORNEYS—*See* ATTORNEY AND SOLICITOR.

As to the power of the Law Society of Upper Canada, to make by-laws imposing term fees. See *Law Society* v. *Dougall*, 9 Q. B. 541.

In the year 1846, the Law Society of Upper Canada entered into a covenant with the crown in conformity with 9 Vict. c. 33, to provide, at their own cost, and without further charge to the province, for all time to come, fit and proper accommodation for the Superior Courts of law and equity for Upper Canada, as then existing

or thereafter to be constituted; and in default, or in case of the buildings becoming dilapidated, &c., the crown to repair, &c., and the outlay to become a charge on the Society's land. On the execution of this covenant, £6,000 was paid over to the society by the government, and proper accommodation was provided by the former for the then existing courts. Subsequently the Court of Common Pleas was established, and it became necessary to enlarge the buildings in which the courts were held at a greatly enhanced outlay. The 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, were passed for raising funds for the purpose; and the moneys authorized thereby were expended in the erection of Osgoode hall, for the accommodation of the courts. In 1865, at the request of the society, a certain sum was supplied by the goverment for necessary repairs to the building, and by subsequent arrangement with the Ontario government, the latter agreed to pay the Society annually $3,000 for the purpose of heat and light:—Held, per Hagarty, C. J., that notwithstanding the greatly increased expense, since the establishment of the Court of Common Pleas and the passage of the acts 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, and C. S. U. C. c. 33, of repairing and maintaining the buildings at Osgoode Hall, the society was nevertheless bound by its express covenant entered into in conformity with 9 Vict. c. 33, to repair and maintain them, and was not impliedly, much less expressly released therefrom in consequence of the legislation that had taken place in relation thereto. Per Galt, J., that the effect of 33 Vict. c. 9, O., was to entitle the law society to have the government account to them annually for the sum of $29,000, and that this sum must be considered as a provision to enable them to perform their covenant, and that consequently the same was in full force. Per Gwynne, J., that the effect of subsequent legislation had been to discharge the society from their covenant. *Regina* v. *The Law Society*, 20 C. P. 490.

Held, affirming the above judgment. Gwynne, J., diss., that the Law Society were not released, under the facts and circumstances there set forth, from their covenant, and that no estoppel arose, in favour of the society against the crown, in consequence of the several acts of the legislature. *S. C.*, 21 C. P. 229.

LAW STAMPS.

The fees on a reference to a county judge from the Superior Court, such as an examination of a judgment debtor, must be paid in stamps, not in cash. *James* v. *Jones*, 4 P. R. 194.—C. L. Chamb.—J. Wilson.

An appearance to a writ in the Common Pleas, was filed in the office of the deputy clerk of the crown, who was also clerk of the County Court, but by mistake was put with the County Court papers, and a stamp necessary for an appearance in the Superior Court was not fixed. The plaintiff signed judgment as on default of appearance:—Held, that the appearance was a nullity, and was absolutely void under the stamp act, and leave was refused to have the stamp affixed as of the day of filing, or to take it off the County Court files. *Bank of Montreal* v. *Harrison*, 4 P. R. 331.—C. L. Chamb.—Draper.

An appeal bond and the affidavit of executi thereof are separate documents, and must stamped as such when filed. *Macbeth* v. *Smar* 1 Chy. Chamb. 269.—VanKoughnet.

The recent act respecting law stamps has mad no alteration in the practice of the court as the mode of computing the proper amount fees. *Ib.*

LEASE.

See LANDLORD AND TENANT.

LEAVE AND LICENSE.

I. PLEA OF IN ACTIONS OF TRESPASS—*S* TRESPASS.

II. DEFENCE IN ACTIONS FOR INJURIES OCC SIONED BY MILL-DAMS—*See* WATER AN WATER COURSES.

In an action of covenant, a plea of leave an license by parol to commit the breach, is bad *Gwynne* v. *Brock*, H. T. 5 Vict.

A plea of leave and license is no answer to a action of covenant. *McDonald et al.* v. *Gre Western R. W. Co.*, 21 Q. B. 223.

The plaintiff, in covenant against the father alleged as a breach that the apprentice unlawfully absented himself on a certain day, and from thence hitherto remained and continued absen from the service of the plaintiff. Plea, as to the absenting, that the apprentice did depart and absent himself by plaintiff's leave and license:—Held, sufficient, without pleading a license to continue absent, as the plea only professed to answer the absenting:—Held, also, that the plea need not shew that the license was by deed or in writing. *Black* v. *Stevenson*, 3 Q. B. 160.

Quære, whether long possession of an easemen in land, though it may not supply evidence of a grant, may be received in support of a plea of leave and license. *Brown* v. *Street*, 1 Q. B. 12

The plaintiff declared in assumpsit on an agree ment with the defendant to make 100,000 bricks averring that he had made 68,000 of them, and prepared in part 30,000 more, but that defendant would not allow him to complete them, but absolutely discharged, hindered, and prevented him from doing so. Defendant pleaded, that the plaintiff entered upon a close of the defendant to complete the work there, and that defendant prevented him, as he lawfully might, which was the same hindering and preventing; the plaintiff replied leave and license:—Held, replication good. *Toleman* v. *Crew*, 2 Q. B. 186. S 6 O. S. 271.

The plaintiff went to British Columbia nin years before this action, leaving his wife her to whom he wrote and occasionally sent money She procured the defendant to endorse a no made by her for the price of furniture to car on a boarding house, (which she subsequently carried on with the plaintiff's knowledge,) an executed to defendant a chattel mortgage und seal in her own name on said furniture. T

rent of the house being in arrear, and part of the mortgage money overdue, the landlord distrained, and defendant enforced his mortgage; and the plaintiff's wife not dissenting, but rather assenting, the goods were sold, and the balance after payment of rent and mortgage, was handed over to her. The plaintiff thereupon sued defendant in trespass and trover:—Held, that the wife was the agent of her husband, the plaintiff, in respect of purchasing the furniture, and to do all that was necessary to acquire it. Held, also, that as by this action the plaintiff ratified the conduct of his wife in purchasing the furniture, he should not be allowed to repudiate the mortgage which formed part of the whole arrangement. Semble, that the wife standing by and permitting the sale of the property under the mortgage was some evidence under the plea of leave and license. *Halfpenny* v. *Pennock*, 33 Q. B. 229.

LEATHER.

See HIDES.

LEGACY.

I. ABATEMENT, 2101.
II. ADEMPTION. 2101.
III. ASSENT OF EXECUTORS, 2102.
IV. MISCELLANEOUS CASES, 2102.
V. CONSTRUCTION OF WILLS—*See* WILL.

I. ABATEMENT.

Payment of a legacy in full is a primâ facie admission of assets to pay all the legacies in full, because otherwise all the legacies must abate in proportion; but it is open to explanation. *Coleman* v. *Whitehead*, 3 Chy. 227.

The provision for the widow of a testator and certain legacies being charged upon real estate, which it was apprehended might prove deficient, the legacies, not the provision for the widow, were ordered to be abated ratably. *Becker* v. *Hammond*, 12 Chy. 485.

A testator out of the proceeds of his real and personal estate gave to one son $200, to another $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100, and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will:—Held, that these legacies were specific and not merely demonstrative, and if the fund was insufficient to pay them all, they must abate proportionally. *Bleeker* v. *White*, 23 Chy. 163.

II. ADEMPTION.

A testator bequeathed to W. L. £1,500, "due by me to R. C., and secured by mortgage." After the making of this will, and in the testator's life-time, R. C. sold to one H., the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this property and other property, and a covenant to pay the amount; retaining in his possession the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for payment of the debt. The testator died without in any way altering his will in regard to this legacy:—Held, that the legacy was not adeemed. *Loring* v. *Loring*, 12 Chy. 103.

III. ASSENT OF EXECUTORS.

The assent of an executor to a legacy, may be by implication as well as by express words, and in this case it was held to be sufficiently shewn by his conduct. *Honsberger* v. *Honsberger*, 5 O. S. 479.

In ejectment it appeared that C. died in 1851 intestate, seized of an unexpired term of years in the land, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle, J. D., for his life, and then to the plaintiff, the testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards, in 1860, J. D. administered to C.'s estate, and as such administrator assigned his interest also to F. under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff; and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamy*, 21 Q. B. 216.

When an executor pays some legacies, and makes provision for the others, he has not conclusively admitted assets, because the provision which was made for the unpaid legacies may have proved insufficient without any fault being attributable to him. *Coleman* v. *Whitehead*, 3 Chy. 227.

Where the legacies were payable in a year after testator's death, and another legacy would not be payable for twelve years, and did not bear interest in the meantime, and the executor paid the legacies immediately payable—sufficient property to all appearance remaining to meet the future legacy—and let the residuary legatee into the enjoyment of the residue, on his undertaking to pay the legacy when it became due out of the assets; and subsequently, with the assent of the executor, a portion of personal residue was appropriated to the satisfaction of a devise of land worth a certain sum, or its proceeds:—Held, that the executor had not so admitted assets as to warrant a personal decree against him at once. *Ib.*

IV. MISCELLANEOUS CASES.

Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and de-

vised part of his lands to his brothers, on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors :—Held, that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

Defendant delivered to the deceased wife of the plaintiff, a note in payment of a legacy bequeathed to her, and she died before payment :—Held, that a plea, that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action on the note. *Robinson* v. *Cripps*, 6 C. P. 381.

By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that country, interest in not recoverable upon a legacy until suit brought therefor, without an express promise; and the legatee referred to having sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in this court to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Chy. 518; affirmed on appeal, 8 Chy. 220.

Legatees are not necessary parties defendant in an administration suit. *Harrison* v. *Shaw*, 2 Chy. Chamb. 44.—Mowat.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the master's office. To entitle them to such costs, some sufficient reason must be shewn for their being represented by a separate solicitor. *Gorham* v. *Gorham*, 17 Chy. 386.

Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment of the amount to the solicitor of the legatee, without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 4 Chy. Chamb. 27.

LEGISLATURE.

See CONSTITUTIONAL LAW—PARLIAMENT.

LETTERS.

I. OF ADMINISTRATION—*See* EXECUTORS AND ADMINISTRATORS.

II. MAKING CONTRACTS BY—*See* CONTRACT.

III. ADMISSIBILITY IN EVIDENCE—*See* EVIDENCE.

IV. PATENT.

1. *For Lands*—*See* CROWN LANDS.

2. *For Inventions*—*See* PATENT FOR INVENTIONS.

V. ROGATORY—*See* EVIDENCE.

VI. TRANSMISSION OF—*See* POST OFFICE.

A foreign post mark on a letter is primâ fa evidence of the time when the letter was mail *O'Neill* v. *Perrin*, M. T. 3 Vict.

Extracts from a letter embodied in an affida cannot be noticed; either the whole letter o copy should be before a court, or at least should be sworn that the letter contains nothi more relating to the action. *Vaughan* v. *R et al.*, 8 Q. B. 506.

To an action on a fire policy, defendant set a condition endorsed on the policy, that any su sequent mortgage of the property insured "mu be notified to the secretary in writing forthwit otherwise the policy shall be void." The plai tiff mortgaged part of the property insured one McC., who mailed a letter to defendan secretary, notifying him, as required by t condition, but the letter did not reach him: Held, that the mere posting, without shewin that it reached the secretary, was not a co pliance with the condition. *McCann* v. *T Waterloo County Mutual Fire Insurance Co.*, Q. B. 376.

An interim receipt for an insurance premiu provided that the directors should have pow to cancel the contract at any time within thir days, "by causing a notice to that effect to mailed to the applicant," at a specified addres The general manager of the company proved th he directed a letter declining the risk to be se to the plaintiff: that he saw it written a placed with other letters to be sent: and th one H., a clerk in the office, had charge of the and his duty was to address them to the parti and enter them in the mailing book. The ma ing book was, produced, with an entry in it this letter; and H. swore that this entry was his writing, and that he had no reason to dou that the letter had been mailed. The plaintiff (t insured), however, swore that he had never r ceived it. Per Hagarty, C. J.—On this eviden the question of mailing must have been submitt to the jury, who should have found that it h been mailed. Per Gwynne, J.—A verdict fin ing otherwise could not have been sustaine The case, however, was decided in defendan favour upon another ground. *Johnston* v. *T Provincial Ins. Co.*, C. P., H. T. 1877. Not y reported.

LIBEL.

See DEFAMATION.

LIBERUM TENEMENTUM.

See TRESPASS.

LICENSE.

I. For Easements.

1. *Grant*, 2105.

2. *Revocation and Countermand*, 2108.

II. For Use of Chattels, 2112.

III. To Cut Crown Timber—*See* Crown Lands.

IV. Billiard Tables—*See* Billiard Tables—Municipal Corporations.

V. Ferries—*See* Ferry.

VI. Hawkers and Pedlars—*See* Hawkers and Pedlars—Municipal Corporations.

VII. Other Municipal Licenses—*See* Municipal Corporations.

VIII. Taverns and Shops—*See* Taverns and Shops.

IX. Plea of—*See* Leave and License—Trespass—Water and Water Courses.

I. For Easements.

1. *Grant.*

Case for overflowing plaintiff's land. Quære, whether long possession of an easement in land, though it may not supply evidence of grant, may be received in support of a plea of leave and license. *Brown* v. *Street*, 1 Q. B. 124.

Trespass q. c. f. Plea: liberum tenementum. Replication: demise to defendant from plaintiff from year to year. Rejoinder: That *after* the demise, it was consented and agreed that defendant and his servants, &c., should have leave to pass and re-pass in and over the close, in which, &c.:—Held, that to support this rejoinder, a written agreement at least, if not one under seal, should be proved. *Brougham* v. *Balfour*, 3 C. P. 297.

Trespass to south parts of lots 14 and 15, and taking and converting wheat and straw of the plaintiff—Plea, leave and license generally. In support of this plea, defendants proved a deed made by plaintiff, 20th February, 1846, whereby in consideration of £28 received from defendant T., he "bargained and sold" to him, among other things specified, "twenty acres of wheat then growing on the south part of lot 14, and in the plaintiff's possession, the plaintiff bargained and sold "all the said twenty acres of wheat, with the right of ingress and egress into and from lot 14, to harvest and remove the said twenty acres of wheat. Then followed a proviso that if plaintiff should pay to T. £28 with interest, on a day named, the deed should be void. Plaintiff covenanted to pay the money, and it was stipulated that, until default, plaintiff might retain in his possession and use the goods and premises mortgaged, unless he should before the day of payment be sued by any other person, in which case T. might take and enjoy the said goods as his own:—Held, that defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15. Semble, that if the license to enter on lot 14 gave a right to enter on lot 15 as being necessary to the privilege granted with respect to lot 14, they should have in a special plea set forth the necessity. Held, that defendants must fail also, as the license was not to enter and take the plaintiff's wheat, but to enter for the purpose of taking the defendant's wheat. Semble, also, plea bad, as the license proved was conditional and not absolute; there should have been a special plea shewing default in payment by plaintiff on the day named. Semble, that the only right the deed gave the defendants was to cut and carry away the wheat of the plaintiff; the defendants had no right to enter on the plaintiff's land and take the wheat away by force, after it had been cut and stacked by plaintiff. *Lunn* v. *Turner et al.*, 4 Q. B. 282.

Semble, that though a license given by plaintiff to defendant not under seal will not create an easement, yet that it may be sufficient as a license to prevent the plaintiff from recovering damages for the erection of a dam as a wrongful act. *Robinson* v. *Fetterly et al.*, 8 Q. B. 340.

Case for overflowing land of the Canada Company. Defendant produced a letter to one S., under whom he claimed, from the plaintiffs' agent, saying that the land would be sold to him for the purpose of erecting a saw-mill, on certain specified conditions—two of which were, that the mill should be in operation within twelve months, and that he should furnish the company, or their settlers, with lumber at a reasonable rate:—Held, that this letter could not be construed as a license to defendant to overflow the plaintiffs' land to any extent necessary for working his mill, without clearly shewing that the probable effect of building the mill and putting up the dam, was known to and contemplated by the parties at the time:—Held, also, that the plaintiffs as a corporation could not be bound with respect to such an injury as was shewn in this case, by anything done by their ordinary agents without special authority. *Canada Company* v. *Pettis*, 9 Q. B. 669.

The plaintiff had purchased from the Canada Company all the merchantable timber on a certain lot, and held a letter from them (set out in the case) authorizing him to enter upon the land and mark whatever trees he might choose, and afterwards to cut and carry them away:—Held, that he had not such a possession as would enable him to bring trespass. Quære, what remedy he could have for trespasses on the land; whether he could support an action on the case against the trepasser for interfering with his privilege, or would be compelled to look to the company, treating their letter as an agreement. *Perry* v. *Buck*, 12 Q. B. 451.

Trespass against a sheriff for taking plaintiff's goods under a fi. fa. The goods in question, an engine and boiler, had been in a saw-mill which was burned down, and remained there, set in brick and bolted to timbers let into the ground. The sheriff offered them for sale while in this state, but there were no buyers. On the return day of the writ, the execution debtor sold them verbally to the plaintiffs, who detached them from the mill and removed them to another place, where the sheriff followed and sold under a ven. ex.:—Held, that the first attempt at sale was clearly illegal, as the goods were then fixed to the freehold and could not be taken as chattels. Quære, whether the verbal sale was effectual, or whether the Statute of Frauds would apply. Semble, that

it would not, but that the sale would, in effect, amount only to a license to the vendee to enter on the land and detach the goods; and quære, whether on being so severed, the fi. fa. would not attach upon them. *Walton et al.* v. *Jarvis*, 13 Q. B. 616.

Defendant leased to M. a lot of land for 25 years, for the purpose of boring for oil, salt, or minerals, with right of ingress and egress in a certain designated manner. M. was to pay an advance of $35 on oil, and one-eighth part, every three months, of all oil obtained, and was to be allowed two years for testing the oil bearing character of the le d, when, if oil was not found in paying quantities, the lease was to be null and void, and plaintiffs were to return the $35 advanced. Defendant was to have the free use of the premises for agricultural purposes, except such portions as should be required for the oil operations. Quære, whether the instrument in question amounted to a lease, or was a mere license to bore for oil, salt, or minerals. *Burnside et al.* v. *Marcus*, 17 C. P. 430.

Declaration for breaking and entering the plaintiff's close, and cutting and carrying away the grain. Equitable plea—that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was verbally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him; that when the lease was executed, a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, plea good, for the independent verbal agreement made in consideration of defendant signing the lease, was good as an agreement, though defendant, by the 4th sec. of the Statute of Frauds, might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinnes* v. *Kennedy*, 29 Q. B. 93.

M., the owner of land adjoining a railway, took down the fence separating it from the track, with the assent of the railway company, in order to supply them with wood cut upon the land. He then sold the land to one C., stipulating that he should retain one or two acres on which this wood was piled. C. afterwards leased the east half of the land to the plaintiff, containing part of the land retained by M., and C. allowed the plaintiff's cattle to run on the west half, there being no line fence between the two halves. The plaintiff's cattle escaped from this west half on to the railway where the fence had been removed by M., and were killed:—Held, that the plaintiff could not recover, for the facts shewed a license by implication from C. to leave the fence as it was, and the plaintiff, as C.'s licensee, could have no better right than C. *Kilmer* v. *Great Western R. W. Co.*, 35 Q. B. 595.

A bill was filed by the owner of a mill, alleging a verbal agreement with the proprietor of land adjoining, for the right to pen back a stream running through his land, and which was used for driving the plaintiff's mill, in consideration of which he was to open up a road across his farm, for the use and convenience of such land owner; but no writing was ever drawn up evidencing the agreement. The vendee, the owner of the land, instituted proceedings against the mill-owner for damages by penning back the water, which overflowed a considerable portion of his land, The evidence being positive as to the agreement to permit the penning back of the water, and the road across the plaintiff's farm having been used by the proprietor of the land and his vendee, the court decreed a specific performance of the parol agreement, but, under the circumstances, without costs. *Nicol* v. *Tuckerberry*, 10 Chy. 109.

The holders of a license to dig for ore made a voluntary transfer of their right to another, and subsequently the licensor duly conveyed, for value, a like privilege to others, who also purchased from the original licensees their interest and entered upon and worked the lands. Nearly three years afterwards, the assignee of the first license filed a bill seeking to enforce an exclusive right to dig. The court, under the circumstances, dismissed the bill with costs. *Ross* v. *Fox*, 13 Chy. 683.

A party to whom a license to dig for ore, (the grantor being entitled to a royalty of one-twentieth part,) was granted, was described in the instrument as a miner, and he subequently transferred his right to another, without authority from the owner of the soil:—Held, that the personal quality of the grantee, formed a material ingredient in the contract, and therefore the right could not be assigned. *Ib.*

[See also next Sub-head.]

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2. *Revocation and Countermand.*

Debt on bond conditioned that "the defendant, his heirs and assigns, should permit the plaintiff to cut down and carry away all the fire-wood from certain lands without let, suit, hinderance, &c. Plea, that defendant always permitted, &c. Replication, that defendant conveyed the land in fee to a stranger, who would not permit plaintiff to cut the wood, &c.: Held, bad on demurrer, as shewing no breach, the bond being a license under seal binding the defendant and his vendee, and not revocable by parol, and the plaintiff having shewn no actual obstruction. *Fowke* v. *Fothergill*, 4 O. S. 185.

Where the sheriff had seized goods under a fi. fa. and allowed them to remain on defendant's premises on the understanding that they should be sold there on a future day if the money were not paid before, the license thus given to enter on the premises and sell the goods accordingly cannot be revoked by defendant. *McGillis* v. *McMartin*, 1 Q. B. 145.

G., owning lot 24, obtained a parol license from the plaintiff, owner of lot 25, to erect a dam across a stream running from lot 25 through lot 24, and thereupon erected a dam; and in further consequence of such license, built a mill on said lot

to be worked by means of said dam. Defendant purchased the lot, mill, &c., from G., and in order to work the mill, upheld said dam, and thereby overflowed plaintiff's land. Plaintiff sued, and defendant pleaded the license to G., and that defendant having purchased the lot, &c., from G., for the purpose, &c., upheld the said dam, &c. :—Held, on demurrer; Robinson, C. J., diss., plea bad: 1. Because the license, being coupled with the grant of an easement, the grant not being by deed, was void, and the license consequently revocable; 2. Because it was a license, for all that appears, given to G. personally, and being revocable was not assignable: 3. Because the right to overflow plaintiff's land was claimed as incident to the possession of the mill on lot 24; but the plea did not shew that the right formed such an incident, either by the manner of its creation or otherwise. *Beaver* v. *Reed*, 9 Q. B. 152.

On the 26th October, 1852, the Buffalo and Brantford Joint-stock R. W. Co., took a deed from plaintiff's father, by which, in consideration of the benefits which would result to him from the construction of the road, and of £27 10s., he agreed "to allow and permit the said company forthwith to take, occupy, possess, and enjoy of and through" the land in question. It appeared that the plaintiff had no title to the land, but had merely been allowed by his father to occupy it; that he had admitted in presence of his father, that it was with his father and not with him that the company must settle; and that he had worked under defendant, a contractor with the company, in making the fence along the line through this land. After the deed, the plaintiff and his father forbade defendant from entering. The defendant entered in December, 1852, for the purpose of making the railway, and the fences along the line being insufficient, the plaintiff's wheat was injured by cattle getting in. For these injuries he sued in this action trespass q. c. f. The jury found for the plaintiff and £25, on the ground, as they stated that defendant had been forbidden to enter upon the premises before any work was done:—Held, 1. That the deed taken was more than a mere agreement as to the price; the effect of it being to give the company permission forthwith to take and occupy a right of way through the land of the ordinary width of the road: 2. That the company could enter forthwith, though they had not paid or tendered the money; that not being a condition precedent according to the deed, and there being nothing in the 12 Vict. c. 84, their charter, to prevent it; and therefore that they could not be considered trespassers:—Held, also, as to the plaintiff, that the verdict was wrong, taking the reasons given by the jury; for looking upon the deed merely as a license, it was acted upon the moment the company entered into contracts for the work, on which they would be liable to others, and was therefore not revocable. *Nelson* v. *Cook*, 12 Q. B. 22.

Defendant, in writing, agreed with the plaintiff to take a certain saw mill according to the terms of a certain lease, and with a provision that defendant was to take the pine off the land, known as the Sammis lot, first, as the said plaintiff was bound to take off the same. The plaintiff subsequently purchased the fee simple of the Sammis's land:—Held, that the plaintiff was entitled to revoke any license implied by such agreement, and to maintain trespass against defendant for removing, from the lot formerly owned by Sammis pine saw logs, after he had received notice forbidding such removal. *Campbell* v. *Howland*, 7 C. P. 358.

One J. S., being owner of the east half of one lot, and the west half of another adjoining, by deed, expressed to be in pursuance of the act respecting short forms of conveyances, conveyed to G. S. in fee the west half, without express mention of any rights, easements, &c. There were then on the west half a saw mill and factory, which then, and for some years prior, during the unity of title to both lots, were driven by the waters of a river, which was dammed back, to form a pond on both lots, by a dam and embankment extending on to both. At the time of conveyance, also, there was on the west half a building intended as a grist mill, ready for the reception of machinery, and the embankment of the mill pond was partly cut through to carry the water therefrom to another pond partly begun, from which the grist mill was to be supplied. After the conveyance, G. S. cut through the embankment at the place where the cutting had been begun, carried the water required from one pond to the other by a flume, and thus worked the grist mill which he had completed, and which could not otherwise have been worked. By this he diverted the water from the first pond, and from the east half to a greater extent than it had been diverted before the conveyance. Such diversion and working of the mill were with the *parol* license of J. S. The cutting, flume and grist mill pond were all on the west half, and the water was returned from the mill to the river below the east half:—Held, that, apart from any question of implied grant, by necessity, as the act referred to included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purposes of the *saw mill and factory*, to the same extent as before the conveyance. But, Held, per A. Wilson, J., Richards, C. J., concurring, though absent, that no right or easement passed in respect of the grist mill; and, also, that the parol license was revocable; but that plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S., and those claiming under him, from interfering with the right claimed respecting the grist mill. *Edinburgh Life Assurance Company* v. *Barnhart*, 17 C. P. 63.

Declaration—First count. Trespass, for breaking and entering plaintiff's close, breaking down plaintiff's wall, carrying away part of the material, and building a house against the wall. Second count, for obstructing an ancient light of the plaintiff's. Plea: leave and license. To which, so far as it applied to the second count, the plaintiff replied a revocation of the leave before any of the grievances were committed. It appeared that the plaintiff and defendant owned adjoining shops in a city, and that defendant, wishing to improve his own premises, obtained the plaintiff's leave to build on the partition wall owned by plaintiff. It was understood that defendant should pay for this, but the price was never fixed. Defendant finished his building without any objection being made, but afterwards they disagreed as to the sum to be paid,

and the plaintiff brought this action, having first served a notice revoking the license and requiring defendant to remove the building:—Held, as to the first count, that the plaintiff must fail, for the gravamen of the charge was the breaking and entering the close, the rest being merely aggravation, and no trespass was shewn to be done after the leave was revoked. Held, also, as to the second count, that the evidence proved the plea of leave and license, and that the replication setting up a revocation before the commission of any of the grievances was not proved. Semble, that the license having been acted upon, and expense incurred by the defendant, it could not be revoked. *Morgan* v. *Lailey*, 33 Q. B. 369.

The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively, and those through whom they claimed, had occupied up to 1867 according to a fence, which had been the boundary between them for thirty years. In that year a survey was made, by which the line was placed further to the east. F., through whom the plaintiff claimed, then owned to the north of the plaintiff in lot 18, and one O., through whom the defendant claimed, owned the land opposite to them in lot 17. In 1868 F. moved the fence on to the new line. He said that O., in 1867, told the plaintiff he might occupy the strip between the old and new line, and in 1868-69 the plaintiff cut grass on this strip. O. afterwards sold to one J., who occupied up to to the old line, and sold to defendant. The plaintiff in 1872 moved the fence to the new line, and the defendant immediately replaced it, for which the plaintiff brought trespass:—Held, that he could not recover, for the defendant had acquired a title by possession, and O.'s permission to the plaintiff was at most a mere license, which was revoked by his sale to J., and never gave the plaintiff possession so as to entitle him to maintain trespass. *Cole* v. *Brunt*, 35 Q. B. 103.

The plaintiff owned lot 11 on Seaton street, in the city of Toronto, and defendant lot 10 adjoining. There was a house situate partly on each lot, and it appeared that the plaintiff and one A., under whom defendant claimed, had mutually agreed that A. should occupy a part of the house which, owing to the position of the partition walls, encroached slightly on lot 11. A. so occupied until her death, and her heirs until they conveyed to defendant:—Held, that defendant must be regarded either as tenant at will to or as occupying under a license from the plaintiff, and could not be ejected without notice or a revocation of the license; and that in either case he would be entitled to a reasonable time to remove what he might have in the house. *Keys* v. *Guy*, 36 Q. B. 356.

On the 1st October, 1875, plaintiff wrote to D., the owner of certain land in the township of Caledon, that he understood that one M., who had had a written lease from D., which had expired, but who had remained on on the terms of the lease, was going to leave, and that if the farm was for rent he would give D. $100 a year, and pay all taxes, &c., and requesting an answer by return mail, as he wished to commence ploughing. D., who was then in the United States, replied that he had no objection to plaintiff's terms as to renting the farm; and that he might commence to plough on the foll ing conditions: "I rent to you for one y with right to sell the farm at any time, giving up possession thereof when required, your being paid for labour and seed at valuati should the purchaser wish possession. I wil up at Caledon as soon as I get home, and m final arrangements as to payment and securit The plaintiff entered and did the ploughing, without M. having given up possession, or w out the arrangements as to payment and secu being perfected. Subsequently D. sold to defendant, who thereupon took possession. appeared that D. offered to pay the plaintiff his fall ploughing, but that he did not send any claim. Evidence was also given of exp sions made use of by D. to intending purchas referring to plaintiff as the tenant, who had place for a year, but would give up possession being paid for his ploughing, and as the out ing tenant who would have to be paid for ploughing:—Held, that there was no pres demise, but that the plaintiff merely had a lice to enter and plough, pending the conclusion the proposed bargain, which license was revo by the entry of defendant, the owner of the *Stubbs* v. *Broddy et al.*, 27 C. P. 234.

A. being entitled at his own expense to m a road for himself across B.'s farm at the n convenient point, it was agreed between th that A. should use B.'s road on certain terms Held, that this agreement was a mere licer not coupled with any interest, or incident, auxiliary to a sale or grant, and was theref revocable; and being revoked at law, no equ arose to interfere with A.'s legal right, on ground of encouragement on the part of the or forbearance and irreparable inconvenience the part of the other. *Fielder* v. *Bannister* Chy. 257.

The owner of the lands, supposed to cont valuable ores, authorized two persons by an strument in writing, (intended to be, but mistake not sealed,) to dig for minerals in land, they agreeing to give to the owner of soil one-twentieth part of all the minerals t might find or take:—Held, 1. That the inte intended to be conveyed was an incorpor freehold or tenement, and could only be crea by deed; 2. That if it was intended to oper as a license only, it would be revocable, and court would not make a decree to establis right or interest which might be immedia revoked. *Ross* v. *Fox*, 13 Chy. 683.

See also the next case.

II. For the Use of Chattels.

A. demised to B. for a term, with a claus forfeiture in case the term should be taken in cution, and at the same time delivered cer chattels into B.'s possession upon the terms tained in a memorandum attached to the le signed by A., stating that he agreed to allow use of the chattels to assist him to pay the and maintain his family. On an interpleader tween A. and C., who had seized the chat under an execution against B.:—Held, that memorandum formed no part of the lease, operated only as a license to use, which revocable. *Muckleston* v. *Smith*, 17 C. P.

LIEN.

I. When it Exists.
1. *For Work done*, 2113.
2. *Other Cases*, 2114.
II. When Lost or Waived, 2115.
III. Pleadings, 2118.
IV. Mechanics' Lien Acts, 2118.
V. Miscellaneous Cases, 2119.
VI. By Particular Persons.
1. *Attorneys*—*See* Attorney and Solicitor.
2. *Auctioneers*—*See* Auction and Auctioneers.
3. *Inn-keepers*—*See* Innkeepers.
4. *In Insolvency Proceedings*—*See* Bankruptcy and Insolvency.
5. *Of Judgments*—*See* Judgment.
6. *Livery Stable Keeper*—*See* Livery Stable Keeper.
7. *Mortgagees*—*See* Mortgage.
8. *Shipping*—*See* Ship.
9. *Vendors' Lien*—*See* Sale of Land.
10. *Warehousemen* — *See* Warehouse and Warehouse Receipts.
VII. For Improvements on Land—*See* Improvements on Land.
VIII. Equitable Mortgage—*See* Mortgage.

I. When it Exists.

1. *For Work Done.*

A builder has no lien for payment upon a house erected by him on the land of his employer. Where A. contracted to build a house for B. and to deliver possession thereof when finished, upon which he was to be paid :—Held, that no action would lie to recover the price until an absolute and unreserved delivery of the house had taken place ; and that he has not a right to withhold the key of house until he received payment, though B. had not acquired any title to the land on which it was built. *Johnson* v. *Crew*, 5 O. S. 260.

Quere, as to a farrier's right of lien on a horse for services rendered. *Nicolls* v. *Duncan* 11 Q. B. 332.

One Robins had agreed to make for Ruthven, the execution debtor, an iron fence, for which Ruthven furnished him with the iron, and paid a certain sum on account of the work. Being unable to pay the balance. G. advanced the money, taking Ruthven's note ; and the fence, which was then in Robins's yard, was delivered by Ruthven to him to hold for G. until payment of the note, but there was no written assignment. When the note fell due, Ruthven authorized G. to sell the fence, but it remained until it was seized under an execution against Ruthven :—Held, that the execution could not prevail against G.'s claim, for Ruthven never had been entitled to the fence as his own. *Gurney et al.* v. *James*, 10 Q. B. 156.

A packer has a lien upon the goods packed by him for the materials used and work done in packing. The plaintiff employed one B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charges for packing from defendants, who were authorized by him to collect them :—Held, that defendants could legally retain the goods for these charges as well as for their freight. *Hayward* v *Grand Trunk R. W. Co.*, 22 Q. B. 392.

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2. *Other Cases.*

The plaintiffs were a company existing in and chartered by the State of New York, for the purpose of carrying on mutual insurance, in the county of Genesee. The charter provided that the company should have a lien by way of mortgage on the property insured, and upon the right, title, and interest of the assured to the land on which said property stood :—Held, that a foreign legislature could make no law creating a lien on real estate in Canada ; and consequently that any contract founded on such a consideration, was void ab initio. *Genesee Mutual Insurance Co.* v. *Westman*, 8 Q. B. 487.

Held, that the Bond Head Harbour Company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground, refuse to register the assignment of the stock by S. to the plaintiffs. *McMurrich et al.* v. *Bond Head Harbour Co.*, 9 Q. B. 333.

A factor has no lien on goods consigned to him until they actually come into his possession. *Clark* v. *Great Western Railway Co.*, 8 C. P. 191.

The sheriff has no lien or claim on the goods seized for his fees. *In re Ross*, 3 P. R. 394—C. L. Chamb.—J. Wilson.

Where plaintiff, being the owner of timbered land, verbally agreed to sell growing timber to defendant, and there was a dispute as to price, it was held that the property in the trees passed as soon as severed from the freehold ; but that the plaintiff had a lien upon them for the price, and therefore that defendant, without discharging the lien, had no right to remove the timber. *McCarthy* v. *Oliver*, 10 L. J. 130.—C. L. Chamb. —A. Wilson. But see *S. C.* 14 C. P. 290.

A retiring partner obtained from one of the continuing partners a letter agreeing to reimburse the amount advanced by the partner so retiring, out of the one-fourth of the profits to be received from the business :—Held, that the retiring partner had a lien on such fourth part of the profits, and a corresponding portion of the capital stock and assets of the partnership ; and was entitled to an account of the partnership dealings. *McGregor* v. *Anderson*, 7 Chy. 354.

Under the act for quieting titles, where a contestant sets up a tax sale, which is found invalid, he is entitled to a lien for the taxes paid by his purchase money, with the proper percentage to which the owner would have been liable if no sale had taken place. *In re Cameron*, 14 Chy. 612.

If the court can trace money or property however obtained from the true owner into any other shape, it will secure it for the true owner by holding it to be his in equity or by giving him a lien on it. *The Merchants Express Co.* v. *Morton*, 15 Chy. 274.

An incorporated company having executed a bond which, though it contained no direct words

of charge, was evidently intended to give a lien on the property of the company, it was—Held, that the lien was sufficiently created. *The Town of Dundas* v. *Desjardins Canal Co.*, 17 Chy. 27.

M. was administrator of the estate of S., and was managing the real estate for the heirs; he was also one of the executors and trustees of E.; there was a sum of $808.55 due for taxes on some property of the S. estate, and M. paid the same with money of the E. estate, directing the agent of that estate to charge the amount to the S. estate; M. did not enter the amount in his accounts with the S. estate as a loan, and, on the contrary, in the accounts which he rendered, he took credit for the amount as a payment by himself. The heirs knew nothing of the loan until some time afterwards; they had not authorized M. to borrow money; and he was at the time indebted to them as agent in a sum exceeding the amount of the taxes; M. afterwards died insolvent, and indebted to both estates:—Held, in appeal, reversing the decree below, that the E. estate could not hold the heirs of the S. estate liable for the $808.55, and was not entitled to a lien therefor on the property in respect of which the taxes were payable. *Ewart* v. *Steven*, 18 Chy. 35; *S. C.*, in the court below, 16 Chy. 193.

The costs of a suit at law to recover back a deposit paid on account of purchase money, do not form any lien upon the land, although the deposit itself does constitute such a lien. *Burns* v. *Griffin*, 24 Chy. 451.

II. When Lost or Waived.

A sends a waggon to B. to make the wood work. B. having finished the wood work, sends the waggon in A.'s name for the iron work, and gets it back again from the blacksmith's. A. calls for the waggon; B. allows him to remove the box in the highway, but on his returning for the running part, B. refuses to let it go till he is paid his bill:—Held, that B. by sending the waggon to the blacksmith's had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon, and that allowing A. to remove the box into the highway, was no waiver of his lien. *Millburn* v. *Millburn*, 4 Q. B. 179.

In this case, where defendant claimed a lien on certain goods for wharfage, but it appeared that for many years, including the time when these goods came, defendant and plaintiff had been dealing together, and defendant had charged his claims for wharfage in account current, on which payments had been made from time to time:—Held, that it was properly left to the jury to say whether the wharfage on the goods in question had been paid, and that they were justified in finding that it had been. *Boyd et al.* v. *Maitland*, 16 Q. B. 311.

Replevin for railway iron. It appeared that the iron had been imported from England by the Buffalo, Brantford, and Goderich R. W. Co., and was shipped from Kingston to Port Colborne, subject to ocean freight, and the freight by schooner from Kingston. On arriving at Port Colborne, no one being ready to pay, the iron was left by the master in defendant's charge, to hold subject to the freight, and was piled on a piece of ground belonging to government, where other iron owned by the company, was also lying, but separate from this. Afterwards the Buffalo and Lake Huron R. W. Co., the plaintiffs bought out the old company under the 19 Vict. c. 21, and arranged certain writs of fi. fa. under which the sheriff had seized this and the other iron; and they thereupon demanded the iron in question from the defendant, who refused to give it up, claiming the ocean freight, which had in fact been paid, and the freight from Kingston, as well as demurrage, and some other charges not recoverable. The plaintiffs, however, refused to pay any thing, and replevied:—Held, 1. That the iron could not be considered as having been delivered to the old railway company, when landed, as it was, at Port Colborne; 2. That the statute 19 Vict. c. 21, did not take away the right of lien; nor could anything done by the sheriff have that effect; 3. That defendant having a clear right to detain for the freight from Kingston, of which no tender had been made, his right was not prejudiced by having demanded more than was due. *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 Q. B. 283.

Defendant having an admitted lien upon a buggy for repairs, it was—Held, on the evidence set out in the case, that there was no sufficient evidence of a tender of the sum, or a waiver of it. *Lake* v. *Biggar*, 11 C. P. 170. See, also, *Milburn* v. *Milburn*, 4 Q. B. 179.

Where the holder of goods detains them for different claims, as to one of which he has a lien and the other not, the owner must tender the proper amount, unless the holder either expressly or by fair implication dispenses with it. *Kendal* v. *Fitzgerald*, 21 Q. B. 585; *Buffalo and Lake Huron R. W. Co.* v. *Gordon*, 16 Q. B. 283; *McBride* v. *Bailey*, 6 C. P. 523.

Held, that the mere fact of a warehouseman who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim as due, either to himself or a third person, does not dispense with a tender of the sum due, and amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused; and that in this case the evidence set out below was insufficient for that purpose. The plaintiffs denied that any claim for storage was made, while the defendants asserted the contrary:—Held, that if not made when the goods were demanded, the defendants could not defeat the plaintiffs' claim in trover by afterwards setting it up. *Llado et al.* v. *Morgan et al.*, 23 C. P. 517.

H. & H. stored wheat in defendant's warehouse at K., and for charges incurred thereon gave them a draft on their own firm in M. which the defendants accepted in payment, and receipted the bill. The draft was presented and accepted, but during its currency H. & H. failed. Defendants then refused to give up the remainder of the wheat, (having already shipped part of it to Montreal,) claiming a lien for their general charges:—Held, that their lien was suspended during the currency of the bill. *Rendall* v. *Walker*, 8 C. P. 37.

M. being the owner of certain land, sold and conveyed the timber and cordwood thereon to McG., who took possession, giving his note in part payment; he then converted the timber into cordwood and sold it to one S. and absco

ded :—Held, that M. had clearly lost his lien. *Wyatt* v. *Bank of Toronto*, 8 C. P. 104.

A. having taken a likeness for B., agreed to take in payment therefor $20 in cash and a cognovit for $70, payable at a future date. After receipt of $20 and tender of the cognovit :—Held, that the agreement was a waiver of A.'s right to lien, but did not amount to an accord and satisfaction. *Dempsey* v. *Carson*, 11 C. P. 462.

Plaintiff sold to defendant cordwood lying on the plaintiff's premises, and agreed to remove it to the bank of an adjacent canal, and there deliver it; plaintiff having delivered a portion at the bank :—Semble, that any lien for the price which the plaintiff might before have had upon such wood, was lost by its removal to land neither his own nor under his control. *McNeil* v. *Kelcher*, 15 C. P. 470.

Plaintiff employed B. to pack some furniture and send it to him by defendants' railway. B. did so, and received his charge for packing from defendants, who were authorized by him to collect them :—Held, that B.'s lien was not lost by delivering the goods to defendants for carriage, subject to it, or by accepting the charges from defendants. *Hayward* v. *Grand Trunk R. W. Co.*, 32 Q. B. 392.

By 16 Vict. c. 22 and c. 124, and the 18 Vict. c. 13, certain municipalities were authorized to issue debentures under by-laws of the corporations to aid in the construction of a railroad. The contractors for building the road agreed with the company to take a certain amount of their remuneration in these debentures, and the work having been commenced, certain of these debentures were issued to the company. The contractors afterwards failed to carry on the works, and disputes having arisen between them and the company, all matters in difference were left to arbitration, and an award thereunder was made in favour of the contractors for the sum of £27,645, payable by instalments. One of these instalments having become due, and been left unpaid, the contractors filed a bill to have the debentures delivered over to them in the proportion stipulated for according to the terms of the contract :—Held, although the contractors would have been entitled to a specific lien on these debentures under their original agreement, the fact that they had referred all matters in difference to arbitration, and had obtained an award in their favour for a money payment, precluded them from now obtaining that relief; and a demurrer for want of equity was allowed. *Sykes* v. *Brockville and Ottawa R. W. Co.*, 9 Chy. 9.

When a decree on further directions had been registered against the lands of the defendant; and afterwards the original decree was reversed on rehearing, the Chancellor held that the order reversing the original decree destroyed the lien, but that the court could not make an order directly affecting it, observing, on an application to discharge the lien created by the registration, that the court cannot discharge a lis pendens in this manner, the only way of getting rid of which is to obtain an order dismissing the bill. *Graham* v. *Chalmers*, 2 Chy. Chamb. 53.

The 19 Vict. c. 21, incorporating the Buffalo and Lake Huron R. W. Co. with power to purchase the railway therein mentioned, did not deprive unpaid owners of any lien they had for the price of land theretofore sold to the old company. *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Chy. 521.

III. Pleadings.

Where in trover for bills of exchange, the defendant pleaded a lien by agreement, and the plaintiff replied a tender, without averring that the sum tendered was sufficient, the replication was—Held bad on general demurrer. *Conger* v. *Hutchinson*, 6 O. S. 644.

Semble, a lien may be specially pleaded in an action of detinue. *Riordon et al.* v. *Brown*, 1 C. P. 199.

Where the goods have been replevied under the 14 & 15 Vict. c. 64, and the declaration is for detaining merely, the pleadings should be as in detinue. *Stephens* v. *Cousins*, 16 Q. B. 329.

In such an action a lien cannot be given in evidence under a plea denying the plaintiff's property. *Ib.*

IV. Mechanics' Lien Acts.

A mechanic having erected two separate buildings under two distinct contracts for the owner of the land on which they were built, cannot register a claim for one gross sum in respect of the two; at all events he cannot do so unless it appears on the face of the instrument how much was claimed in respect of each contract. *Currier* v. *Friedrick*, 22 Chy. 243.

In registering a claim under the Mechanics' Lien Act, the claimant made an affidavit verifying it, and referred thereto as marked "A.," but no such mark was upon it :—Held, that this did not invalidate the registry. *Ib.*

A mechanic, having a claim for the erection of buildings under a contract, assigned his claim to the plaintiff to secure money due to him, who, for the purpose of enabling the mechanic to register under the act, reassigned to him :—Held, that such reassignment enabled the mechanic to make the claim for registry, notwithstanding the equitable right of the plaintiff. *Ib.*

The lien given to mechanics under "The Mechanics' Lien Act" of 1873, 36 Vict. c. 27, O., has not the effect of giving a lien to parties who furnish materials to the mechanic for the purpose of executing the contract entered into by him with the owner of the land. *Crone* v. *Struthers*, 22 Chy. 247.

Held, on demurrer, that an architect is entitled to register a claim under the Mechanics' Lien Act of 1874, O., for money due him for making plans and specifications for, as also superintending the erection of, buildings for the owner. *Arnoldi* v. *Gouin*, 22 Chy. 314.

G. & M. agreed with the defendant B. to furnish and put up in his building certain machinery, to be paid for partly by assigning a mortgage for $1066, held by B., and the residue of the price to be secured by a mortgage to be executed by B., no time being mentioned for which credit was to be given. On the 8th of June, 1875, B. discharged G. & M.'s workman from further

work in putting up the machinery, and the balance thereof was left in the building. On the 2nd of July, 1875, G. & M. registered the usual mechanics' lien for $1030, balance of the price of the machinery so put up, and $38.45 for labour, and on the 7th of the same month, filed a bill to enforce their lien, which on the 19th of January following, on motion of the defendant, was dismissed for want of service, but without prejudice to the lien, if any, of G. & M. On the 15th of July preceding, the present suit was commenced, and on the 19th of January, a decree was made declaring the plaintiffs entitled to a lien and directing the usual accounts to be taken :—Held, that as against B., G. & M. were entitled to prove for the amount of their claim ; and as the plaintiffs did not appeal from the allowance thereof by the master, the court dismissed an appeal therefrom by the assignee of B. with costs. *Bunting* v. *Bell*, 23 Chy. 584.

The effect of the Mechanics' Lien Act of 1874 is, to cancel a lien that had been created under the Act of 1873, although a bill to enforce the claim had been filed within ninety days from the expiry of the period of credit as prescribed by the 4th section of that [illegible] ; no proceeding to realize the claim having [illegible]en taken for more than thirty days after the [illegible]inery, the foundation of the claim, had bee[illegible] ; the provisions of the act of 1873 being inconsistent with, and repugnant to the provisions of the later act, which repeals all acts inconsistent therewith. *Walker* v. *Walton*, 24 Chy. 209.

Where a bill is filed by a sub-contractor against the owner of property and a contractor with him, to enforce a claim against such contractor, the owner of the property, and all persons claiming to have liens, are necessary parties in the Master's office, whose costs will be ordered to be paid out of the amount found due the contractor, and the balance distributed ratably between the several lien holders, and a personal order made against the contractor for the deficiency, if any. *Hovenden* v. *Ellison*, 24 Chy. 448.

A suit brought by a lien holder operates for the benefit of all of the same class, so that a suit instituted by one within the thirty days mentioned in the Act, keeps alive all similar liens then existing. *Ib.*

V. Miscellaneous Cases.

In an instrument under seal, the words "and for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage, and hypothecate the said piece or parcel of land," &c., pass no interest ; they only shew an intention to create a charge of lien. *Doe* d. *Roes* v. *Papst*, 8 Q. B. 574.

The plaintiff's right to a lien on the land under 33 Vict. c. 23, O., and the mode of enforcing it, if the tax title had been invalid, remarked upon by A. Wilson, J. *Jones* v. *Cowden*, 34 Q. B. 345.

In January, 1872, the plaintiff, a musical instrument maker at Toronto, rented a piano to one J., at Woodstock, at $6 per month, with the right of purchase, the rent to go towards payment of purchase money, which was fixed at $450 ; and several months afterwards, when J., had paid three months rent, a written contract was signed by J. The defendant, J.'s landlord, having caused the piano to be distrained for ren in arrear, it was sold by the bailiff for $75, th defendant being the purchaser, and the defen dant afterwards allowed J. $125 extra in settle ment with him, making $200 in all :—Held, tha the evidence sufficiently shewed the piano to b the plaintiff's property, and that he was entitle to maintain trover for it against defendant :— Held, also, that the sale to the defendant passe nothing, for as landlord he could not himsel purchase goods sold by his bailiff :—Held, also that defendant could not set up a lien for th rent as against the plaintiff, for the distress wa at an end, and the goods in no way in the custod of the law. *Williams* v. *Grey*, 23 C. P. 561.

A mortgagee or judgment creditor of a rail way company, is not entitled to enforce paymen of his demand by sale or foreclosure of the rail way, he is only entitled to have a manager o receiver of the undertaking appointed ; and Quære, whether the rule is otherwise in the cas of a vendor seeking to enforce his lien for un paid purchase money. *Galt* v. *Erie and Niagara R. W. Co.*, 14 Chy. 499.

The Dominion Act 34 Vict. c. 5, s. 47, enable a party making advances to a manufacturer t stipulate for obtaining a lien on warehouse re ceipts to be subsequently granted to the manu facturer. *Suter* v. *Merchants' Bank*, 24 Chy 365.

LIFE ASSURANCE.

See Insurance.

LIFE ESTATE.

See Estate—Will.

LIGHT-HOUSE.

See Harbour Companies.

LIGHTS.

I. To Ships—*See* Ship.

The owner of two adjoining shops leased on to plaintiff and the other to defendant. Th plaintiff's shop window had been so constructe as to present a side view to persons coming alon the street, the object being to attract their at tention, and obtain their custom for the ware displayed in the shop ; and the privilege wa shewn to be a very important one. The tenan of the adjoining shop having placed a show cas in an open space or door-way of his shop, so a to intercept the view of the plaintiff's window was restrained by injunction from continuing th obstruction. *Brummel* v. *Wharin*, 12 Chy. 28

The plaintiff filed his bill to restrain certain the defendants from closing windows which look ed across a lane, of which plaintiff claimed to b owner, and on which defendants were erecting building some time before the commencement

the suit. It appeared in evidence that the plaintiff had no title to the lane, but that the former owner of it had given him to understand that the lane would never be built on. At the hearing the plaintiff was allowed to amend his bill, by striking out the part claiming title to the lane; and a perpetual injunction was granted, restraining defendants from closing the lane—the delay in filing the bill having been satisfactorily accounted for—with costs, less those occasioned by plaintiff's claiming title to the lane. *Biggar* v. *Allan*, 15 Chy. 358.

LIMITATION OF ACTIONS AND SUITS.

I. Claim to Realty.

1. *Operation of the Statute*, 2122.
2. *Nature and Proof of Possession*, 2122.
3. *Possession before 4 Will. IV. c. 1.*, 2123.
4. *Possession before Patent, or as against the Crown*, 2124.
5. *Possession as against Patentee*, 2125.
6. *Tenant in Tail*, 2126.
7. *Tenants in Common*, 2127.
8. *Landlord and Tenant*, 2127.
9. *Tenant at Will*, 2127.
10. *Mortgagor and Mortgagee*, 2130.
11. *Servant or Caretaker*, 2131.
12. *Adverse Possession*, 2131.
13. *Exclusive Possession—Possession by or among Relatives*, 2132.
14. *Actual and Constructive Possession.*
    (a) *Wild Land*, 2134.
    (b) *Mistake in Boundaries*, 2136.
    (c) *Other Cases*, 2137.
15. *Disputed or Mistaken Boundaries*, 2137.
16. *Continuous Possession*, 2141.
17. *Entry or Claim*, 2142.
18. *Discontinuance and Dispossession*, 2145.
19. *Avoidance by Process*, 2147.
20. *Acknowledgment of Title*, 2147.
21. *Cases under the Quieting Titles Act*, 2148.
22. *Other Cases*, 2149.

II. Personal Actions.

1. *When the Statute begins to run*, 2152.
2. *Acknowledgment in Bar or Payment*, 2153.
3. *Avoidance by Process*, 2159.
4. *Specialties*, 2160.
5. *Other Cases*, 2160.

III. Disabilities.

1. *Absence from the Country*, 2162.
2. *Other Cases*, 2163.

IV. Arrears of Rent or Interest, 2165.

V. Trustees and Agents, 2166.

VI. Public Officers, 2167.

VII. Agreements to Waive the Statute—Fraud, 2168.

VIII. Miscellaneous Cases, 2170.

IX. Actions on Bills and Notes—*See* Bills of Exchange and Promissory Notes.

X. Defence of Statute to Actions for Recovery of Costs—*See* Attorney and Solicitor.

XI. Dormant Equities Acts—*See* Dormant Equities.

XII. Actions of Dower—*See* Dower.

XIII. Actions on Insurance Polices—*See* Insurance.

XIV. Laches—*See* Laches.

XV. Right to Redeem—*See* Mortgage.

XVI. Quashing By-laws — *See* Municipal Corporations—Public Schools.

XVII. Actions against Railway Companies—*See* Railways and Railway Companies.

XVIII. Easements by Prescription—*See* Water and Water Courses—Way.

XIX. Actions against Municipal Corporations for Non-repair of Highways—*See* Way.

I. Claim to Realty.

1. *Operation of the Statute.*

The right to land is not barred by forty years want of possession, unless some other person has also been in possession for that time. *Ketchum* v. *Mighton et al.*, 14 Q. B. 99.

In ejectment, where the defendants claimed title by possession, and the plaintiff was found to have been out of possession for twenty years, the jury were directed that to entitle the defendants to a verdict they must shew twenty years continuous possession in themselves, and those under whom they claimed:—Held, a misdirection, for an owner out of possession for twenty years may be barred, though no one of the occupants may have obtained a statutory title. *Kipp* v. *Incorporated Synod of the Diocese of Toronto*, 33 Q. B. 220.

To bar a plaintiff in ejectment under the Statute of Limitations he must not only have been out of possession for twenty years, but there must have been actual possession by another. *Lloyd* v. *Henderson*, 25 C. P. 253.

2. *Nature and Proof of Possession.*

Quære, as to the effect against the true owner of a succession of trespassers taking possession of deserted land at intervals, some of them before the 4 Will. IV. c. 1, and not claiming under each other. *Doe* d. *Baldwin* v. *Stone*, 5 Q. B. 388.

Semble, that the payment of taxes in itself signifies nothing in making good a title by possession. *Doe* d. *McDonell* v. *Rattray*, 7 Q. B. 321. But see, contra, *Davis* v. *Henderson*, 29 Q. B. 344. See, also, *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486.

In an action of ejectment by a son against his father, the plaintiff claimed under a deed from the defendant. There was evidence to shew that since this deed the defendant had been more

than twenty years in possession, without any recognition of the plaintiff's right. The plaintiff, to repel this evidence, attempted to shew that during a part of that period the defendant was in possession as agent of his (the plaintiff's) brother, to whom he had given a lease; and among other evidence he offered a paper in the defendant's handwriting, purporting to be a lease from the plaintiff to D. M., his brother, of certain lands, including the premises in question, for a part of the time during which the defendant claimed to have held adversely. At the foot, but not in the defendant's writing, was written the plaintiff's name, and the word "copy." No proof was offered respecting this paper, except that it was in the defendant's handwriting:—Held, on motion for a new trial, that such paper should have been received. Draper, J., diss. *McQueen* v. *McQueen*, 10 Q. B. 193.

The defendant lived on the lot adjoining the land in question, and there was conflicting evidence as to the nature of the possession held, and the acts of ownership exercised by him over this land:—Held, that it should have been left to the jury to say whether, under the evidence set out in this case, the possession held by the defendant was of that constant and visible kind which would be sufficient under the statute. *Doe* d. *Shepherd* v. *Bayly*, 10 Q. B. 310.

Held, that upon the evidence of title by possession in this case, the jury properly found for defendant as to the cleared, and for plaintiff as to the uncleared, land, as to which latter he proved only chopping trees and cutting wood at different times, amounting only to occasional acts of trespass. *Allison* v. *Rednor*, 14 Q. B. 459.

Held, that the evidence set out in this case was insufficient to establish satisfactorily a title in defendants by possession; and that there was less, if any, proof that the grantee, or some one claiming under him, was aware of such possession. The jury having found in their favour, a new trial was therefore granted, with costs to abide the event. *Young* v. *Elliott*, 23 Q. B. 420.

A person seeking to invoke the aid of the statute against a claim in respect of lands must shew that he, and those under whom he claims, have been in possession of the land, or what in law is equivalent to possession. *Arner* v. *McKenna*, 9 Chy. 226.

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3. *Possession before 4 Will. IV. c. 1.*

The 4 Will. IV. c. 1 s. 17, has a retrospective operation. *Doe* d. *McKay* v. *Purdy et al.*, 6 O. S. 144.

A., in 1817, agreed with B. to purchase land, and was let into possession. B. died before the 4 Will. IV. c. 1. C., the son of A., made a bargain with D., the husband of the lessor of the plaintiff, to whom B. had devised the land, and fails in his payments, upon which ejectment was brought to dispossess him, and was discontinued at his request in 1834; after this, the lessor of the plaintiff brought her action of ejectment:—Held, upon these facts, that A. became a tenant at will to B. in 1817: that upon B.'s death, his tenancy at will determined; that that relation being at an end before the 4 Will. IV. c. 1 was passed, the time which thus elapsed was not to be taken into account as a part of the twenty years: that the ejectment in 1834, while it determined the tenancy at will, gave no new starting point, and had no retrospective operation; that the lessor of the plaintiff by her consenting to defendant's remaining on the land, after the interview of 1834, revived the tenancy at will; and that as twenty years had not elapsed since, the lessor of the plaintiff was entitled to recover. *Doe* d. *Kingsbury* v. *Stewart*, 5 Q. B. 108.

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4. *Possession before Patent, or as against the Crown.*

The Statute of Limitations does not run against the crown. *Doe* d. *West* v. *Howard et al.*, 5 O. S. 462.

The Nullum Tempus Act, 9 Geo. III. c. 16, is in force in this province, but it does not apply to the unsurveyed waste lands of the crown. *Regina* v. *McCormick*, 18 Q. B. 131.

Pointe au Pelè Island, in lake Erie, and forming by law part of the township of Mersea, had been occupied by defendants and those under whom they claimed, without interruption, since 1789. It was not shewn that the possession held had been other than that of trespassers, nor that the crown had ever taken charge of or received any rents from the island, nor that it had been surveyed, nor the title of the Indians extinguished, and it had never been assessed or returned as assessable:—Held, that the crown was not barred by such possession. *Ib.*

Plaintiff and defendant held the north and south halves of a lot respectively as lessees from the crown. Defendants entered and held possession up to a certain line for more than twenty years, and the plaintiff had held the remainder for some sixteen years. They then each obtained patents for their halves, and on discovering that the lot overran, and that the defendant's fence encroached upon his half, plaintiff brought ejectment:—Held, that he was entitled to recover: that the possession by defendant could not affect the title derived under the patent, for the statute did not run while the fee was in the crown. *Jamieson* v. *Harker*, 1 Q. B. 590.

The plaintiff held a lease of a lot from the crown, which would expire in 1845, and in 183 allowed defendant, his son-in-law, to go upon portion of it, which he held for more than twenty years. In 1839 the plaintiff agreed to purchase from the government, and paid an instalment and in 1856 obtained his patent, when he brought ejectment against the defendant:—Held, affirming the last case, that defendant's possession could not avail him while the title was in the crown, and the plaintiff must recover. *Dorsey* v. *Cox*, 18 Q. B. 594.

On an information for intrusion upon land of the crown:—Held, there being no proof that the crown had been out of possession for twenty years, that under "not guilty" defendant could not give evidence of title under a crown lease. Held, also, that the crown on this plea were not entitled to judgment at once, but must go down to trial to shew the intrusion and damages; and because defendants under the plea might abate

the crown out of possession for twenty years, and thus put the crown to proof of title. *Regina* v. *Sinnott*, 27 Q. B. 539.

The statute of limitations does not run against the crown, and it makes no difference that the land is vested in the crown as trustee. Where, therefore, in ejectment by the crown for land held as trustee for the University of Toronto under C. S. C. c. 62, s. 65, it appeared that defendant had held possession for twenty-seven years, the plaintiff was nevertheless—Held, entitled to succeed. *Regina* v. *Williams*, 39 Q. B. 397.

See *Doe Fitzgerald* v. *Finn*, 1 Q. B. 70, p. 2126.

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5. *Possession as against Patentee.*

[See *4 Will. IV. c. 1, s. 17, C. S. U. C. c. 88, s. 3, amended by 27-28 Vict. c. 20.*]

In ejectment the burden of proof to shew that the statute of 4 Will. IV. c. 1, s. 17, is inapplicable is thrown upon defendant. *Doe* d. *McKay* v. *Purdy et al.*, 6 O. S. 144.

The effect of the exception in 4 Will. IV. c. 1, s. 17, in favour of a grantee of the crown who has never gone into possession, is, that while ignorant of the fact of his land being in the possession of some other, he is not to be regarded as disseized, and consequently may devise. *Doe* d. *McGillis* v. *McGillivray*, 9 Q. B. 9.

And it protects the grantee of the crown, even though it should appear that he was unconscious of his title, and believed that he had disposed of his land. *Doe* d. *Pettit* v. *Ryerson*, 9 Q. B. 276.

A person holding a bond for a deed from the patentee of the crown is not so "entitled to the land," that his knowledge of an adverse possession takes the case out of the statute. *Johnson et al.* v. *McKenna*, 10 Q. B. 520.

In ejectment the plaintiff claimed under a tax deed made in 1842, coming within the 3 Vict. c. 46. Defendant proved a paper title from the patentees, and gave evidence of possession held from 1846, for more than twenty years before this action. The jury having found for the defendant:—Held, without deciding the validity of the tax sale, that he had acquired a good title under the Statute of Limitations, against which the plaintiff was not protected by sec. 3 of C. S. U. C. c. 88. *Cushing* v. *McDonald*, 26 Q. B. 605.

A petitioner claiming title by length of possession against the patentee of the crown, must shew that the patentee or his heir had knowledge of such possession, or he must shew a forty years' possession. *Re Linet*, 3 Chy. Chamb. 230.—Taylor, *Referee*.

A person going into possession under a deed from one who is supposed to be the heir of the grantee of crown, but who is found by the jury not to have been such heir, is not a person claiming to hold under the grantee within the meaning of C. S. U. C. 88, sec. 3, so as to be relieved from shewing that the grantee, or some one claiming under him, had notice of his possession. *Turley* v. *Williamson et al.*, 15 C. P. 538.

The patentee may maintain ejectment against a person who has been in adverse possession for upwards of twenty years before the patent, and it is not necessary that the crown should proceed by information of intrusion in such a case before the grant, or that the grant should specially convey the crown's right of entry on the land to the grantee. *Doe* d. *Fitzgerald* v. *Finn*, *Doe* d. *Fitzgerald et al.* v. *Clench*, 1 Q. B. 70.

The possession of land by a person deriving title from the crown, which under the section will enable the statute to run against him, must be a possession after the patent had issued. *Stewart* v. *Murphy*, 16 Q. B. 224. See also, *Mulholland* v. *Conklin*, 22 C. P. 381. Per Gwynne, J.

Quære, whether the occupation of the patentee in this case merely for the purpose of performing settlement duty, would have been sufficient, even after the patent, to deprive him of the benefit of the statute. *Stewart* v. *Murphy*, 16 Q. B. 224.

Quære, per Robinson, C.J., whether when the crown grants lands of which another is in possession and continues in possession twenty years, the grantee who has never been in possession is barred. *Hill* v. *McKinnon*, 16 Q. B. 216.

In ejectment for land in the township of Mono, the plaintiff claimed under a deed from M., the patentee of the crown; the defendant by adverse possession. M. had conveyed to the plaintiff in 1873, being then eighty-four years old. It appeared that in January, 1835, one H., describing himself as attorney to M., and asserting himself to be fully empowered by M. to locate and settle 100 acres to which M. was entitled for militia services, petitioned that the location might be made in the township of Mono or Caledon. In March, 1835, a location ticket was issued in the name of M., for the land in question, but stating that no patent should issue until a resident settler had been established on the lot, who should occupy and improve the same within six months from the date of the ticket; and in December, 1835, a patent issued to M.—M., who was examined as a witness, swore that he never knew H. or gave him any authority, and that he knew nothing of the lot, until the plaintiff applied to him for a conveyance:—Held, that there was evidence for the jury that M., by himself or his agents, had entered upon the land after the issuing of the patent, or was aware that it had been so entered upon, and that evidence should have been received of the acts and statements of H. relative to clearing the land, so as to enable the statute to run; and as this evidence was withdrawn from the jury, and the only question submitted was as to the identity of the patentee with the plaintiff's grantor, a new trial was therefore granted. On appeal, the judgment was upheld. *Armstrong* v. *Stewart*, 25 C. P. 198.

See *Young* v. *Elliott*, 23 Q. B. 420, p. 2123.

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6. *Tenant in Tail.*

Before the passing of the act respecting the assurance of estates tail, a tenant in tail executed a deed purporting to convey the property in fee, and gave up possession to the purchaser:—Held, that the statute did not begin to run until the death of the grantor. *Re Sharer*, 3 Chy. Chamb. 379.—Mowat.

7. *Tenants in Common.*

W. S., by will, devised to his wife, R. S., the one-third of lot two, that is to say, the part on which the orchard stands, during her life; and to his three youngest sons, A., J., and U., the whole of the said lot two, to be equally divided between them, after the decease of their mother. The plaintiff claimed one undivided third of the whole, as eldest brother and heir-at-law of U.:—Held, that the right of entry of U. to the two-thirds, upon which there was no estate for life created, and of those claiming under him, accrued upon his majority, and twenty years' possession by defendants had barred that right; and therefore that the plaintiff could only succeed as to the undivided one-third of the orchard or centre third. *Shaw* v. *Shaw*, 8 C. P. 270.

A. devised lands to his 39 grand-children, as tenants in common. A division took place by mutual understanding, there being no written conveyances, and each party took possession of a certain piece of land. The portion taken by the grand-child through whom defendant claimed, afterwards turned out not to belong to the testator, and in lieu thereof he took a certain other lot, which for some reason had not been allotted to any of the devisees. This action was commenced 25 years after he or those claiming under him had taken possession, by one of the 39 grand-children:—Held, that the plaintiff was barred. Held, also, that the party through whom the defendant claimed, being one of several tenants in common of the whole lot, possession of part must be considered as possession of the whole, and the case did not therefore come within the decision of Doe d. Hill *v.* Gander, 1 Q. B. 3. *Meyers* v. *Doyle et al.*, 9 C. P. 371.

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8. *Landlord and Tenant.*

Where a landlord places a tenant in possession of lot one, and the tenant knowingly encroaches on lot two:—Held that the tenant's occupation does not enure to create for the landlord a title to two. *Doe* d. *Smyth* v. *Leavens*, 3 Q. B. 411.

Held, following Doe d. Davy *v.* Oxenham, 7 M. & W. 131, that where, in the case of a lease for twenty years, the lessor permits the lessee to continue during the term without payment of rent, the statute does not begin to run against the lessor and those claiming under him until the determination of the lease. *Liney* v. *Rose*, 17 C. P. 186.

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9. *Tenant at Will.*

Held, that where A. commenced his possession by the permission of B., and upon a contract to purchase, B. must be held as in the actual possession of the land, through his tenant at will A., and as being dispossessed at the end of the first year's tenancy; and that therefore the 17th section of 4 Will. IV. c. 1, would apply so as to bring B. within its operation. *Doe* d. *Perry et al.* v. *Henderson*, 3 Q. B. 486.

One L., in 1822, obtained a patent for a lot on which he had previously lived for several years; but before the patent issued he had removed to another part of the country. After his removal one M. made some agreement with him to purchase the lot, and lived on it till 1823, when died. M.'s wife, soon after his death, dispo of the place, or her right in it, to W., defend father, who occupied the adjoining lot. It not appear that M. ever had any interest bey an agreement to purchase, or what were the ditions of his agreement, or what his wife ceived from W., or that she gave him a writ of any sort. W. built a house on the lot, wh was occupied by himself, his widow and sons, succession, until 1825, after which it remain vacant. The defendant lived on the lot adj ing, and there was conflicting testimony as to nature of the possession held, and the acts ownership exercised by him, over the land question, up to this action. The above facts w relied on as entitling him under the Statute Limitations. The plaintiff proved that in 18 L. conveyed to S., her husband, under wh she claimed as devisee: that S. had gone tw expressly to see the land, in 1830 and 1832, each occasion taking with him persons to wh he proposed to sell: that on the first visit th saw the defendant, who made no objection wh told by S. he had come to take possession, a that he was going to sell the property; and th on the second visit defendant agreed to purch the land from S., but afterwards failed in t payments which he had promised to make Held, that the tenancy by defendant up to 18 could be considered only as a tenancy at will, the widow of M., under whom he claimed, con for all that appeared, have given no better righ and that the entry in 1830 was sufficient to d termine the will; that the defendant's agreeme to purchase in 1832 constituted a new tenancy will, and the statute began to run at the expir tion of a year from that time. *Doe* d. *Shephe* v. *Bayley*, 10 Q. B. 310.

A. entered into possession in 1833, and in 18 agreed to purchase from B., the owner, the p chase money being payable by instalments wi interest, the last of which would fall due in 18 when a deed was to be given. Nothing was s in the agreement about possession or the rig to it, and A. continued to hold for more th 20 years without making any payment:—He that A. was only tenant at will; that the w determined at the expiration of the year fr the execution of the agreement; and that bringing ejectment in 1857 was barred. *Jo* v. *Cleaveland*, 16 Q. B. 9.

B. entered with the consent of the owner, a the evidence shewed possession in B. and successors for 21 years from B.'s entry:—He that the statute began to run at the expirat of a year, and the plaintiff, claiming under owner, was barred. *McLaren* v. *Morphy*, 19 B. 609.

In ejectment, defendant claimed under a d from one C. The land had been granted to A married woman, and C. proved that in 1825 got a deed, since lost, from her and her husba on which was endorsed a certificate of A.'s amination and acknowledgment by two ma trates, both dead, before whom he took her that purpose. He bought out the interest one K., who was in possession under an agr ment to purchase from A. and her husband, he paid the balance due to them by K., fr whom he received possession. A. and her husb having died within the last five years, their h

brought ejectment :—Held, that the plaintiffs were not barred by the statute, for that C., under the circumstances, entered as a purchaser from A. and her husband ; that their deed to him being void, he held as tenant at will ; and the statute did not begin to run for a year, since which forty years had not elapsed. Quære, as to the effect of the statute if K. had been merely a trespasser, and C. had obtained possession from him, getting nothing from A. but a void deed. *Amey et al.* v. *Card et al.*, 25 Q. B. 501.

On the 9th January, 1844, one W. took possession of the land in question under an indenture of lease for four years, executed by C., the owner, under power of attorney, at the rent of £15 a year. This instrument also contained the right to purchase for £250, £50 to be paid on the execution of the instrument, and the balance in four instalments of £50 each, on the 9th of January in each year, the first payment to be made on the 9th of January, 1845 ; and if the purchase were carried out, in lieu of the rent reserved a sum equal to six per cent. on the original purchase money should be paid. W. made the first payment of £50 at the time of executing this instrument, and deposited £50 in the bank to meet the second, but the person in whom the legal estate was vested having died it was not paid, and nothing more was done. W. remained in possession until his death in 1850, when he was succeeded by his son, to whom it appeared he had previously sold, and the son conveyed to the defendants, who entered and had been in possession ever since :—Held, that H., the plaintiff, claiming under C.'s will, was barred by the statute. Held, also, that the fact of the son shewing to the defendants when he sold to them a letter written by C.'s attorney at the time of his father's purchase to the person then in charge of the land, to deliver possession to his father, did not create a new tenancy at will between the defendants and C. Held, also, that the execution of a deed in 1862 by W.'s heir-at-law to one R., who in 1869 conveyed to the plaintiff, did not defeat the defendants' title, as they were in possession not in privity with him. *Cahuac* v. *Scott, Cahuac* v. *Erle*, 22 C. P. 551.

In ejectment it appeared that in March, 1859, the plaintiff told his son, then over 22 years of age, and married, and who had up to that time lived with and assisted the father, to go and live on a certain fifty acres of the lot, the land in question, which had been previously measured off and was wild, and make a living there. The son accordingly entered into possession, cleared nearly all, erected two dwelling houses and a barn, &c., on it, expending some $500 of his wife's money in so doing, and had lived on it ever since, the land being assessed in his name and the taxes paid by him ; without any demand of possession ever having been made by the father, or any claim for rent until about a week previous to 1st July, 1876, when the son refused to pay anything, claiming the land as his own. The father stated that he intended it to be the son's after his death, though he did not so inform him; while the son stated that he entered under the expectation and belief that it was to be his and would not otherwise have done so. It also appeared that in February, 1865, the son, wishing to raise some money on the land, procured the father to execute a mortgage on it for $550, for his, the son's, benefit, he receiving the amount and undertaking to pay it off, which he did, together with the yearly interest as it accrued due, and on the 30th January, 1871, the mortgage was discharged. There was no evidence of any communication between the son and the mortgagee. In September, 1876, this action was commenced :—Held, the case having been tried without a jury, that, as a matter of law, the son became upon entry tenant at will to his father, so that the statute began to run in a year from that time ; that, as a matter of fact, when the mortgage was executed, neither father nor son intended thereby to make any change in the nature of the son's possession, or to create any new tenancy, for which there was no necessity in the interest of the mortgagee : that the existing tenancy at will therefore was not thereby determined, nor any new tenancy at will created ; that even if it had been so created, the statute would have begun to run again in February, 1866 ; and that the plaintiff therefore suing after ten years was barred, under the 38 Vict. c. 16, O. Foster *v.* Emerson, 5 Chy. 135, contra, commented upon, and not followed. *Keffer* v. *Keffer*, 27 C. P. 257.

See *Doe* d. *Kingsbury* v. *Stewart*, 5 Q. B. 108, p. 2124 ; *Williams* v. *McDonald*, 33 Q. B. 423, p. 2143 ; *Rumrell* v. *Henderson*, 22 C. P. 180, p. 2133 ; *McNish* v. *Munro*, 25 C. P. 290, 2139.

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10. *Mortgagor and Mortgagee.*

When the mortgagor is in possession, a mortgage may be presumed satisfied after twenty years from the payment of the mortgage money. *Doe* d. *McGregor* v. *Hawke*, *Doe* d. *McGregor* v. *Crow*, 5 O. S. 496.

Under the old Statute of Limitations, 21 Jac. I., the possession of the mortgagor, when not adverse, would not bar the mortgagee. *Doe.* d. *Dunlop* v. *McNab*, 5 Q. B. 289.

When interest on a mortgage has not been paid, and the mortgagee has never entered, it will be presumed that the money has been paid at the day, and consequently that the mortgagee has no subsisting title. *Ib.*

Where a mortgagee has neither taken possession of the land after default, nor received interest within twenty years, the title is in the mortgagor, and the mortgagee in ejectment against a third party may be nonsuited. *Doe* d. *McLean et al.*, v. *Fish et al.*, 5 Q. B. 295.

Where there is no re-demise to the mortgagor until default, and the land is vacant at the execution of the mortgage :—Semble, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment after twenty years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account. A. Wilson, J., diss. The mere fact that the mortgagee is barred by the statute of his remedy on the covenant for the money will not establish a payment so as to re-convey the legal title to the mortgagor. *Mahar* v. *Fraser et al.*, 17 C. P. 408.

A mortgagee having obtained possession by ejectment has a good title after twenty years, notwithstanding that during these years an administration order of the person, not being the

mortgagor, entitled to the equity of redemption, had been obtained. *Crooks* v. *Watkins*, 8 Chy. 340.

A suit of foreclosure or for the sale of mortgaged premises in default of payment, is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon the land within sec. 24 of C. S. U. C. c. 88. *Barwick* v. *Barwick*, 21 Chy. 39.

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11. *Servant or Caretaker.*

Semble: that if defendant can be shewn to have been occupying the land as the servant of the owner during the twenty years, and not for his own use or benefit, the statute will not run. *Doe* d. *Perry et al.* v. *Henderson*, 3 Q. B. 486.

See, also, *Doe* d. *Quinsey* v. *Caniffe*, 5 Q. B. 602, p. infra; *Doe* d. *Silverthorn* v. *Teal*, 7 Q. B. 370, p. 2132; *Heyland* v. *Scott*, 19 C. P. 165, p. 2136.

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12. *Adverse Possession.*

Where a line had been agreed on by the proprietors of adjoining lots, by which they agreed "to abide as long as we live, and if our children find it wrong they may correct it:"—Held, that this was a permissive occupation, and could not be considered as an adverse holding. *Doe* d. *Murray* v. *Mathews*, 6 O. S. 461.

Quære, as to the effect of the statute when the twenty years' possession has not been adverse, but with the consent of the plaintiff, as an act of kindness on his part, though paying no rent, and acknowledging no title. *Doe* d. *Smyth* v. *Leavens*, 3 Q. B. 411.

A., the owner, agreed to sell to B., who went into possession and failed in making his payments. A. then conveyed to C. in B.'s presence, who said that he would at once leave the place. B. nevertheless continued in possession for more than twenty years, paying C. no rent, and making no acknowledgment of C.'s title:—Held, that B.'s possession gave him the legal title. *Doe* d. *Ausman* v. *Minthorne*, 3 Q. B. 423.

Where A. has been twenty years in possession, paying no rent, and signing no written acknowledgment of title in another, such possession, whether it originate adversely to the claims of the true owner, B., or with his permission, operates under the statute to extinguish the title of B. and vest the title in A. *Doe* d. *Perry et al.* v. *Henderson*, 3 Q. B. 486.

Where a son has been allowed by his father to remain in possession for twenty years, and it cannot be shewn that he was there as the servant or agent of his father, or has paid rent within the twenty years, or acknowledged the father's title in writing, the father will lose his title, no matter what the verbal tacit understanding of both parties as to the real ownership might have been. *Doe* d. *Quinsey* v. *Caniffe*, 5 Q. B. 602.

One A. F. being the owner of a full lot of 200 acres, in 1823, conveyed the west half to his son I, in fee, who went into possession. In 1827 or 1828, I. removed, and died out of the actual possession in January, 1829 or 1830, leaving a son R., born in 1824. After I.'s removal, A. F. took possession. On the death of I., A. F. brought I.'s son, R., to live with him on the land, where he continued to reside till A. F.'s death
In March, 1839, A. F. made a conveyan
west half to another son of his, N. P. F
who died in possession in March, 1831,
the same to his son J. F., one of the def
The mother of J. F. married one L.,
tinued to reside on the lot with her hus
1848 or 1849. After A. F.'s death, the d
was found among his papers with the se
off. In 1847, R., the son of I., brough
ment against L. and wife for this w
which suit was compromised by R. agr
convey in fee to J. F., the son of N. P.
west half of the said west half, and b
behalf of J. F., agreeing that J. F. shoul
coming of age, convey in fee to R. the
of said west half of the lot. R. conveyed
tion to J. F., but J. F. never conveyed t
east half of west half, the subject of this
In 1847, after this settlement, R. conv
portion in question to one D. R., throug
the plaintiffs claimed, while L. and wife
possession of the lot:—Held, 1. That th
of A. F.'s possession was for the jury t
mine; 2. That while R. was living wit
on the land, he could not be treated a
possession. A verdict for the plaintiff
held. *Fraser et al.* v. *Fraser et al.*, 14 C

The owner of land put his father in po
in 1847, under a parol agreement that th
should clear up and cultivate the land
to his benefit the profit thereof. The fa
mained in undisturbed possession until h
in 1870:—Held, that the father had obt
title by length of possession, and a bill
obtain the delivery up of certain deeds e
between the father and another son, w
missed with costs. *Truesdell* v. *Cook*, 18 C

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13. *Exclusive Possession—Possession by o
Relatives.*

In 1822, A., a maniac, conveyed land
who then entered into possession. A.
1826. C., his eldest son and heir, becam
in 1829. He died in 1829, and his brot
heir, D., the lessor of the plaintiff, becam
in 1831, and brought his ejectment agains
the ground that his father was non co
the time of his executing the deed in 18
brought his action more than ten years a
lunatic died, and after he himself came
and more than five years after 4 Will. IV.
Held, that D., under these facts, was
and, Held, also, that B. could not be con
in possession as the servant or bailiff of th
tic. *Doe* d. *Silverthorn* v. *Teal*, 7 Q. B.

The patentee of land devised it to his w
life, and afterwards to one of his sons in f
the will was void. The widow, nevert
lived upon the land with her children, cl
a life estate. Her eldest son remained wi
for some years and removed, leaving the
dants, (two younger brothers) who con
until her death (more than twenty years)
them managing the farm during seven y
the time:—Held, that their possession w
such as to give them the title against their
brother, the heir-at-law. *McArthur et*
McArthur et al., 14 Q. B. 544.

In ejectment, it appeared that the mot
defendant, owning the land, lived upon it

ed to reside till A. F.'s death in 1841.
1839, A. F. made a conveyance of the
o another son of his, N. P. F., in fee,
n possession in March, 1831, devising
o his son J. F., one of the defendants.
er of J. F. married one L., and con-
reside on the lot with her husband till
49. After A. F.'s death, the deed to I.
among his papers with the seals torn
47, R., the son of I., brought eject-
nst L. and wife for this west half,
was compromised by R. agreeing to
fee to J. F., the son of N. P. F., the
of the said west half, and by L., on
. F., agreeing that J. F. should, on his
age, convey in fee to R. the east half
t half of the lot, R. conveyed the por-
F., but J. F. never conveyed to R. the
f west half, the subject of this action.
fter this settlement, R. conveyed the
question to one D. R., through whom
ffs claimed, while L. and wife were in
of the lot :—Held, 1. That the nature
possession was for the jury to deter-
That while R. was living with A. F.
d, he could not be treated as out of
. A verdict for the plaintiff was up-
ser et al. v. *Fraser et al.*, 14 C. P. 70.

er of land put his father in possession
der a parol agreement that the father
ar up and cultivate the land, taking
efit the profit thereof. The father re-
undisturbed possession until his death.
-Held, that the father had obtained
ngth of possession, and a bill filed to
delivery up of certain deeds executed
he father and another son, was dis-
h costs. *Truesdell* v. *Cook*, 18 Chy. 592.

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ive Possession—Possession by or among Relatives.

A., a maniac, conveyed land to B.
entered into possession. A. died
his eldest son and heir, became of ag
He died in 1829, and his brother an
ne lessor of the plaintiff, became of ag
d brought his ejectment against B.,
l that his father was non compos
f his executing the deed in 1822.
s action more than ten years after t
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han five years after 4 Will. IV. c. 1
D., under these facts, was barre
also, that B. could not be consider
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o younger brothers) who contin
death (more than twenty years) on
aging the farm during seven year
—Held, that their possession was
give them the title against their
he heir-at-law. *McArthur et al.*
et al., 14 Q. B. 544.

ment, it appeared that the mothe
owning the land, lived upon it

er death in 1854. Defendant, the eldest son, and four other children, then lived with her, and there were four others, making nine, entitled to inherit. In 1858 the defendant conveyed one-ninth to his brother-in-law, who conveyed to the plaintiff, and the plaintiff's title to this was admitted; but the defendant claimed the remaining eight-ninths by possession. He swore that when he came of age in 1846, his mother verbally gave him the land, and promised to deed it to him, and that he had been assessed for it ever since; but she had lived on it with him until her death, which was within twenty years :—Held, that defendant had no possession as against the mother during her life, and that he therefore must fail. *Orr* v. *Orr*, 31 Q. B. 13.

In ejectment, it appeared that a son of plaintiff's ancestor had, some three years before the latter's death in 1850, at his instance, moved on to the land in question, for the purpose of working it for him. No rent appeared to have been ever paid by the son :—Held, that there was nothing in this evidence to shew a tenancy at will between father and son, and that the Statute of Limitations did not therefore begin to run against the father during his lifetime; and, consequently, that the plaintiffs, his grand-children, who were then infants, and claimed under the eldest son, were not affected by it. *Rumrell et al.* v. *Henderson et al.*, 22 C. P. 180.

A father being desirous of assisting his sons, put them in possession of portions of his real estate, and frequently expressed his determination to convey such portions to the sons. During the continuance of such possession, however, the father was frequently on the premises assisting with his advice and directing the actions of his sons in improving the property, and conveyed an acre to one of the sons, and subsequently sold a valuable portion of the premises occupied by the same son. By his will, the father devised his lands to be divided between all his children :—Held, that the sons had not, under the circumstances, acquired a title under the statute. *Keffer* v. *Emerson*, 5 Chy. 135. See, however, *Keffer* v. *Keffer*, 27 C. P. 257.

Defendant's mother was in possession of a farm at the time of her second marriage, and defendant, her son by a former marriage and a minor, lived with her. On the death of her second husband, the defendant, who had just become of age, continued with his mother on the farm and managed it :—Held, that he could not claim the farm against a person to whom the mother subsequently mortgaged it. *White* v. *Haight*, 11 Chy. 420.

Defendant's father had for sixteen years been in possession of land, to which he had no title, legal, or equitable, and the legal owner then conveyed it to defendant, a youth about twelve years old, who was living on the lot with his father, and continued to do so for eleven years thereafter, when the property was sold on an execution against the father :—Held, that the possession, after the execution of the deed, was the possession of the son: that the father acquired no title thereby against the son; and that the sheriff's deed was void against the son, and could be set aside as a cloud on his title. *McKinnon* v. *McDonald*, 11 Chy. 432.

The owner of real estate, held under a registered title, devised a portion thereof—his homestead—to his wife in fee, but the will, although known to all the members of the family, never was registered. At the death of the testator (1831) the eldest son and heir-at-law was residing on a farm of seventy-five acres, which his father had conveyed to him, with one of his brothers, but after the death of his father he went with his wife and children, and his brother, to reside on the homestead with his mother; and some years afterwards, by arrangement among some of the members of the family, he conveyed the farm of seventy-five acres to the brother, who thereupon took possession of and occupied it; but the heir-at-law continued on the homestead until his mother's death, which occurred twenty-four years after the death of the testator, during all which time he acted as apparent owner of the homestead, building on and improving it; the taxes therefor being assessed in his name, and he voting at elections upon it. About eight years after the death of his mother, and in the year 1862, the heir-at-law, who continued to occupy the homestead, created a mortgage thereon, which was duly registered, in favour of a person who was ignorant of the existence of the will. On a bill filed to enforce the mortgage :—Held, that, under the circumstances, the possession must be treated as that of the heir-at-law; that his brothers and sisters could not, as against a bonâ fide purchaser or mortgagee, allege the possession to have been that of the widow, and thereby set up a title under the statute; and that as against such purchaser or mortgagee the will, under the registry laws, must be treated as fraudulent and void. *Stephens* v. *Simpson*, 12 Chy. 493; affirmed on appeal, A. Wilson, J., diss., 15 Chy. 594.

The son of an intestate and his wife having been in undisturbed possession of land of the intestate long enough to give title to one or the other; and it appearing that it was farmed and improved by the husband, and assessed in his name: that the claim of the wife thereto had not been set up until after her husband had fallen into difficulties, and that such claim rested only upon the statement of the intestate, made after the title had ripened in some one, that he had, in his waggon, conveyed the wife of his son to the land, while the son was absent, and left her in possession :—Held, that the possession was that of the son; and that his title vested in his assignee in insolvency. *Filman* v. *Filman*, 15 Chy. 643.

Two brothers, tenants in common in fee, maintained their father with them on the property. One of the brothers died intestate leaving his father his heir; the father continued to live with the surviving brother on the property, and to be maintained by him; the father did not affect to be the owner of the property :—Held, that this living on the property was sufficient to prevent the statute from running against the father, as respected his undivided moiety. *Holmes* v. *Holmes*, 17 Chy. 610.

See, also, *Fraser et al.* v. *Fraser et al.* 14 C. P. 70, p. 2132.

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14. *Actual and Constructive Possession.*

(a) *Wild Land.*

To enable the statute to operate in bar of the true title, there must be an actual occupation, to

the exclusion of the real owner. Where, therefore, a party having permission given him to occupy the west half of the lot, did confine himself, so far as residence and cultivation went, to that half, and only committed depredations on the other half :—Held, that he could not be considered as having exclusive possession of both halves. *Doe* d. *McDowell* v. *Rattray*, 7 Q. B. 321.

Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot. It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing, and cultivating, has been limited to a portion; and—Held, that in this case there was evidence legally sufficient to warrant such inference. *Dundas* v. *Johnston*, 24 Q. B. 547.

Semble, that a squatter will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not merely desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession. *Ib.*

Where a person having in fact no title has occupied part of a lot of land for twenty years, and other parts for a less period, he is entitled only to the first mentioned portion as against the true owner; and it can make no difference that he acted under a belief of title honestly entertained. *Young* v. *Elliott*, 25 Q. B. 330. See also *Wishart* v. *Cook* 15 Chy. 237; *Low* v. *Morrison*, 14 Chy. 192.

Where a bonâ fide purchaser claims a whole lot, of which a portion is cleared, under a title which turns out to be defective, and while cultivating such portion treats the wild and uncultivated part as owners under such circumstances usually do, there is evidence to go to a jury to sustain his title by possession to the whole. In this case the grantee of the crown died in 1838, having by his will devised to his wife his personal property only. Supposing that it passed the real estate also, she registered the will, leased this land, one hundred acres, and received the rents until 1843, when she sold it, for its full value, to one L., who sold to defendant in the following year, there being then about thirty-five acres cleared. Defendant took possession on his purchase, built a house, and had occupied it ever since, having cleared about twenty acres more. The heir-at-law of the patentee, who was six years old when his father died, brought ejectment in 1868, so that the statute had clearly run against him as to all of which there had been possession. The jury found that defendant had held possession of the whole one hundred acres for more than twenty years :—Held, that such verdict was warranted, and that the plaintiff could not recover. Per Morrison, J.—Payment of taxes on the whole is an important fact in such a case. *Davis* v. *Henderson*, 29 Q. B. 344. See *Wigle* v. *Merrick*, 8 C. P. 325, per Richards, J.

The possession for twenty years of part of a lot of land by a caretaker, expressly employed to protect the whole, on behalf of one cl such whole, and which is accordingly so ted from all other intruders, may be a su possession of the whole to establish a title the statute, and such possession will not fined to the part actually enclosed and occ *Heyland* v. *Scott*, 19 C. P. 165.

The principle laid down in the last ca in Davies *v.* Henderson, 29 Q. B. 344, as exercise of acts of ownership over wild sufficient to establish a possession under t tutes of Limitation, recognized and acted and, Held, that the evidence, set out in the of this case, was sufficient to shew a title session to the south half of the lot, though twenty-five acres only had been actually occ *Mulholland* v. *Conklin*, 22 C. P. 372.

Where a vendee takes possession knowledge and concurrence of the v pays his purchase money, he is to be reg as in possession of the whole lot, and not i of such part of it as he may actually occup improve; and after twenty years' possessi him and his successors, the title of the v will be extinguished. *McKinnon* v. *McD* 13 Chy. 152.

To prove title by possession the plaintiff sh that a person under whom he claimed had early date cleared part of the lot in que but there being no evidence that he did so any claim of right, it was held that such cl was not constructively a possession of the the lot. *McMaster* v. *Morrison*, 14 Chy.

(b) *Mistake in Boundaries.*

Were A. had improved on the front lot, and put up a division fence betwee and his neighbour, so far as his imp extended, which fence was found upo survey to enclose part of the adjacent Held, that though the statute might ha owner of the adjacent lot from regaining po sion of the portion of his lot which he ha fered his neighbour to enclose for more twenty years, yet that would not affec right to any other portion of his land actually enclosed, as he could not be held constructively dispossessed of that portion lot which the erroneous fence, if protra would embrace. *Doe* d. *Beckett* v. *Nightin* 5 Q. B. 518.

Although a man by erecting and maintai for twenty years a fence between his and adjoining lot may acquire a right to hold ther notwithstanding such fence does not stan the true line of division according to the ori survey, and may after twenty years of occupation successfully resist an action of e ment brought by the owner of the adjoin ing to recover the encroachment, yet such encro ment will not be extended by any applicatio constructive possession beyond the limits fe in, nor give the right to insist on the cour that fence as establishing the course of the of division between the lots further than fence has been maintained for twenty ye Twenty years' mutual acquiescence in a b dary line, although differing from that set o the original survey, is binding upon the ow of adjoining lots, especially if upon this ass

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and which is accordingly so protec-
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right, it was held that such clearing
structively a possession of the rest
v. *Master* v. *Morrison*, 14 Chy. 138.

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b) *Mistake in Boundaries.*

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boundary each owner have his full complement of land. The principles laid down in the last case, and in Dennison *v.* Chew, 5 O. S. 161, affirmed. *Bell* v. *Howard*, 6 C. P. 292. See also *Doe* d. *Hill* v. *Gaunder*, 1 Q. B. 3; *Wideman* v. *Read*, 7 C. P. 134.

If two parties owning respective halves of a lot agree to a division line which is not the true boundary, possession by one party of a portion of land according to such line for twenty years, will not give him any right by constructive possession to the whole as if this line were carried out. *Ferrier* v. *Moodie*, 12 Q. B. 379.

(c) *Other Cases.*

Seizin in fee cannot be presumed from a mere constructive possession but from an actual visible possession only. *Doe* d. *Morgan* v. *Simpson*, 5 O. S. 335.

Where several lots of land are mortgaged, and the mortgagor and his heir remain in possession of some of them for more than twenty years, so as to bar under our statute, 4 Will. IV., the mortgagee's title:—Held, that the mortgagor's title by possession is not, like that of a mere trespasser, confined to the land which he actually occupies, but covers the whole land included in the mortgage, as well the lot upon which the mortgagor lives as the other unoccupied lots. *Doe* d. *Dunlop* v. *McNab*, 5 Q. B. 289.

Per Burns, J. Discontinuance may be of a constructive as well as of an actual possession, and in this case there was evidence to go the jury and whether the plaintiff had not discontinued the constructive possession which he acquired by consent on the death of the patentee. *Pringle* v. *Allan et al.*, 18 Q. B. 575.

See, also, *Moffatt* v. *Walker*, 15 Chy. 155, p. 170.

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15. *Disputed or Mistaken Boundaries.*

The operation of the Statute of Limitations is not suspended by the Survey Act 59 Geo. III. c. 14. Where twenty years' possession has followed a division of adjacent lots, ejectment will not lie, although the division may have been inaccurate. *Doe* d. *Stewart* v. *Radich*, Tay. 9.

A and B. having received grants from the Crown for adjoining lots, A. inadvertently occupied a portion of B.'s lot, believing it to be his own. Some years after, B.'s lot was confiscated under the Alien Act, 54 Geo. III. c. 9, and sold under 59 Geo. III. c. 12. A., and those claiming under him, had held the disputed tract for upwards of twenty years at the time of action brought, but not at the time B.'s estate was confiscated, and the crown became seized by inquest of office:—Held, that A.'s occupation did not work a dissesin of B.; that B. continued seized as to entitle the crown to that portion of the lot in A.'s possession; and that the barring of the crown commissioners could maintain ejectment against the occupiers thereof. *Doe* d. *Howard* v. *McDonnell*, Dra. 374.

Twenty years' possession, according to a certain boundary line will bar an ejectment brought to disturb such boundary, unless a new survey can be made strictly in accordance with the 59 Geo. III. c. 14. *Doe* d. *Morgan* v. *Simpson*, T. T. 1 & 2 Vict.

Where parties run the side lines between their respective lots, and possess the land on either side, according to such side lines, for twenty years and upwards, such possession is confirmed by the Statute of Limitations, although on a survey made according to the statute of 1818, it may turn out that the lines run in the first instance, and according to which the possession has been held, are erroneous. Robinson, C. J., diss. *Dennison* v. *Chew*, 5 O. S. 161.

A patent was granted to A. of part of lot four, and to B. of part of lot five. More than forty years before action a division fence had been put up on the then supposed boundary line between the lots, according to which the proprietors had ever since respectively occupied. C. (the defendant) holding under B., claimed a part of lot four, not as embraced in the patent, but as being actually possessed by him and others before him in the title of B. as part of lot five, and so considered, both by the proprietors of four and five, until very recently. D., (the lessor of the plaintiff) claiming under A.'s patent, brought ejectment against C. to recover part of lot four, notwithstanding C.'s possession of such part for more than forty years; but—Held, that whatever might have been the effect before 4 Will. IV. c. 1, of possession held under a mistake of boundary, since that act the statute commenced to run against A. from the time of B.'s possession of the land under the old division line, and therefore the plaintiff was barred. *Doe* d. *Dunlop* v. *Servos*, 5 Q. B. 284.

A possession inadvertently held under an erroneous impression as to boundary, with no intention of claiming the land otherwise than as it was supposed to form part of a certain lot covered by the party's deed, would by mere lapse of time ripen into a title. *Doe* d. *Taylor* v. *Sexton*, 8 Q. B. 264.

The fact that both plaintiff and defendant were under a common error as to the true boundary of their lands will not prevent the statute from running against the true line, though it would be otherwise if it had been agreed upon between them that a certain line should govern whether correct or not. *Martin* v. *Weld*, 19 Q. B. 631.

In 1847, by a fence intended as a division fence between lots 26 and 25 in the township of Southwold, the land claimed in this action as part of 25 was included with 26, and was occupied by M., the owner of 26, as part of his lot, until 1854, when the error was discovered by a survey. M. assented to the line as then run, and was to have moved his fence, but he continued to occupy until 1856, when he conveyed to the defendant, who entered into possession and occupied up to the fence as M. had done. The deed purported to convey the south half of lot 26, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining, or therewith demised, held, and occupied or enjoyed, or taken or known as part and parcel thereof. By deeds made in 1865 and 1874 M. conveyed all his estate and interest in lot 25. In 1875, the plaintiffs, claiming under these conveyances, brought ejectment against the defendant for the part of 25 which had been enclosed with

26, as above stated, contending that M., notwithstanding the deed of 1856 and the delivering up of possession to the defendant, still retained a right of entry, either because the defendant was his tenant at will and so estopped from denying his title, or by virtue of his prior possession:—Held, in the Common Pleas, that whatever interest M. had in the land in question, whether it was part of 26 or of 25, passed to the defendant under the deed to him of lot 26, together with the appurtenances, &c., therewith occupied, &c. Held, on appeal, that no part of 26 passed by M.'s deed to defendant, but—Held, that the plaintiff could not recover, for the defendant, when he took possession, did not enter as acknowledging any remaining right in M., and therefore, not being tenant at will to M. of this piece, or estopped from denying M.'s title, he had acquired title as against the plaintiffs under the statute. *McNish et al.* v. *Munro*, 25 C. P. 290.

In ejectment the plaintiff claimed, under a deed from her father, a piece of land constituting part of the defendants' lot, which the father claimed to have acquired by length of possession. For the defence P., one of the defendants, stated, that on a survey being made some 17 years previously, and during the time the statute was claimed to have run, it was found that the boundary line between the plaintiff's father's lot and the defendants', which adjoined each other, was erroneous, and that each was in possession of a portion of the other's land; and that it was then agreed between the plaintiff's father, who died some two years afterwards, and defendant, that they should exchange the said portions, which was accordingly done, but without any deed or writing between them: that each took possession of their pieces, but without removing the fence which divided their lots: that on the defendant's piece, being the land in question, he erected a log-house, and had been in possession ever since, taking the crops off it. The plaintiff herself admitted an exchange at the time stated, in consequence of the parties being so found in the possession of each other's lands and of defendant going into possession and taking the hay; and also, that on the fence being subsequently blown down, she did not erect it on the same place as before, but on the true line. The plaintiff's sister also stated, though not quite certain, that she remembered that the exchange took place:—Held, that this was sufficient evidence in corroboration under 36 Vict. c. 10, s. 6, O., to render the defendant's evidence admissible. Held, also, that under the circumstances the plaintiff could not set up the fact of the exchange not having been by deed. *Findley* v. *Pedan et al.*, 26 C. P. 483.

The plaintiff owned lot 28 and the defendant lot 27, in the third concession of Hamilton, between which there was no road allowance, and the plaintiff, previous to the survey of that concession, made under 29 Vict. c. 72, had occupied the land in question for more than twenty years. By this survey, it belonged to lot 27:—Held, Morrison, J., diss., that the effect of such survey was to fix conclusively the division line between the lots; but, Held, also, that the plaintiff's title by possession was not taken away by it. *Taylor* v. *Croft*, 30 Q. B. 573.

The plaintiff and defendant, adjoining proprietors, on lots 18 and 17 respectively those through whom they claimed, had occ up to 1867, according to a fence, which ha the boundary between them for thirty yea that year a survey was made, by which th was placed further to the east. F., th whom the plaintiff claimed, then owned north of the plaintiff in lot 18, and o through whom the defendant claimed, the land opposite to them in lot 17. In F. moved his fence on to the new line said that O., in 1867, told the plaintiff he occupy the strip between the old and th line, and in 1868-9, the plaintiff cut grass strip. O. afterwards sold to one J., who pied up to the old line, and sold to defe The plaintiff, in 1872, moved the fence new line, and defendant immediately repla for which the plaintiff brought trespass:— that he could not recover, for the defendan acquired a title by possession, and O.'s p sion to the plaintiff was at most a mere li which was revoked by his sale to J., and gave the plaintiff possession so as to entitl to maintain trespass. *Cole* v. *Brant*, 35 103.

Between thirty and fifty years ago the o and occupiers respectively of adjoining l and 15, through whom plaintiff and defe claimed, erected and maintained at their charge a boundary line fence between thei and they had respectively been in posse during that period, of the land up to the The plaintiff commenced clearing on the ne rear of his lot, continuing in a southerly tion until within about four chains of th cession line in front, when, to protect the l cleared, he erected a fence across his lot boundary fence, leaving the piece to the up to the concession line open until about s teen years ago, when he put up a fence alon concession line; but he had always maintai roadway from the concession along the l the fence as the means of access to his l By a recent survey defendants claimed tha boundary fence was erroneous and encroach lot 15, and that they were entitled to the of land in question, lying between the ne and boundary fence, and to the south of the first enclosed by plaintiff across his lot:— that the plaintiff had acquired a title by p sion to all the land up to the boundary even though such fence might not be on th line, and encroached on defendants' lot 15 that, under the circumstances, his only h erected the fence along the concession line the last seventeen years was of no import *Elliott* v. *Bulmer et al.*, 27 C. P. 217.

The plaintiff and defendant were owne adjoining lots in the township of Vaughan. Act of the Legislature of Canada (23 V 102), had been passed providing for a new s of the township; and, according to a s made under the provisions of that Act, a st land containing about two acres and three-te occupied by the defendant, it was allege longed to the plaintiff. On that strip there recently been standing nine pine trees, sev which the defendant had cut down. It appe that some years before 1851 a fence from front or easterly side of these lots, for a dis of about 60 or 70 rods, had been put up and then standing on the supposed division line

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tween the two lots; and also another fence running from the rear or westerly side of the lots to a distance of about 25 or 30 rods, leaving a space of about 600 yards in the centre unenclosed; but the parties respectively in occupation of the lots had always used the land on either side of the supposed line as belonging to them, up till about the year 1858, when the father of the plaintiff and the then owner of the defendant's lot procured a survey to be made, and a fence to be erected on the division line then laid out, which was paid for jointly by them, and which corresponded with a line which had been run and blazed by the same surveyor in 1851. The plaintiff, in 1873, filed a bill seeking to restrain the further cutting of timber, and for a declaration that the strip in question was his property:—Held, that there had been a sufficient occupation of the lands on either side of the line for such a length of time as bound the parties under the Statute of Limitations, even if the survey made and fence erected in 1858 were not sufficient acts to compel the parties to abide by that line as the true boundary; Blake, V.C., being of opinion that they were. Spragge, C., dubitante as to the parties being bound under the statute; but, being clear that the matter in dispute was too insignificant to call for the interference of this court by injunction, he concurred in dismissing the bill with costs. Held, also, that the statute of 1860, directing a survey of the township to be made, had not the effect of creating any new right or title, as between parties who had been in undisturbed possession for the statutable period of twenty years before action or suit brought. *Bernard* v. *Gibson*, 21 Chy. 195.

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16. *Continuous Possession.*

In ejectment the plaintiffs proved a paper title, and defendant, the heir-at-law of the patentee, claimed by possession. It appeared that one B. in the spring of 1834 took possession of an acre of the same lot, which he agreed to purchase from one M., through whom the plaintiffs claimed, and built a house on it, in which he lived till 1844. The land in dispute lay between his acre and the river, and he was allowed to occupy and enclose it by the owner, whose title he always acknowledged, though not in writing. He left in 1844, and his house continued vacant for two years, the land in question remaining enclosed as before. The house and acre were then taken by a tenant under B., and occupied for three years together with this land, and after being vacant for three months two other tenants came in succession, and occupied the house until June, 1855, holding this land in the same way as B. and the others had done, when defendant brought ejectment for the house and acre, and having recovered a verdict, took possession of the land in question as well:—Held, that the possession of B. and those succeeding him must be treated as continuous, notwithstanding the breaks in the occupation, and that a verdict was properly found for defendant. *McLaren et al.* v. *Morphy*, 19 Q. B. 99.

In ejectment, defendant claimed by length of possession by herself and ancestor. The evidence as to her possession being continuous was conflicting, and for part of the time it appeared to have been by such acts as keeping the key of the house, and leaving upon the premises one or two trifling articles, with an occasional return to the place. The whole case was left to the jury on the evidence, with a direction from the judge that he could not say there had not been a keeping of possession shewn by defendant. It also appeared that, in any event, the most the defendant could recover would be a very inconsiderable portion of the land in question, and there had been already two verdicts against her. The court refused to protract the litigation by granting a new trial. *Lewis* v. *Kelly*, 17 C. P 250.

In ejectment, where defendants claimed title by possession, and the plaintiff was found to have been out of possession for twenty years, the jury were directed, that to entitle defendants to a verdict they must shew twenty years' continuous possession in themselves, and those under whom they claimed:—Held, a misdirection; for an owner out of possession for twenty years may be barred, though no one of the occupants may have obtained a statutory title. *Kipp* v. *Incorporated Synod of the Diocese of Toronto*, 33 Q. B. 220.

In ejectment it appeared that the patent issued in 1823 to the plaintiff's mother, the daughter of an U. E. loyalist. She died in 1846, and her husband in 1865. Neither of them ever asserted any title, and the plaintiff never heard of the land in the family until about three years ago, when he was informed by a stranger that it was his. The defendants produced the patent, and two deeds executed by one F. in 1828 and 1829, for the north and south halves of the lot, respectively, with a series of conveyances tracing title from F. to the defendants. There was evidence that F. did the settlement duties in 1821 or 1822, and made the affidavit of their performance, and that he lived on the lot for some years, but it seemed doubtful whether in fact possession was taken by any one until one W. entered in 1838. There had, however, been undisputed possession from that time, and the taxes had been paid by the respective occupants. F.'s daughter, who found the patent, proved that some of F.'s papers had been destroyed by her after his death, and some burned during his lifetime, though she thought no deed was among them. The learned judge was against the defendants on the question of possession (forty years possession being required), but left the case to the jury, saying that, under the circumstances, it was competent for them to presume a conveyance from the patentee; and they found for defendants:—Held, that there was some evidence for the jury on both points, and the court refused to interfere. Remarks as to the doctrine of presumption in such cases, and its application under the circumstances of this country. *McLeod* v. *Austin et al.*, 37 Q. B. 443.

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17. *Entry or Claim.*

One G., owning land, allowed a school house to be built upon it in 1840, and a school was kept there until 1851, when a new site was obtained, and the trustees sold the old house. Before doing so, however, they sent for G. to get his consent; and he came to the house, and said the purchaser might live in it until the land was cleared up around it. In ejectment against defendant claiming under the purchaser:—Held,

that there was evidence of an entry by G. in 1851, from which time only possession would run; and that the plaintiff, therefore, was not barred. *Henderson* v. *Harris*, 30 Q. B. 360.

Where one was in possession of the land, claiming as assignee of a bond for a deed, made by the owner in fee, whose estate B. took by devise:—Held, that an entry by B. animo possidendi, and enclosing the land with a field of his own adjoining, caused the statute to cease to run as against B., and that the right of entry of B. and those claiming under him dated from an entry thereafter made by the defendants upon B.'s possession so obtained. *Clements* v. *Martin et al.*, 21 C. P. 512.

Ejectment for three acres and one acre, separate parcels of lot 36 in the 2nd concession of Lochiel. On the 16th of June, 1839, McD., mother of the plaintiff, became owner of the whole lot by conveyance from the grantee of the crown. On the 6th of April, 1847, she conveyed the whole lot to W., her son, by a deed which was to be given to him when he should give security for her support. This he did by bond, and the deed to him was registered on the 20th April, 1857. On the 16th April, 1849, however, she conveyed to the plaintiff, another son, the three-acre parcel, by a deed registered on 2nd October, 1849. On the 10th June, 1851, W. conveyed the one acre parcel to plaintiff. On the 17th May, 1862, W. gave a mortgage on the lot to plaintiff, registered 23rd September, 1862, to secure advances made by plaintiff to pay off a previous mortgage to defendant, which mortgage to plaintiff contained a reservation of four acres already made by deeds of conveyance to the party of the third part (plaintiff) from McD. and W. This mortgage was discharged before this suit was commenced. On the 28th December, 1868, W. conveyed the whole lot to defendant, without any reservation of the three or one acre parcels. W. lived on the lot and used it as owner from the date of the conveyance to him in 1847 till he sold it in 1868. The plaintiff went to the United States in 1849, but came back yearly and stayed on the lot, where his mother also lived with W. In his evidence, W. said he always considered the four acres to be his brother's, and did not hold them adversely, but made no difference in working them:—Held, as to the three acre parcel, that the plaintiff was barred by the Statute of Limitations, notwithstanding his annual visits to the land. Held, also, Wilson, J., diss., that the reservation in the mortgage to the plaintiff by the defendant, dated 17th May, 1862, was not an acknowledgment of the plaintiff's title at that time to the lands so reserved. Held, also, as to the one acre conveyed to plaintiff by W. on 10th June, 1851, that W. being allowed to remain in possession was a tenant at will, which tenancy ended on the 10th June, 1852, and the action having been commenced on the 14th June, 1871, the plaintiff was not barred. Per Wilson, J., taking the words in connection with the transactions between the parties, the one conveying and the other receiving the mortgaged land, the reservation in the mortgage of the 17th May, 1862, was an express and unequivocal declaration in writing that the plaintiff's title to the four acres was valid and subsisting at that time. *Williams* v. *McDonald*, 33 Q. B. 423.

On the 9th of January, 1844, one J. W. took possession of the land in question under an indenture of lease for four years, executed by the owner, under power of attorney, at the of £15 a year. This instrument also conta the right to purchase for £250, £50 to be pai the execution of the instrument, and the bal in four instalments of £50 each, on the 9 January in each year, the first payment made on the 9th of January, 1845; and if chase carried out, in lieu of the rent reserv sum equal to six per cent. on the original chase money should be paid, J. W. made first payment of the £50 at the time of execu this instrument, and deposited £50 in the to meet the second; but the person in whom legal estate was vested having died, it was paid, and nothing more was done. J. W mained in possession until his death in 1 when he was succeeded by his son, to who appeared that he had previously sold, and son conveyed to the defendants, who ente and had been in possession ever since:—H that H., the plaintiff, claiming under C.'s was barred by the statute. Held, also, the execution of a deed in 1862, by J. heir-at-law to one R., who in 1869 conve to the plaintiff, did not defeat the defend title, as they were in possession not in pri with him. *Cahuac* v. *Scott, and Cahuac* v. 22 C. P. 551.

In this case it appeared that over twenty y ago a fence was mutually erected by plai and defendants' father, who then occupied 32, as a line fence along the course of an blazed line, though for what purpose such had been run did not appear. The fence continued to be used as a line fence until 186 when, in consequence of the survey made u the 24 Vict. c. 64, and 25 Vict. c. 38, the pl tiff claimed that the line was incorrect, and procured the surveyor who had made the vey to run the line. The surveyor divi equally the space in the block containing t two lots between the road monuments pla several years previously by himself at the f angles of the side road allowances; but there no evidence to shew how he ascertained the tion of such side roads in making that survey of any search for the original monument. 1865–6, after this new line had been run, plaintiff pulled down a piece of the old fence removed it to the new line, where it rema for two or three days, until put back by the fendants to the original line, where it h remained ever since. Semble, that the p tiff's entry in 1865–6, was sufficient to stop running of the Statute of Limitations. *Po* v. *Thornbeck et al.*, 27 C. P. 291.

In February, 1853, after the expiration lease by the plaintiffs to R. for ten years continued in possession; and in 1854, defend who had married R.'s daughter, came to r with R., under a verbal agreement, as he a ted, whereby R. handed over the possessi him; but the evidence shewed that R. an wife still remained on the place until his d in 1860. After R.'s death, his widow and d dant continued to reside on the premises the defendant was frequently absent wo for others. In 1862, while defendant w absent, and the widow alone in actual p possession, S., the plaintiffs' agent, entered the widow signed a written instrument, wi sed by S., confessing that she was on the

merely on sufferance of the plaintiffs, and undertaking to give them possession whenever they might require it. Afterwards defendant returned to the premises; and in 1866 the plaintiffs brought ejectment:—Held, that the plaintiffs' entry and the acknowledgment signed by the widow in 1862 put an end to defendant's former possession, if any, so that the Statute of Limitations would run only from that period; and that they therefore were not barred. *Canada Company* v. *Douglas*, 27 C. P. 339.

About the year 1830 one James Gray took possession of lot 13 in the first concession of East Hawkesbury, and resided on the west half, his sons, John, Andrew, and Adam, living and working with him until about 1847-48, when Adam, under the expectation that the land would be his, entered into possession of the east half, with the permission of his father, who subsequently, in 1848, devised it to him by will, and afterwards spoke of him as owner; and although the father up to the time of his death, in 1857, assisted Adam in working this piece, the possession appeared to be exclusively Adam's, who was assessed as owner and paid the taxes, &c. After the father's death, Adam, and those claiming under him, continued the possession until the commencement of this suit. In 1857 the father made a second will, devising this east half to his son John, with an executory devise over, on failure of issue, to his son Thomas. In 1862 while Adam was so in possession he obtained a conveyance with full covenants for title from John. In 1874 John died unmarried, and without issue; and on the 5th May, 1875, Thomas brought ejectment against defendants claiming under Adam; but neither at the trial nor in term was any question raised as to the effect of John's deed:—Held, in the Court of Common Pleas, that the plaintiff could not recover, for, without considering the effect of John's deed, there was sufficient evidence of possession in the defendants to give them the title under the Statute of Limitations, the possession of Adam having been under the evidence an exclusive possession as owner. On appeal, the effect of John's deed having been argued and considered. Held, per Patterson and Moss, JJ., that its effect was to stop the running of the statute, and create a fresh statutory point, for after the deed Adam's possession became rightful; so the defendants had not acquired the title by possession as against Thomas, and that therefore the judgment should be reversed. Per Burton, J., and Harrison, C.J., that no such effect should be given to the deed: that defendants had acquired the title under the statute; and that the judgment should be affirmed. Per Harrison, C.J., that the question not having been raised in the Court below should not be given effect to in appeal. Per Moss, J., the Court should not refuse to entertain the point, for it was not one which could be affected by further evidence. *Gray* v. *Richford et al.*, 1 App. R. 112.

See *Doe* d. *Sheppard* v. *Bayley*, 10 Q.B. 310, 328; *Foster* v. *Emerson*, 5 Chy. 135, p. 2133.

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18. *Discontinuance and Dispossession.*

The plaintiff, being the patentee of a 200 acre lot, sold to one T. the rear 50 acres, and afterwards "the front three-quarters" to one K. Supposing that he had parted with all his land, he moved off the lot; it turned out, however, that, owing to an error in running the lines, a small surplus, not covered by the deeds, was left between the parts sold; and after a lapse of more than thirty years the plaintiff brought ejectment to recover this portion:—Held, that to enable the Statute of Limitations to run, it was not necessary that K. should have taken possession, imagining that he had bought all not sold to T., and intending therefore to claim and possess the part in question; but that it should have been left to the jury to say whether the plaintiff, having been in possession of the rents and profits, had not discontinued such possession, and whether such discontinuance was not more than twenty years before action brought. *Doe* d. *Taylor* v. *Proudfoot*, 9 Q. B. 503.

Possession follows the conveyance of the estate, and such constructive possession will be presumed to continue until proof of actual entry by a stranger, or of discontinuance by some distinct act evincing intention to do so. Absence from the province and the want of actual occupation for more than twenty years by the owner, is not a discontinuance of possession, within sec. 17, of 4 Will. IV, c. 1. *Doe* d. *Cuthbertson* v. *McGillis*, 2 C. P. 124.

Semble, that under the evidence set out in the report of this case, the plaintiff was entitled to a verdict; for either S., under whom she claimed, was never in possession in respect to the patent under which he claimed, and therefore could not be said to have been dispossessed, in which case the statute never began to run against him; or, if in possession at all, it must have been by virtue of his actual entry in 1830 and 1832, since which times twenty years had not elapsed. *Doe* d. *Shepherd* v. *Bayley*, 10 Q. B. 310.

Ejectment. — The plaintiff in 1814, being charged with high treason, fled from the province, leaving his family on the property in question, and they afterwards joined him in the enemy's country:—Held, that the circumstances of his leaving should have been considered by the jury as conclusive of an intention to abandon the possession; and that it could not be said that leaving his family in possession was the same as remaining himself; that the discontinuance commenced when they left; and that, being abroad then, the plaintiff was entitled to the benefit of the disability. *Butler et al.* v. *Donaldson*, 12 Q. B. 255.

The right to land is not barred by forty years want of possession unless some other person has also been in possession for that time. *Ketchum* v. *Mighton et al.*, 14 Q. B. 99.

In this case, where the plaintiff had been out of possession more than forty years and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed, had a suspicious appearance, the jury having found in his favour, a new trial was granted. *Ib.*

Held, that upon the evidence in this case, the jury were warranted in finding that there had been no dispossession by C., one of two devisees of the land in question, more than twenty years before this action, and therefore that the plaintiffs claiming under F., the other devisee, were

not barred. *Ingalls et ux.* v. *Arnold et al.*, 14 Q. B. 296.

It was proved that the plaintiff's father, the son of the patentee, had put a brother of the plaintiff on the lot in 1835 or 1836, but how long he remained was not shewn; and that in 1837 or 1838, the plaintiff told one H. that M., under whom defendants claimed, owned this lot; and the same witness swore that the plaintiff had worked on the land for one of the defendants. There was no proof of possession for twenty years. Per Burns, J., discontinuance may be of a constructive as well as of an actual possession, and in this case there was evidence to go to the jury to find whether the plaintiff had not discontinued the constructive possession which he acquired by descent on the death of the patentee. *Pringle* v. *Allan et al.*, 18 Q. B. 575.

To bar the plaintiff in ejectment under the Statute of Limitations, he must not only have been out of possession for twenty years, but there must have been actual possession by another. *Lloyd* v. *Henderson*, 25 C. P. 253.

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19. *Avoidance by Process.*

A judgment in ejectment recovered by C. against B. within twenty years, but upon which B. had never been dispossessed, does not save B. from being barred by the statute. *Doe* d. *Ausman* v. *Minthorne*, 3 Q. B. 423. See also *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486.

The bringing of an action, not the recovery of possession, stays the operation of the statute; therefore, where possession was taken under a hab. fac. poss., though after ten years from the recovery of judgment:—Held, that the possession so taken related to the date of bringing the action, and that the intervening ten years' possession would not enure to the benefit of the tenant, so as to assist him in claiming title under the statute. *Turley* v. *Williamson*, 15 C. P. 538.

The filing of a petition under the act for quieting titles is not such a proceeding as will save the rights of a party contestant otherwise barred by the statute. *Laing* v. *Avery*, 14 Chy. 33.

See also, II. 3 p. 2159.

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20. *Acknowledgment of Title.*

A verbal acknowledgment of title made during the twenty years will not save the statute. *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486.

An acknowledgment in writing after the twenty years will not revive a title which the twenty years' possession had extinguished. *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486. *McDonald* v. *McIntosh*, 8 Q. B. 388; *McIntyre* v. *The Canada Company*, 18 Chy. 367.

Where A. has been twenty years in possession, a conveyance by B. to A. within the twenty years of part of the lot in dispute would not save the statute, this being no written acknowledgment on the part of A. of B.'s title; and the fact of A.'s paying the taxes by B.'s direction is no bar to the statute. *Doe* d. *Perry* v. *Henderson*, 3 Q. B. 486.

A notice to quit from C. to B. within the twenty years does not save C. from being barred by the statute. *Doe* d. *Ausman* v. *Minthor* Q. B. 423.

The plaintiffs claimed title through R., o the children and devisees of C. The defer claimed through R. and the other devisees and by length of possession. C. died in having by his will made in 1841 devised this to his children in fee. R. died in 1851. Ne she nor any one on her behalf had any po sion since 1848. It was proved that in 184 F., who was then on the lot, and through w defendant claimed, told one M. that he had share of the lot, and was to pay the rent t the solicitor for the plaintiffs in a Chancery brought by F., and by R. and other plaintif partition of C.'s property, on account of costs of that suit; and that he afterwards the eldest son of R. in 1850, who went to for rent, that he kept it back to pay the It also appeared that F. had paid money 1857 to the town agent of C. in that su account of the costs. It was sworn, how that F. occupied under a brother of R., w right he had purchased, not under R., an lease was proved from R., nor any authority her for the payment to C.:—Held, Wilson diss., not sufficient evidence of payment of to R. to take the case out of the statute. *R et al.* v. *Smith*, 35 Q. B. 165.

The defendant in a bond to F. dated in recited that he (defendant) had bought in estate of all the owners of this lot except estate of the family of F., and of such oth the claimants as were under disability, w class would include the plaintiffs, which de dant was to get in; and an agreement in wri was made between F. and another and the fendant, in 1855, by which defendant agree buy in all the interest of the children of the C. in this lot:—Held, not an acknowledg under the statute, not being given to the p tiffs or their agent. *Ib.*

An acknowledgment to a party's tr is sufficient to take a case out of the sta *McIntyre* v. *The Canada Company*, 18 367.

Where a mortgagor wrote to the mort in answer to a demand for payment, "I comply with your request as to the repay of $500 I borrowed from you so many years and until I pay the money I will execute thing you wish me to do for its security," there was evidence shewing that the only m ever loaned to the mortgagor by the mort was the sum so advanced on the mortga was Held, sufficient to take the case out o statute. *Barwick* v. *Barwick*, 21 Chy. 39.

See *Williams* v. *McDonald*, 33 Q. B. 42 2143; *Canada Company* v. *Douglas*, 27 339, p. 2145.

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21. *Cases under the Quieting Titles Act*

Where the petitioner, under the Qui Titles Act, seeks to establish title by posse the possession under which a title is cla must be uninterrupted possession, as own the land, and should be in accordance wit title set up. *Re Bell*, 3 Chy. Chamb. Taylor, *Referee*.

A petitioner, under the Act for Quieting Titles, claiming by length of possession, must prove possession for the requisite length of time by clear and positive evidence, which should be of more than one independent witness. *Re Caverhill*, 8 L. J. N. S. 50.—Chy.

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22. *Other Cases.*

A. the owner of land agrees to sell to B. B. goes into possession. B. fails in making his payments. A. then conveys the land to C. in B's presence and apparently with the consent of B., who says that he will *at once* leave the place. B. nevertheless continues uninterruptedly in possession for more than twenty years, paying C. no rent and making no written or other acknowledgment of C.'s title:—Held, that B.'s twenty years' possession under these circumstances gives him the legal title. *Doe* d. *Ausman et al.* v. *Minthorne*, 3 Q. B. 423.

Quære, if B., in undisturbed possession for twenty years, voluntarily restores possession to C., can B. turn C. out again by reverting to his title under the act.

Semble, that a plaintiff in ejectment relying in the opening of his case upon a primâ facie title by possession, and being met by proof on the part of the defendant of a prior possession, cannot repel such proof by attempting to shew the possession of defendant that of a tenant to him (the plaintiff) as landlord. He should go into his case fully in the first instance. Robinson, C. J., diss. *Doe* d. *Osborne* v. *McDougall et al.*, 6 Q. B. 135.

A defence under the statute against a clear title is not one to be favoured, especially in cases between relations; and where the jury have leaned against such defence in support of the honesty of the case, and there has been no misdirection, the defendant must show very strong grounds to entitle him to a new trial on the evidence. *Hemmingway* v. *Hemmingway*, 11 Q. B. 237.

The right to land is not barred by forty years' want of possession, unless some other person has also been in possession for that time. *Ketchum* v. *Mighton et al.*, 14 Q. B. 99.

In this case, where the plaintiff had been out of possession more than forty years, and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed had a suspicious appearance, the jury having found in his favour, a new trial was granted. *Ib.*

Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held, that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainder man till the death of the tenant for life. *Sladden* v. *Smith*, 6 C. P. 74.

Held, that twenty years' user will legitimate an easement affecting private property, but not a nuisance. *Regina* v. *Brewster et al*, 8 C. P. 208.

Forty years are allowed for the bringing of actions for land or rent in case of disabilities. The term of forty years, however, is not a universal bar. Twenty years forms the regular bar. But the twenty years run only from the time the first right accrued. *Petre et al.* v. *Mailloux*, 8 C. P. 334.

A. being a widow, and having a son, J. R., marries B. in or about 1796. In 1803, a patent of the land in question issues to A. At the time of marriage, and for a year afterwards, they lived on the lot. They then left it, having sold to one S. R., who took possession, and he or those claiming under him remained in possession till the bringing of this action. In June, 1812, A. and B. jointly conveyed (with no certificate of examination of the married woman) to S. R. A. died about 1840, and B. in 1846 or 7. T. R., the son, died before this action, having in October, 1843, executed a power of attorney to J. W., to convey the land in question, to bring ejectment, and to defend actions therefor, &c. Under this power J. W., as attorney for T. R., conveyed to M., one of the plaintiffs. A. had issue by her marriage with B.:—Held, that more than forty years having elapsed since the time of taking possession by S. R., (taking the patent or receipt as the date) the action must fail. *Myers etal.* v. *Greely*, 9 C. P. 297.

A rector is not barred by adverse possession of the glebe land for twenty years, unless he has been incumbent during the whole of that time. *Hill* v. *McKinnon*, 16 Q. B. 216.

Where an action of ejectment brought under the old practice in 1848, had been stayed owing to an order for security for costs, and the demise had expired nine years since, the court refused an amendment by enlarging the term, which would have deprived the defendant of a title acquired under the Statute of Limitations. *Doe* d. *Day* v. *Bennett et al.*, 21 Q. B. 405.

Ejectment—The land was granted to one M. McD., who, with her husband, executed a deed to one M., in 1831, but her name was not mentioned in it as a granting party, and there was no certificate of examination endorsed. The plaintiff claimed title through this deed, by a conveyance to him in 1860, from the heir-at-law of one J. R., and he held also a deed from the heir-at-law of the patentee, executed in June, 1861. Defendants claimed through one W., who in 1845 purchased under an execution against J. R., and by possession. It was proved that in 1834, J. R. went upon the land, and lived there till his death in 1843. His widow and family soon afterwards went to Scotland, leaving one K. in charge, who in 1845 accepted a lease for five years from W., and at the expiration of the term was ejected by W.'s vendee, under whom defendants came in and held until September, 1861, when this action was brought. The husband of the patentee died in May, 1841, and the jury found that she had then knowledge of some one being in possessson. She lived until 1851:—Held, that defendants were entitled under the Statute of Limitations, for the conveyance executed by her passed nothing, and twenty years had elapsed since her husband's death, during which possession had been held by parties with whom the plaintiff had no privity. *Malloch* v. *Derivan et al.*, 22 Q. B. 54.

When a party, by deed, has granted a piece of land to another, though he may retain possession

of part of the land granted, and though the grantee may suppose his grant does not cover such part, yet if the deed does actually cover the land, the grantee is entitled to it, if he asserts his right within twenty years from the date of the grant. *Styles* v. *Taylor*, 14 C. P. 93.

Though a man has been in possession for twenty years of land granted to his wife for life, he does not thereby acquire an absolute title, for he is merely seised with her, by operation of law, of her estate therein, and any grant made by him will only pass an estate for his own life, *if his wife should so long live*. *Nolan* v. *Fox*, 15 C. P. 565.

In ejectment, it appeared that B., the patentee, agreed so sell the land, in 1837, to A. R., giving him a bond for a deed. A. R. took possession, and died on the land in 1839. His widow then went to Scotland, and in 1840 his brother, P. R., came out and took possession, with the knowledge of B., to whom he paid the balance of the purchase money. In 1842, his mother, with her grandchild, the daughter of A. R., came out and lived with P. R. until 1850, when he sold out to his mother, who remained until her death in 1854, and devised it to her daughter, who died, leaving the defendant, her husband, in possession. The plaintiffs' claimed under the heir of the patentee, and under the heirs of A. R. :—Held, that they were barred by possession ; for, as to the patentee, he had been out of possession since 1840, when P. R. entered with his knowledge ; and as to the heirs of A. R., he, A. R., had never the legal estate, and there was no proof that P. R. had entered under them or recognized their right. There was some evidence of an offer by defendant to purchase plaintiffs' claim ; but, Held, that this could avail only if defendant had no title, not to defeat a good title. *McGregor et al.* v. *LaRush*, 30 Q. B. 299.

A deed of the land in question from the testator, under whom the plaintiffs claimed, to one P., was produced by defendant unregistered, and under which the grantee had never taken possession, the testator having retained possession till his death, and his widow and devisee for life having continued in possession under the will, which she registered, in all a period of twenty-seven years :—Held, that the title of the plaintiffs, who claimed under the deceased, in remainder, under the will, was not defeated by the deed to P., for whatever estate was conferred by it, was lost by the twenty-seven years adverse possession. *Hamilton et al.* v. *Lightbody*, 21 C. P. 126.

To bar a plaintiff in ejectment under the Statute of Limitations, he must not only have been out of possession for twenty years, but there must have been actual possession by another. *Lloyd* v. *Henderson*, 25 C. P. 253.

In ejectment it appeared that W. W., Jr., owning the land in question, left it in 1852 in possession of his father, the defendant ; and that in 1859, he, in the presence and with the consent and approval of his father, mortgaged it to R., through whom the plaintiff claimed :—Held, that defendant could not, as against the plaintiff, set up any title founded on his possession before the execution of the mortgage. *Boys* v. *Wood et al.*, 39 Q. B. 495.

P. being in possession of land of which he not the owner, made a verbal gift of the lan C., but afterwards ejected him. C. then obtai a conveyance from the owner. More than tw years had elapsed from the time that the sta began to run in favour of P. against the owner :—Held, that C.'s possession did no terrupt in C.'s favour the running of the stat and that the owner being barred, C., his gran was barred also. *McIntyre* v. *The Canada C pany*, 18 Chy. 367.

Where a plaintiff files a bill praying relie the ground of a legal title in himself, no sho lapse of time than would be a bar at law i obstacle to relief in equity. *Connor* v. *McP son*, 18 Chy. 607.

The statute 32 Vict. c. 36, s. 155, limiting time for bringing suits for setting aside a sale taxes, applies only where an actual, though ir ular, sale of lands has been effected. *G street* v. *Paris*, 21 Chy. 229.

The public cannot release their rights ; there is no extinctive presumption or pres tion. Therefore where an original allowance road had been taken possession of and occu by the plaintiff, and those under whom claimed, for a period of forty years and wards :—Held, that such lengthened posses afforded no ground for opposing the action of municipality in resuming possession of the r for the purpose of opening up the same. *M* v. *Glover*, 24 Chy. 219.

II. Personal Actions.

1. *When the Statute begins to Run.*

In case for fraudulent misrepresentation, statute begins to run from the time of misre sentation, not from its discovery by the pl tiff, nor from the time that damage accr *Dickson* v. *Jarvis*, 5 O. S. 694.

A. gave B. & C. a note signed by hims which they discounted. When it matured B C. delivered to the holder, by way of renew a note purporting to be made by A., like other note, and which such holder on that t accepted, and he delivered up the old note. being afterwards alleged that the renewal not signed by A., but by another person of same name unknown to the holder :—Held, A. could not take advantage of this fraud : his liability in respect of the note still existe equity ; and that the holder could sue wi six years from the discovery of the fraud. *M* v. *Freeman*, 13 Chy. 465.

An action against a commissioner of In affairs for seizing and selling timber cut on dian lands, must be brought within six mo from the seizure, not from the sale. *Jon Bain*, 12 Q. B. 550.

In April, 1846, certain mares, the propert the plaintiffs, strayed to defendant's farm, advertised them, but no owner appeared, the defendant began to use them about a afterwards. In July, 1846, the same mares, ing supposed to be on the plaintiff's past were sold by the sheriff, under an execu against the plaintiff, to one S., who never tained possession of them, but hearing, in

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year 1852, they had foaled and were in the defendant's possession, made a written demand on the defendant for them and their progeny in September of that year. A year afterwards S. made over his interest to the plaintiff as a gift, without consideration or any delivery taking place. In 1855, the plaintiff made a demand on the defendant for the mares and their colts, which was refused. Pleas, not guilty, not possessed, and Statute of Limitations:—Held, that the conversion took place in 1847, and that the action was barred by the statute. *Scott* v. *McAlpine*, 6 C. P. 302.

Where an action for seduction is brought by the brother of the girl, not by the parents, the statute of Will. IV. ch. 8, does not apply, and proof of service must be given. The statute of limitations begins to run from the time of seduction, not from the birth of the child. *McKay* v. *Burley*, 18 Q. B. 251.

The plaintiff's attorney sued in 1870 for bills of costs in suits brought for the defendant, in which suits judgment was entered, respectively, in 1860 and 1861, and executions which were issued in 1863 had been renewed yearly, at defendant's request, until 1870:—Held, that the plaintiffs could not recover for any costs incurred before and in the entry of the judgments; for they were entitled on the recovery of judgment to sue for their bill, and were barred by the statute, which then began to run. Harris *v.* Quine, L. R. 4 Q. B. 657, distinguished. *Lizars et al.* v. *Dawson*, 32 Q. B. 237.

Where a cause of action accrues in the lifetime of the debtor, the statute begins to run against his estate notwithstanding there is no executor or administrator; but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative who can sue and be sued. *Grant* v. *McDonald*, 8 Chy. 468.

On a purchase of land the vendee gave his note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrators, it was held that, as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Chy. 570.

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2. *Acknowledgment in Bar or Payment.*

[*The provincial statute 13 & 14 Vict. c. 61, s. 1, (C. S. U. C. c. 44,) enacts, among other things, that all actions on simple contract (of the nature mentioned in the preamble of the Act) no acknowledgment or promise by words only shall be deemed sufficient evidence of a new and continuing contract, to take any case out of the Statute of Limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, signed by the party to be chargeable thereby.*]

In an action by an administrator, a replication of a promise to the intestate, in answer to a plea of the statute, is not supported by proof of a promise to the administrator. *Wright* v. *Mer-*, 6 O. S. 167.

To take a case out of the statute, slight evidence is sufficient, but the recognition of liability must be unequivocal, or the promise must be unconditional, or the condition performed. *Carpenter* v. *Vanderlip*, E. T. 3 Vict.

Where in consideration of the sale of a vessel to A., B. joined with him in an agreement to deliver lumber:—Held, that this was a joint contract, although B. was only a surety, and that it was not therefore necessary that the consideration should appear on the face of the agreement; and that the promise of A. was sufficient to take the case out of the statute as against B. *Thompson et al.* v. *Cummings*, M. T. 4 Vict.

An admission by an executor that a note, barred by the statute is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient. *Lampman* v. *Davis*, 1 Q. B. 179.

An admission by an executor of a debt due by his testator is not sufficient in an action against the executor without an express promise on his part to pay the debt admitted; but an account stated by an executor of a debt due by his testator, which had never before such accounting been ascertained or determined, is sufficient to charge the executor as a substantive debt, without any promise to pay. *Watkins* v. *Washburn*, 2 Q. B. 291.

A statement of a party upon being presented with an account, "that he was satisfied the amount had been paid to the plaintiff's agent, that the agent had been in the habit of having large transactions with him, and was more frequently in debt than otherwise, but that he could not see how the matter stood, as he had not his books to refer to":—Held, not sufficient. *McCormack* v. *Berzey*, 1 Q. B. 388.

A statement by a defendant that he did not think he owed the money, and that if he did, the statute would prevent the recovery; but that he would give the plaintiff $50 rather than have any trouble about it, is not sufficient. *Spalding* v. *Parker*, 3 Q. B. 66.

The plaintiff, as administrator, sues the defendant upon four notes made in 1796, averring administration de bonis non in 1847, and laying promises to himself as administrator. The defendant pleads that he did not promise in manner and form, &c. Upon the trial it was proved by a witness, not shewn to have been the plaintiff's agent or in any way privy to the cause of action, that he came from the United States in 1842, to speak to the defendant about these notes: that the defendant then said to him, "Get me the large note you speak of and shew that to me and I will pay the whole;" that he brought him the note when he came the second time, in 1844, and after much discussion the conversation ended in the defendant saying, that he, the witness, must see a third party to whom the defendant referred, intimating that he would not engage to pay until something had been ascertained through this reference; that he (the witness) made the reference to this third party, that nothing resulted from the interview, and that an action was therefore brought:—Held, upon these facts, (Jones, J., diss.) that if the admissions to the witness could be construed into an absolute promise to pay, still being made be-

fore the plaintiff had received his letters of administration, they could not support the issue raised. *Beard* v. *Ketchum*, 5 Q. B. 114.

Quære, do the admissions in evidence support an absolute promise to pay, supposing them to have been made to the administrator himself; and if they do, does the fact of their being made to the witness, instead of to the administrator, make any difference. *Ib.*

Quære, when can an account be considered an open unsettled account, so as to defeat the operation of the statute, by the latter items in the account drawing the others with them. *Hamilton* v. *Matthews*, 5 Q. B. 148.

The principle that the later items of an account draw the others after them, and thus save all from the statute, does not apply where quarterly payments (i. e., for rent or tuition) are made and received, as for a late specific independent quarter due at the time of payment, unmixed with items for any earlier quarter; the presumption in such a case is, unless the contrary is shewn, that the earlier quarters have been all paid and satisfied. *King's College* v. *McDougall*, 5 Q. B. 315.

A conversation in which the defendant admitted that the plaintiff had a judgment against him, that he, defendant, had no means of paying it, but that if they would be reasonable he thought his friends would assist him; adding that he was entitled to some credits, which the plaintiffs had not allowed him, and that if they would accept land, he thought he could manage to pay them £1.000 in that way, coupled with a letter in which defendant proposed to the plaintiffs to make over to them for their claim against him about 6000 acres of land:—Held, a sufficient admission of a debt of £1,000, under the account stated, to take the case out of the statute. *Russell et al.* v. *Crysler*, 5 Q. B. 484.

A promise to pay by one of several joint and several makers of a note, would take the case out of the statute. *Sifton* v. *McCabe et al.*, 6 Q. B. 394. But now it will not, under C. S. U. C. c. 44, s. 3.

The 13 & 14 Vict. c. 61, has a retrospective effect. *Grantham* v. *Powell*, 10 Q. B. 306. But see *Crooks* v. *Crooks*, 4 Chy. 615.

Held, that the following admissions of defendant: "The notes are genuine; that is, I made them; but I am under the impression that they were paid through A. and B., and I don't think I am called upon to have any further conversation with you about them," were not sufficient. *Grantham* v. *Powell*, 6 Q. B. 494.

The following answer of an attorney to his client, when demanding payment of moneys left for collection, "that the debt had not been paid, and that the defendant had no property, and that he, the attorney, could not help the debt being unpaid," not containing an express promise to pay, or admission from which a promise could be implied;—Held, not sufficient, though it was subsequently proved that at the time of such answer the attorney had collected the client's debts. *Dougall* v. *Cline*, 6 Q. B. 546.

Where part of plaintiff's own demands stated in his particulars are barred by the statute, he has a right to place against these the items of set-off appearing in his particulars to be beyo six years. *Ford et al.* v. *Spafford*, 8 Q. B. 17

The plaintiff wrote to defendant, who ha demand against one C., saying that C. had as him to settle the claim with defendant, and quested him, therefore, to charge it to his plaintiff's account. It was not proved that account had been rendered by defendant which he took credit to himself for this as a p ment on any particular account:—Held, t this must be considered merely as an item set-off, and not as a payment; and, there that the plaintiff was not entitled to credit it a payment of that part of his demand which barred by the statute. Semble, that the omiss in our act 13 & 14 Vict. c. 61, s. 1, of the p viso which is contained in the English statut Geo. IV. c. 14, will not operate to take aw from the fact of payment any effect which would have had before. *Notman* v. *Crooks*, Q. B. 105.

The plaintiff sued, in 1849, on a debt accru more than six years before. A new trial w granted in 1850, but the second trial was delay until 1852:—Held, that the 13 & 14 Vict. c. which came into operation in January, 18 precluded him from recovering on a verbal p mise. The court, under the circumstances, lowed defendant to claim the benefit of th statute, though he had not insisted upon it trial, but had objected to the sufficiency of t evidence on other grounds. *Grantham* v. *Pow* 10 Q. B. 305.

In an action on a note the plaintiff proved t following acknowledgment by defendant: received your letter, dated January 31. I a sorry to say I cannot do anyting for you at pre ent, but shall remember you as soon as possible —Held, not sufficient to import a promise to p on request, the question of defendant's abili not having been raised or left to the jur *Gemmell* v. *Colton*, 6 C. P. 57.

Defendant, one of three partners who had co tracted a debt which was barred by the statut wrote to his agent that he wished to pay share of the debts of the firm, and offered t creditors 6s. 8d. in the £, on their giving h a release. Some of the creditors accepted a were paid, but the plaintiff refused and sued the whole:—Held, that the letter was not su cient to take the case out of the statute. *Bar* v. *Metcalf*, 17 Q. B. 388.

The plaintiff proved the following letter wr ten by one of the defendants, the partner of t other, both being concerned in the busine carried on at Hamilton: "Kingston, 12th Apr 1848. Your account (£82 currency) has be handed us by D., and we shall write our Ham ton friends to have the amount placed at y credit. Of course you are aware that they h an account against you for damages, &c., d to their vessel":—Held, to import a promise pay on request; and there being no proof request before action, that interest should b be allowed. Held, also, sufficient to take t case out of the statute. *Jones* v. *Brown et a* 9 C. P. 201.

Plaintiff in March, 1859, rendered to the Mis T., daughters of defendant, an account of goo apparently furnished by him to them. Most the items in the account were entered against t

name of the individual daughter for whom they seemed to have been ordered, but several articles were entered without its appearing for whom they were ordered; the defendant's name did not appear in the account at all. In February, 1864, plaintiff by his agent presented to the defendant and one of her daughters the following memorandum, which they signed: "To the executors of the late G. T. Gentlemen,—Being indebted to J. L. of T., for goods, &c., furnished *to us*, in the sum of, &c., as shewn in the annexed statement, we authorize you to pay this amount to him as soon as you may deem practicable. A portion of this account is strictly chargeable against *our younger sister and brother*, which portion we are willing should be charged against *our* interests in the estate, *we assuming the whole obligation*:"—Held, that the signing of this memorandum by defendant was evidence to warrant the jury in finding that defendant was primarily liable for the account to which the memorandum related; and, though the court would have been better satisfied had the verdict been the other way, still, in the absence of an affidavit by defendant denying such liability, they did not feel justified in granting a new trial:—Held, also, that the memorandum was an acknowledgment sufficient to raise an implied promise to pay, being in effect made to plaintiff's agent and delivered to him to be presented to the executors for payment; and that it was, therefore, sufficient to take the case out of the statute. Secus, had the memorandum been sent direct to the executors, without the intervention of plaintiff or his agent. *Lyon* v. *Tiffany*, 16 C. P. 197.

Quære, whether a bill of exchange, drawn by defendant on the executors and payable to plaintiff, would have shewn any greater privity between the parties as to the acknowledgment than the memorandum in question. Petch *v.* Lyon, 9 Q. B. 147, referred to as the proper course to have been pursued by defendant in order to repel the presumption of liability arising from the signing of the memorandum. *Ib.*

In an action on the common counts, the plaintiff relied upon two letters written to him by defendants, as an answer to the statute. The first contained this sentence: "Since getting your letter I have been contriving a measure by which I hope to realize enough to make a settlement with you by next October, but before then I can do nothing, as it is quite enough for me to realize a living up here at present; and it is a fearful sacrifice that I am entering into, the scheme to pay you, no less than giving up my practice and all my little effects to a medical man, who is to give me what will materially aid me in carrying out my project," &c. The second letter, written sixteen months afterwards, offered an acre of land, if defendant would take it, free of incumbrances, and certain goods, adding, "I am as anxious as you are to have a settlement. If this should meet your approbation I will go up to Georgetown and give you a deed of it. Let me hear from you soon":—Held, (affirming the rule in Smith *v.* Thorne, 18 Q. B. 143, that the acknowledgment must support a promise to pay on request, either by shewing on the face of it an unconditional promise, or, if conditional, by proving the condition performed;) that the first letter shewed only a promise dependent on effecting the scheme set forth, and that the second was clearly insufficient. *Young* v. *Moore*, 23 Q. B. 151.

Action on a note made by defendant and L., payable to C., and by him endorsed to plaintiff, due in July, 1859. Plea, Statute of Limitations. To take the case out of the statute, plaintiff proved that one T. C., owing defendant $30, got an order, with defendant's assent, from C., who then held the note, on, L., requesting L. to pay defendant $30, which he, C., would credit on the note; and this sum was accordingly so paid, and credited:—Held, clearly a payment by L. on his own account, and not by or for defendant, so as to take the case out of the statute as against defendant. *Cowing* v. *Vincent*, 29 Q. B. 427.

A note not properly stamped cannot be used as an acknowledgment to take a case out of the statute of limitations. *McKay* v. *Grimley*, 30 Q. B. 54.

In an action on a note made by defendant payable to the plaintiff for $4,000, it was proved that when the note was given, an account was stated between plaintiff and defendant, the sum found due being $4,000, the amount of the note, which was made up of the principal sums advanced from time to time, and of the interest on those sums, which it was then agreed should be converted into principal:—Held, sufficient to take the case out of the Statute of Limitations. Held, also, however, that the statute never applied at all, as it was proved that in 1866, before the lapse of six years, the plaintiff and defendants met together and stated an account in writing, at $1,923; and that when the second accounting took place in 1872, being within six years of the former accounting, it was agreed that in the new account the former account should constitute an item, the written acknowledgment of which was given up to the defendant and burned. *House* v. *House*, 24 C. P. 526.

In an action by an executor for services rendered by the testator as a labourer, on a monthly hiring, extending over many years, it appeared that payments had been made on account, at irregular intervals, both to the testator and to the plaintiff after his death, without any specific appropriation either by the defendant or the payee:—Held, that the plaintiff was entitled to have such payments applied to the earlier items which had become barred by the statute. Quære, there being only the one claim, for continuous services, whether a jury might not infer that such payments were made on account, so as to take that part of the claim prior to the six years out of the statute. *Cathcart* v. *Haggart*, 37 Q. B. 47.

The plaintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by the statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them, the plaintiff told him or his clerk that he had credited it against his, the plaintiff's, account, to which defendant assented. In 1875, the plaintiff wrote to defendant sending his account and asking for payment, and stating that he had credited defendant's account rendered. The defendant's clerk answered repudiating the claim:—Held, 1. That

there was no evidence of any payment on account to take the case out of the statute, there being no act on *defendant's part* amounting to payment; and, 2. That the letter if it had contained any acknowledgment, would have been inoperative, not being signed by defendant himself. *Ball* v. *Parker*, 39 Q. B. 488.

An executor de son tort cannot, by giving a confession of judgment, or making payments on account of a debt, or by any other act of his, give a new start to the statute as against the rightful administrator, or the parties beneficially interested in the estate. *Grant* v. *McDonald*, 8 Chy. 468.

Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt. *Emes* v. *Emes*, 11 Chy. 325.

Where a debt, the remedy for which is barred by the Statute of Limitations, is acknowledged by the debtor, and judgment is recovered therefor, a voluntary settlement made before such acknowledgment, and before the remedy was barred, is void as against a *fi fa* issued on the judgment. *Irwin* v. *Freeman*, 13 Chy. 465.

A suit of foreclosure or for the sale of mortgaged premises in default of payment is not a suit for the recovery of land, but is a proceeding for the recovery of money due upon land within sec. 24 of C. S. U. C. c. 88. Where, therefore, a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security"; and there was evidence showing that the only money ever loaned to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was—Held sufficient to take the case out of the statute. *Barwick* v. *Barwick*, 21 Chy. 39.

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3. *Avoidance by Process.*

Where there have been several writs of ca. re. sued out and the last served, the plaintiff, to have the action considered as being commenced by the first writ, must shew at the trial that it was returned. Semble, that the continuance between the intermediate writs may be entered at any time. *McLean* v. *Knox*, 4 Q. B. 52.

The commencement of an action may be proved by the production of the writ of ca. re. *Upper* v. *McFarland et al.*, 5 Q. B. 101.

Quere, is the statute saved by a writ issued before the expiration of the six years, though defendant was not served with such writ, but had been served with an alias writ issued after the six years had expired, and though the first writ had not been returned until after the six years? *Holman* v. *Weller*, 8 Q. B. 202.

Where an action for services rendered was commenced by writ of summons, which was succeeded by an alias and pluries writ, each of which was placed in the sheriff's hands, but not served or intended to be served, and defendant was afterwards served with an alias pluries summons, it was held at nisi prius that the statute would bar only such demands as had accrued six years before the issuing of the first process. *Notman* v. *Crooks*, 10 Q. B. 105.

In an action on a note, due 4th Septemb 1847, the original writ issued on the 15th Apr 1853, and was returned non est inventus, a filed 3rd September, 1853. On the same day alias writ was issued, which was also return non est inventus, but was not filed until the 12 May, 1854; nor was any memorandum endors on it, specifying the date of the first writ. pluries issued on 12th May, and was served 31st July. Plea, the Statute of Limitations Held, that the 12 Vict. c. 63, s. 25, not havi been complied with, defendant was entitled succeed. *Ford* v. *McGoey*, 12 Q. B. 505.

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4. *Specialties.*

Where the mortgagor is in possession a mor gage may be presumed satisfied after twen years from the payment of the mortgage mone *Doe* d. *McGregor* v. *Hawke Doe* d. *McGregor* v. *Crow*, 5 O. S. 496.

Where there is no re-demise to the mortgag until default, and the land is vacant at the e ecution of the mortgage:—Semble, that t mortgagee being under such an instrume deemed in possession of the land by operati of law, the presumption of payment aft twenty years does not arise, even though t mortgagee has never made an actual entry, n received any payment on account. A. Wils J., diss. *Mahar et ux.* v. *Fraser et al.*, 17 P. 408.

The mere fact that the mortgagee is barre by the Statute of his remedy on the covena of the money will not establish a payment so to re-convey the legal title to the mortgagor.

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5. *Other Cases.*

To a plea of the statute in assumpsit, a rep cation that the defendant was a sheriff, and th the amount claimed was an overplus remaini in his hands of money levied under a fi. fa., w Held bad on general demurrer, although t plaintiff might have evaded the statute had s declared in case, setting out the circumstanc specially. *Ruggles* v. *Beikie*, 2 O. S. 370.

Where, in assumpsit on a promise to inde nify, defendant pleaded that more than six ye had elapsed since the promise accrued, the pl was held bad on general demurrer. *Ives* v. *Ir* T. T. 3 & 4 Vict.

The exception in the statute extends to actio of account, not to actions of assumpsit on op accounts. *Russell et al.* v. *Robertson*, 1 Q. 235.

Semble, that the court has authority to preve an attorney pleading the statute to defeat client's just claim, but that this power does extend to his executors. *Dougall et al.* v. *Cli* 6 Q. B. 546.

The suffering a judgment by default in a c where the plea of the statute would have bee bar to the action, is no proof of fraud in the fendant. If such judgment be fraudulent giving a preference to one creditor over anoth it can only be objected to on that ground b creditor. *Sloan et al.* v. *Whalen*, 15 C. P. 3

In an action by an attorney against his cli for costs, it appeared that the claim was bar

by the statute, but that the lands of the defendant in the suit had been sold under a fi. fa. sued out within six years, and bought in by this defendant, under his own execution:—Held, that this would not revive the claim, by making the defendant accountable to the plaintiff as if he had then received the costs to his use, but that only the costs of the fi. fa. could be recovered. *Jones* v. *Hutton*, 11 Q. B. 554.

Held, that a plea to a foreign judgment setting up the Statute of Limitations as a bar to the cause of action on which the judgment was recovered, was bad, in not stating that it was the period of limitation according to the foreign law. *Fowler* v. *Vail*, 27 C. P. 417.

Quære, has the statute of limitations, 13 & 14 Vict. c. 61, a retrospective effect. *Crooks* v. *Crooks*, 4 Chy. 615.

The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Coldwell* v. *Hall*, 9 Chy. 110.

An executor has a right to retain a debt barred by the Statute of Limitations. *Crooks* v. *Crooks*, 4 Chy. 615.

Where an executor of a creditor is also administrator or executor of such creditor's debtor, the right of retainer arises when there are any assets, and he will be assumed to have exercised such right without any actual act of appropriation being established; and though his claim would otherwise be barred by the statute. *Kline* v. *Kline*, 3 Chy. Chamb. 161.—Boyd, *Master*.

The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in a case where there is no competition of creditors. *Ib.*

A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir:—Held, that lapse of time, falling short of the statutory bar, was no defence by a purchaser from the heir-at-law. *Smith* v. *Bonnistreel*, 13 Chy. 29.

Held, that the Statute of Limitations does not bar the claim of an executor against the estate of the testator: that an executor is not justified in keeping an estate open and unadministered in order to obtain interest upon a claim which he has against the estate; and that delay on the part of executors to sell lands which by the will are saleable for payment of debts will render the executors liable for rent and profits. *Emes* v. *Emes*, 11 Chy. 325.

The executor of an estate, which was small, permitted the widow of the testator to receive the moneys of the estate and expend them in the support of herself and children; and on the eldest son coming of age in 1852, the executor pointed out to him the clause in the will directing a distribution of the personal estate, but the only estate the executor then had was some household furniture. In 1867, the widow having set up a claim for dower, rejecting an annuity provided for her by the will, the heir-at-law filed a bill against the executor for an account: Held, that the statute did not bar the relief; but, inasmuch as the executor had had reason to believe he would never be called on for an account, the court thought the master, in proceeding under the decree, should act liberally upon the rule of the court giving the master a discretion as to the mode of vouching accounts in his office. *Walmsley* v. *Ball*, 15 Chy. 210.

Where a member of a partnership, whose accounts the master was directed to take, was by order made a party in the master's office, but on subsequent enquiry it appeared that all liability on his part was barred by the statute, the master, on the application of the party added, discharged his former order, holding that he was not a necessary or proper party, and that all partnership accounts required to be taken could be taken in his absence. *Kline* v. *Kline*, 3 Chy. Chamb. 161.—Boyd, *Master*.

In a partnership suit it was held that the defence of the statute could not be raised under the common decree, directing an account of the partnership dealings and transactions. *Carroll* v. *Eccles*, 17 Chy. 529.

In partnership suits the defence of the statute is not available unless six years have elapsed before the filing of the bill since the dealings of the partners wholly ceased. *Storm* v. *Cumberland*, 18 Chy. 245.

Where a debtor made an assignment to trustees for the benefit of those creditors only who should execute it within one year, or notify the trustees in writing of their assent to it; and where one creditor had been aware of the terms of the deed, and neglected to sign it, but had notified one of the trustees of his assent; and another creditor had not been aware of the deed, but had taken no proceedings hostile to it, and had given his assent to it when it came to his knowledge; and another, though aware of the deed and its provisions, had neither executed it nor notified the trustees of his assent to it, but had never acted contrary or taken proceedings hostile to it:—Held, that they were entitled to come in and prove their claims equally with those creditors who had executed the deed in accordance with its terms, although they had allowed more than ten years to elapse. *Gunn* v. *Adams*, 8 L. J. N. S. 211.—Chy. Chamb. 115.—Taylor, *Referee*.

III. Disabilities.

1. *Absence from the Country.*

[*By 25 Vict. c. 20, this ground of disability is abolished.*]

The statute did not run against a plaintiff absent from the province at the time the cause of action accrued, nor until he came here. *Forsyth et al.* v. *Hall*, Dra. 291.

A plea that the defendant and plaintiff were both resident in a foreign country when the cause of action accrued, and that by the laws of that country defendant is discharged, because no action was brought there within six years, the defendant and plaintiff having both resided there during all that time, was held bad on general demurrer. *Hart* v. *Wilson*, 6 O. S. 19.

In a replication of the plaintiff's absence, a place where he was must have been alleged. *Hannay* v. *Bell*, 6 O. S. 255.

Where to a plea of non assumpsit infra sex annos a plaintiff replies the residence of the defendant beyond the jurisdiction of the court at the time

the action accrued, and a commencement of the action within six years after a return, the sufficiency of proof of these facts is a question for the decision of the jury and not a ground of nonsuit. *Johnson* v. *Buchanan*, 1 Q. B. 171.

Action by husband and wife on a contract made with the wife before marriage. Plea—the statute; to which the plaintiff replied absence beyond the seas when the cause of action accrued, upon which defendant took issue. It was proved that the wife had never been in this province, and it appeared she had been married in Scotland:—Held, not necessary to shew that the husband never was in this province. *Greig et ux.* v. *Baird*, 1 Q. B. 472.

To a plea of the statute the plaintiff replied that when the cause of action accrued he was resident in Lower Canada, and the defendant rejoined that he was also resident in Lower Canada all that time. The rejoinder was held bad. *Simpson* v. *Privat*, 2 Q. B. 265. See also *Lane* v. *Small*, 4 Q. B. 448.

The defendant pleads the statute; the plaintiff replies, absence. The plaintiff having an agent in this province transacting his business, who might have sued, would not deprive the plaintiff of the benefit of the exception. *Lane* v. *Stennett*, 4 Q. B. 440.

To a plea of the statute the plaintiff replied that when the cause of action accrued he was in foreign parts, &c., and did not return to this province till the 1st of July, 1846. The defendant rejoined that the plaintiff did not, on the day named, or at any time, return to Upper Canada:—Held, that the issue was immaterial. *Crosby* v. *Collins*, 5 Q. B. 545.

Whenever a plaintiff comes within the jurisdiction the statute began to run, and he could not urge as an excuse that he did not remain long enough to sue. It was not necessary to shew that defendant was also within the province when the plaintiff came, unless such issue was expressly raised. *Torrance et al.* v. *Privat*, 9 Q. B. 570.

The 25 Vict. c. 20, abolishes all exceptions and distinctions in favour of absentees. *Low* v. *Morrison*, 14 Chy. 192.

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2. *Other Cases.*

When the statute once begins it continues to run, notwithstanding any subsequent disability. *Doe* d. *Dixon* v. *Grant et al.*, 3 O. S. 511.

The plaintiff proved possession of nine acres of land cleared by him since 1847, more than twenty years. Defendant's father died in 1850, defendant being then only about four years old:—Held, that the plaintiff as to this portion was clearly entitled by possession, for the statute having begun to run against defendant's father, would continue as against defendant, notwithstanding her infancy. *Wigle* v. *Stewart*, 28 Q. B. 427.

The respondent filed his bill to redeem a mortgage made by his father in 1835, payable on the 4th February, 1837. The mortgagor remained in possession until his death in May, 1838, and his heir, (then an infant) continued until some time in 1839, about a year after the death of the mortgagor, when the mortgagee obtained possession. In 1842, the mortgagee sold to one of the appellants. The respondant's bill was filed on the 18th October, 1859:—Held, affirming the judgment of the Court of Chancery:—1. That the respondent was entitled to redeem; 2. That disabilities apply to the redemption of mortgages the same as to actions to recover land or rent, and that the statute was no bar to the relief sought by the respondent. *Hall* v. *Caldwell*, 7 L. J. 42.—E. & A.

In 18 2, A., a maniac, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age in 1829. He died in 1829, and his brother and heir, D., (the lessor of the plaintiff,) became of age in 1831, and brought ejectment against B., on the ground that his father was non compos at the time of his executing the deed in 1822. D. brought his action more than ten years after the lunatic died, and after he himself came of age, and more than five years after 4Will. IV. c. 1:—Held, that D., under these facts, was barred from recovery by the Statute of Limitations: and Held, also, that B. could not be considered in possession as the servant or bailiff of the lunatic. *Doe* d. *Silverthorn* v. *Teal*, 7 Q. B. 370.

Ejectment—The plaintiff claimed as heir-at-law of E. F., his mother, the patentee of the lot in question, under a patent issued the 13th of August, 1836. It appeared that J. F., plaintiff's father, died in April, 1850, and his mother, the patentee, about two years before. Defendant had been in possession since 1836. This writ was issued the 10th September, 1861:—Held, that the patentee having died under the disability of coverture, the plaintiff, under C. S. U. C. c. 88, s. 47, had ten years from her death, or twenty years from the time when her right accrued in 1836, and that both the periods having expired before the issue of the writ, the plaintiff was barred. The fact of the father being for two years tenant by the curtesy would not give the plaintiff twenty years from his father's death. Wigle *v.* Merrick, 8 C. P. 307, remarked upon. *Farquharson* v. *Morrow*, 12 C. P. 311.

After the expiration of more than twenty years from the accrual of the husband's right to make an entry or bring an action, the statute will operate as a bar during the coverture to any action by husbands and wives jointly for land owned by the wives. *Ingalls et al.* v. *Reid*, 15 C. P. 490.

A. insured with a mutual insurance company, by a policy expiring on the 26th June, 1863. The 29 Vict. c. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the act, if the loss happened before, *saving the rights of* [illegible] *under legal disability.* To a plea that the loss happened before the act, [illegible] the action was not commenced within one year from its passing, defendant replied, that when the act was passed A. was in prison (not saying for felony), and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death:—Held, no answer to the plea. *Tallman* v. *Mutual Fire Ins. Co. of Clinton*, 27 Q. B. 100.

In ejectment, the plaintiff claimed as heir-at-law of his mother, T., a daughter of H. H.

died in 1839, having devised the land to his widow, A., during widowhood, and then to be equally divided among his children. She married again in 1843. T. married the plaintiff's father in 1842, being then eighteen, and they lived with her mother, he working the land, until 1844. T. died in 1848. About 1868, the plaintiff's father surrendered his interest to the plaintiff, who was born in December, 1847. Defendants claimed title to the land by length of possession:—Held, that the estate of the plaintiff's father in right of his wife being one for which the father could have maintained an action when they left the land in 1844, the plaintiff was barred, at all events during his father's life. Semble, that on the father's death he would still be barred, though he had never been in a position to sue. *Trickey* v. *Seeley et al.*, 31 Q. B. 214.

See *Rumrell et al.* v. *Henderson*, 22 C. P. 180, p. 2133.

IV. Arrears of Rent or Interest.

The Statute of Limitations form no bar to a claim against a mortgagee in possession for occupation rent. *Coldwell* v. *Hall*, 9 Chy. 110.

A testator bequeathed his personal estate to his executrix and executors, in trust for the purposes of his will, and he gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children, or child, if there should be but one, "the sum of £1,500, due to me by C., and secured by a certain mortgage," &c.:—Held, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the statute therefore not applying to the case. *Loring* v. *Loring*, 12 Chy. 374.

Where a purchaser takes possession before conveyance, he is liable to interest from the time of taking possession, and the liability is not limited to six years. *The Great Western R. W. Co.* v. *Jones*, 13 Chy. 355.

During the lifetime of a mortgagor the mortgagee has no lien on the mortgaged property for more than six years arrears of interest, though he may have a personal action on the covenant for more; but in this country, as well as in England, after the mortgagor's death the mortgagee, to avoid circuity, may, as against the heirs, tack to his debt all the interest recoverable on the covenant. *Carroll* v. *Robertson*, 15 Chy. 173.

A mortgagee sold the mortgaged property under a power of sale:—Held, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford* v. *Allan*, 15 Chy. 565.

On a purchase of land the vendee gave his note payable in a year with interest, for part of the purchase money. The vendor died before the note became due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrator it was held, that as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note. *Stevenson* v. *Hodder*, 15 Chy. 570.

A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hand of the assignee of the mortgage, and a suit having been instituted upon the mortgage by the trustee and the party interested in the note, it was—Held, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run. *Scatcherd* v. *Kiely*, 22 Chy. 8.

Since the A. J. Act, 36 Vict. c. 8, O., and to avoid circuity of action, the court will allow interest to a defendant for more than six years in a suit to redeem. *Howeren* v. *Bradburn*, 22 Chy. 96.

Where a defendant desires to prevent the plaintiff from recovering interest for a longer period than six years, he must set up the defence of the Statute of Limitations: merely filing the usual disputing note is not sufficient for this purpose. *Wright* v. *Morgan*, 24 Chy. 457. Reversed on appeal 16th June, 1877.

V. Trustees and Agents.

Where lands are devised to trustees to sell and divide the proceeds among the residuary legatees, this is not a charge upon land within the meaning of the C. S. U. C. c. 88, sec. 24, so as to be barred by the lapse of twenty years, but it is a case of express trust within the 32nd section of the same act, following Watson *v.* Saul, 1 Giff. 188. *Tiffany* v. *Thompson*, 9 Chy. 244.

A bill was filed by a surviving partner against the representatives of the deceased partner, praying an account of certain partnership dealings, to which a demurrer for want of equity was allowed, on the ground that the relief sought was barred by the lapse of more than six years between the death of the deceased partner and the filing of the bill. Leave was given to amend with a view of shewing that certain land held by the deceased partner, and which had descended to his heir-at-law, had been purchased with partnership assets, and that therefore there was a resulting trust in favour of the plaintiff. *McFadgen* v. *Stewart*, 11 Chy. 272.

Conveyances obtained by a solicitor from his client must state the transaction correctly; and the solicitor must preserve evidence that an adequate price was paid, and that the transaction was in all respects fair, and such as a competent and independent adviser of the client would have approved of. Where these obligations are neglected the suit of the client must be brought within twenty years; but an unexplained delay of less than that period may, under circumstances, be a bar. Where nineteen years had elapsed, and the delay was accounted for, the heirs of the client were held entitled to relief. *Oakes* v. *Smith*, 17 Chy. 600.

A deputy registrar having remitted registration fees to parties who employed him as a conveyancer, the statute was held to be no bar to the claims of the principal for such and other transactions between them. *Smith* v. *Redford*, 19 Chy. 274.

The Statute of Limitations being urged against the admission of claims by creditors under an assignment:—Held, that the relation of trustee and cestui que trust had been established between

the assignees and the creditors who had acquiesced in the deed, as well as those who had actually executed it, and that therefore the statute was inoperative. *Gunn* v. *Adams*, 8 L. J. N. S. 211—Chy. Chamb.—Taylor, *Referee*.

There was also the additional reason in two cases that the statute had never begun to run, owing to the creditors' right of action having arisen after the debtor had absconded. *Ib.*

PUBLIC OFFICERS.

A surveyor of streets appointed under the Provincial Statute Geo. IV. c. 9, does not come within the 50 Geo. III. c. 1, s. 34, which requires actions for anything done under the authority of that act to be brought within three months. *McFarlane* v. *McDougall*, 3 O. S. 73.

Actions against the officers of Her Majesty's ordinance, as incorporated under 7 Vict. c. 11, are subject to the limitation provided for in 8 Geo. IV. c. 1. *Denaut* v. *The Principal Officers of Her Majesty's Ordinance*, 10 Q. B. 189.

Owing to a mistake in the crown office, a rule to return the writ of certiorari, and afterwards a rule for an attachment, issued, although a return had in fact been filed. The conviction was quashed, but more than six months having thus expired since the conviction, the court were asked to allow process to issue against the justice for the illegal conviction as of a previous term, but the application was refused. Quære, whether the six months could be held to run only from the time of quashing the conviction. *In re Joice*, 19 Q. B. 197.

Held, in deference to former decisions of this court, that a school trustee who is sued for any act done in his corporate capacity is entitled to notice of action, and that the action must be brought within six months. And that a school trustee acting in the discharge of his duty as such, is entitled to the protection of, and comes within, the statute 16 Vict. c. 180, notwithstanding he should have signed a warrant individually instead of in his corporate capacity. *Spry* v. *Mumby et al.*, 11 C. P. 285.

Held, also, that a collector who committed a trespass while acting under a warrant issued by a competent authority, was entitled to notice of action, and that the action should be brought within six months. *Ib.*

To a declaration against a sheriff for an escape from arrest under a capias, defendant pleaded, that the action did not accrue within two years; that the plaintiff did not declare in the cause in which the arrest was made within one year, and did not prosecute the said suit:—Held, on demurrer, both pleas bad. *Wilson* v. *Munro*, 20 Q. B. 18.

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600, prior to that which the plaintiff purchased, supposing it, from the certificate, to be a first incumbrance. In an action against the registrar for this omission in his certificate:—Held, that the registrar was not entitled to notice of action, and that the six months limitation clause did not apply, for though an officer within the meaning of the Act C. S. U. C. c. 126, this was not an act committed, but a negligent omission. *Harrison* v. *Bregu*, 20 Q. B. 324.

A Division Court bailiff is entitled to notice of action upon the statutory covenant, for an excessive seizure and sacrifice of plaintiff's goods, must be brought within six months; and the defence may be raised under the general issue by statute. *Pearson* v. *Ruttan et al.*, 15 C. P. 79.

In an action against a pathmaster, it appeared that the act complained of was done on the 5th November, 1874, and the action was commenced on the 5th May, 1875. Held, in time. *Crooks* v. *Williams*, 39 Q. B. 530.

VII. AGREEMENTS TO WAIVE THE STATUTE—FRAUD.

Declaration on a special agreement, by which plaintiff sold to defendant a steam engine for $700, alleging non-payment; and on the common counts. Sixth plea, set-off on two promissory notes made by the plaintiff, payable to F. & W., and endorsed by them to defendant, and for goods sold and delivered, &c., claiming a balance from plaintiff. Second replication, Statute of Limitations. Equitable rejoinder, so far as the replication relates to the the two notes set up in the plea: that on the 6th December, 1862, and before this suit, and before the notes were barred by the statute, the plaintiff sued defendant in the Queen's Bench for the same causes of action now sued for; that defendant on the 4th March, 1863, pleaded by way of set-off therein the same notes, which exceeded plaintiff's claim, and which were over due but not then barred, and required the plaintiff to reply thereto: that the plaintiff did not reply and did nothing in the suit until October, 1868, when said notes had become barred by the statute, and thereupon the plaintiff discontinued said suit and commenced this action. And defendant avers that at the plaintiff's request he did not sign judgment of non pros. in said suit, as he could and would have done; and it was then agreed that in consideration that he would not sign judgment, the said two notes should be allowed against plaintiff's claim, and they were then mutually set-off and allowed against it: that defendant, relying on such request and agreement, took no further step in the suit, or to recover his set-off, but allowed it to be so set-off against the plaintiff's claim, which was thereby fully paid and satisfied. And defendant says that it is inequitable that the plaintiff should now be allowed to maintain this action, and defeat defendant's set-off by the statute. Surrejoinder, on equitable grounds: that defendant waived and forfeited his rights under the alleged agreement by giving the plaintiff, before the discontinuance of the former and the commencement of this action, to-wit, on the 30th September, 1868, notice of his intention to proceed in the first action by entering judgment of non pros. for want of a replication, and by accepting his costs of defence taxed on the plaintiff's rule to discontinue:—Held, upon demurrer: 1. That the agreement might have been pleaded as an accord and satisfaction to the declaration; but that defendant might nevertheless rely on the set-off, and set up the agreement in answer to the statute; 2. That the rejoinder

shewed a good answer to the replication. Semble, that the rejoinder, without reference to the agreement, would have been sufficient if it had alleged that the present set-off was pleaded within a reasonable time for bringing an action for such set-off after the termination of the first suit, to wit, within one year therefrom; for that the previous suit ended by discontinuance was a good answer to the statute. But, Semble, also, that without such averment it was bad, and that the dates appearing on the record could not be allowed to supply it. Held, also, that the rejoinder was not a departure from the plea. Held, also, that the surrejoinder was good, for the defendant had lost his right to the costs, if they could be recovered only by signing judgment which he had agreed not to sign; that the termination of the first action remitted both parties to their original rights, and defeated the accord and satisfaction between them; but that the defendant having broken the agreement, the remission related back only to such rights as they existed when the suit ended. Semble, also, that in no way could the defendant by pleading avoid the replication and rely upon the equity of the statute, for that the agreement and its waiver excluded that ground of defence. *Parsons* v. *Crabb*, 31 Q. B. 434.

A. and B., being the owners in fee of certain lands, sold them to C., and in 1836 executed conveyances, but continued in possession as before. In 1850 D., claiming to hold a deed for the lands, executed by the heir-at-law of C., then dead, got possession of the lands from A. and B., under the belief that he was the grantee of C.'s heir-at-law. D. then conveyed the lands to defendants, or to persons under whom they claimed. These went into possession in 1850 or 1851, and continued in possession till 1868, when the real heiress of C. brought ejectment against them, who claimed by possession. It appeared that the deed executed by D. was a fraudulent instrument not executed by C.'s heir-at-law, but by some stranger:—Held, that the title of C. was barred by the statute. *Butterfield et ux.* v. *Mabee et al.*, 22 C. P. 230.

Declaration on an agreement to pay $450 by a promissory note; breach, non-payment. Sixth plea, set-off on two notes made by plaintiff and endorsed to defendant. To this plea, plaintiff replied the Statute of Limitations. The defendant rejoined, in substance, to the second replication to the seventh plea, that in the former suit the same subjects of demand and set-off were in dispute; that the former suit was commenced on the 6th December, 1862, and was kept pending until the plaintiff on his own mere motion, discontinued it on the 8th October, 1868; that when the plaintiff commenced this suit on the 9th October, 1868, the statute had operated against the set-off, and that defendant, on the 15th March, 1869, and within a reasonable time, to wit, within one year, from the discontinuance of the former action, pleaded the said set-off in this action:—Held, that the rejoinder was good, for that in this province a set-off, on which the defendant may recover a balance, is as much within the equity of the statute as an action for the same demand would be. The plaintiff also surrejoined; 2. That the two notes were drawn and payable in the Province of Quebec, and by the law there the cause of action thereon became extinguished after five years from the accruing thereof, and that such cause of action became extinguished pending the former action. Held, bad as a departure. *Parsons* v. *Crabb*, 34 Q. B. 136.

It was a condition of the policy that no action or suit, either at law or in equity, should be brought against defendants therein after the lapse of one year from the loss, this being a condition also prescribed by the 36 Vict. c. 44, sec. 54, O., relating to mutual fire insurance companies. The plaintiff, suing on this policy after the expiration of the year, declared on equitable grounds, alleging in one count that defendants prevented the plaintiff from suing in time by an agreement that if the plaintiff would permit and give them time to examine his books, &c., they would pay as should thereupon be agreed, provided the plaintiff would refrain from suing during such examination, and while negotiations should be pending, and that in consideration thereof defendants would waive the condition. The second count alleged that defendants prevented plaintiff from suing, by representing that notwithstanding they had good defences to urge, they would pay what they should find to be really due on an investigation of the plaintiff's books and accounts, &c., if the plaintiff would give them sufficient time therefor, and would not sue during such investigation. It was then averred that such investigations and negotiations with the plaintiff continued until after the year, when it was agreed that defendants should pay the plaintiff $500 in full, which they had not paid:—Held, that there was no evidence to go to a jury, either of the agreement alleged, or that the defendants prevented or waived the performance of the condition, or of anything which could in equity prevent the defendants from insisting on the forfeiture. *Davis* v. *The Canada Farmers' Mutual Ins. Co.*, 39 Q. B. 452.

Defendant acquired the legal title under a deed in December, 1842, in the portion allotted to him of the land in which the plaintiff and defendant, as also one M., had previously been jointly interested; and the strip of land in question in this suit was erroneously included in this conveyance; and the fact was known, but the conveyance was executed notwithstanding. About the same time, the plaintiff and defendant executed a document agreeing to leave this strip for their mutual benefit, the plaintiff to have the timber thereon. Defendant had not actual possession of the strip, which was uncleared, but there was no separation between it and the other portion of the lot which he did occupy under his conveyance:—Held, that this document operated to prevent the defendant from acquiring a title to this strip under the statute. *Maffatt* v. *Walker*, 15 Chy. 155.

Miscellaneous Cases.

Semble, that the court would not have interfered in this case by mandamus had not the prosecutor's remedy by suit probably been barred by 16 Vict. c. 99, sec. 10. *Regina ex rel. Trustees of St. Andrew's* v. *Great Western Railway*, 14 C. P. 462.

The plaintiff filed his information to forfeit land sold by lottery, contrary to the 12 Geo. II. c. 28, more than five years after the sale complained of:—Held, too late, for the case came

within the 31 Eliz. c. 5, by which he was limited to one year. *Mewburn* v. *Street*, 21 Q. B. 498.

Where it appears upon the record in a penal action that it is brought too late, the defendant may take advantage of the objection without having specially pleaded it. *Mewburn* v. *Street*, 21 Q. B. 498.

Held, Richards, C. J., Wilson, J., and Mowat, V. C., diss., that a party aggrieved by an act of a municipal council, is not bound to commence his action within six months from the committing of the act complained of. *Hodgins* v. *The Corporation of the United Counties of Huron and Bruce*, 3 E. & A. 169.

An action for a penalty for not affixing stamps to an instrument, under 27 & 28 Vict. c. 4, s. 5, must, by the 31 Eliz. c. 5, be brought within a year. No right of action vests in the plaintiff until the action is so brought, and the defendant therefore may take advantage of this latter statute under a plea of not guilty. The defendant was held not precluded from such defence by having marked in the margin of his plea the statute 21 Jac. I., c. 4, only. *Mason* q. t. v. *Mossop*, 29 Q. B. 500.

An application was made to vacate a præcipe decree taken into the Master's office, and to allow, instead of a disputing note, an answer to be filed setting up the Statute of Limitations. The application was, held, to be properly made in Chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it. The statute cannot be set up as a defence in this way, but must be pleaded. *Cattanach* v. *Urquhart*, 6 P. R. 28.—Chy. Chamb.—Holmested, *Referee*.

It is a plain common law right to have the free use of the air in its natural unpolluted state, and an acquiescence in its being polluted for any period short of twenty years will not bar that right. To bar the right within a shorter period, there must be such encouragement or other act by the party afterwards complaining, as to make it a fraud in him to object. *Radenhurst* v. *Coate*, 6 Chy. 139.

In January, 1864, a non-borrowing member of a building society died intestate. No one administered to his estate until June 1867. In that interval his shares ran in arrear, and in consequence the society, in November, 1865, declared the shares forfeited, and carried the amount thereof to the credit of the profit and loss account. After the society had been wound up, or been supposed to have been wound up, and the assets distributed, letters of administration were obtained, and the administrator applied to the society to be admitted as a member thereof, but was refused:—Held, 1. That the proceeding of the society to forfeit the shares in the absence of a personal representative was illegal; that they could not do so any more than they could proceed at law to enforce payment of the calls; 2. That the plaintiff, the administrator, was entitled to relief, and that the lapse of time between the attempted forfeiture of the shares and the procuring letters of administration was no answer to the plaintiff's claim. Draper, C. J., Hagarty, C. J., Wilson, J., and Gwynne, J., diss. *Glass* v. *Hope*, 16 Chy. 420.

An objection of the Statute of Limitatio cannot be made by an appellant against t masters's report, without having been taken b fore the master. *Brigham* v. *Smith*, 18 Ch 224.

The court will not relieve a party against t effect of one lapse of time in order to enab him to set up another lapse of time again creditors. Where, therefore, a party applied f leave to appeal after the time for appealing, for giving notice thereof, had expired, in ord to enable him to set up the Statute of Limitatio against certain creditor's claims, the court r fused the application. *Brigham* v. *Smith*, 3 Chy Chamb. 313.—Taylor, *Referee*, Mowat.

Where a judgment is successfully impeache on the ground of fraud and collusion betwee the creditor and the executor of the debtor, it open to the parties interested in the estate the deceased to set up the statute to the clai of the creditor, which the executor had omitte or neglected to plead. *Jardine* v. *Wood*, 19 Chy 617.

LIMITED PARTNERSHIP.

See PARTNERSHIP.

LIMITS.

See BAIL.

LINE FENCES.

See FENCES.

LIQUIDATED DAMAGES.

See PENALTY BY CONTRACT.

LIS PENDENS.

The registrar was required to record a certi cate of lis pendens affecting "lot No. 16, in th 9th concession of the township of Erin, and lo Nos. 14 and 15 in the 10th concession of th same township," which he refused to do, as th west halves of lots 14 and 15 had been laid ou into village lots, according to a plan filed in h office. On application for a mandamus:—Held that so far as regarded the west halves he w right, for by the Registry Act, 29 Vict. c. 24, 73, the certificate should shew the village lo affected. The point being new, and there bei no difficulty in recording the certificate again lot 16, the rule for a mandamus was discharge without costs. *In re Thompson and Webster*, Q. B. 237.

In September, 1855, one G. entered into a co tract (which was never registered) with one M for the sale to him of a lot of land. On Octobe 1857, the plaintiffs recovered and registered judgment against G., and thereby acquired pr ority over M., on the lot sold by him, and

March, 1861, filed a bill against G., to enforce their judgment against the lot contracted to be sold to M., as well as against other lands of G., to which bill the plaintiffs (having no notice of the contract) did not make M. a party, a certificate of lis pendens being however registered. In March, 1862, M. obtained from G., under the contract, a conveyance of the lot, which he registered in September, 1862, and the plaintiffs becoming aware thereof applied ex parte on the 10th June, 1864, under the order of the 29th of June, 1861, for, and obtained, an order to make M. a party in the Master's office :—Held, on appeal to the full court, (VanKoughnet, C., diss.), that the suit was not pending as against M. prior to the date of the order to make him a party : that therefore there was no suit pending against him on the 18th May, 1861, and in consequence, that the lien created by the registration of the plaintiffs' judgment against the lot, the subject of the contract, was gone, and that M. was not a necessary or proper party to the suit, and that the order to make him a party should be discharged. *Juson* v. *Gardiner*, 11 Chy. 23.

Where a certificate of lis pendens is registered under the statute, and the bill afterwards dismissed, it is not necessary to obtain an order discharging the lis pendens from the registry, the registration of the decree dismissing the bill being sufficient. *Dexter* v. *Cosford*, 1 Chy. Chamb. 22 ; 5 L. J. 67.—Spragge.

Where a decree on further directions had been registered against lands, and afterwards the original decree was reversed on rehearing, Van Koughnet, C., held that the order reversing the original decree destroyed the lien. The court cannot discharge the lis pendens on an application for that purpose—the mode of getting rid of it is by dismissal of the bill. *Graham* v. *Chalmers*, 2 Chy. Chamb. 53.

Where a bill had been filed and a lis pendens registered, but no office copy served within the twelve weeks allowed for service, the bill was ordered to be dismissed with costs. *Somerville* v. *Kerr*, 2 Chy. Chamb. 154.—VanKoughnet.

In a class suit, in which a decree has been made, although the plaintiff's claim has been paid, the bill will not be dismissed nor a lis pendens vacated, where other persons may be entitled to the benefit of the decree, and to retain the lis pendens. *Arnbery* v. *Thornton*, 6 P. R. 190.—Chy. Chamb.—Holmested, *Referee*.

A certificate of lis pendens should not be issued in a suit brought for alimony only. *White* v. *White*, 6 P. R. 208—Chy. Chamb.—Holmested, *Referee*.

Where the purchaser paid a deposit on effecting a purchase, which he afterwards rescinded in consequence of a good title not having been made out, and recovered judgment at law for the amount of the deposit, which he was unable to realize under execution :—Held, notwithstanding the provisions of the Administration of Justice Act, that the purchaser had a right to institute proceedings in this court to enforce his lien, his object being to obtain a lis pendens which he could not obtain at law, in order to prevent the vendor disposing of his lands as he had of his goods. *Burns* v. *Griffin*, 24 Chy. 451.

On a bill filed by a judgment creditor, with fi. fa. in hands of the sheriff, the court restrained the defendants from selling, assigning, or otherwise disposing of a mortgage held by him created by one T. in favour of one S., and by S. assigned to the defendant. For the purpose of obtaining a lis pendens the plaintiff was entitled to proceed in equity, notwithstanding the Administration of Justice Act. *Cochrane* v. *Franklin*, 13 L. J. N. S. 91—Chy.

In future, however, this will not be the case, as during the last session power was given to the Common Law Courts to grant a lis pendens. *Ib.*

LIVERY OF SEISIN.

The plaintiff, by indenture dated 6th April, 1854, did "lease let and to farm let," the land in question to defendant upon the terms that he should pay all rates, levies, and assessments upon the said property, inclose the same with a good fence, and farm the same in a husband-like manner, and not transfer without the lessor's consent ; and the plaintiff for himself, his heirs and assigns, did thereby rent unto the defendant (the premises) at the rate of six pence per acre per annum, payable half-yearly in advance. There was no livery of seisin, nor any time mentioned, but the defendant entered into possession :—Held, that an estate at will only passed. *Wilmot* v. *Larabee*, 7 C. P. 407.

Possession is evidence of livery of seisin of land ; and where there is evidence of possession accompanying and following a deed for upwards of thirty years, seisin may well be presumed. *Nolan* v. *Fox*, 15 C. P. 565.

By a deed dated 27th March, 1824, one J. S. leased land to H. S., to hold from the *30th day of the same month*, until her decease :—Held, that though under the authorities, it might, if executed and livery of seisin given on the day it bore date, be void ; yet if not executed or livery of seisin not given until after the day on which it was to begin to operate, it would be good ; and Semble, the jury might properly have been asked, under the peculiar facts of the case, to presume one or both of these propositions in favour of the plaintiff, the grantee under the deed. *Ib.*

A., by indenture, in 1826, in consideration of the rents and covenants by M. to be paid and performed, "granted, demised, and to farm let to M., his heirs and assigns," certain land, habendum, "unto the said M., his heirs and assigns, from the day of the date hereof, for and during the term of 21 years," yielding and paying yearly during said term to M., his heirs and assigns, 7s. 6d. There was a covenant by M. to pay rent, and by A. for quiet enjoyment during the term. At the end of the term M. gave up the lease to A., saying he had no further claim, but he was allowed to continue in possession upon no definite understanding, and defendant went in after him. Upon ejectment brought by the devisee of A. :—Held, that without livery of seisin, the fee simple granted in the premises could not take effect, and the habendum for twenty-one years would stand ; but a new trial was granted to determine the fact of livery. *McDonald* v. *McGillis*, 26 Q. B. 458.

Semble, that the jury should not be directed to presume livery of seisin, as they would be if the possession had been held as on a claim of absolute ownership. *Ib.*

LIVERY-STABLE KEEPER.

The plaintiffs, owning a line of stages, entered into a special agreement with defendant, an innkeeper, for the stabling and feed of their horses. Some dispute arose as to the defendant's charges, and defendant refused to let the plaintiffs remove the horses. The plaintiffs then brought trover :—Held, that defendant had no right of lien, as the plaintiffs employed defendant as a livery-stable keeper, and under a special agreement which gave him no continuing right of possession. Held, also, that a conversion was sufficiently proved. *Dixon et al.* v. *Dalby*, 11 Q. B. 79.

LOANS OF MONEY.

I. Investments—*See* Investment of Money.

As to the damages recoverable for breach of a contract to advance money. See *Hyde* v. *Gooderham et al.*, 6 C. P. 21.

LOCAL MASTERS.

Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in this court, although they may not actually share in the emoluments of the suit. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Chy.

LONDON (TOWN OF.)

The corporation of London, under 3 Vict. c. 31, had the power to make a by-law prohibiting the sale of butchers' meat within certain hours, except at the public market. *Peters* v. *The President and Board of Police of London*, 2 Q. B. 543.

Quære : does that act give the board of police of London power to establish and regulate a market and appoint fees to be taken thereat. *The Board of Police of London* v. *Talbot*, 3 Q. B. 311.

A., upon being appointed clerk of the market to the board of police of London, entered into a bond for the payment of a certain sum of money in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for the non-payment of the money, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat." He then avered that the plaintiffs had no such authority, and that on this account the bond was void :—Held, plea bad, in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *Ib.*

Held, that under 10 & 11 Vict. c. 48, the corporation of London were the sole judges of the return and qualifications of candidates for seats in the common council, and that their decision was final. *Re Balkwell*, 5 Q. B. 624.

Held, that a by-law of the corporation of London, passed under the 10 & 11 Vict. c. 48, and providing that the owner of a billiard table shall pay £10 per annum for a license to keep the same, had not the effect of abrogating the duty imposed on billiard tables by the provincial act 50 Geo. III. c. 6, but must be considered as a regulation superadded for the purposes of the town of London. *Church* q. t. v. *Richards*, 6 Q. B. 562.

Held, that an action of debt would lie for the penalty, under 50 Geo. III. c. 6, for keeping a table without license, and that after verdict it need not be averred that the defendant had not paid the penalty. *Ib.*

The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised within the old and new surveys of the town of London, together with the lands adjoining thereto, lying between the said surveys and the river Thames, producing the northern boundary line of the new survey until it intersects the north branch, and the eastern boundary line until it intersects the east branch of the river :—Held, that the city limits extended to the middle of the river ; and that a conviction by a county magistrate for passing the toll gate on the city side of the river was therefore bad, as the offence was out of his jurisdiction. *In re McDonough*, 30 Q. B. 288.

Where two properties or municipalities are divided by a river or highway, the limit of each is primâ facie the centre of the river or road. *Ib.*

LORD'S DAY.

See Sunday.

LOST DOCUMENTS.

I. Bills or Notes—*See* Bills of Exchange and Promissory Notes.

II. Deeds—*See* Deed.

III. Wills—*See* Will.

IV. Evidence of—*See* Evidence.

New Nisi Prius record made up, the original having been destroyed by fire. *White* v. *Hutchison*, Tay. 305.

Where an attorney's clerk had lost his articles he was sworn in on an affidavit of the loss, and producing the usual certificate of service. *In re Loring*, M. T. 2 Vict.

Where the plaintiff was nonsuited in an action upon a bond which had been filed as an exhibit at a previous trial, because he was unable to produce it, the nonsuit was set aside and a new trial granted on payment of costs, the bond having been afterwards found. *Muirhead* v. *M'Dougall*, H. T. 2 Vict.

An arbitrator having failed, owing to the loss of the papers in the cause, to make his award within the time limited, a judge extended the time under C. L. P. Act c. 22, s. 172. *Johnston* v. *Anglin*, 5 P. R. 62.—C. L. Chamb.—Morrison.

Action by the plaintiff, administrator of M., against defendant, on his covenant in a registered mortgage to pay M. the amount due thereon. Plea, on equitable grounds, in substance, that the plaintiff told defendant before the instalment sued for fell due, that he could not find the mortgage, and defendant then informed him that he would be prepared to pay when it fell due; that when he received notice of this action he notified the plaintiff's attorneys that he was prepared to pay on production of the duplicate copy of the mortgage, which was held by M., or on proof of the loss; and that he was and is so prepared; but plaintiff refused to shew said copy or furnish any proof of the loss. The plea also averred that testator had made a will, and appointed certain persons executors, who had possession of the will; and the defendant submitted that he was entitled to such duplicate or proof of loss, and alleged that he was prepared to pay or deposit the money as the court should direct, to be paid over to plaintiff on such production or proof:—Held, plea bad, for it must be assumed that the mortgage was recorded at length; no assignment either directly or by deposit was averred; and under the Registry Act defendant would be fully protected on payment of the mortgage and recording the discharge; and the alleged will was not said to be valid or existing. *Macauley* v. *Boyle*, 25 C. P. 239.

After the loss of a mortgage deed the mortgagor offered to pay the overdue interest on an affidavit being produced that the mortgagee had not parted with the mortgage. The affidavit was produced accordingly, but the mortgagor did not make the payment, and a bill of foreclosure was filed in respect of this and subsequent defaults:—Held, that the plaintiffs must bear the expense of proof of loss, and the expense of the indemnity bond, but were entitled to the other costs of the suit. *McDonald* v. *Hime*, 15 Chy. 72.

The jurisdiction of equity in the case of lost bonds exists also in the case of bonds which have been destroyed. *The County of Frontenac* v. *Breden*, 17 Chy. 645.

LOTTERY.

See GAMING.

LOUGHBOROUGH, (TOWNSHIP OF.)

In the first government survey of a township (Loughborough,) the lines between alternate concessions only, as the 2nd and 3rd, 4th and 5th, 6th and 7th, had been run and staked out, numbering from south to north. These lines were not straight, but curved or bended southward in the centre of the township. It appeared, (though not very satisfactorily) that several persons had, under government, settled according to these lines. Subsequently, a surveyor was employed by government to run the concessions omitted in the first survey, viz., 1st and 2nd, 3rd and 4th, 5th and 6th concessions. He did so; but instead of running them parallel to, or divergent, as the lines formerly surveyed, he ran them in straight lines, thus cutting off part of the rear of the northerly concessions and adding them to the front of the southerly concessions:—Held, that the last mentioned survey could not be adopted as the governing one. *Keeley* v. *Harrigan*, 3 C. P. 173; affirmed by *Raile* v. *Cronson*, 9 C. P. 9.

LOWER CANADA.

See QUEBEC.

LUGGAGE.

I. LIABILITY OF INNKEEPER—*See* INNKEEPER.

II. LIABILITY OF RAILWAY COMPANIES—*See* RAILWAYS AND RAILWAY COMPANIES.

LUMBER.

See TIMBER.

LUNATIC.

I. COMMISSION AND COMMITTEE.
1. *Application for*, 2178.
2. *Other Cases*, 2179.
II. APPOINTMENT OF GUARDIAN, 2179.
III. CONTRACTS AND DEALINGS WITH, 2180.
IV. ESTATE OF, 2183.
V. MISCELLANEOUS CASES, 2184.
VI. SECURITY FOR COSTS BY NEXT FRIEND—*See* COSTS.

See C. S. U. C. c. 12, s. 31, et seq.

I. COMMISSION AND COMMITTEE.

1. *Application for.*

The judge in chambers granted an application for a commission de lunatico inquirendo, the orders of June, 1853, giving to a judge in chambers authority to act in such a matter. *Re Stuart*, 4 Chy. 44.

On an application in lunacy, the court ordered the sheriff to empannel a jury for the then next sittings of the court. The matter was not proceeded with until the sittings succeeding the next; and the matter then coming on:—Held, that the panel was not properly constituted; that the sheriff's authority to summon a jury was confined to the first sittings after the date of the order. *In re McNulty*, 13 Chy. 463.

Semble, an alleged lunatic should receive the same notice of a trial before the court as of an inquisition under the former practice. *Ib.*

An application to declare a person a lunatic without the expense of a commission must be supported by affidavits of more than one medical man. Semble, also, that notice of the application should be given to the lunatic; but that it will be dispensed with where service on the lunatic would be dangerous to him. The fitness of the proposed committee must be shewn on affidavit. *In re Patton*, 1 Chy. Chamb. 192.—Spragge. See, also, *Re Flemming*, 13 L. J. N. S. 197—Chy. Chamb.—Proudfoot.

Before granting an order declaring a person a lunatic, he must be served with notice of the application, and any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him. *In re Miller*, 1 Chy. Chamb. 215.—Spragge.

As to the evidence required to dispense with such service as dangerous to the lunatic or useless. See *Re Newman*, 2 Chy. Chamb. 390.—Taylor, *Secretary*; *Re Mein*, 2 Chy. Chamb. 429.—Taylor, *Secretary*.

Applications for a commission should be disposed of before one and the same judge. *In re Milne*, 1 Chy. Chamb. 194.—VanKoughnet.

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2. *Other Cases.*

This court, in a proper case, will, upon petition, quash a commission of lunacy, and the inquisition taken under it, without putting the party to the expense and delay of a traverse; but in such a case, where the alleged lunatic had afforded grounds for the application against him, the court, while quashing the inquisition, refused to charge the party applying for the commission with costs. *Re Milne*, 11 Chy. 153.

The recognizance of the committee, or of a receiver, will not be deemed sufficient security under the statute. *Re Ward*, 2 Chy. Chamb. 188.—Taylor, *Secretary*.

A person whom it was sought to have declared a lunatic was shewn to be in a state of mind described as "senile imbecility":—Held, that he might properly be declared a lunatic under C. S. U. C. c. 12, ss. 31, 32, and 33. *Re Kelly*, 6 P. R. 220.—Chy. Chamb.—Spragge.

See, also, IV., p. 2183.

II. Appointment of Guardian.

In moving to have a guardian ad litem appointed to a person of unsound mind, it must be shewn that he has not been so found by inquisition. *Crawford* v. *Birdsall*, 1 Chy. Chamb. 70.—Spragge.

On an application to appoint a guardian ad litem to a person alleged to be of unsound mind, not so found by inquisition, it is not sufficient evidence of the lunacy that deponents swear that the person is of unsound mind, or that they believe him to be so; such facts should be shewn, that the court may judge for itself. *McIntyre* v. *Kingsley*, 1 Chy. Chamb. 281.—Spragge.

It must also be shewn that the proposed guardian has no interest conflicting with that of the lunatic. *Ib.*

III. Contracts and Dealings with.

In this case Sullivan, J., refused to set asi the execution issued upon a cognovit, either the ground of insanity of the defendant, or fraud on the part of the plaintiff. *Paterson Squires et al.*, 1 C. L. Chamb. 234.

Action for taking goods. Second plea: avow as bailiffs of W. H. for rent due by one W B., the goods being on the demised premise Second replication thereto—that the said W. after the demise, by deed bearing date 30 October, 1869, granted to the plaintiff in f the land mentioned in the plea, whereby t plaintiff became entitled to the rent from W B., and W. H., at the said time when, & had no interest in the lands. Third replic tion: that on the 7th of May, 1870, the te ant by deed released to the plaintiff all his esta in the land, and the landlord, in considerati thereof, released the tenant from the rents a covenants. Third plea: Avowry and cogn zance under a distress for rent due upon a d mise from defendant A. H. to W. B. Secon replication: that before the demise one W. was seized in fee of the land, and by deed, dat 30th October, 1869, granted it to the plaintif who entered and took possession, and held it owner in fee at the time of the distress. T defendants rejoined to each of the above repl cations, that at the time of making the allege deed W. H. was of unsound mind, and incapa ble of executing and understanding the same, the plaintiff then well knew:—Held, good, f that the defendants were entitled to set up suc defence. *Hayward* v. *Thacker et al.*, 31 Q. 427.

The plaintiff, on the 4th of April, 1864, mort gaged land to L., who covenanted thereby fo quiet enjoyment by the plaintiff until default To an action against L.'s administrator on thi covenant, alleging an eviction by persons claim ing under L., defendant pleaded that L. con veyed the land to the plaintiff on the 31st March, 1864, which was the plaintiff's only tit to the land; that the mortgage sued on was secure the purchase money, and was execute immediately after the deed, and as a part of th same transaction: that the plaintiff by the mor gage covenanted that he was seised in fee an had good right to convey; and that the evicti complained of was an action of ejectment brough by the heirs of L., on the ground that L. was unsound mind when he executed the deed on th 31st of March, 1864, which was proved at th trial, and the jury thereupon found for the heir —Held, that the plea was bad; for the avoi ance of the deed for insanity did not necessari involve the avoidance of the mortgage; nor d the estoppel applicable to the deed extend to t mortgage; that defendant should have plead L.'s insanity directly to the mortgage if he wish to test its validity; and moreover the parties he were not the same as in the ejectment suit, n was it certain from the record in ejectment th the recovery therein was on the ground allege *Eccles* v. *Lowry*, 32 Q. B. 635.

In this case a mortgage given in 1848, by mortgagor who died in 1855, was impeached the ground of insanity:—Held, that a ratio act (the giving of the mortgage) being proved testimony not impeached to have been done i rational manner, and a security given for a va

ble consideration, under no suspicion of unfairness or knowledge by the mortgagees of the alleged insanity, the transaction could not be upset by general evidence of insane delusions, expressions, and conduct ranging over a number of years, but none of it bearing on the time when the mortgage was made, or in any way approaching the impeached dealing; and the jury on such evidence having found the mortgage void, and rendered a verdict for the plaintiff, a nonsuit was ordered. *Campbell et al.* v. *Hill*, 22 C. P. 526.

The fact that a mortgagor at the time of executing the mortgage was insane is no ground for setting it aside, if the mortgagees dealt with him and advanced their money on the mortgage in good faith, and without knowledge of his insanity:—Held, in this case, affirming the judgment below, that there was no evidence of such knowledge, and that a nonsuit, therefore, was properly entered. Spragge, C., Morrison, J., and Strong and Blake, V.CC., were of opinion that the evidence, set out in the case, was, and Draper, C. J. of Appeal, Richards, C. J., and Galt, J., that it was not, sufficient to go to the jury as to the insanity of the mortgagor at the time of the execution of the mortgage. *Campbell* v. *Hill*, 23 C. P. 473, in Appeal.

Before the court will compel a purchaser to accept a title, it must be shewn that the title is reasonably clear and marketable, without doubt as to the evidence of it. Where, therefore, the deed to the vendor was executed on the 14th of February, 1854, and in December of that year a commission of lunacy was issued against the grantor in that deed, under which it was found that he was insane, and had been so from the month of February or March previous, the court refused to enforce the contract. *Francis* v. *St. Germain*, 6 Chy. 636.

Where the lunacy of the previous owner of the estate was relied on as an objection to the title, and the vendor alleged that if such were the fact it was shewn that he had purchased fairly, and without notice of the lunacy, as a ground for enforcing the contract; still, as the fact that the vendor had purchased without such notice was one which from its nature was incapable of proof, and notice on some future occasion might be clearly shewn, the court allowed the objection, and dismissed the vendor's bill with costs. *Ib.*

Y. being the owner of valuable lands, became infirm in mind. He believed that he could control the elements, and asserted power in himself to recall from death, and in various other ways, for several years previous to his death, constantly shewed mental infirmity. While in this state his family, by an arrangement between them, entered into possession of the real estate, and severally worked it and enjoyed its profits. W. and P., Y.'s children, and M., his wife, obtained from him conveyances to them respectively of all his real estate, which were executed in presence of an attorney, and there was some evidence of a money consideration having been paid to Y. for them. It was not shewn conclusively that these conveyances were executed in a lucid interval. Y. having died intestate, on a bill by the heir of M., one of Y.'s children, these conveyances were set aside as fraudulent, with costs, and W., P., and M. were ordered to account for rents and profits. *Young* v. *Young*, 10 Chy. 365.

Held, that mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator. *Emes* v. *Emes*, 11 Chy. 25.

The father of P. and J. died during the infancy of J., leaving to them by his will 100 acres of land. After they attained majority, this land was, by deed, equally partitioned between them. J. was of weak intellect, without knowledge of land or money, and unable to read or write. P. afterwards obtained from J. a conveyance of his 50 acres, and executed a bond in his favour, charging these 50 acres with the payment of £50 per annum during J.'s life. P then mortgaged the 100 acres, and obtained from J. a release of the annuity bond, which was executed in presence of the solicitor of the mortgagees, without any good consideration therefor. On a petition filed to have J.'s lunacy declared, the evidence was taken in presence of the parties so interested in the land. J. was declared a lunatic, but, as no notice to the mortgagees or their solicitor of his imbecility when the mortgage was executed was proved, without prejudice to the mortgage, but allowing the committee of the lunatic to impeach it by bill. *In re McSherry*, 10 Chy. 390.

To avoid a transaction on the ground of lunacy, it is not necessary to shew that the lunacy was connected with or led to it. But to avoid a sale for value by a lunatic, it may be necessary to establish that the purchaser was aware of the seller's mental condition. *McDonald* v. *McDonald*, 14 Chy. 545.

A vendor was insane, but not on all subjects; and, apart from his delusions, a stranger might not perceive his insanity. In the negotiation for a sale of land, he said to the purchaser that he was bewitched, which, it was shewn, was one of his delusions:—Held, reversing the decree below, 14 Chy. 545, that this was not sufficient to affect the vendee with notice of the vendor's condition. *S. C.*, 16 Chy. 37, in Appeal.

A. received $1,200 belonging to his son-in-law, R., and invested it with other money of A.'s own in the purchase of a farm, which cost £3,200. R. with his family went into possession of the farm, and A., the father-in-law, by his will devised the farm to R.'s wife and son jointly for the life of the wife, with remainder to the son in fee, subject to the payment of $200 to a daughter of R., and of $600 to another person. It was assumed in the cause that R. was at the time of the purchase and thenceforward of unsound mind and unable to give a valid assent to the transaction; and the court held that on that assumption he was entitled to the $1,200 as against A.'s estate, and that the devise to his wife and son were no satisfaction of the claim; and also that he was probably entitled to a charge on the land for the debt. But the court directed enquiries whether R. was at the date of the transaction of mental capacity to assent to the purchase; and if so, whether he did assent thereto; also, enquiry as to the occupation of the land by R. and his family before the death of A., and the value of such occupation. *Goodfellow* v. *Robertson*, 18 Chy. 572.

The power to appoint a guardian is unaffected by 34 Vict. c. 18 s. 15. *McDonald* v. *Beard*, 13 L. J. N. S. 197.—Chy. Chamb.—Stephens, *Referee*.

IV. Estate of.

The court is bound to take notice that the Imperial Act, 11 Geo. IV. and 1 Will. IV. c. 60, enables lands in this province, held in trust by a person of unsound mind, to be conveyed by a a committee appointed by the High Court of Chancery in England. *Thompson* v. *Bennett*, 22 C. P. 393.

When the estate of a person who has been found a lunatic is small, the court will combine in one reference to the master all the usual enquiries, although the several objects are in England the subjects of separate references. *Re Duggan*, 2 Chy. 622.

A special act, passed in Upper Canada in 1827, authorized a commission to issue to enquire into the lunacy of one P. V.; and, if he should be found a lunatic, the act directed a committee of his estate to be appointed, and authorized such committee to sell his goods and lands, and to invest the proceeds in bank stock or real securities; and enacted that whatever remained of such investments at the lunatic's death should be distributed among his legal representatives according to law:—Held, that such residue was personal estate, and was to be distributed among the next of kin. *Clarke* v. *Ruttan*, 11 Chy. 416.

One of several heirs of intestate being lunatic, an act of parliament was procured, authorizing the sale of intestate's lands, and the investment of the lunatic's share in government securities or mortgages, for the benefit of the lunatic "and his representatives." The lunatic afterwards died, and in a proceeding to distribute the share of the lunatic, it was—Held, that this share, for the purposes of distribution, retained the character of realty, and was to be divided between his real representatives and not his next of kin. *Campbell* v. *Campbell*, 19 Chy. 254.

Although the general rule of the court is, that no course will be taken that will prejudicially affect the interests or the comfort of a lunatic, even for the benefit of creditors; still the court will assist creditors where that can be done without prejudice to the lunatic. And where the court, by its orders, has induced creditors to prove their debts in this court and thus prevented them from proceeding at law, Quære, whether the court is not bound to afford them relief, even to the prejudice of the lunatic's estate. *In re Shaw*, 14 Chy. 524.

In June, 1864, the committee of a lunatic's estate applied for and obtained an order for the sale of lands for the payment of debts reported due by the lunatic; but the committee took no action whatever under the order, and in 1868, after nearly four years, certain of the creditors applied for the conduct of the order directing the sale of the lands; and the court, under the circumstances, made the order. *Ib.*

The committee having neglected to collect rent of a tenant whom he found in possession of a portion of the estate, was charged with the amount thereof on passing his accounts. *In re Shaw*, 15 Chy. 619.

The committee expended more money in making surveys and roads—with a view to a sale of a portion of the estate—than the court had authorized, and which excess was occasioned by the failure of a neighbouring proprietor, who had agreed to contribute towards such expenditure. On appeal from the master the co directed such excess to be allowed him on pa ing his accounts. *Ib.*

The powers, duties, and liabilities of a co mittee of a lunatic's estate considered and act on. *Ib.*

Where the heirs at law or next of kin of lunatic are unknown, or reside at a distance, a service on them would be attended with gre expense, the court may dispense wi h service notice on them of a sale of the real estate of t lunatic. *Re McGrath*, 2 Chy. Chamb. 435. Taylor, *Secretary*.

The court will exercise a wide discretion as the disposition of lunatics' estate; and when appears to be necessary, will order its sale a disposition, and authorize the committee to c lect rents, &c. *Re Keenan*, 2 Chy. Chamb. 49 —Taylor, *Secretary*.

On an application by the bursar of the Pr vincial lunatic asylum for moneys in co belonging to a lunatic party in a suit, in whi his property had been sold:—Held, that su application was not authorized by the statut C. S. U. C. c. 71. *Mein* v. *Mein*, 3 Ch Chamb. 62.—Taylor, *Secretary*.

The control of a court ceases with the dea of the lunatic, and an order for the distributi of a lunatic's estate will not be made under pr ceedings in lunacy. Under such circumstanc the committee took, under authority of t court, proceedings for the administration of t estate by applying for an administration orde which was granted, the proceedings being direc ed to be as inexpensive as possible. *Re Br linger*, 3 Chy. Chamb. 290. — Taylor, *Secretar*

V. Miscellaneous Cases.

In 1822, A., a maniac, conveyed land to H who then entered into possession. A. died 1829. C., his eldest son and heir, became age in 1829. He died in 1829, and his broth and heir, D., (the lessor of the plaintiff), becam of age in 1831, and brought his ejectment again B., on the ground that his father was non co pos at the time of his executing the deed 1822. D. brought his action more than t years after the lunatic died, and after he hims came of age, and more than five years after statute 4 Will. IV. c. 1:—Held, that D., un these facts, was barred from recovery by Statute of Limitations; and held, also, that could not be considered in possession as the s vant or bailiff of the lunatic. *Doe* d. *Silverth* v. *Teal*, 7 Q. B. 370.

The crown granted land by letters patent J. S. "in trust for his son I. S., a lunatic, heirs and assigns for ever, to have and to h the same land to him, the said J. S., his h and assigns for ever:"—Held, per Draper, and Burns, J., (Robinson, C. J., diss.), that patent coming, as any other mode of assura under the operation of the Statute of Uses Hen. VIII. c. 10, if it did not, from partic considerations applying to the lunatic only, the real estate *in him*, yet that it neverthe created a use which, *on the death of the lun* was executed in his heir, and that therefo deed made by the heir after his death w

be valid as against a deed executed by the grantee of the crown. *Doe* d. *Snyder* v. *Masters et al.*, 8 Q. B. 55.

Held, that a tort feasor cannot plead incapacity of mind in answer to an action for an assault. *Taggard* v. *Innes*, 12 C. P. 77.

In this case the charge was assault with intent to ravish. The woman was insane, and there was no evidence as to her general character for chastity, or anything to raise a presumption that she would not consent. The jury were directed that if she had no moral preception of right and wrong, and her acts were not controlled by the will, she was not capable of giving consent, and the yielding on her part, the prisoner knowing her state, was not an act done with her will. They convicted, saying she was insane and consented:—Held, that the conviction could not be sustained. *Regina* v. *Connolly*, 26 Q. B. 317.

In the case of rape of an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury. There must be some evidence that it was without her consent, e. g. that she was incapable, from imbecility of expressing assent or dissent; and if she consent from mere animal passion, it is not rape. *Ib.*

A section of a by-law prohibiting the sale of intoxicating liquors to idiots and insane persons:—Held, good. *In re Ross* v. *The Corporation of the United Counties of York and Peel*, 14 C. P. 171.

Defendant, within one month after the plaintiff's escape from a lunatic asylum where he had been confined as a lunatic, with full knowledge of the plaintiff having recovered his sanity and really believing him to be sane, falsely represented to the medical superintendent of the asylum that the plaintiff was still insane, and had threatened to take one M.'s life, which was thereby in danger, and that the plaintiff's brothers had requested the defendant to procure his recapture; and the defendant thereupon obtained from the medical superintendent a warrant for his arrest, which he handed to a constable, and the plaintiff was arrested and reconveyed to the asylum, but after a medical examination the next day was discharged:—Held, that the plaintiff could recover in case for the malicious arrest, the jury having found that the defendant acted maliciously and without reasonable or probable cause; but that trespass would not lie, for the warrant having been bonâ fide issued by the medical superintendent, and being valid on the face of it, and authorized by the statute 36 Vic. c. 31, s. 22, O., the defendant was protected by it. In this case the jury found that the defendant acted maliciously and without any reasonable or probable cause, but they gave a verdict only for one shilling. A new trial was granted for smallness of damages, Hagarty, C. J., dissenting. *Doblyn* v. *Decow*, 25 C. P. 18.

When a bill was filed in the name of a person of unsound mind, not so found by inquisition, by a next friend, the court, on the submission of defendant, made a decree declaring that the plaintiff was entitled to certain lands of which defendant had the legal estate, subject to defendant's lien for taxes, &c., which he had paid thereon; and the defendant not asking a sale, and it not appearing that a sale or other direction following the declaration was necessary in the interest of the plaintiff, the court made no order founded on such declaration; and it not appearing that the suit was necessary, or that the defendant was guilty of any blameable conduct, he was held entitled to costs, and the next friend was ordered to pay them without prejudice to any question as between him and the plaintiff's estate. *Young* v. *Heron*, 14 Chy. 580.

MACHINERY.

I. Injury From.

II. Exemption of, from Distress for Benefit of Trade—*See* Distress.

III. When Fixtures—*See* Fixtures.

IV. Restraining Removal of—*See* Injunction.

V. Patents for—*See* Patents for Invention.

I. Injury From.

[*See C. S. U. C. c. 70; 37 Vict. c. 12, O.*]

The plaintiff, a boy of twelve, in the employ of defendant, was left with two other boys to attend to a flax scutching machine. He had never attended to the machinery before, and he said that he received no instructions. The two boys were sent away, and the plaintiff, in attempting to replace a roller, which frequently came out of its place, had his arm crushed in some cog-wheels which were not covered. These wheels were on the opposite side of the machine from where the plaintiff was required to work, and the roller could readily have been replaced without going near them. The plaintiff further said that he put the roller on as he had seen the boys do it, and that he had not been warned not to go near the cog-wheels. The defendant's evidence, on the other hand, shewed that the plaintiff had been distinctly warned; that the other boys had not placed the roller on as plaintiff did; and that the plaintiff had been shewn how to put it in. It also appeared that the machine had been in use several years without an accident, although boys had constantly been employed about it:—Held, that there was evidence to go to the jury, if the plaintiff's statements were true, and a nonsuit was set aside. *Vicary* v. *Keith*, 34 Q. B. 212.

MAGISTRATES.

See Justice of the Peace—Sessions.

MAINTENANCE.

I. Of Suits—*See* Champerty and Maintenance.

II. Of Wife—*See* Husband and Wife—Will.

III. Of Infants—*See* Infant—Will.

MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

I. Malicious Arrest.

1. *When an Action lies for*, 2187.
2. *Parties—Principal and Agent*, 2188.
3. *Arrest*, 2189.
4. *Malice and Want of Reasonable and Probable Cause.*
   (a) *Averment of*, 2189.
   (b) *Proof of*, 2190.
5. *Termination of Suit*, 2193.
6. *Pleading*, 2193.
7. *Evidence*, 2194.

II. Malicious Criminal Proceedings.

1. *When an Action lies for*, 2194.
2. *Malice and want of Reasonable and Probable Cause*, 2196.
3. *Evidence*, 2198.
4. *Other Cases*, 2199.

III. Other Malicious Proceedings.

1. *Proceedings in Bankruptcy or Insolvency*, 2200.
2. *Issuing or Enforcing Executions on Judgments*, 2201.
3. *Issuing Attachments*,
   (a) *From Superior Courts*, 2202.
   (b) *From Division Courts*, 2203.
4. *Other Cases*, 2204.

IV. Actions Against Magistrates—*See* Justice of the Peace.

I. Malicious Arrest.

1. *When an Action lies for.*

Case will lie for maliciously swearing to "an apprehension that the plaintiff would leave the province," if any cause for such apprehension be negatived. *Dunn* v. *McDougall*, 5 O. S. 156.

Though a writ of capias be set aside for irregularity, an action on the case will lie against the parties suing out the same maliciously. *Cameron* v. *Playter et al.*, 3 Q. B. 138.

Trespass would be the proper form of action against the party making the arrest. *Ib.*

Where a person has been arrested, though irregularly, under colour and in consequence of a writ, he may sue in case as for an arrest made by the direction of the person who actually caused that writ to issue. *Thorne* v. *Mason*, 8 Q. B. 236.

After a bailable ca. re. placed in the sheriff's hands, defendant settled the suit in full; he was afterwards taken on the writ, and thereupon sued for malicious arrest:—Held, not maintainable without proof of actual malice. *McIntosh* v. *Stephens*, 9 Q. B. 235.

Arrest for claim secured by mortgage—Action for—Verdict for plaintiff—New trial refused. *Blakely* v. *Patterson*, 15 Q. B. 180.

Where an arrest is set aside on condition of bringing no action, that means no action which could not have been brought unless the writ had been set aside. Defendant therefore may sue the plaintiff for malicious arrest. *Graham* v. *Thompson*, 16 Q. B. 259.

But where a person in custody under a capias had obtained an order for his discharge, upon such condition, and afterwards acted upon the order, an action for malicious arrest brought by him was stayed with costs. The last case held inapplicable to the present state of the law. *Hall* v. *Brown*, 3 P. R. 293.—C. L. Chamb.—A. Wilson.

Defendant, within one month after the plaintiff's escape from a lunatic asylum where he had been confined as a lunatic, with full knowledge of the plaintiff having recovered his sanity and really believing him to be sane, falsely represented to the medical superintendent of the asylum that the plaintiff was still insane, and had threatened to take one M.'s life, which was thereby in danger, and that the plaintiff's brothers had requested the defendant to procure his recapture; and the defendant thereupon obtained from the medical superintendent a warrant for his arrest, which he handed to a constable, and the plaintiff was arrested and reconveyed to the asylum, but after a medical examination the next day was discharged:—Held, that the plaintiff could recover in case for the malicious arrest, the jury having found that the defendant acted maliciously and without reasonable or probable cause; but that trespass would not lie, for the warrant having been bonâ fide issued by the medical superintendent, and being valid on the face of it and authorized by the Statute 36 Vict. c. 31, s. 22, O., the defendant was protected by it. *Dobbyn* v. *Decow*, 25 C. P. 18.

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2. *Parties—Principal and Agent.*

An action for a malicious arrest will not lie against a principal on an arrest made on his agent's affidavit of his own apprehension that the debtor would leave the province, the affidavit and arrest both being made without the principal's knowledge, privity, or procurement. *Smith* v *Thompson*, 6 O. S. 325.

Where a debt is due to A. & B., and A. makes an affidavit to arrest the debtor, B. is not liable to an action for a malicious arrest, unless it can be shewn that he authorized the malicious act, or was privy to it, or afterwards adopted or assented to it. *Cameron* v. *Playter et al.*, 3 Q. B. 138.

An agent of a creditor making an affidavit upon which the debtor is arrested on a ca. sa., is liable to an action for causing the writ to be sued out and to be indorsed and delivered to the sheriff, and the debtor to be arrested thereupon, though the jury expressly find that he only made the affidavit. *Davis* v. *Fortune*, 6 Q. B. 281.

Where it was averred in the declaration that by virtue of the affidavit of the defendant, he maliciously caused a ca. sa. to be sued out, when he had no probable cause for believing, &c., and that he further maliciously caused the writ to be indorsed and delivered to the sheriff, &c.:—Held, on motion in arrest of judgment, that these facts, if found by a jury, constituted in themselves the agency of defendant for the plaintiff in the suit,

which need not otherwise be more positively averred. *S. C. Ib.* 597.

See *McLarren* v. *Blacklock*, 14 Q. B. 24, p. 2194.

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3. *Arrest.*

The arrest is not proved by shewing that the bailiff with the warrant went to plaintiff's house and told him at the door that he had a writ against him, but did not enter the house, nor touch him, and afterwards left him, on his promise to put in bail the next day, which he did. *Perrin* v. *Joyce*, 6 O. S. 300.

The deputy sheriff went to the debtor's house with a ca. sa. to arrest him, and being assured that a friend of the debtor, then from home, would go his bail, he returned home without the debtor. Afterwards he went again and told the debtor, without laying hands on him, that he must come to his (the sheriff's) house, which he did, and remained there till discharged—but not under actual constraint:—Held, that there had been no legal arrest on the first visit of the sheriff; that the merely insisting on the debtor going to the sheriff's house on the second visit, did not of itself constitute an arrest; but that the debtor, in having gone there as desired, and remained there till discharged, though without constraint, had been duly arrested. *McIntosh* v. *Demeray*, 5 Q. B. 343.

See, also, *Moore* v. *Teetzel*, 1 P. R. 369; *Wilson* v. *Brecker*, 11 C. P. 268.

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4. *Malice and Want of Reasonable and Probable Cause.*

(a) *Averment of.*

A declaration held good in arrest of judgment, stating that defendant made the arrest, "having no reasonable or probable cause to apprehend," instead of alleging "that he did not apprehend," that the plaintiff would leave the province, &c. *Denham* v. *Ridout*, 6 O. S. 193.

A declaration that the defendant, not being apprehensive that the plaintiff would leave Canada, instead of Upper Canada, &c., swore that he was so apprehensive:—Held, bad, in arrest of judgment. *Thompson* v. *Garrison*, 6 O. S. 309; *McBean* v. *Campbell*, *Ib.*, 457.

In an action for a malicious arrest under a ca. sa., it is sufficient to aver that the defendant maliciously sued out a ca. sa., when he had no reason to believe that the plaintiff had made, &c. *McIntosh* v. *Demeray*, 5 Q. B. 343.

A declaration that defendant had not good reason to believe, instead of that he had not any reasonable cause for believing, and not believing, that the plaintiff was about to leave:—Held, sufficient. *Lyons* v. *Kelly*, 6 Q. B. 278.

Plaintiff charged defendant with maliciously causing the writ to be indorsed for a larger sum than warranted by the judgment, but he did not aver a want of probable cause therefor, nor lay any precise day on which the arrest was made, nor aver that defendant maliciously caused the plaintiff to be arrested:—Held, declaration bad. *Lockland* v. *Adams*, 7 Q. B. 139.

Plea. That defendant had a reasonable and probable cause of action, &c.:—Held, bad, as amounting to the general issue. *Sanderson* v. *Downs*, 11 Q. B. 99.

Plea, to a declaration for malicious arrest on a ca. sa., that defendant had reasonable and probable cause, for that, &c., setting out the facts on which he relied:—Held, bad, for uncertainty, and as amounting to the general issue; and semble, bad in substance, the facts shewing no sufficient cause. *Jones* v. *Dunn*, 1 C. P. 204.

See *Griffith* v. *Hall*, 26 Q. B. 94, p. 2194.

(b) *Proof of.*

Arrest on Ca. Re.]—In an action for a malicious arrest without any probable cause of action, it is not sufficient to establish a primâ facie case to shew an exemplification of the judgment in the former case, by which it appears that a verdict was rendered for the defendant in that action. *Sherwood* v. *O'Reilly*, 3 Q. B. 4.

The plaintiff offered in evidence the original record in the suit of the present defendant against him, with the verdict of the jury in his, plaintiff's, favour endorsed thereon:—Held, inadmissible. *Daly* v. *Leamy*, 5 C. P. 375.

Where in an action for a malicious arrest on a ca. re., the learned judge at the trial was of opinion that want of probable cause had not been shewn by the evidence, and charged the jury strongly to that effect, but did not peremptorily direct them to find for the defendant—the court granted a new trial without costs. *Tyler* v. *Babington*, 4 Q. B. 202.

In an action for malicious arrest defendant cannot succeed in banc. in nonsuiting the plaintiff or in obtaining a new trial, on the ground that no probable cause was shewn, if he took no such objection either at the trial or in moving for his rule. *Jones* v. *Daff*, 5 Q. B. 143.

In an action for arrest under a ca. re., the plaintiff gave general evidence of his solvency, &c. No malice was proved on defendant's part, but defendant gave no evidence to shew why he had arrested. The jury having found nominal damages of 1s. for the plaintiff, the court refused a new trial. *Lyons* v. *Kelly*, 6 Q. B. 278.

The mere fact that defendant was told by one or two persons that they thought he would be justified in arresting the plaintiff, otherwise he would lose his debt, is not enough to enable the judge to rule absolutely at the trial in defendant's favour. *Thorne* v. *Mason*, 8 Q. B. 236.

Defendant, living in York, received an anonymous letter, dated 6th May, 1850, posted at Adolphustown, the plaintiff's residence, informing him that the plaintiff had sold out and was going to leave the country in five or six weeks. Defendant, on the 24th June, 1850, without making any enquiries in the meantime, arrested the plaintiff on a ca. re.:—Held, that there was a case for the jury; but the verdict being large, £100, and many circumstances tending to repel malice, a new trial was granted on payment of costs. *Ruttan* v. *Pringle*, 1 C. P. 244.

Defendant gave abundance of evidence to shew reasonable cause. The judge left it to the jury to say whether they believed that defendant re-

ceived the information stated to have been given, and whether he thought it to be true that the plaintiff was about to leave the province :—Held, that the jury should have been told that the plaintiff had not proved a want of probable cause. *Smith* v. *McKay*, 10 Q. B. 412.

Held, that upon the evidence in this case, it should have been ruled by the judge that the case failed, for that probable cause was shewn to his satisfaction, of which he was the judge. *S. C. Ib.* 613.

Held, that under the evidence set out in this case, the plaintiff clearly failed to shew want of reasonable and probable cause, and that a nonsuit should be entered. *Wanless* v. *Matheson et al.*, 15 Q. B. 278.

In an action for arrest on mesne process for £93, the plaintiff proved that before such arrest he had assigned all his effects, amounting to £30,000, in trust for his creditors generally, with a proviso that a dividend should be made for all, but that the sums accruing to such as had not come into the assignment should be paid to the plaintiff; that he was employed by the assignees at a salary in arranging the estate, and that defendant had knowledge of the assignment. He also proved his own general high character and standing, and that defendant had been cautioned by one witness against making the arrest. On cross-examination it appeared that the plaintiff's family and connexions resided out of Upper Canada; that his house had been advertised for sale a short time after the assignment; that his liabilities were about £40,000; and that the assignment had been made without previously calling a meeting of his creditors :—Held, that the plaintiff had shewn primâ facie a want of reasonable and probable cause, and should have been allowed to go to the jury. *Torrance* v. *Jarvis*, 13 Q. B. 120.

Plaintiff sued defendant in the first count for malicious arrest, by a false affidavit that defendant had a cause of action against him for the seduction of his daughter; and in the second count for effecting the same object by falsely, &c., representing that he was about to quit Canada, with intent, &c. The plaintiff established a primâ facie case on both counts, in answer to which defendant proved that he was present when his daughter made an affidavit before a justice of the peace that she was pregnant by the plaintiff: that he had been informed of statements made by the plaintiff affording a very strong inference of improper intercourse: that he was told the plaintiff had said he had "signed away" his place; and that he, defendant, had received a letter from plaintiff's cousin, condemning the plaintiff for not marrying defendant's daughter, and telling defendant that it was his duty to look after him, as he was going to sell his place, and wanted to sell it to the writer: — Held, that these facts sufficiently shewed reasonable and probable cause: that as they were uncontradicted, there was no question for the jury; and that a nonsuit therefore was proper. *Ruddell* v. *Brown*, 24 Q. B. 90.

The affidavit, on which the order for the capias issued, stated that deponent (defendant) had been informed by certain parties, one O. and one W., that thay had heard plaintiff state that he would soon "fix" his property, so that he could go to live with his daughter in the United States, and that plaintiff led them to believe that he contemplated leaving Canada and putting his property out of reach of his creditors. At the trial plaintiff called O., who at first flatly contradicted defendant's affidavit, but on cross-examination said that W. had gone to see plaintiff who owed him money, which, however, he did not get; that plaintiff said he had a daughter in the States, and if he had his business all right and all "fixed" he would go to her; that defendant was asking him (witness) about this, and he told him he did not know; that he did not tell defendant, in W.'s presence, that plaintiff was going away as soon as he got his property "fixed;" that he did not tell him so until the other day, since being up in town to attend this trial; that he did not "know" he had ever told him anything about it; that he had told W. With this evidence, plaintiff closed his case, without calling W., who was then called for the defence, and stated that he knew plaintiff had been indebted to defendant for some time; that he accompanied O. on his visit to plaintiff, when O. offered him for some articles more than they were worth, in order to get his money, but plaintiff refused to let him have them; that plaintiff spoke of his daughter in the States, and said he would go there if he had all things right; that he was making much on the farm, neither paying debts nor making much more than a living; that there did not seem much prospect of his paying O. and that he was owing a good deal; that he told defendant, on his return, that before long plaintiff would be off to the States; that plaintiff promised to call and see defendant about his debt, which he never did; that he (witness) had frequently told defendant he had better look out for himself or he would lose his debt; that defendant became more alarmed when he heard of plaintiff having tried on a former occasion to abscond, when he was arrested and imprisoned; and that he (witness) had subsequently, in answer to an application for his discharge, sworn that he inferred from a conversation he had with him that he intended to get rid of his property and go to the States, and that he (witness) had informed defendant of this before the plaintiff's arrest :—Held, that on this evidence the judge should, as a matter of law, have held there was no want of reasonable and probable cause, and that a nonsuit should have been entered. *Bald* v. *Jones*, 19 C. P. 365.

Arrest on Ca. Sa.]—In an action for a malicious arrest on a ca. sa., the defendant does not answer a primâ facie case of want of probable cause, by shewing that although the plaintiff had been visibly in possession of considerable property, the sheriff had returned nulla bona. *Smith* v. *Ch* 6 O. S. 213.

In an action for a malicious arrest on a ca. s the question to be submitted is not whether t assignment of the property, which caused defendant to arrest, really is fraudulent or n but whether defendant had a good reason suspect it. *Gunn* v. *McDonald*, 6 Q. B. 596.

Where it appeared that the defendant bef making the affidavit for a ca. sa. had consult his attorney, who advised the arrest, the co granted a new trial to defendant on payment costs. *Nourse* v. *Calcutt*, 6 C. P. 14. See al *Crawford* v. *McLaren*, 9 C. P. 215, p. 220 *Fellowes* v. *Hutchinson*, 12 Q. B. 633, p. 2197.

5. *Termination of Suit.*

In case for a malicious arrest, the declaration, and not the writ, was held to be the commencement of the suit; and the suit in which the arrest was made was therefore held to be at an end by the lapse of a year before the declaration in this suit. *Cameron* v. *Fergusson*, 3 O. S. 318.

The determination of the suit is sufficiently averred by stating that "the plaintiff (the defendant in the original suit) recovered a certain sum for damages and costs" under the provincial statute 2 Geo. IV. c. 5, allowing a verdict and judgment for defendant in set-off, "and that the defendant was in mercy," &c., without averring also, "that the defendant took nothing by his writ." *Wilcox* v. *Brunside*, 5 O. S. 525.

Where one of two counts was bad for not alleging the suit to be at an end, nor shewing how it ended, and plaintiff obtained a general verdict:—Held, on motion to arrest judgment, that such omission was not cured by verdict. *Manning* v. *Rossin*, 3 C. P. 89.

The first count charged that defendant, not having any reasonable or probable cause, but contriving, &c., (not saying more particularly in what respect there was such want). The second count was in substance similar. Neither count contained any allegation that the suit was at an end:—Held, that this latter objection was fatal; and judgment was arrested. *Bishop* v. *Martin*, 14 Q. B. 416.

In an action for arrest under a judge's order:—Held, not necessary to allege in the declaration that the action in which the arrest took place was at an end, or that the plaintiff had been discharged and the order set aside. *Eakins* v. *Christopher*, 18 C. P. 532.

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6. *Pleading.*

In an action for arrest under a judge's order, an averment that the defendant maliciously obtained the order and endorsed the writ of ca. re. for bail, shews sufficiently that the writ was endorsed under the order. *Burnside* v. *Wilcox*, 5 O. S. 525.

In trespass for an arrest under a ca. re. against the plaintiff arresting, the declaration need not set out the affidavit to arrest. *Beamer* v. *Darling*, 4 Q. B. 211.

In an action for a malicious arrest on a ca. sa., it is not necessary to set out the judgment in the declaration. *Crawford* v. *Stennett*, E. T. 2 Vict.

To a declaration "for maliciously causing the plaintiff to be arrested," a plea that defendant did not make the affidavit stated in the declaration was held bad, for professing to answer the whole cause of action, and answering only part. *Long* v. *Lee*, 4 Q. B. 377.

A declaration for malicious arrest alleged that at the time of making the affidavit, procuring the judge's order, issuing the capias, and arresting the plaintiff, defendant had no reasonable or probable cause for believing, &c., yet he falsely and maliciously, and without any reasonable or probable cause, made oath that he verily believed, &c., and by means of such false allegations falsely and maliciously induced the judge to grant the order, and caused the plaintiff's arrest:—Held, sufficient: that it was unnecessary to shew the order set aside, or to aver that the affidavit shewed facts and circumstances to satisfy the judge—the real cause of action being that the defendant by his false and malicious statement set the law in motion. Defendant in his plea stated what allegations the affidavit contained, (not averring their truth) and that they satisfied the judge, who thereupon granted the order:—Held, clearly no defence. *Griffith* v. *Hall*, 26 Q. B. 94.

A declaration in the form prescribed by C. S. U. C. c. 22, schedule B. No. 27:—Held, sufficient. *Eakins* v. *Christopher*, 18 C. P. 532.

Held, that it is not necessary in an action against a clerk of a Division Court, which charges that he, "as such clerk, maliciously, &c., issued a warrant of commitment," to allege that it was so issued without the order of the judge. *McBride* v. *Howard*, 12 L. J. 280.—C. C.—Dartnell.

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7. *Evidence.*

An examined copy of the affidavit on which the arrest was made, coming from the hands of the proper officer, and shewn to have been used in the cause, is sufficient to prove that it was made by the defendant. *Spafford* v. *Buchanan*, 3 O. S. 391; *Fitzgerald* v. *Webster*, T. T. 2 & 3 Vict.

Held, affirming Spafford v. Buchanan, 3 O. S. 391, that in an action for malicious arrest on a ca. sa., the affidavit is sufficiently proved by a copy of the original filed in the crown office; and that the identity of defendant with deponent may be presumed prima facie from the name. *Wilson* v. *Thorpe*, 18 Q. B. 443.

Upon the general issue, in an action for a malicious arrest, the writ is not admitted. *James* v. *Mills*, 4 Q. B. 366.

In an action for malicious arrest, a notice to produce the writ of ca. re. issued, &c., at the suit of A. against the *defendant* in this cause:—Held, sufficient, the mistake in using the word "defendant" for "plaintiff" being a mere clerical error, which could not mislead. *Wilson* v. *Gilmour*, 5 Q. B. 212.

To connect a defendant sued for malicious arrest with the writ, the writ itself should be produced, or, to let in secondary evidence, its loss must be shewn or notice to produce it, unless defendant has adopted the arrest, as by filing affidavits in justification. *Thorne* v. *Mason*, 8 Q. B. 236.

It is necessary to produce or prove the writ in order to connect defendant with the act. *Patterson* v. *Morrison*, 17 Q. B. 130.

Where the action is against the agent of the plaintiff in the suit, it is not sufficient to produce an affidavit purporting to be made by him: it must be proved to have been made by him, and that he was the plaintiff's agent. *McLarren* v. *Blacklock*, 14 Q. B. 24.

II. Malicious Criminal Proceedings.

1. *When an Action lies for.*

Although generally a party who makes a false statement, knowing it to be such, to be acted

upon by another, is liable for any injury thus caused; yet where the party, in laying an information before a police magistrate, had given an incorrect version of the statement made to him by the defendant, and caused the plaintiff's arrest, it was held that defendant was not liable. *Sparks* v. *Joseph*, 7 C. P. 69.

The declaration alleged that defendant falsely and maliciously, and without any reasonable or probable cause, procured one H. to appear before a magistrate, and charged defendant with obtaining money from Z. and others by false pretences, and upon such charge procured the magistrate to issue his warrant, and under it caused defendant to be arrested and brought before the magistrate, who having heard the charge dismissed it, and discharged him. At the trial it appeared that the offence was alleged to have been committed by the plaintiff in the county of Middlesex, but the charge was made and the warrant issued in the city of London, by a J. P. for the county only, not for the city: —Held, that as the magistrate, acting out of his jurisdiction, had no authority whatever, the action was misconceived: that it was as if defendant had himself directed the arrest; and that trespass, therefore, not case, was the proper remedy; and a nonsuit was ordered:—Held, also, that defendant was not precluded from objecting to the magistrate's jurisdiction, by having caused the application to him as such, there being nothing to shew that he did not really believe him to have authority. *Hunt* v. *McArthur*, 24 Q. B. 254.

Plaintiff sued defendant in the first count in trespass, stating that, acting as coroner, he assaulted plaintiff, &c. The second count stated that defendant was acting as coroner, &c., and that, a jury being duly sworn, he held an inquisition on the body of one F., then lying dead, setting forth the finding of the jury—which shewed that deceased had died from the effects of laudanum administered according to a prescription by plaintiff, and through culpable negligence on his part in not having given sufficiently explicit directions—and charging that the defendant maliciously and without reasonable cause issued his warrant for plaintiff's arrest and committal for wilful murder, on which plaintiff was arrested, &c. At the trial, on its being objected that defendant, as coroner, was judge of a court of record, and therefore that no action would lie against him for anything done in his judicial capacity, plaintiff proposed to shew that he had acted maliciously and was therefore not protected, but without suggesting in what particular he had so acted. It was not disputed, however, that defendant had acted within his jurisdiction and super visum corporis, or that he had issued his warrant on the finding of the jury. On this plaintiff was nonsuited:—Held, that as defendant was acting judicially trespass would not lie against him; and that, though the nonsuit did not appear so erroneous as to warrant its being set aside, still, that if the plaintiff desired to present facts to the jury not suggested to them at the trial, the court would allow him to do so, on payment of costs. *Garner* v. *Coleman*, 19 C. P. 106.

Defendant, a justice of the peace, on the 5th May, 1869, issued his warrant against plaintiff on an alleged charge of stealing a lease, without any information being laid, upon which warrant plaintiff was arrested and brought At the sessions defendant appeared tor, when plaintiff was tried and a Held, that a count for malicious could be added for this. *Appleton* v C. P. 138.

The first count averred that the charged the plaintiff with having death of S. by administering a poise and, upon such charge procured a plaintiff's apprehension; and the ch information was to the same effect:— as disclosing no valid cause of ac felony was charged, and the admin the drug might have been either acci a medicine, so that there was nothin to found the magistrate's jurisdiction v. *Stephens*, 24 C. P. 424. See *Cam Donell*, 27 Q. B. 343.

See *Munroe* v. *Abbott*, 39 Q. B *Sinclair* v. *Haynes*, 16 Q. B. 247, p.

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2. *Malice and Want of Reasonable a Cause.*

It is not sufficient for the plaintiff prosecution and its abandonment, t jury; he must also shew want of pro *Lapointe* v. *Stennett*, T. T. 1 & 2 Vic

Where, in an action for malicious for arson, it was shewn that defenda information through the office of the secretary that certain persons conf penitentiary could give information ject of the burning, and he went received their statement that the p committed arson:—Held, that if he fide on this representation, it formed justification. *Oswald* v. *Mewburn*,

Case for malicious prosecution fo Held, that under the evidence sta report defendant had reasonable gro pecting the plaintiff, and that a rightly directed. *Wilson* v. *Lee*, 11

The declaration for malicious pro leged that defendant charged the pl having unlawfully and maliciously the defendant's premises. The infor duced at the trial, was that defendan were set on fire, that he had reaso they were set on fire by the plaintiff; that she might be held to answe charge." A verdict having been r the plaintiff for $1900:—Held, on th ted in the case, that there was evide of reasonable and probable cause; declaration, after verdict, though not precise, might be held to import That there was a variance between tion and evidence, the information any crime; and, Quære, whether to suit the information the count co The court, considering the damage allowed the insertion of a count in lieu of that in case, if the plaintiff sent to reduce the verdict to $300; granted a new trial on payment of leave to the plaintiff to amend. *Abbott*, 39 Q. B. 78.

Defendant lost a bird and saw it i house, who refused to give it up.

was arrested and brought before him. sessions defendant appeared as prosecu- n plaintiff was tried and acquitted :— hat a count for malicious prosecution added for this. *Appleton* v. *Lepper*, 20 8.

irst count averred that the defendant the plaintiff with having caused the f S. by administering a poisonous drug, on such charge procured a warrant for 's apprehension ; and the charge in the tion was to the same effect :—Held, bad, osing no valid cause of action, for no vas charged, and the administration of might have been either accidental or as ine, so that there was nothing on which the magistrate's jurisdiction. *Stephens ens*, 24 C. P. 424. See *Campbell* v. *Mc.* 27 Q. B. 343.

Munroe v. *Abbott*, 39 Q. B. 78. infra. v. *Haynes*, 16 Q. B. 247, p. 2199.

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re, in an action for malicious prosecution n, it was shewn that defendant received tion through the office of the governor's y that certain persons confined in the tiary could give information on the sub the burning, and he went there and l their statement that the plaintiff had ted arson :—Held, that if he acted bona this representation, it formed a sufficient ation. *Oswald* v. *Meeburn*, 6 O. S. 471.

for malicious prosecution for arson :— that under the evidence stated in the defendant had reasonable ground for sus- the plaintiff, and that a nonsuit was directed. *Wilson* v. *Lee*, 11 Q. B. 91.

declaration for malicious prosecution al hat defendant charged the plaintiff with unlawfully and maliciously set on fire endant's premises. The information, pro at the trial, was that defendant's premises et on fire, that he had reason to believe ere set on fire by the plaintiff ; and prayed he might be held to answer "the said ." A verdict having been rendered for intiff for $1900 :—Held, on the facts sta the case, that there was evidence of want onable and probable cause ; 2. That ation, after verdict, though not sufficient , might be held to import a crime : here was a variance between the declara d evidence, the information not charging rime ; and, Quere, whether if amende the information the count could be good ourt, considering the damages excessive d the insertion of a count in trespass that in case, if the plaintiff would co reduce the verdict to $300 ; and if no d a new trial on payment of costs, wi to the plaintiff to amend. *Munroe* , 39 Q. B. 78.

endant lost a bird and saw it in plaintiff who refused to give it up. Defend

then went to a magistrate and stated that he had lost a bird, either accidentally or that it had been stolen, and that he suspected it to be at plaintiff's house. The magistrate issued a search warrant, on which the plaintiff was brought before him and discharged, it appearing that no larceny was committed :—Held, that there was no evidence of malicious intention, and a verdict for defendant was upheld. *Lucy* v. *Smith*, 8 Q. B. 518.

Where A., went before a justice of the peace, and charged B. with having clandestinely removed and secreted a quantity of wool and books belonging to him, and the justice on such complaint issued his warrant directing the constable to search for the said books ; and if found to bring them and the said B. before him, to be dealt with according to law :—Held, that the charge and nature of the complaint not being such as authorized the justice in issuing his warrant, B. could only recover against A. by proving that in making the complaint A. acted maliciously and without any reasonable or probable cause. *McNellis* v. *Gartshore*, 2 C. P. 464.

Case for preferring a charge of felony. The jury were directed to enquire whether defendant had laid a bonâ fide statement of the material facts of the case before counsel, and whether he acted bonâ fide on the opinion obtained, and that if so, that was reasonable and probable cause :—Held, right. *Fellowes* v. *Hutchinson*, 12 Q. B. 633. See, also, *Nourse* v. *Calcutt*, 6 C. P. 14, p. 2192 ; *Crawford* v. *McLaren*, 9 C. P. 215, p. 2205.

Action for charging plaintiff before a justice of the peace with embezzlement. On the trial, the affidavit on which the information was laid, and the warrant and arrest thereunder, were proved ; and that defendant had preferred a charge before the grand jury, and that they had ignored the bill :—Held, that the ignoring of the bill was some evidence of want of reasonable and probable cause, and a nonsuit was set aside. *McCleary* v. *Bettis*, 14 C. P. 95.

The defendant was a justice of the peace, and in the course of his duty as such acquired his knowledge of the circumstances on which he preferred the charge against defendant :—Held that he was clearly not entitled as a magistrate, on that ground, to require that express malice should be proved against him. *Orr* v. *Spooner*, 9 Q. B. 601.

In an action for malicious prosecution for stealing timber, it appeared that defendant took one B. who had cut timber for him in 1862-3, to look for some timber lying near the plaintiff's barn, which B. told him he was positive was the same that he had cut for defendant. B. found a newly made path from this timber to where he had cut for defendant, and at this latter place he found almost most of the timber had been carried off and the remainder knocked about :—Held, that there was reasonable and probable cause : that B.'s evidence being uncontradicted, and there being no proof of defendant's absence of belief that the timber was his, there was nothing to go to the jury ; and that the plaintiff therefore was properly nonsuited. One of the plaintiff's daughters swore that the timber at the barn had been cut elsewhere by the plaintiff, but there was nothing to shew that the defendant was aware before the plaintiff's trial that she knew anything of the matter :—Held, immaterial. *Joint* v. *Thompson*, 26 Q. B. 519.

Want of reasonable and probable cause must be shewn by the plaintiff. Slight evidence may be sufficient, for it is the proof of a negative, but there must be some proof ; and where it was shewn only that defendant laid the information on which the plaintiff was arrested, and that the magistrates, after hearing the parties, dismissed the charge :—Held, that a verdict was properly directed for defendant. *Barbour* v. *Gettings*, 26 Q. B. 544.

The defendant having lost a pig, and bonâ fide believing one subsequently found in the possession of one C. to be his, and that it had been stolen by the plaintiff and one D., caused proceedings to be instituted against them for stealing it. On the hearing of the charge the magistrate, instead of merely satisfying himself as to whether a primâ facie case was proved, entered fully into the question of the guilt and innocence of the prisoners, and received the evidence of one W. and his family to prove that W. had raised and sold the pig to them, and dismissed the charge. Defendant, being afterwards informed by C. of a previous statement made by W., shewing his evidence to be false, and believing he was merely trying to screen the prisoners, and was equally guilty with them, consulted with the county attorney, and acting upon his advice caused proceedings against the plaintiff, D., and W., upon which they were indicted, tried, and acquitted. The learned judge, however, was of opinion, and so endorsed on the indictment, that the evidence justified and shewed reasonable and probable cause for the charge. In an action for malicious prosecution :—Held, Hagarty, C. J., doubting, that a nonsuit was properly entered, for that the facts shewed reasonable and probable cause, which was not disproved by laying the second charge, under the circumstances, after the dismissal of the first. *Rice* v. *Saunders*, 26 C. P. 27.

Declaration in trespass, for assaulting the plaintiff and giving him into custody. Plea, that the plaintiff was defendant's clerk, and as such was in the habit of receiving money for the defendant : that a large sum of defendant's money which had come into plaintiff's hands was feloniously stolen by some person : that the plaintiff, though requested by defendant, would not account for the same ; whereupon the defendant, having good and probable cause of suspicion and suspecting the plaintiff to have been guilty of the felony, gave him in charge to a constable *to* take him before a magistrate :—Held, no defence, for that no reasonable or probable cause was shewn, either as regarded the action of defendant or of the constable. *Patterson* v. *Scott*, 38 Q. B. 642.

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3. Evidence.

If the record of the acquittal of the plaintiff is produced at Nisi Prius, the court cannot enquire into the circumstances under which it has been brought forward ; but it must be received in evidence, although no order was ever granted for the delivery of a copy of the indictment to the plaintiff. *Lusty* v. *Magrath*, 6 O. S. 340. See *Regina* v. *Ivy*, 24 C. P. 78.

In an action for malicious prosecution for felony before magistrates, it is not necessary to

prove that defendant laid an information on oath, where that is not averred in the declaration; it is enough to shew that he set the magistrate in motion. Nor is it indispensable that the party charged should have been arrested or imprisoned. In this case the plaintiff, on receiving the magistrate's summons, attended in obedience to it. The charge of felony made against him by defendant was dismissed; but the magistrates thought he had been guilty of misconduct in the same matter, and he was requested to attend on another day, to which they adjourned for the purpose of considering that point:—Held, that the determination of the proceedings with regard to the charge complained of was sufficiently shewn. *Sinclair* v. *Haynes*, 16 Q. B. 247.

In an action for maliciously making a charge before a magistrate, upon which plaintiff was arrested and afterwards discharged:—Held, that it was necessary to produce the information, or lay a foundation for secondary evidence; and that the plaintiff having done neither was properly nonsuited. *Nourse* v. *Foster*, 21 Q. B. 47.

In an action for maliciously and without probable cause procuring a warrant to issue and arresting the plaintiff:—Held, that an exemplification by which the indictment appeared to have no general heading or caption, was not evidence sufficient to sustain the action. *Aston* v. *Wright*, 13 C. P. 14.

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4. *Other Cases.*

Where in case for a malicious prosecution it was alleged in the declaration that the trial of the indictment took place before a Court of Oyer and Terminer, and the indictment was at general gaol delivery:—Held, that the variance was amendable, and that the trial of the indictment being through a Queen's counsel did not deprive the plaintiff of the right of action against the real prosecutor. *Carr* v. *Proudfoot*, E. T. 3 Vict.

In a declaration for procuring plaintiff to be indicted at the Court of Oyer and Terminer, averments, that defendant, on the 2nd of June, went before a court holden on the 1st of June, and that the plaintiff was acquitted at Nisi Prius on an indictment found by the Court of Oyer and Terminer, were held bad. *Ashford* v. *Goheen, et al.*, 7 Q. B. 547.

A general verdict on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court being of opinion that there was only one joint cause of action against the defendants, that is the arrest, restricted the verdict to that count:—Held, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew that no charge had been made against plaintiff; that the warrant was given by the one to the other for the arrest of plaintiff, who was accordingly arrested upon it, and that illegally. Semble, 1. That if it had appeared that defendant who issued the warrant was liable in case only, and malice of some special kind, personal to himself, in which his co-defendant was not, and could not be a partaker, had been proved, a joint action would not lie against both; 2. That one defendant might have been convicted in trespass, and the other in c *Friel* v. *Ferguson et al.*, 15 C. P. 584.

In an action against two justices for one ac imprisonment, charged in one count as a t pass and in another as done maliciously, jury found $800 against one defendant, and $ against the other. Semble, that the dama could not be thus severed; but, Held, no gro for a new trial, as the finding might be tre as a verdict for $800 against one defendant, other being let go free by the plaintiff: Qu as to the proper mode of entering the judgm *Clissold* v. *Machell*, 25 Q. B. 80; affirmed Appeal, 26 Q. B. 422.

The plaintiff, in a previous action, sued trespass, for assault and false imprisonment, was nonsuited, on the ground that her reme if any, was by action for malicious prosecut She accordingly sued in the latter form of act The defendant then obtained a summons to s all proceedings until the costs in the first act should be paid on the ground that this was brought for the same cause of action. T summons having been made absolute, the pla tiff appealed. Harrison, C. J., before wh the appeal was heard, allowed the appeal set aside the order staying proceedings, h ing that trespass for assault and false impris ment and case for malicious prosecution clearly not the same cause of action. Sem that the jurisdiction to stay proceedings in c of this kind should be sparingly used. *Doola Martin*, 6 P. R. 319. See *Hunt* v. *McArth* 25 Q. B. 90.

III. Other Malicious Proceedings.

1. *Proceedings in Bankruptcy or Insolvency.*

In an action for maliciously suing out a c mission of bankruptcy against the plaintiff should be distinctly averred that defendant ac without cause—the averment that he falsely a maliciously swore to the debt is not sufficie The declaration should also state that the c mission issued upon the affidavits set out, a that they were made before a competent auth ity; also, that the commission was supersed before action. *Locke* v. *Wilson*, 6 Q. B. 600.

Declaration, that plaintiff and another carr on business under name of "McGill Bros.," w in good credit and solvent, and had not ceased meet their commercial liabilities, as defenda well knew: that defendants, being creditors over $500, maliciously intending to injure pla tiff, and destroy his business and credit, fals and maliciously, and without reasonable, & cause, made a demand in writing on said firm the form "E" in the schedule to the Insolv Act of 1864; that within five days thereaf defendants refused to abandon said proceedin but, as a condition, insisted that plaintiff shou retire from said firm, and that certain secur for a composition on debts of said firm shou be given, or defendants would proceed; that t trade and credit of the firm were much injure and that in consequence of defendants' proce ings the plaintiff was put out of said firm, with receiving any share of the assets, &c.:—He on demurrer, bad, as shewing that the proce ings on the demand terminated against the pla tiff, not in his favour, and as disclosing a state facts, in the submission of plaintiff to the

mand, instead of controverting its reasonableness, which shewed that defendants had reasonable grounds for the proceedings complained of. *Mayil*, v. *Samuel et al.*, 19 C. P. 443.

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2. *Issuing or Enforcing Execution on Judgments.*

In an action for enforcing a judgment in itself regular, but which has been satisfied, malice and want of probable cause must be alleged in the declaration. *Ault* v. *Armstrong*, 12 Q. B. 385.

The declaration, after setting out a judgment recovered against the plaintiff in an action in which defendant was the then plaintiff's attorney, alleged that the plaintiff paid the same except a small sum, yet that defendant well knowing, but contriving, &c., issued a fi. fa., and wrongfully and unjustly caused the same to be endorsed for the full amount of damages and costs, well knowing that only a small portion thereof remained unpaid, and caused the sheriff to seize the plaintiff's goods :—Held, that no cause of action was shewn, for it was not stated that defendant acted maliciously and without reasonable or probable cause, and these averments were not dispensed with by the allegation of his knowledge that the debt was nearly paid. Semble, that the declaration was defective also in not sufficiently shewing damage sustained, for it did not appear that the sheriff seized goods to a larger amount than was really due. *Young* v. *Daniell*, 21 Q. B. 443. See also, *Barber* v. *Daniell*, 12 C. P. 68.

Declaration that defendant S. recovered a judgment in the Queen's Bench against the now plaintiff, for 1s. damages, and that the master improperly allowed his costs at £39 3s. 1d., for which judgment was entered; that the costs were afterwards revised and allowed at £11 3s. 9d., for which S., was entitled to execution; yet the defendants wrongfully and maliciously, and without reasonable or probable cause, caused a fi. fa. to be enforced by the sheriff for £39 3s. 1d. Demurrer, because the declaration did not allege that the judgment was altered, &c., or that the amount was levied on an execution improperly sued out, &c. :—Held, that the declaration was sufficient. *Dewar et al.* v. *Carrique*, 14 C. P. 137.

Declaration, that defendant recovered a judgment against the plaintiff, and issued a fi. fa. thereon, and afterwards by an instrument under seal duly released the plaintiff therefrom, yet that defendant maliciously caused the sheriff to seize the plaintiff's goods under the writ, and would not direct him to stay, so that the plaintiff was obliged to pay a large sum of money to release them. Plea, on equitable grounds, that after the recovery of said judgment, and before the release, a fi. fa. was issued thereon : that in ignorance of the issuing of said writ, and believing that all the costs on said judgment did not exceed £6 5s., defendant consented to refer all matters between himself and the plaintiff to arbitration : that the arbitrators awarded that the plaintiff should pay defendant £202, and should also pay to him the said costs, which they believed amounted only to £6 5s., and they directed that sum to be paid, in ignorance of the fact that said costs, with the sheriff's fees, in truth amounted to £15 : that it was the intention of the arbitrators that all the said costs should be paid by the plaintiff, but neither they nor the defendant became aware of the mistake until after the time for moving against the award had elapsed : that in similar ignorance of these facts mutual releases were directed by the arbitrators, and defendant executed and delivered the release in the declaration mentioned : that before the trespass complained of defendant discovered the mistake, and requested the plaintiff to pay the balance of said costs to the sheriff, which he promised but afterwards refused to do, and defendant thereupon, with the knowledge and privity of the plaintiff, who took no means to prevent the same, allowed the sheriff to obtain satisfaction of the said balance, as he lawfully might :—Held, on demurrer, plea bad, as shewing no defence. Held, also, that it sufficiently appeared from the declaration that the seizure took place after the release, and that the objection was, at all events, removed by the plea. *Duross* v. *Duross*, 19 Q. B. 77.

Declaration, that defendants having recovered judgment and execution against plaintiff and others, plaintiff and said others paid and satisfied said judgment debt, except a small amount not exceeding about $20; yet defendants, well knowing, &c., and notwithstanding the small amount due, but contriving and intending to injure and aggrieve the plaintiff, thereafter, to wit, &c., wrongfully and unjustly, and by pretence that there was a large amount due, to wit, &c., caused the sheriff to take and seize certain goods of great value, to wit, &c., of plaintiff's, and to make thereout $200 :—Held, on demurrer, bad, for not alleging that the act complained of was done maliciously, and without probable cause. *Ventris* v. *Brown et al.*, 22 C. P. 345.

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3. *Issuing Attachments.*

(a) *From Superior Courts.*

Declaration, for maliciously causing a steamer of the plaintiffs to be attached in the United States, alleging that the suit had been determined in favour of plaintiffs. Plea, that defendant appealed from the decision, which appeal is still pending: — Held, on demurrer, plea good. *Griffith et al.* v. *Ward*, 20 Q. B. 31.

Declaration, that one O. caused an attachment to issue against the plaintiff as an absconding debtor, and that defendant, in order to enable him to obtain an order for such attachment, falsely, maliciously, and without reasonable or probable cause, made a false affidavit that he had good reason to believe and did believe that the plaintiff had departed from Upper Canada, with intent, &c. It was objected, in arrest of judgment, that there was no averment that the attachment had been set aside, nor that defendant had no reasonable cause for making the affidavit, or for his belief; but, Held, that the first averment was unnecessary, and that the other was sufficiently made, after verdict. *Fahey* v. *Kennedy*, 28 Q. B. 301.

The first count was for maliciously making affidavit of debt, of the plaintiff's insolvency, and of his intention to remove and dispose of certain goods with intent to defraud defendants, and thereby procuing an attachment, and the plaintiff to be declared an insolvent—alleging that the attachment and proceedings were after-

wards set aside. The second count was in trespass for seizing plaintiff's goods:—Held, as to the first count, that the affidavit of defendants' agent as to the removal of the goods not being corroborated by two witnesses, as required by the act, was no objection, for by the form of action the plaintiff conceded the process to have been legal, and relied on its having been issued maliciously. On the second count, the jury were told that if the attachment had been set aside, the plaintiff was entitled to a verdict; and the plaintiff objected that as the setting aside had been proved, it should not have been left as if open to doubt. The jury having found for defendants:—Held, that the charge was unobjectionable; and as on the evidence nominal damages only would have been sufficient, the court refused to interfere. *Eaton* v. *The Gore Bank*, 27 Q. B. 490.

(b) *From Division Court.*

Held, that the jury might with propriety infer malice from the fact of the defendant having recovered a sum less than that attached for, unless satisfactorily accounted for. *Palk* v. *Kenney*, 11 Q. B. 350.

In an action for maliciously suing out an attachment in the Division Court, it appeared that the defendant, when he made the affidavit, was aware that the plaintiff was then actually in prison. For the defence it was shewn that the goods attached were eventually sold under executions against the plaintiff, and therefore no substantial damage was suffered. The court, however, refused a new trial on this ground, the verdict being small. *Owens* v. *Purcell*, 11 Q. B. 390.

In such a case it is proper to charge in the declaration that defendant had no reason to believe that the plaintiff was about to abscond from the province of Canada, not the Upper province only. *Ib.*

Defendant having sued out an attachment from the Division Court, and seized under it certain materials employed in repairing plaintiff's vessel:—Held, that such attachment could not be warranted by any intention on the plaintiff's part to remove the property, the statute requiring an attempt to remove, C. S. U. C. c. 19, s. 199; and there being no evidence of such an attempt, or of any reasonable ground for supposing it to have been made, that the defendant was liable for issuing the attachment without reasonable or probable cause. *Hood* v. *Conkrite*, 29 Q. B. 98.

A count for maliciously attaching for $96, when the plaintiff owed defendant only $22:—Held, good, without shewing, as in the case of a distress for rent, that the goods were sold to satisfy more than $22. *Ib.*

Defendant had claimed $74 for rent of shipyard, which had been disallowed by the Division Court. The evidence in support of the claim was, in substance, that after defendant had worked on a vessel being repaired there for plaintiff for some time, a difficulty arose between him and the plaintiff, in consequence of which he refused to go on, and the plaintiff desired him to do nothing more. The vessel then remained in the yard for more than a month, until the plaintiff got her ready to launch, defendant having notified the plaintiff that he must pay rent in advance; but there was no evidence of any ting or agreement:—Held, that on these f the jury were warranted in finding that the fendant had no reasonable ground for attac for the rent. *Ib.*

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4. *Other Cases.*

Case against the mayor of a municipal cou for that the council in session had resolved determined (not under seal) to demise cer land to the plaintiff, and that he was willing offered to accept, &c.; and that the cou while in session, and defendant being ma did instruct and order him as such mayor, and on behalf of the council and in the nam the council, to make and execute the lease which he had notice, but which he malicio refused to do, though thereunto requested Held, action not maintainable. *Fair* v. *Ma* 3 C. P. 484.

The plaintiffs, the municipality of East N souri for 1858, by their declaration—after al ing that the defendants were township co cillors for East Nissouri during 1856, tha commission was issued under 12 Vict. c. 81 181, to enquire into the financial affairs of township, and the commissioners had there and by force of the statute, all such powers by law are vested in commissioners under 9 Vi c. 38, and were by virtue of the said commiss and of the said statute empowered to summ witnesses before them, and require them to g evidence, and produce such documents as t commissioners should deem requisite; and th the commissioners, in pursuance of their s powers, met, and summoned the defendants witnesses to give evidence on oath, and produ certain documents which the said commissione deemed requisite—charged that defendan contriving and maliciously intending to obstr and delay the commissioners in the discharge their duties, and in making the said enqui and to cause great damage to the plaintiffs reason of the expenses of said commissione and to obstruct and delay them in obtaining s evidence, and to prevent the production of s documents, wickedly and maliciously amo themselves did conspire, contrive, confeder and agree together to obstruct and delay t commissioners in making said enquiry, and cause great expense to the plaintiffs by incre ing the costs of said commission, and to obstr and prevent them from obtaining said eviden and to obstruct and delay the production of s documents, and prevent and hinder the s enquiry. And that defendants, maliciou contriving and intending as aforesaid, afte wards, and in pursuance of the said conspira &c., refused and neglected to attend before t said commissioners as witnesses, and to gi evidence to them, and to produce the said do ments, although defendants might, and cou and ought to have attended and given su evidence, and produced said documents; a did procure one N., the clerk of said muni pality, and who as such clerk had the custo and possession of said documents, to part wi the custody and possession thereof, and to co ceal or remove himself, to avoid being su moned or attending as a witness before s commissioners, and to obstruct and delay t

production of said documents before them; and did otherwise procure the said documents to be concealed and kept concealed from said commissioners—whereby the said enquiry was hindered and delayed, and the plaintiffs were in consequence made liable to pay £300 over and above what they would otherwise have been compelled to pay, if it had not been for said acts and conduct of defendants; that the necessary expenses of executing said commission, as provided by the statute, would not have exceeded £50, except for such unlawful conduct of defendants; but in consequence and by means thereof, and of the premises, said expenses amounted to £350, and the same were, after the execution of said commission, and before this suit, settled and allowed by the Inspector-General, according to the statute, at £350, being £300 more than would otherwise have been incurred or allowed, and which said sum the plaintiffs had paid to said commissioners before the commencement of this suit. Upon demurrer:—Held, that the declaration was good. That although a case of the first impression, a good ground of action was shewn, there being a wrongful act done by the defendants without any reasonable cause, and legal damage resulting to the plaintiffs. As to the various objections taken:—1. Held, that the damage was sufficiently stated, and was a legal damage, being directly occasioned by the act complained of. 2. Quære, whether the declaration could be taken to allege that power was given *by the commission* to summon witnesses, &c. If not, the commissioners would have no such power. 3. Held, that it was sufficiently averred that defendants acted maliciously, and without reasonable or probable cause. 4. That the fact of the costs having been allowed by the Inspector-General at £350, was no answer to the charge made against defendants. 5. That it was unnecessary to aver that defendants had been tendered their expenses as witnesses, there being no provision for such payment. 6. Or that the evidence or documents required were material. 7. That as upon the whole declaration good ground was shewn to sustain an action on the case, it could be no objection that a conspiracy was alleged, and that the facts stated would not support an action for conspiracy. 8. That defendants must be treated as being charged as individuals, not as acting in their capacity of councillors. *Municipality of the Township of East Nissouri* v. *Horsman et al.*, 16 Q. B. 556.

A writ of replevin having been issued by defendant against plaintiff, under which certain books of account were seized and given to defendant, the plaintiff some time afterwards brought an action for damages, contending that defendant had maliciously sued out the writ to injure him, claiming large damages. The jury found for the plaintiff £80:—Held, that a suitor taking legal advice upon a question of law and acting thereon apparently bonâ fide is not responsible; nor can an action for maliciously taking such proceeding be successfully prosecuted against him. Per Richards, J.—The verdict would have been set aside for excessive damages, if not otherwise. *Crawford* v. *McLaren*, 9 C. P. 215.

The first count alleged that the plaintiff was a hotel-keeper at Niagara Falls, and furnished guides and dresses to persons going under the Falls, and by consent of the Government had a stairway for visitors down the bank of the river: that the defendants also had a stairway for the same purpose: that the plaintiff's stairway had been burned down, and while he was rebuilding it the defendants, contriving to injure him, falsely and maliciously, and without reasonable or probable cause, represented to the attorney-general that the land on which the plaintiff's stairway was built (which belonged to the crown) was necessary for military purposes, and that the land on top of the bank was required for a highway, and had so been used for many years by license from the crown, and that the plaintiff had wrongfully intruded on said land, and had begun to excavate and destroy the cliff at the top of the bank, reducing the width of the road: and thereby the defendants induced the attorney-general to permit the use of his name in filing an information in Chancery to restrain the plaintiff, and obtained an injunction to restrain him, from interfering with the bank; whereby the plaintiff was delayed in completing his stairway until he obtained a license from the crown so to do, and lost the profits of his business, &c. The second count alleged that the plaintiff and defendants were both engaged in furnishing refreshments and dresses to persons wishing to go under the falls: that there was a certain public stairway for such persons down the bank: that the defendants intending, &c., to injure the plaintiff, falsely and maliciously, and without reasonable or probable cause, represented to the public wishing to go down the stairway that they had a right to prevent them, and forbade and refused to allow persons wearing dresses furnished by the plaintiff to pass down, by reason whereof hundreds of persons, who would have procured dresses from the plaintiff, were forced and obliged to get their dresses from the defendants, and the plaintiff lost the profits of hiring his dresses and selling refreshments, &c.:—Held, on demurrer, both counts bad; for as to the first, no action would lie so long as the decree in equity remained in force, notwithstanding the subsequent license from the crown; and as to the second, it charged no violation of any right of the plaintiff, nor the maliciously procuring the breach of any contract with him, and it therefore shewed no cause of action. *Davis* v. *Barnett et al.*, 26 Q. B. 109.

Plaintiff sued defendant for having caused an appearance to be entered for the defendants in an ejectment, brought by plaintiff against them, for land assigned to plaintiff under process issued in an action of dower against this defendant, alleging that he had done so wilfully, wrongfully, and without the consent, knowledge, or authority of the defendants, but not charging malice or want of reasonable or probable cause:—Held, on demurrer, that the declaration was bad on this ground. Semble, that defendant and his attorney would, on a such a declaration, be liable to defendants in the ejectment suit; and that the defendants therein being worthless, he would also be liable to the plaintiff for the costs of that suit, on a summary application to the court made therein. *Fisher* v. *Holden*, 17 C. P. 395.

Plaintiffs manufactured in Montreal some Old Tom gin, &c., which they sold and shipped to Guelph to J. & H., no permit accompanying it. The casks were branded as if manufactured in London, England; but the invoice received by

the consignees from the plaintiffs, and handed to the officers, shewed that the goods came from the plaintiffs, and described the plaintiffs as distillers, &c. The defendants as officers of inland revenue seized and detained the goods for want of a permit, but subsequently, upon its being shewn at Ottawa that the goods were manufactured from spirits which had paid duty, they, by instructions, offered to release the goods on payment of costs of seizure:—Held, that, under the circumstances set out, the defendants had reasonable and probable cause for believing the goods were being unlawfully removed, and for seizing them; 2. That the seizure being so justified, and no permit obtained, the refusal to deliver up, except on payment of costs, could not make defendants liable. *Winning* v. *Gow et al.*, 32 Q. B. 528.

See *Dobbyn* v. *Decow*, 25 C. P. 18, p. 2188.
See also *Bigelow* v. *Staley*, 14 C. P. 276.

MALICIOUS PROSECUTION.

See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

MALICIOUSLY INJURING PROPERTY.

Quære, would a complaint against A. B. that he "was seen in the act of destroying or injuring private property," without alleging that the property belonged to *another* person, or that the act was wilfully or maliciously done, authorize a warrant as for a malicious injury to property under 4 & 5 Vict. c. 26. *Powell* v. *Williamson*, 1 Q. B. 154.

On the 8th November, 1875, an information was laid against B. before the police magistrate of St. Thomas, by one N., under the 32 & 33 Vict. c. 22, D., for having unlawfully and maliciously broken and injured a fence round the land of N. The defence set up was, that the fence encroached upon B.'s land, but there was evidence which, if believed, went to shew that B. did not commit the injury under a bonâ fide exercise or belief of a right; and the magistrate convicted and fined him. B. appealed to the general sessions of the peace, where neither side asked for a jury; the court urged them to have one, but the respondent, N., refused; and the court having heard the evidence, decided that B. acted, though mistakenly, under a bonâ fide belief that he had a right to remove the fence, and without malice: and they ordered the conviction to be quashed, with costs. N. then applied to quash this order, upon the ground, amongst others, that the case could not be tried without a jury; but:—Held, that the 32 & 33 Vict. c. 31, s. 66, D., which authorizes the court to try without a jury, is within the powers of the Dominion parliament, and that the case having been properly before the sessions, this court could not review their decision upon the merits. Sec. 66 of the 32 & 33 Vict. c. 22, does not dispense with proof of malice in such cases, but, read in connection with sec. 29, merely means that the malice need not be conceived against the owner of the property injured. *Regina* v. *Bradshaw*, 38 Q. B. 564. Gwynne, J., sitting in vacation. See *S. C.* before the Sessions, 13 L. J. N. S. 41.

[Other Malicious Injuries to property—CRIMINAL LAW.]

MANDAMUS.

I. WHERE IT LIES.
1. *Generally*, 2208.
2. *Where there is another Remedy*, 2209
3. *To Exercise Discretionary Functi* 2211.
4. *To Deliver up Documents*, 2211.
5. *To Repair or Rebuild Highways Bridges*, 2211.
II. TO COUNTY OR DIVISION COURT JUD OR OFFICERS, 2213.
III. TO SESSIONS, 2215.
IV. TO JUSTICES OF THE PEACE, 2215.
V. TO MUNICIPAL CORPORATIONS AND O CERS.
1. *Election of Members and Officers*, 2
2. *Assessments*, 2217.
3. *To Treasurer to pay moneys*, 2219.
4. *Other Cases*, 2219.
5. *To Levy School Rates*—*See Public Scho*
6. *To pass By-laws or issue debent in aid of Railways*—*See* RAILW AND RAILWAY COMPANIES.
VI. TO PUBLIC COMPANIES.
1. *To Register Transfer of Shares*, 22
2. *To Appoint Arbitrator*, 2220.
(a) *For injury to Property*—*See* RA WAYS AND RAILWAY COMPAN
3. *Other Cases*, 2220.
VII. TO PUBLIC OFFICERS, 1221.
VIII. TO SCHOOL TRUSTEES — *See* PU SCHOOLS.
IX. TO REGISTRARS—*See* REGISTRY LAWS.
X. DEMAND AND REFUSAL, 2221.
XI. WRIT OF.
1. *Who may Apply*, 2223.
2. *Issue of*, 2223.
3. *Affidavits*, 2224.
4. *How Directed*, 2224.
5. *Return to*, 2224.
XII. COSTS, 2224.
XIII. ENFORCING BY ATTACHMENT, 2225.

See C. S. U. C. c. 23; 28 Vict. c. 18; 35 c. 14, O.

I. WHERE IT LIES.

1. *Generally.*

A mandamus never issues except to admi restore some person to an ascertained right. *re Barnhart*, 5 O. S. 507.

A mandamus will lie to compel a witne prove the execution of a deed and memorial registry. *Regina* v. *O'Meara*, 15 Q. B. 201.

A gas company incorporated under C. S. C. c. 65, having made a charge for a special illumination, which was disputed, refused to supply gas to the same premises for ordinary purposes until their claim had been paid:—Held, that this was not justified, but that a mandamus would not lie, as the statute imposed no duty; and that the only remedy was by action. *In re The Commercial Bank of Canada and the London Gas Co.* 20 Q. B. 233.

See *Regina* v. *Corporation of Bruce*, 11 C. P. 575, p. 2223.

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2. *Where there is another Remedy.*

Where lands were sold for taxes, on the 1st March 1830, and on the 1st March 1831 the owner paid the purchase money and twenty per cent. besides, as required by the statute, to the deputy sheriff, who collected taxes for the treasurer then absent, and a short time afterwards the purchaser demanded a deed from the sheriff, who refused to give it—the court refused a mandamus to compel him, stating that the owner was in time, and if not, they would leave the purchaser to his action. *In re Sheriff of Newcastle District*, Dra. 503.

A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. *Hughes* v. *Mutual Ins. Co. of Newcastle*, 13 Q. B. 153.

The writ was refused therefore against a Mutual Insurance Company, to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. *Ib.*

As a general rule a mandamus will not be granted unless the applicant has no other specific legal remedy. *School Trustees of Elzevir* v. *The Corporation of Elzevir*, 12 C. P. 548.

The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi directed to H. to deliver up to him the books and papers: that he went to the office with two constables, in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority, but refusing to allow her or her solicitor to examine it, and that they then took away the books, &c. Upon these affidavits the court granted a rule nisi for attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. A rule for an order to M. to restore the books, &c., thus obtained was refused, as H. might bring trespass, claiming a mandamus in the action: and where full redress can be had by an ordinary suit applications for summary remedies should not be encouraged. A writ of replevin had previously been refused. *In re McLay et al.*, 24 Q. B. 54.

Held, that the prosecutors were entitled to a mandamus under 20 Vict. c. 146, to the G. W. R. Co. to appoint an arbitrator to determine the compensation to be paid, though they might have submitted their case to a jury as well as to arbitration had they so chosen. Semble, that the court would not have interfered by mandamus had not the prosecutors' remedy by suit probably been barred by 16 Vict. c. 99, sec. 10. *Regina* v. *The Great Western R. W. Co.*, 14 C. P. 462.

A mandamus to compel a County Court to proceed with an action was refused, among other reasons, because the applicant had a remedy by appeal. *Meyers et al.* v. *Baker*, 26 Q. B. 16.

Upon an application for a mandamus to a township corporation to make and deliver to trustees certain debentures for $25,000 authorized by two by-laws of the corporation granting aid to a railway company, it was argued that the company had lost all claim to $18,000, if not to the whole of the bonus, by non-commencement of their road. On the other hand, the company contended that, by certain agreements with the corporation, and by several statutes, extending the time for commencement, their right to the debentures was preserved:—Held, that such right, depending upon matters of contract, should not be determined upon such an application, but by suit in the ordinary way; and the application was discharged with costs. *In re the London, Huron, and Bruce R. W. Co., and the Council of the Township of East Wawanosh et al.*, 36 Q. B. 93. See, also, *In re North Simcoe R. W. Co. and the City of Toronto*, 36 Q. B. 101.

Application for a mandamus to deliver to trustees certain debentures for a railway bonus. Per Harrison, C. J.—The whole matter was one of contract, and the company, if entitled to the debentures, had another remedy, either at law or in equity, which would be more convenient and appropriate than a writ of mandamus. *In re Stratford and the Huron R. W. Co. and The Corporation of the County of Perth*, 38 Q. B. 112.

Per Burton and Moss, JJ., on appeal from the above judgment.—The absence of an adequate legal remedy is a sufficient ground for granting a writ of mandamus, notwithstanding the existence of an equitable remedy: and since the Administration of Justice Act, 1873, the applicant for such a writ should succeed on disclosing a case which would entitle him to relief in equity. Per Moss, J. This writ is not now invested with any prerogative character in this Province; and it would be a convenient rule, upon applications for it, to act upon principles similar to those which govern a Court of Equity in suits for specific performance. *Ib.*

Remarks as to the remedy by mandamus, and the effect of there being another remedy available in equity, though not at law. Semble, that it is the inadequacy and not the mere absence of all other legal remedies, coupled with the danger of a failure of justice without it, which must usually determine the propriety of granting or refusing the writ. *In re The Hamilton and North Western R. W. Co. and The Municipal Council of the Corporation of the County of Halton*, 39 Q. B. 93.

See *Election Board of Police of Brockville*, 3 O. S. 173, p. 2217; *Regina* v. *Bank of Upper Canada*, 5 Q. B. 338, p. 2217; *Regina* v. *The Mayor of the Town of Cornwall*, 25 Q. B. 293, p. 2217; *Kinnear and the Corporation of the County of Haldimand*, 30 Q. B. 398, p. 2212; *In re Quin and the Treasurer of Dundas*, 23 Q. B. 308, p. 2218; *Re McDonald and The Mail Printing Co.*, 6 P. R. 309, p. 2226.

3. *To Exercise Discretionary Functions.*

C., a servant living in the township of London, was travelling to Komoka with a load of trees, and was injured on the way by the waggon upsetting. He was taken to the tavern of M., in the township of Lobo, where his leg was amputated, and he remained several months at M.'s expense, destitute and helpless:—Held, that the court by mandamus could not compel the corporation to provide for his relief, the power to do so being discretionary. *In re McDougall and the Corporation of the Township of Lobo*, 21 Q. B. 80.

The issuing of a warrant of commitment, under 32 & 33 Vict. c. 31, sec. 75, is discretionary, not compulsory upon a justice of the peace; and the court will therefore on this ground, as well as upon the ground that the party sought to be committed has not been made a party to the application, refuse a mandamus, if this be the proper remedy, which in this case it was held not to be, but that the application should have been under C. S. U. C. c., 126, sec. 8. *In re Delaney and McNabb*, 21 C. P. 563.

See *Re Boundary Line between Eastern and Johnstown Districts*, M. T. 6 Vict., p. 2215; *Re Conklin*, 31 Q. B. 160, p. 2216.

See, also, I. 5, infra.

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4. *To Deliver up Documents.*

Mandamus granted to the clerk of a Court of Requests to give up the books and papers of the court, on being removed from office. *In re Lacroix*, 4 O. S. 339.

At a session in October, 1846, A. was elected by the district council treasurer of the district. When elected, A. was himself a district councillor; and then B. held the office of treasurer, having been long previously appointed by royal commission. B. refused to give A. the books, &c., of the office, upon the grounds that under the District Council Acts, 4 & 5 Vict. c. 10, and 9 Vict. c. 40, the election had been held at an improper time, and that the two offices of district councillor and treasurer were incompatible. Upon application for a mandamus to B. to deliver over the books, &c.:—Held, 1. that A. had been elected at the proper time and session; 2. that the two offices were incompatible; 3. that A. was ineligible for election, the council having no power to receive his resignation as councillor; 4. that notwithstanding A.'s irregular election, he, as treasurer de facto, under the 9 Vict. c. 40, had a legal right to the books, &c., of his office, and that the mandamus might go, the legality of the election being questionable in another proceeding. *Regina* v. *Smith*, 4 Q. B. 322.

A mandamus was ordered to the clerk of a township to deliver up the papers to the council first chosen, a second election having, under the circumstances, been held invalid. *In re Corporation of Asphodel and Sargeant et al.*, 17 Q. B. 593.

See *In re McLay et al.*, 24 Q. B. 54, p. 2210.

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5. *To Repair or Rebuild Highways or Bridges.*

Semble, that under the facts of this case there was clearly a duty incumbent on the municipal council, under 12 Vict. c. 81, s. 37, to plank gravel the road assumed by them, as they w desired. The court, however, granted onl mandamus nisi, in order that any question rai upon the return might be disposed of formal *In re Municipality of Augusta and Munici Council of Leeds and Grenville*, 12 Q. B. 522.

A mandamus nisi having issued command a municipal corporation to repair and rebuil bridge over the Grand river at Cayuga, appeared on the return that the liability disputed on several grounds, it being conten that the bridge did not belong to the def dants, that it was not constructed on the provided by the charter of the original c pany which built it, and was in an unfit dangerous place, and that it should be repai by another municipality:—Held, that un these circumstances a mandamus would not and that the applicants must proceed by indi ment:—and Semble, that the latter is the pro remedy in all cases except where a charter been obtained to construct a road, and the w has never been done. *Regina* v. *The Munici Corporation of the County of Haldimand*, 20 B. 574.

A mandamus to compel the county to build bridge over the Grand river at Indiana was fused, for (1), the bridge having been built b joint stock company the public could not bound to repair it; and at all events, the obli tion being at least very doubtful, the part should be left to their remedy by indictmen and (2), the place at which such bridge sho be erected must be in the discretion of t council. *Kinnear and the Corporation of County of Haldimand*, 30 Q. B. 398.

It was held that the corporation of the coun of Haldimand were not liable to indictment not repairing the bridge over the Grand river the village of York, for it had been built by joint stock company which had abandoned and had never been assumed by the coun nor had it become a public highway by dedi tion, tolls having been imposed on it. Que however, whether the council could not be co pelled to establish a bridge across the river some convenient place between Caledonia Cayuga, there being none for that distance, ab eleven miles. *Regina* v. *The Corporation of County of Haldimand*, 38 Q. B. 396.

Held, upon the facts stated in the affida filed, that a mandamus would lie to compel county to build the bridge, as suggested in last case; and the writ was ordered. Harris C. J., diss. *Brooks and The Corporation of County of Haldimand*, Q. B. E. T. 1877; yet reported.

Semble, that a mandamus, under the circ stances of this case, would not have been gran at the instance of the municipality to compe railway intersecting highways to restore them their former state, or in a sufficient manner to impair their usefulness. *Regina* v. *The G Western Railway Co.*, 21 Q. B. 555.

A motion for a mandamus requiring B. & the purchasers of a road company, to repa portion of the said road, was refused on the thority of Regina v. Trustees of the Oxford Turnpike Roads, 12 A. & E. 427, and the par left to their remedy by indictment. *Regi Brown et. al.*, 13 C. P. 356.

In 1856, a road company obtained leave to build a bridge at a point on the O. river from the Public Works department, under whose control this portion of the river was, upon condition that in the event of navigation being resumed the bridge should be removed, and if the government required a drawbridge should be substituted. Navigation being resumed, the bridge was ordered to be removed by the department, and was removed by the county, under whose control the road had passed. Upon application for a mandamus to the corporation of the county to build a swing or other bridge at the point :—Held, that it was discretionary with the government to allow a bridge there or not, and that the county was neither authorized nor compelled to build it. The application was therefore refused. *Re Wescott et al., and the Corporation of the County of Peterborough*, 33 Q. B. 280.

Where a county council is liable to repair a bridge, the proper remedy is by indictment, not mandamus. *Re Jamieson and the Corporation of the County of Lanark*, 38 Q. B. 647.

II. To County or Division Court Judges or Officers.

The court will only grant a mandamus to the judge of the County Court where his jurisdiction is clear. *Trainor* v. *Holcombe*, 7 Q. B. 548.

A mandamus was refused to compel a County Court judge to approve of the security tendered for appeal after the four days given for such tender had expired. *Ford* v. *Crabb*, 8 Q. B. 274.

A judge by order stayed the proceedings in a cause until the attorney or his client, a trustee, should give a proper indemnity to the plaintiff, who had executed a deed of trust making the client a trustee of his estate, against any costs of the action in case the plaintiff became nonsuited, &c. A mandamus to compel the judge below to grant a summons or take other proceedings for rescinding the order was refused, as it would be interfering with the jurisdiction of a competent tribunal. *In re Judge of the County of Elgin and Macartney*, 13 C. P. 73.

A mandamus will lie to the judge of a County Court commanding him to hear and determine a matter. *In re Burns* v. *Butterfield*, 12 Q. B. 140.

But not to correct his judgment when given. *Ib.*

Nor to reverse his decision on a point of practice. *In re Woods* v. *Rennett*, 12 Q. B. 167.

A garnishee summons having issued in a County Court suit, one H. opposed it as assignee of the judgment debtor, and in answer to his claim an affidavit was filed, from which it would appear that the judge was interested with H., who was his brother-in-law, in his claim. The judge then declined to act further in the matter. A mandamus to compel him to dispose of the case was refused. *In re The Judge of the County Court of Elgin*, 20 Q. B. 588.

A judge of a County Court having endorsed on a rule nisi before him "judgment refused for want of jurisdiction, rule absolute refused," upon which decision a judgment was entered :—Held, that while the judgment stood of record a mandamus to decide the case could be directed by the court, there being no cause pending before the judge. *Williamson* v. *Bryans*, 12 C. P. 275.

Action of trespass de bonis, &c., in a County Court, in which defendants, after declaration, applied to the judge, who stayed proceedings on it appearing that defendants had been sued for the same causes of action in the County Court of another county, in which action the proceedings against them were held to be coram non judice; and whereof the costs, though taxed, had not been paid. On motion for mandamus to compel the judge to try this case :—Held, that the defendants, being primarily interested, had a right to be before the court and heard. The mandamus was therefore refused. *In re Dollery* v. *Whaley et al.*, 12 C. P. 552.

A mandamus to compel a County Court to proceed with an action was refused, among other reasons, because the applicant had a remedy by appeal. *Meyers et al.* v. *Baker*, *Hargreaves* v. *Meyers et al.*, 26 Q. B. 16.

C. was in possession of property when the assessors went round to assess; but he left, and M. took possession before the assessment slip was delivered. Immediately on receiving it, M. went and asked the assessor to change the assessment, as C. had gone to live elsewhere; but the assessor refused. M. then appealed to the Court of Revision, which refused to interfere, and afterwards to the county judge, by whom the complaint was dismissed on a technical objection taken to the form of the complaint. On application for a mandamus to the judge to enquire and determine whether M.'s name was not improperly omitted from the electors' roll :—Held, that such objection should not prevail; and the mandamus was ordered. Held, also, that under the circumstances M.'s name should be entered on the list. *Re McCulloch and the Judge of the County Court of Leeds and Grenville*, 35 Q. B. 449.

L. and his wife, who had married in 1865, recovered judgment in the Division Court against B., for rent due to Mrs. L., on land which she had inherited from her father in 1852, and B. on the same day recovered a judgment against L. for a larger sum :—Held, that Mrs. L. being entitled under the act to the rent as her own, and her husband joined in the action for conformity only, there could be no set-off against it of B.'s judgment against L. Such set-off having been directed in the Division Court, a mandamus was granted to the clerk, to issue execution on the judgment recovered by Mrs. L. *In re Linden et ux.* v. *Buchanan*, 29 Q. B. 1.

A. was defendant in the Division Court in a suit brought to try the right to a picture seized under execution, and which he claimed. Judgment was given against him in his absence, and he obtained a new trial on payment into court of the amount for which the picture was seized, to abide the event of a trial. A verdict was afterwards given against him. On applying for the money, he found that it had been paid over to the execution creditors. He then enquired for the picture, but it had been seized and sold under other executions. A rule was moved for a mandamus to the judge to make an order on the clerk to pay to A. the sum deposited; but the court held that they could not interfere. *In re Crookshank*, 9 Q. B. 677.

III. To Sessions.

A mandamus was refused to justices of a district in Quarter Sessions, to order parliamentary wages to be paid to the representative of a town, under the 43 Geo. III. c. 9. *Rex* v. *Justices of Niagara*, Tay. 394.

Where a person had been convicted before justices and fined, and on an appeal to the Quarter Sessions the justices there admitted more evidence than had been heard on the conviction, and the accused party was acquitted, but on receiving the opinion of the attorney-general that the additional evidence should not have been admitted the justices in sessions confirmed the conviction, and ordered it to be recorded, but took no notice of the acquittal—the court granted a mandamus, commanding them to enter an acquittal. *Rex* v. *Justices of Bathurst*, 4 O. S. 340.

A mandamus will not be granted to order the justices in sessions to direct the treasurer of a district to pay the balance of an account for printing for the district, which has been rejected by them as excessive. *Staunton* v. *Justices of the Home District*, E. T. 3 Vict.

Where the Quarter Sessions have audited the accounts of a clerk of the peace, this court will not interfere by mandamus to compel the allowance of particular items. *Dartnell and the Court of General Sessions for Prescott and Russell*, 26 Q. B. 430.

Where there is a disputed boundary between two districts, and one of the districts appoints an agent for settling the boundary, under 1 Vict. c. 19, s. 3, the court will not, on the refusal of the justices of the Quarter Sessions of the other district to appoint an agent on their behalf, direct a mandamus to them to do so, as the act leaves it discretionary with them to proceed or not. *In re Boundary line between Eastern and Johnstown Districts*, M. T. 6 Vict.

The court having granted a prohibition against proceeding further with an appeal from a conviction, refused a mandamus to the clerk of the peace to certify the non-payment of costs, under C. S. U. C. c. 103, s. 67. *In re Coleman, Clerk of the Peace for the County of Hastings*, 23 Q. B. 615.

Where a conviction has been affirmed by a jury on appeal to the Quarter Sessions, that court has no authority to grant a new trial:—Quære, whether, when such verdict has been rendered against the express direction of the chairman, that court would be bound, or should be compelled by mandamus, to enforce the conviction so affirmed. *Yearke* v. *Bingleman*, 28 Q. B. 551.

Under the facts stated in this case, a mandamus was ordered to issue, directing the order of the Quarter Sessions quashing a conviction to be set aside, as in excess of jurisdiction, and the conviction to be amended and affirmed. *McKenna* v. *Powell*, 20 C. P. 394.

IV. To Justices of the Peace.

Upon a mandamus nisi to justices, they should return the recorded proceedings had before them, and not collateral matter not embraced in the entries of the court. *Rex* v. *Justices of the Home District*, T. T. 11 Geo. IV.

The court refused to grant a mandamus compel two justices to issue execution upo conviction, under 6 Will. IV. c. 4, s. 2, for ling spirituous liquors without license, the viction having been grounded upon the writ statement of the informer and the oath of other witness; there being a doubt, under statute, whether the information ought not to be an oath. *Regina* v. *McConnell*, 6 O. S.

Mandamus refused to a magistrate, to rev a certificate granted by him at an adjour Quarter Sessions, authorizing the issue o tavern license to A. B., for keeping a tav in the township of Vaughan, the certific having been granted in contravention of a law of the municipal council of Vaughan. *gina ex rel. Gamble* v. *Burnside et al.*, 8 Q. B.

The applicant, C., having appeared to information charging him with an assault, praying that the case might be disposed of su marily under the statute, H., the complaina applied to amend the information by adding words "falsely imprison." This being refus H. offered no evidence, and a second informat was at once laid, including the charge of fa imprisonment. The magistrate refused to g a certificate of dismissal of the first charge, or proceed further thereon, but endorsed on information, "Case withdrawn by permission the Court, with the view of having a new inf mation laid";—Held, that the complaina could not, even with the magistrate's conse withdraw the charge, the defendant being titled to have it disposed of. Held, also, th an information may be amended, but if on oa it must be re-sworn; and that the amendme might have been made here. Semble, that t more correct course would have been to go with the original case, and, under 32-33 Vi c. 20, s. 46, to refrain from adjudicating. mandamus to hear and determine the first char and, if dismissed, to grant a certificate of missal, was however refused, for the withdra was equivalent to a dismissal; and the mag trate might, under s. 46, refrain from adjudic ing, and if it were dismissed without a hear on the merits there would be no certificate. *re Conklin*, 31 Q. B. 160.

The defendant was convicted in July, 18 under the Public Health Act, 36 Vict. c. 43, of creating a nuisance; the magistrates refus to hear witnesses for the defence, on the grou that the statute made no provision for such w nesses being called:—Held, that an applicat in May, 1875, for a mandamus to re-open complaint, was not too late, and the writ granted; the refusal to hear one side being same as if the case had not been heard at *Re Holland*, 37 Q. B. 214.

V. To Municipal Corporations and Offic

1. *Election of Members and Officers.*

Where a mandamus was applied for to warden of a district, to swear in a person claimed to be duly elected a councillor, the discharged the rule, it appearing that a coun lor had been returned and sworn in for the to ship, which return had been contested, the per remedy being by quo warranto. *In re nan*, 6 O. S. 330.

The court will not grant a mandamus to try an election of corporate officers, but will leave the parties contesting the validity of the election to their remedy by quo warranto. *Election Board of Police, Brockville*, 3 O. S. 173; *Regina v. Bank of Upper Canada*, 5 Q. B. 338.

A mandamus may be granted to a municipal corporation to proceed in the trial of a contested election. *In re Denham and the Corporation of the City of Toronto*, 3 O. S. 605.

Semble, that as soon as the judgment under a summons issued under 12 Vict. c. 81, ousting the defendant, has become final, the course for the relator to take will be to apply to the municipal corporation to admit him, and if they refuse, then to apply for a mandamus. *Regina ex rel. Gibbons v. McLellan*, 1 C. L. Chamb. 125.—Draper.

At an election of township councillors, the person who acted as returning officer for one of the five wards was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, without taking the oath of office, proceeded to elect the reeve:—Held, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election:—Held, also, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being within the meaning of the Municipal Council Act, an "entry upon their duties." A mandamus applied for by the reeve thus elected to the clerk to certify his election, was therefore refused. *In re Hawk and Ballard, Town Clerk of the Municipal Council of the Township of Wellesley*, 3 C. P. 241.

On application for a mandamus to the mayor of a town to issue his warrant for a new election in place of a member of the council, whose seat it was alleged had become vacant by his insolvency:—Held, that the vacancy must first be established by quo warranto, and that mandamus was not the proper remedy. *Regina v. The Mayor of the Town of Cornwall*, 25 Q. B. 293.

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2. *Assessments.*

The court refused to interfere by mandamus to compel a municipal council to alter the assessment of the applicant's property as settled on appeal by a Court of Revision, or to express any opinion as to the principle to be adopted in the taxation of property. *In re Dickson and the Municipal Council of the Village of Galt*, 10 Q. B. 305.

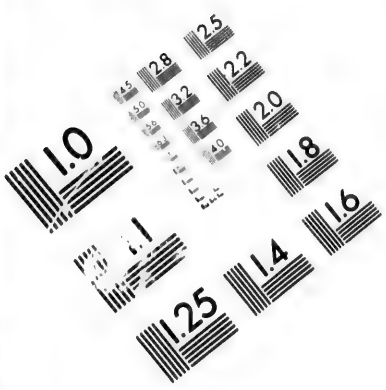
The court refused a mandamus commanding a county council to proceed as directed by the Assessment Act, C. S. U. C. c. 55, in equalizing the assessment, as it was not clear that they had not complied with it by their by-law. *Gibson and the Corporation of the United Counties of Huron and Bruce*, 20 Q. B. 111.

One S. from 1858 to 1861, inclusive, occupied, as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots, and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot 24 had, during these four years, been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was applied to to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, 8228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere. *In re Secker and Paxton, Treasurer of the County of Ontario* 22 Q. B. 118.

A rate having been imposed to build a new school house in the town of Amherstburgh, certain persons who were not catholics, but protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all such rates for common schools for 1861; and the clerk, thereupon, in making up the collector's roll, omitted this rate opposite to their names:—Held, that the clerk had done wrong, and might be punished under C. S. U. C. c. 55, ss. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll. *In re Ridsdale and Brush, Clerk of the Corporation of the Town of Amherstburgh*, 22 Q. B. 122.

An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May, the court met, when it was objected for the parties named that six days' notice had not been given, but only five. The court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters:—Held, that they were right, the six days' notice being imperatively required by the act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it. Semble, that, if this were otherwise, the proper course would have been a mandamus to the mayor to summon the Court of Revision, under section 55 of the C. S. U. C. c. 55. *Regina v. The Court of Revision of the Town of Cornwall*, 25 Q. B. 286.

The treasurer of a town, by authority of the corporation, applied for a mandamus to the collector, commanding him to give an account in writing for each of seven years during which he had held office, of the taxes remaining due on his rolls, and the reason why he could not collect the same, by inserting in each case the words "non-resident," or "no property to distrain," and to make oath that the sums were unpaid. The court refused the writ, holding that as there were other remedies provided, under secs. 167, 170, 173, and 177, of the Assessment Act, it must at least be shewn that they could not be used or be of any avail. *In re Quin and The Treasurer of the Town of Dundas*, 23 Q. B. 308.



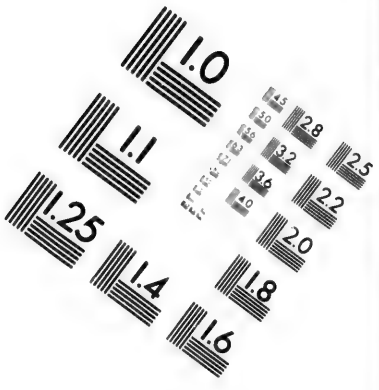
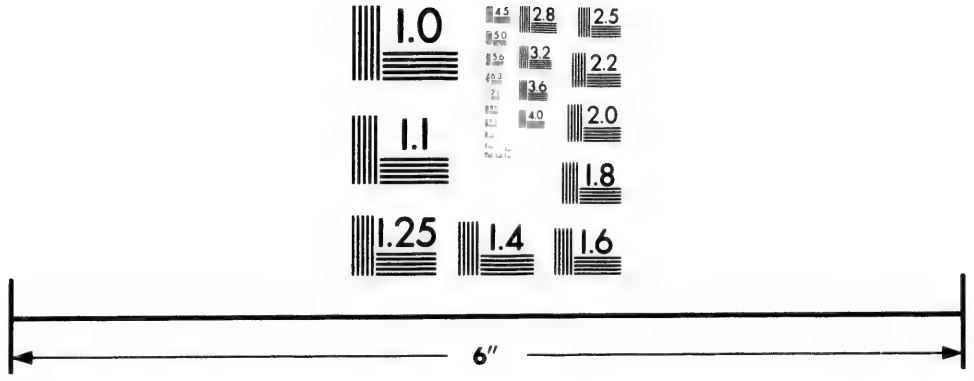
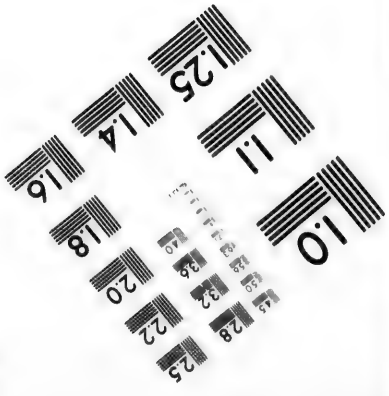


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3. *To Treasurer to pay Moneys.*

Quære, whether this court will award a mandamus to a treasurer of a district. *Rex* v. *Harris*, Tay. 10.

Mandamus refused to a district treasurer to pay over to a member of the house of assembly his wages, for which he had obtained the speaker's warrant, under 1 Vict. c. 17, it not being shewn that the money had been raised by assessment, or that any application had been made to the magistrates in sessions to order the payment. *Cornwall* v. *Baby*, H. T. 5 Vict.

Where the treasurer of the district council refused to pay certain charges of the clerk of the peace, and returned to a mandamus nisi that such charges were not shewn to be connected with the administration of justice, or specifically provided for by law, so that they should be audited by the council; and further, that he had no funds out of which to pay, the return was allowed. *In re Clerk of the Peace* v. *Western District Municipal Council*, 1 Q. B. 162.

A mandamus to pay the sheriff's account, audited by the justices in Quarter Sessions, was refused, and the sheriff left to his remedy against the treasurer by indictment. *In re Hamilton* v. *Harris*, 1 Q. B. 513.

Under the 20 Vict. c. 36, the coroner is made the judge of the necessity for investigation into the cause of a fire; and therefore to an application for a mandamus to the treasurer to pay him his fees, it was—Held, no answer to shew that in the opinion of the reeve and others the enquiry was not called for:—Held, also, that the want of funds in the treasurer's hands was no answer, the payment not having been refused on that ground. *In re Fergus and Cooley*, 18 Q. B. 341.

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4. *Other Cases.*

The court refused a mandamus, at the instance of the justices of a district, to compel the district council to build a court house. *Justices of the District of Huron* v. *Huron District Council*, 5 Q. B. 574. See also *Regina* v. *Municipal Council of Bruce*, 11 C. P. 575, p. 2223.

The court refused a mandamus to compel the inspectors of licenses to examine a certain house fitted up by the applicant as a saloon, and to grant him the proper certificate, if he had complied with the by-law in that behalf. *In re Baxter* v. *Hesson et al.*, 12 Q. B. 139.

Where, on an an application to quash a by-law for closing up a road allowance, the evidence was contradictory as to whether the substituted way was fit for travel or not, the court suggested the issue of a mandamus, and the employment of some competent person to inspect and report, by which the true state of the road might be determined. *In re Thurston* v. *The Corporation of the Township of Verulam*, 25 C. P. 593.—A. Wilson, J., sitting in Vacation.

VI. To Public Companies.

1. *To Register Transfer of Shares.*

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff as a shareholder:—H the C. S. C., c. 70, as well as C. L. P. 255, 256, must be obeyed; and that as of the writ had been served on defenda the sheriff's certificate, the plaintiff n *Goodwin* v. *Ottawa and Prescott R. W* Q. B. 186.

Upon an application to compel a raily pany by mandamus to register a tra stock, it appeared that the stock had under an execution recovered again mayor, aldermen, and commonalty of th Ottawa," and by C. S. U. C. c. 54, the the corporation was changed to "the co of the city of Ottawa":—Held, that properly followed the judgment as re and was sufficient, the corporation be merly known by the name therein given also, that a demand for the transfer of st the secretary and treasurer of the comp a notice of facts served upon him in the the company was sufficient, the court opinion that service and demand upon t dent was not indispensable. *In re G The Ottawa & Prescott R. W. Co.*, 13 C.

On application for such a mandamus that a demand and refusal after servi attested copy of execution was essenti C. S. C., c. 70. The execution debtor president of the company, and, on shewi he asserted payment of the execution b sale, &c.:—Held, that this could not ju company in refusing to transfer, for the concern with the transactions between cution plaintiff and defendant, or betwee dant and the sheriff. Quære, as to the a delay in serving the attested copy bey ten days after the sale prescribed by *In re Guillott and the Sandwich and Gravel Road Co.*, 26 Q. B. 246.

Application by the transferee of certa in a joint stock company, for a m to the directors to enter such transfe books of the company. The by-law of pany provided that "any shareholder leave of the directors, but not otherwi fer his share, or shares, by making an such transfer in a book," &c. The declined to grant the required leave, b reason to the applicant for their refusa that it was for the directors to exer discretion, and that they need not reasons; and having exercised this without any evidence of caprice, the could not succeed. *In re Macdona Mail Printing and Publishing Compa* 309.—C. L. Chamb.—Hagarty.

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2. *To appoint Arbitrator.*

A mandamus nisi was awarded t missioners of the St. Lawrence Canal an arbitrator to join in awarding u settled claim. *Re McNairn and Co for the St Lawrence Canal*, 3 Q. B. 15

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3. *Other Cases.*

The court will not, although the power, grant a mandamus for the in the stock book, or other books of a l

on special grounds. *Bank of Upper Canada* v. *Baldwin*, Dra. 55.

A mandamus will be granted only where the applicant has no other specific legal remedy, not where such remedy exists, but is unproductive. The writ was refused, therefore, against a mutual insurance company to compel them to pay a claim, the ground of application being that they had no real or personal property which could be taken in execution. It appeared also that the present directors had no power to compel payment by those who had been mutual insurers with the plaintiff, but no longer belonged to the company, their deposit notes having been cancelled. *Hughes* v. *Mutual Fire Ins. Co. of the District of Newcastle*, 13 Q. B. 153. See also, *S. C.*, 11 Q. B. 241.

Where an election of directors in a joint stock company was clearly illegal—the voters having each been allowed only one vote, whereas each share should have given a vote—but the parties chosen had for more than eight months discharged the duties, the court refused to interfere by mandamus for a new election. Quære, whether mandamus or quo warranto would be the proper remedy. *In re Moore and The Port Bruce Harbour Co.*, 14 Q. B. 365.

See *In re the Commercial Bank and the London Gas Co.*, 20 Q. B. 233, p. 2209.

VII. To Public Officers.

A rule for a mandamus will be granted against boundary line commissioners if they do not return the proceedings had before them within fourteen days after notice of appeal. *Delony et al.* v. *Striker et al.*, E. T. 3 Vict.

A mandamus was granted, directing the board of police of Niagara to pay over to the inspector of licenses the sum of £240, received by the clerk of the board for tavern licenses for 1846 and 1847; the court deciding that, under the 17th sec. of 8 Vict. c. 62, and 3rd and 4th secs. of 8 Vict. c. 72, the government, and not the town of Niagara, were entitled to receive the dues upon such licenses. *Regina* v. *The Board of Police of Niagara*, 4 Q. B. 141.

Where a coroner, under C. S. U. C. c. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a post mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by s. 9, a mandamus to the coroner, to make his order on the county treasurer for the fees of such witness, under s. 10, was refused. Semble, that on an application for such mandamus, the county treasurer, as well as the coroner, must be called upon. *In re Harbottle and Wilson*, 30 Q. B. 314.

X. Demand and Refusal.

Plaintiff's attorney wrote on the 20th December to the treasurer of the insurance company, demanding a portion of the claim, and on the 21st received an answer, saying that the defendants' solicitor was absent, and that the treasurer had written to him, and would write again to the attorney on receiving a reply. No further answer was sent to the attorney; and in the treasurer's affidavit, filed in June, in opposing this application, no mention was made of this sum:—Held, a sufficient refusal. *Hughes* v. *Mutual Fire Ins. Co. of the District of Newcastle*, 13 Q. B. 153; *S. C.*, 11 Q. B. 241.

A mandamus to a clerk of a municipality to furnish a copy of a by-law was refused, where it did not appear that the demand was accompanied by an offer of his fee. *In re Township Clerk of Euphrasia*, 12 Q. B. 622.

Where, on application for a mandamus to a township clerk to permit inspection of the assessment roll, a demand and refusal were sworn to, and defendant denied the refusal, and alleged that he had always been willing to do what was required, the court granted the writ. *In re School Trustees of Otonabee, &c., and Casement*, 17 Q. B. 275.

Where any reason is given for the refusal complained of it should be stated in the application for a mandamus. *Municipal Corporation of Vespra et al.* v. *Beatty*, 17 Q. B. 540.

Several demands to transfer stock having been made, and delays and evasive answers given, without in direct terms refusing:—Held, that a sufficient refusal was shewn to justify the issue of a mandamus to compel the transfer. *In re Goodwin* v. *The Ottawa & Prescott R. W. Co.*, 13 C. P. 254.

Held, that the demand for the transfer of stock upon the secretary and treasurer of the company, and a notice of facts served upon him in the name of the company, was sufficient, the court being of opinion that service and demand upon the president was indispensable. *Ib.*

On an application, at the instance of a resident ratepayer of Walkerton, for a mandamus commanding the provisional council to proceed with the erection and construction of a court house and gaol at Walkerton, it was—Held, 1. That in such a case, the court should be careful only to grant the writ on clear grounds; 2. That the applicant in this case had failed to establish a sufficient demand and refusal—that the court should have distinctly before it what was demanded, how the demand was made, and how answered. *Regina* v. *The Municipal Council of Bruce*, 11 C. P. 575.

On application for a mandamus to compel a municipal corporation to provide money for school purposes, when it appeared that steps had been taken to provide the sum required, a mandamus nisi was nevertheless granted. *Re School Trustees of Toronto, and the Corporation of the City of Toronto*, 23 Q. B. 203.

On application for a mandamus to the chairman of the Quarter Sessions, to sign an order on the treasurer for payment of the sheriff's account, which had been audited and passed, the chairman stated, in his affidavit filed on shewing cause, that he declined to mark the account as audited and passed, and said that he would not sign a check therefor:—Held, that this removed all objection to the proof of a demand and refusal. *In re Davidson and Miller*, 24 Q. B. 66.

Before the court will grant a mandamus to a municipal corporation to pass or submit a by-law to the electors granting a railway bonus, a distinct demand upon and refusal by the corporation to pass or submit the by-law must be shewn.

P., a member of defendants' council, presented a petition for a by-law granting such a bonus, on the 20th June, and on the 21st the committee to which it was referred reported favourably, adding that they had a legal opinion going to shew that it was imperative on them to submit the by-law. The council refused to adopt this report, and on the same day P. moved that a by-law in accordance with the petition be then read a first time, which was lost, but it did not appear that the by-law was drawn up or presented to the council, and it was not before the court. On the 25th, P. applied for a mandamus:—Held, not a sufficient demand and refusal; for the council were not bound to adopt the report, or assent to the legal opinion embodied in it, or to pass the motion for the first reading of a by-law not before them; and they were entitled to some time to consider the nature of the by-law they were required to pass and submit; and, Semble, they should have had reasonable notice of the intention to make this application. *Re Peck and the Corporation of the County of Peterborough*, 34 Q. B. 129.

XI. Writ of.

1. *Who may Apply.*

An application by two members of a municipal council of a district, for a mandamus to the warden, to repay to the treasurer a sum he had received from the council as a salary for his services as warden, was refused, the parties applying having no particular interest in ths matter. *Regina* v. *The District Council of the District of Gore*, 5 Q. B. 357.

On an application for a mandamus to compel a public body to raise and expend a large sum of money for general purposes, in this instance to build the gaol and court house, Quære, per Draper, C. J., could the applicant as a ratepayer claim a remedy by mandamus in such a case. *Regina* v. *The Municipal Council of Bruce*, 11 C. P. 575.

It was objected that the applicant for a mandamus to the inspector of licenses to inspect and report on his premises, so as to enable him to apply for a license, did not shew that he was a natural born or naturalized subject, as required by the by-law; but,—Held, that such objection could not have prevailed, for he was shewn to have been duly licensed up to 1st of May, 1876, and no exception had been made to him. *Re Blakely, Inspector of Licenses for the County of Prince Edward*, 40 Q. B. 102.

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2. *Issue of.*

A mandamus nisi, issued upon a rule, must follow the rule, otherwise it may be quashed on motion before the return is filed. *Regina* v. *McLean*, 5 Q. B. 473.

A mandamus does not require fourteen days between the teste and return, but under C. L. P. Act sec. 282, may be returnable forthwith, and by sec. 4 it may be signed and issued by the clerk of the process. *Burdett* v. *Sawyer*, 2 P. R. 398.—P. C.—Burns.

A rule nisi for a mandamus cannot be granted by the practice court. *In re Williams and The Great Western R. W. Co.*, 26 Q. B. 340.

Held, on the authority of Sams *v.* The Corporation of Toronto, 9 Q. B. 181, that a judge sitting in Practice Court has no authority to issue a rule nisi for a mandamus in a cause pending in the County Court. *Crysdale* v. *Moorman*, 17 C. P. 218.

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3. *Affidavits.*

Semble, that affidavits in moving for a rule nisi for a mandamus may be entitled "In re complaint of —— *v.* ——," though it is more proper to entitle them only in the court. *In re Municipality of Augusta* v. *Municipal Council of Leeds and Grenville*, 1 P. R. 121.—Q. B.

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4. *How Directed.*

A mandamus nisi having been directed to "M. S., Treasurer of Belleville," and an attachment being moved for after he had ceased to be treasurer for not making a return to the same:—Held, that the proper direction would have been "To the Treasurer, &c.," generally, though the personal direction was not absolutely wrong, but that as M. S. had ceased to hold the office the attachment must be refused. *Burdett* v. *Sawyer*, 2 P. R. 398.—P. C.—Burns.

Upon an application to compel a railway company, by peremptory mandamus, to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "The mayor, aldermen, and commonalty of the city of Ottawa;" and by C. S. U. C. c. 54, the name of the corporation was changed to "The corporation of the city of Ottawa:—Held, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given. *In re Goodwin* v. *The Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

Held, that a mandamus might be directed to the company, not to the officers. *Ib.*

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5. *Return to.*

Upon a mandamus nisi to justice, they should return the recorded proceedings had before them and not collateral matter not embraced in the entries of the court. *Rex* v. *Justices of the Home District*, T. T. 11 Geo. IV.

It was held no return to a mandamus to A. describing him by name as a member of a corporation named, that there was no such corporation—the description being unnecessary. The court will not, on a suggestion that the return to a mandamus was not actually made by the authority of the person to whom the writ is directed, as it purports to be made, treat it as a nullity; it must be expressly shewn that it was unauthorized. *Regina* v. *Balkwell*, 6 O. S. 297.

In this country there could be no demurrer to a return. *Regina* v. *Wells*, 17 Q. B. 545.

But now there may be, by 28 Vict. c. 18, s. 7. *Ib.*

XII. Costs.

It was decided in The Corporation of Lambton *v.* Poussett, 21 Q. B. 472, that the clerk of the

pence is not to look to the government for the expenses payable by them under C. S. U. C. c. 120, but to the county, who are to be reimbursed by the government. Where the clerk applied to the county auditors, instead of the sessions, and they refused on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus, calling upon the county to pay. *In re Poussett and the Corporation of the County of Lambton*, 22 Q. B. 80.

The registrar was required to record a certificate of lis pendens affecting "lot number 16 in the 9th concession of the township of Erin, and lots numbers 14 & 15 in the 10th concession of the same township," which he refused to do, as the west halves of lots 14 & 15 had been laid out into village lots according to a plan filed in his office. On application for a mandamus:—Held, that so far as regarded the west halves he was right, for by the Registry Act, 29 Vict. c. 24, s. 73, the certificate should shew the village lots affected. The point raised in this case being new, and there being no difficulty in recording the certificate against lot 16, the rule for a mandamus against the registrar was discharged without costs. *In re Thompson et al. and Webster*, 25 Q. B. 237.

Where the demand had been refused upon an untenable ground, the defendants were made to pay the costs of the application for the writ, which was refused upon another ground. *Re Hutchison and the School Trustees of St. Catharines*, 31 Q. B. 274.

A rule nisi having issued for a mandamus to compel a registrar to register a discharge of two mortgages, the objection to including both mortgages in one certificate was first taken on the argument; and the court, under these circumstances, discharged the rule without costs. *In re Smith and Shenston, Registrar of the Co. of Brant*, 31 Q. B. 305.

Where a mandamus to compel the corporation to levy an amount required for school purposes was refused, but the affidavits filed on shewing cause were unnecessarily long, the corporation were allowed only half their costs. *In re The Public School Trustees of the Township of Fredericksburg and the Corporation of the Township of Fredericksburg*, 37 Q. B. 534.

XIII. Enforcing by Attachment.

A mandamus nisi having been issued to school trustees to levy the amount of a judgment obtained against them, no return was made, and a rule nisi for an attachment issued. In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co-trustees and the local superintendent, he had resigned his office before the writ was granted. The court, under these circumstances, discharged the rule nisi as against these two, on payment of costs of the application, and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule. *Regina* v. *The Trustees of School Section* 27, *in the Township of Tyendinaga*, 20 Q. B. 528.

No attachment will lie for not making a return to a peremptory mandamus; it should be for not obeying the writ. Such an attachment must be tested in term, on the same day as the rule on which it issues. The rule nisi called upon the trustees of school section 27, in the township of Tyendinaga, in the county of Hastings, to shew cause why an attachment should not issue against them. On an affidavit of service of this rule on A., B., and C., stating them to be trustees of said section, a rule absolute was granted, following it in form, and thereupon an attachment issued against A., B., and C.:—Held, bad, as not warranted by the rules. *Regina* v. *School Trustees of School Section No.* 27 *in the Township of Tyendinaga*, 3 P. R. 43.—C. L. Chamb.—Burns.

The affidavits stated that M., who claimed the office of registrar, obtained a mandamus nisi, directed to H., to deliver up to him the books and papers: that he went to the office with two constables in H.'s absence, and demanded them of his wife, reading what purported to be a peremptory mandamus as his authority (it being only a mandamus nisi), but refusing to allow her or her solicitor to examine it; and they then took away the books, &c. Upon these affidavits the court granted a rule nisi for an attachment against M., but refused it against the constables, there being nothing to shew that they were aware of the fraud. *In re McLay et al.*, 24 Q. B. 54.

MANSLAUGHTER.

See Criminal Law.

MANUFACTURES.

Exemption of from taxation—Power of Municipality. *See Pirie and the Corporation of the Town of Dundas*, 29 Q. B. 401.

MAPS.

In Evidence—*See* Evidence.

MARINE INSURANCE.

See Insurance.

MARKETS.

See Municipal Corporations.

MARKET OVERT.

When a horse was stolen from the plaintiff and bought by defendant at public auction, but not in market overt, and the plaintiff afterwards seeing the horse took possession of it, and defendant immediately retook it:—Held, that the plaintiff had a right to retake it, no property having passed to defendant by the sale; and

that although it was in his possession only for a moment, yet the property revested in him, and he could maintain trespass against the defendant for the retaking. *Bowman* v. *Yielding et al.*, M. T. 3 Vict.

MARMORA FOUNDRY COMPANY.

Action for calls under 1 Will. IV. c. 11, against the defendant as one of the stockholders :—Held, that the stockholders in the said corporation were admissible as witnesses for the plaintiffs under the 12 Vict. c. 70 : that the said act was not obsolete for non user ; that the clauses requiring the books of subscription to be opened within two months was only directory : that the subscription books subsequently opened might be considered as in connexion with those previously opened, and that all the proceedings from the beginning might be taken together : that the omission in the new books of the name of H., one of the original petitioners for the act, (he being dead) did not render the proceedings of the company invalid, nor was it fatal to the plaintiffs : that the sanction for the opening of the new subscription books of the two surviving petitioners to parliament for the act of incorporation was sufficient : that the names of the petitioners in the said act named need not necessarily be signed to the new subscription books ; and that defendant was not discharged from his liability by a minute made at a meeting of the directors, and entered in their minute book, declaring that the names of all stockholders who were in arrear should be erased from the subscription stock book of the company. *Marmora Foundry Co.* v. *Murney*, 1 C. P. 29.

Sufficiency of declaration for calls under the statute 1 Will. IV. c. 11, incorporating the plaintiffs. *The Marmora Foundry Co.* v. *Murney*, 1 C. P. 1 ; *The Marmora Foundry Co.* v. *Boswell, Ib.*, 175 ; *The Marmora Foundry Co.* v. *Dougall, Ib.*, 194.

By the Marmora Foundry Act, 1 Will. IV. c. 11, it is provided that the stock subscribed for "shall be due and payable to the said company" in the manner mentioned in the act ; and that in case of neglect or refusal to pay the instalments due on shares, such shares shall be forfeited and sold :—Held, in accordance with the Court of Common Pleas, that the company were not restricted to the remedy by forfeiture ; and that they might maintain an action against a shareholder upon calls of stock subscribed. Draper, J., diss. *Marmora Foundry Co.* v. *Jackson*, 9 Q. B. 509.

MARRIAGE.

I. Breach of Promise of Marriage—*See* Husband and Wife.

II. Bigamy—*See* Criminal Law.

III. Criminal Conversation—*See* Husband and Wife.

IV. Validity—*See* Husband and Wife.

V. Settlements—*See* Fraudulent Conveyances—Husband and Wife.

VI. Alimony and Deeds of Separation—Husband and Wife.

VII. Conditions in Will Regarding Will.

MARSHALLING.

See Mortgage.

In 1849 G., being the owner of Whiteacr Blackacre, contracted to sell half of the f to B. by a bond which was never registere 1852 G. executed a mortgage covering bot to C., which was immediately registered, b Christian name of the grantor's wife (wh cuted to bar dower) did not appear in the r rial. In 1853 G. gave a mortgage of Blac to P., who also immediately registered his veyance. In 1855 G. sold the remaining h Whiteacre to M., and in the following ye conveyed his interest in the other half to S 1861 C. sold Blackacre under a power of s his mortgage, and the sale realized fully was due thereon. In 1862 P. filed his bill ag M. & S. in order that he might be subrogat the rights of C. as against Whiteacre fo amount due him on his security. S. & H previously paid all their purchase money :— that P. was not entitled to any relief again but that if C.'s mortgage was duly register was entitled to contribution against M. *Bo* v. *Smith*, 9 Chy. 347.

H. obtained from his debtor an assignme his books of account, notes, bills, and evidences of debt, by way of security ag notes for the accommodation of the debtor also a conveyance of real estate from the f of the debtor for the same purpose. H been compelled to pay a large sum on such H. recovered judgment against the debto sued out execution thereon, which was th placed in the hands of the sheriff agains debtor, and the effects of the debtor were wards sold under this and other execution sequently placed in the hands of the s upon which sale sufficient was realized t the execution of H. and leave a balance hands of the sheriff ; and H.'s claim was a ingly paid, and the books of account and securities held by him were delivered up debtor, after notice from J., a later jud creditor, not to part with them ; and the f land was re-conveyed to him. The exe creditor who gave the notice, claimed, in quence, priority over intermediate exe creditors, and also a right to compel H. t good the amount of his claim in consequ having parted with the securities. Upon from the Court of Chancery—Held, 1. Af the decree below, 5 Chy. 636, that a subs execution creditor had not any equity to the first creditor to recover payment of h out of the property held by him in securit to leave the goods of the debtor to satisfy t sequent executions ; nor had he any righ upon H. to assign the lands conveyed to the debtor's father ; nor was H. personall to the subsequent execution creditors. 2. Reversing the decision below, [Este Spragge, V.CC., diss.], that the securitie

hands of H. being, at that time, not seizable under common law process, no right vested in J. to have them transferred to him by H., nor was H. bound to make good to J. any loss sustained by him by reason of his refusal to deliver the securities to J., but that such securities being in the nature of equitable assets, they should be distributed amongst all the creditors pari passu. And, per Robinson, C. J., that this was not a case to which the principle of marshalling the assets applied, and that H. had a perfect right to restore the securities to the debtor. *Topping* v. *Joseph*, 1 E. & A. 292, an appeal from *S. C.* sub-nom. *Joseph* v. *Heaton*, 5 Chy. 636.

S. was surety to B. for a debt, for which A., the principal debtor, gave a mortgage to B. as a further security. The creditor recovered judgment against the surety and sold his lands under execution. While the fi. fa. was in the sheriff's hands and before the sale, S. mortgaged the lands to creditors of his own :—Held, that as the surety would, on paying the debt to B., have been entitled to the benefit of the mortgage which the principal debtor had given to B., so where the lands of S. were sold to pay the debt and the mortgagees of S. were thereby deprived of them, these mortgagees were entitled to the benefit of the original mortgage as against any subsequent assignment of the mortgage by the mortgagee, and any subsequent mortgage by the mortgagor. *Quay* v. *Sculthorpe*, 16 Chy. 449.

The court will not direct assets to be marshalled in favour of a charity unless the will says this is to be done. *Anderson* v. *Kilborn*, 22 Chy. 385.

MASTER.

See PRACTICE AT LAW—PRACTICE IN EQUITY.

Local masters and deputy registrars of the court are not at liberty to practise in partnership with solicitors practising in this court, although they may not actually share in the emoluments of the suit. *McLean* v. *Cross*, 3 Chy. Chamb. 432.—Chy.

MASTER AND SERVANT.

I. CONTRACT OF HIRING.

1. *What amounts to a Yearly Hiring*, 2230.
2. *Between Relations*, 2231.
3. *Other Cases*, 2232.

II. LIABILITY OF SERVANT, 2234.

III. RIGHTS OF MASTER AND SERVANT.

1. *Dismissal.*
   (a) *Justifiable Grounds*, 2234.
   (b) *Pleading*, 2234.
   (c) *Other Cases*, 2235.
2. *Injuries to Servants*, 2236.
3. *Occupation of Land by Servant—See* LIMITATION OF ACTIONS AND SUITS.
4. *Seduction of Servant—See* SEDUCTION.

IV. LIABILITY OF MASTER.

1. *For Injury to Servant in Course of Employment*, 2236.
2. *For acts of Fellow Servants*, 2237.
3. *For acts of Servant in Course of Employment.*
   (a) *Generally*, 2239.
   (b) *For Contractor's Workmen—See* CONTRACTOR.
4. *Railway Companies and Servants—See* RAILWAYS AND R. W. CO.'S.

V. JURISDICTION OF JUSTICES, 2240.

VI. APPRENTICES—*See* APPRENTICE.

VII. ARTICLED CLERKS—*See* ATTORNEY AND SOLICITOR.

I. CONTRACT OF HIRING.

1. *What amounts to a Yearly Hiring.*

The plaintiff was engaged by one, on behalf of all the owners of a steamer, to sail her by the season. This engagement was verbal, and with the understanding that it was not determinable without some notice. He sailed her during the years 1855 and 1856 under this arrangement, during which time the owner who had made the arrangement sold out, and during 1857 the vessel was not run. The plaintiff contended that he was entitled to his salary for 1857, under the agreement :—Held, that the evidence shewed no agreement for that year. *Dick* v. *Heron*, 8 C. P. 67.

When the hiring is general, it is presumed by law to be by the year. *Rettinger* v. *Macdougall*, 9 C. P. 485.

The declaration alleged that defendants, being associated as a gas company, agreed to employ the plaintiff as their manager at a monthly salary, and if anything should occur to prevent the completion of their project, to pay him a year's salary from that time; but should they close their operations by sale of their chartered rights, then it should be in his option to divide equally with them the profits. The plaintiff then averred that he entered into their service, received his salary for nine months and a-half, and was willing to remain: that defendants had discontinued, and sold their chartered rights, and that thereupon a year's salary became due to him. Defendants (among other pleas) pleaded that long before such sale the plaintiff voluntarily left their service, and was not then nor thereafter in their employment. The jury having found in their favour on this plea :—Held, on motion for judgment non obstante, that defendants must succeed, for the plaintiff was not entitled to the year's salary except in the event of losing his employment by the discontinuance of their operations, it being intended as a compensation for such loss by their act, not by his own. *Watson* v. *Miller et al.*, 23 Q. B. 217.

Held, that a new county council of a municipality may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary. *Hickey* v. *Corporation of the County of Renfrew*, 20 C. P. 429. See, also, *Broughton* v. *Corporation of Brantford*, 19 C. P. 434, p. 2236.

A resolution passed by defendants, that the plaintiff be engaged for the society's office as a

clerk, "at three months, on trial, at a salary of $800 per annum":—Held, clearly not to support a count alleging his employment for a year. Held, also, looking at the statutes incorporating defendants, C. S. U. C. c. 53, 37 Vict. c. 50, D., the duration and character of plaintiff's employment, and the circumstances of his appointment, as set out in the report, that the contract, so far as executory, must be under the defendants' corporate seal. *Hughes* v. *The Canada Permanent Loan and Savings Society*, 39 Q. B. 221.

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2. *Between Relations.*

Unless a specific contract of hiring be proved, the court will discountenance an action by a son or daughter against a parent for services performed while living in the parent's house. *Sprague et ux.* v. *Nickerson*, 1 Q. B. 284.

Quære, whether if an infant hire himself for wages to his parent the contract is binding on the latter. *Perlet* v. *Perlet*, 15 Q. B. 165.

The plaintiff sued his father's executor on a promissory note made to him in 1850, by his father, payable seven years after date. According to his own account, the consideration for this note was work done by him for his father from the time he came of age, in 1816, for two years, under an agreement, but the note was handed by the testator to plaintiff's brother for him, and the plaintiff first became aware of its existence in 1858. The father died in 1856, and the plaintiff took his share of the personal property, without saying anything of this claim, which was not referred to in the father's will, made in 1847, though the plaintiff was mentioned in it. He had never asked for payment for his services, and other sons had worked for the father after they came of age without charge. The jury having found for defendant, the court, under the very singular circumstances of the case, refused to interfere, although the making of the note, and the consideration for it as stated by the testator when he made it, were clearly proved. *Wismer* v. *Wismer*, 23 Q. B. 519.

In an action by a son against his father for wages, the only evidence tending to establish the relation of employer and employed, beyond the fact of the plaintiff having worked, was that of a witness who swore that six or seven years ago the father had asked him what wages he was getting, and said that the plaintiff wanted $12.50. and that he would give him $12:—Held, sufficient to go the jury. *Henricks* v. *Henricks*, 27 Q. B. 447.

The plaintiff sued her brother for wages during several years that she had lived with him on his farm, keeping house for him while he was unmarried:—Held, that from this alone the law would not, under the circumstances, imply a promise to pay; and there being no other evidence of any hiring or promise, that there was nothing to go to the jury. *Redmond* v. *Redmond*, 27 Q. B. 220.

A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to the widow. The widow and son and an infirm daughter lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making demand for her one-third of the produce, a there being no agreement between them on t subject. A bill by the widow against her so representative for an account of her share of t produce was dismissed with costs. *Gilmore* *Gilmore*, 14 Chy. 57.

The mere fact that one brother performs several years work for another, will not raise t presumption of a promise to pay. Whe therefore, the evidence before the master w that the claimant had worked in the mill of t testator (his brother) from the year 1861 1874, without any express agreement for wag but the testator had promised *to be faithful* the claimant, and the master refused to admit t claim, this ruling was, on appeal, affirmed the court. *Re Ritchie, Sewery* v. *Ritchie*, Chy. 66.

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3. *Other Cases.*

A person hiring himself to work with his o team of oxen, is not within the British statu for punishing labourers deserting their servi *Whelen* v. *Stevens*, Tay. 439.

Where the plaintiff covenanted that his should serve the defendant for seven years, consideration whereof the defendant covenant at the expiration of the time to convey two hu dred acres of land to the son, his heirs a assigns:—Held, that the service for seven ye was a condition precedent to the right to t conveyance of the land. *Goodall* v. *Elmsley*, T. 4 Vict.

Semble, that a municipal corporation may c tract to hire a clerk or servant to render serv in the ordinary business of the corporati without using their corporate seal, and such s vant may sue on the contract. *Raines* v. *T Credit Harbour Co.*, 1 Q. B. 174. See *Demp* v. *City of Toronto*, 6 Q. B. 1, p. 2236; *Quin School Trustees*, 7 Q. B. 130, p. 2235; *Hughes Canada Permanent Loan and Savings Society*, Q. B. 221, p. 2231.

Semble, that school trustees have no po under the School Act, 9 Vict. c. 20, to make agreement for providing the teacher with bo and lodging. *Quin* v. *The School Trustees*, B. 130.

When a person hired by the year dep without consent during the year, he forfeits wages; and it is important that this law sho be enforced. Where the plaintiff had taken s a course, and afterwards sued for his wages, a verdict was given in his favour for £25, court granted a new trial without costs, the it appeared that defendant had offered him sum to settle. *Blake* v. *Shaw*, 10 Q. B. 180

The plaintiff was employed by defendan foreman in a printing office, and sued for w due him, proving on the trial that defen was in the habit of settling the amount the weekly. The jury on this evidence found the hiring was a weekly one, and the refused to disturb the verdict. *Rettings Macdougall*, 9 C. P. 485.

In an action for wages of the plaintiff s as defendant's servant, it was proved tha fendant had said he would give the son

was going : that the son went to him at twelve years of age, and worked for him four years, and that on his leaving defendant told him to send his father and he would settle with him :—Held, that this was clearly evidence to go to the jury of an agreement between plaintiff and defendant. *Pickering* v. *Ellis*, 28 Q. B. 187.

Where services were rendered by the plaintiff to the defendant, in expectation that the defendant would marry her, but there was no contract of hiring, and the plaintiff expressly said that she was not to receive and did not expect wages or pay :—Held, that on defendant's refusal to marry the plaintiff no action would lie as upon an implied promise to pay the value of such services in money. *Robinson* v. *Shistel*, 23 C. P. 114.

Where an agreement contains the names of the two contracting parties, the subject matter of the contract, and the promise, it is binding on the party signing it, although not signed by the other party. In this case, the defendant entered into a written agreement, whereby, in consideration of a certain salary and allowances to be paid to him by the plaintiffs, he agreed to serve them in their business as bankers for three years, and if he should leave within that period to pay them $400, as liquidated damages. The agreement was signed by the defendant but not by the bank :—Held, that defendant was bound by it, and having left without excuse he was liable for the $400, which was recovered as liquidated damages, and not as a penalty. *Bank of British North America* v. *Simpson*, 24 C. P. 354.

The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition, that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general board for the due performance of his duties ; that he did not furnish such security ; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the board, and that the board unreasonably, capriciously, and improperly refused to be satisfied therewith :—Held, replication bad ; for the furnishing security satisfactory to the board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting bonâ fide under an honest sense of dissatisfaction. *Macmath* v. *Confederation Life Association*, 36 Q. B. 459—Hagarty, sitting in Vacation.

By an agreement signed by both the parties, plaintiff agreed and bound himself to defendant to act as his book-keeper, &c., for five years, for a specified sum in each year, and to pay $10 per month for board, to be deducted from his salary, and also to pay his washing and other personal expenses. It was added : "This agreement to commence from 1st February, 1876, and end 1st February, 1880 :"—Held, that there was no obligation, either express or implied, on the defendant to continue his business or retain the plaintiff in his employment during the five years. *Roche* v. *Walsh*, 27 C. P. 555.

When a minor enters into a contract for hiring, the wages he earns belong to him and not to his parent. *Delesdernier* v. *Burton*, 12 Chy. 569.

II. Liability of Servant.

A servant who has notice of an injunction may be committed for breach of it, though he has not been served with the writ. And after leaving his master's service he continues bound by an injunction issued while he was a servant against the master and his servants to restrain waste. *Brown* v. *Sage*, 12 Chy. 25. See, also, *Gilchrist* v. *Corporation of Carden*, 26 C. P. 1, p. 2239.

III. Rights of Master and Servant.

1. *Dismissal.*

(a) *Justifiable Grounds.*

In assumpsit against defendant on an agreement to serve the plaintiffs faithfully, the plaintiffs assigned as a breach that during the time of service the defendant wrongfully behaved himself in a careless and negligent manner while in their service :—Held, bad, on special demurrer, as not sufficiently specific. *O'Neill et al.* v. *Leight*, 2 Q. B. 204.

Defendant hired plaintiff to make for him certain machines and superintend their use in his manufactory for five years, unless before terminated as thereinafter provided ; and in case of failure of the plaintiff to perform fully the agreement, it might be terminated at defendant's option by written notice, and the plaintiff should be responsible to defendant in damages for such failure ; and in case any dispute should arise as to the sufficiency of the machines, or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final. To an action by the plaintiff for wrongful dismissal, defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified:—Held, 1. That defendant was bound to establish the ground mentioned in his notice for terminating his agreement ; and 2. That the agreement to refer, being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action. *Griggs* v. *Billington*, 27 Q. B. 520.

The second count was for wrongful dismissal of the plaintiff, who had been hired by defendant as a merchant's clerk for a year. Plea, that defendant had large sums of money stolen from him by some persons : that the plaintiff being then in defendant's employment, and having as such clerk had said money in his possession, did not nor would account for the same, whereby defendant had reason to and did suspect that plaintiff had feloniously embezzled the money, and by reason thereof defendant dismissed him : —Held, bad, for no facts were stated to justify defendant's alleged suspicion. *Patterson* v. *Scott*, 38 Q. B. 642.

(b) *Pleading.*

A declaration setting out a contract to pay a certain sum per year for services as long as a party should remain in such service, and a readiness and willingness to continue, will not entitle a party to recover for a wrongful dismissal, unless the declaration plainly and directly allege that the defendant did agree to retain the plain-

tiff in his service for the period within which he is stated to have been dismissed. *Raines* v. *The Credit Harbour Co.*, 1 Q. B. 174.

A clerk or servant engaged on a yearly hiring cannot, on being wrongfully dismissed, recover his year's wages in an action on the common counts commenced before the expiration of the year; and this, although the hiring was for one year at a certain sum per month. *McGuffin* v. *Cayley*, 2 Q. B. 308.

In an action for wrongfully dismissing the plaintiff, a school teacher, a plea averring the dismissal of the plaintiff by a third party authorized by law to do so is bad, being an argumentative denial of the wrong complained of. *Campbell* v. *Black et al.*, 4 Q. B. 488.

As to the mode of setting out an alleged demise from the Toronto Club of certain rooms and apartments in the club house to a servant or steward of the club, who relied upon the said demise, as giving him an exclusive possession upon which he could maintain trespass. Semble, that under the demise, as set forth in the replication, an action of trespass could not be sustained. If the servant had been improperly dismissed he should have sued in assumpsit for a breach of contract, not in trespass for taking possession of his apartments. *Williams* v. *Herrick*, 5 Q. B. 613.

In an action by a teacher against the school trustees appointed by the Act 9 Vict. c. 20, setting out a special agreement to retain the plaintiff in the employment of a teacher for one year, at a certain salary, &c.; and also upon a parol agreement, for wrongfully, and without cause, turning the plaintiff away, and preventing him thereby from earning his salary:—Held, that the declaration in both cases was bad in not averring the agreement to have been made with the defendants by their corporate seal. *Quin* v. *The School Trustees*, 7 Q. B. 130.

Action upon an agreement in writing between plaintiff and defendant, by which the plaintiff was engaged as editor of a newspaper for one year at a salary payable quarterly. Defendant pleaded that the plaintiff conducted himself in such an improper, offensive, and disobedient manner towards him, that he dismissed the plaintiff, as he lawfully might:—Held, a bad plea. *Hunter* v. *Foote*, 12 C. P. 175.

(c) *Other Cases.*

The plaintiff had been appointed many years ago, by the corporation of the city of Toronto, weigh-master and clerk of the fish-market. He had been voted each year by the common council a sum of money for his services during the then current year. The muncipal year began on the 23rd of January. For the year 1847, the plaintiff had been voted £90 for his salary. On the 30th of June, 1848, the corporation having determined to farm out the plaintiff's office, he was dismissed without notice, and without any allowance being made for his services between January and June of 1848. The plaintiff brought an action of assumpsit against the corporation to recover a year's salary at the same rate as had been voted him the previous year. The corporation resisted the action upon the general grounds: 1. That assumpsit for services rendered as upon an executed contract not under the corpo seal, would not lie. 2. That the plaintiff his office at sufferance, both as respected ten and allowance. 3. That before action brou the corporation should have been requeste vote an allowance, but:—Held, that assum would well lie; and that though the plain holding his office during pleasure, by the ac incorporation, could not recover the whole ye salary for 1848, still he was entitled to his sa for 1848 to the time of his dismissal, at the of salary voted to him for 1847, and that no vious demand upon the corporation to vote allowance need be proved. *Dempsey* v. *City of Toronto*, 6 Q. B. 1.

The property of the Grand River Naviga Co. having passed to defendants, a munic corporation, plaintiff was appointed man thereof under their common seal, at an an salary, from 1st January, 1865, an appointn to which he had been previously recommen in a part of a committee of council, and resolution the mayor was authorized to exe the necessary bonds between plaintiff and de dant:—Held, a valid appointment, and necessary to have been made by by-law. De dants having dismissed plaintiff in Septem 1867:—Held, that such dismissal, before the of the year, was wrongful, defendants ha recognized plaintiff as their officer during second year. *Broughton* v. *The Corporation Brantford*, 19 C. P. 434. See *Hickey* v. *poration of Renfrew*, 20 C. P. 429, p. 2230.

Where a person in the service of another u a yearly hiring is dismissed for cause by his ployer during the currency of any one year, is not entitled to any remuneration for the tion of the year that he has served; but if has been paid any portion of such year's sa the employer is not entitled to recover it ba neither is he entitled to have it applied on count of moneys payable in respect of a prev year's service; and although the employer dismissing his employee may have assigned ground therefor, he is not precluded from a wards shewing the entire ground for such missal. *Tibbs* v. *Wilkes*, 23 Chy. 439.

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2. *Injuries to Servants.*

Where in trespass for an assault and bat for wounding and kicking, and for tearing plaintiff's clothes, the defendant justified a moderate correction of the plaintiff as his vant—the plea was held bad on demurrer, afforded no answer to the wounding and te the clothes of the plaintiff. *Mitchell* v. *De* 2 Q. B. 430.

IV. Liability of Master.

1. *For Injury to Servant in Course of Employ*

The plaintiff, a boy of twelve, in the e of defendant, was left with two other b attend to a flax scutching machine. H never attended to the machinery before, a said he had received no instructions. Th boys were sent away, and the plaintiff, tempting to replace a roller, which freq came out of its place, had his arm crus some cog-wheels which were not covered.

wheels were on the opposite side of the machine from where the plaintiff was required to work, and the roller could readily have been replaced without going near them. The plaintiff further said that he put the roller on as he had seen the boys do it, and that he had not been warned not to go near the cog-wheels. The defendant's evidence, on the other hand, shewed that the plaintiff had been distinctly warned; that the other boys had not placed the roller on as plaintiff did; and that the plaintiff had been shewn how to put it in. It also appeared that the machine had been in use several years without an accident, although boys had constantly been employed about it:—Held, that there was evidence to go to the jury, if the plaintiff's statements were true, and a nonsuit was set aside. *Vicary* v. *Keith*, 34 Q. B. 212.

Across the hatchway of defendant's vessel there was a string beam fastened by a cleat for the support of the hatch, and the men in descending the hatch to trim or load the vessel used to swing down it, holding on either by the beam or the combings of the hatch. The plaintiff, engaged as a hand on board, while descending the hatch, rested his whole weight on the beam, and the cleat happening to be loose or out, he was thrown down and injured. There was no proof of knowledge either by defendant or the master of the vessel of any defect, or any defective construction or unsoundness of material, nor was it shewn when or how the cleat came out:—Held, that there was no evidence of negligence in defendant so as to render him liable, and a nonsuit was upheld. *Jarvis* v. *May*, 26 C. P. 523.

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2. *For Acts of Fellow Servants.*

Action against a railway company for the death of one D., an engine driver in their employment, alleging that they negligently employed one R., an incompetent person, as switchman, and that by his incompetency the collision occurred. It appeared that R. neglected to raise the semaphore at the east end of the Stratford station, so as to prevent D.'s train going west from entering the yard while a freight train was coming from the west, and this caused the accident. According to the testimony on both sides, R. was an intelligent man, employed at work which one witness said could be learned in a day, another in two or three weeks, and after being a week about the yard he had performed this work regularly for two weeks without complaint until this occasion. A verdict having been found for the plaintiff:—Held, that there was no evidence to go to the jury that defendants negligently employed an incompetent person: that for R.'s neglect, he being D.'s fellow servant, the plaintiff clearly could not recover; and a nonsuit was ordered. *Deverill* v. *Grand Trunk R. W. Co.*, 25 Q. B. 517.

Plaintiff as administratrix sued defendants for the death of her husband, caused by a railway accident. It appeared that deceased, with three others and a foreman, were employed with a hand-car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching at speed a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it waving a flag. Two of the men stepped aside when it came up, but deceased and the other man ran in front of it along the track, until it drove the hand-car against and killed them both:—Held, clearly a case of contributory negligence on the part of deceased; and a nonsuit was ordered. One of the brakesmen on the train swore that the brakes were defective, and that the train could not therefore be stopped in obedience to the proper signal, which was up. It appeared, however, that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by the defendants could have done in a few minutes; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped: that it came up at a speed shewing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station, and that at the next station, on the same grade, and with the same brakes, it was stopped without difficulty:—Held, that these facts conclusively shewed the negligence not to have been that of the defendants, but of their servants engaged in a common employment with deceased, and for which, therefore, defendants were not responsible. *Plant* v. *Grand Trunk R. W. Co.*, 27 Q. B. 78.

Declaration, that I. S. (husband of the plaintiff,) was a servant and workman employed by certain contractors with defendants in ballasting defendants' railway, and in performing such work certain cars and engines under the guidance and management of defendants' servants were used for the transport of materials and the conveyance of workmen employed by the contractors, said workmen not being servants of the defendants, to and from their residence and their work, for reward to the defendants; and that I. S., in his life-time, being such workman, became a passenger on a car drawn on said railway by a locomotive under the defendants' management, to be carried from his place of work home, and as such workman and passenger then was lawfully on said car, yet the defendants so negligently managed the train, &c., that I. S. was thereby injured, and died. Semble, that the deceased could not have been considered a fellow servant with those employed by the defendants. *Sheerman* v. *Toronto, Grey, and Bruce R. W. Co.*, 34 Q. B. 451. See, also, *Torpy* v. *Grand Trunk R. W. Co.*, 20 Q. B. 446.

Declaration, that the defendant, an hotel keeper, and not a contractor or builder, was engaged in erecting a building, being an addition to an hotel, and employed one G. as architect of said building to furnish the plans, select the materials, employ men to erect the building, and generally to superintend the erection thereof for the defendant, and represent the defendant therein: that G., in pursuance of his duty and authority, employed one M. as sub-foreman in the erection of the building, and the plaintiff as a workman under him: that G. directed M. to remove some lumber to the upper floor, which the plaintiff, with other workmen under the defendant, was ordered by M. to do; and the plaintiff, in pursuance of his employment, was lawfully on the upper floor, the said floor having been constructed by the defendant and G. in the pursuance of his duty and employment as aforesaid, where, by the insufficiency of the beams supporting said floor—which insufficiency was known to the defendant though unknown to the

plaintiff—and the negligence of G. and the defendant in the construction of said floor and building, the said floor gave way, and thereby plaintiff was injured:—Held, on demurrer, that the declaration shewed a good cause of action against defendant, for it must be taken to mean that the defendant had the building under his own care and supervision, so that what G. did was the act of the defendant only, and not the act of G. as a fellow workman with the plaintiff. Remarks as to the use of ambiguous language in pleading. *Macdonald* v. *Dick*, 34 Q. B. 623.—A. Wilson, sitting alone.

3. *For Acts of Servant in Course of Employment.*

(a) *Generally.*

A master is liable for the acts of his farm servant in impounding cattle in his absence, the servant acting within the general scope of his authority. *Spafford* v. *Hubble*, E. T. 7 Will. IV.

The plaintiff had workmen attending a steam mill. Defendant being interested in getting saw logs cut up, removed plaintiff's fireman and placed another man in his stead, and added several of his own workmen to those employed by the plaintiff. Owing to some mismanagement the boiler burst:—Held, that there was evidence for the jury that defendant was a trespasser: that whether he was responsible as such for the injury done to the boiler depended on the nature and extent of his interference, and how far he was implicated in the acts which caused the explosion. *Eligh* v. *Winters*, 5 C. P. 491.

Where the declaration alleges that at the time when the negligence or wrongful act was committed A. was defendant's servant, and that A. did the act, the fact of A. being such servant is a material allegation, which is not put in issue under not guilty. In this case the declaration alleged that the plaintiff and defendant at the time when, &c., were possessed of adjoining land, and that G. being defendant's servant, negligently set out a fire, which extended to plaintiff's land:—Held, that the word "being" referred to the time of the alleged negligence. *Henderson* v. *Chapman*, 3 P. R. 331.—C. L. Chamb.—A. Wilson.

Upon a road, not a regular road allowance, but formed of land given by the owners thereof for their general convenience, statute labour had been performed for some time under the regular pathmaster, and the public funds expended:—Held, that the road must be considered to be under the charge of the municipality, so as to render them liable for its state of repair. The liability to keep in repair extends to overhanging trees liable to fall upon the road and cause damage to passers by. Where therefore defendants' servants, in getting materials on land adjoining the road for its repair, felled a tree which in falling lodged against another tree near the road, and being left there afterwards fell and killed the plaintiff's wife while passing along the road:—Held, that the defendants were liable. Per Gwynne, J.—The defendants' servants as well as the defendants were liable, but in the event of the latter being held liable, they would have a remedy over against the former. *Gilchrist* v. *The Corporation of the Township of Carden*, 26 C. P. 1.

V. Jurisdiction of Justices.

See C. S. U. C. c. 75; 29 Vict. c. 33, D.; 30, cc. 24, 25, 26.

The act, 10 & 11 Vict. c. 23, does not to the case of school trustees and school te *In re Joice*, 19 Q. B. 197.

Where it is shown to a judge in cha that there is a reasonable doubt as to the le of a conviction under the act, the judge order the issue of a writ of certiorari fo removal of the conviction, notwithstandin confirmation of the conviction by the Co Sessions, to whom an appeal was made a the legality of the conviction. *In re Sul* 8 L. J. 276.—C. L. Chamb.—Richards.

Defendant engaged to work with one T. 9th of April, 1860, at $8 per month; the ba being that he was to work for half a month as long after as he was found to suit, or unt fall ploughing was done. He left on the 2 November, having told T. about three w previously that he would like to go the which T. assented. Defendant complained before a magistrate for not paying his w and was indicted for perjury committed on occasion, and found guilty:—Held, that hiring was such as to give the magistrate diction under the C. S. U. C. c. 75, an conviction was affirmed. *Regina* v. *Walk* Q. B. 34.

An order for the payment of money, ma a justice under the act, is not a conviction w it is necessary to return to the Quarter Sess *Ramsey* q. t. v. *Jones*, 21 Q. B. 370.

Held, that a conviction under the act, U. C. c. 75, s. 12, must shew that the p against whom the complaint is lodged w servant at the time of the conviction or o that the complaint was "upon oath," a what manner the wages are due. *Helps* v. 9 L. J. 302.—C. C.—Cooper.

A. engaged B. and his hired man C. to a house for him, and agreed to pay B. his nary wages, and $1 per diem for C. A. m default was convicted before a magistrate this act, and ordered to pay B. $15.50 fo services. A. appealed, and the convictio quashed. B. then obtained a summons t cause why a certiorari should not issue to the order quashing conviction, &c., in Queen's Bench.:—Held, that the applica a right to the certiorari; but semble, that t ceedings to reinstate the conviction we necessary: that the agreement referred not come within the second branch of C C. c. 75, s. 3; and semble, that the terms the first branch of that section refer t ments where master, journeyman, and l belong to the same calling, and one the other to work for him in its exerc *re Doyle*, 4 P. R. 32.—C. L. Chamb.—

The alleged conviction in this case (l action against a J. P. for false imprisonm malicious arrest) was made under the s authority of C. S. U. C. c. 75, but noth peared on the proceedings to shew the of master and servant, or any offence pu under the act, and it therefore shewed diction in defendant. *McDonald* v. *St* Q. B. 577.

S., a justice of the peace, upon an information laid before him, issued a summons for non-payment of wages under C. S. U. C. c. 75, sec. 12, returnable before himself or such other justices as might then be present. On the return two other justices were present, who, without any objection from S., heard the complaint with him. At the conclusion of the case, these two thought the complaint should be dismissed, while S. was in favour of the claimant, and, against the protest of the other two, S. made an order requiring the defendants to pay the claim and costs, and in default that a distress should issue; the two other justices made an order dismissing the complaint. Subsequently a formal conviction was drawn up, and signed and sealed by S., the whole proceedings being set out as before him alone, and afterwards a distress warrant was issued by him. The minutes of the evidence taken down by the magistrates' clerk were headed as in a cause before the three justices:—Held, that the conviction was clearly bad, and must be quashed, S. having no exclusive right to deal with the case merely because he had issued the summons. *Regina* v. *Milne et al.*, 25 C. P. 94.—Hagarty, sitting alone.

A magistrate having entertained a case under the Master and Servant's Act, C. S. U. C. c. 75, as amended by 29 Vict. c. 33, D., and convicted the plaintiff, notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction, and was shewn a professional opinion to that effect and referred to the statute:—Held, that the jury were warranted in finding that he did not bona fide believe that he was acting in the execution of his duty in a matter within his jurisdiction; and that he was therefore not entitled to notice of action. *Cummins* v. *Moore*, 37 Q. B. 130.

See *Whelen* v. *Stevens*, Tay. 439, p. 2232.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN ACT.

See LIEN.

MEDICAL PRACTITIONERS.

I. AUTHORITY TO PRACTICE, 2241.

II. FEES AT INQUESTS, 2242.

III. SALE OF GOODWILL OF BUSINESS, 2242.

IV. LIABILITY FOR NEGLIGENCE AND UNSKILFULNESS, 2242.

V. MISCELLANEOUS CASES, 2244.

I. AUTHORITY TO PRACTICE.

A medical practitioner duly licensed in either section of the province may practice in the other without a fresh license:—Held, therefore, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws respecting the profession there. *Shaver* v. *Linton*, 22 Q. B. 177.

The appellant having been convicted before justices of having pretended to be a physician, contrary to 29 Vict. c. 34, appealed to the Quarter Sessions and was found guilty:—Held, that the sessions had no power to reserve a case for the opinion of the court under C. S. U. C. c. 112, the appellant not being a person "convicted of treason, felony, or misdemeanour." Semble, that if the 29th Vict. had in terms declared the act charged unlawful, it would have been an indictable misdemeanour. *Pomeroy* v. *Wilson*, 26 Q. B. 45.

See *Swann et al.* v. *Scott*, 23 Q. B. 434, infra.

II. FEES AT INQUESTS.

A medical witness, in obedience to the coroner's summons, attended during two inquests held on fifty-two persons killed by a railway accident, and occupying several days; no post mortem examinations were made:—Held, that under 13 & 14 Vict. c. 56, s. 7, he could be allowed only 25s. for each day's attendance (not for each body,) together with his mileage in travelling. *In re Askin and Charteris*, 13 Q. B. 408.

Where a coroner, under C. S. U. C. c. 125, summoned a second medical practitioner as a witness at an inquest, and to perform a post mortem examination, but it was not shewn that such practitioner had been named in writing and his attendance required by a majority of the jurymen, as provided for by sec. 9, a mandamus to the coroner, to make his order on the county treasurer for the fees of such witness, under sec. 10, was refused. Semble, that on application for such mandamus the county treasurer, as well as the coroner, must be called upon. *In re Harbottle and Wilson*, 30 Q. B. 314.

III. SALE OF GOODWILL OF BUSINESS.

The plaintiffs, S. and W., S. being a licensed medical practitioner and W. an apothecary, purchased the goodwill of defendant's practice as a medical man, at I., defendant agreeing not to practise within eight miles of that place. In an action on this agreement:—Held, that there was nothing illegal in the plaintiffs entering into partnership: that no intention could be inferred that W. should practice physic contrary to the statute; and that the fact of his not being licensed could therefore form no defence. *Swann et al.* v. *Scott*, 23 Q. B. 434.

The goodwill of a professional business, as a surgeon's, may be sold by the personal representative, and the contract enforced, where the price has been agreed upon, or any other means of fixing its value provided. It is therefore an asset of the estate, to be accounted for in the ordinary course of administration. Semble, however, that the personal representative could not be compelled to find a sale for it. *Christie* v. *Clarke*, 16 C. P. 544. See *S. C.* 27 Q. B. 21.

IV. LIABILITY FOR NEGLIGENCE AND UNSKILFULNESS.

Case, by the husband alone, for negligent and unskilful treatment of his wife in child-birth.

The first count was bad for merely stating negligence, without averring any damage accruing therefrom. The second count alleged that by reason of the defendant's improper treatment of the plaintiff's wife her life was endangered, and she was much injured—being a ground of action for which the husband could not sue alone. The third count combined different causes of action, some for which the husband could sue alone, and others for which the wife should be joined :—Held, that the proper course was to arrest the judgment and not to award a venire de novo. *Smith* v. *Carder*, 11 Q. B. 77.

The plaintiff sued defendant for neglecting, as a medical man, to attend upon his wife during child-birth, alleging the contract in one count to be to attend at 3 p. m. on the 12th April, and in another count to attend when notified :—Held, that upon the evidence, stated in the case, a contract and breach of it were shewn, which, with proper amendments, as pointed out in the case, would support the declaration ; but, Held, also, that the plaintiff in this action could not recover for the personal injury and suffering of the wife. *Hunter* v. *Ogden*, 31 Q. B. 132.

In an action by husband and wife for negligence of defendants, surgeons, in treatment of the wife, the evidence was of a very weak and unsatisfactory character, amounting in fact to pure conjecture whether there had been any negligence or not, while the evidence offered on behalf of defendants was of the most favourable character to them :—Held, that on plaintiffs' counsel declining to take a nonsuit, the judge was right in directing the jury to find for defendants, as also in refusing him the right to address the jury on the whole case. *Storey* v. *Veach et ux.*, *Anderson et ux.* v. *Walker*, *Thackeray et ux.* v. *Askin*, 22 C. P. 164.

In an action for libel against a surgeon respecting unskilful treatment by him of a fractured thigh, the question was raised, whether the failure to cure was not owing to the rough treatment of the patient by his master; and defendant desired to prove that the patient had been heard to complain of such usage. Semble, that such evidence was admissible. *Smith* v. *McIntosh*, 14 Q. B. 592.

Action against defendant, a medical man, for negligence in the setting of plaintiff's thigh bone, which had been fractured. The professional evidence generally went to shew improper treatment : that the proper treatment in such a case would greatly depend upon the condition of the patient, and particularly upon the condition of the knee, which, it came out on cross-examination of plaintiff's witnesses, had also been injured more or less. The jury having found for the plaintiff, the Court refused a new trial on affidavits of the discovery of further corroborative evidence shewing plaintiff's knee had been seriously injured. *Fawcett* v. *Mothersell*, 14 C. P. 104.

Where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury. In an action against a surgeon for malpractice in amputating an arm above, instead of below the elbow, several medical men of repute approved of defendant's course. The jury having, nevertheless, found for the plaintiff, a new trial was granted without costs. *Jackson* v. *Hyde*, 28 Q. B. 294.

V. MISCELLANEOUS CASES.

It is not admissible to ask medical w
on cross-examination what books they
the best upon the subject in question,
to read such books to the jury; but t
be asked whether such books have in
their opinion. *Brown* v. *Sheppard*, 13 Q

The relationship of a medical man
patient is one of trust and confidence,
settlement made through him, in conse
advice given *malâ fide*, will be set aside
v. *Grand Trunk Railway Co.*, 16 C. P. 5

MEMORIALS.

I. PROOF OF DEEDS BY MEMORIALS—
DENCE.

II. REGISTRY OF INSTRUMENTS BY—S
ISTRY LAWS.

MENTAL INCAPACITY.

See FRAUD AND MISREPRESENTATION—
TIC—WILL.

Mere physical weakness, however gre
out proof of mental incapacity, is not s
to render invalid an acknowledgment
Emes v. *Emes*, 11 Chy. 325.

Under the facts of this case, it was
there was not sufficient evidence of men
pacity to render invalid an acknowled
a debt signed by the testator. *Ib.*

MERCANTILE AGENCY.

The defendants, who carried on the
of a trade protection society, in consid
a yearly subscription, undertook to pr
furnish the plaintiff, a merchant in T
the best of their ability, with informat
mercantile standing and credit of the
customers among the merchants, tra
manufacturers throughout the United
Canada (in the communities wherein
spectively resided), for the purpose of
plaintiff in determining the propriety
credit. On the 10th of June, 1875, t
sent his clerk to the defendants to as
mercantile standing and credit of o
siding and doing business in Toront
applied to him to purchase goods on c
defendants' clerk read out of a book t
tiff's clerk—that W. had stock abo
and $5,000 or $6,000 in his business,
to be worth $7,000 ; that his charact
its were good ; that he was doing a
and that his credit was good locally.
tiff, relying on this report, which h
(to the knowledge of plaintiff) to t
tion which the defendants had coll
29th April previously, without mak
ther enquiries, sold to W., about
afterwards, $500 worth of goods on
was really insolvent at the time th
was made, and on the 8th July f

ELLANEOUS CASES.

ble to ask medical witnesses
on what books they consider
subject in question, and then
s to the jury; but they may
such books have influenced
own v. *Sheppard*, 13 Q. B. 178.

p of a medical man to his
trust and confidence, and any
through him, in consequence of
fide, will be set aside. *Rowe*
Railway Co., 16 C. P. 500.

MEMORIALS.

DEEDS BY MEMORIALS—*See* EVI-

OF INSTRUMENTS BY—*See* REG-
AWS.

ENTAL INCAPACITY.

AND MISREPRESENTATION — LUNA-
TIC—WILL.

sical weakness, however great, with-
f mental incapacity, is not sufficient
nvalid an acknowledgment of debt.
ies, 11 Chy. 325.

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ender invalid an acknowledgment of
ned by the testator. *Ib.*

MERCANTILE AGENCY.

fendants, who carried on the business
protection society, in consideration of
subscription, undertook to procure and
he plaintiff, a merchant in Toronto, to
of their ability, with information of the
he standing and credit of the plaintiff's
s among the merchants, traders, and
turers throughout the United States and
(in the communities wherein they re-
y resided), for the purpose of aiding the
in determining the propriety of giving
On the 10th of June, 1875, the plaintiff
clerk to the defendants to ascertain the
ile standing and credit of one W., re-
nd doing business in Toronto, who had
to him to purchase goods on credit. The
nts' clerk read out of a book to the plain
erk—that W. had stock about $10,000
000 or $6,000 in his business, and claime
orth $7,000; that his character and ha
e good; that he was doing a fair trade
t his credit was good locally. The plain
ying on this report, which had referen
knowledge of plaintiff) to the inform
hich the defendants had collected on
April previously, without making any f
nquiries, sold to W., about twelve d
ards, $500 worth of goods on credit.
ally insolvent at the time that the re
hade, and on the 8th July following,

sconded without paying the plaintiff. The jury found that the defendants did not furnish the information to the best of their ability, and that the plaintiff did not act imprudently in not making further enquiries:—Held, reversing the judgment of the Queen's Bench, 39 Q. B. 551. Hagarty, C. J. C. P., diss., that the defendants were not liable for the loss which the plaintiff had sustained, for that the action was brought upon or by reason of the representation, which was not in writing and signed by them under C. S. U. C. c. 44, s. 10, and was therefore not receivable in evidence; and the fact that the representation was made in pursuance of a contract did not prevent the application of the statute. Held, also, that under the circumstances the plaintiff was only entitled to nominal damages for the breach of the contract to procure and furnish the information. *McLean* v. *Dun et al.*, 1 App. R. 153.

MERGER.

I. OF SIMPLE CONTRACT DEBTS BY SPECIALTIES, 2245.

1. *Bills and Notes*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. OF ESTATES, 2246.

III. MISCELLANEOUS CASES, 2247.

IV. OF MORTGAGES—*See* MORTGAGE.

I. OF SIMPLE CONTRACT DEBTS BY SPECIALTIES.

Where there is a simple contract debt due by A. and B., partners, and the plaintiff takes a mortgage from A., giving time, the simple contract debt is thereby extinguished as regards B. *Loomis et al.* v. *Ballard et al.*, 7 Q. B. 366.

Held, that under the facts proved in this case, the mortgage by plaintiff to defendants of his mill to secure advances on his flour, to be sold by defendants as commission merchants, was not to be treated as superseding the parol agreement for such advances, or as shewing a different agreement from that evidenced by the letters. *Wigle* v. *Gooderham et al.*, 6 C .P. 21.

The acceptance of a conveyance by way of mortgage for a simple contract debt of a larger amount than that secured and covenanted to be paid by the mortgage, is a satisfaction of the simple contract debt for the larger amount. *Allen* v. *Alexander*, 11 C. P. 541.

Held, that the mortgage in this case being expressed to have been given as further security, and providing that it should stand as security for any renewal of the bills sued on, was collateral only, not a merger. *Gore Bank* v. *McWhirter*, 8 C. P. 293.

Held, also, that the remedy on the specialty and simple contract not being co-extensive or between the same parties, the doctrine of merger did not apply. *Ib.*

Plaintiff declared on defendant's agreement to sell him certain lands, and convey the same to him in fee simple free from all incumbrances—alleging in one count that he had not so conveyed, and in another that although defendant by deed pretended to convey the land to one H., at the plaintiff's request, free from incumbrances, yet defendant had allowed part of it to be sold for taxes. Defendant pleaded that the incumbrances were created by a former owner, of which defendant had no notice, and which he was not legally bound to pay, and that afterwards he, at plaintiff's request, conveyed the land to H. by a deed with qualified covenants, which the plaintiff accepted, whereby defendant was released from said agreement:—Held, no defence, for there was no merger, because the deed was not to the plaintiff, no release was shewn, and no accord and satisfaction. Quære, as to the effect of the deed if it had been given to the plaintiff. *McLennan* v. *Cheguin*, 37 Q. B. 301.

In 1858, a parol contract was entered into for the sale of one acre of land, the consideration for which was paid, and the purchaser was let into possession of the property, which he occupied, improved, and built upon. Afterwards, and in the same year, the vendor executed by way of security a life lease to another person of fifty acres, including the acre sold. In 1860, a bond was executed by the vendor to the wife of the purchaser for the conveyance of the acre to her. The purchaser of the acre having filed a bill for specific performance of the parol contract, the court refused relief on that ground, the parol contract having become merged in the written contract or bond. *McCrumm* v. *Crawford*, 9 Chy. 337.

See, also, COLLATERAL SECURITY.

II. OF ESTATES.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and voidable as to them, is nevertheless as between the lessor and lessee a merger of the lease, or more properly a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession. *Doe* d. *McPherson* v. *Hunter*, 4 Q. B. 449.

Where a tenant for life and the reversioner in fee had conveyed property in fee simple by one deed of bargain and sale to one person, it was held that the life estate did not merge in the reversion, and that the Statute of Limitations did not run against the remainder man till the death of the tenant for life. *Sladden* v. *Smith*, 7 C. P. 74.

Held, that the husband of a deceased wife cannot be tenant by the curtesy, except of lands of which his wife was seised of such an estate as that her issue by him would inherit, as heir to her; and that as between the reversioner and tenant by curtesy, a conveyance from the tenant by the curtesy operates as a surrender of the life estate, and that the freehold in law vests in the assignee before entry; and the lesser estate would, by operation of law as between them, merge in the greater, and the assignee's right of enjoyment would be immediate, as if the tenant for life had died. Richards, J., diss. *Wigle* v. *Merrick et al.*, 8 C. P. 307.

Defendant on the 13th October, 1852, granted the land in question to one S., to hold "to the said S. and the heirs of his body for twenty-one years, or the term of his natural life, from the

1st of April, 1853, fully to be completed and ended :"—Held, that by the lease S. took a life estate, in which the term merged, and he therefore had no interest which the sheriff could sell under the fi. fa. against goods. *Dalye* v. *Robertson*, 19 Q. B. 411.

S. having mortgaged certain land in fee, afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words "bargain, sell, and release," to convey a legal estate in fee. On the same day, J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action, by certificate duly registered, and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage :—Held, that S. had a legal reversion by estoppel as against the tenant, which passed to the plaintiff by the first conveyance from S. Held, also, that the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J., and that the plaintiff being still bound by the lease, defendant was so as well. *Cameron* v. *Todd*, 22 Q. B. 390.

III. Miscellaneous Cases.

The plaintiffs sued as "The Trustees of the Toronto Berkeley Street Congregation of the Wesleyan Methodist Church in Canada in connection with the English Conference," alleging that in consideration that they would take down or remove the church held by them for the purposes connected with the trusts set out in the deed conveying the land to them on which it stood, and would rebuild it so as better to answer the purposes of said deed, defendant promised to pay them $160 to assist them in so doing :—Held, that the plaintiffs being entitled to sue in their corporate or quasi corporate capacity their individuality was merged therein, and the objection that the defendant, being a trustee, was also one of the plaintiffs could not arise. *The Trustees of the Toronto Berkeley Street Church, &c.*, v. *Stevens*, 37 Q. B. 9.

A testator devised all his estate real and personal to his wife for life, and after her death the real estate was to be equally divided between one of his sons and one of his daughters; the daughter to have all his personal estate also, in the event of the death of either without heirs, his or her share was to be divided between the other children of the testator. Several pecuniary bequests were made, which were to be paid by the son and daughter, by instalments, commencing one year after they should "have come into possession hereby given." The daughter married and died during the life of the widow, leaving the husband tenant by the curtesy, but no child her surviving. The widow subsequently died, and thereupon the tenant by the curtesy recovered possession of his deceased wife's share in ejectment. More than a year after the death of the widow, a daughter of the testator, one of the legatees named in his will, filed a bill payment of the arrears of her legacy in the events that had happened, that th no merger of any portion of her legacy, b of her interest in the deceased daughter *Robson* v. *Jardine*, 22 Chy. 420.

MESNE PROFITS.

See Ejectment.

MIDLAND RAILWAY OF CANA

See Railways and Railway Compa

MILEAGE.

I. Of Gaoler—*See* Gaol and Gaole
II. Of Sheriff—*See* Sheriff.

MILITIA.

See Army, Navy, and Militia.

MILLS AND MILL OWNERS.

I. Rights and Liabilities of Mill —*See* Water and Water Cou
II. Mill Fixtures—*See* Fixtures.

MINES AND MINERAL LAND

See Oil Lands.

A mining company incorporated un C. c. 63, s. 57, has not, as a necessary the right to draw, accept, or endorse exchange for the purposes of their and the power of "selling or otherwise of their ores as the company may se their articles of association, will not right by implication. *Gilbert* v. *McAn* 28 Q. B. 384.

The plaintiff, having discovered mi certain lands, agreed with D. & T. should furnish the funds to work the m after securing the title, convey an third to him. He afterwards agreed his interest in this agreement to de consideration of $100, and one-half of profit might be derived from the share be given to him by D. & T. ; and the agreed to account for and pay over t half of whatever profits or returns derived from the said share assigned ant, as agreed to be given to the D. & T. ; and further, it was agree plaintiff should not have to pay or a moneys or labour in the working of The defendant having sold one-half est to one G. for $1,125 :—Held, that was not profits or returns derived f ant's share, for which he was boun

to the plaintiff under his agreement. *Loucks* v. *Wallbridge*, 31 Q. B. 32.

The plaintiffs and defendant entered into a joint adventure to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the title to the mineral rights in the land. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under sec. 442 of the Municipal Act of 1873, which authorizes such sale, but with the proviso that the public travel should not be interfered with. A conveyance containing the above proviso was, with defendant's consent, made to one R. B. G., who executed a formal declaration of trust of one-third interest to the plaintiffs, but not of the balance; but he stated that he held the whole land in trust for plaintiffs, and was willing to convey as they directed, and the plaintiffs informed defendant that they were ready to convey to him. Defendant obtained an Act incorporating a company to work the mine and issue stock, which company proved a failure, but through no default of defendant, who was the heaviest loser of all the parties interested. The plaintiffs having sued defendant for not forming the company or carrying on mining operations, and having obtained a verdict for $400:—Held, that the verdict must be reduced to nominal damages. Held, also, that the conveyance by the municipality of the mineral rights, under sec. 442, was sufficient, and that sec. 441, for stopping up of a road allowance, did not apply. Held, also, that although the conveyance of the mineral rights was to R. B. J., defendant could not urge that he could not be compelled to convey, owing to the absence of any writing; and that the plaintiffs, having control of the title, were in a position to aver and prove their readiness to perform the agreement. *Johns et al.* v. *Beck*, 24 C. P. 219.

Defendants, who had some interest in gold lands, having discovered the owner of an outstanding title, employed the plaintiff to buy up the same; agreeing to give the plaintiff one-fourth of the land for his trouble on his paying one-fourth of the consideration, and to reconvey to the owner of such title another one-fourth part. The title having been bought up, the defendants did reconvey the one-fourth to the owner, but refused to carry out the agreement with the plaintiff:—Held, that the agreement was such as this court would specifically perform, and decreed the same accordingly, with costs. *Bigart* v. *Patterson*, 14 Chy. 624.

A partnership was formed between three persons A, B, and C, to dig for gold on the property of one Allan; two of them, A and B, were to do the work, and the third, C, to pay the expenses; all three were to share in the profits. The place named was afterwards abandoned by mutual consent, and the two working partners, A and B, removed, at the instance of the third, C, to work in another township (Elzevir), where they resumed work, C, paying expenses as before:—Held, that in the absence of any express agreement, it was to be presumed they were working on the same terms as at the place originally worked. *Burn* v. *Strong*, 14 Chy. 651.

The plaintiff had occasion to leave the work on the 2nd of March, and did not return. He filed a bill to enforce his partnership rights on the 30th of July:—Held, that, as there was no stipulation respecting the time he was to work, and he was not requested to resume work, and no notice was given him of any complaint or intention to exclude him from the profits of the adventure, the delay did not bar the suit. *Ib.*

C, in his own name bought the privilege of digging for gold on the Elzevir lot, and subsequently formed a company by whom that lot was purchased:—Held, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C in this transaction. *Ib.*

There was no writing signed by C, acknowledging the agency and trust:—Held, that A and B, having entered and worked on the lot, the Statute of Frauds did not apply. *Ib.*

An arrangement with the plaintiff, such as was customary in carrying out objects like those defined in a company's incorporation act, and as was conducive to the attainment of those objects, having been duly carried out:—Held, that the arrangement could not afterwards be declared to have been beyond the powers of the company or its directors, so as to entitle the company to keep for their own use without compensation to the plaintiff the whole benefit which the arrangement had afforded the company. *McDonald* v. *The Upper Canada Mining Co.*, 15 Chy. 179; affirmed on re-hearing. *Ib.* 551.

M. was aware of a valuable mining location on Lake Superior, and was regarded by other explorers in that region entitled to it. He made known this location to an incorporated mining company under an agreement that he should be compensated for the communication; but the mode of compensation was not determined. The communication having proved valuable to the company, it was—Held, that M. was entitled to compensation in the manner usual in such cases. *Ib.*

The usual mode was proved to be, by receiving a share or partnership interest in the mine, on the patent being procured:—Held that this mode was not ultra vires of the company or the directors. *Ib.*

The agreement was not under the corporate seal. The company received $5,500 for their claim to the property by way of compromise, from a director who had availed himself of the plaintiff's communication to the directors, to obtain secretly a grant of the property to himself personally:—Held, that the plaintiff was entitled to share this sum, and that the want of a seal was no defence. *Ib.*

A mining lease for 99 years contained provisions enabling the lessor to demand at his option a royalty upon the proceeds of the mine, or $4000 in lieu of such royalty. The lessor had not exercised such option:—Held that the lessee was a purchaser for value, and that a prior voluntary conveyance was void as against him. *Conlin* v. *Elmer*, 16 Chy. 541.

One of two tenants in common of land, leased part of it as a stone quarry:—Held, that the other tenant in common was entitled to an injunction against further quarrying, and to an account against the lessee for one moiety of what had been already quarried. *Goodenow* v. *Farquhar*, 19 Chy. 614.

MISDEMEANOR.

See CRIMINAL LAW.

MISDIRECTION.

See NEW TRIAL.

MISJOINDER.

I. OF COUNTS—*See* PLEADING AT LAW.

II. OF PARTIES.

1. *At Law*—*See* AMENDMENT AT LAW.
2. *In Equity.*
   (a) *Foreclosure Suits*—*See* MORTGAGE.
   (b) *Other Suits*—*See* PLEADING IN EQUITY.

MISNOMER.

I. BAILABLE PROCEEDINGS, 2251.

II. IN PLEADINGS, 2252.

III. IN OTHER PROCEEDINGS, 2252.

IV. WHAT PREVENTS A PARTY FROM TAKING ADVANTAGE, 2255.

V. AMENDMENT—*See* AMENDMENT AT LAW.

VI. OF CORPORATIONS.

1. *Generally*—*See* CORPORATIONS.
2. *Municipal*—*See* MUNICIPAL CORPORATIONS.

I. BAILABLE PROCEEDINGS.

Where there are two plaintiffs with the same surname, the non-repetition of the surname after the Christian name of each in a bail piece is only an irregularity, and will not warrant the plaintiffs in taking an assignment of the bail bond. *Meighan et al.* v. *Brown*, Dra. 167.

An arrest was set aside, where the defendant, whose name was "Patrick," was called "Peter" in the affidavit and writ. *Botsford* v. *Stewart*, E. T. 11 Geo. IV.

One of several defendants, Stephen Nathaniel Campbell, was arrested on a writ of capias, in which he was called Samuel N. Campbell. As to the misnomer, the plaintiff shewed that the defendant had represented his first name to be Samuel, but did not shew that he had said this was his only name, or that any enquiries had been made to learn what his second name was: —Held, that the arrest was bad. *Pegg* v. *Campbell et al.*, 1 P. R. 328.—C. L. Chamb.—Robinson.

The plaintiff, Campbell, who lived at Montreal, was arrested at Kingston upon a warrant reciting that R. B. Boman had been charged, &c., for that he the said — Campbell, did, &c., and commanding the arrest of the said R. B. Boman. The information was against R. B. Boman, the name of Campbell having been struck out. It was found that the plaintiff was known as Campbell, but carried on business as R. B. Boman Co.:—Held, that the information and warr could afford no justification, for they were agai Boman, not the plantiff, and though the plain had entered his name as "R. B. Boman" in hotel where he was staying, there was nothin shew that he had ever represented that to his name, and he was known to the hotel kee and bar keeper as Campbell. *Campbell* v. *Donell et al.*, 27 Q. B. 343.

II. IN PLEADINGS.

A defendant cannot sign judgment of pros. for not declaring, where the plaintiffs h in fact declared but a mistake has been made the name of one of them, the proper course be to move to amend the declaration as to the n under 7 Will. IV. c. 3, or to set it aside irregularity. *Hart et al.* v. *Boyle*, 6 O. S. 168

It is no ground of nonsuit that the plain has declared by a name different from her name; it can only be taken advantage of by application to amend the declaration. *Mur* v. *Bunt et al.*, 2 Q. B. 284.

The plaintiff declared by the name of Hut son. Defendant in his plea spelt the plainti name Hutchinson. The plaintiff treated plea as a nullity, and signed judgment, and t out execution. Burns, J., stayed proceedings the next term so that defendant might apply set the judgment aside, which he thought defendant entitled to. *Hutchison* v. *Hart*, C. L. Chamb. 223.

Writ of summons in Common Pleas, T. H. Purdy *v.* Rowlands. Declaration by mistake Queen's Bench J. T. H. Purdy *v.* Rowlan Motion to set aside declaration for irregular is properly made on affidavits entitled as in latter cause. *Purdy* v. *Rowlands*, 4 P. R. 3 —C. L. Chamb.—Draper.

Where an incorporated company files a using a name other than that mentioned in act of incorporation, the bill is liable to a dem rer for want of equity. *The Cornish Si Mining Co.* v. *Bull*, 21 Chy. 592.

III. IN OTHER PROCEEDINGS.

An obligor who is called by a wrong nam a bond, but executes it by his right name, n be sued by the name in the bond. *Ketchu Brady*, M. T. 3 Vict.

Held, that a mistake in the initial letter the name of one of the parties is not fatal t award. *Charles* v. *Hickson*, T. T. 3 & 4 Vic P. C.—Macaulay.

Where a verdict was taken for the plain subject to a reference, and the arbitrator awar for defendant, but everywhere styled the pl tiff "John," instead of "Patrick,"—the c set the award aside and granted a new t *McMannon* v. *McElderry*, H. T. 6 Vict.

Jacques and Jakes are not necessarily i sonans, so that the substitution of the one the other is sufficient. *Jaques* v. *Nicholls*, T 3 & 4 Vict.—P. C.—Macaulay.

Owen and Orrin are not idem sonans. *Terr Mathews*, T. T. 3 & 4 Vict.,—P. C.—Macaula

Held, per Sullivan, J., that the styling of a cognovit thus—"Thomas Paterson, plaintiff, v. *Philemn* Squires and *Willian* Squires, defendants, leaving out the letter o, and omitting part of the letter m, was not an irregularity, (there being no doubt as to the identity of the parties,) upon which a judgment and execution entered and issued upon the cognovit could be set aside. *Paterson* v. *Squires et al.*, 1 C. L. Chamb. 234.

"Rae" instead of "Wray" held idem sonans. *Vance et al.* v. *Wray*, 3 L. J. 69.—C. L. Chamb. —Richards.

A rule nisi having been obtained on an attorney to pay over to Charles Edward Hatherley a sum of money, a technical objection was taken that the complainant's name was not Charles Edward, but Charles Edmund:—Held, per Draper, J., that the objection must prevail. *In re Latham, one, &c.*, 1 P. R. 91.—P. C.

Where in the style of the cause the plaintiff was called "Davids Cass," but in the title of affidavits in support of a rule nisi in the same case "Davis H. Cass," and "Davis Hawley Cass": Held, a fatal variance. *Beauchamp* v. *Cass*, 1 P. R. 291.—Richards.

The patent for land issued to Michael Corrigan, and the name was so spelt in the deed from him under which the plaintiff claimed, but was signed Michael Corgan:—Held, no variance. *Prince* v. *McLean*, 17 Q. B. 463.

The franchise ought not to be lost to any one really entitled to vote, if it can be sustained in a reasonable view of the requirements of the statute. The rating of electors under s. 75 of C. S. U. C. c. 54, is sufficient if in the surnames of the electors, although the Christian names be erroneous. Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified. So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified. "Thomas Sanderson" was held to be idem sonans with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating. *Regina ex rel. Chambers* v. *Allison*, 1 L. J. N. S. 244.—C. L. Chamb.—J. Wilson.

A judgment was recovered against Charles Westley Lount, which was the correct name of the defendant. The registration was of a judgment against Charles Wesley Lount:—Held, sufficient. *Proudfoot* v. *Lount*, 9 Chy. 70.

A confession of judgment was executed in the name of Matthew Rodger; the certificate of registration was of a judgment against Matthew Rodgers:—Held that the mistake vitiated the registration. *McDonald* v. *Rodger*, 9 Chy. 75.

In the copy of the rule nisi first served on a corporation, the applicant's name was by mistake written James instead of Joseph Thompson. The road in question also passed through the land of one James Thompson, with whom an arbitration had taken place, and the corporation, supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The Court, in making it absolute, with costs, directed the costs incurred by the corporation in consequence of the error to be deducted. *In re Thompson and The Corporation of the United Townships of Bedford, Olden, Oso, and Palmerston*, 21 Q. B. 545.

Upon a commission the name of one witness was stated to be William Lansing Flynn, and in the return of the commissioners they stated that they had reduced to writing the answers of William L. Flynn:—Held, not to vitiate the commission. *Comstock et al.* v. *Tyrrell et al.*, 12 C. P. 173.

Held, that a mistake in the entitling of the cause in the commission (the defendant having been styled William instead of Samuel) was fatal to it, and that the taking of the evidence under it was a void proceeding. *Graham* v. *Stewart*, 15 C. P. 169.

A commission was addressed to S. B. Henry, and G., of Philadelphia, jointly and severally. G. took no part in executing it, but all was done by one S. B. Huey, and an affidavit of the plaintiff's counsel at Philadelphia, taken before G., explained that Huey was the name forwarded by him to the plaintiff's attorney here, but through some clerical error it was directed to Henry; that he knew no such person as S. B. Henry in Philadelphia, but that the Huey before whom the depositions were taken was the person intended. This objection was not taken to the commission at the trial, though others were, and the evidence of witnesses on both sides taken under it was read:—Held, Hagarty, J., diss., that, nevertheless, the objection was fatal, for the depositions being taken without authority were not in fact depositions, and the execution of the commission was a nullity. *Lodge* v. *Thompson*, 26 Q. B. 588.

The naming of a railway "railroad" at the heading of a page of a stock book was held not to vitiate the subscription. *Smith* v. *Spencer*, 12 C. P. 277.

In an application for a mandamus to compel a municipal corporation to provide $286.74 for a board of school trustees, they were described in the proceedings as "The Trustees of the Port Rowan High School":—Held, description of trustees sufficient, for although "The Trustees of the Port Rowan County High School" would appear to be the more correct one, yet 34 Vict. c. 33, O., did not in express terms require it, and the township corporation had by their action shewn that they fully understood the body with whom they were dealing. *In re The Trustees of the Port Rowan High School and Corporation of the Township of Walsingham*, 9 L. J. N. S. 188. —C. P.

Held, that the proper designation of a Warden in a quo warranto summons is "Warden of the Corporation of the County of ——;" but that "the Warden of the County of ——" is not improper, as there is no particular name or designation in the Municipal Act of 1866. *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19. —C. L. Chamb.—Richards.

Held, that "the Warden of the County Council of the County of Simcoe" might, if deemed necessary, be amended by striking out the words "of the County Council" after the word "Warden," and before the words "of the County of Simcoe" in the writs to be issued in

pursuance of the judgment in a quo warranto matter. *Ib.*

A misnomer of a witness *David* instead of *Daniel*, in an affidavit of disbursements, was held to be immaterial on a motion to revise a taxation, the defendants having disbursed the amount. *Ham et ux.* v. *Lasher*, 24 Q. B. 357.

In a notice of trial the Christian name of defendant was wrong in the style of cause:—Held, that the notice must be set aside. *Carnegie* v. *Rutherford*, 9 L. J. N. S. 212.—Dalton, *C. C. & P.*

In a writ of fi. fa., and the endorsements thereon, the plaintiffs were styled defendants and vice versâ, the words being transposed throughout, and the Christian names of the defendant were also transposed:—Held, that the writ and endorsements were clearly irregular. *Davidson et al.* v. *Grange*, 5 P. R. 258.—C. L. Chamb.—Morrison.

The court will allow an amendment where an unimportant mistake has been made in a name which has misled no one and the right person has been served. The court does not favour objections of this nature, and refused an enlargement, where, but for such mistake, the proceedings were regular and ample notice had been given. *Re Fraser—Fraser* v. *Fraser*, 2 Chy. Chamb. 457.—Taylor, *Secretary.*

IV. What Prevents a Party from Taking Advantage.

Where the plaintiffs are styled in proceedings upon a cognovit as they are named in the cognovit itself, the defendant, having recognized the plaintiffs' names in his cognovit, cannot object that the Christian and surnames of the plaintiffs have not been used in the proceedings. *Parker et al. v. Roberts*, 3 Q. B. 114.

When a party, by his own conduct and admissions, has justified the calling him by a wrong name, he cannot object to the use of such name as a misnomer: and—Held, that in this case the defendant was precluded from raising the objection. *Browne et al.* v. *Smith*, 1 P. R. 347—C. L. Chamb.—Richards.

The plaintiffs declared on a bond to "The Beverley Municipal Council" (there being no such corporation in existence). The defendants did not, deny the making of the bond, but pleaded over. On demurrer to the plea, and objections to the declaration:—Held, that by not pleading non est factum defendants were debarred from taking the objection to the form of the bond as pleaded. *The Corporation of the Township of Beverley* v. *Barlow et al.*, 10 C. P. 178.

MISREPRESENTATION.

See Fraud and Misrepresentation.

MISTAKE.

I. In Deeds and Written Documents.
1. *Generally*, 2256.
2. *Description of Land Conveyed*, 2258.
3. *Awards or Submissions*—*See* Arbitration and Award.
4. *Assignments for Creditors* — *See* Bankruptcy and Insolvency.
5. *Issuing Patents*—*See* Crown Land
6. *Rectifying and Varying Deeds*—*See* Deed.
7. *Assessors or Collector's Roll*—*See* Mandamus — Municipal Corporations.
8. *Voters' Lists*—*See* Parliament.
9. *Releases*—*See* Release.

II. In Legal Proceedings.
1. *Generally*, 2259.
2. *Filing or Entering Papers in Crown Office*—*See* Crown Office.
3. *When grounds for New Trial*—*See* New Trial.
4. *In Affidavits*—*See* Affidavit.
5. *Amendment of*—*See* Amendment at Law—Amendment in Equity.
6. *Supplemental Answer to Rectify*—*See* Pleading in Equity.
7. *Copy of Writ*—*See* Practice at Law
8. *Nisi Prius Record incorrectly made up*—*See* Practice at Law.
9. *In Master's Report* — *See* Practice in Equity.

III. Miscellaneous Cases, 2262.

IV. In Boundaries —*See* Boundary—Limitation of Actions and Suits—Survey

V. In Names—*See* Misnomer.

VI. Action to recover back Money paid under Mistake—*See* Money Count

VII. As Affecting Right to Specific Performance of Contract—*See* Specific Performance.

VIII. In Surveys—*See* Survey.

I. In Deeds and Written Documents.

1. *Generally.*

The court will receive parol evidence to rectify a written instrument, notwithstanding the language used was that intended by the parties, where the legal effect of such language is different from what was their intention and agreement. *Merritt* v. *Ives*, 2 O. S. 25.—Chy.

K. having agreed with the plaintiffs for the purchase of some lumber, the defendants consented to guarantee his punctual payment for the same; but inadvertently the first agreement in which K. bound himself to pay for the lumber was recited in the agreement signed by the sureties as bearing date the 22nd of December 1851, whereas it was dated on the 8th January 1852. Semble, that on such an issue, if it were shewn that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, and the plaintiffs might recover. *Wadsworth et al.* v. *Townley et al.*, 10 Q. B. 579.

Cancellation of lease by taking out several sheets and replacing them by others. Effect of

Intention of parties. See *Bell* v. *McKindsey*, 32 Q. B. 162; 3 E. & A. 9.

Lease.—Assignment. Mistake as to position of the property, there being no frodtage on a street as supposed. Equitable defence to action for rent. *Talbot et al.* v. *Rossin et al.*, 23 Q. B. 170.

To an action of covenant on a lease, defendant pleaded in substance, on equitable grounds, that by mutual mistake the covenant declared on was inserted in the lease in different terms from what both parties had agreed upon, intended and supposed when the lease was executed, and that reading the covenant as it should have been, there was no breach thereof:—Held, Gwynne, J., diss., plea bad. *Shier* v. *Shier*, 22 C. P. 147.

When a person elected alderman of a city made a declaration of office inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the quo warranto mons against him, qualified in respect of oth property, his election was upheld. *Regina ex el Hartrey* v. *Dickey*, 1 L. J. N. S. 190.—C. L. Chamb.—Morrison.

Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially when it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections. *Re Secord and the Corporation of the County of Lincoln*, 24 Q. B. 142.

Where to an action on a policy of insurance on plaintiff's vessel, the defendants pleaded that before the loss the parties cancelled the policy, while the evidence shewed that the cancellation took place after the loss:—Held, that the plea was disproved, and that the plaintiff was entitled to recover. Per Hagarty, C. J.—Knowledge on the part of the defendants, and ignorance in the plaintiff of the loss having occurred at the time of such cancellation would render it inoperative; and even if the defendants were equally ignorant with the plaintiff, the cancellation would still be void as made under a common mistake of fact. *Brown* v. *British America Ass. Co.*, 25 C. P. 514.

A married woman owning land, she and her husband contracted for the sale thereof, but the deed executed to the purchaser was a conveyance by the husband only, with a bar of dower by the wife. The error was not discovered until after the property had been disposed of in parcels and passed into other hands. The original owner and her husband then executed for a nominal consideration a deed conveying the property absolutely to one of the parties interested, but under the belief that the only effect of such second deed was to remove the defect in the first deed, and to confirm the title of all parties claiming thereunder. On a bill by one of these parties and the grantor (the husband being dead) Vice-Chancellor Esten decreed the grantee in the second deed to be a trustee for all the parties interested; and this decree, on appeal, was affirmed with costs. *Grace* v. *MacDermott*, 13 Chy. 247.

Parol evidence is not admissible to shew that by mistake the written agreement did not express the true agreement, unless mistake is expressly charged. *McDonald* v. *Rose*, 17 Chy. 657.

An immaterial variation between a chattel mortgage and the copy subsequently filed does not invalidate the re-filing. *Walker* v. *Niles*, 18 Chy. 210.

A mistake in the number of the lot where the chattels were, was held to be immaterial under the circumstances. *Ib.*

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2. *Description of Land Conveyed.*

Part of the land included in a conveyance was inserted by mistake, the vendor not being or pretending to be the owner of it. To an action on the covenants for title an equitable plea alleging these facts was held good. *Belyea* v. *Muir et al.*, 5 P. R. 273.—C. L. Chamb.—Dalton, *C. C. & P.*

Where a mortgage was, through error, created upon a wrong lot of land, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had title, this court ordered him to account for the proceeds of the sale, not exceeding the amount secured by the mortgage, with interest and costs. *Lundy* v. *McKamis*, 11 Chy. 578.

C. conveyed certain land to defendant, and the deed was registered. Afterwards C. by mistake included this with other land in a conveyance to one K., which was also registered. Defendant subsequently sold the land to the plaintiff, and the deed to K. having been treated as a cloud on the title, defendant and C. executed a bond to the plaintiff, reciting the above facts, and conditioned to procure within two months a conveyance from the representatives of K. (who had died), of all K.'s interest in the land, or, in case of their being unable through disability to execute such conveyance, then to take the necessary proceedings within two months to remove such cloud; and within that period to make and complete for the plaintiff a good and clear paper title, free from all incumbrances. The plaintiff sued defendant on this bond, alleging as breaches that defendant did not obtain such a conveyance, take such proceedings as would remove the cloud, or make and complete a good and clear paper title. To this the defendant pleaded that the conveyance to K. was by mistake, and the plaintiff purchased from W. with notice thereof, and on the understanding that proceedings would be taken to foreclose the mortgage: that C.'s executor had foreclosed; and that the executor was ready and willing to convey to plaintiff all K.'s interest in the property: that there was no cloud upon the title, and no title claimed by K., her conveyance being subsequent to defendant's and its registration:—Held, on appeal to the full court, plea bad; for the condition of the bond being for the removal of K.'s deed, the plaintiff was entitled to have it performed, although the plaintiff might without it have a good title. *Matthews* v. *Walker*, 26 C. P. 67.

Where a vendee before obtaining a conveyance assigned to A. half of the land purchased, and to B. the other half; and the vendor afterwards executed a conveyance to each, by which it was intended to convey to A. and B. their respective portions of the land, but by a mistake in the respective descriptions the conveyance to A. comprised B.'s land, and did not comprise A.'s

own, nor did the conveyance to B. comprise A.'s land; but each took and kept the land actually intended for him:—Held, Spragge, V. C., diss., that, to a bill filed by B. against A. for a conveyance of B.'s land to him, the heir of the original vendor, in whom the legal estate in A.'s land was still vested, was a necessary party. *Rowsell* v. *Hayden*, 2 Chy. 557.

Quære, where the agent of a person resident out of this province sold by parol half a lot of land of the principal, and afterwards wrote to him a letter detailing the terms of the contract, but mentioning the whole instead of the half of the lot, and the mistake was clearly proved, whether this would be a sufficient note in writing to satisfy the provisions of the statute. *Jennings* v. *Robertson*, 3 Chy. 513.

In 1834, a contract was made for the purchase of the easterly fifty acres of a lot of land, but through mistake the deed covered the whole north-half, thus conveying the legal title to the northly-easterly and north-westerly quarters, but the purchaser went into possession of the portion actually intended to be conveyed, and shortly after the vendee of the westerly portion went into possession of and occupied it without any disturbance of his title or assertion of right by the party to whom the conveyance had been made by mistake, (although all parties knew of the error that had occurred,) until the year 1857, when the assignee of the person holding the legal title instituted proceedings in ejectment, and recovered judgment; the evidence of adverse possession not being sufficient to outweigh the legal effect of the deed which had been so erroneously executed. This court restrained the owner of the legal title from proceeding to recover possession, and ordered him to convey the legal title to the plaintiff, who was equitably entitled thereto, and to pay the costs of the suit, holding that the Dormant Equities Act did not apply to bar the plaintiff. *Arner* v. *McKenna*, 9 Chy. 226.

W. mortgaged his land to S., and afterwards sold and conveyed the equity of redemption to A.; but by mutual mistake the land was so described in the conveyance to A. as to comprise part only: A. sold and conveyed to S. by the same description. The plaintiff afterwards discovered the omission, procured W. to sell and convey the omitted portion to him, and filed a bill against S. for a conveyance thereof. It was proved that before the sale to the plaintiff W. had sold all he purchased to A.:—Held, that this was sufficient proof of that actual notice which is requisite in this class of cases. *Wigle* v. *Setterington*, 19 Chy. 512. See, also, *School Trustees* v. *Farrell*, 5 L. J. 230.

II. In Legal Proceedings.

1. *Generally.*

Where, with a view of giving defendant time, the plaintiff had, upon the misinformation of the deputy sheriff, given a receipt for the debt as the only proper mode of staying the execution, and which receipt the sheriff had stated in the return of the writ of fi. fa.—the Court ordered an alias to issue. *Hinnerley* v. *Gould*, Tay. 143.

In an action for a malicious arrest the plaintiff's attorney served defendant's attorney with a notice "to produce the writ of ca. re. issue &c., at the suit of A., against the defendant this cause":—Held, sufficient, the mistake using the word "defendant" for "plaintiff being a mere clerical error, which could n mislead. *Wilson* v. *Gilmour*, 5 Q. B. 212.

A mistake in the pleadings of "plaintiff" "defendant" is no ground of demurrer wh there can be no doubt as to what was mean *Hayward* v. *Harper*, 4 Q. B. 489; *O'Donnell Hugill et al.*, 11 Q. B. 441.

An application for a new trial made in t court was referred to the C. P., as the reco had been returned there, and the case, whi had been tried before the C. J. of the C. was not to be found in his note book of tri from this court. A rule nisi was then obtain in proper time in the C. P., and enlarged fr the next term, and in the meantime it was d covered that the record had been by mista endorsed in C. P. Under these circumstanc the application was entertained in this court the return of the rule. *Bens* v. *Storer et al.*, Q. B. 623. See also *Canniff* v. *Bogert*, 7 C. P. 8

Held, that immaterial discrepancies betwe the sworn copy filed and the original cognov constituted no ground for setting aside the jud ment entered on such cognovit and subseque proceedings. *Irvin* v. *Ham*, 9 L. J. 80.—C. Chamb.—Draper.

A mortgage and memorial were executed the 26th February, 1855, but by a clerical er the date in the mortgage was written as 185 The memorial stated the date of the mortga as 1855:—Held, that the error did not vitiate t registration. *Harty* v. *Appleby*, 19 Chy. 205.

In 1855, the widow and children of one two joint owners of land petitioned for a par tion under 2 Will. IV., c. 35, the other own being respondent. In the same year a partiti was made under a writ directed to the sheri the return and plan were filed, and a rule record and confirm it was moved for, but some mistake this rule never issued, and th was no official entry of its having been eit granted or refused. In 1860 the respond died. The partition thus made had always b acquiesced in, the parties supposing that it h been confirmed:—Held, that the court co not now, even by consent, examine and confi such partition, for it would in effect be giv judgment against a party (the respondent) se ral years dead, and the proceeding would void. *Park et al.* v. *Park*, 24 Q. B. 459.

In a fi. fa. and the endorsements thereon plaintiffs were styled defendants, and vice ve the words being transposed throughout, and Christian names of the defendant were also tr posed:—Held, clearly irregular. *Davidson* v. *Grange*, 5 P. R. 258.

When in equity any error occurs in draw up any of the papers in a cause, and it is ne sary to have the mistake rectified, the p applying for that purpose must pay the cost the motion. *Emmons* v. *Crooks*, 1 Chy. 558.

A testator devised to his son a certain na lot; the residue of his estate, after certain o specific devises, he directed to be divided tween his two brothers and sister, amongst wh after the death of the testator, the property

divided, in which division by mistake the lot devised to the son was included, which was allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake which had been committed, applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them, by reason of which a re-division of the estate was impossible; and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake in thus allotting the devised lot. The court, under the circumstances, ordered a valuation to be made of the residuary estate at its present value, one third of which, with interest from the date of the first division, to be contributed ratably by the other residuary devisees or their representatives, or, if desired by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Chy. 94.

An application to correct a clerical error in a decree or order must, as a general rule, be made on notice. *Radenhurst* v. *Reynolds*, 11 Chy. 521.

A sum of money having been paid in under the decree, an application was made by the plaintiff to have it paid out, which the court declined to order without an unconditional execution of a discharge of mortgage by the company. A deed sealed by the company, but which had never been delivered, was then, through some misunderstanding, submitted to the court as duly executed and delivered, and on the faith of this representation the money was paid out accordingly. On the facts being subsequently discovered by the defendant, and brought before the court on petition, the court ordered the restoration of the money. *Robson* v. *Wride*, 13 Chy. 419.

In taking account of mortgage money and interest, the master computed interest up to the 19th of March, but by some error in preparing his report the money was appointed to be paid on the 19th of January. Upon the application of the plaintiff ex parte this error was ordered to be corrected. *White* v. *Courtney*, 1 Chy. Chamb. 11.—Spragge.

Where a defendant moved to dismiss the plaintiff's bill, the plaintiff having failed to comply with an undertaking, such failure having arisen through a slip of the plaintiff's solicitor, the application to dismiss was refused. *Devlin* v. *Devlin*, 3 Chy. Chamb. 491.—Boyd, *Master*.

Where a party had a clear right in regard to certain equities to set them up by way of equitable defence to an action at law, or to come to this court, and by mistake pleaded them at law as a legal defence only, upon which he necessarily failed:—Held [reversing the decree of Mowat, V.C.], that this did not form any bar to relief, on the same grounds, in this court. *Arnold* v. *Allinor*, 16 Chy. 213.

An application was made to vacate a præcipe decree taken in the master's office, and to allow instead of a disputing note an answer to be filed setting up the Statute of Limitations:—Held, that the motion was properly made in chambers, and was granted, it being shewn that the note was filed through the mistake of a solicitor in supposing that the defence of the statute was available under it. *Cattanach* v. *Urquhart*, 9 L. J. N. S. 212.—Blake.—Taylor, *Secretary*. See *Wright* v. *Morgan*, 24 Chy. 457, p. 2166.

III. Miscellaneous Cases.

Where a decree by mistake gave a trustee priority, in respect of a debt due to him by the estate, over claims of certain parties who were entitled to priority over the trustees:—Held, on an application to correct the error, that an assignment for value, executed by the trustee after the decree, was no answer to the application, and that the assignee took subject to all the equities to which the trustee himself was subject. *Wood* v. *Brett*, 14 Chy. 72.

A registrar of deeds gave to an intending purchaser an abstract of title, which by mistake omitted an outstanding mortgage:—Held, that a purchaser who had notice of the omitted mortgage could not make any claim against the registrar in respect of payments made by the purchaser after such notice; and the registrar who on finding his mistake had brought up the outstanding mortgage was held entitled to foreclose the same. *Brega* v. *Dickey*, 16 Chy. 494.

In an action on a policy of insurance the proofs of loss were not in accordance with the conditions of the policy, in that the magistrate's certificate stated that the magistrate was "contiguous" instead of "most contiguous" to the place of the loss, and also omitted to state that the insured had sustained loss on the property insured to the amount claimed by him; but it appeared that the certificate was in accordance with a printed form furnished to the insured for him to fill up by the company's agent, as well as with the policy at first delivered to the insured, and in his possession when the fire took place, but subsequently, and after the loss had occurred, on the ground of a misdescription of the property insured, exchanged for the policy sued on; and the defendants, though aware of the plaintiff having complied with the first policy and of the mistake as to the subsequent one, never informed him, so that he might correct it, but laid by until the trial when they attempted to take advantage of it:—Held, that under these circumstances the defendants could not avail themselves of the mistake. *Shannon* v. *The Hastings Mutual Fire Ins. Co.*, 26 C. P. 380.

MONAGHAN (TOWNSHIP OF).

Held, that under 16 Vict. c. 228, sec. 1, (repealed by 18 Vict. c. 154), Birdsall's line, as laid out on the ground, must govern as the allowance for road between lots 12 and 13 along their whole extent, and that it was immaterial whether such line was correctly described in the statute. *Otty* v. *Davis*, 12 Q. B. 454.

MONEY.

I. What is Money, 2263.

II. Foreign Currency.

1. *Payments in*—*See* Payment.

2. *Bills or Notes in*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

III. SEIZURE OF—*See* EXECUTION.

IV. INTEREST—*See* INTEREST OF MONEY.

V. PAYMENT BY—*See* PAYMENT.

VI. MISCELLANEOUS CASES, 2263.

I. WHAT IS MONEY.

Dollars and cents are not New York currency within the meaning of 2 Geo. IV., c. 13. *Phinny et al.* v. *Stevenson*, 1 Q. B. 428.

"Due J. G., or bearer, $462 in Canada bills, payable fourteen days after date," &c. :—Held, not a note; for such bills (issued under 29 & 30 Vict. c. 10) though currency, are not specie or money. *Gray* v. *Worden*, 29 Q. B. 535.

Quære, whether an instrument purporting to be a bill of exchange, payable in New York, "with current funds," if it mean other than lawful money of the U. S., is a bill of exchange. *Stephens* v. *Berry*, 15 C. P. 548.

Held, that a note made in this province, payable in current funds of the U. S. of America, was not a promissory note. *Bettis* v. *Weller et al.*, 30 Q. B. 23.

The plaintiff having declared upon such note, defendants pleaded, setting it out in hæc verba, and alleging that it was made in this province: that the current funds mentioned were paper notes issued by the U. S. government, and current there as money, but that the dollar named in them was not equal to the dollar of our money, nor of any fixed value; and that, except by endorsement of said notes by defendants, there was no contract between them and the plaintiff:—Held, that the plea was good, and not objectionable as varying the written contract by parol. *Ib.*

VI. MISCELLANEOUS CASES.

A plaintiff may recover on an express promise to pay a specific sum, though such promise were made on the occasion of presenting the account due to the defendant, no admission of which account could, according to the 2 Geo. IV., c. 13, 1821, be received in evidence, the account rendered being in New York currency, and the books from which the account was taken being also kept in that currency. *Crooks et al.* v. *Law*, 5 O. S. 306.

As to the damages recoverable for breach of a contract to advance money. See *Hyde* v. *Goodcrham et al.*, 6 C. P. 21.

Agreement to sell American currency or greenbacks. Trover and detinue for. Property passing. Payment by promissory note. See *Walsh* v. *Brown*, 18 C. P. 60.

An instrument, dated at New York, signed and endorsed by defendant, promising to pay to the order of myself $1040.23 at the Bank of Upper Canada in Toronto, with the current rate of exchange on New York:—Held, sufficient evidence prima facie of an account stated, for that the transaction would be assumed as immediate between plaintiff and defendant without proof to the contrary, and though not a promissory note according to Fahnestock *v.* Palmer, 9 C. P. 172 it was a written acknowledgment of indebtedness in the sum named. The plaintiff was held entitled to the full sum of $1040.23, not merely to so much as would purchase a draft on New York for that sum, which when the note fell due would have cost only $754: *Grant* v. *Young*, 23 Q. B. 387; *Wood* v. *Young*, 14 C. P. 250.

Plaintiff sued for money advanced by him to defendants to purchase wheat for him, alleging that they had not purchased or accounted. Defendants pleaded, in substance, that the money while kept unmixed with their own as the plaintiff's money, was stolen from them by persons unknown, without any neglect on their part. Remarks as to such defence and the facts required to sustain it. *Bickle* v. *Mathewson et al.*, 26 Q. B. 137.

If the court can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity or by giving him a lien on it. Accordingly where money was stolen the owner was held entitled to a leasehold, furniture, and other chattels, purchased with the stolen moneys, and an injunction was granted to restrain parting therewith until the hearing. *The Merchants' Express Co.* v. *Morton*, 15 Chy. 274.

Where a robbery had been committed in a foreign country, but no trial had taken place and the money stolen had been invested in the purchase of property in this country, the court granted an injunction to restrain the selling or incumbering thereof. *Ib.*

County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money. *Peers* v. *Oxford*, 17 Chy. 472.

MONEY COUNTS.

I. FOR MONEY LENT, 2265.

II. FOR MONEY PAID.

1. *Request*, 2266.
2. *Payment*, 2268.
3. *Damages and Costs*, 2269.
4. *Other Cases*, 2269.

III. FOR MONEY HAD AND RECEIVED.

1. *Privity of Contract*, 2272.
2. *Money Paid under Protest or Compulsion*, 2273.
3. *On Payment of Illegal Fees or Tolls*, 2275.
4. *Money Paid under Mistake of Facts or of Law*, 2276.
5. *For Money Paid on Illegal Contract*, 2278.
6. *For Money paid on Failure of Consideration*, 2279.
7. *On Rescission of Special Contract*, 22
8. *For Money Paid on Failure of Title*, 2281.
9. *For Money obtained by Fraud*, 2281.

10. *Against Trustees or Agents*, 2282.
11. *Proof of Receipt of Money*, 2283.
12. *Pleading and Evidence*, 2284.
13. *Other Cases*, 2285.
14. *Recovering back Taxes—See* ASSESSMENT AND TAXES.
15. *Recovering back Money paid in Excess of Legal Interest—See* USURY.
16. *Recovering back Money paid on Sale of Land—See* SALE OF LAND.

IV. ACCOUNT STATED.
1. *Evidence.*
(a) *Instruments purporting to be Bills or Notes*, 2288.
(b) *Other Cases*, 2289.
2. *As a Defence*, 2292.

V. PLEADING, 2293.

VI. MISCELLANEOUS CASES, 2293.

VII. FORM AND CONTENTS OF AFFIDAVIT TO HOLD TO BAIL ON—*See* ARREST.

I. FOR MONEY LENT.

The production of a cheque is not even primâ facie evidence of money lent by the drawer. *Foster* v. *Fraser*, M. T. 4 Vict.

Held, under the facts set out in the report, that the plaintiff was not precluded from recovering money advanced to B. for the liquidation of liabilities by B. to the N. company, or from enforcing any security for its repayment, because that company, in such transactions, exceeded its power under its charter. *Cayley* v. *McDonnell et al.* 8 Q. B. 454.

Plaintiff lent defendant £35, upon a verbal agreement that he should build with it a house upon a lot belonging to him, in which the plaintiff and her mother should live during the mother's life. The house was built, and they went into possession on this understanding, but afterwards it was verbally agreed that defendant should give plaintiff a lease during the life of the mother. He, however, mortgaged the premises to a third party and brought ejectment to turn plaintiff out:—Held, that the plaintiff might recover back the £35 as money lent. *Harrington* v. *Harrington*, 15 Q. B. 241.

The plaintiff, a warehouseman and dealer in grain, received in his warehouse from defendant between the 1st and 14th of October, 832 bushels of barley; and between the 15th September and the 2nd November, had advanced to defendant $242. Disputes having arisen, defendant sued the plaintiff for the value of the barley, and the plaintiff sued defendant in this action for the advance as money lent. In the first suit the now plaintiff pleaded the money paid, and received the benefit of it. The jury in this action found that the money was advanced upon the grain, not to be repaid until the sale of the grain to the plaintiff or some one else, and that there was no sale to the plaintiff:—Held, that this finding entitled defendant to a verdict. *Trumpour* v. *Crandall*, 31 Q. B. 9.

Advances made by commission merchants on goods received for sale—Right to recover. See *Palmer* v. *Holmes et al.*, 14 C. P. 194.

II. FOR MONEY PAID.

1. *Request.*

In declaring for money paid, it must be averred that the money was paid by the plaintiff at defendant's request. *Aikin* v. *Howcutt*, 7 Q. B. 143.

A ca. sa. against both defendants was given to the deputy sheriff, and a warrant made to the plaintiff, a bailiff, to execute it; he arrested both defendants, and one escaped. The sheriff paid the debt and sued his deputy, who recovered over against the bailiff, and the bailiff then sued both defendants as for money paid. A nonsuit was directed, on the ground that the payment by the sheriff satisfied the plaintiff in the original suit, and therefore this plaintiff could not recover as for money paid to the use of the defendants, because their debt was satisfied before:—Held, that the nonsuit on this ground was wrong. Quere, however, whether, under the facts proved, an assent to the payment could be implied on the part of both defendants, so as to sustain this action. *Sumner* v. *Kirkpatrick et al.*, 10 Q. B. 483.

The master of the appellant's vessel, (on appeal from the County Court) on the transhipment of a cargo of wheat, on its way from Owen Sound to Quebec, into the respondent's vessel, gave a receipt to the respondent for the lake freight, stating that the appellant's vessel and her owner were thereby held responsible for the wheat, weighing 5,934 bushels at Quebec. On arrival at Quebec the cargo was found sixty-eight bushels short, and the respondent allowed the value of that quantity to the consignee out of the river freight:—Held, that the respondent was not entitled to recover the amount deducted as for money paid for the appellant, there being no request on the appellant's part express or implied. *Waddel* v. *McIntosh*, 7 C. P. 49.

Defendant conveyed land to the plaintiff by a statutory deed with covenants for title, taking back a mortgage for the purchase money, in which it was provided that the plaintiff should retain possession with default. Before making the deed the defendant had leased land to one D., to whom the plaintiff was obliged to pay £66 to obtain possession:—Held, that this could not be recovered as money paid, for it was not money paid at defendant's request, or for which defendant was liable to D. *Proctor* v. *Gamble*, 16 Q. B. 110.

One S. was treasurer of the county of Middlesex and agent of the Gore Bank, having his office for both purposes in the same building. The council had no account with the bank, and did not direct S. where to keep his funds as treasurer, and he had always received enough to meet all disbursements for the county. He did, however, open an account with the bank, without the knowledge of the council, and having misapplied the moneys of the council, overdrew that account without the knowledge or authority of the bank nearly £8,000, to pay debts due by the county for interest on debentures and other claims. The coupons on some of these debentures were stamped by S. as paid by the Gore Bank. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use:—Held, that

no portion of it could be recovered. *The Gore Bank* v. *Municipal Council of Middlesex*, 16 Q. B. 559.

Defendants were trustees under the will of one K., the plaintiff being in partnership with one of them, S., as attorneys. The plaintiff and S. brought an action of ejectment in the name of the trustees, which was compromised at the assizes by S., and $1,800, which was agreed to be paid to the defendants in that suit, was secured to them by the notes of S. and the plaintiff, his partner, on receiving which the defendants released the land to the plaintiffs. This land was conveyed to J., a son of testator, by whom it was mortgaged to pay all claims arising out of the compromise, and the money thus obtained was handed to S. The plaintiff was afterwards sued on one of the notes given by him and S., S. having paid the others, and the amount, $658 25c., levied from him by execution. The other trustees were not aware of the compromise when made, but did not dissent when informed of it, and on being told of the action brought against the plaintiff, said he ought to be re-paid. The plaintiff having sued them, however, they defended at the desire of J.; and the court being left to draw such inferences as a jury might:—Held, that the plaintiff could not recover, for there was no sufficient evidence that he became liable at the defendants' request, and he could not be said to have paid the money for them or to their use. Semble, however, that if a jury had found for the plaintiff, the verdict, not being wholly unsupported by evidence, would not have been set aside. *Armour* v. *Jeffrey et al.*, 21 Q. B. 513.

T. being the owner of a lot of land mortgaged it to the Kingston Building Society, and subsequently agreed to sell it to S., getting P. & B. to join him in a bond, conditioned that T., on a certain day in March, 1855, or as soon after as the society should expire, should convey the land to the obligee on his making certain payments to T. T. having neglected to make the monthly payments due to the society on the mortgage, the society, under a power of sale therein contained, on the 13th September, 1855, sold the land to one W. for £200, being £135 more than the amount due to the society. P., B., & S. having heard of the sale entered into an arrangement with W., whereby he agreed, in consideration of the payment to him of £350, to convey the land to S. T. gave to P. an order to receive the balance of the £200, in the possession of the society after the payment of the claim, which being deducted from the £350 to be paid to W., left the sum of £214 18s. 11d. to be made up to complete the payment to W. This sum was paid by P., B. & S. paying each one-third, amounting to £71 12s. 11d. T. was apprised of this arrangement, and said he would pay the whole amount if he could, and that he would make up $100, which he did not do. The jury having found a verdict for P., for the amount paid by him and interest thereon:—Held, that there was evidence sufficient to justify a finding that the money was paid by P., at the request of the defendant, T. *Preston* v. *Twigg*, 11 C. P. 281.

S. having mortgaged certain land to F. agreed to sell it to the plaintiff, and went to the office of defendant, who acted as agent for F., where S. executed a bond to convey to the plaintiff on payment of £200 down and the balance by instalments, and at the request of S. the plaintiff paid this £200 to defendant for F. on account of the mortgage. Afterwards, at their joint request, defendant returned £50 to the plaintiff and S. having released to F. his equity of redemption, the plaintiff sued defendant to recover back the £150 remaining, as money paid to his use. Some evidence was given at the trial to shew that the title was defective:—Held, that the plaintiff clearly could not recover, for the money was not paid to defendant on any contract between him and the plaintiff, but was a payment by S. of his debt due to F. Semble, that the evidence was not sufficient to shew a failure of title, but that if it had been, F., under the circumstances, could at most have been liable only on receiving payment of his mortgage, to convey to the plaintiff such title as he had derived from S. *Branigan* v. *Cartwright*, 23 Q. B. 264.

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2. *Payment.*

Where the plaintiff had agreed verbally with defendant to purchase land from him, and having been let into possession, had made payments on account in money and cattle, and defendant afterwards sold the land to another person promising to repay what he had received from the plaintiff:—Held, that on his refusal to do so the plaintiff could recover the amount from him in an action for money paid. *Hill* v. *Stanton*, Q. B. 149.

In May, 1852, the plaintiff, for defendant's accommodation, gave him his note for £50 which defendant discounted at the Bank of Upper Canada. On the 9th November, 1852, the defendant being sued by the bank was obliged to pay this note, together with £5 13s. 2d costs. On the 10th of September, 1852, the plaintiff gave another note to the defendant for £40, for his accommodation, for the purpose of renewing a previous note of the same nature. This note also came into the hands of the bank and was paid to them by the plaintiff, but not until after this suit, though defendant had discounted and obtained the money on it before. The plaintiff having sued upon the common counts, for money paid, &c.:—Held, that he could recover only the amount of the £50 note as to the claim on the £40 note, the payment made by the plaintiff could not be referred back to the time when the defendant received the money from the bank; in other words, it could not be said that the money was paid by the bank for the plaintiff, and so paid by him to the defendant, before the commencement of the suit:—Held, also, that the fact of the plaintiff having been arrested only for the amount of the first note, would be no objection to his recovery on the second, if he were otherwise entitled. *Lees* v. *Westley*, 11 Q. B. 322.

Defendant owing one C., procured K. to give his note to C. for $400, and got the plaintiff to give K. a mortgage by way of indemnity. K having paid the money called upon the plaintiff who, being unable to pay, gave K. an absolute deed of the land, which K. accepted in satisfaction:—Held, that the $400 for which the land was thus taken, might be recovered by the plaintiff from defendant as money paid. *Clark* v. *Chipman*, 26 Q. B. 170.

3. *Damages and Costs.*

An action for money paid will not lie for costs paid by plaintiff against a person who has engaged to indemnify him against such costs; the action should be special on the indemnity. *Miller* v. *Munro*, 6 O. S. 166. See *Lees* v. *Westley*, 11 Q. B. 322.

Bail who have paid the costs of an action against themselves, cannot recover them from their principal as money paid; they must declare specially. *Shore* v. *Burrill*, M. T. 3 Vict.

A. releases B. from gaol by undertaking to pay C. the debt B. owed him. C. sues A. upon this undertaking, and B. requests A. to defend the suit to gain time:—Held, that A. could recover from B. the costs of this suit as money paid to his use. *Smith* v. *Davidson*, 4 Q. B. 191.

As to the right, generally, to recover money paid for damages and costs. See COVENANT FOR TITLE—DAMAGES.

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4. *Other Cases.*

Where A. sold land to B. for £225, and B. sold it to C. for the same sum, and C. sold it to D., and it was agreed between A., C., and D. that D. should pay A., who thereupon discharged B., who discharged C., and A. agreed to take from D. land in payment of £200 of the purchase money, and took D.'s promissory note for £25, the residue; but having subsequently borrowed £95 of D., instead of receiving a conveyance a deed of the land in payment of the £200, he took a bond that a deed should be made to him on the repayment of the £95 by instalments; but having made default in the payment of these, he abandoned the bond and note given by D., and brought an action against B. for the £225, as money paid to his use:—Held, that the action could not be maintained, A. having lost his remedy on D.'s bond through his own default, and therefore having no right to make B. pay the money. *Holmes* v. *Spencer*, 3 O. S. 161.

Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying £125 for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then for a nominal consideration conveyed to the son the land received in exchange:—Held, that the executors of the father might maintain an action against the son for the £125 as money paid to his use; that they were not estopped by the consideration stated in the deed, and it was not for an interest in lands within the Statute of Frauds. *McBride et al.* v. *Parnell*, 4 O. S. 152.

One defendant in assumpsit who has paid all the damages under an execution, may recover contribution from the other. In such action the regularity of the judgment in the original suit cannot be questioned; and it is not necessary to shew any notice of the execution, nor demand of the money, before action. *Woodruff* v. *Glassford*, 4 O. S. 155.

A. and B., being in partnership, applied to C. to endorse a note for their accommodation. The note was signed by A. alone, but was represented by both as drawn on account of the firm, and that both were liable to pay it. When it became due A. had absconded. C. having paid the note:—Held, that he might recover the amount he so paid from B., as money paid to his use. *Annis et al.* v. *Lowes*, 5 O. S. 198.

M., formerly deputy sheriff of the L. district, sues R., the sheriff, for services in the execution of his office. At the trial the plaintiff produced an order drawn on him by defendant in favour of one R., desiring him to pay the latter £50 out of the moneys he had received for sheriff's fees:—Held, that in absence of any further information, the mere proof of the payment of that order did not entitle the plaintiff to recover. *Moore* v. *Rapelje*, 5 O. S. 452.

Held, that money paid on a promissory note on which the plaintiff was guarantee or joint maker with defendant, given for the value of goods which, as the plaintiff knew, were to have been smuggled into this province could not be recovered. *Anguish* v. *House*, 5 O. S. 642.

Where two masons brought an action for work and labour against their employer, and recovered a verdict for £60, it was held that the employer could not afterwards bring an action against them for money he had paid them on account, and which he had attempted to prove in the former action. *Hunt* v. *McCarthy et al.*, 6 O. S. 434.

A. receives a hogshead of sugar to be stored in his warehouse. It belonged to B., but through mistake was delivered to C., who claimed it. B. convinces A. that he has made a mistake in delivering it to C., and A. pays B. the price of the sugar:—Held, that A. on these facts need not declare specially, but could recover against C. for money paid. *Kitson* v. *Short*, 4 Q. B. 220.

Where a plaintiff takes up a note which defendant has given him, and which he was bound to pay at maturity, he may recover against the defendant as for money paid. *McNab* v. *Waystaff*, 5 Q. B. 588.

Certain premises in the city of Toronto which drained into a ravine were demised by defendant to one A., of whom the plaintiff in replevin was assignee. The city of Toronto, in making improvements, closed up the ravine, and thereby occasioned an accumulation of water on the premises in question, rendering a drainage into the common sewerage necessary. The plaintiff then drained his premises into such sewer, and paid the frontage or sewerage rate charged by the city by-law upon the proprietor of the property, and claimed to set off the amount of such payment against defendant's rent:—Held, on demurrer, that such payment was voluntary and could not be recovered back from the defendant, although it might enure to his benefit. *Aldwell* v. *Hanath*, 7 C. P. 9.

Plaintiff was teller of a bank at which a note of defendant became due. Defendant paid in to plaintiff a sum afterwards discovered to be £25 short, and plaintiff was compelled to make it good to the bank:—Held, McLean, J., diss., that he could recover it from defendant as money paid to his use. *Rivers* v. *Roe*, 4 C. P. 21.

The plaintiffs drew upon J. a bill for £200, payable to their order, which they endorsed to the

Gore Bank, by whom it was sent to the agent of defendants, the Bank of Upper Canada, for collection. When it fell due, J., with the agent's consent, drew upon the plaintiffs to meet it, but the proceeds of this draft, contrary to J.'s direction, were placed to his credit with defendants against other acceptances of his, and the plaintiffs paid both drafts:—Held, that they might recover the proceeds of the second bill from defendants as money had and received. Per Burns, J. They might also recover as for money paid. Per Robinson, C. J., not. *Riddell et al.* v. *Bank of Upper Canada*, 18 Q. B. 139.

H. had leased to defendant certain premises, the plaintiff becoming his surety for the rent. Defendant being in arrear the three met, and it was agreed that the lease should be given up; that the plaintiff should secure H. by mortgage for the amount due, and that H. should release defendant. The mortgage was executed and H. gave a receipt to the plaintiff for the sum secured. Before the mortgage fell due or had been satisfied, the plaintiff sued defendant as for money paid, and the jury found that the mortgage was received in satisfaction of defendant's debt with his assent:—Held, that the action would lie. *McVicar* v. *Royce*, 17 Q. B. 529.

Defendant took a written agreement for a lease of certain premises which was silent as to taxes, but when it was signed, he verbally agreed to pay them. No lease was ever executed, owing to a disagreement on another point. Defendant occupied the premises for four years, paying taxes for three years without objection, but when sued for rent subsequently accrued he claimed to set off such taxes, on the ground that, as the agreement made no provision for them and could not be added to by verbal evidence, they must fall upon the landlord:—Held, that having made the payment voluntarily, in pursuance of his own agreement, even if it were without consideration, he could not recover back or set off such payment. *McAnany* v. *Tickell*, 23 Q. B. 499.

The plaintiffs sued on the common counts for money advanced by them to defendants on account of oil furnished by the defendants to the plaintiffs, to be shipped to Liverpool and sold. The defendants pleaded never indebted; and also a plea setting up a special contract which was not proved:—Held, that the plaintiffs were entitled to recover on the common counts. *Palmer et al.* v. *Holmes et al.*, 14 C. P. 194. See, also, *Craig et al.* v. *Corcoran*, 23 Q. B. 441; *Stewart* v. *Lowe*, 24 Q. B. 434.

Defendant at B., consigned for sale to the plaintiff, a commission merchant at M., a lot of butter for sale, and drew upon him at five days for $2,000, which the plaintiff accepted, and paid at maturity. At that time his instructions were not to sell for less than 18½c per lb., which he could not get. The market continued to fall, and after a lengthy correspondence the butter was sent to plaintiff's agent at H., who wrote that no sale could be effected there, and advising J. Plaintiff then sued defendant upon the common counts for the money paid by him:—Held, that he was entitled to recover, and that there was nothing in the facts, more fully set out in the case, to vary the common law obligation to refund the advance on request, or to compel the plaintiff to wait until a sale should be effected. *Cowie* v. *Apps*, 22 C. P. 589.

Defendant held the joint and several
plaintiff, and one B. as security for the
the latter, after payment by whom, unkn
plaintiff at the time, he endorsed it to o
who sued the plaintiff, and under press
judgment obtained payment from him
amount covered by it:—Held, that the
paid to W. by plaintiff was money paid
use of the defendant, from whom plaintiff
therefore recover it back in this form of
McKindsey v. *Stewart*, 20 C. P. 295; a
on appeal, 21 C. P. 226.

P. conveyed land to defendant, "subje
mortgage," and with a covenant for quiet
ment free from incumbrances. Defendan
demised the same land to P. and wife for t
spective lives, and P. assigned to plaintiff
interest therein, to hold during the life
The mortgagees, or their assignee, brought
ment against both plaintiff and P., whe
plaintiff paid the amount due under the
gage, and sued defendant for money paid
use:—Held, that he could not recover
form of action. *Snyder* v. *Snyder*, 22
361.

A surety paying the debt of his principa
arrangements between the creditor and the
cipal debtor, which would have discharg
surety, cannot recover back the money so
Geary v. *The Gore Bank*, 5 Chy. 536.

See *Wilson et al.* v. *Mason*, 38 Q. B. 14, p

III. For Money had and Receive

1. *Privity of Contract.*

L. arranged with the Canada Agency
ation, an English Company investing mo
Canada, and having defendant R. as
manager and defendant H. as one of
local directors, for a loan of money.
paying off a prior mortgage on the la
L., and the expenses, &c., the manager
his order a check for the balance of
signed by R. & H. the defendants. L.,
made a claim for a larger amount, sued
H. for what he claimed:—Held, on appe
the County Court, that defendants w
liable, as they never received any money
use of the plaintiff, having no control
except as manager and director of the
ation, and acting solely as its officers: a
the evidence did not establish any pr
respect of the money claimed, without w
action would not lie. *Heward et al.*,
lants, v. *Logan, Respondent*, 14 C. P. 59

Plaintiff and others took out atta
against an absconding debtor, and th
seized being claimed, the plaintiff ind
the bailiff, who sold and paid over the
defendant, the clerk of the Division Co
claimants sued the plaintiff and the pu
and recovered from them the value of th
after which defendant distributed th
among the attaching creditors, of whom
self was one, pro rata. Plaintiff thereu
defendant and his sureties as for money
to his use:—Held, reversing the judgm
County Court, that he could not recove
money was not received by defendan
official capacity as the plaintiff's, and the

against the plaintiff, to which defendant was a stranger, could not make it his as against defendant, so as to support this action upon the statutory covenant. Quære, per Hagarty, J., whether the plaintiff, having procured the money to be paid to the defendant as that of the attaching creditors, could afterwards claim it as his own. *Preston* v. *Wilmot*, 23 Q. B. 348.

Plaintiff conveyed his land to G. to raise money by mortgage upon it for the plaintiff's use. G. did so, and for the plaintiff paid defendant's attorney about $160 under pressure, but under protest, which the plaintiff sued to recover back:—Held, after verdict, that it might be presumed G. had paid, or accounted for, the money to the plaintiff, as he had raised it for the plaintiff, and that the plaintiff might recover. *Sanderson* v. *Gairdner*, 14 C. P. 330.

Defendant had contracted to supply the Buffalo and Lake Huron R. W. Co. with wood. In 1858, by an instrument under seal between them, in consideration of $22,000, defendant released the company from the contract, and the company covenanted to indemnify the defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land; one in South Easthope, which had been leased by plaintiffs to defendant; the other in Zorra, which had been leased by the plaintiffs to one J., who had assigned it to M. In 1865 defendant wrote to the Company, stating that the plaintiffs had claimed from him rent in arrear on these two lots amounting to $2030, and offering, if the Company would pay him that sum, and re-convey the leases, to assume them for the future. The company assented, paid him the $2000, transferred to him his leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant, after receiving this money, paid the rent on the South Easthope lot. The plaintiffs having recovered from defendant as for money received to their use:—Held, that the verdict was wrong, for though the settlement was made on the basis of the amount due to them on the leases, yet it was paid to defendant not as the plaintiffs' money, but as the price of the railway company's discharge, and there was no privity between plaintiffs and defendant. *The Canada Company* v. *McDonald*, 25 Q. B. 384.

Defendant being the treasurer of a turf club, by which horse races were conducted, received subscriptions from members and others to form a fund out of which the purses run for were to be paid. The plaintiff entered horses and won purses, but defendant refused to pay, alleging that the club was indebted to him for advances which he had previously made:—Held, that the plaintiff could not sue defendant for money had and received, there being no privity between them, and defendant being accountable only to the club. *Simms* v. *Denison*, 28 Q. B. 323.

See, also, *French* v. *Weir*, 6 L. J. 190.

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2. Money Paid under Protest or Compulsion.

Where taxes were paid to the treasurer of the Home district on lands in the Ottawa district to be transmitted to the treasurer of the latter district, and, not having been so transmitted, the lands were advertised for sale, and the plaintiff, to save the lands, paid the taxes to the treasurer of the Ottawa district under protest:—Held, that he could not recover them back as money had and received. *Baldwin* v. *Johnson*, 2 Q. B. 475.

The fact of a payment having been made under protest, but without duress, or assent on the part of the payee to any reservation of his right, would form no ground for an action to recover back the money. *Doe* d. *Morgan et al.* v. *Boyer*, 9 Q. B. 318.

Plaintiff sold to one M. a steam engine for £650, of which M. paid £100 on account, and gave a chattel mortgage on the engine. The plaintiff afterwards received a letter from the defendant stating that the engine was to be sold for the balance of an execution against M. The engine was put up for sale, and the plaintiff became the purchaser, but before the sale defendant told the plaintiff that no chattel mortgage could be given which would prevent any other execution attaching on the engine as long as the execution in his hands was unsatisfied. That sale was not carried out. The engine was afterwards put up for sale again, and a person in plaintiff's employ bought it in for £35, after protesting against the sale. The engine was, however, taken away by plaintiff after the first payment on the mortgage became due:—Held, in an action for money had and received, that the facts as above would not support the action. *Morton* v. *Corbett*, 6 C. P. 251.

W. obtained from P. an order for £50 (which was paid) on a statement that he could prosecute him for felony:—Held, recoverable. *Pasco* v. *Wegg*, 6 C. P. 375.

Plaintiff having bought a lot of land from defendant, agreed to pay him $1000 on a certain day, and to give a mortgage on the lot for the balance of the purchase money, the defendant agreeing to accept in part payment of the latter an assignment of a mortgage held by plaintiff for $1,600, bearing six per cent. interest, which was to be sold to defendant at such a reduction as would pay him eight per cent. On a calculation made as to what this reduction should be, plaintiff objected that it was too great, but defendant replied that if it turned out that there had been a mistake he would rectify it. Defendant then credited plaintiff on his mortgage with the amount at which the other had been taken. It was subsequently ascertained that an error had been made in the calculation, to the extent of some $200. Defendant sued plaintiff on his mortgage for the balance of the purchase money, less the sum for which he had given him credit, and though admitting there had been a mistake in arriving at that sum, he refused to correct it, and plaintiff paid him in full under pressure of the suit, but also under protest:—Held, that the agreement for the sale of the mortgage was not an agreement relating to the sale of land requiring it to have been in writing:—Held, also, that plaintiff was entitled to recover back the $20, for that it could not be considered a payment for the recovery of which he was estopped by what took place when he was sued; but that he could not recover on the common counts for money had and received.

The court, therefore, instead of entering a verdict for the plaintiff, as moved, pursuant to leave, granted a new trial, with liberty to plaintiff to amend his declaration. *Carscaden* v. *Shore*, 17 C. P. 493.

An action for distraining for more rent than is due cannot be maintained without a tender of the sum which is really due, and the excess paid cannot be recovered back as money had and received. *Owen* v. *Taylor*, 39 Q. B. 358.

The defendant, assignee in insolvency of L. & Co., advertised the whole estate for sale, consisting of a wholesale stock of groceries, &c., and a distillery and plant, which were specified in the advertisement in parcels, with the supposed value of each, the total being said to be about $51,000. He had an inventory prepared, which professed to give the cost price, and the advertisement invited tenders "at so much in the dollar on inventory price," to be paid in three equal quarterly instalments, or five per cent. to be allowed off for cash. Most of the goods were then in bond. W. & Co., on the 12th January, 1875, tendered for the whole stock, "as per inventory, the sum of 76¼c on the dollar, payable in cash after having checked over the stock and found it correct." On the next day, at a meeting of creditors, the assignee was instructed to accept this offer, and he wrote to W. & Co., accepting it, repeating the offer almost in their words. Afterwards, acting under the orders of certain creditors, the assignee refused to deliver the goods to W. & Co., unless they would pay the duty as well as the 76¼c on the $51,000; and to obtain the goods W. & Co. had to pay $43,000, being about $1,500 more than they would owe according to their offer, without the duty:—Held, that looking at the advertisement, tender, and acceptance, W. & Co. were not bound to pay the duty; and that the payment by them was not a voluntary one, so as to prevent them from recovering back the excess as money had and received. W. & Co., to obtain possession of part of the distillery plant which was affixed to the distillery, had to expend money in order to remove it. Held, recoverable as money paid. *Wilson et al.* v. *Mason*, *Lamb* v. *Wilson et al.*, 38 Q. B. 14.

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3. *On Payment of Illegal Fees or Tolls.*

Where the plaintiff agreed with a harbour company for the admission into their harbour of certain property of the plaintiff for a fixed sum, less than the toll which they might have claimed under their charter, but they afterwards refused to allow the property to be removed without the payment of their usual harbour dues:—Held, that the plaintiff might recover back the overplus. *Marsh* v. *Port Hope Harbour Co.*, 6 O. S. 100.

Semble, that money paid as tolls under compulsion, in order to enjoy a road, may be recovered. *Little* v. *Dundas and Waterloo Macadamized Road Co.*, 2 C. P. 399.

Fees illegally exacted by a clerk of the peace for services in striking a special jury, can be recovered back as money had and received. *Hooker et al.* v. *Gurnett*, 16 Q. B. 180.

Held, that an overcharge by the sheriff for summoning jurors might be recovered back by the county in an action for money had and r ceived, Burns, J., dissenting, on the ground th the Statutes afforded room for doubt as to t right, and though the sheriff might have charg too much, the mode of charging contended for the plaintiffs was not correct; and that as the fe had been demanded and paid for many yea without question, the sheriff should not called upon to shew the exact sum to which was entitled. *The Corporation of the County Haldimand* v. *Martin, Sheriff*, 19 Q. B. 178.

In this case the question was, whether certa fees, classified in schedules in a special case su mitted, could legally be claimed, and how f the county having paid them during sever years upon accounts duly audited and passe could recover back such as he was not entitl to. Besides deciding as to the different charg the following general principles were laid dow —Where the clerk of the peace, at the reque of the justices or municipality, or of the coun auditors, renders services which he is not bou to render, and for which no fee is allowed, thou he might be unable to sue for his charges, y when they have been duly audited and paid u der no misunderstanding the municipality cann recover them back; and the same rule is applic ble to disbursements, as for stationery, office fu niture, &c. Where the fees are within the C. U. C. c. 119, s. 8, and have been received the clerk contrary to its express provisions, th may be recovered back as money illegally r ceived, though his accounts containing the have been audited and passed. *Corporation the County of Lambton* v. *Poussett*, 21 Q. B. 47

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4. *Money paid under Mistake of Facts or of La*

Of Facts.]—A party may recover back mone paid in forgetfulness of certain facts, which h without doubt been known to him:—Held, th upon the facts in this case the assured could n recover back from the underwriters the amou they had paid on their premium note. *Perry al.* v. *Newcastle Fire Insurance Co.*, 8 Q. B. 36

Defendant sold to plaintiff and M. some lumbe the quantity of which was estimated accordi to a measurement made by M. and defendan son. Two notes were given for part of t purchase money, the first of which was paid plaintiff and M., and the second by plaintiff af he and M. had dissolved partnership. It a peared that before this note was paid, and bef the dissolution, M. had gone over the measu ment again with defendant's son, and found deficiency of £74; for which the plaintiff su defendant as money had and received:—He that he could not recover, for the payment w made after the deficiency was known to M. wh the partnership continued, and therefore know to plaintiff. *Snarr* v. *Small*, 13 Q. B. 125.

M. had a contract to supply wood to a railw company, for which he was to be paid when had been inspected and accepted. While l cords were lying in the company's yard inspection, he assigned all the wood that belong to him, with other property, to the plaintiff, the benefit of his creditors. He at the sa time made over his interest in the contract defendant, who completed it, and the compa afterwards by mistake paid defendant for th 152 cords, as well as for what he had hims

supplied:—Held, that the plaintiff might recover this sum as money had and received:—Held, also, that defendant could not object that the assignment to plaintiff was not properly filed. *Scott* v. *Kelly*, 17 Q. B. 306.

Defendant having a judgment against M. and others, obtained an order on C. and others, garnishees, to pay over, after deducting any contra claim they might have. The defendant received on this order $171, by check of the plaintiff's firm, the plaintiff alone being the assignee of C.'s estate. It was afterwards discovered that the order had been for too much, and it was therefore rescinded, except as to the proper sum, which the garnishees' admitted set-off more than covered, so that nothing in fact should have been paid:—Held, that the plaintiff might recover the $171 from defendant as money had and received. Held, also, that the fact of the payment having been made by the check of plaintiff's firm, could not prevent the plaintiff alone from recovering, as the money was proved to have been the money of C.'s estate, in which the plaintiff's partners had no interest. *Sessions* v. *Strachan*, 23 Q. B. 492.

A person seeking to recover money paid under mistake of fact is not now bound to shew that he has been guilty of no laches; the only limitation is, that he must not waive all enquiry. *The Law Society of Upper Canada* v. *The Corporation of the City of Toronto*, 25 Q. B. 199.

Defendant sold by a bill of sale to the plaintiff his good-will, lease, and certain druggist's stock thereafter to be selected, to the amount of $5,700. One P. selected the stock from the stock list for the plaintiff, who paid the $5,700, and by some oversight a lot of lamp cleaners to the extent of $173, were charged and paid for as part of the $5,700, which, as the jury found, neither P. nor the plaintiff had ever chosen or accepted. Defendant having refused on application to take away these lamp cleaners, or repay the $173:—Held, reversing the judgment of the County Court, that, notwithstanding the bill of sale, the plaintiff was entitled to recover back the $173 as money paid under a mistake of fact, and without consideration. *Mingaye* v. *White*, 34 Q. B. 82.

The defendant insured his dwelling house and contents in a mutual insurance company, stating in his application that he was the owner of the property by deed in fee. The property being destroyed by fire, defendant swore to the same facts in his affidavit of claim, and obtained $700 from the plaintiffs in settlement. The plaintiffs subsequently discovered that the property was not owned by the defendant, but by his father, and they threatened to arrest defendant and prosecute him for obtaining the money paid to him under false pretences, and for perjury; and defendant, to avoid the arrest and prosecution, gave the plaintiffs a note for the $700:—Held, that the plaintiffs could not recover on the note, for in the absence of the policy, which was not produced in evidence, it was not shewn that the misrepresentation as to title avoided it, or entitled the plaintiffs to recover back the insurance money, and therefore no consideration appeared but that of avoiding the arrest and prosecution:—Held, also, that for the same reason the plaintiffs could not recover on the common counts, as for money paid under a mistake or misrepresentation of fact; but a new trial was granted to enable plaintiffs to shew the facts more fully. *Canada Farmers' Mutual Insurance Co.* v. *Watson*, 25 C. P. 1.

Of Law.]—Money paid on a verbal agreement for the sale of lands, cannot, without shewing more, be recovered back, on the ground that the agreement is void by the Statute of Frauds. *Barber* v. *Armstrong*, 6 O. S. 543.

When a person has paid money with a full knowledge of facts, he cannot recover it back on the ground that he paid it in ignorance of the law resulting from those facts. *Perry et al* v. *Newcastle Fire Insurance Co.*, 8 Q. B. 363.

The mortgagees of a vessel had insured her with plaintiffs. She was stranded at a place not within the policy, and the plaintiffs, who had received a protest from the captain, assuming that they were liable, sent their agent to get her off. The agent met defendant at the place, and, in his own words, "employed him as he would have employed a perfect stranger" to perform the service, advancing to him $300 on account. The defendant it appeared was in fact an owner of or interested in the vessel, but when acquired or to what extent was not shewn. The plaintiffs having discovered that they were not liable, demanded back the money, which defendant refused to pay, alleging that he had used it; and they then sued:—Held, that the jury were warranted in finding for defendant, for if the money was not paid upon the policy, but advanced upon a distinct agreement, the mistake as to their liability would not enable them to recover. *Montreal Assurance Company* v. *McCormick*, 25 Q. B. 440.

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5. *For Money Paid on Illegal Contracts.*

Where A. had received money on an agreement to deliver timber to B. which he afterwards refused to deliver, and was sued by B. to recover the money back, it is no defence to shew the agreement made on a Sunday, and therefore void under 8 Vict. c. 45. *Vail* v. *Duggan et al.*, 7 Q. B. 568.

Plaintiff and A. bet upon a horse race, and deposited the money with defendant as stakeholder. The bet was illegal, as neither of the parties owned either of the horses, and they were not running for any other stake. A. won, and the defendant paid over the money on his order, having been previously notified not to do so:—Held, that the plaintiff might recover back the amount from defendant as money had and received. *Anderson* v. *Galbraith*, 16 Q. B. 57; *Sheldon* v. *Law*, 3 O. S. 85; *Battersby* v. *Odell*, 23 Q. B. 482.

In an action for money had and received, brought by the municipality of a township for 1857, against the defendant, who had been reeve in 1856, it appeared that at a meeting of the council in that year, the defendant being in the chair, it was resolved: 1. That the treasurer should pay the defendant the sum of £129, "for moneys advanced, attending commission, salary as councillor for 1856, for defending Chancery suit, &c." 2. That the defendant should be authorized to sign an order on the treasurer to pay certain witnesses called by the council their expenses attending the commission,

and paying other township officers, &c., not already paid by orders on the treasury. 3. That the reeve should give an order on the treasurer for £10 10s., in favour of N., for services as township clerk. It was proved that the treasurer paid the £129 to defendant; that the commission mentioned was held under 12 Vict., c. 81, sec. 181, to examine into the financial affairs of the township; that the suit referred to had been brought by one C. respecting the affairs of the township; but the clerk swore that no documents had come into his possession shewing for what the moneys paid to the defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorize any of these payments:—Held, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence. With regard to the different items mentioned in the resolutions:—Held, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal. As to the charge for "attending commission," that it was primâ facie illegal, and the defendant should have shewn his right to it. That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. As to the money paid for defending the suit, that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend. As to the second resolution, that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers. As to the third resolution, that as there was no evidence of illegality in the payment nothing could be recovered. *The Municipality of East Nissouri* v. *Horseman*, 16 Q. B. 576.

Held, that the 2nd section of 16 Vict., c. 80, did not bar the right to recover in an action of assumpsit for money paid in excess of legal interest. *Shinson* v. *Kerby*, 7 Chy. 510.

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6. *For Money Paid on Failure of Consideration.*

A foreign corporation—to wit, a bank—cannot maintain an action upon notes discounted and received by them in the course of conducting banking business in this Province, although they may maintain an action for money had and received to their use against the party for whom such note was discounted, and to whom money was advanced upon it. *Bank of Montreal* v. *Bethune*, 4 O. S. 341. See *Howe Machine Co.* v. *Walker*, 35 Q. B. 37.

A party contributing to a joint stock adventure which does not go into effect, may recover back his money in an action for money had and received. *Gilpin* v. *Greene*, 7 Q. B. 586.

The plaintiff, as executor of one W., having paid money to defendant, as a legatee, and the will with the probate having been afterwards set aside by a decree, the plaintiff was held entitled to recover back the money. *Haldan* v. *Beatty*, 40 Q. B. 110.

A. & H., a firm doing business in Hamilto had a draft for $1,200, accepted by B. at Mo treal for their accommodation, falling due on t 27th of April. H., in order to obtain funds meet it, on the 26th of April procured a draft B. for $600, to be discounted by the plaintif telling them that it would be accepted, and t proceeds of it were placed to the general cred of the firm. This draft was sent to B. for acce tance, and H. on the same day wrote to him e closing the firm's check for $1,200 on the Ba of Montreal, to take up the $1,200 draft, a requesting him to accept that for $600. On t 27th B. duly paid the draft for $1,200. On t 28th A. and H. had a difference, and A. hearin from H. that the firm were in difficulties, a that he intended using their funds in paying and another person, A. thereupon, on the 29 drew out on the check of the firm their balan in plaintiffs' bank, consisting of the proceeds the draft for $600, of which A. knew nothin and of other moneys, and handed it to the solicitor, for the benefit of the creditors generall Between the 25th and 29th, both the debtor a creditor side of the firm's account had been de with, and the balance increased in their favou H., on the 29th, on hearing what A. had don wrote to B., that in consequence the check s to him could not be paid, and B. then refused accept the draft. On the 2nd of May the fir became insolvent, and an assignee was appoint to whom the solicitor handed over the mone deposited with him. The plaintiffs, howeve claimed the amount of the $600 draft, conten ing that it was only discounted on the faith its being accepted, and that as one of the par ners had caused its non-acceptance by his lett to the drawee, there was a failure of consider tion, and that they were therefore entitled follow the money in the assignee's hands; but Held, that they were not so entitled: that t case was the ordinary one of the discount of draft on the belief that it would be accepte and that the money formed part of the firm general assets and passed to the assignee. *T Canadian Bank of Commerce* v. *Davidson*, C. P. 537.

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7. *On Rescission of Special Contract.*

An action for money had and received as t purchase money of an estate, will not lie so lo as the vendee enjoys the estate and continues possession. *Smart et al. Executors of Innes Brown*, 5 O. S. 650.

Where the plaintiff let to defendants a fa on shares by an instrument under seal, a defendants covenanted to deliver to him portion of the crop by a certain day, but bef that day sold the crop and applied the money their own use:—Held, that the plaintiff co not rescind the contract and sue for his prop tion as money had and received. *Ducat Sweeney et al*, M. T. 3 Vict.

Held, that under the special circumstances this case, (given in the report) the plaintiff co not recover back the money mentioned defendant's receipt as having been paid him by plaintiff on account of stock taken plaintiff in a certain foundry, in which the pla tiff had purchased defendant's interest un a special agreement, as money had and receiv on the ground that the contract had been resc

ded. (Robinson, C.J., diss.) *Kay* v. *Cameron*, 5 Q. B. 530.

The plaintiff purchased from defendant, who held a bond for a deed from one C., his right to certain land. Before the purchase money was paid up by plaintiff, and after defendant had obtained his deed from C., defendant conveyed to the G. W. R. W. Co. a small part of the lot for their road. It appeared that the railway had been surveyed before the sale to the plaintiff; that the plaintiff had taken and for some time held possession of the land under his agreement; and defendant declared that he was ready to convey to the plaintiff, on receiving what was due, giving him credit on account for the sum paid by the company:—Held, that under these circumstances, the plaintiff could not treat the contract as rescinded, and recover the amount paid by him, with interest, as money had and received. *Reynolds* v. *Crawford*, 12 Q. B. 168.

The plaintiff and defendant made the following agreement: "I, S. (the defendant) give $20 to M. (the plaintiff) for the colt which I have in possession, but I promise to give back the colt to M. if he will pay the same sum with 12 per cent. interest c before the 1st May 1866. If not paid the co. ll be the property of S., then he can do with it as he likes or keep it for himself.". The plaintiff paid defendant $15, but failed to pay the balance, and in September 1867 defendant sold the colt:—Held, that the plaintiff could recover the $15 paid by him, as money had and received. *Moore* v. *Sibbald*, 29 Q. B. 487.

8. *For Money Paid on Failure of Title.*

Money paid by a testator on an agreement for the purchase of lands, which the vendor has failed to complete, may be recovered back by the executors as money had and received to the use of the testator. *Executors of Innes* v. *Brown*, 5 O. S. 665.

An auctioneer at an attempted sale of goods warranted them, saying they were his own, and he would stand between the purchaser and loss. Having sold the property by auction a few days subsequently to a bidder on the former occasion, and the goods having been claimed and taken by a third party under a chattel mortgage which covered them, the auctioneer, upon an action for money had and received, was held responsible to the purchaser. *Somers* v. *O'Donohue*, 9 C. P. 208.

A party purchasing land through the persuasion of another (who did not pretend to have a title himself), with notice of an encumbrance thereon, and making no search at the registry office, and paying the consideration to the person through whose persuasion he purchased, who appropriated it, with his knowledge and consent, towards the payment of the incumbrance as far as it went:—Held, not entitled to recover upon the common counts from the party to whom he paid it. *Miller* v. *Cummings*, 10 C. P. 448.

9. *For Money Obtained by Fraud.*

A., a crown lands agent, being asked by the plaintiff whether there were any lands for sale by government in the township of M., told him that there were not, but that B. had certain lots there, to which he would sell his right, and the plaintiff being introduced by A. to B., paid the latter £50 for his good will, together with the first instalment required by government, and received from him a receipt for the latter signed by A. as crown lands agent. The jury found that the representation that there were no lands for sale was false, and made by A. in concert with B. to enable the latter to obtain an advance upon the government price:—Held, that the £50 and interest might be recovered in an action against A. and B., either upon a special count charging the false representation, and the damage suffered in consequence, or as money had and received. *McMaster* v. *Geddes et al.*, 19 Q. B. 216.

10. *Against Trustees or Agents.*

When money is received in the execution of a trust, money had and received cannot be maintained against the trustee so long as such trust remains open. Quære, whether in this case, even if there had been a final settlement of the account, leaving a surplus in the trustee's hands the cestui que trust could have recovered against him without declaring specially. *McPherson* v. *Proudfoot*, 2 C. P. 57.

The assignment contained three parties, C. B., the assignor, being the party of the first part the defendants, the assignees, of the second part, and "the several other persons whose names and seals are hereunto subscribed and fixed, creditors of the said C. B., of the third part." No creditor executed the assignment, but the defendants (assignees) admitted part of the plaintiff's claim by letter:—Held, that such admission made him a party to the assignment, although he had not executed it, and that the defendants were liable for money had and received. *Burrows* v. *Gates et al.*, 8 C. P. 121.

Held, under the facts of this case, that defendants, as trustees, could be liable only in equity, or, if at law, not for money had and received, but in a special action on the deed. *Harris* v. *Buntin et al.*, 16 Q. B. 59.

Held, affirming the judgment of the County Court, that the board of school trustees could maintain an action for money had and received against their secretary-treasurer, to recover a balance of money in his hands not expended or accounted for. *The Trustees of S. S. No. 7 in the Township of Stephen* v. *Mitchell*, 29 Q. B. 382.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges: that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury: whereas the work had not been done, and plaintiffs thus lost the money. Common counts were added. It appeared that the corporation, by one resolution, directed that $300 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another, that $100 should be placed to the credit of each councillor, to be expended by them on the roads and bridges in

their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, *though contracted for*, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended:—Held, that there could be no recovery on the common counts, for defendant had received no money. Quære, whether this action would lie by the corporation against one of its members, or whether the proper remedy was not in equity against defendant as trustee. *The Corporation of the Township of Chatham* v. *Houston*, 27 Q. B. 550.

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11. *Proof of Receipt of Money.*

Where plaintiff's agent had paid money into the agency of the Gore Bank at Simcoe, partly in cash and partly by cheque on the Commercial Bank at Toronto, to be placed to plaintiff's credit with the Gore Bank at Hamilton, and the agent at Simcoe took upon the whole sum the usual commission of a quarter per cent. for transmission, but the cheque was lost in being sent from Hamilton to Toronto, and was never paid by the Commercial Bank, or credited to the plaintiff—it was held that the plaintiff could not sue the Gore Bank for the amount of the cheque as money had and received. *Todd* v. *The Gore Bank*, 1 Q. B. 40.

A. leaves with B. the following receipt:—"Mr. John L'Esperance has left with me a note signed by J. G. Tremaine for £97, payable at the Bank of Montreal here, at three months from the 31st ultimo, which I am to account to him for *if paid*, deducting the amount he owes me.—Cobourg, April 1st 1846, (signed), Benjamin Clarke."—A. indorses the note and gets it discounted at a Bank. When it becomes due the note is renewed with B.'s assent, who indorses the same. Before the renewal becomes due, B. sues A. for money had and received:—Held, that the action would not lie. *L'Esperance* v. *Clarke*, 4 Q. B. 12.

Defendants H. and G., who had been in partnership as brokers, were sued for money had and received, the cause of action being for the proceeds of two notes made by the plaintiff, payable to them, to be discounted, which it was alleged that they had received and not paid over. G. allowed judgment to go by default. It appeared that the plaintiff had handed the notes to G., acting for the firm, to get them discounted for him; that they were endorsed in the name of the firm while it continued; and that after the partnership had been duly dissolved, G. sold them, and received the proceeds, which he applied to pay a debt of his own, contracted by him in the name of the firm, H. not being aware of the sale:—Held, that the plaintiff could not recover against both defendants, for the money was not received by the firm, but by G. alone, after the dissolution and without the knowledge of H. *Hammond* v. *Heward et al.*, 20 Q. B. 36; *S. C.*, 11 C. P. 261.

Certain sale notes were deposited with def dants as collateral security for the payment note, endorsed by the plaintiff for the accom dation of one M., and discounted by defenda for M. The collaterals were of the same va as the principal note, and were to be paid i the bank and applied on the note, so that w they were paid the note also was to be paid the plaintiff's liability to cease. After the p cipal note became due defendants denied t they held the sale notes as collaterals, and fused to give the plaintiff any information a what had been paid on them; and the plain then paid the note in full, and demanded assignment of the collaterals, the plaintiff's p ment being made by a part payment in ca and his note for the balance, which he paid maturity:—Held, that the plaintiff was entit to recover, as money had and received to use, the amount paid to the defendants on collaterals, and that the fact of his only pay part of the principal note in cash, and giv his note for the balance, did not take aw his right:—Semble, also that his right wo not be affected even if the payment on the laterals were after his payment. *Cornish* v. *Niagara District Bank*, 24 C. P. 262.

See *Corporation of the Township of Chath* v. *Houston*, 27 Q. B. 550. p. 2283.

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12. *Pleading and Evidence.*

In an action for money had and receiv against an attorney, evidence that the judgm under which the money was collected, fraudulently confessed, was held not admissi *Williams* v. *King*, Dra. 439.

The words "value received" in—"I prom to pay A. or bearer 25*l.* value received, to paid in merchantable wheat at market price import a debt due, and are primâ facie evide of a consideration; and such an instrument be shewn under the count for money had received, and account stated. *Waddel* v. *McC* 3 O. S. 502; *S. C.*, 4 O. S. 191.

In an action by a treasurer of a district, u the Division Courts Act, against the clerk Division Court, for not paying over moneys ceived, it is sufficient to declare in the treasu own name for money had and received by de dant to the use of the plaintiff for the purp of the act. *Howard* v. *Walton*, 2 Q. B. 266

In an action on a sheriff's covenant it is a breach to state that he was indebted in a su sum for money had and received, wit specifying how or on what occasion the m was received. *Commercial Bank* v. *Jarvis* 6 O. S. 474.

Where a promissory note was given to a torney to get the amount of it secured, and attorney subsequently said he would pay amount in a few days, and an action was a wards brought against him for negligence i suing on the note, with a count for money and received:—Held that neither count was ported by the evidence. *Drennan* v. *Bo* 3 Q. B. 72.

The party discounting a bill has, in ge no recourse whatever upon the person from w he has taken it, when the latter has not in

way made himself a party to it. Peculiar circumstances, however, may render such party liable on the common counts; and it was held that the evidence in this case warranted a recovery against him for money had and received. *Ross* v. *Codd*, 7 Q. B. 64.

13. *Other Cases.*

Where a father took shares in an association formed to build a steamboat, in the name of his son, then an infant, and during the minority of the child directed two of the shares to be transferred to the defendant, which was done:—Held, that the infant could not, on attaining his majority, maintain assumpsit for money had and received, to recover dividends on these shares, received by defendant. *Hall* v. *Bidwell*, 3 O. S. 22.

Money had and received may be maintained against a sheriff by the plaintiff in the suit for money levied on an execution. *Shuter et al.* v. *Leonard*, 3 O. S. 314.

No action lies against the deputy sheriff for money received by him and paid over to the sheriff; the action must be brought against the sheriff himself. *Bird* v. *Hopkins*, H. T. 5 Vict.

Where an execution creditor has under the statute of Anne paid rent demanded by a landlord upon an execution against the tenant upon the premises of the former, and the sheriff levies as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums, and liable to him in an action for money had and received, and so does a bailiff under the Division Courts Act; and therefore the execution money in his hands might be attached to satisfy the demand of another execution claimant against the execution creditor. *Lockart* v. *Gray*, 2 L. J. N. S. 163.—C. L. Chamb.—A. Wilson.

Where a judgment was assigned to defendant for the joint benefit of the plaintiff and himself, and he received the whole of it:—Held, that the plaintiff could recover his share as money had and received. *Hooker et al.* v. *McMillan*, 4 O. S. 14.

Where, according to the rule of a race, for one hundred guineas, the decision of the stewards was to be final, and the plaintiff's horse won the first heat, and came in first in the second, but, in consequence of alleged foul riding, was adjudged by the stewards to have been distanced, and another horse was pronounced the winner:—Held, that the plaintiff could not contest such a decision in an action for money had and received against the treasurer of the race, who had not paid over the purse. *Gorham* v. *Boulton*, 6 O. S. 321.

The Bank of B. N. A. in England, received money there to be transmitted to B. in Upper Canada, and sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (B. having in the meantime died) and B.'s name forged on the letter of credit, and the money received by some person unknown:—Held, that B's executrix was entitled to recover the money from the bank in Toronto as money had and received toB's use. *Gissing et ux., Executors*, v. *Hopper*, 6 O. S. 505.

Where plaintiff had been employed by A. in getting out timber, which A. afterwards sold to defendant, who agreed verbally with the plaintiff and others who had been working with him—the timber being in their possession—that he would pay the wages of the plaintiff and others if they would assist in rafting the timber to Quebec, out of the proceeds of its sale there:—Held, that on shewing the sale there, the plaintiff was entitled to recover for his wages as money had and received; and that the case was not within the Statute of Frauds. *McDonell* v. *Cook*, 1 Q. B. 542.

A. was cutting timber on B.'s land. B. refused to allow him, unless C., who was to get the timber when cut, should become answerable for it. C. agreed to become so, and A. was permitted by B. to take away the timber. It was further agreed between B. and C. that upon the timber being passed at Bytown free of duties to the Government—that is, passed as private timber—B. should be paid by C. the price the Government would have paid for it had it been Crown timber:—Held, that upon a sale of the timber at Quebec, C. might be liable to B. for money had and received. *McNab* v. *McGill*, 6 Q. B. 142.

F. had a demand against one T. on notes and acceptances of about $20,000. The plaintiffs agreed to transfer to him certain bank stock worth $2,550, as a loan, to secure which he agreed to assign and afterwards delivered to them $14,200 of these notes, all of which were negotiable, but some only were endorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about $300 excepted) came into the defendant's hands:—Held, that the plaintiffs might recover from the defendant as money had and received the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt. *Lee et al.* v. *Woodside*, 22 Q. B. 15.

Defendant living at Chatham, consigned to the plaintiff, at Montreal, certain tobacco for sale, and, without authority, drew upon him at the same time for $250, which the plaintiff accepted and paid. The price which defendant asked could not be obtained in Montreal, and the plaintiff therefore shipped the tobacco to England, where it was sold. The net proceeds, after deducting freight and charges, were only £14 sterling, and he sued defendant upon the common counts for the difference, $278, the expenses of shipping being also deducted. Defendant pleaded never indebted, payment, and set-off. When the draft fell due defendant had written to the plaintiff, offering to raise funds to retire it by drawing upon him again. The account sales received by the plaintiff from England had been sent to the defendant, who said, on receiving them, that he did not think he ought to bear the whole loss, but offered $150. The jury

gave a verdict for $200:—Held, there being no evidence of any special contract, that the plaintiff was entitled to recover his advances without waiting for the sale of the tobacco, and that if he had done wrong in his dealings with it, such defence should have been pleaded. The verdict was therefore upheld. *Stewart* v. *Lowe*, 24 Q. B. 434. See, also, *Craig et al.* v. *Corcoran*, 23 Q. B. 441; *Palmer et al.* v. *Holmes et al.*, 14 C. P. 194.

Plaintiff gave two notes against F. to defendant, a Division Court Clerk, to collect, and to apply on a note for $300 which the plaintiff owed to defendant. The defendant sold the two notes to one M., guaranteeing their recovery, and M., having recovered judgment against F., but made nothing thereon, obtained back from defendant what he had paid. Defendant transferred the note for $300 to T., who sued the plaintiff thereon and recovered judgment:—Held, that the plaintiff could recover from the defendant the money received by him from M. as money had and received, for the defendant had no authority to make the conditional transfer; and as F's notes were extinguished by the judgment recovered on them, and the holder of the plaintiff's note had recovered judgment against him, the defendant had rendered it impossible to restore the plaintiff to his original position. *Moorman* v. *Farmer*, 27 Q. B. 1.

The plaintiff having a bank account with defendants' agency at St. Catharines, deposited with them on Saturday morning, about 11.30, a cheque of one C. on another bank in the same place, for $350, payable to the plaintiff or bearer, and not endorsed. The sum was credited in the plaintiff's pass book as cash, and the cheque stamped with a stamp used by defendants as "The property of the Quebec Bank, St. Catharines." On Monday morning it was presented for payment and dishonoured; but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. Defendants having charged the amount of the cheque to the plaintiff, he sued them for money had and received and money lent:—Held, that he could not recover, for defendants were not guilty of laches; and semble, that they could have recovered back the amount from the plaintiff, even if they had paid it to him. *Owens* v. *The Quebec Bank*, 30 Q. B. 382.

On the trial of an election petition against the return of a member to the Local Legislature, which resulted in favour of petitioner, to whom the costs were awarded, the defendant was retained by and acted as petitioner's attorney, and M., one of the plaintiffs, a firm of attorneys as well as barristers, acted as petitioner's senior counsel, under an agreement to that effect with defendant, neither he nor his firm being retained by petitioner. The petitioner's costs were settled by defendant and the respondent's attorney, and defendant received $1,600, including $365 counsel fees to M., which M. proved became the property of his firm. The plaintiffs having brought an action against defendant to recover these counsel fees, as money had and received to their use:—Held, that they could not recover, for that the costs, including these fees, belonged to the petitioner and not to defendant as attorney. *Miller et al.* v. *McCarthy*, 27 C. P. 147.

IV. Account Stated.

1. *Evidence.*

(a) *Instruments purporting to be Bills or Not*

A document which acknowledges a sum at the time of its date, but payable on a fut contingency, though not a promissory note evidence of an account stated. *Russell* v. *W* 5 O. S. 725.

In an action against two joint makers a note, one having signed as surety for the oth the note is prima facie evidence only of an count stated, which the surety may rebut shewing the facts. *Hogan* v. *McSherry et al* O. S. 633.

In an action against one of two joint make surety for the other, the note is not evidence an account stated. *Hogan* v. *Malone*, H. T Vict.

A promissory note given to an agent upo settlement of accounts is evidence of an acco stated with his principal, when the fact of age was known to the other party. *Rhodes* v. *Ex tors of Crawford*, 1 Q. B. 257.

Held, that the following instrument: "T days after date we promise to pay N. Newh the sum of £83 15s, for value received," up which was endorsed at the time the note w given the following memorandum, "It is agre that this note is to be paid by a lawful mortga with interest on the same, having three years run," could not be sued upon as a note betwe the original parties, and could not be given evidence under the count in account state *Newhorn* v. *Lawrence et al.* 5 Q. B. 359.

For value received, I promise to pay Jam McQueen and Jacob McQueen, or their orde the sum of £102 15s. cy., to be paid in year proportions":—Held, as evidence of an accou stated, though the money was not to be paya immediately. *McQueen* v. *McQueen*, 9 Q. 536.

"Three months after date, we, or either of promise to pay to Elias S. Reed, (the plaintif or John Fraser, his guardian, at the post off Embro, £119 17s. cy., value received in rent farm," adding a count on an account stated. was proved that defendant had been in possess of plaintiff's farm before and after the note made, which was given for rent due, and t the plaintiff was abroad at the time of mak the note:—Held, that this writing, though a promissory note, would support a recov under the account stated. *Reed* v. *Reed*, Q. B. 26.

A claim upon an account stated cannot be s ported by a note which was not due at the c mencement of the suit, and the defence is a able under the general issue. *Hill* v. *Lot* Q. B. 465.

The declaration contained three counts cl ing each £50, but the damages were laid onl £50, and the particulars were for account dered £55 15s—less by cash £22 10s—£33 At the trial the plaintiff relied on the coun account stated, and produced a draft by himse defendant for £55 15s. 1d., "being the balanc full of your account," and proved that when sented the defendant acknowledged the acc to be correct, but refused to accept it as he

afraid he would be sued. A verdict having been found for £343s. 3d. : Semble, that the evidence of an account stated was sufficient. *McMurtry* v. *Munro*, 14 Q. B. 166.

"$300—Good to T. T. to the amount of $300, to be paid to him on his order, at E. C.'s mill, in the township of Elma, in the county of Perth, in lumber, at cash price" :—Held, a sufficient acknowledgment of debt or liability and a promise to pay, and that it imported a sufficient consideration to sustain the count on account stated. *Tyke* v. *Conford*, 14 C. P. 64.

An instrument dated at New York, signed and endorsed by defendant, promising to pay "to the order of myself" $1040.23 at the Bank of Upper Canada, in Toronto, with the current rate of exchange on New York" :—Held, sufficient evidence prima facie of an account stated ; for that the transaction would be assumed as immediate between plaintiff and defendant, without proof to the contrary, and though not a promissory note, it was a written acknowledgment of indebtedness in the sum named. *Grant* v. *Young*, 23 Q. B. 387. *Wood et al.* v. *Young*, 14 C. P. 250.

The defendant had signed a note or instrument agreeing to pay five per cent. a month :—Held, that the amount agreed upon was recoverable under the common count for interest and account stated. *Young et al.* v. *Fluke*, 15 C. P. 360.

Held, that a bill of exchange not properly stamped was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor), as there was no privity between them ; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise. *Stephens* v *Berry*, 15 C. P. 548.

The notes sued on, which were void for want of stamps, were renewals, with interest at 20 per cent. added to them, of former notes which had been given up to defendant, and of which secondary evidence was given :—Held, evidence of an account stated, and that the plaintiff was entitled to recover the amount of the original notes, and interest at 6 per cent. *Ritchie* v. *Prout*, 16 C. P. 426.

Held, that an instrument in this form, "Good to Mr. Palmer for $850 on demand, was not a promissory note, and so requiring a stamp—Wilson, J., diss.—but that (Gwynne, J., diss.) in the absence of any explanation of the circumstances under which it was given, it was primâ facie evidence to go to a jury of an account stated. *Palmer* v. *McLennan et al.*, 22 C. P. 258. *S. C.* in Appeal. *Ib.* 565.

See *Waddle* v. *McCabe*, 3 O. S. 502, p. 2284.

(b) *Other Cases.*

In an action for goods sold, and upon an account stated, evidence of the acknowledgment by letter of an account being due, and of an account having been read over to the defendant, to which he made no objection, coupled with evidence that an item of £2 in the bill of particulars produced in court was the same which was read over to defendant, and with the witness's belief that the accounts were the same, was held sufficient to support the verdict, which was for £18, though one principal ground of the witness's belief of the accounts being correspondent arose from his knowledge of the plaintiff's character. *Large* v. *Perkins*, Tay. 62.

The plaintiff may recover on the count for an account stated on an express promise to pay a specified sum, part of an account, the admission of the correctness of which by the defendant cannot be received in evidence under 2 Geo. IV., c. 13, the account being in New York currency. *Crooks et al.* v. *Law*, 5 O. S. 306.

An account stated by an executor, of a debt due by his testator never before ascertained or determined, is sufficient to charge the executor as a substantive debt, without any express promise to pay. *Watkins* v. *Washburn*, 2 Q. B. 291.

A defendant casually observing to a third party, in the presence of the plaintiff, that he had paid the whole price for his land, except a certain sum, without any further explanation, is not satisfactory, if any, evidence of an account stated. Semble, that if otherwise the Statute of Frauds would not have applied, though the sum was due in respect of the sale of lands. *Curtis* v. *Flindall*, 3 Q. B. 323. See also *Dalton* v. *Botts*, Tay. 281.

A district council cannot be sued upon the common money counts upon the account stated, unless at least the subject matter of the account be averred, and is seen to be such as can by law create a debt from the defendants to the plaintiffs to be satisfied out of the funds of the district. *Huron District Council* v. *London District Council*, 4 Q. B. 302.

Where A., as part consideration for the purchase of certain timber from B., promised C. to pay B.'s debt to him of £20, and paid £10 to C., and was to pay the remaining £10 next morning :—Held, that C. could recover the £10 from A. on account stated. *Fergusson* v. *Kerr*, 5 Q. B. 261.

Where to a special count upon an award made after the time had expired, there was added an account stated :—Held, that an award so given could not be taken as evidence of such account stated, as the arbitrators could not be said, after their authority had expired, to be proceeding with defendant's assent and to be stating an account for him as his agent. *Ruthven* v. *Ruthven*, 8 Q. B. 12.

A. gave to B. and C. a writing, by which, for value received, he promised to pay them a certain sum in yearly proportions. This appeared to have been given for the price of land sold to A. :—Held, that it was immaterial whether the land was owned by A. alone or by A. and B., and that the plaintiffs might recover either under a count as on an agreement or on an account stated. *McQueen et al.* v. *McQueen*, 10 Q. B. 359.

One of two defendants having admitted to a witness called by the plaintiff that there was a balance of £203 15s, due to the plaintiff, from which was to be deducted an unascertained debt due to the other defendant, and also a balance on a certain sum due by the plaintiff to his brother :—Held, not sufficient evidence of an account stated. *Bloomley* v. *Grinton et al.*, 1 C. P. 309.

An admission made casually to a stranger, and not to the plaintiff or an agent of his, is not in itself sufficient to sustain an action on the account stated. *Green* v. *Burtch*, 1 C. P. 313.

An assignment of a right to real estate executed under seal by the defendant only, in which the consideration money is acknowledged to have been paid, will not support an action for the purchase money, nor be received as proof of an original executory agreement in writing for the sale of the premises; nor will subsequent admissions of defendant's liability supply the place of written proof or of an account stated, unless some specific amount be acknowledged. *Ib.*

The plaintiff sued the executors of Z. on account stated, and relied upon an account made out by defendants' book-keeper, headed as an account of the plaintiff with the estate of Z., including this work, and shewing a balance due to him; but the book-keeper stated that it was made out at the plaintiff's request, and on account of certain sealed contracts on which the plaintiff could not sue alone:—Held, not sufficient to give a right of action to the plaintiff alone. *Zimmerman* v. *Woodruff et al.*, 17 Q. B. 584.

The plaintiff having purchased land from defendant under a written contract, it was verbally agreed between them that the sale should be cancelled, and that defendant should return what plaintiff had paid, and pay him $102 for giving up his bargain. The plaintiff thereupon gave up possession, and defendant sold to another. In an action for the $102 (the declaration containing a count on account stated) it was proved that defendant had acknowledged that he was to pay the plaintiff this sum for giving up the land, but the plaintiff was nonsuited for want of an agreement in writing:—Held, that if the acknowledgment was made after the agreement had been cancelled, and the land re-sold by defendant, the plaintiff might recover on the account stated; and this not being clear upon the evidence, a new trial was granted to ascertain the fact. *Gross* v. *Bricker*, 18 Q. B. 410.

The first count of the declaration claimed £100, being the consideration for the assignment by plaintiff to defendant of his interest in an agreement for the purchase of certain freehold property. Second count, for money payable for land bargained and sold by plaintiff to defendant, on an account stated, and for interest. J., the owner of 50 acres, agreed to convey certain lots, in accordance with a lottery, to be held by one D. Lot No. 107 in the lottery was the prize, and was supposed to have a mill privilege upon it. One V., the holder of ticket No. 35, became entitled to No. 107, and he requested J. to convey it to plaintiff, which was done. Subsequently C. (defendant) agreed to purchase the mill privilege from plaintiff, but not being satisfied with his title, he took a quit claim deed from J., paying him £15 7s., which he said he would deduct from the amount he was to pay plaintiff. L. (plaintiff) had drawn another lot, and obtained a conveyance of it upon giving his notes for the purchase money, which notes J. gave to C. (defendant) when he conveyed the mill pond to him. These notes formed no part of plaintiff's payment for lot 107:—Held, that the evidence did not support a claim upon an account stated. *Lloyd* v. *Clark*, 12 C. P. 320.

The mere calculation of what is due as balance of a former transaction will not sup an action on account stated. *McKay* v. *Gri* 30 Q. B. 54.

Plaintiff assigned to defendant his intere a certain lease, by deed containing a receip the consideration money, $350. This deed placed in K.'s hands to hold till defendan posited that sum. K. delivered it to defen on his promise that he would pay, and defen afterwards paid him $75, saying that he w hand him the balance as soon as he obtaine On being asked again he said that he had money, but that the plaintiff should pay pa the expense of a bond which he had had to respecting the title. Plaintiff then sued the common counts for the purchase mon land, and on an account stated:—Held, tha was estopped by the receipt under seal, could not recover on either count. Cockin Ward, 1 C. B. 858, distinguished as to account stated. *Sparling* v. *Savage*, 25 C 259.

Plaintiff sold and conveyed certain land deed containing a receipt for the purchase mo $808, with a receipt for same also indo Plaintiff then sued defendant upon the con counts for the purchase money of the land, on an account stated. The defendant plea among other pleas, payment. After the sal fendant told one M. that he had only paid p tiff $41, and offered to pay him, M., wha plaintiff was willing he should. It also appe though not very clearly, that plaintiff was pr at this conversation:—Quære, whether the versation between defendant and M. amou to a statement of account, or anything than an admission from which non-payme the purchase money might be assumed. v. *McCall*, 19 C. P. 90.

There must be an antecedent and subsi debt between the parties, and a special ment to pay a sum of money cannot be conv into an account stated. A bill of costs wa in, taxed at £40, in a suit by one V. again fendant, in which M., one of the plaintiff plaintiffs' attorney. There was a receipt f endorsed upon it signed by M., and a mem dum signed by defendant, "I will pay the balance one week":—Held, no evidence account stated. *Toms et al.* v. *Sills*, 29 Q.

See *McMurtry* v. *Munro*, 14 Q. B. 166, p

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2. *As a Defence.*

In assumpsit for work and labour, it i cient to plead that after the accruing causes of action, and before suit, the pl and defendant accounted together of a cerning the causes of action in the decl mentioned, and certain other demands of dant against the plaintiffs; and upo accounting a sum of £50, and no mo found to be due from defendant to pl which the defendant then promised to pa plaintiffs, and hath always been willing *Melville et al.* v. *Carpenter*, 11 Q. B. 132

A similar plea to an action on account held good. *Beattie* v. *Hatch*, 12 Q. B. 1

Where a defendant by his answer s stated account, the plaintiff does not a

defence by bringing on the cause by way of motion for decree; and the proper decree in such a case is a reference as to such alleged account. *Neil* v. *Neil*, 15 Chy. 110.

V. Pleading.

To an action on the common counts for board, &c., found for the defendant's illegitimate child, at defendant's request, alleging a subsequent promise of defendant to pay, &c., a denial of the request was held a bad plea. *Flaherty* v. *Moirs*, 1 Q. B. 221.

To a declaration on the common counts, for goods sold, &c., defendant pleaded that the causes of action, if any, accrued against defendant and one S.; and that after the goods were sold, &c., and before suit, to wit, on, &c., by indenture made between defendant, then a partner, and for and on behalf of the firm of S. & I., B. & H., and plaintiff and other creditors of said firm, in consideration of defendant assigning all his goods to B. & H., they agreed to pay 7s. 6d. in the pound on the amount of their respective claims as set opposite their respective names in the schedule to said indenture annexed; and that defendant did assign to said B. and H., and that they paid to plaintiff 7s. 6d. in the pound, who accepted and received the same in full satisfaction of all debts and claims, &c., against defendant from the beginning of the world to the day next before the date of said indenture, with an averment that the causes of action in the declaration mentioned accrued in respect of debts, &c., in said indenture and schedule mentioned, and before the day next before the date of said indenture; to which the plaintiff replied, by traversing the averment that the causes of action accrued in respect of debts in said indenture and schedule mentioned, &c.:—Held, bad, on demurrer, on the ground that the plaintiff should have new assigned. *Hall* v. *Irons*, 4 C. P. 351.

A count for interest for the forbearance of money at the rate of thirty per cent. per annum:—Held, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged. *Bleakley* v. *Easton*, 22 Q. B. 348.

A by-law of the plaintiffs provided that any member neglecting to pay his monthly dues should be fined a specified sum per share each month "until the end of one year, when the share or shares in default shall be declared forfeited to the society," &c.:—Held, that such fines could not be recovered on a common count, but that the declaration should set out the by-law. *Ottawa Union Building Society* v. *Scott*, 24 Q. B. 341.

VI. Miscellaneous Cases.

Though a note declared on vary from the pleadings, it is still evidence under the common counts. *Hathaway* v. *Malcolm*, Tay. 182.

A note made in Albany, U. S., may be declared on under the common counts, under the statute of Anne. *Kirk* v. *Tannahill*, Tay. 448.

A plaintiff who fails on the special counts of his declaration will not be allowed afterwards to resort to common counts. *Holden* v. *McCarthy*, 5 O. S. 99.

Where the plaintiff brought an action of debt on the common counts against the Huron District Council for compensation awarded to him by a jury for making a road across his premises before the formation of the Huron District, and while the land formed part of the District of London, and the Huron District had, after its erection, assumed the payment of the sum awarded—the Court held, that the action would not lie against the Huron District Council at all; but even if the council had been responsible, the declaration should have been special. *McKee* v. *The Huron District Council*, 1 Q. B. 368.

When there is a special count and common count in the declaration, the effect of the special count being bad when general damages have been assessed, is, that there must be a venire de novo, unless it can be said that the verdict was given wholly upon evidence applicable to the common count alone, and not to the special count. *Dodge* v. *Muir*, 7 Q. B. 526.

Where the defendant agreed that if the plaintiff would give up his claim against A. B. for £46, he would pay him £35 out of the proceeds of a certain raft when it would arrive at Quebec:—Held, that the plaintiff could sue the defendant on such agreement upon the common counts, and without producing proof of the agreement in writing. *McDonald* v. *Glass*, 8 Q. B. 245.

In an action on the common counts for money paid, money lent, goods sold, &c., the plea of payment admits only that something not ascertained is due in respect of the causes of action sued upon, leaving plaintiff to prove the precise amount. *Mulholland* v. *Morley*, 7 L. J. 323.—C. C.—Mackenzie.

The common counts cannot be used where the claim is by virtue of a deed. *The Corporation of the County of Wentworth* v. *The Corporation of the City of Hamilton*, 34 Q. B. 585.

In an action on the common counts the plea of nunquam indebitatus and payment are distributive, and a verdict may be entered on these issues for the defendant, for so much of the amount sued for as the plaintiff fails to recover. Such a verdict may not be proper in every case. In this case the substantial question at the trial was the plaintiffs' right to a sum of $410, which the jury found for defendants, but the plaintiffs had a verdict for a sum of $20, which defendants had never disputed, and had, as they asserted, unintentionally omitted to pay. Under these circumstances the verdict was entered in defendants' favour for the residue. *Hope et al.* v. *Stewart et al.*, 35 Q. B. 89.

MONEY HAD AND RECEIVED—MONEY LENT—MONEY PAID.

See Money Counts.

MONEY PAID INTO COURT.

See Payment.

MONOPOLY.

See Contract.

MORTGAGE.

I. PARTIES.
1. *Corporations—See* CORPORATIONS.
2. *Infants—See* INFANT.
3. *Insanity of Mortgagor—See* LUNATIC.
4. *Married Women—See* HUSBAND AND WIFE.
5. *Partners—See* PARTNERSHIP.

II. CONTRACTS OF MORTGAGE.
1. *Form of*, 2298.
(a) *Under the Short Forms Act—See* DEED.
2. *Mortgage or Purchase*,
(a) *Generally*, 229
(b) *Absolute Conveyance with Contract to Reconvey or Repurchase*, 2302.
(c) *Parol Evidence to Explain Deeds absolute in form but intended only as Security—See* EVIDENCE.
3. *Other Cases*, 2305.
4. *Execution and Delivery—See* DEED.
5. *Description of Land in—See* DEED.
6. *Fraudulent — See* FRAUDULENT CONVEYANCES.
7. *Of Fixtures—See* FIXTURES.
8. *Of Goods and Chattels—See* BILLS OF SALE AND CHATTEL MORTGAGES.
9. *Of Ships—See* SHIP.

III. EQUITABLE MORTGAGES, 2305.

IV. REGISTRATION OF—*See* REGISTRY LAWS.

V. PAYMENT, SATISFACTION, DISCHARGE, AND MERGER.
1. *What Constitutes Payment*, 2306.
2. *Presumption and Proof of Payment*, 2307.
3. *Presumption of Reconveyance—See* EVIDENCE.
4. *Executors and Administrators*, 2308.
5. *Attorney or Agent*, 2309.
6. *Conveyance of Mortgagee's Interest*, 2310.
7. *Release of Part of the Premises*, 2310.
8. *Sale of the Equity of Redemption*, 2311.
9. *Merger of Mortgage Debt*, 2312.
10. *Merger of Simple Contract Debts in Mortgage—See* MERGER.
11. *Certificate of Discharge*, 2315.
12. *Other Cases*, 2317.
13. *Appropriation of Payments—See* PAYMENT.

VI. RIGHTS AND LIABILITIES OF THE PARTIES AND THOSE CLAIMING UNDER THEM.
1. *Possession of the Property*, 2320.
2. *Rights of Widow of Mortgagor*, 2321.
(a) *Dower—See* DOWER.
3. *Rights of Mortgagor to Maintain Actions*, 2321.
4. *Rights of Mortgagee to Maintain Actions*, 2322.
5. *Leases by Mortgagor*, 2323.
6. *Rights and Liabilities of Purchasers of the Equity of Redemption*, 2325.
7. *Recovery of the Mortgage Money.*
(a) *When an Action will Lie*, 232
(b) *Right to Call in the whole Default*, 2330.
(c) *Interest*, 2332.
(d) *Other Cases*, 2333.
(e) *Recovery by Foreclosure a Sale—See* pp. 2369, 2389.
(f) *Right of Distress—See* DISTRE
8. *Agreement to Release in Portions*, 233
9. *Special Covenants and Conditions*, 233
10. *Conditions as to Notice or Dema before Ejectment—See* EJECTMEN
11. *Mortgagee in Possession.*
(a) *Liability to Account for Re and Profits*, 2336.
(b) *Allowance for Improvemen* 2338.
12. *Application of Insurance Moneys.*
(a) *Generally*, 2340.
(b) *Insurance by or for Mortg gee—Right of Subrogation See* INSURANCE
(c) *Effect of Mortgage in Avoidi Policy—See* INSURANCE.
13. *Right of Mortgagee to Prevent Sec rity being Diminished*, 2342.
14. *Other Rights and Liabilities of Mo gagee*, 2343.
15. *As affected by Insolvency Proceedings See* BANKRUPTCY AND INSOLVENC
16. *Covenants for Title—See* COVENAN FOR TITLE.
17. *Sale of Equity of Redemption und Execution—See* EXECUTION.
18. *Barred by Time — See* LIMITATI OF ACTIONS AND SUITS.
19. *Sale under Power of Sale—See* p. 23
20. *Effect of Mortgagee Purchasing La for Taxes—See* ASSESSMENT A TAXES.

VII. ASSIGNMENT AND TRANSFER.
1. *Form of Assignment*, 2343.
2. *Covenants by Assignor*, 2344.
3. *Rights of the parties after Assignmen Notice*, 2345.

VIII. SEVERAL MORTGAGES.
1. *Priority.*
(a) *Generally*, 2348.
(b) *As Affected by Registry —* REGISTRY LAWS.
2. *Tacking*, 2349.
3. *Marshalling Securities*, 2350.
4. *Other Cases*, 2351.

IX. SALE UNDER POWER OF SALE.
1. *Validity of the Sale*, 2352.
2. *Other Cases*, 2354.

X. REDEMPTION OF MORTGAGES.
1. *Equity of Redemption — Its Incid &c.*, 2355.

2. *Who Entitled to Redeem*, 2357.
3. *Terms of Redemption—Amount Payable*, 2358.
4. *How Barred or Lost.*
   (a) *Lapse of Time*, 2359.
   (b) *Conduct of Parties*, 2363.
   (c) *Sale by Mortgagee*, 2364.
5. *Bills to Redeem.*
   (a) *Practice*, 2365.
   (b) *Pleading*, 2366.
   (c) *Parties*, 2366.
   (d) *Costs*, 2368.
6. *Staying Proceedings in Ejectment by Mortgagees—See* EJECTMENT.

XI. FORECLOSURE.

1. *When Decreed, and at Whose Suit*, 2369.
2. *Bill.*
   (a) *Form of*, 2372.
   (b) *Amendment*, 2372.
   (c) *Service — See* PLEADING IN EQUITY.
   (d) *Dismissing*, 2373.
3. *Parties.*
   (a) *Assignees*, 2373.
   (b) *Bankrupt Mortgagor*, 2373.
   (c) *Creditors*, 2373.
   (d) *Mortgagees*, 2374.
   (e) *Principal and Surety*, 2374.
   (f) *Real and Personal Representatives*, 2374.
   (g) *Trustees and Cestuis que Trust*, 2375.
   (h) *Wife*, 2376.
   (i) *Other Parties*, 2376.
   (j) *Practice in Adding Parties*, 2377.
4. *Decree.*
   (a) *Form of*, 2377.
   (b) *Foreclosure or Sale*, 2378.
   (c) *Amendment of*, 2379.
   (d) *Setting Aside*, 2379.
   (e) *Other Cases*, 2379.
5. *Final Order and Decree.*
   (a) *Practice on Application for*, 2380.
   (b) *Setting Aside*, 2382.
6. *Foreclosure after Abortive Sale*, 2383.
7. *Opening Foreclosure*, 2383.
8. *Order for Delivery of Possession*, 2385.
9. *Costs*, 2386.
10. *Other Cases*, 2388.
11. *By and Against Infants—See* INFANTS.
12. *By and Against Husband and Wife—See* HUSBAND AND WIFE.

XII. SALE.

1. *When it will be Directed*, 2389.
2. *Parties to the Bill*, 2390.
3. *Decree*, 2390.
4. *Final Order for Sale*, 2390.
5. *Other Cases*, 2391.
6. *Conduct of Sale—See* SALE OF LAND BY ORDER OF THE COURT.

XIII. PROCEEDINGS IN MORTGAGE SUITS IN EQUITY.

1. *Taking Accounts*, 2392.
2. *Order for Payment*, 2395.
3. *Disclaimer*, 2397.
4. *Revivor*, 2397.
5. *Practice*, 2398.
6. *Payment of Money out of Court on Sale of Mortgaged Premises — See* PAYMENT.
7. *Other Cases*, 2401.
8. *Appeal from Master—See* PRACTICE IN EQUITY.

XIV. MISCELLANEOUS CASES, 2403.

XV. MORTGAGES TO BUILDING SOCIETIES—*See* BUILDING SOCIETIES.

XVI. MORTGAGES OF CHATTELS—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

XVII. OF FIXTURES—*See* FIXTURES.

XVIII. MORTGAGES OF SHIPS—*See* SHIPS.

XIX. MORTGAGES TAKEN AS COLLATERAL SECURITY.

1. *Generally—See* COLLATERAL SECURITY.
2. *By Banks—See* BANKS.

XX. EQUITABLE JURISDICTION OF COUNTY COURTS—*See* COUNTY COURTS.

XXI. RECTIFYING AND VARYING MORTGAGES—*See* DEED.

XXII. RIGHT OF DOWER ON MORTGAGED PROPERTY—*See* DOWER.

XXIII. EFFECT OF OUTSTANDING MORTGAGES ON PLAINTIFFS' TITLE IN EJECTMENT—*See* EJECTMENT.

XXIV. DORMANT EQUITIES AS AFFECTING MORTGAGES—*See* DORMANT EQUITIES.

XXV. EFFECT OF EXECUTIONS—*See* EXECUTION.

XXVI. FRAUDULENT MORTGAGES—*See* FRAUDULENT CONVEYANCES.

XXVII. POSSESSION BY MORTGAGOR OR MORTGAGEE—*See* LIMITATION OF ACTIONS AND SUITS.

XXVIII. MISTAKE IN—*See* MISTAKE.

II. CONTRACTS OF MORTGAGE.

1. *Form of.*

In an instrument under seal, the words "And for securing, &c., the said P. P. doth hereby specially bind, oblige, mortgage and hypothecate the said piece or parcel of land," &c., pass no interest; they only shew an intention to create a charge or lien. *Doe* d. *Ross* v. *Papst*, 8 Q. B. 574.

A deed poll to secure a sum of money, in which the words were "mortgage all that certain parcel of land, &c., to have and to hold the

aforesaid land unto the said J. R., his heirs, executors, administrators, and assigns;"—Held, sufficient to pass the right of possession to the grantee. *Vandelinder* v. *Vandelinder*, 14 C. P. 129.

A trader being indebted to a wholesale merchant for goods supplied, executed a mortgage in favour of the creditor, securing £3,000, and the creditor having entered into a new partnership, the firm continued to make further advances for several years, during which time the debtor made several payments, much more than would have been sufficient to pay off his indebtedness; and the firm in rendering their accounts to the mortgagor did not bring in the old debt:—Held, that these circumstances were sufficient to shew that the security was intended to cover a floating balance. *Russell* v. *Davey*, 7 Chy. 13.

In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee a mortgage; Semble, that it would be improper to insert a power of sale in such mortgage; and, Quære, if the deed merely contains qualified covenants whether the mortgage should contain any others. *McKay* v. *Reed*, 1 Chy. Chamb. 208.—Spragge.

Where a mortgage has been settled by a master, and the party ordered to execute it objects to its form, it is not a proper mode of raising such objections to refuse to execute such mortgage, and to execute a mortgage differing from the one settled. *Ib.*

An incorporated company having executed a bond, which, though it contained no direct words of charge, was evidently intended to give a lien on the property of the company, it was held that the lien was sufficiently created. *The Town of Dundas* v. *The Desjardins Canal Co.*, 17 Chy. 27.

See, *Malloch* v. *McEwan*, 9 C. P. 467, p. 2335; *Miller* v. *Stitt*, 17 C. P. 559, p. 2305.

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2. *Mortgage or Purchase.*

(a) *Generally.*

An agreement between defendant and one S. recited that S. was the owner of the land in question, and had agreed to convey the same to defendant on payment of a certain sum on a day named, and that in default defendant should immediately cease to have any right to the land, and S. after giving a month's notice might sell, and after deducting the amount due and interest pay to defendant any surplus. Defendant then covenanted to pay said sum, and on payment thereof S. covenanted to convey to him; and S. also covenanted, in the event of a sale, to pay defendant any surplus. S. sold under the power, and conveyed to the plaintiff by deed, reciting the sale, and that he (S.) was the owner in fee of the land. The plaintiff, in ejectment, claimed under this deed. Per McLean, J., the conveyance to the plaintiff was open to objection as being executed by S. as owner in fee, while the agreement, though it recited his ownership, conveyed no estate to S. from the defendant, but was at most only a mortgage with power of sale. *Bartels* v. *Benson*, 21 Q. B. 143.

A person in indigent circumstances being entitled to a grant of land from the crown, had consulted a solicitor with a view of obtaining it. In the course of their transactions the solici wrote, "I think I can manage for you so eff tually that I can get your deed from governme probably through some assistance on my pa The client having executed an assignment, as alleged, by way of security to the solicitor, the patent for the land having been issued, solicitor set up the transaction as an absol purchase, in consequence of which the wife the plaintiff, acting as his agent, took steps assert her husband's claim, and procured assistance of her brother. After repeated ap cations the solicitor agreed to re-convey u being paid £170, asserted by him to be due. T the brother advanced and took a conveyanc the property, said to be worth £800, in his name, and then alleged he had purchased for own benefit. The court (Esten, V. C., di declared the deed to the solicitor a mortg only; that his assignee had in fact acted as ag of the plaintiff, and could not purchase for own benefit; and directed an enquiry as to tain points left in doubt by the evidence bef the court, and an examination of the solicit books, unless the purchaser would consent re-convey upon receiving back the amount by him to the solicitor. *McIlroy* v. *Hawk* Chy. 516.

The owner being indebted, conveyed his la to one M. for sufficient to pay off his liabilit without any reference to the value of the p perty, of which he remained in possession, sold to third parties, subject "to a conveya to the late Lieutenant-General Murray, inten to operate as a mortgage." It was proved t the avowed object of M. was to relieve the ow from his embarrassments, and secure his la from seizure; but the same having passed un the will of M. to trustees, one of them refu to allow a redemption except under a decree of court. The court considered that the evide clearly established the conveyance to have b given by way of security only, and that the dees had a right to redeem; that the trustee not acted unreasonably; and that one of the t tees being beneficially interested in the estate, cestuis que trust were sufficiently represente the suit. *Kerr* v. *Murray*, 6 Chy. 343.

In October, 1840, the holder of a bond the conveyance to him of real estate assig over the same to a creditor in payment of demand, the creditor paying at the same ti certain sum in cash, who two years after obta possession of the property by ejectment ag the debtor, who had in the interim been in ceipt of the rents. In December, 1855, debtor filed his bill, stating the transactio have been by way of mortgage only, and pra to be allowed to redeem. Issues were s quently directed as to the question of mort or no mortgage, and found in favour of the p tiff; after which, on further directions, a d for redemption was pronounced in favour o debtor, which on appeal was reversed, and bill in the court below ordered to be dism with costs; and Semble, that such a questi properly one of law, not of fact, and not as forms an issue to be tried by a jury. *W* v. *Monro*, 8 Chy. 60. *S. C.* in court bel Chy. 662; 6 Chy. 385.

T. and B. being sureties for W. for the ment of certain moneys to the City of To obtained from him a mortgage, with a pow

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court (Esten, V. C., diss.)
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Chy. 385.

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sale, by way of indemnity. Afterwards, having been obliged to pay certain money to the city, and being also liable to pay other sums on his account, they obtained from him an absolute deed for the nominal consideration of £1000, but in fact there was no money paid, and no accounting between the parties. Subsequently the owner of a prior mortgage instituted proceedings to foreclose, and on an application to extend the time for payment, T. made affidavit that the application was made as well on behalf of the mortgagor as on behalf of himself and B.; and it was also shewn that when the deed was signed T. stated that W. would retain his right to redeem, the object of the conveyance being merely to enable T. and B. to raise money to pay off the mortgagee, who was pressing, and other demands. On a bill filed by W. against B. and the representatives of T. (who had died in the meantime), alleging the transaction to have been by way of security only, and praying to be allowed to redeem, a decree was made as prayed, which on appeal was affirmed, notwithstanding the surviving grantee in the deed, B., swore that the conveyance had been made by W. for the purpose of absolutely releasing his interest in the lands conveyed (Draper, C. J., diss.). *Bernard* v. *Walker*, 2 E. & A. 121.

A married woman, the owner of a leasehold interest, with a right of purchase, joined with her husband in a conveyance thereof to a purchaser. The vendors afterwards filed a bill to declare the conveyance to have been by way of security only, and that the plaintiffs were entitled to redeem the same:—Held, affirming the decree of the court below, that there was not sufficient to cut down the absolute conveyance to a mortgage interest. *Sampson* v. *McArthur*, 8 Chy. 72.

A. held a bond for the conveyance of property, and assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., and C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely. A. having become bankrupt his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over, with liberty to C. to give such evidence upon payment of costs, unless the plaintiff should desire also to give evidence, in which case the cause was to stand over without costs. *Cherry* v. *Morton*, 8 Chy. 402.

On the 16th January, 1831, an absolute conveyance was made by A., in fee, to secure a loan, the grantor remaining in possession until the spring of 1841. On the first of March, 1841, the alleged mortgagee wrote to a subsequent mortgagee on the same property, claiming £93 as due from A., and on the 7th and 21st of June, of the same year, he again wrote to the same incumbrancer, alleging that he had originally advanced about £60, which, with interest, then amounted to £90 or £100, and suggesting that the land should be sold for the benefit of A., against whom he kept an account in his books of principal and interest in respect of the alleged debt up to the 1st of January, 1856. The subsequent incumbrancer purchased the equity of redemption. Upon a bill filed by such mesne incumbrancer in February, 1861, to redeem the premises against the representatives of the alleged mortgagee, the court—Held, that the letters took the case out of the Statute of Frauds; and that the plaintiff was not barred by the Statute of Limitations. *Malloch* v. *Pinhey*, 9 Chy. 550.

The plaintiffs executed an absolute assignment of their interest in real estate, and the assignee gave his note for £500, which he alleged to be the consideration, payable in two years, subject to a condition expressed in the note, that the maker might retain thereout any advances he should in the meantime make to the assignors. No change of possession within the two years was intended, and none took place. The assignee alleged that the transaction was a sale to him with a right to the assignors to re-purchase by re-paying any advances he should make within two years; but no evidence of this being given, the court held that the transaction must be treated as a mortgage. *Fallon* v. *Keenan*, 12 Chy. 388.

A conveyance absolute in form, but intended as a security, was made by the owner of real estate. The sum secured was paid, but no reconveyance executed. The owner, however, was always permitted to deal with the estate as his own, and mortgaged it with the knowledge of the person holding the legal title, who, after the death of the mortgagor, brought ejectment, claiming under the absolute conveyance. The court restrained the action, and ordered the plaintiff therein to pay the costs in this court. *Cayley* v. *McDonald*, 14 Chy. 540.

Where a deed was absolute in form, and the alleged consideration was, in part, promissory notes theretofore held by the grantee against the grantor, the fact of those notes being left with the grantee, is not alone sufficient to prove that the deed was intended as a mortgage. *Healey* v. *Daniels*, 14 Chy. 633.

In a suit to declare a deed absolute in form to be a mortgage, and to restrain an action of ejectment against the plaintiff, it appeared that at the date of the commencement of the action the plaintiff was in arrear for payments of interest to the defendant upon the agreement entered into between them when the deed was given:—Held, that the plaintiff was not entitled to six months for payment of the arrears and costs. *Dornyn* v. *Fralick*, 21 Chy. 191.

See *Aitchison* v. *Coombs*, 6 Chy. 643, p. 2364; *Glass* v. *Hackleton*, 10 Chy. 470, p. 2367; *Monk* v. *Kyle*, 12 Chy. 537, p. 2305; *Moore* v. *Hobson*, 14 Chy. 705, p. 2367; *Roach* v. *Landy*, 19 Chy. 243, p. 2364.

(b) *Absolute Conveyance with Contract to Re-convey or Repurchase.*

A. having purchased land, and paid several instalments, but received no deed, assigned his right to B., taking a bond from him that if he should obtain the deed, on the payment by A. to him of £100, in two years, he would convey to A.:—Held, on ejectment by B., the two years having expired, that A. could not treat the bond as a mortgage, and redeem under the act. *Doe d. Shannon* v. *Ross*, 5 O. S. 484.

A lessee of the crown, being in arrear for rent, assigned his interest to another, taking a bond to re-convey one-half thereof, on payment of half

the amount advanced, within a year. After the year the assignee refused to convey, alleging that the transaction was a conditional sale. Upon a bill filed to redeem, the court held that the transaction was primâ facie one of mortgage; and the party alleging it to be a sale having failed to prove it so, a decree was made for redemption. *Bostwick* v. *Phillips*, 6 Chy. 427.

When an agreement not under seal was entered into by a mortgagee, who obtained from the mortgagor a deed of certain property, whereby the mortgagor was allowed to retain possession of a portion of the property, and the mortgagee the other portion until he was paid, such agreement having been destroyed by the mortgagee, and ejectment brought on the deed, the court restrained the mortgagee from enforcing his legal right. *Harris* v. *Meyers*, 7 L. J. 243.—Chy.

On application for a loan upon real estate, the party applied to refused to lend, but offered to purchase the land, which proposal the owner refused. About two weeks after, the owner consented to sell for £400, provided the purchaser would give a bond to re-convey on payment of £512 at the end of two years, and a deed and bond were executed accordingly. When the time for payment was approaching, the purchaser assented to an extension of the time on certain terms, which were not finally carried out. Afterwards the purchaser sued the vendor upon his covenant for good title, and usury was pleaded, which the verdict negatived:—Held, that the transaction was one of sale, with a right to re-purchase, and not of mortgage. *Bullen* v. *Renwick*, 8 Chy. 342. But

On a re-hearing, the deed was declared to have been made as security only, the bond to re-convey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof. *S. C.* 9 Chy. 202.

Where there was a conveyance of land upon an advance of money, and a bond given by the lender to re-convey at the end of a year upon payment of the sum advanced, and an additional sum calculated upon the value of the money for that time, the transaction was held a mortgage, notwithstanding the instrument expressed it a sale and purchase. *Fink* v. *Patterson*, 8 Chy. 417.

Certain trustees conveyed to A. and took back from him a covenant to erect buildings on the property to the value of £2,000, or in default that he would re-convey:—Held, to be a mortgage for £2,000, and that subsequent purchasers and incumbrancers were entitled to redeem. *O'Reil'y* v. *Wilkes*, 8 L. J. 135.—Chy.

In April, 1830, A., the owner of real estate, owing B. £121, and unable to pay, procured two sureties to join him in a bond for the amount, and to indemnify them conveyed several valuable lots of land by a deed absolute in form, taking back a bond of defeasance. Ten days afterwards one of the sureties delivered to B. a promissory note of two other persons for about one-half the debt and interest, and in May of the following year, A. being still unable to pay, and his sureties desiring to be relieved from liability, it was arranged between A. and B. that A. should convey certain of the lands, which had been so transferred to the sureties, to B., which was accordingly done by an absolute deed, and the bond cancelled; B. at the time giving back this memorandum signed by himself; "Received of Mr. A. McDonell lands as follows," (enumerating them part being cultivated, the rest waste lands) "for the sum of £126.5s.;" (this being the original debt and interest) "Should he want the above property I should have no objection to giving it back, if Mr. McDonell would pay me the above sum, in three instalments, viz.," (setting out the several instalments,) "with interest from this date." A. was then in possession and occupation of the cultivated lands, and also in possession of the wild lands, and so continued until 1848, when B. brought ejectment for the cultivated lands, and obtained possession in 1849. About the same time (1849) other creditors of A. had obtained judgment and execution against him under which his interest in these lands was sold in 1850, and purchased by B. through an agent. In the books of B. (for the year 1849) entries were found charging A. with interest on the amount from 1831 to 1849. B. never gave credit for the amount of the promissory note received by him, nor did he produce it or account for it in any way. In 1860 a bill was filed by A. claiming a right to redeem, and a decree for redemption was made. On appeal:—Held, Draper and Richards, C.JJ., and Morrison, J., diss., affirming the decree: 1. That, under the circumstances stated, the deed to B., together with the memorandum signed by him, operated as a mortgage security only; 2. That the circumstances appearing were such as did not warrant the court in its discretion in refusing redemption under the provisions of the 11th clause of the Chancery Act; 3. Following McCabe v. Thompson, 6 Chy. 175, that the security of B. having been created by deed absolute in form, the right or interest of A. therein was not saleable by the sheriff under common law process; 4. That the Dormant Equities Act did not apply; 5. That under the circumstances, the lapse of twenty years since the time appointed for payment did not bar A.'s right to redeem. *McDonald* v. *McDonell*, 2 E. & A. 393. The decree below is reported at *Ib.* 399.

A mortgagee took a release of the equity of redemption, and thereupon an agreement was signed by both parties for the purchase of the property by the grantor for a sum exceeding the amount due on the mortgages, not giving the grantor a mere option to purchase, but binding him to buy and pay the stipulated price:—Held that the transaction was one of mortgage. *Hawke* v. *Milliken*, 12 Chy. 236.

The distinction between a mortgage and an absolute sale with a contemporaneous agreement for repurchase explained; and an absolute conveyance held to be of the latter character rather than the former, on the weight of evidence which was conflicting. *Rapson* v. *Hersee*, 1 Chy. 685.

In 1838, A. having a life-estate in certain land, his wife having the remainder in fee, and being also owner in fee of property adjoining, and executions against his lands at the suit of B. and others being in the sheriff's hands, A. and his wife agreed verbally with B. that B. should purchase at the sheriff's sale; and that they also would convey to B., who should re-sell to them. Accordingly B. bought at the sale, and A. and

his wife conveyed to B., but the wife was not examined before magistrates until 1841. When this omission was supplied two bonds were executed, one by B., for re-selling the property to A. and wife on payment of the money (the amount of the executions), and the other by A. and wife for payment of the money; they agreeing that on default they would give up possession, and that any intermediate payments should be retained by B. as rent. In 1842 new bonds to the same effect were exchanged, naming a larger sum, in order to cover some further advances which B. had meanwhile made to A. A. and wife remained in possession until default, and were then ejected. After A.'s death his widow filed a bill to redeem, claiming that the parties were in effect mortgagors and mortgagee. VanKoughnet, C., so held, and made a decree for redemption, but the decree was reversed in Appeal (Spragge, C., diss.). *Monk* v. *Kyle*, 17 Chy. 537.

See *Clarke* v. *Little*, 5 Chy. 363, p. 2364; *McCann* v. *Dempsey*, 6 Chy. 192, p. 320; *Robertson* v. *Scobie*, 10 Chy. 557, p. 2365.

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3. *Other Cases.*

Under sec. 2 of 8 Vict. c. 45, all sales of real and personal property made on a Sunday are void. *Lai* v. *Stall*, 6 Q. B. 506.

Semble, that mortgages would not be void. See *Wilt* v. *Lai et al.*, 7 Q. B. 535.

On an advance of money on the security of real estate, the lender cannot bargain for the purchase of the property at a specified sum in case of default in repaying the advance at the time stipulated. *Fallon* v. *Keenan*, 12 Chy. 388.

III. Equitable Mortgages.

In ejectment plaintiff claimed under a sealed instrument executed in his favour by one M., and witnessing that in consideration of prior indebtedness for professional services, and to secure plaintiff for future services of the same kind, and of the sum of £25 already paid and advanced by plaintiff to him, &c., he M. covenanted, granted and agreed that he would stand seised and possessed of the land in question to the use of plaintiff, his heirs and assigns, by way of charge, security and mortgage on the land, for said moneys and costs; and when plaintiff's costs were taxed he was to be at liberty to hold the instrument as and by way of a charge, mortgage and security upon the land for the amount so to be ascertained, or M. would; and M. covenanted that he or his heirs would, on demand, execute a good and sufficient mortgage in law, with bar of dower, if necessary, and usual covenants, &c. Semble, that effect would be given to the whole instrument, and the real intent of the parties carried out, by holding that it was to operate as a charge, security and mortgage in equity on the land until plaintiff's claim was ascertained by taxation, and so continued as an equitable charge, unless plaintiff desired a legal mortgage, which in that case M. covenanted to execute. Quære, whether plaintiff took the legal estate, so as to enable him to maintain ejectment. *Miller* v. *Stitt et al.*, 17 C. P. 559.

Where a mortgage was created by the deposit of mortgages, and the borrower signed a memorandum stating the sum loaned and times for repayment, and agreeing to execute a writing to enable the lender to transfer or control the mortgages so deposited:—Held, that this memorandum did not require registration, not being, in the language of C. S. U. C. c. 89, sec. 17, "a deed, conveyance or assurance affecting lands." *Harrison* v. *Armour*, 11 Chy. 303.

A., the equitable owner of property, had it conveyed to his son, a minor, in trust for A. himself. A. afterwards signed the son's name to a mortgage of the property to a creditor, and added his own name as witness:—Held, that the instrument, though void at law, created a valid charge in equity. *Dennistoun* v. *Fyfe*, 11 Chy. 372.

A subsequent incumbrancer is entitled to a sale upon the usual terms, where the plaintiff is an equitable mortgagee by deposit of title deeds, as well as when the mortgage is by deed. *Kerr* v. *Bebee*, 12 Chy. 204.

An equitable mortgagee is after default entitled to a receiver where the mortgagor is in possession, whether the security is scanty or not; and he need not make a prior mortgagee who has the legal estate a party to the suit. *Aikins* v. *Blain*, 13 Chy. 646.

Where mortgages are deposited as security for advances, and the mortgagor subsequently acquires the equity of redemption, the depositee's lien on the property is not confined to the amount of the mortgages. *Jones* v. *Bank of Upper Canada*, 13 Chy. 74.

The customer of a bank created a mortgage in favour of it by deposit of title deeds. In a suit to realize the security, the debtor swore that the deposit had been made to secure certain future advances, all of which had been paid. The officers of the bank, on the other hand, swore that the security was required by the bank and given by the debtor to secure all his indebtedness, past as well as future, and a memorandum indorsed, at the time of the deposit, on the envelope containing the deeds was to the same effect. The court, in the view that the deposit, if made as alleged by the bank, was lawful, while if made for the purpose stated by the debtor it would have been illegal, decreed in favour of the bank with costs. *Royal Canadian Bank* v. *Cummer*, 15 Chy. 627.

V. Payment—Satisfaction—Discharge—and Merger.

1. *What Constitutes Payment.*

In this case, the defendant, the mortgagor, being unable to pay off plaintiff's mortgage, at the suggestion of the plaintiff's attorney borrowed the required amount from the moneys of another client in the attorney's hands, with which the attorney was to pay off the plaintiff's mortgage, the defendant giving another mortgage therefor. Quære, whether this arrangement amounted to a payment of the plaintiff's mortgage to the attorney. *Palmer* v. *Winstanley*, 23 C. P. 586.

M. mortgaged lot 11 to Y. for £50; he then also holding a lease renewable in perpetuity

of lot A. at a rental of £4 per annum. The rent being in arrear, judgment was obtained and execution issued by the lessor against M. therefore. Y. then agreed with M. to pay this execution, M. to assign to him the lease of lot A. : and further, it was agreed that if the lessors " will give to the party of the first part (1) a deed in fee simple, or a lease perpetually renewable at the present rent, he, the party of the first part, will discharge and release a mortgage," &c., being that above mentioned. Y. afterwards obtained a conveyance from the lessors of lot A. ; but it did not appear that it was made for the sum contemplated at the time of the agreement between Y. and M. Y. afterwards pressed for payment of the mortgage debt, when M. made excuses for delay, and did not rely on the agreement as a bar to Y.'s claim. Y. having brought ejectment on his mortgage, M.'s bill to stay it, and to have the agreement and subsequent purchase by Y., construed into a satisfaction of the mortgage debt, was dismissed with costs. *McKenzie* v. *Yielding*, 11 Chy. 406.

A tenant in possession being mortgagee of the property, and indebted to the mortgagor under an award in a sum exceeding the amount due under the mortgage, a settlement was effected, whereby the mortgagor agreed to discharge the amount due under the award, and also the mortgagee $100 to go out of possession, though not distinctly shewn, yet the circumstances induced the belief that the arrangement embraced a discharge of the mortgage debt, and the court dismissed a bill of foreclosure filed by the mortgagee several years afterwards. *Fair* v. *Tate*, 13 Chy. 160.

Where a purchaser of the equity of redemption paid the amount found due to plaintiff, it was held that this was a payment by defendant, or some one on his account, and the final order of foreclosure was set aside. *Reid* v. *Cooper*, 2 Chy. Chamb. 90.—Spragge.

See *Cameron* v. *Knapp*, 7 C. P. 502, p. 2330; *Knapp* v. *Cameron*, 6 Chy. 559, p. 2331.

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2. *Presumption and Proof of Payment.*

When the mortgagor is in possession, a mortgage may be presumed satisfied when twenty years have elapsed from the time of the payment of the mortgage money. *Doe* d. *McGregor* v. *Hawke, and Doe* d. *McGregor* v. *Crow*, 5 O. S. 496. See, also, *Doe* d. *Dunlop* v. *McNab*, 5 Q. B. 289.

Where there is no re-demise to the mortgagor until default in payment of the mortgage moneys, and the land is vacant at the time of the execution of the mortgage, Semble, that the mortgagee being under such an instrument deemed in possession of the land by operation of law, the presumption of payment of the mortgage moneys after the lapse of twenty years does not arise, even though the mortgagee has never made an actual entry, nor received any payment on account of the mortgage (A. Wilson, J., diss.) The mere fact that the mortgagee is barred by the Statute of Limitations of his remedy on the covenant for the recovery of the money will not establish a payment, so as to re-convey the legal title to the mortgagor. *Mahar et ux.* v. *Fraser et al.*, 17 C. P. 408.

In a petition under the act for quieting title a mortgage more than twenty years old appeared on the registrar's abstract. A discharge of the did not appear to have been registered. Nor was produced, nor was any proof given of the mortgage ever having been discharged. It was stated on affidavit that nothing was known of the mortgagees, and that no demand had ever been made for the mortgage debt, though nothing had been paid, and that no acknowledgment had been given within twenty years or more:—Held that evidence should be adduced of search for the mortgagees or their representatives : that a single ex parte affidavit that no payment or demand had taken place would not bar claims of mortgagees who could be served with notice, but if they could not be found notice might be dispensed with after a great lapse of time, and satisfaction presumed. *Re Caverhill*, 8 L. J. N. S. 50.—Chy. Chamb.—Mowat.

In a suit for the recovery of mortgage money the question between the parties was, whether the mortgage money had been paid ; both parties offered evidence at the hearing, and the court received the same and adjudged thereon without a reference. *Bacon* v. *Shier*, 16 Chy. 485.

In 1859 a mortgage was transferred to secure several notes of the mortgagee, one of which was, about fourteen years afterwards, found in the hands of the assignee of the mortgagee, and he conjointly with M., who claimed to be entitled to the note, filed a bill to foreclose. The mortgagor and mortgagee both testified that they thought, and had for many years been under the impression, that the whole claim under the assignment had been paid : that the plaintiff, M., was not interested in this note, and that the same had, through oversight, not been delivered up. The attorney who had acted for M. having sworn that this note was the one in which M. was interested, and that it had never been paid the court, in view of the fact that the mortgage and note were both found in the hands of the assignee, and that no demand during so many years had been made for their discharge, pronounced the usual decree in favour of plaintiff. *Scatcherd* v. *Kiely*, 21 Chy. 30.

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4. *Executors and Administrators.*

The C. S. U. C. c. 87, sec. 5, only authorizes executors to convey the legal estate on payment of the mortgage debt, not to a purchaser from them. *Hunter* v. *Farr et al.*, 23 Q. B. 32. *Robinson* v. *Byers*, 9 Chy. 572.

One of two executors was indebted to the estate on a mortgage given to their testator, which fact his co-executor was aware, but took no steps to compel payment ; and the mortgagor, as executor, executed a discharge of the mortgage under the statute, and registered the same :—Held, that the co-executor was liable to make good any loss occasioned to the estate thereby. *McPhadden* v. *Bacon*, 13 Chy. 591.

Quære, whether the discharge, to be valid, did not require the signatures of both executors.

Under 31 Vict. c. 20, sec. 62, O., one of several executors can alone execute a valid discharge of a mortgage. *Ex parte Johnson*, 6 P. R. 2. —Chy. Chamb.—Blake.

A foreign administrator cannot effectually release a mortgage on land in this Province. Payment to him, and a release by the heirs, are not sufficient to entitle the owner to a certificate of title, free from incumbrances, under the Act for Quieting Titles. *In re Thorpe*, 15 Chy. 76.

A mortgagee appointed the mortgagor one of his executors; and the mortgagor became the acting executor. The mortgagor afterwards agreed with B., the owner of other property, for an exchange free from encumbrances, and that B. should pay $2,000 for the difference in value. The mortgagor had endorsed on the mortgage certain sums as paid by him thereon after the mortgagee's death, reducing thereby the amount appearing to be due on the mortgage to $1,600, no part of which, however, was payable. B. satisfied the $1,600, partly in money paid to the mortgagor, partly by a debt owing to B. by the mortgagor, and partly by moneys which had theretofore been lent by B. for the purposes of the mortgagee's estate, and the mortgagor thereupon indorsed on the mortgage a receipt for $1,600 in full. The contemporaneous payment of money was with the assent of the other executor. It afterwards appeared that the mortgagor was largely indebted to the mortgagee's estate at the date of all these transactions:—Held, that the contemporaneous payment was a valid payment pro tanto, the same having been made with the assent of the co-executor; but that the estate, or the co-executor, was not bound by the receipts endorsed on the mortgage; and that B. was not entitled to credit, as against the estate, for the private debt due to him by the mortgagor, nor for his antecedent loan. *Bacon* v. *Shier*, 16 Chy. 485.

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5. *Attorney or Agent.*

A discharge of mortgage was executed under a power which, after authorizing the attorney to sell the principal's lands and give receipts for the consideration money, gave power, upon payment of all or any debts, to give proper and sufficient acquittances and discharges for the same:—Held, sufficient authority to sign the statutory certificate. *Lee et al.* v. *Morrow*, 25 Q. B. 604.

Held, that an authority by plaintiff to his attorney to collect the interest due on a mortgage in the plaintiff's, and not in the attorney's, possession, did not entitle the attorney to receive payment of the principal. *Palmer* v. *Winstanley*, 23 C. P. 586.

A. had authority to collect rent, and to contract for the sale of property, and to receive the down payments:—Held, that such authority did not entitle him to receive payments on a mortgage given for the unpaid purchase money. *Greenwood* v. *Commercial Bank*, 14 Chy. 40.

Where such an agent had at one time, without authority, received some payments on such mortgages, which the principal did not publicly repudiate, and another mortgagor, who did not appear to have had notice of these payments, made a payment to the agent, on his mortgage, fourteen months after the agent had ceased to receive any mortgage money, such payment was held to be not a good payment. *Ib.*

See *Palmer* v. *Winstanley*, 23 C. P. 586, p. 2306.

6. *Conveyance of Mortgagee's Interest.*

Defendant, being seized in fee of land, mortgaged it to H. in 1867. In January, 1868, an attachment in Insolvency issued against him, and in May following he gave a second mortgage to the plaintiff. H. filed a bill to foreclose W., defendant's assignee in insolvency, and the Master's report in the suit treated the plaintiff as an encumbrancer. The plaintiff assigned his mortgage to H., and W. assigned the equity of redemption to G. Pending the foreclosure suit, but after the report had become absolute, G. paid to H. part of the money due on defendant's mortgage, and received an assignment from him and a release of the land from this mortgage. It was contended that H. having disabled himself from reconveying to defendant, could not as beneficial plaintiff recover from him the balance of the mortgage money; but—Held, otherwise, for defendant having conveyed nothing by the mortgage, his equity of redemption being then vested in W., could have nothing to get back. The replication setting out the facts above stated having been proved:—Held, that the plaintiff should have had a verdict, without reference to its validity in law as an answer to the plea. *Ryan* v. *Wilson*, 32 Q. B. 553.

Where, after the mortgagor had assigned his equity of redemption, the mortgagee, with the concurrence of the assignee, by sale and transfer of the mortgaged premises, put it out of his power to reconvey on redemption by the mortgagor, it was—Held, that he could not call upon the mortgagor for payment of any deficiency resulting upon such sale of the estate. *Burnham* v. *Galt*, 16 Chy. 417.

If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if at the time of bringing the action he has paid off the mortgage created by himself, and is in a position to reconvey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing. Gowland *v.* Garbutt, 13 Chy. 578, observed upon. *Mansen* v. *Hauss*, 22 Chy. 279.

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7. *Release of Part of the Premises.*

A mortgagor conveyed part of the mortgaged property to a purchaser, the mortgagor covenanting against incumbrances; and the mortgagee subsequently released the part so sold from his mortgage:—Held, that, as the release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the mortgaged property. *Crawford* v. *Armour*, 13 Chy. 576.

Where a mortgagee and mortgagor sold and conveyed part of the mortgaged property, without the concurrence of a person to whom, subsequently to the mortgage, the mortgagor had sold the remainder of the property, and whose interest was known to the mortgagee; and the mortgagee covenanted for freedom from incumbrances:—Held, that, the mortgagee having thereby put it out of his power to re-convey the whole of the mortgaged property, he could not call on the owner of the remaining portion for payment of

the balance of the mortgage money. *Gowland* v. *Garbutt*, 13 Chy. 578.

This rule does not apply where the sale is under a power contained in the mortgage, or where the mortgage is of chattels, which a mortgagee has a right to sell without any express power. *Ib.*

But it applies to a sale under a decree in a suit to which the owner of the unsold portion was no party. *Ib.*

Where the mortgagee's right to claim a lien on the unsold portion has thus been put an end to, it is not revived by his, two years afterwards, obtaining the consent of the first purchaser to a reconveyance on payment of the mortgage money. *Ib.* See, also. *Guthrie* v. *Shields*. *Ib.*, 585, (note.)

Possession by an adverse claimant is no notice of his interest, to a party parting with the estate. A mortgagor sold one of the mortgaged parcels, and the purchaser went into possession; the mortgagees afterwards, having no notice of the sale, released the other parcels to the mortgagor, retaining the mortgage on the sold parcel; upon which the purchaser of that parcel filed a bill to have it declared that by the release his parcel was discharged from the mortgage:—Held, that he was not entitled to such relief; and that, not having offered to redeem, his bill should be dismissed with costs; but the defendants having prayed a foreclosure in default of payment, a decree to that effect was pronounced. *Beck* v. *Moffatt*, 17 Chy. 601.

First mortgagees with a power of sale released portions of the mortgaged property to the mortgagor:—Held, that this did not give priority to a subsequent incumbrancer, with respect to the remainder of the property; but might render the first mortgagees responsible to the second for the fair value of the parcels released. *The Trust and Loan Co. of Canada* v. *Boulton*, 18 Chy. 234.

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8. *Sale of the Equity of Redemption.*

A. mortgaged lands to Z. and the defendant, and the defendant assigned his interest therein to Z., covenanting by the same instrument for the punctual payment by the mortgagor of one-half of the principal and interest. To an action on this covenant by the executors of Z., defendant pleaded that a judgment had been recovered against the mortgagor on said mortgage, for the benefit of Z., who afterwards devised all his real estate to the plaintiffs, and that the equity of redemption having been duly sold under said judgment, was purchased by the plaintiffs as such executors and devisees, and conveyed to them by the sheriff, whereby the debt became satisfied, and defendant was discharged. In another plea it was alleged that the equity of redemption was purchased by M., one of the plaintiffs, and the conveyance thereof taken to him for the benefit of himself and the other plaintiffs, as such executors and devisees:—Held, 1. That the plaintiffs, as devisees of Z., were assignees of the mortgage within 12 Vict. c. 73, and that the purchase by them of the equity of redemption must have the same effect as if it had been by Z. in his lifetime; 2. That the effect of the statute was to work a satisfaction of the mortgage, though the provision is merely that the mortgagee, &c., buying, shall give a release to the mortgagor; and, Semble, that the defendant, instead of setting out the facts, might have pleaded payment in the ordinary form; 3. That upon the facts stated in the second plea, the case must be looked upon as if all the executors had been purchasers; 4. That the mortgage being satisfied, defendant was also discharged from his covenant; and therefore, that the second plea (which was demurred to) shewed a good defence. *Woodruff et al.* v. *Mills*, 20 Q. B. 51.

One C. gave a mortgage, on which a covenant by one S. was endorsed as security for the interest. C. having made default, the mortgagees recovered judgment on the mortgage, and under a fi. fa. lands sold C.'s equity of redemption. S. having been called upon under his covenant, his executor sued C., the mortgagor, in this action, for indemnity:—Held, that under the facts as stated, the sale of the equity of redemption did not operate as a release of the mortgagor, nor of his surety, nor of defendant's liability to indemnify his surety. *Stewart* v. *Clark*, 13 C. P. 203.

Property which was subject to a mortgage, having been allowed to run into arrear for taxes, was offered for sale by the sheriff, under the wild land assessment law, at which sale the mortgagee became the purchaser, and subsequently obtained the usual conveyance from the sheriff. The mortgagee afterwards instituted proceedings against the mortgagor, to enforce payment of the mortgage money and interest, whereupon the mortgagor filed a bill in this court to restrain the action so brought against him, asserting that the sale by the sheriff had the effect of discharging him from all further liability in respect of the mortgage debt. The court, under the circumstances, refused the application, the effect of such purchase by the mortgagee being not greater than a decree of foreclosure, where, if after a final decree the mortgagee proceeds to enforce payment of the mortgage money, it will open up the foreclosure: and, Semble, that after such a sale the mortgagor might have treated the mortgagee as liable to be redeemed, and have filed his bill for that purpose. *Smart* v. *Cottle*, 10 Chy. 59.

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9. *Merger of Mortgage Debt.*

The plaintiff brought ejectment on the 6th September, 1865, claiming under a mortgage from W., the then defendant, in whose place M. was allowed to defend as landlord, claiming under a mortgage from W. to McI., assigned to him. The mortgage to McI. was given on the 9th of November, 1861, and that to the plaintiff on the 21st of March, 1864. On the 21st of September, 1865, McI. by deed reciting an interlocutory decree in Chancery in respect of the foreclosure of W.'s mortgage to him, conveyed to M. as W.'s appointee, and on the 9th of November, 1865, by a decree in the same suit, this mortgage was finally foreclosed. It was contended that the mortgage to McI. had merged in the inheritance, and could not be set up against the plaintiff, but—Held, that if it were so the plaintiff could not recover, for when he brought his action he was barred by the mortgage, and he could not avail himself of what took place afterwards

It was proved that the defendant, in April or May, 1865, asserted that he had got a deed of the equity of redemption from W.:—Held, however, that this might refer to the equity as created by the second mortgage, and that the defendant was not estopped from denying W.'s title to mortgage in fee in 1864. *McKay* v. *McKay*, 25 Q. B. 133.

Declaration on a covenant to pay money. Plea, that the plaintiff sold a vessel to defendants, and the deed containing the covenant sued on was a mortgage and reconveyance thereof to the plaintiff to secure the purchase money; that while the plaintiff was such mortgagee, the vessel, and all defendant's interest therein was sold, and the plaintiff became, and is, the absolute owner of said vessel, whereby said mortgage became merged and satisfied. Equitable replication, that the vessel was seized and libelled for wages due to her crew, and condemned and sold in Detroit, in the United States, under the admiralty law there, and the plaintiff purchased her for about $2,300: that she was so sold without plaintiff's privity or consent: that by the foreign law the purchaser acquires an absolute and paramount title thereto, and purchased at the sale as any stranger might, and thereby bought the same absolutely, and not merely the interest or equity of redemption of the defendants, therein as in the plea alleged; and that he holds the same by title paramount, and not as a mortgagee having purchased the equity of redemption thereof; and that said mortgage did not thereby become merged and satisfied as alleged:—Held, on demurrer, that defendant was not liable, for that the mortgagee could not sue for the mortgage money, while asserting his right to the property mortgaged wholly independent of any title derived from the mortgagor, and without any right to redeem. *Parkinson* v. *Higgins et al.*, 37 Q. B. 308.

The replication, having been amended after the judgment on the previous demurrer, alleged that the vessel, being a British ship, was seized for wages due to the crew and sold at Detroit, in the United States, solely through defendant's default: that by the law of the United States the wages formed a lien prior to the mortgage, and the plaintiff, wholly to protect himself, and not to gain any advantage over defendant, became the purchaser: that he offered, and was always willing, to re-convey and deliver her to defendants on being paid the mortgage money and the money paid by him at such sale, which defendant refused to pay: that the plaintiff, having possession of the vessel, insured her, and on her loss by the perils of the sea received the insurance money, which the plaintiff is, and always has been ready to apply on the purchase money:—Held, on demurrer, affirming the judgment of Gwynne, J., a good replication, and that the plaintiff, under the circumstances stated, was not precluded from recovering on the covenant. *S. C.*, 40 Q. B. 274.

Where a third mortgagee, who took without notice of the second mortgage, obtained an assignment to himself of the first mortgage after he had notice of the second, and then purchased the interest of the mortgagor:—Held, the second mortgage was the only subsisting incumbrance on the property. *Emmons* v. *Crooks*, 1 Chy. 159.

L. purchased from S., who conveyed to him, and immediately took back a mortgage to secure the purchase money, in which L.'s wife did not join. L. afterwards conveyed his equity of redemption to H., who subsequently conveyed to S., and S. then sold to another party. L. having died, his widow sued at law for dower. A bill was filed, praying an injunction to stay the action, and for a declaration that the widow was, under the circumstances, not entitled to dower:—Held, that the mortgage was not extinguished as a charge on the purchase of the equity of redemption by S. from H., or merged in his legal estate. Per Esten, V. C., the question of merger is one of intention; in the absence of evidence of intention, the court will consider that course selected by the purchaser which was most for his benefit; and that in this case the mortgage became merged in S.'s estate; that the plaintiff had no equity to restrain the action for dower, and that the bill should be dismissed. *Henry* v. *Low*, 9 Chy. 265.

Where a derivative mortgagee took a conveyance from the original mortgagors, and there was no express stipulation as to whether there should be a merger or not; but the conveyance taken from the mortgagors was therein declared to be made in consideration of the settlement of a suit of foreclosure between the parties to the deed, and in satisfaction of the grantee's lien, claim, and interest on the property, and subject to the lien and interest of the original mortgagee; and the grantee gave to one of the mortgagors a bond of indemnity against any claim of the original mortgagees against him in respect of the original mortgage debt:—Held, that the debt to the grantee (the derivative mortgagee) was at an end, and that the balance due to the original mortgagee was the only charge on the property. *Finlayson* v. *Mills*, 11 Chy. 218.

Where a mortgagee of lands buys up the equity of redemption, taking a conveyance to himself, his charge will merge or not, according to the bargain between the parties at the time of his obtaining the transfer. *Finlayson* v. *Mills*, 11 Chy. 218. See *Barker* v. *Eccles*, 18 Chy. 440, p. 2348.

Premises having been twice mortgaged, were sold at sheriff's sale to S., who afterwards obtained an assignment to himself of the first mortgage:—Held, that he might still claim the sum due on the first mortgage, no merger having taken place. Semble, that in this respect our law is more favourable to S.'s position than English law would be. *Elliott* v. *Jayne*, 11 Chy. 412.

C. being the sixth mortgagee, filed his bill against the holder of the equity of redemption and other incumbrancers. The prior mortgagees were not parties to the suit. A sale having been directed, was conducted by the solicitors for one of the defendants, and C. purchased the premises for less than his mortgage debt. The conditions of sale contained the following clause: "The said premises will be sold, subject to prior mortgage incumbrances, amounting in the aggregate to the sum of £1,831." C. then bought up the three first mortgages and had them assigned to a trustee for his benefit, and in other respects shewed his intention to retain them as outstanding liens. He also negotiated for time with the holders of the fourth and fifth mortgages, pro-

posing as part of the terms to treat the first three mortgages as discharged. These negotiations failed. G., the fifth mortgagee, redeemed the fourth and foreclosed C. as owner of the equity of redemption. The three first mortgages, having been assigned to the plantiff:—Held, on a bill by him on them, against G., that these three mortgages had not merged in C.'s equity of redemption, and that the negotiations between him and the present holders of the equity of redemption having proved abortive, could not be set up to bar the right of action of C. and his assignee upon these mortgages. *Beaty* v. *Goodcrham*, 13 Chy. 317.

Covenant on a mortgage, Plea, that defendant conveyed to the plaintiff his equity of redemption in the land mortgaged, which the plaintiff accepted in satisfaction of the claim. It appeared that when the plaintiff commenced this action, defendant offered to convey the land in satisfaction of the debt, but the plaintiff declined. His attorney afterwards, hearing that one G. would buy the land and pay the mortgage, told the plaintiff, who said it was all the same to him from whom the money came, and at G.'s wish, the deed was made by defendant to the plaintiff instead of to G., and left with the attorney. Afterwards, however, it appeared that G. had referred to another lot owned by defendant, and he refused, therefore, to carry out the agreement:—Held, that the plea was not proved. *Haar* v. *Henley*, 18 Q. B. 494.

Under the 14 & 15 Vict. c. 45, (C. S. U. C. c. 87,) a mortgagee has a right to get in the equity of redemption in any way without thereby merging his security, and thus enabling a puisne incumbrancer to compel him to pay off such puisne incumbrancer's claim. Therefore, where a first mortgagee took from the mortgagor a release of the equity of redemption, the consideration therefor being expressed to be the amount due on the mortgage for principal and interest, "and in satisfaction thereof," to the intent that the mortgagee "may hereafter hold and enjoy the said land and premises * * * freed from the proviso of redemption"; and the mortgagor covenanted for further assurance, and that he had done no act to incumber:—Held, reversing the decree below, 21 Chy. 242, that the security of the first mortgagee was not thereby merged, and that the only relief a subsequent incumbrancer was entitled to, was that of redeeming the first mortgagee.—Strong, J., diss. *Hart* v. *McQuesten*, 22 Chy. 133, in Appeal.

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11. *Certificate of Discharge.*

The registrar is bound to register or file a certificate, or discharge of a portion of the lands contained in a mortgage. *In re Ridout, Registrar of the United Counties of York, Ontario, and Peel*, 2 C. P. 477.

Semble, that the certificate of the registrar of the discharge of a mortgage, endorsed on the mortgage deed, is a sufficient evidence of a reconveyance under the statute, without shewing the execution of the discharge itself. *Doe* d. *Crookshank* v. *Humberstone*, 6 O. S. 103.

Held, that a discharge of mortgage, not being under seal, was not an estoppel as to the fact of payment. *Bigelow* v. *Staley*, 14 C. P. 276.

In an action by vendor against vendee on a agreement to purchase land, the question was whether the vendor had a good title. It ap peared that there were two mortgages upon th land, both paid; of the one an entry of discharg had been duly made in the registry office, of th other a certificate of discharge had been signe but not recorded:—Held, that from the entr by the registrar the certificate, which was no produced, must be assumed to have been in pro per form, and as such entry had by the statut the force of a re-conveyance, the first mortgag could form no objection; but, 2, that as to th second mortgage, though it was paid, the lega estate remained in the mortgagee, and the plain tiffs therefore could not succeed. *Lee et al.* v *Morrow*, 25 Q. B. 604.

The registrar having recorded a certificate o discharge of mortgage under C. S. U. C. c. 89 upon an affidavit which did not state the plac of execution, as required by the statute:—Held that though he should properly have refused t register it, yet being registered, it was effectua as a re-conveyance of the legal estate to th mortgagor. Robson *v.* Waddell, 24 Q. B. 574 distinguished. *Magrath* v. *Todd*, 26 Q. B. 87.

In ejectment it appeared that defendant had purchased under execution, and there being a mortgage on the land he paid it off, and took a certificate of discharge in the usual form, stating that the mortgagor had paid the money due, no such a certificate as is provided for by C. L. P. A. s. 258, on sale under execution of a mortga gor's interest. Semble, that the taking the cer tificate of discharge as stated could not defeat the purchaser's title by vesting the mortgagee's estate in the mortgagor, but that it would enure to the benefit of such purchaser as the mortga gor's assignee. *Lee* v. *Howes et al.*, 30 Q. B. 292.

Under 31 Vict. c. 20, O., a registrar cannot be required to register a certificate of discharge o mortgage, applying to more than one instru ment. Each mortgage to be discharged should have a separate certificate. *In re Smith and Shenston, Registrar of the County of Brant*, 3 Q. B. 305.

Quære, as to the effect and validity of a cer tificate embracing several mortgages, or of it registry. *Ib.*

In this case, the certificate related to tw mortgages, stating that they were respectivel registered in the registry office for the county o Brant, on the day and hour named, in letter A o the general register for the county, as numbe 53 and 66 respectively. The registrar registere it in the general register book, but refused t record it in the books for the town and townshi of Brantford, though the mortgages include land there, on the ground that it only mentione the number of each mortgage as registered i the general registry book:—Held, that this re son was insufficient. *Ib.*

A mortgagor before his death paid about three fourths of the mortgage money, and his widow acting for his estate, paid the rest. The certi cate of discharge, given four years after h death, under 29 Vict. c. 24, O., and duly regi tered, stated that *the mortgagor* had satisfied th mortgage, and that it was therefore discharged —Held, sufficient. Semble, that it would hav

been sufficient, also, if the payer's name had been altogether omitted. *Carrick et al.* v. *Smith*, 35 Q. B. 348.

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12. *Other Cases.*

Declaration for an instalment due by defendant to plaintiff on a mortgage. Equitable plea, that at the time of executing the instrument declared on there was a prior mortgage on the property, which, before this action, had been foreclosed; that the mortgagee in this prior mortgage had agreed to and had conveyed to an appointee the estate in the lands upon condition that the surplus value thereof, above the nrst mortgage, should go towards satisfaction of defendant's mortgage; and that the surplus value thereof was the full amount of the principal and interest of the defendant's mortgage, and thereby in equity defendant was relieved from his covenants. On demurrer—Held, that the facts shewed an outstanding equity of redemption in defendant; that a release would have to be executed by him, which this court had no power to compel; and therefore the plea was bad. *Brown* v. *Osborne*, 11 C. P. 500.

A party procured a release of a mortgage from a mortgagee, in order that a mortgage might be made to another party, by way of trust to raise money. The trust was never carried out, the party for whose benefit it was intended having died. His executors then filed a bill to foreclose, and thereupon the mortgagor filed a bill, on the ground that the trust having failed the mortgage should be delivered up to be cancelled:—Held, that he was entitled to the relief. *Worthington* v. *Eliot*, *Eliot* v. *Worthington*, 6 L. J. 65—Chy.

Where the husband of one of several tenants in common, in order to secure a debt due by another of them, executed a mortgage which conveyed a life estate only; and on default in paying the mortgage money the mortgagee had sued and obtained judgment and execution against all the mortgagors for the debt, and under the execution had sold their reversion, and the mortgage was thereby satisfied, but the purchaser went into possession during the life of the mortgagee:—Held, that the personal representative of the husband was a necessary party to a suit by the mortgagors for a re-conveyance of the mortgagee's life estate, and an account of the rents and profits. *Nelson* v. *Robertson*, 1 Chy. 530.

A mortgage was made for £1196, payable £200 in four, £200 in eight, and £224 in twelve months, the residue at later periods. The third instalment was paid. For the first and second the mortgagor gave two notes, bearing even date with the mortgage, and took the following receipt from the mortgagee: "Received from R. B. W, his notes for £200 at four months, and £200 at eight months from the first of June last, in full for the same amounts due on a mortgage made by him to me, maturing at same date." And the following endorsement was made on the mortgage: "Received from R. B. W. two notes of hand, endorsed by L., for £200 each, to complete the two first payments on the within mortgage. The notes not having been paid:—Held, that the right to recover upon the mortgage was only suspended, and not discharged by taking the notes. *Gibb* v *Warren*, 7 Chy. 496.

The holder of a mortgage on real estate, and of a judgment recovered against the mortgagor, agreed, after the death of the mortgagor, with his widow and two of the heirs, for the release, on certain terms, of the equity of redemption in the mortgaged premises, and also for the conveyance to him of another portion of the real estate in discharge of the mortgage and judgment debts. On a bill filed to enforce this agreement, it appeared that the other children of the mortgagor, who were infants, were interested in the estate. The court refused the relief prayed, but directed a reference to the master, to enquire if it would be more for the advantage of the infants to adopt the agreement, or that a sale of the estate should be made under the decree of the court. *McDougall* v. *Barron*, 9 Chy. 450.

S., by arrangement between himself and H., the owner of the equity of redemption under a mortgage made by G., released the security without any consideration paid therefor by H. or G., and discharged H. from liability. On a bill filed by an execution creditor of S., charging that at the time of this release S. was indebted to him, and was in embarrassed and insolvent circumstances, praying that the discharge might be declared void, as being within the 13 Eliz. c. 5, under our act 20 Vict. c. 57, and for foreclosure or sale, and an order against H. to pay the deficiency:—Held, that the interest of a mortgagee is of a nature to bring it within the statute of Elizabeth, if it can be seized under the 20 Vict. or can be compulsorily applied to the payment of the debts, and that a discharge of it without consideration is "a gift or alienation" within the prior statute: that the mortgage would have been seizable had it not been discharged: that when the mortgage is actually seized by the sheriff, and the mortgage debt is to be received, the sheriff, perhaps, must sue, and the creditors are, under the statute, entitled to the same remedies (with that one exception) as an ordinary assignee: that when the mortgage debt is to be realized otherwise than by the sheriff suing, it lies upon the court to see that it is realized for the benefit of the party entitled: that the discharge of the mortgage, and the arrangement between H. and S., had the effect of releasing G. from liability, though the release might be declared void, and the mortgage set up again, and therefore that G. would not have been a proper party. *Bank of U. C.* v. *Shickluna*, 10 Chy. 157.

A mortgage being payable in lawful money of the United States of America, the holder thereof, in seeking to foreclose, is entitled only to claim the amount in the current money of that country, or its equivalent at the time of default made in payment, or at any time subsequent at his option. Crawford *v.* Beard et al., 14 C. P. 87, approved of and followed. *Morrell* v. *Ward and Dow* v. *Ward*, 10 Chy. 231.

A mortgagor wrote to his mortgagee stating that a sale had been arranged of a portion of the property for £100, and urging him to release the same for that sum. Subsequently the mortgagee released upon receipt of £50 only:—Held, that the mortgagor was entitled to credit on his mort-

gage for £100, mentioned in his letter. *Ball* v. *Jarvis*, 10 Chy. 568.

Where a mortgage was to secure advances to be made from time to time, and interest thereon, and there were mutual accounts, the items of which were entered in the mortgagee's books, with the concurrence of the mortgagor, who was his clerk :—Held, that the credits given therein to the mortgagor were first applicable to the interest on all these advances, and then to the eldest of the principal sums charged. *Ross* v. *Perrault*, 13 Chy. 206.

A mortgagor conveyed part of the mortgaged property to a purchaser, covenanting against incumbrances ; and the mortgagee subsequently released that part :—Held, that, as this release was in accordance with the mortgagor's own obligation as to that part, it did not affect the mortgagee's right to recover the mortgage debt, or his lien on the rest of the property. *Crawford* v. *Armour*, 13 Chy. 576.

B., being the owner of lot A., mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B., to exchange properties, B. undertaking to to have his mortgage to C. transferred from lot A to B., to which C. assented, not informing either of them of the assignment. C. who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B. ; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment :—Held, reversing the decision of the Chancellor, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot A., and that the plaintiffs were entitled to a foreclosure. Held, also, that W. was affected with notice of the assignment by reason of the registration ; and with constructive notice, by his omission to make any enquiries for the mortgage. Held, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice ; and that, if necessary, an amendment should have been allowed under the Administration of Justice Act, 1873, s. 50. *Gilleland et al.* v. *Wadsworth et al.*, 1 App. 82.

A mortgagee is not obliged to accept payment of the whole principal and interest of a mortgage on which only certain interest is due and a bill to foreclose which has been filed. *Green* v. *Adams*, 2 Chy. Chamb. 134.—Taylor, *Secretary*.

It is, at least, doubtful whether a mortgage in fee by a tenant in tail in possession bars the entail ; and whether, upon a discharge being executed, the mortgagor does not take back his original estate. *Re Dolsen*, 4 Chy. Chamb. 36. —Taylor, *Secretary*.

A tender of mortgage money, with a statement that the party tendering did not consider that the amount tendered was due, and that the other would thereafter be compelled to re-pay the excess, was held, not to have been invalidated by this statement. *Peers* v. *Allen*, 19 Chy. 98

A tender to the owner of a mortgage (who claimed a larger sum), with a condition that the mortgage on the sum tendered being accepted should be given up, was held bad, as being conditional tender. *Ib.*

Defendant being lessee for years, with the right to purchase the fee, in 1859 mortgaged t one S. for £75, payable in four years, with a pro viso that until default defendant should hol possession. In 1861, he made another mortgage of the same premises to the plaintiff in fee, fo £118, payable in six years, with a similar proviso In 1863, the first mortgage was assigned by S. t the plaintiff, and to an action of ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default :—Held, that the plaintiff was not estopped, for 1. The second mortgage might take effect by passing an interest : 2 If the plaintiff was estopped by the second mortgage defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large : but 3. Semble, that the re-de mise in a mortgage cannot operate by estoppel, or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. Quære, per Hagarty, J., whether, although the proviso could form no defence in this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract not to disturb his possession. *James* v. *McGibney*, 24 Q. B. 155.

See *Parker* v. *Vine Growers Association*, 23 Chy. 179, p. 2331.

VI. Rights and Liabilities of the Parties and those claiming under them.

1. *Possession of the Property.*

A mortgagee is entitled to take possession a any time, even before default, unless the right to possession till default be reserved ; and wher it has not been, and the mortgagor has died, th widow stands in no better position than he husband. *Doe* d. *Mowat et al.* v. *Smith et al.*, Q. B. 139.

A mortgagor continuing in possession, whe the mortgage reserves no such right, is no liable to the mortgagee for rents and profits, o in general, for waste. *Wafer* v. *Taylor et al* 9 Q. B. 609.

Ejectment on a mortgage made by defendan as a member of the society, to them, of a leas hold interest, dated 31st August, 1861, whic mortgage contained a proviso for payment of th mortgage money by monthly instalments, for n years from the date, together with charges, fine &c., due, or or to be imposed by said society the defendant, as a member thereof, and a cov nant to pay the instalments, &c., and to inde nify plaintiffs against all payments and cov nants, &c., contained in the lease of the premis in question to himself, and an agreement th until default defendant should have possessio Proviso, that in case of default in payment any of the sums mentioned, for six month

plaintiffs might enter, take possession, and sell, &c. At the trial it was proved that defendant was in default for February, March, April, and May—the instalments for June and July had been paid. Defendant contended that the plaintiffs could not sue till some payment had been six months in arrear:—Held, that the only agreement in the mortgage entitling defendant to hold possession was that providing he should hold till default was made in some or one of the payments in the proviso mentioned: that, therefore, this proviso could be at most but a re-demise for the space of five years, with an agreement for a determination thereof at any moment on the defaults specified accruing; that the proviso as to any default for the space of six months, did not amount to a re-demise; and that the plaintiffs therefore were entitled to recover. *The Toronto Permanent Building Society* v. *McCurry et al.*, 12 C. P. 532.

As to the position and rights of the mortgagor under the proviso for possession until default. See further, *Canada Permanent Building and Savings' Society* v. *Byers*, 19 C. P. 473 p. 2325; *James* v. *McGibney*, 24 Q. B. 155, p. 2320.

See also VI. 3, infra.

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2. *Rights of Widow of Mortgagor.*

Where a wife joins in a mortgage, and on the death of the husband there are not sufficient assets for the payment of all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors. *Baker* v. *Dawbarn*, 19 Chy. 113; *White* v. *Bastedo*, 15 Chy. 546.

Where a woman joins with her husband in executing a mortgage to secure money borrowed by the husband, no portion of which is received by her to her own use, and after the husband's death the land is sold at the instance of creditors, the widow is entitled even as against them to be paid her dower out of the gross amount realized on the sale, to an amount not exceeding the surplus after payment of the mortgage. Semble, in the event of no surplus, the widow could only claim as any other creditor of her husband. Sheppard v. Sheppard, 14 Chy. 174, approved and followed. *In re the Estate of Donald Robertson*, 24 Chy. 442.

The testator devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower; the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses:—Held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her freed from the debts of the testator. *Dungey* v. *Dungey*, 24 Chy. 455.

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3. *Rights of Mortgagor to maintain Actions.*

Trespass, for breaking and entering plaintiff's house. Pleas—2. That the house was not plaintiff's: 3. Liberum tenementum of the defendant J. A., and entry of the other defendant by his command. The land had belonged to one C., who mortgaged in fee to S. to secure a sum payable by instalments, with a proviso for possession by the mortgagor until default after three months' notice. C. conveyed to M., and M. to defendant J. A. No default had been made on the mortgage. The plaintiff had entered under an agent of S.:—Held, that the defendant was entitled to succeed on the second plea; and semble, upon the third also. *Dundas* v. *Arthur et al.*, 14 Q. B. 521.

The mortgagor of a property with a clause for the retaining possession until default (such default not having taken place) is entitled, so long as the mortgage continues in force without default, to maintain an action for an injury done to the reversion. *Rogers* v. *Dickson*, 10 C. P. 481.

One F., being the owner of certain land, mortgaged it in fee to the Trust and Loan Company, with a proviso that until default he should remain in possession. Upon his death, the plaintiffs (his heirs at law), during the currency of the mortgage, brought ejectment to recover possession from a tenant, no default having been made on the mortgage:—Held, that the proviso for remaining in possession until default made would entitle the mortgagor to bring ejectment, but that the right of action descended to the executors and not the heirs-at-law, and therefore the defendant was entitled to recover. *Ford et al.* v. *Jones*, 12 C. P. 358.

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4. *Rights of Mortgagee to maintain Actions.*

The first count of the declaration alleged that one B. was the owner of certain land described, in fee simple, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of $1,350, and interest, by instalments, as specified: that it was provided in the mortgage, that B. should not, without the plaintiffs' written consent, cut down or remove any of the standing timber until the first four instalments of principal, and interest up to a certain date, should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest, and that defendant afterwards, without plaintiffs' leave, and against their will, entered on the land, and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees. It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, defendant E. assisting him, in order to sell it and leave the place depreciated: that the damage thus done was $150; and that defendants did not purchase the timber from R., as had been asserted, believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants on these answers, that they did not intend to find E. guilty:—Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrong-doers: that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and semble, that, though not in actual possession, he might, under the cir-

cumstances, maintain trespass also. Quære, whether the first count was in case for injury to plaintiffs' reversionary interest, or in trespass. Semble, that it was in trespass; but held, that it disclosed a good cause of action. *Mann et al* v. *English et al.*, 38 Q. B. 240.

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5. Leases by Mortgagor.

The tenant of a mortgagor, holding under a lease for years, during the continuance of his term attorned to the mortgagees, and after the term had expired continued to hold the premises from the mortgagees as a yearly tenant, and when his tenancy ceased claimed from them certain shelves and boxes with which he had fitted up a shop on the premises during the continuance of his lease from the mortgagor, and which were not fixtures, and for which, upon the mortgagees' refusal to part with their possession, he brought trover:—Held, that the action was maintainable. *Denholm* v. *The Commercial Bank*, 1 Q. B. 369.

Where a mortgagee received rent from a tenant of the mortgagor by lease subsequent to the mortgage, but afterwards directed the tenant to pay the rent to the mortgagor, which he did:—Held, that the mortgagee could not distrain afterwards, as he had himself put an end to the implied tenancy created by his former receipt of rent. *Lambert* v. *Marsh*, 2 Q. B. 39.

Where before the mortgage was given defendant became a tenant of the mortgagor for a year:—Held, that at the end of that time his right ceased, and that the mortgagees could eject him without notice. *The Canada Permanent Building and Savings Society* v. *Rowell*, 19 Q. B. 124.

One L., being the owner in fee of certain premises, by an instrument not under seal, dated 31st October, 1857, leased them to S. O., one of the defendants, for a period of five years. On 31st March, 1858, by indenture, he mortgaged the premises to J. C. & T. C., the plaintiffs, redeemable as therein set forth, and on the 8th June, 1858, by indenture, he again leased for a period of five years to S. O. Upon ejectment brought by the mortgagees—Held, that the indenture of the 31st October, 1857, not being under seal, did not operate, since the statute 14 & 15 Vict. c. 7, sec. 4, as a lease for five years, but enured to the benefit of the lessee as a yearly tenancy; and no notice to quit or other determination of the tenancy having been given, the plaintiffs were not entitled to succeed; 2. that although the indenture of June, 1858, as between the parties to it, operated as an extinguishment of the original agreement, yet it did not entitle the plaintiffs as mortgagees to succeed, they being no party to it. *Caverhill et al.* v. *Orvis et al.*, 12 C. P. 392.

On 1st November, 1856, one S., being seized in fee of certain lands in two lots, demised the same to defendant for five years from date. In July, 1857, S. mortgaged one lot, No. 42, to one C., in fee, and in February, 1858, mortgaged lot 43 to S. in fee. In June, 1861, C. and S. assigned their respective mortgages to plaintiff. In April, 1860, the sheriff, under execution, sold and conveyed the interest of S. in these lands to one T., who, in April, 1860, conveyed to plaintiff. The plaintiff, on 10th February, 1862, sued defendant for use and occupation. On the trial there was no evidence of notice from plaintiff to defendant that he (plaintiff) was possessed of the mortgage above-mentioned, or of notice to defendant by mortgagees or plaintiff to pay rent to them or any of them. He (defendant) paid the rent for the whole term to S.:—Held, that though no attornment by defendant was necessary to render him liable, still he could not be prejudiced by any act of plaintiff as holding under S., till he had notice of the mortgage, and no notice having been given, his payments to S. during the term were good. *McFarlane* v. *Buchanan*, 12 C. P. 591.

The plaintiff declared that on the 12th December, 1857, one T. mortgaged certain lands to defendant for £300, and defendant by a memorandum in writing, signed by said T. and defendant, then agreed with T. to lease said land from him (T.) for two years at £40 a year, which said rent defendant and T. then agreed should be endorsed on and taken in part payment of the mortgage so soon as the two years should have elapsed: that afterwards, in April, 1858, defendant sold and assigned said mortgage to the plaintiff, and then promised the plaintiff to pay him the said £80 at the end of said two years, but did not pay the same. Plea, that before said agreement T. sold and conveyed the lands to one G., who thereupon gave notice to defendant to pay said rent to him, and that afterwards defendant paid to G. the first year's rent, and then gave up possession of the land to him:—Held, on demurrer, that the declaration was insufficient, for the agreement between the defendant and plaintiff would be without consideration as they could not without T.'s privity compromise his right to the rent; and that the plea shewed a good defence. *Murdiff* v. *Ware*, 21 Q. B. 68.

One L., who held a mortgage on the premises from one S. before plaintiff's title accrued, and which was executed and over-due before the lease by plaintiff to defendant, notified defendant to pay the rent to him instead of to the plaintiff, threatening distress and ejectment on default. Defendant thereupon attorned to L., and paid him the £50:—Held, that such payment constituted a good defence to an action by plaintiff against defendant for the rent. *Fairbairn* v. *Hilliard*, 27 Q. B. 111.

A mortgage in fee to secure the payment of $1,490.42, by monthly instalments of $12.42, provided that the mortgagor should become tenant to the mortgagees thenceforth during their will, at the rent of one pepper corn monthly until default, and after default at the yearly rent of $149.04 payable monthly. There was also a proviso that, in case of default, the mortgagees, without any previous demand of possession, might enter and sell. In ejectment by the mortgagees upon default against the lessee of the mortgagor subsequent to the mortgage:—Held, that no notice to quit or demand of possession was necessary; that the combined effect of the two clauses was to create in the mortgagor a qualified tenancy at will, and to enable the mortgagees, at their option, either to distrain or at any time to eject the mortgagor himself without demand, but that the mortgagor's lessee, not having been accepted by the mortgagees as their tenant, was not entitled to a demand of possession. If the mortgagor had been simply tenant

at will, Semble, that the mortagees might have treated the lease by him to defendant as a determination of such tenancy. *Canada Permanent Building and Savings Society* v. *Byers*, 19 C. P. 473.

The owner of land deposited his title deeds on the 19th of May, for the purpose of having a mortgage thereof prepared, which was accordingly made out and executed on the 30th of the same month. On the preceding day the mortgagor made a lease, of which, however, the mortgagee had not any notice. A bill filed by the lessee to restrain proceedings at law under the mortgage was dismissed. *McKay* v. *Davidson*, 13 Chy. 498.

A mortgagor cannot, to the injury of an assignee of the equity of redemption, receive rent from a tenant of the mortgaged premises in advance. Where therefore a mortgagor created a ... of the mortgaged property, and gave an ...er for rent in advance to the mortgagee, to be, and which was, applied by him in discharge of other liabilities of the mortgagor, who afterwards transferred his equity of redemption to a bonâ fide assignee, without notice of such advance of rent:—Held, that the owner of the equity of redemption was entitled to have the amount of rent so advanced, applied in payment of the mortgage debt. *Gilmour* v. *Roe*, 21 Chy. 284.

See *McMaster* v. *Demmery*, 12 Chy. 193, p. 2374.

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6. *Rights and Liabilities of Purchasers of the Equity of Redemption.*

On the sale of an estate, the purchaser executed a re-conveyance by way of mortgage to the vendor, and afterwards sold a part of the ...perty, by a deed without covenants, which ...ained this clause:—"That I, the said M., ...y heirs and assigns, and every of them, ...all estate, right, title, interest, property, claim, and demand, of, into or out of the said parcel or tract of land, or any part thereof, are, is, and shall be by these presents for ever excluded and debarred." Upon a bill by his vendees, the original purchaser (who had executed the mortgage) was decreed to re-imburse his vendees the amount they should be compelled to pay in order to discharge such mortgage; and in default, a sale of the portion of the estate retained by him. *Maitland* v. *McLarty*, 1 Chy. 576.

The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract, express or implied, to discharge, cannot keep such charge alive against a mesne incumbrance, which, by the terms of the contract of purchase, express or implied, the purchaser was also bound to dis...rge. *Blake* v. *Beaty and Beaty* v. *Blake*, 5 Chy. 359.

Irrespective of the form of the contract between the parties, the rule is clear that the purchaser of an equity of redemption is bound as between himself and his assignor to pay off the incumbrances. *Thompson* v. *Wilkes*, 5 Chy. 394.

The purchaser of an estate subject to his vendor's mortgage is bound to indemnify the vendor against such mortgage debt. *Roberts* v. *Rees*, 5 L. J. 41.—Chy.

Where a purchaser of a mortgaged estate takes the same subject to the vendor's mortgage, and sells to another without paying off said mortgage, he will be compelled to fulfil his undertaking to do so. Thus, A., being the owner in fee of a certain lot of land, mortgaged the same to B., and then sold to C., leaving the mortgage to be paid by C. to B. as the balance of the purchase money. C. then sold to D. without paying the mortgage, and default having been made B. sued A. at law on his covenant, whereupon A. then filed a bill against C. and D. to pay off the mortgage:—Held, that A., as surety for C., had a right to call upon him to pay the mortgage to B.; and also his costs of the action at law.—Held, also, that D. was a proper party where the vendor sought to enforce his lien on the land. *Joice* v. *Duffy*, 5 L. J. 141.—Chy.

The assignee of a mortgagor's interest, through the medium of a sheriff, after the mortgage has been satisfied, cannot be looked upon as a tenant at sufferance to the mortgagee. A conveyance, therefore, made by the mortgagee while such an assignee was in possession, would be void. *Doe* d. *Carey et al.* v. *Cumberland*, 7 Q. B. 494.

Upon a sale of land the vendor gave a bond to indemnify the purchaser against a mortgage on the land sold, and thereupon the purchaser gave a mortgage for £500, and paid the residue of the purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the prior incumbrance, and he sued the purchaser on his mortgage, who thereupon filed a bill claiming a right to apply the amount due by him in discharge of the prior mortgage, then due and unpaid. A motion for an injunction to restrain the action at law was refused. *Tully* v. *Bradbury*, 8 Chy. 561.

A., the owner of lands, mortgaged them to B. C. then registered a judgment against A. After the time for payment of the mortgage A. conveyed absolutely to B., who released his mortgage, and then conveyed to D. In a suit by C. to foreclose under his judgment, D. claimed priority in respect of B.'s mortgage over C.'s judgment, on the ground that the conveyance from A. to B. was in substance a release of A.'s equity of redemption, and that B. still held his mortgage against subsequent incumbrancers:—Held, that in the absence of any act manifesting an intention that the mortgage should not be kept on foot, a mortgagee acquiring the equity of redemption would be entitled to such priority; but that the release was strong evidence that there was no such intention here. *Buckley* v. *Wilson*, 8 Chy. 566.

On the purchase of an estate subject to a mortgage the purchaser agreed to pay off the security, and subsequently agreed with the mortgagee for an extension of time for five years, agreeing in consideration thereof to pay an increased rate of interest, and covenanted that he would pay to the mortgagee the said interest quarterly, so long as the said forbearance should continue, and until the principal money was fully paid. On a bill filed to enforce payment of the incumbrance:—Held, that the purchaser was personally bound to pay only the interest on the

debt; and that by the extension of time to the purchaser, who had become the party primarily bound to pay, the personal liability of the mortgagor therefor had been discharged. *Mathers* v. *Helliwell*, 10 Chy. 172.

Upon the sale of land subject to a mortgage, the vendor covenanted to indemnify against incumbrances, and the purchaser gave a mortgage on the land for part of the purchase money. He afterwards learned that before his purchase, these and other premises had been mortgaged to another person for a sum larger than what he then owed. The vendor had since assigned the purchaser's mortgage to the defendant C. The prior mortgagee being about to sell under his mortgage the premises covered by the second mortgage, the purchaser filed his bill against the assignee of the vendor, and the vendor, claiming a right to apply the amount due by him in discharge of the first mortgage, and for an injunction to restrain any action for such amount until the premises bought by him should be released from the first mortgage. It did not appear clearly that C., the assignee, was a purchaser of the mortgage for value, but rather that he held it as collateral security for a debt due, and the vendor had become insolvent. Under these circumstances, an interim injunction was granted upon payment of the amount due into court. *Heap* v. *Crawford*, 10 Chy. 442.

J. and S., the owners of two distinct parcels of land, agreed to exchange the one for the other. S.'s land was subject to a mortgage, which he agreed to pay off, but did not; and J. was compelled to redeem the same:—Held, that he was entitled to a lien on the land conveyed by him to S., as for unpaid purchase money, for the amount paid to redeem the mortgage. *Seney* v. *Porter*, 12 Chy. 546.

Where two mortgages had been created on a leasehold interest in rectory lands, the equity of redemption in which was afterwards sold at sheriff's sale under common law process and the purchaser paid off the prior mortgage:—Held, that the purchaser being bound to protect the mortgagor against both the incumbrances was not at liberty to keep alive the prior mortgage as against the second mortgage. *McDonald* v. *Reynolds*, 14 Chy. 691.

In such case, the purchaser, upon the expiration of the term, obtained a new lease from the Rector, and created a mortgage on such new term:—Held, that such new lease was a mere graft upon the original one, and as such was subject to the mortgage which had been left outstanding; but as notice of that fact could not, under the circumstances, be imputed to the mortgagee of the new term, he was declared entitled to priority. *Ib.*

A, the registered owner of Whiteacre and Blackacre and other lands, mortgaged all to the plaintiff. He then sold Whiteacre to B., and afterwards Blackacre to K., covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after the execution:—Held, that B.'s right, as between him and K., was to throw the whole mortgage, and not merely a ratable part, on Blackacre. *Jones* v. *Beck*, 18 Chy. 671.

The owner of land, after mortgaging it, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, a afterwards purchased the mortgaged premis under a decree at the suit of the mortgagee. the sale the amount realised was not sufficie to cover the amount due to the mortgagee Held, that under the circumstances he was entitled to any lien on the estate for t deficiency. *Forbes* v. *Adamson*, 1 Chy. Chan 117. VanKoughnet.

On the sale of land, subject to a prior mo gage by the vendor, not then due, the vend covenanted with the purchaser, B., that he h not encumbered the property, and B. execut a mortgage for his unpaid purchase money. T intention was, that the vendor should pay t prior mortgage, but he failed to do so. After became due, he sold and assigned B.'s mortga to the plaintiff, who had notice of all the fac The plaintiff afterwards obtained an assignme of the prior mortgage, and B. paid off the sam Held, Strong, V. C., diss., that B. was entit to apply on his mortgage the money so paid him to the plaintiff. *Henderson* v. *Brown*, Chy. 79.

A testator bequeathed to each of his childr $100 on attaining majority, and the residue his property to his widow for life, to be divid amongst his children according to her judgme or at any time to give such a portion to each either as she thought proper. Letters of adm istration were granted to the widow, and she, order to raise money to pay legacies, mortgag the real estate, the equity of redemption which was subsequently sold under execution sheriff's sale, and the purchaser obtained by c veyance from the appointee of the widow the simple in the land:—Held, that the will operat as a devise of some estate to the widow, and ma her a trustee of the realty, which she to charged with the legacies; and that under terms of the will and the provisions of Property and Trusts Act, (29 Vict. c. 28, sec. the widow had power to create the mortga and that the purchaser at sheriff's sale t subject thereto, and was bound to redeem o foreclosed. *Lundy* v. *Martin*, 21 Chy. 452.

B. sold land to C., who was to pay a mortg thereon as part of the purchase money, and deed described the land as being "subject t mortgage in favour of McF. for $596 with inte as therein mentioned":—Held, in a suit to minister the estate of C., that the executors entitled to credit for all moneys paid by t on account of the mortgage; and that the m gagee was entitled to prove for the balance o mortgage debt against the general estate *Re Crozier—Parker* v. *Glover*, 24 Chy. 537.

The acceptance of a deed reciting that property is conveyed subject to a mortga other incumbrance implies an agreement t demnify the grantor, but does not enure undertaking to pay the debt, unless the an is included in the consideration and retaine the vendee as so much money belonging t incumbrancer. *Ib.*

A mortgagor having become insolven assignees sold the equity of redemption:— that the purchaser was not bound to make any deficiency on a sale to realize the sec *Nichols* v. *Watson*, 23 Chy. 606.

See *Irving* v. *Boyd*, 15 Chy. 157, p. 234

7. *Recovery of Mortgage Money.*

(a) *When an Action will lie.*

Debt does not lie for the first instalment of a mortgage before the others are due. *Forsyth et al* v. *Johnson et al.*, 6 O. S. 97.

But it was held to lie under the facts of this case for an instalment. *De Tayll* v. *McDonald et al.*, 8 Q. B. 171.

Covenant cannot be sustained on the proviso for payment in a mortgage. *Martin* v. *Woods*, T. T. 3 & 4 Vict.

Where the proviso in a mortgage is a mere defeazance, but there is no covenant to pay, and no evidence given of a loan or debt, an action of debt will not lie. Where there is evidence of a loan or debt, of course a promise to repay it will be implied. *Hall* v. *Morley*, 8 Q. B. 584.

Defendant, in consideration of $530 acknowledged to be paid, assigned to the plaintiff a mortgage for $360, with a proviso that the assignment should be void on payment of the $530 and interest, but no covenant to pay:—Held, affirming the last case that no action could be maintained on the common counts. Under the facts, however, a new trial was allowed on payment of costs. *Pearman* v. *Hyland*, 22 Q. B. 202.

Held, that the mere words in the proviso of a mortgage "in three equal payments to be respectively made," did not create a covenant to pay the amount specified. *Jackson* v. *Yeomans*, 19 C. P. 394.

Where the mortgage contains only a proviso for making it void on payment of the mortgage money, and a proviso to sell and eject on default, but no covenant to pay, no liability to pay is created by mere proof of the mortgage; there must be evidence given of a loan or debt. *Jackson et ux.* v. *Yeomans*, 28 Q. B. 307.

A mere promise to pay such money in consideration of forbearance to sue would not be binding, though if in consideration of forbearing to sell or eject it would be:—Held, that in this case the evidence of such latter promise was unsatisfactory; and the jury having found for the plaintiff, a new trial was granted. *Ib.*

On a new trial it appeared that defendant having purchased land from the plaintiff for $6,000, paid $600 down, and gave a mortgage for the balance of $5,400, $400 of which was to be paid on an event specified, $1,000 within three months, and the remaining $4,000 in three equal payments in six, nine, and twelve months from the date of the mortgage; but the mortgage contained no covenant to pay. The first payment of $400 was made, and afterwards, in consideration of the plaintiff forbearing to take any proceedings on the mortgage for two months, defendant promised to pay the $1,000 then overdue. The plaintiff, having waited accordingly, and left defendant in possession for that time, sued upon this promise:—Held, Wilson, J., diss., that he could not recover, for that the promise, which was verbal, was a contract for an interest in land, within sec. 4 of the Statute of Frauds; and that if it amounted to a lease it was not one within sec. 2, so as to be good without writing. Per Wilson, J.—The agreement was a demise, and within sec. 2, and the $1,000 promised to be paid might for this purpose be treated as rent reserved for the two months. *S. C.* 39 Q. B. 280.

Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines receiving the money the court would restrain him from afterwards suing for the mortgage debt. *Munsen* v. *Hauss*, 22 Chy. 279.

(b) *Right to call in the whole on Default.*

Defendants, B. & S., with two others, L. & H., mortgaged to the plaintiff to secure £4,000 and interest, by which it was agreed that if default should be made in any payment of interest, for the period of one month after it should have become due "and been demanded," then the whole principal money and such unpaid interest should immediately be payable. The plaintiff sued defendants alone upon this mortgage for the principal and the interest, making no mention of the other mortgagors, and alleged in the declaration that though an instalment of interest was overdue, and although payment thereof had been demanded from defendants, yet that they had not paid within one month after such demand. A demand on defendants was proved, but not on the others: Held, that a plea by defendant S., that no demand was made on defendants, and on L. & H. was bad, for the other mortgagors not being sued, and defendants not having pleaded in abatement, it was sufficient to prove a demand upon defendants only:—Semble, that such a covenant is not to be looked upon in a court of law as a penalty, but merely as fixing the credit to be allowed for the principal:—Held, also, that the plaintiff was entitled to succeed on the plea of defendant B., that no demand was made as alleged, for the demand on defendants was proved, as alleged in the declaration. *Case* v. *Burton et al.*, 19 Q. B. 540.

The plaintiff held defendant's mortgage, with a condition that the whole principal should become payable if the interest was in arrear for ten days. By agreement between them plaintiff drew on defendant for the interest (at three days' sight) a few days before it became due, which draft was discounted by plaintiff at his bank, and the proceeds placed to his credit prior to the expiration of the ten days, and was afterwards accepted by defendant; but upon maturity was dishonoured and charged to plaintiff's account:—Held, that this was no payment, and that the whole mortgage money was due. *Cameron* v. *Knapp et al.*, 7 C. P. 502.

Held, that looking at the form of the mortgage in this case, (which provided that on default in payment of the interest the principal should fall due,) and the declaration, the plaintiff was not entitled to a verdict for the whole principal, for the declaration did not clearly shew that he was claiming it by reason of non-payment of the interest, and he was not bound to sue for the whole amount:—Quære, there being no day named for payment of the interest, when would there be a default so as to make the whole principal due. *Northey* v. *Tramenhiser*, 30 Q. B. 426.

A mortgage to secure a sum of money by instalments, with interest in the meantime quarterly, stipulated in case of default in payment of the interest within ten days after any of the days or times when the same was made payable, in any year, that the whole of the principal money should become payable immediately, and the mortgagor covenanted to pay the same accordingly :—Held, that this was in the nature of a penalty only, and that an action to enforce payment of the whole sum due, after default in one gale of interest would be restrained. The mortgagee, by arrangement between the mortgagor, himself, and his assignee, drew upon the mortgagor for a quarter's interest, but for some reason not accounted for the draft was not presented until after the ten days, when it was accepted, but owing to some mistake it was not paid at maturity. The holders of the mortgage insisted upon this as a default making the whole mortgage money due, and and proceeded at law to enforce it :—Held, that this relieved the mortgagor from tendering the next quarter's interest when it became due, and that the mortgagee, or his assigns, could not insist upon that default in answer to a motion to restrain the proceedings at law. *Knapp* v. *Cameron*, 6 Chy. 559.

Where bonds were given to pay a certain sum and interest, in twenty years, and also mortgages of lands, redeemable in ten years, as security for the payment of the principal money of the bonds :—Held, that a breach of the covenant to pay interest on the bonds did not accelerate the right of the mortgagees to proceed upon the mortgages ; but they were entitled to a decree for sale of other bonds given as collateral security. *Great Western R. W. Co.* v. *Galt and Guelph R. W. Co.*, 8 Chy. 283.

The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established ; although the identical conditions attached to the one right may not be attached to the other. By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor ; but, in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable :—Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although, as it fell due, the interest could be collected. And, Quære, whether in such a case the mortgagor would have the right to pay the principal money against the will of the mortgagee by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months, and claim that as the condition on which he was at liberty to redeem. But, semble, he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose before the right to redeem arises in favour of the mortgagor. *Parker* v. *The Vine Growers' Association*, 23 Chy. 179.

See *Trust and Loan Company* v. *Drennan*, 16 C. P. 321, p. 2340 ; *McLaren* v. *Miller*, 20 Chy. 637, p. 2332.

(c) *Interest.*

Covenant to pay £292 in eight equal annual instalments, "with interest on the principal sum remaining due at each payment" :—Held, that interest must be paid with each instalment on the whole principal money unpaid, though it might not be then payable,—not on the instalment only. *Hall et al* v. *Brown*, 15 Q. B. 419.

Where a bill is filed to foreclose a mortgage payable by instalments, and defendant moves to dismiss on payment of the instalment and interest then due, the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application. *Strachan* v. *Murney*, 6 Chy. 378.

A mortgage made payable by instalments, with interest on each as it became due, contained a stipulation that if any of the instalments should remain unpaid for the space of thirty days after the same became payable, that the whole principle sum, with interest remaining unpaid, should forthwith become due and payable. Default was made in payment of some of the instalments ; the mortgagee, however, did not call in or insist upon payment of the whole sum remaining unpaid, but continued to receive payments from the mortgagor on account. On a bill to redeem the mortgagee claimed to be entitled to charge interest on the whole sum due at the time of each payment, in consequence of the default which had occurred :—Held, that he could claim interest only on each of the instalments as it became due, according to the terms of the proviso for redemption. *McLaren* v. *Miller*, 20 Chy. 637.

A written promise by a mortgagor, after default, to allow more than six per cent. interest reserved by the mortgage, was held binding, though there did not appear by the writing to have been any consideration of forbearance or otherwise for such promise. *Brown* v. *Deacon*, 12 Chy. 198.

A parol agreement to add two per cent. to the rate of interest reserved by a mortgage in consideration of an extension of the time for payment, was—Held, insufficient to charge the extra interest upon the land. *Totten* v. *Watson*, 17 Chy. 233.

Where a mortgage stipulated that up to a certain day the interest should be eight per cent. ; and if the principal were not then paid, twelve per cent. should be thereafter charged :—Held, that the stipulation for payment of twelve per cent. was not by way of penalty, but an agreement to pay that rate from the day named. *Waddell* v. *McColl*, 14 Chy. 211.

A mortgage dated 16th October, 1866, provided for payment of the principal in three years, and interest meanwhile at twelve per cent, half yearly, on the 16th of April and October in every year ; and declared, that to secure prompt payment of said interest the mortgagee would take at the rate of ten per cent. if the interest was paid on the said 17th day of April and October respectively :—Held, that the first reference to the day being unequivocal must govern ; that the interest was due on the 16th ; and not having been paid then, that a bill on the 17th to foreclose was not irregular. *Bennett* v. *Foreman*, 15 Chy. 117.

A mortgage dated 23rd May, 1846, secured the payment of £112 10s. without interest, on or before the 23rd May, 1847, contained a power of sale on default of payment, and provided that the mortgagee, after deducting the costs and expenses of sale, "and the said sum of £112 10s., without interest," should pay the surplus to the mortgagor:—Held, that interest was payable from default. *McDonell* v. *West*, 14 Chy. 492.

During the lifetime of a mortgagor, the mortgagee has no lien on the property for more than six years' arrears of interest, though he may have a personal action on the covenant for more; but, in this country as well as in England, after the mortgagor's death the mortgagee, to avoid circuity, may, as against the heirs, tack to his debt all the interest recoverable on the covenant. *Carroll* v. *Robertson*, 15 Chy. 173.

A bargain for extra interest made between a derivative mortgagee and mortgagor inures to the benefit of the original mortgagee. *Grahame* v. *Anderson*, 15 Chy. 189.

In equity a tender by a mortgagor stops interest, unless the mortgagee shews that the money was afterwards used by the mortgagor, and a profit made of it. *Knapp* v. *Bower*, 17 Chy. 695.

Former practice in respect to computation of subsequent interest now altered, except in certain cases. Subsequent interest should be computed upon the aggregate of principal, interest and costs, which the puisne incumbrancer has paid for redemption money. Upon the principal money subsequent interest should be regulated by the rate fixed in the mortgage security; upon the interest and costs only statutory interest should be computed. *McMaster* v. *Hector*, 8 L. J. N. S. 284.—Boyd, *Master*.

A mortgage had been created by a married woman upon her estate. After her death a suit was brought against her husband and her children; and the court in directing a sale of the mortgage property, refused to make the estate of the children liable to arrears of interest for more than six years; but directed payment to the mortgagee out of any excess after payment of principal money, costs, and six years interest, of so much of his balance as would represent the husband's interest as tenant, by the curtesy in such balance. *Taylor* v. *Hargrave*, 19 Chy. 271.

A mortgage had been transferred to a trustee to secure certain notes of the mortgagee, one of which, after several years, was found in the hands of the assignee of the mortgage, and a suit having been instituted upon the mortgage, by the trustee and the party interested in the note, it was—Held, that to the extent of the amount remaining due on the mortgage, including six years' interest, the party beneficially interested was entitled to recover the amount of the note and interest for the whole period the note had run. *Scatcherd* v. *Kiely*, 22 Chy. 8.

See *Ford* v. *Allen*, 15 Chy. 565, p. 2359.

(d) *Other Cases.*

The court refused to interfere in a summary manner to stay proceedings in an action of covenant on a mortgage to secure money brought for the benefit of an assignee, though it was shewn that the mortgagee had signed a writing not under seal, by which he acknowledged that the instalments mentioned in the mortgage were for a larger sum than was really due. *Baby* v. *Milne*, 5 O. S. 76.

Defendant being indebted to plaintiff, by an indenture reciting his indebtedness, and that he had agreed with the plaintiff for the re-payment of said sum due within six months from date, with interest, conveyed to plaintiff certain lands, habendum in fee. Proviso, that plaintiff, if the debt was duly paid, would re-convey; but there was no covenant for payment by defendant. Endorsed on the indenture was a deed poll executed by plaintiff, stating the said debt thereby secured to be the proper money of one J. L., and that the plaintiff's name was only introduced therein as agent for said J. L., and in consideration of the trust, and of 5s., he absolutely assigned all interest in the lands in the said indenture, as well as the indenture, to the said J. L. On motion to set aside nonsuit:—Held, that it was not open to defendant to deny that he was at the date of the said indenture indebted to the plaintiff. *Allnutt* v. *Ryland*, 11 C. P. 300.

Action by the plaintiff, administrator of M., against defendant on his covenant in a registered mortgage to pay M. the amount due thereon. Plea, on equitable grounds, in substance, that the plaintiff told defendant before the instalment sued for fell due that he could not find the mortgage, and defendant then informed him that he would be prepared to pay when it fell due: that when he received notice of this action he notified the plaintiff's attorneys that he was prepared to pay on production of the duplicate copy of the mortgage, which was held by M., or on proof of the loss; and that he was and is so prepared; but plaintiff refused to shew said copy or furnish any proof of the loss. The plea also averred that the testator had made a will, and appointed certain persons executors, who had possession of the will; and defendant submitted that he was entitled to such duplicate or proof of loss, and alleged that he was prepared to pay or deposit the money as the court should direct, to be paid over to plaintiff on such production or proof:—Held, plea bad, for it must be assumed that the mortgage was recorded at length; no assignment either directly or by deposit was averred; and under the Registry Act defendant would be fully protected on payment of the mortgage and recording the discharge; and the alleged will was not said to be valid or existing. *Macauley* v. *Boyle*, 25 C. P. 239.—Hagarty, sitting alone.

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8. *Agreement to Release in Portions.*

A mortgage contained a covenant to release any land sold during the continuation of the mortgage upon the payment of £200 per acre. An assignee of the mortgagor made a general payment upon the mortgage, and afterwards, upon selling a portion, demanded a release from an assignee of the mortgagee:—Held, that the benefit of this covenant would pass to an assignee of the equity of redemption, but that the mortgagee must receive the stipulated sum per acre upon the sale of the portion to be released; and no general payment on the mortgage would be sufficient. *Webber* v. *O'Neil*, 10 Chy. 440.

Where a mortgage provided that in cases of sale the mortgagee, on receipt or tender of a certain proportion of the purchase money, should release the part sold from the mortgage :—Held, that the first person who thereafter purchased and paid to the mortgagor his purchase money, but obtained no release from the mortgagee, was not entitled, as he would have been in the absence of this provision, to pay off the whole mortgage, and to demand payment of the whole from a subsequent purchaser redeeming him; but that each purchaser (including the first), was entitled to redeem his own part on payment of the stipulated proportion of money. *Davis* v. *White*, 16 Chy. 312.

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9. *Special Covenants and Conditions.*

One McEwan conveyed freehold property to the the plaintiff in fee, with a proviso for avoidance if McEwan should board, clothe, and provide all necessaries for the plaintiff for his life, or in the event of his desiring to board elsewhere, then, McEwan should pay him yearly £12 while he should remain away. The plaintiff boarded with the mortgagee till his death, and afterwards (for some time) with his widow and devisee, the defendant. He then left, but after a time returned and demanded to be boarded. Defendant refused to take him back, saying that he should get his £12 and no more. The plaintiff then claimed a forfeiture, and brought ejectment: —Held, that the mortgage operated as a conveyance in fee with a proviso for the cesser of the estate granted on the performance by the grantor of an alternative condition, with a right of re-entry in the grantee as owner on non-performance, and a right of possession until default as quasi tenant for the life of the grantee. And that the plaintiff having left was not entitled to come back when he demanded to be received, but became entitled to the money payment, and therefore there was no default. Richards, J., diss. *Maloch* v. *McEwan*, 9 C. P. 467.

Defendant owing the plaintiffs a large sum on bills of exchange, some overdue, some maturing, gave them a mortgage on land, reciting the debt on the bills and the plaintiffs' agreement to accept further security by way of mortgage, and containing a proviso that it should be void on the payment of the bills, and a further proviso that on default of payment for twelve months the plaintiff might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant :—Held, that the proviso as to default and notice applied only to the remedy against the lands. Defendant in his plea, after setting out the mortgage and proviso, and averring that the plaintiff had not given the six months' notice, concluded, "and so the defendant had not made default before the commencement of this suit." Held, that as the notice was unnecessary the plea was not proved. *The Gore Bank* v. *Eaton*, 27 Q. B. 332.

A mortgagee, with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises, without three months notice to the mortgagor, demanding payment :— Held, that such notice was unnecessary before filing a bill for foreclosure. *Lamb* v. *McCormack*, 6 Chy. 240.

On an advance of money on the security o real estate, the lender cannot bargain for th purchase of the property at a specified sum i case of default in repaying the advance at th time stipulated. *Fuller* v. *Keenan*, 12 Chy. 388

A mortgage, payable in ten years, containe a proviso that if the mortgagor mortgaged o otherwise encumbered the premises, or suffere them to become liable to sale for taxes, th mortgage money should become immediatel payable :—Held that an assignment in insol vency, though voluntary, was not such a incumbering of the estate as entitled the mort gagee to call for the mortgage money. *McKa* v. *McFarlane*, 19 Chy. 345.

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11. *Mortgagee in Possession.*

(a) *Liability to account for Rents and Profits.*

A mortgagee taking possession, and evicting tenant of the mortgagor who is willing to rem and pay rent, will be held accountable for the rents from that time. *Penn* v. *Lockwood*, 1 Chy 547.

In taking the accounts in the master's office it is improper to charge a mortgagee in possession with annual rests on rents received by him until he is paid off in full. *Coldwell* v. *Hall*, 9 Chy. 110.

The principle upon which a mortgagee is liable to be charged with rents not actually received considered. *Ib.*

The Statute of Limitations forms no bar to a claim against a mortgagee in possession for occupation rent. *Ib.*

If a mortgagee retains possession of the property after being paid in full, the general rule is, to charge him with interest and rests in respect of his subsequent receipts : a fortiori is such a charge proper where a mortgagee resists the mortgagor's right to redeem. *Crippen* v. *Oglvie*, 15 Chy. 568.

After a treaty with A. for a loan on land, the owner conveyed absolutely to A., receiving back a bond conditioned to re-convey the property on payment of a certain sum at the end of two years, and made default in such payment. On re-hearing the deed was declared to have been made as security only—the bond to re-convey containing an undertaking by the vendor to pay the stipulated amount, and it appearing that the value of the property greatly exceeded the sum paid for the alleged purchase thereof; but under the circumstances the court charged the mortgagee with such rents and profits as were actually received, or an occupation rent, if in actual possession; not with such rents as might have been received, and allowed him for repairs and permanent improvements. *Bullen* v. *Renwick*, Chy. 202.

In a redemption suit by the second mortgagee against the first, it appeared that the equity of redemption had become vested in the first mortgagee, and that he had entered into possession, and had cut and removed timber to a great value than the amount due on his mortgage: Held, that he was only bound to account for the value of such timber and occupation rent as were taken or received by him as mortgagee, not

owner of the equity of redemption; but that the second mortgagee might ask for a receiver. *Steinhoff* v *Brown*, 11 Chy. 114.

The holder of a mortgage went to reside with his sister, the widow of the mortgagor, upon the mortgaged premises, but asserted no claim or right to possession as mortgagee until some years afterwards, when the widow, being about to marry, desired her brother to leave. The brother was charged with occupation rent from that period, not from the time of his going to reside on the property; and such assertion of right had not the effect of referring back his possession to the time when he first acquired the right or went to reside on the property. *Paul* v. *Johnson*, 12 Chy. 474.

Where the plaintiff, a mortgagee, is in occupation of the mortgaged premises, the master should charge him with occupation rent up to the day appointed for payment; so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent only to the date of the master's report, and had since continued in possession, the final order for foreclosure was refused. *Pipe* v. *Shafer*, 1 Chy. Chamb. 251.—Spragge.

After default on a mortgage, a tenant put in possession by the mortgagor promised to pay the mortgagee rent, but failed to do so:—Held, that the mortgagee was not chargeable with such rent. *Waddell* v. *McColl*, 14 Chy. 211.

Where it is necessary that a mortgagee should, for his own protection, take possession, he is not chargeable with rests, and this even though the mortgage was not in arrear. *Gordon* v. *Eakins*, 16 Chy. 363.

A tenant of a mortgagor paid and took an assignment of the mortgage after the mortgagor's death, and the representatives of the mortgagor having no means of paying the debt, he agreed with the widow that she and her children should occupy the dwelling house and four acres of the mortgaged property; and that he himself should occupy the residue at a rental of $170, should pay $40 a year to the widow, and apply the residue of the rent on the mortgage:—Held, in a suit by a purchaser of the equity of redemption to redeem, that the defendant was not chargeable with the $40 a year he had paid the widow, nor with rests, though the rent for which he was accountable exceeded the interest. *Ib.*

One of several devisees claimed to be solely entitled, and mortgaged the property. The mortgagees entered into the receipt of the rents:—Held, that they must account to the other devisees for their shares of the rent. *McIntosh* v. *Ontario Bank*, 19 Chy. 155.

The owner of land made a conveyance thereof to the grantee, his heirs and assigns, which was intended as a security for repayment of a sum advanced, with interest, and after the same was fully paid and satisfied, the deed was expressed to be to the use of E B, wife of the grantor, for life; and, after her decease, to the use of the children of the grantor and the said E B in fee; no time being specified for payment of the money. Upon the execution of this deed the grantor put the grantee into possession of the estate, which he continued to occupy for some time. Subsequently the grantee allowed the grantor to resume possession of the property, and afterwards assigned his interest to his sister E. G. who took no step to recover possession or interfere with the occupation of the grantor or those claiming under him. On a bill subsequently filed by the children of the grantor, alleging that the moneys secured by such deed had been fully paid and satisfied:—Held, that under the circumstances, E. G. was not liable for the rents and profits. *Rice* v. *George*, 19 Chy. 174.

Although the rule is, that when a mortgagee enters into possession he does so for the purpose of recovering both his principal and interest, and the estate, in the view of a Court of Equity, is a security only for the money due on the mortgage, and the court requires him to be diligent in realizing the amount due, in order that he may restore the estate to the mortgagor, who is in equity the party entitled to it: still he will not be held responsible for any greater rent than he has actually received, unless it is clearly established in evidence that he knew a greater rent might and could have been obtained, and that he refused or neglected to obtain the same. *Merrian* v. *Cronk*, 31 Chy. 60.

(b) *Allowance for Improvements.*

A mortgagee in possession of a grist mill and other property erected a carding and fulling-mill. This was disallowed to him, as being an improvement that a mortgagee could not make without consent. *Kerby* v. *Kerby*, 5 Chy. 587.

Semble, that when a mortgagee is charged with rents and profits received from improvements made by himself, he should be allowed the expense of such improvements to a corresponding amount. *Constable* v. *Guest*, 6 Chy. 510.

The allowance for improvements under sec. 11 of the Chancery Act (7 Will. IV. c. 2) is discretionary with the court. Where, therefore, upon a reference to the master, under a decree for redemption, where the mortgage had become absolute before 1837, the master had allowed the price of certain valuable improvements, amongst others, a brick dwelling, stating that he did so solely under the statute, the court referred the matter back to the master, leaving it open to him to allow or disallow such improvements. *Harrison* v. *Jones*, 10 Chy. 99.

The principles upon which improvements by a mortgagee in possession are to be allowed for considered and acted on. *Paul* v. *Johnson*, 12 Chy. 474.

Where the mortgagee in possession had planted out fruit and ornamental trees, suitable for carrying out improvements commenced by the mortgagor, he was allowed the cost price of the same, and a reasonable amount for care and cultivation, but not the value thereof at the time of redemption. *Ib.*

A mortgagee in possession purchased at sheriff's sale, under an execution issued upon a confession of judgment signed by the administratrix in favour of the mortgagee, who was her brother, and acting as her counsellor and agent in the matters connected with the intestate's estate, and who thereupon made large improvements on the mortgage premises, under the belief that his purchase at sheriff's sale had vested in him the

absolute fee in the property. Under these circumstances, the court, considering the case one of some hardship on the mortgagee, refused on further directions to send the case back to the master, although it was probable some improvements had been allowed for, which had been made before the mortgagee's purchase at sheriff's sale, and were not in strictness allowable; the party complaining of the allowance not having objected to the report, and the report not shewing on its face when the improvements were made. *Ib.*

Improvements made under the belief of absolute ownership are allowed more liberally than to one who improves knowing that he is but a mortgagee. *Carroll* v. *Robertson*, 15 Chy. 173.

The holder of a mortgage having purchased under the power of sale contained in the mortgage, and afterwards under a sheriff's sale, sold and conveyed to a purchaser, who went into possession and made permanent improvements. On his purchase being set aside, it was—Held, that his vendee was entitled to be allowed for his improvements. Semble, the same rule would apply if the mortgagee himself had made the improvements. *McLaren* v. *Fraser*, 17 Chy. 567.

A foreclosure suit had been instituted in 1865, and brought to a conclusion; after which, in 1866, to supply a defect in the first suit a second one was brought, and the report of the master obtained therein in December, 1868, which was appealed against and a reference back ordered. In proceeding under this order, in 1875, the personal representative of the mortgagee, who had died during the pendency of the appeal, claimed a sum of $2,937, with interest, for permanent improvements, but for which the mortgagee had never put forward any claim during the proceedings under the original decrees. The master having refused to entertain the claim, a petition was presented to the court praying for an order to be allowed to prove such claim notwithstanding the delay; but the court, in view of all the circumstances, refused the application, and dismissed the petition with costs. The circumstances under which a claim may be made for improvements by a mortgagee while in possession, and the effect of the statute 36 Vict. c. 22, O., in respect of improvements made on the lands of others through mistake as to the ownership, considered. *Romanes* v. *Herns*, 22 Chy. 469.

Mortgagors released their equity of redemption to the mortgagee, who about two months afterwards signed a memorandum agreeing to reconvey upon being paid principal and interest and all costs of improvements made by her:—Held, on a bill to redeem, that the mortgagee was entitled to recover for all permanent and lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon. And where the mortgagors so agreeing were merely trustees, and the person beneficially interested was cognizant of the various improvements being made, and stood by and permitted them:—Held, that neither he nor those entitled through him could be permitted to redeem without paying for such improvements. *Brotherton* v. *Hetherington*, 23 Chy. 187.

See *Skae* v. *Chapman*, 21 Chy. 534, p. 2362.

12. *Application of Insurance Moneys.*

(a.) *Generally.*

Declaration on defendant's covenant in a mo gage to pay $4,400 by instalments with intere at 8 per cent., and that in case of default in pa ment of any instalment, the whole sum, with accrued interest should immediately become du that the plaintiffs were to be at liberty to insu for $3,500, and to charge the premiums to defe dant, who was to pay them with interest: th defendant made default in payment of certa instalments, whereby the whole $4,400 with i terest became payable, and remained unpaid un the 19th of May, 1864, and from that day a fu ther sum with interest remained due. The was also a claim of $62 for premiums of i surance paid by plaintiffs. Equitable plea, th the forfeiture of the $4,400, by reason of t non-payment of the instalments, was to be plaintiffs' option; and that it was provided th plaintiffs might insure for the $3,500, and th the policies should be to the use of and trust for plaintiffs, for better securing to plai tiffs the amount specified in the mortgage, an subject thereto in trust for defendant, &c.; th plaintiffs did insure, and the premises were d stroyed by fire; that the plaintiffs received t amount insured, and paid themselves thereo all instalments with interest overdue, and t premiums, and still had a balance to meet futu instalments; that in equity, therefore, plaintif were estopped from claiming by way of forfe ture the $4,400 by reason of the default in pa ment of the first two instalments, and that e cept by way of such forfeiture, nothing was du —Held, on demurrer, plea bad, for the plaintif did not claim by way of forfeiture but under d fendant's covenant, and at most the plea shewe facts which might be evidence of plaintiffs' ele tion to claim the whole. *Trust and Loan Co.* v *Drennan*, 16 C. P. 321.

On 19th February, 1868, H. mortgaged la to one of the defendants, to secure payment $2,400 as follows: $500 in two years, and t balance in five years, with interest half-yearl The mortgage was in the usual statutory for and contained a covenant to insure the buildin in at least $1,500. Subsequently H. insured $1,500 on the buildings, and $500 on machine therein. In the body of the policy the benefit the insurance was secured to the plaintiff (app ently in anticipation of his becoming the hol of the mortgage), thus: "Any claim for loss be paid to Robert Green, of Guelph." Def dants afterwards assigned this mortgage to pla tiff, and both defendants entered into a bond plaintiff, of same date, in $1,000, conditioned after reciting the assignment, and that the first stalment of $500, under the mortgage, would due 19th February, 1870,—that H. should that instalment to the plaintiff, when due. failed, and the instalment due 19th Februa 1870, was not paid. The property was bur some months afterwards, and in January foll ing, plaintiff received the full insurance mo $2,000, which was retained and applied by to his own use. He then sued defendants their bond. Defendants set up the retention plaintiff of the insurance moneys, as a paym on the mortgage debt of more than the first stalment and interest, and contended that t bond was thus discharged:—Held, no defe

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Defendants set up the retention by
insurance moneys, as a payment
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interest, and contended that the
s discharged:—Held, no defence

for, 1, the bond being forfeited by condition broken, the facts relied on could not be set up as a legal bar; and, 2, either the insurance moneys received by the plaintiff (there being no stipulation as to their application) had not been legally applied, and could not be regarded as applied in *satisfaction* of any part of the mortgage debt; or, if capable of being so applied, they might be applied at the sole pleasure of the plaintiff so as to insure to him the full benefit of defendants' bond as security for the first instalment, as mentioned in the condition. *Green* v. *Hewer et al.*, 21 C. P. 531.

The mortgagor covenanted to insure, and insured accordingly. The houses having been burned, he attended, with the mortgagee, at the office of the insurance company, and signed an order, drawn up by the secretary of the company, to pay the insurance money to the mortgagee upon a verbal agreement on his part to expend it in rebuilding. The mortgagee having withdrawn from this agreement, the mortgagor attended before the board of directors, and obtained from them the usual promissory note of the company at three months, for the amount of the policy, which he transferred to a third party for value, but who was aware of the claim of the mortgagee. The mortgagee thereupon filed a bill against the mortgagor and the company, claiming the insurance money to the extent of the amount due on his mortgage. The court made a decree for payment, and ordered the company to pay plaintiff the costs, but dismissed the bill as against the mortgagor, with costs, he being an unnecessary party:—Held, also, that the person to whom the note of the company was transferred, was not a necessary party. *Watt* v. *The Gore District Mutual Ins. Co.*, 8 Chy. 523.

Where a mortgage deed contains no provision as to the application or appropriation of insurance money coming to the mortgagee before the time appointed for payment of the mortgage money, he is not bound to apply it in reduction of the sum secured, or the interest accruing thereon, until the expiration of the time allowed for payment of the mortgage money. In such a case the mortgagor would be entitled to have the money expended in rebuilding, and re-placing all parts, as near as may be, as they stood before the fire. *Austin* v. *Story*, 10 Chy. 306.

Where a mortgage contains no covenant by the mortgagor to insure, but he does insure, and a loss by fire occurs, whereby the insurance money becomes payable, the mortgagee is entitled, under the 14 Geo. III., c. 78, sec. 83, to have the insurance money laid out in rebuilding. *Stinson* v. *Pennock*, 14 Chy. 604.

A mortgagee insuring the mortgaged premises out of his own funds is entitled to receive the amount of the policy in the event of loss for his own benefit, without giving credit therefor upon the mortgage. *Russell* v. *Robertson*, 1 Chy. Chamb. 72.—Sprague.

The owner of land mortgaged the same, and, in pursuance of a covenant in the deed, insured the buildings on the land. The policy provided that the loss, if any, should be paid to the mortgagees. The buildings were shortly afterwards destroyed by fire, and the insurance moneys paid to the mortgagees, who assigned the mortgage to trustees of the insurance company, and they thereupon proceeded to foreclose:—Held, on appeal, by a puisne incumbrancer, from the report of the master, that the plaintiffs were not bound to give credit for the amount paid to the mortgagees. *Westmacott* v. *Hanley*, 22 Chy. 382.

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13. *Right of Mortgagee to prevent Security being Diminished.*

The defendant, who was entitled to purchase land, had made default in paying the purchase money secured by mortgage, and had agreed to release to the plaintiffs the equity of redemption with the option of repurchasing; had failed to erect a new saw mill on the land, as stipulated for; had allowed the saw mills already thereon to fall into disrepair; and had been cutting and removing the timber, so that the saw mills were in such a condition that they would become utterly lost to the plaintiffs if the defendant was allowed to retain possession; and that the saw mills and timber constituted the almost entire value of the mortgage security:—Held, that the plaintiffs were entitled to an order for possession, in case the defendant did not pay the overdue instalments in a month, without prejudice to the plaintiff's right to enforce the agreement for sale, and in the meantime he was restrained from cutting or removing timber. *Phillips* v. *Preston*, 14 Chy. 67.

A mortgage having been created on land on which was a steam saw mill, the mortgagor was restrained from removing the machinery, although it was alleged that the property would still remain a sufficient security, for such removal would have changed the character of the premises. *Gordon* v. *Johnston*, 14 Chy. 402.

A mortgagee filed his bill for foreclosure and for an injunction to restrain the vendee of the mortgagor from removing a building erected on the property. The court thought that though the building had been actually removed, it was a proper case for a mandatory injunction; but it appearing that the building had been removed piece-meal, and that there might be difficulty in restoring it, an enquiry was directed to ascertain the value thereof, as sufficient for the justice of the case. *Meyers* v. *Smith*, 15 Chy. 616.

Semble, that standing timber is within the provisions of the registry laws; and that the purchaser of a right to cut the same is affected with notice of the conveyance from the original owner and a mortgage back from his vendee. Unless a mortgagor prove demonstrably, so as to leave no room for doubt that the mortgage premises remain ample security for the mortgage debt, the court will restrain him from cutting over the whole land. The jurisdiction as to restraining the cutting and removal of timber was not preventive only; the court would in a proper case interpose where the timber could be followed. The Administration of Justice Act 1873, sec. 32, it would appear, however, has removed any technical difficulty of this sort. Where timber is cut without any intentional wrong, and there is no evidence of mala fides or intentional wrong, the injury actually sustained by such cutting is the measure of damage to the owner or mortgagee of the land. *McLean* v. *Burton*, 24 Chy. 134.

See, also, INJUNCTION, p. 1765.

14. *Other Rights and Liabilities of Mortgagee.*

A mortgagee from whom the mortgagor has accepted a lease of the mortgaged premises will not be permitted at the expiration of the term to proceed against the mortgagor as an overholding tenant under C S. U. C. c. 27 s. 63. *In re Reeve*, 4 P. R. 27.—C. L. Chamb.—Richards.

A mortgagee of land, part of which was taken by a railway, was offered £100 as compensation for the land so taken, which he refused; and the matter having been referred to arbitration, £30 only was awarded. On a bill filed to redeem—Held, that, under the circumstances, he was chargeable only with the sum awarded. *Gunn* v. *McDonald*, 11 Chy. 140.

Land mortgaged by the owner was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:—Held, that the mortgagee had the prior right; that his mortgage being registered, the corporation had notice of it; and that he was entitled to recover the amount from the corporation with costs. *Dunlop* v. *The Township of York*, 16 Chy. 216.

A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to other persons. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt:—Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him before the sums charged thereon for legacies were raised. *Ricker* v. *Ricker*, 14 Chy. 264.

A mortgagee paying off a prior execution has a lien therefor against subsequent executions. *The Trust and Loan Company* v. *Cuthbert*, 14 Chy. 410.

A chose in action can be reached by process of sequestration, but the right or interest of a surety in regard to the money for the payment of which he is surety, is not property of such a nature as can be reached by that process. Where therefore a mortgagee filed his bill against the assignee of the equity of redemption to enforce by this means payment of the deficiency arising on a sale of the mortgaged premises, it was held that the right of the mortgagor to call upon his assignee to discharge the mortgage debt was not of such a nature as could be reached. *Irving* v. *Boyd*, 15 Chy. 157.

VII. Assignment and Transfer.

1. *Form of Assignment.*

Where the granting part of a deed of assignment of mortgage transfers the indenture simply, and the habendum the interest in the land described in the indenture, the estate passes. *Doe* d. *Wood et al.* v. *Fox et al.*, 3 Q. B. 134.

A mortgagee by indorsement assigned to M. "his executors, administrators, and assigns, all his 'right, title, and interest in and to the within mortgage'":—Held, not to pass the land mortgaged. *Moran* v. *Currie*, 8 C. P. 60.

"Assign, transfer, and set over" in an assignment of a mortgage, are the proper technical words to pass an estate in lands and tenements. *Watt* v. *Fowler*, 12 C. P. 254.

An assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned, and transferred" unto the assignee "his heirs and assigns, the annexed mortgage and all the right, title and interest therein," of the assignor, "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use forever":—Held, that the land mortgaged, did not pass by these words; but that had it been a devise, instead of a deed inter vivos, the land would have passed under the term "mortgage." *Auston* v. *Boulton*, 16 C. P. 318.

The holder of a mortgage security while labouring under an attack of sickness, of which he subsequently died, endorsed on the indenture a memorandum assigning the same to his wife for the benefit of herself and his children, which he signed, but did not seal, although the memorandum expressed it to be under seal:—Held, that the wife took no interest under such assignment, either as a gift inter vivos or as a donatio mortis causa; and a bill filed by her to compel the executors to execute a formal assignment of the mortgage was dismissed with costs. *Tiffany* v. *Clarke*, 6 Chy. 474.

An assignment by an administratrix of a mortgage, part of the assets of the intestate, was held valid, though not therein stated to be executed by her as administratrix. *Yarrington* v. *Lyon*, 12 Chy. 308.

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2. *Covenants by Assignor.*

Upon a foreclosure suit upon a mortgage for £350, and on which only £250 had been in fact advanced, the court disallowed the addition of £100 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor upon his covenant for the validity of the security &c.:—Held, not recoverable. *Sturgess* v. *Bilton*, 11 C. P. 102.

A mortgagee who for a valuable consideration transfers the mortgage, and all his estate in the land therein, and covenants that the mortgage at the time of the assignment is in full force and valid and effectual in law, and not assigned, released, or otherwise made void, and that no part of the money thereby secured has been paid, is liable to the assignee though the mortgagor never had any interest in the premises professed to be mortgaged, and the mortgage never was any lien thereon. *Powell* v. *Baker*, 13 C. P. 194.

The declaration claimed £1,500, being the amount secured by mortgage, made by one B. to defendant, and assigned by him, with a covenant in the assignment that he should be personally liable for the due payment of all the moneys, performance of the things stipulated in the mortgage, in case of any deduction, defalcation or abatement. Breach, that B. did not pay the £1,500 on the days appointed, but made default, and that defendant has not fulfilled his covenant. The defendant, besides non est factum, pleaded pleas denying his indebtedness, except as to moneys remaining due at the time of the assignment, and also after the assignment, but be-

the 25th December, 1860; and demurred to the declaration, denying his liability merely on B.'s default, without shewing any means taken to recover the amount:—Held, that the declaration was good, the assignment as stated in the declaration being large enough to pass all the debt secured by the mortgage, and it was not shewn to be in any part paid. 2. That defendant's covenant bound him to pay all moneys secured by B. upon his, B.'s, default. 3. That the breach claimed no more than the plaintiff might possibly be entitled to upon the assignment and covenant. *Morson* v. *Hunter*, 11 C. P. 585.

On the transfer of a mortgage the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same: —Held, that this did not constitute him a surety, within the meaning of section 4 of the 32nd of the orders of 1853. *Clarke* v. *Best*, 8 Chy. 7.

Where a mortgagee assigned the mortgage, covenanting for the payment of the mortgage money, and subject to an agreement between the mortgagee and assignee, that the former might have a re-assignment of the mortgage on payment of principal and interest due thereon, and the mortgagee afterwards made payments under his covenant :—Held, that he was entitled to a lien therefor as against the mortgagor. *Fleming* v. *Palmer*, 12 Chy. 226.

Where the assignee of a mortgage, with power to sell or lease in default, gave notice to the mortgagor and the mortgagee of his intention to sell, but gave no public notice of the intended sale, and notwithstanding the protest of the mortgagee, who had covenanted to make good any deficiency in case of a sale being enforced, proceeded with the sale, and sold for little more than half of the balance due to a person cognizant of the facts, and then proceeded against the mortgagee for the deficiency. The court set aside the sale, but refused the plaintiff his costs, he having made unfounded charges of fraud and collusion against defendants. *Richmond* v. *Evans*, 8 Chy. 508.

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3. *Rights of the Parties after Assignment.—Notice.*

The assignee of a mortgage, who takes without the intervention of the mortgagor, is bound by the state of the account between the mortgagor and mortgagee. *Gooderham* v. *De Grassi*, 2 Chy. 135.

Where two were mortgagees, and one assigned his interest to the other, the mortgagor was allowed credit, as against the assignee, for goods delivered to the assignor, until notice of the assignment. *Galbraith* v. *Morrison*, 8 Chy. 289.

The rule in equity is, that the assignee of a mortgage takes it subject not only to the state of the account between the mortgagor and mortgagee, but also to the same equities as affect it in the hands of the mortgagee. *McPherson* v. *Dougan*, 9 Chy. 258.

The assignee of a mortgage is entitled to set up the defence of a purchase for value without notice. The intending purchaser of a mortgage should communicate with the mortgagor before purchasing; and if he refrains from doing so his assignment is subject to all equities between the mortgagor and mortgagee, though he may not have had actual notice of them. *Totton* v. *Douglas*, 15 Chy. 126.

The holder of a mortgage security assigned the same for value on the 9th of October, (Saturday.) On the 11th the mortgagor, without notice of the transfer, satisfied the mortgage with the mortgagee, one of the assignees being present, and saying nothing of the assignment. On a bill filed by the mortgagor the court ordered the mortgage to be released, but refused the plaintiff his costs, as he failed to prove fraud which he charged. *Engerson* v. *Smith*, 9 Chy. 16.

A mortgage was held by an assignee for the benefit of the assignor (the mortgagee,) and the mortgagor, without notice of such assignment, paid the mortgagee, and obtained from him a discharge under the statute. The court held the payment good, and ordered the plaintiff to execute a release, it being doubtful whether under the circumstances the discharge from the mortgagee would re-vest the property in the mortgagor. *McDonough* v. *Dougherty*, 10 Chy 12.

The trustee of a mortgage, who had no authority to transfer it, did nevertheless sell it to a third person :—Held, that a bill impeaching the transfer was not demurrable for not charging that the purchaser had taken the transfer with notice of the trust. *Ryckman* v. *The Canada Life Ass. Co.*, 17 Chy. 550.

Following the rule in Henderson *v.* Brown, 18 Chy. 79, and other cases in this court, the court held the assignee of a mortgage bound by all the equities affecting it in the hands of the mortgagee. And the mortgagor, in a suit to foreclose, having set up that before notice of the transfer he had, at the instance of the mortgagee, incurred liabilities for, and paid off debts of the mortgagee, equal to the amount due on the mortgage, a reference was directed to the master to inquire as to this; and if found to be so the bill was to stand dismissed with costs. *Baskerville* v. *Otterson*, 20 Chy. 379.

The assignee of a mortgage, like the assignee of a promissory note, after maturity, or other chose in action, takes the same subject to all equities, as well those of third parties, as those of the parties to the instrument. *Elliott* v. *McConnell*, 21 Chy. 276.

A mortgage for $1,200 was created by a third party, who was indebted to G., in favour of a solicitor, as security for such costs as he might incur in carrying out a suit for G. The client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed $500, which was done. The assignee having failed to notify the mortgagor of the assignment, by reason of which a sum of $530 had been by the client allowed to be paid to the solicitor :—Held, that the assignee could only recover what might be found due in respect of such costs over and above the amount so paid. *Atkinson* v. *Gallagher*, 23 Chy. 201.

B., being the owner of lot A, mortgaged the same to C., who assigned the security to J., covenanting for the payment of the mortgage money, which assignment was duly registered. Afterwards B. agreed with W., the owner of lot B, to exchange properties, B. undertaking to have his mortgage to C. transferred from lot A

to lot B, to which C. assented, not informing either of them of the assignment. C., who was a solicitor, was employed by both parties to prepare the several conveyances, including the mortgage from B. to himself on the newly acquired property. No mention was made or production demanded of the first mortgage, which remained undischarged. B. paid off and obtained from C. a discharge of the new mortgage given by him on lot B; and C. paid the interest to J. for several years, when he made default, and the plaintiffs, the representatives of J., then applied to B., when he, for the first time, was made aware of the assignment:—Held, reversing the decision of the Chancellor, that the payments so made by B. to C. had not the effect of discharging the mortgage on lot A, and that the plaintiffs were entitled to a foreclosure. Held, also, that W. was affected with notice of the assignment by reason of the registration; and with constructive notice, by his omission to make any enquiries for the mortgage. Held, also, that it was not necessary to set up the registration of the assignment in the bill in order to prove notice; and that, if necessary, an amendment should have been allowed under the A. J. Act, 1873, s. 50. *Gilleland et al.* v. *Wadsworth et al.*, 1 App. R. 82; 23 Chy. 547.

When a mortgagee sells or otherwise disposes of his mortgage security, being aware that the mortgagor has parted with his interest, he is bound to communicate that information to his assignee, otherwise, in the event of such assignee filing a bill to foreclose against the mortgagor, who disclaims any interest in the property, the mortgagee will be bound to pay the costs of the mortgagor, notwithstanding he may have been retained as a party to the suit until the hearing. *Masson* v. *Roblin*, 2 O. S. 41.—Chy.

In 1821 plaintiff mortgaged three properties to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827, the mortgagees being then in great difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, one property, for about its value, and they gave credit for the amount on the mortgage. This property afterwards passed through several hands, and it was bought by the present owner in 1837, who made considerable improvements on it:—Held, that the effect of the sale and transfer by the mortgagees of the portion of the mortgaged property was to transfer to the purchasers a part of the mortgage debt, proportioned to the value of the property transferred, as compared with the whole property mortgaged. *McLellan* v. *Maitland*, 3 Chy. 164.

The Trust and Loan Company being the holders of a mortgage bearing eight per cent. interest, transferred the same to a private individual:—Held, that the assignee was entitled to enforce payment of the stipulated interest, notwithstanding that at the time of the creation of the incumbrance the company only could legally have reserved such a rate of interest. *Reid* v. *Whitehead*, 10 Chy. 446.

An assignment to the Trust and Loan Company of a valid existing mortgage bearing more than eight per cent. interest is not necessarily void. *The Trust and Loan Company of Canada* v. *Boulton*, 18 Chy. 234.

Mortgage held good in the hands of an assign for value without notice, though the parties f whose benefit it was given were not named in or shewn by any writing. *Muir* v. *Dunnet*, Chy. 85.

Where a mortgagee assigned the mortgag covenanting for the payment of the mortgag money, and subject to an agreement between t mortgagee and assignee, that the former migh have a re-assignment of the mortgage on pa ment of principal and interest due thereon, an the mortgagee afterwards made payments unde his covenants:—Held, that he was entitled to lien therefor as against the mortgagor. *Flemi* v. *Palmer*, 12 Chy. 226.

An assignee of a mortgage cannot, as again a prior equity, set up the plea of purchase wit out notice. *Smart* v. *McEwan*, 18 Chy. 623.

The registered owner of land mortgaged t same, and afterwards conveyed absolutely to purchaser, who registered before the mortgag giving a mortgage to secure purchase money and subsequently the vendor assigned his mor gage to a purchaser who had no notice of t prior mortgage:—Held, that the purchaser mortgage in the hands of the assignee was sub ject to the lien or charge of the vendor's mor gagee. *Ib.*

See *Muir* v. *Dunnet*, 11 Chy. 85, infra.

VIII. Several Mortgages.

1. *Priority.*

(a) *Generally.*

The mortgagor having afterwards become in debted to the mortgagee in a further sum con veyed the lands to him in fee, and some day afterwards the grantee gave the mortgagor bond to re-convey upon payment of the whol debt:—Held, that the grantee was entitled t hold the premises as a security for the whole his debt, as against a mesne incumbrance whic had been created thereon between the time his obtaining the mortgage and the conveyan to him in fee, but of which he had not bee notified before the execution of the conveyan under which he claimed. Held, also, that t registration is not notice in this country. *Street* *The Commercial Bank*, 1 Chy. 169. In Appeal.

Where a party executed a mortgage and h it registered, but did not for some time, give to the mortgagee, and it was afterwards sold a third party, who was not aware of the facts, was held entitled to priority over another mo gage previously executed, but not registered t after the other security had been registere though before it had been delivered to the mo gagee. *Muir* v. *Dunnet*, 11 Chy. 85.

There were two mortgages on certain la O., having notice of the second, bought the fi mortgage, and, at or about the same time t equity of redemption, and gave to his vendo new mortgage for the sum O. was to pay the for. O. conveyed portions of the land to sons, in terms subject to the mortgage which had so given; and he afterwards paid that mo gage off:—Held, (affirming the decree of t Court below,) that these facts were not sufficie evidence of an intention to merge under the Vict. c. 87, and that the second mortgage h

not acquired priority over the mortgage purchased by O.—Mowat, V. C., dubitante. and Gwynne, J., diss. *Barker* v. *Eccles*, 18 Chy. 440, *S. C.* in the Court below, 17 Chy. 631. For judgment of Gwynne, J., see 18 Chy. 523.

Two mortgages were successively taken by distinct creditors, which omitted, by mistake, a piece of ground which the mortgagor held under a contract of purchase only. The second mortgage was afterwards assigned for value, without notice of the first mortgage. The mortgagor died insolvent. One of the heirs, out of his own money, paid the balance of purchase money due on the omitted lot, and obtained from the vendor's heirs a conveyance of that lot to himself. Afterwards the mortgagees respectively discovered the mistake in their mortgages, and each filed a bill to have his mortgage rectified, taking no notice of the other mortgage, and not making the holder of it a defendant. The second mortgagee obtained his decree first, and thereby the estate was vested in him; and the defendant (the heir of the mortgagor) was ordered to pay the costs and to receive credit for what he had paid for his conveyance; the holders of the first mortgage then filed a bill against the plaintiff in the other suit, claiming a prior equity in respect of the omitted parcel:—Held, on rehearing, reversing the decision of Mowat, V. C., 18 Chy. 382, that the defendant (the holder of the second mortgage) could not avail himself of the legal estate in such a case; and that the plaintiff was entitled to the relief prayed. Mowat, V. C., diss. *Merchants' Bank of Canada* v. *Morrison*, 19 Chy. 1; 18 Chy. 382.

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2. *Tacking.*

Where there were three mortgages on the same property, and the third was taken without notice of the second, and was afterwards transferred to another person, who thereupon obtained a conveyance to himself of the first mortgage:—Held, that he could not tack his third mortgage to the first; and the court refused a reference to enquire whether the assignee had notice of the second when he took the conveyance of the third mortgage. *McMurray* v. *Burnham*, 2 Chy. 289.

A mortgagor conveyed his equity of redemption to a third party, and afterwards contracted to release to the mortgagee, and the latter, having no notice of the prior conveyance, paid the mortgagor some part of the consideration that he had contracted to give for the release:—Held, that he was entitled to tack what he had so paid to his mortgage debt. *Gordon* v. *Lothian*, 2 Chy. 293.

R. mortgaged lot 16 to E. to secure £2,047. R. afterwards mortgaged lot 17 to C. to secure £100. R.'s equity of redemption in lot 17 was attached by fi. fa. lands in 1851, but before sale of it E. purchased and received an assignment of C.'s mortgage; after this the sheriff sold R.'s equity of redemption in lot 17 to L. On a bill filed by the representatives of E. to foreclose both mortgages:—Held, that they were entitled to tack and be redeemed, if at all, as to both. *Hyman* v. *Roots*, 10 Chy. 340.

Where the owner of property mortgaged it to W., and then assigned an undivided half to J., subject to the mortgage, and afterwards mortgaged his remaining half to B., who afterwards obtained an assignment of the first mortgage:—Held, that the representatives of J. were not bound to redeem both mortgages, but only the mortgage to W. *Buckler* v. *Bowman*, 12 Chy. 357.

Sec. 66 of the Registry Act (1865), which enaffecting land shall be deemed valid in any court acts that "no equitable lien, charge, or interest, in this province after this act shall come into operation, as against a registered instrument executed by the same party, his heirs or assigns; and tacking shall not be allowed in any case to prevail against the provisions of this act,"—is not retrospective. *McDonald* v. *McDonald*, 14 Chy. 533.

A mortgagor's devisee held not entitled to redeem the mortgage without also paying a judgment held by the owner of the mortgage against the mortgagor. This is not such tacking as the Registry Act forbids. *McLaren* v. *Fraser*, 17 Chy. 533.

A treasurer gave to the municipality a mortgage to secure the moneys coming to his hands. On taking an account in a suit to redeem, it was—Held, that the municipality could not tack a simple contract debt due to them by the plaintiff before the execution of the mortgage. *Ferguson* v. *Frontenac*, 21 Chy. 188.

The rule of equity which allows the holder of several mortgages created by the same mortgagor on separate properties to consolidate the debts, and insist on being redeemed in respect of all before releasing any one of his securities, is not "tacking," and is not such a claim as the Registry Act declares shall not be allowed to prevail against the provisions thereof. *Dominion Savings and Investment Society of London* v. *Kittridge*, 23 Chy. 631.

See *Street* v. *Commercial Bank*, 1 Chy. 169, p. 2348.

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3. *Marshalling Securities.*

In 1849 G., being the owner of Whiteacre and Blackacre, contracted to sell half of the former to B. by a bond, which was never registered. In 1852 G. executed a mortgage covering both lots to C., which was immediately registered, but the Christian name of the grantor's wife, (who executed to bar dower) did not appear in the memorial. In 1853 G. gave a mortgage of Blackacre to P., who also immediately registered his conveyance. In 1855 G. sold the remaining half of Whiteacre to M., and in the following year B. conveyed his interest in the other half to S. In 1861 C. sold Blackacre under a power of sale in his mortgage, and the sale realized fully what was due thereon. In 1862 P. filed his bill against M. & S., in order that he might be subrogated to the rights of C. as against Whiteacre for the amount due him on his security. S. & H. had previously paid all their purchase money:—Held, that P. was not entitled to any relief against S., but that if C.'s mortgage was duly registered, P. was entitled to contribution against M. *Boucher* v. *Smith*, 9 Chy. 347.

The owner of lots A. and B. sold A., but the conveyance was not registered; he afterwards mortgaged A. and B. and the mortgagee registered the mortgage without notice of the prior deed; the mortgagor subsequently sold B. in portions by three successive sales:—Held, in a suit by the assignees of the mortgage for a sale,

that the decree should be for the sale first of B.; and that if a sale of part of B. produced enough the portion last parted with by the mortgagor should be first sold. *Barker* v. *Eccles*, 17 Chy. 277.

A. being the registered owner of Whiteacre and Blackacre and other lands, mortgaged all to plaintiff. He then sold Whiteacre to B., and afterwards Blackacre to K., covenanting in each case against all incumbrances. The various instruments were respectively registered immediately after their execution:—Held, that B.'s right as between him and K., was to throw the whole mortgage and not merely a ratable part on Blackacre. *Jones* v. *Beck*, 18 Chy. 671.

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4. *Other Cases.*

Defendant, being lessee for years, with a right to purchase the fee, in 1859 mortgaged to one S. for £75, payable in four years, with a proviso that until default defendant should hold possession. In 1861 he made another mortgage of the same premises to the plaintiff in fee for £118, payable in six years, with a similar proviso. In 1863 the first mortgage was assigned by S. to the plaintiff, and on ejectment brought by him upon it, defendant set up the proviso in the second mortgage, on which there had been no default:—Held, that the plaintiff was not estopped; for 1. The second mortgage might take effect by passing an interest; 2. If the plaintiff was estopped by the second mortgage, defendant was estopped by the first, and an estoppel against an estoppel sets the matter at large; but 3. Semble, that the re-demise in a mortgage cannot operate, by estoppel or otherwise, to grant a greater estate than the mortgagor conveyed, out of which it is carved, and here he had no such title as he professed to pass. Quære, per Hagarty, J., whether, although the proviso could form no defence to this action, the defendant might not have a remedy elsewhere to prevent such a violation of the plaintiff's personal contract, not to disturb his possession. *James* v. *McGibney*, 24 Q. B. 155.

Where a second mortgage, not noticing the first, contains absolute covenants for title, but where there is no allegation in the pleadings, and no other evidence than the mortgage thus affords, that the mortgagor did not inform such second mortgagee of the first mortgage before the execution of the second, the court will not assume such to be the case, so as to vest the equity of redemption in such second mortgagee, under the 4 & 5 W. & M., c. 16, sec. 3. *Meyers* v. *Harrison*, 1 Chy. 449.

A sale of the equity of redemption had been effected under a power of sale contained in a second mortgage; and, pending a suit in the Court of Chancery, to set aside such sale, the first mortgagee, who was one of the purchasers, was proceeding at law to recover against the mortgagor upon the covenant contained in his mortgage deed: whereupon the mortgagor filed a supplemental bill to restrain proceedings at law. The first mortgagee, in his answer to the original bill, insisted upon the validity of the sale. From what had taken place in relation to the premises it was doubtful whether the mortgage debt was not extinguished, in equity, as between the mortgagor and mortgagee, and the original cause being almost ripe for hearing, an injunction was granted to restrain the action at law until the hearing took place. *Rees* v. *Beckett*, 2 Chy. 650.

A second mortgagee, as such, cannot impeach a prior-registered mortgage as fraudulent and void against creditors, but a judgment creditor having accepted a mortgage, does not lose his rights as a judgment creditor. *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Chy. 59.

It would seem that a first mortgagee has not as such, a right to the rents and profits. Where, therefore, a puisne incumbrancer filed a bill and obtained the appointment of a receiver, who has since his appointment collected the rents and profits of the property, and paid the same into court, and a prior incumbrancer, who was not a party to the first suit, filed a bill upon his mortgage, and moved in that cause for an order to apply the rents, so paid in by the receiver, to payment of his claim, the court, under the circumstances, refused the application with costs, but gave the plaintiff liberty to renew the same, in such manner and in such suit as he should be advised. *Bank of British North America* v. *Heaton*, 1 Chy. Chamb. 175.—Spragge.

V. having mortgaged certain lands to G., subsequently sold his equity of redemption in a portion of the lands to B., from whom he took a mortgage, which he assigned to the plaintiff. G. subsequently sold the whole of the lands under a power of sale in his mortgage, and B. became the purchaser:—Held, that B.'s purchase under the power of sale in the first mortgage did not cut out, but enured to the benefit of V., the second mortgagee. *Box* v. *Bridgman*, 6 P. R. 234.—Chy. Chamb.—Holmested, *Referee*.

A solicitor having a lien on title deeds as against his client for costs generally, was employed by A. to prepare a mortgage from such client, when his professional connection with the mortgagee ceased. A second mortgage was created in favour of another person. On default in such second mortgage, the mortgagee sold under a power of sale in the mortgage:—Held, that the lien on the deeds in his possession, as against the mortgagor, continued as against the purchaser. *Gill* v. *Gamble*, 13 Chy. 169.

The right of consolidating separate mortgage debts on separate properties, is an equitable one and under the 68th sec. of the Registry Act, 3 Vict. c. 20, will not be allowed in favour of the holder of the mortgages against a puisne incumbrancer of one of the mortgaged properties without notice, although such right would be enforced as against the mortgagor himself. *Brower* v. *Canadian Permanent Building Ass.*, 24 Chy. 50[illegible]

IX. Sale under Power of Sa[illegible]

1. *Validity of the Sal[illegible]*

A mortgagee is not at liberty to [illegible] and his power of sale without any re[illegible]e to the interests of the mortgagor. He is in fact a trustee for the mortgagor, subject to his own claim upon the property. The assignee of a mortgage, with power to sell or lease in default, gave notice to the mortgagor and the mortgagee of his intention to sell, but gave no public notice of the intended sale, and notwithstandi[illegible]

the protest of the mortgagee, who had covenanted to make good any deficiency in case of a sale being enforced, proceeded with the sale, and sold for little more than half of the balance due to a person cognizant of the facts, and then proceeded against the mortgagee for the deficiency. The court set aside the sale, but refused the plaintiff his costs, he having made unfounded charges of fraud and collusion against defendants. *Richmond* v. *Evans*, 8 Chy. 508.

It is the settled rule of equity, that a mortgagee, in exercising a power of sale must take reasonable means of preventing a sacrifice of the property. Where he took no means for that purpose, and sold the property for half its cash value, the price received being near the amount due to himself, the sale was set aside. *Latch* v. *Furlong*, 12 Chy. 303.

A building society advertised for sale the mortgage property under their power. At the auction it was stated by the auctioneer that the price to be paid for the premises was to be over and above the amount of certain other mortgage debts against a portion of the same estate. One of the directors, who was also solicitor to the society, bid off the property, though it afterwards appeared that he had acted only as agent for a third party. After the sale the purchaser bought up the interest of the other mortgagees, who had already commenced proceedings to foreclose, carried on the foreclosure suit, and obtained a final decree of foreclosure, no notice being taken of the fact of the money having been paid to the mortgagees. Before this order, however, the mortgagor, claiming to have the surplus of the purchase money over and above the amount of the mortgage under which the property was sold, filed a bill to redeem, when the agent of the purchaser swore that he had not intended to bid the sum he did in addition to the amount of the mortgage paid off. The court set aside the sale, and gave the mortgagor leave to redeem. The Chancellor dissented, and thought that the sale already made should be carried out, and the surplus of the purchase money paid to the mortgagor. *Montgomery* v. *Ford*, 5 Chy. 210.

A person purchased under a power of sale in a mortgage, but the sale was irregular, and was set aside:—Held, that, as a condition of relief against him, he should be allowed for all improvements made under the belief that he was absolute owner, so far as they enhanced the value of the property, but no further, and not only such improvements as a mortgagee in possession would have been entitled to make, knowing that he was a mortgagee. *Carroll* v. *Robertson*, 15 Chy. 173.

Where the sale is not properly conducted through the fault of the solicitor, the mortgagor, or any other party interested, as well as the mortgagee, has a right to complain thereof. On such a sale the solicitor of the mortgagee cannot purchase, though the proceedings for the sale were not taken in his name, and it was not shewn that any loss had occurred by reason of his being the purchaser. *Howard* v. *Harding*, 18 Chy. 181.

On a sale under a power of sale the clerk of the mortgagee's attorney purchased but paid nothing, but the mortgagee conveyed to him, and he immediately reconveyed to the mortgagee:—Held, that the sale was invalid, and the property still redeemable, although the mortgagor immediately after the sale accepted a lease of the property. *Ellis* v. *Dellabough*, 15 Chy. 583.

A purchase by a second from a prior mortgagee, under a power of sale in the first mortgage, was sought to be set aside, on the ground mainly that the mortgagee was a trustee for the mortgagor; but the court upheld the transaction, and, the purchaser submitting to be redeemed in respect of both mortgages, directed the cause to stand over for the purpose of making the mortgagor a party to the suit. *Watkins* v. *McKeller*, 7 Chy. 584.

Where a mortgagee against whom judgments are registered exercises a power of sale, his judgment creditors have such an interest in the due exercise of the power that the court will grant them relief against the mortgagee exercising it to their disadvantage. *Commercial Bank* v. *Watson*, 5 L. J. 163.—Chy.

Where the bill alleged facts which shewed that the lands had been sold by the mortgagee under his power of sale for less than one-fifth of the value; and alleged that the mortgagee, "intending to acquire title himself to the said land * * caused the said lands to be sold for the nominal sum of $409 to one G., who paid no consideration therefor, and on the same day conveyed the same to the defendant Ann Watt, the wife of the mortgagee:" that "Ann Watt had paid no consideration for the pretended sale and conveyance of the said lands to her, and was well aware that the said sale and conveyance took place for the purpose of depriving the plaintiff of her just rights in the premises":—Held, this sufficiently alleged the mortgagee's intention to become himself the purchaser. *Spain* v. *Watt*, 16 Chy. 260.

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2. *Other Cases.*

In ejectment, where plaintiff claimed under a deed executed by a mortgagor under power of sale:—Held, that the estate in the mortgage having become absolute in law in the mortgagee, there was no necessity for shewing that there was a power of sale in the mortgage to convey the legal estate. *Nesbitt* v. *Rice*, 14 C. P. 409.

Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage. *Gordon* v. *Ross*, 11 Chy. 124.

Pending an appeal from the Court of Chancery, a mortgagee was restrained from proceeding to a sale of the mortgage premises under the power of sale. *Commercial Bank* v. *Bank of Upper Canada*, 1 Chy. Chamb. 64.—Esten.

Mortgagees, under their power of sale, sold to M. for $7,800, and gave him possession. M. paid a deposit of $600, and gave his promissory note for $600 more, which he duly paid. He also executed a mortgage for $4,000 which was duly registered, but did not pay the residue of the purchase money, $2,600. The mortgagees executed a deed, but retained it in their possession. Their solicitor also did some acts as if the sale was complete; but the court, being satisfied

that the parties regarded the transaction as still in fieri:—Held, that the mortgagees were not responsible to a subsequent incumbrancer for the $2,600, or chargeable with more than they had received. The bill of a subsequent incumbrancer stated a completed transaction. The mortgagees, through oversight, allowed the bill to be taken pro confesso, and a decree was made accordingly. The plaintiff desiring more extensive relief, filed a petition in the nature of a bill of review. The mortgagees, in their answer to this, set up the facts which shewed the transaction to be not completed. The court considered the whole case to be re-opened by this petition, and decided that the sale to their vendee did not affect the rights of the mortgagees, and that they were chargeable only with the amount actually received from the purchaser. *The Bank of Upper Canada* v. *Wallace*, 16 Chy. 280.

If a first mortgagee, with a power of sale, sells to a puisne incumbrancer, the purchaser acquires an irredeemable interest, as against the mortgagor; and this, though such subsequent incumbrancer had been paid off, and had in hand moneys of the mortgagor sufficient to pay off the first incumbrance, but not specially intrusted to him for that purpose. *Brown* v. *Woodhouse*, 14 Chy. 682.

A solicitor's lien on title deeds for his professional services attaches and continues, although the property to which they relate has passed from the ownership of the client for whom the services were performed, by sale and purchase under a power of sale contained in a mortgage. The purchaser takes the interest of the mortgagor subject to the lien. *Gill* v. *Gamble*, 2 Chy. Chamb. 135.—VanKoughnet.

See *Bartels* v. *Benson*, 21 Q. B. 143, p. 2299; *Ford* v. *Allen*, 15 Chy. 565, p. 2359; *Rees* v. *Beckett*, 2 Chy. 650, p. 2352; *Daniels* v. *Davidson*, 9 Chy. 173, p. 2367; *Gowland* v. *Garbutt*, 13 Chy. 578, p. 2311; *Box* v. *Bridyman*, 6 P. R. 234, p. 2352; *Trust and Loan Co. of Canada* v. *Boulton*, 18 Chy. 234, p. 2311.

X. Redemption of Mortgages.

1. *Equity of Redemption—Its Incidents, &c.*

Bill by judgment creditor, to redeem prior mortgages, and foreclose subsequent purchaser with notice. *Bloor et al.* v. *Bank of Upper Canada*, 2 O. S. 31.

Per Robinson, C. J., and McLean, J.—The Court of Chancery, under the 11th sec. of the Chancery Act, may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession. Per Macaulay and Smith, Ex. CC.—The court has not, under this section, power to refuse redemption, where by the law of England the party would be entitled to redeem, but has only a discretion of imposing terms different from those which would be imposed according to the strict rules in England. *Simpson* v. *Smyth*, 1 E. & A. 9.

The court under that section may, under certain circumstances, refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession. *S. C. Ib.* 172.

Semble, that the relief given to by section 5 of the 32nd of the gene June, 1853, in a suit brought again a mortgage, payable by instalments be afforded him, or those claiming upon a bill filed on their own behalf *Merritt*, 6 Chy. 550.

The rule that a mortgagee of se may refuse to be redeemed in respect does not apply where a sale is aske incumbrancer. *Merritt* v. *Stephenson*

But on a re-hearing the court or count to be taken of what was due securities, and in default a sale, b that in the event of a sale the pre be conveyed to the purchaser relieve of such subsequent mortgagee. *Ib.*

Although the holder of several n the same mortgagor, on separate pr the right of refusing to be redeeme of one of the securities, yet he may deprive himself of this advantage. were mortgagees of lots 27 and 29, the same person, and K. being about the equity of redemption in 29 wrot retary to ascertain the amount d adding, "How is it made up, as I w take it up?" The answer was, "$7 off * * loan on lot No. 29 * before 1st February, 1875." Subs enclosed to the secretary his check stalment, saying, "I wish to pay yo on this property, or [illegible] up and ment at some future time if necessar the second mortgage on it, and ma ment on that condition," which t acknowledged the receipt of as "first interest and costs on L.'s first loa that under the circumstances the co precluded from afterwards insisti right to be paid the amount secure before releasing lot 29 to the injury had subsequently purchased the e demption; and this although at making such inquiry K. was aware gage on lot 27, and had dealt with th in respect thereof by accepting a seco *Dominion Savings and Investment So don* v. *Kittridge*, 23 Chy. 631.

A judgment creditor coming in to re gage incumbrancer is entitled, upo the amount due to the mortgagee, ment not only of the mortgaged pre all collateral securities, whether the ject to the lien of the creditor und ment or not. Therefore, where j been recovered and duly register party who had a contingent interes personal property, subject to a n cuted by way of security for adva debtor had effected an insurance u which he had also assigned to the as an indemnity against loss in resp executed by him as surety for t Held, that the judgment creditors gagor, upon paying the amount d mortgage and indemnifying the mo spect of his liability as surety, we a transfer of the policy of insuranc the mortgage upon the contingent to foreclose the mortgagor in defaul *Gilmour* v. *Cameron*, 6 Chy. 290.

In a redemption suit, upon its appearing that K., a purchaser for value, with constructive but without actual notice, held a registered title of the lands, as well as S., to whom he had sold, the bill was dismissed as against K., with costs; and the plaintiff praying specifically for a reconveyance of the mortgaged premises :—Held, on re-hearing, that he was not entitled to personal relief under the prayer for general relief. *Graham* v. *Chalmers*, 9 Chy. 239. See *S. C.*, 7 Chy. 597.

W. sold land to M., giving a bond for a deed. M. assigned to plaintiff his interest in this bond, as also certain chattels, in security, but retained possession of the instruments. Subsequently M. assigned absolutely the bond to C., to whom (with notice of the prior security) W. conveyed the premises, taking back a mortgage for unpaid purchase money, upon which W. filed a bill for foreclosure against C., making the plaintiffs and their co-partners in the business defendants as incumbrancers by reason of a registered judgment, but they omitted to set up any interest in the premises by reason of the security given to them by M., in which suit the bill was taken pro confesso, and a final order for foreclosure was obtained against all the other defendants. On a bill against W. seeking to redeem, or that he should pay off the claim of the plaintiffs under the security from M. :—Held, that M. was a necessary party to the suit; and also, that W. had a right to pay them off their claims against M., and to call for an assignment of the other securities held by them for such claim, the amount of which M. was bound to pay to the plaintiffs or W., in case of his paying. *McQuestien* v. *Winter*, 10 Chy. 464.

M., the owner of lands subject to a mortgage in favour of S. & B., and to a charge for an annuity, mortgaged them to S. & B., with covenants for title, right to convey, freedom from incumbrances, and for further assurance. S. & B. took proceedings upon their several mortgages, and ultimately M. was foreclosed, but the person entitled to the annuity was not made a party to the cause. Subsequently M. became the assignee of the annuity, and instituted proceedings against the defendants, who were purchasers from S. & B. It appeared that the whole of the land subject to the annuity was not covered by the mortgage from M. to S. & B. :—Held, that as to the other portion of the lands covered by the mortgage, M. being bound by the covenant to pay off the annuity, the court would not enforce it in M.'s favour against such portion; but—Held, that this would not prevent the charge being enforced, the effect being only to postpone the charge of the annuity, as against such portion of the lands, to the mortgage given by M., and that M. was entitled to redeem in order to make the charge available to this extent. Semble, that if the lands covered by the annuity and the mortgage from M. were identical, the court would not enforce the charge in favour of M. *Matthews* v. *Mears*, 21 Chy. 643.

See *Parker* v. *Vinegrowers' Ass.*, 23 Chy. 179, p. 2371.

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2. *Who entitled to Redeem.*

Held, Blake, C., diss., that a sale by the sheriff, under a fi. fa. against lands, of the reversion after a term of 1000 years had been created by way of mortgage, carries with it the right to redeem the term. *Chisholm* v. *Sheddon*, 3 Chy. 655; 1 Chy. 108; 2 Chy. 178.

Held, by Esten and Spragge, V.CC., that the purchaser at sheriff's sale of a reversion in lands mortgaged for a term of years, is entitled to redeem the mortgage for his own benefit. *Waters* v. *Shade*, 2 Chy. 457.

A mortgagee of lands not patented purchased them at sheriff's sale under executions against the mortgagor, to whom the lands had been conveyed at the instance of the execution creditors, in order to enable them to take the lands in execution, during the absence of the mortgagor from the country, and the mortgagee then claimed to hold the lands absolutely :—Held, (Spragge, V. C., diss.) that the estate was still redeemable. *Aitchison* v. *Coombs*, 6 Chy. 643.

Upon a fi. fa. against the executors of a mortgagor, a writ against the lands of the testator was sued out, under which his interest in the mortgage premises was sold, and afterwards the purchaser obtained a conveyance of the legal estate from the mortgagee, all of which took place after 7 Will. IV. c. 2, 1837 :—Held, that the devisees of the mortgagor were entitled to redeem. *Walton* v. *Bernard*, 2 Chy. 344.

Where there were several defendants interested in the equity of redemption, and one purchased several outstanding shares of co-devisees also interested, and so dealt and acted that the other parties interested assumed that he intended to redeem for their mutual benefit, instead of which he arranged with the mortgagee to suffer foreclosure and then bought from him, it was,—Held, that he could properly do so for his own sole benefit. *Ruttan* v. *Levisconte*, 2 Chy. Chamb. 108.—VanKoughnet.

The owner of property mortgaged it, and then died, having devised one-half the property to one son, and the other half to another, charging each with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself :—Held, on re-hearing, that if she was willing to make the annuity a first charge on the property, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 17 Chy. 251; 16 Chy. 239.

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3. *Terms of Redemption—Amount payable.*

Where the administratrix, having bought at sheriff's sale the interest of the mortgagor, paid off the mortgage debt, and treating the property as her own absolute estate, afterwards mortgaged it, the court, at the instance of the heir-at-law of the mortgagor, directed an enquiry as to whether the property was purchased at sheriff's sale with the assets of his ancestor, and that the amount so applied should be deducted from the amount due upon the mortgage given by his ancestor, and that he should be let in to redeem upon payment of the balance. *Warren* v. *McKenzie*, 1 Chy. 436.

A security void at the time of its creation on the ground of usury is not rendered valid by the 16 Vict. c. 80, passed at a subsequent date. Where, therefore, a mortgage had been made upon a usurious agreement, the court (the Chan-

cellor diss.) :—Held, a judgment creditor of the mortgagor entitled to file a bill to redeem upon paying the amount actually advanced before the expiration of the time appointed for payment. *Isherwood* v. *Dixon*, 5 Chy. 314.

The solicitors of the mortgagees gave the mortgagor a memorandum of the amount due, and, relying upon this, B. purchased the equity of redemption. Upon a bill to redeem the court held the mortgagees not bound by this amount, the evidence shewing that the solicitor was not aware that the mortgagor had enquired on behalf of B. *Moffatt* v. *Bank of Upper Canada*, 5 Chy. 374.

The owner of property sold and took a mortgage for the purchase money by instalments. Default having been made in the first instalment, judgment was recovered upon the covenant; whereupon the purchaser filed a bill, setting up that a tenant of the vendor, under a lease previously made, had carried away the crops, and praying to redeem upon payment of the judgment, less the value of these crops. The court, by consent, directed a reference as to the damages sustained by the removal of the crops, but refused to interfere with the judgment, the remaining instalments being more than sufficient to cover such damages. *Moore* v. *Merritt*, 6 Chy. 550.

A mortgagee sold the mortgaged property under a power of sale :—Held, in a suit by the mortgagor for the surplus, that the mortgagee was entitled to retain arrears of interest for more than six years. *Ford* v. *Allen*, 15 Chy. 565.

Since the passing of the Administration of Justice Act, 36 Vict. c. 8, O., and to avoid circuity of action, the court will allow interest to a defendant, for more than six years, in a suit to redeem. *Howeren* v. *Bradburn*, 22 Chy. 96.

Where the answer of a defendant omitted to set up a claim to interest for a period exceeding eight years, the court, on an appeal from the master, offered, if it was necessary that such a claim should be set up, to allow the defendant then to do so, as all the facts were before the court. *Ib.*

In a suit for setting aside a purchase by a mortgagee at a sheriff's sale, and giving the parties interested in the equity of redemption liberty to redeem, the court, while granting that relief, refused actively to enforce the sale by requiring the mortgagee to give credit for the purchase money in reduction of his debt. *McLaren* v. *Fraser*, 17 Chy. 533.

See VI. 8, p. 2334.

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4. How Barred or Lost.

(a) *Lapse of Time.*

In 1821, the plaintiff mortgaged three properties, to secure a debt payable in the following year. It was not then paid. Payment was urgently demanded in 1827; the mortgagees being then in great difficulties, and the debt still remaining due, the mortgagees sold and conveyed, with absolute covenants for title, one property for about its value, and gave credit for the amount on the mortgage. This property afterwards passed through several hands, and was bought by the present owner in 1837, made considerable improvements on it :—H that this property was not redeemable by mortgagor in 1840. *McLellan* v. *Maitla* Chy. 164.

The owner of real estate created a mort which became absolute for default of payr before the passing of the Chancery Act, 7 IV. c. 2. Proceedings were subsequently tuted to foreclose, and in December, 18 final foreclosure was pronounced; and the gagor continued to reside in the neighbour of the property, until January, 1854, whe died, having devised all his real estate t widow. The mortgage premises, after pa through several hands, were purchased b solicitor for the plaintiff in the foreclosure It having been discovered that the mort had died sometime before the day appointe the payment of the money, the widow a bill to redeem, but neither the solicitor n agent who conducted the suit to foreclose either of the purchasers of the property, aware of that fact, or of any defect in the ceedings. Blake, C.—Held, that the proceed after the death of the plaintiff were null that the solicitor must be taken to have notice thereof; and that the right to redeem never been foreclosed. Spragge, V. C.—H that the proceedings were merely irreg that the solicitor was a purchaser for without notice, and was not bound by the within the knowledge of his agent; and tha right to redeem had been extinguished. E V. C., gave no judgment. *Arkell* v. *Wils* Chy. 470.

Held, on appeal from the above, that this a proper case in which to withhold redemp under the discretion given to the court, u the eleventh clause of the Chancery Act; that the purchasers could not reasonably be to have constructive notice of the defect i proceedings; and dismissed the appeal costs *S. C.*, 7 Chy. 270.

In November, 1834, the owner of land veyed in fee for £159, with a proviso that i grantor during his life, or his heirs, &c., i year after his decease, should pay that sum interest, the conveyance should be void. August, 1835, the grantor died without h paid anything, and his representatives had nothing. Between 1841 and 1845, the gr offered the heir-at-law of the grantor to rec on payment of the principal and interest the (£225), but he declined, stating that the lan not worth it, and subsequently went to resi the U. S., where he died, having conveye interest in the land to M., who died in without having registered his deed, or mad claim to the property. In 1856 the heir o a minor, filed a bill to redeem against the gr and his vendee, who had been in possession his purchase in 1851, and had made imp ments to the value of about £700. On ap this court, reversing the decree below, re the relief asked, and dismissed the plain bill, with costs. *Stanton* v. *McKinlay*, 1 A. 265.

Held, that the Dormant Equities Act do apply to cases of actual mortgage—that is w the proviso for redemption appears on the of the instrument creating the incumbr

Such cases are to be dealt with under the 11th clause of the original Chancery Act. So long as the mortgagor remains in possession of the mortgaged estate, the twenty years limited for him to redeem does not begin to run, for so long as he holds possession he is entitled to pay or tender the mortgage money and interest, and if in the meantime the mortgagee should take proceedings to dispossess him by ejectment, he could at any time before judgment stay proceedings by paying the amount due into court, with costs. *Hall* v. *Coldwell*, 8 L. J. 93.—E. & A.

In mortgage, as well as other cases, the disability on account of infancy is to be allowed for in the computation of the time allowed by the statute (C. S. U. C. c. 88) for the bringing of actions. *Ib.*

On the 16th of January, 1831, an absolute conveyance was made in fee to secure a loan, the alleged mortgagor remaining in possession until the spring of 1841. On the 1st of March, 1841, the alleged mortgagee wrote to a subsequent mortgagee of the same property, claiming £94 12s. 8d. as due from the mortgagor; and on the 7th and 21st of June, of the same year, he again wrote to the same incumbrancer alleging that he had originally advanced about £60, which with interest then amounted to £90 or £100, and suggesting that the land should be sold for the benefit of the alleged mortgagor, and he kept an account in his books against the alleged mortgagor of principal and interest in respect of the alleged debt up to the 1st of January, 1856. The subsequent incumbrancer purchased the mortgagor's equity of redemption. Upon a bill filed by such mesne incumbrancer in February, 1861, claiming a right to redeem the premises against the representatives of the alleged mortgagee, who had died in the meantime:—Held, that the letters written by the mortgagee were sufficient to take the case out of the Statute of Frauds, and that the right of the plaintiff was not barred by the provisions of the Statute of Limitations; that the act relating to dormant equities did not apply to the facts of this case; and that the 11th clause of the Chancery Act did not affect the plaintiff's right to redeem. *Malloch* v. *Pinhey*, 9 Chy. 550.

In 1831 a mortgage was created by a conveyance, absolute in form, taking back a bond of defeasance, on several lots of land, one of which was occupied and cultivated by the mortgagor as a farm, the others were wild lands and unoccupied. No attempt was made to disturb such occupation until 1848, when ejectment was brought and the mortgagee put into possession of the cultivated lands in 1849, but no step was taken to obtain possession of the wild lands, other than the fact that the mortgagee had always from the date of the mortgage paid the wild land taxes thereon, and had also, but not until after 1852, sold some of the lands, the purchasers of which had taken possession of them and had continued therein ever since. On a bill filed to redeem in 1860:—Held, (Draper and Richards, C. JJ. and Morrison, J., diss.) that as to the lands not sold, the Statute of Limitations did not apply to bar the mortgagor of the right to redeem. And as to the lands sold, the court ordered the mortgagee to account for the purchase money thereof, with interest. *Macdonald* v. *Macdonell*, 2 E. & A. 393.

The principle on which an equity of redemption is founded is relief against forfeiture; and the equity is not to be allowed where the mortgagee has been guilty of no misconduct, and from the dealings of the parties the allowance would work injustice, though twenty years have not elapsed since the right to redeem accrued. *Skae* v. *Chapman*, 21 Chy. 534.

Where a mortgagee had bought an equity of redemption at a sheriff's sale, the sale being supposed by all parties at the time to be valid, though in fact invalid on technical grounds; but for seventeen years before the filing of the bill to redeem sales and re-sales had been made from time to time of various portions of the property, on the assumption of the sheriff's sale being good; buildings had been erected; some burnt down; new buildings put up; houses built for one purpose altered to suit other purposes; other changes and improvements thereon made, fields and commons being converted into sites for shops, hotels, a bank, and other places of business, and into gardens and yards; all being done with the cognizance of the mortgagor's heir, who for ten years of the seventeen was aware of, or had reason to suspect, the defect in the title of the parties; and his bill was not filed until a large unsecured debt of the mortgagee against the mortgagor, greatly exceeding the value of the property when sold by the sheriff, had been outlawed, and until the persons interested in resisting the plaintiff's claim, and made defendants to the suit, numbered nearly one hundred:—Held, that redemption would be inequitable, and the bill was dismissed, with costs. *Ib.*

The effect in such a case of the statute 36 Vict. c. 22, O., giving a lien for improvements, remarked upon. *Ib.*

In 1835, D., the owner of land, sold and conveyed the same to S. for £310, and a mortgage was executed by the purchaser for the whole of the consideration money. In 1838 S. sold and conveyed his equity of redemption to K. In 1842 the original vendor filed a bill of foreclosure against S., on which a final decree of foreclosure was obtained in August, 1845; but to this suit K., through some oversight, was not made a party. Sixteen months afterwards D. sold the same property to another purchaser, who, in October, 1854, mortgaged to defendant W., and he in September, 1860, obtained a final order of foreclosure, by reason of default in payment, and subsequently conveyed to his co-defendant. During the time W. held the land he paid a sum for taxes exceeding the original purchase money; K. never having paid anything on account thereof, or of the money or interest secured by the mortgage from S. to D. (of 1835). In 1876 K. died, and the plaintiff, his heir-at-law and devisee, in June of that year for the first time discovered the conveyance of 1838 from S. to K., and thereupon filed a bill seeking to redeem:—Held, under the circumstances stated, that whether the original transaction between D. and S. could only be looked at as one between mortgagor and mortgagee, or merely as one between vendor and vendee, the plaintiff was not entitled to relief, and the bill filed by him was, therefore, dismissed with costs; and Semble, that S. having been an innocent purchaser at a time when registration was not notice, would have afforded

a good ground of defence, if it had been taken by the answer. *Kay* v. *Wilson*. 24 Chy. 212.

(b) *Conduct of Parties.*

The court refused leave to redeem, in 1852, on a mortgage to several executors in 1827, payable in 1832, of property of not greater value than the amount secured, the mortgagees having, in 1833, after the mortgagor's default, sold the property for less than was due on it, and the mortgagor having thereupon given possession to the purchaser, in pursuance of a letter from the acting executor (since deceased) to the mortgagor, informing him of the sale, and requesting him to give the vendee possession, "in which case the executors relinquish all claim against you for the interest in arrear," &c. *Clute* v. *Macaulay*, 4 Chy. 140.

A mortgagor conveyed his equity of redemption in certain lands, together with the absolute estate in other property, and took back a mortgage on the whole for part of the purchase money. The purchaser afterwards transferred to a third party. The mortgagee, with a knowledge of the transfer by the mortgagor, filed a bill of foreclosure against him alone, and having obtained a final decree, conveyed to another party, who afterwards died intestate. The person really interested, considering that the foreclosure had the effect of binding his interest, rented the property from the grantee of the mortagee, and also contracted for the purchase of it from him; but, upon discovering his rights, he filed a bill against the heir-at-law to redeem. The denial of notice was imperfect, and it appeared that what the purchaser paid for the property was just what was due on the mortgage, and less than the fair value. At the hearing the court directed an enquiry as to whether the ancestor had notice, actual or constructive, at the time of his purchase of the title of the defendant or his vendor, as to the sufficiency of the consideration paid, and as to the circumstances generally attending the purchase: reserving further directions and costs. *Hogg* v. *Wallis*, 6 Chy. 150.

In July, 1859, F., being a member of the firm of R. M. & Co., mortgaged certain lands, the property of the firm, to defendant C. In September, 1860, by the "act and warrant" (under the Imp. Act 19 & 20 Vict. c. 79) of the sheriff deputy of Lanarkshire, in Scotland, all the real and personal estate of R. M. & Co., in Canada as well as in Scotland, became vested in R., under the bankruptcy laws of that country, as trustee; and in August, 1861, the equity of redemption vested in R. and B., as trustees. In June, 1861, C., being ignorant of the proceedings in bankruptcy, filed his bill of foreclosure against F., who took the copy served on him to R.'s solicitor, but no notice was taken of it, and in 1862 a final order of foreclosure was obtained and registered by C., who in 1853 conveyed to defendant G. In 1864 R. and B. filed the present bill of redemption:—Held, that the conduct of the plaintiffs, after service upon F., and notice to R.'s solicitor, disentitled them to redeem. *Robson* v. *Carpenter*, 11 Chy. 293.

L. and S. were joint owners of certain lands, and L. had created a mortgage on a part of his undivided interest in favour of R. With a view of effecting a partition, L. conveyed his interest to his co-tenant S., who thereupon re-conv to L. a certain defined portion; and in ord protect S. against the mortgage outstandi R.'s hands, L. executed back to S. an inden mortgage. L. did not pay off R.'s mortg and R. having obtained a final decree of closure, sold his interest in the property L., after the partition, had sold a portion o estate to the plaintiffs, who in respect of interest had been made parties to the foreclo suit by R. Subsequently, in an action of e ment, S., set up title under the indemnity gage from L.:—Held, on appeal, affirmin decree below, (14 Chy. 250,) that he had th in the plaintiffs to redeem, who were entitl do so upon paying what S. had paid or liable to pay to R., and all expenses reason incurred, together with costs as of an ord redemption suit—beyond those S. was ord to pay the costs. *Read* v. *Smith*, 16 Chy 14 Chy. 250.

On a bill to redeem, it appeared that plain ancestors had executed an absolute convey under circumstances which entitled him deem, but that he had afterwards acquiesc the grantee's claim of absolute ownership had thenceforward, and for ten years befor death, accepted from such grantee leases paid him rents, making no claim of any interest in the property:—Held, that the gr must be taken to have abandoned his eq and that his heirs were not entitled to red *Roach* v. *Lundy*, 19 Chy. 243.

See *Skae* v. *Chapman*, 21 Chy. 534, p. 23

(c) *Sale by Mortgagee.*

A security was effected by an absolute co ance, and a bond to re-convey, but the mortg sold and conveyed to other persons, who plaintiff alleged, knew the true nature o title. The only notice was a mere casual versation in the bar-room of a tavern, fi years before the filing of a bill by the mort to redeem. The court refused redemption costs. *Clarke* v. *Little*, 5 Chy. 363.

The equitable owner of unpatented land which he held a bond for a deed, mortgag interest therein, and put the mortgagee i session, whereon he and his partner carri business for some time. Subsequently the gagee purchased the lands at sheriff's sale, an execution against the mortgagor. Upon ing up the partnership, the mortgagee w debted to his partner in a large sum, in pay of which he accepted a conveyance fro mortgagee of the mortgage estate, and a bi filed to redeem, charging him with notice nature of the title. In the course of his ination, he stated, "I had heard from J. B mortgagee) that there was such a bond, thought in my own mind that the sheriff had killed a good deal of that:"—Held, Sp V. C., diss., that he was affected with no the mortgagor's title, and therefore liable redeemed. *Aitchison* v. *Coombs*, 6 Chy. 6

In 1836, R. being under obligations to accommodation indorser, and being abo leave Canada, conveyed land to S. by an ab deed. A bond was executed contemporane explaining the transaction and providing f

conveyance on satisfaction to S. of any damages or loss by his liability as indorser. A tenant occupied the premises till 1845, treating R. as landlord and paying the rent to S. as his agent. In 1846, S. sold the premises, the purchaser having no notice of R.'s claim :—Held, on a bill filed by the representative of R. to redeem, that no relief could be granted as against the purchaser, but that the representative of S., he being dead, was bound to account as mortgagee from the time that he went into possession. *Robertson* v. *Scobie*, 10 Chy. 557.

The owner of land conveyed the same, taking from the grantee a bond or agreement for payment of 830 a year, and the keep of a cow, which was to form a first charge or lien on the land. No part of this consideration was ever paid or performed. Before the bond or agreement was registered, the grantee mortgaged the property to a building society, who subsequently sold for the amount of this claim to a party who had notice of the effect of the bond :—Held, that the purchaser was liable to be redeemed on payment of what should be found due in respect of the mortgage to his vendors. *Waddell* v. *Corbett*, 21 Chy. 384.

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5. *Bills to Redeem.*

(a) *Practice.*

In a cause in the nature of a redemption suit, the bill stated the existence of three mortgages : alleged one to be usurious, and the two others to have been for larger sums than had been advanced : prayed special relief, and that an account might be taken of the sums actually advanced, and of the amount due, and for redemption. A motion for an immediate decree under the 77th order of May, 1850, was refused with costs. *Kelly* v. *Mills*, 2 Chy. 253.

It being doubtful when the mortgagor died, his widow and children joined in a suit to redeem, in order that all questions under the act abolishing the law of primogeniture might be avoided. At the hearing, the court allowed proof of intestacy by affidavit, with a view to making the decree as asked. *Constable* v. *Guest*, 6 Chy. 510.

The owner of an equity of redemption filed a bill impreaching the mortgagee's title, on the ground that no money was advanced ; but the court being of opinion that the evidence was sufficient to establish the fact of payment, directed, at the option of defendants, that the bill should be dismissed with costs, or the usual decree made for redemption upon payment of what should be found due upon a reference to the master. *Bedson* v. *Smith*, 10 Chy. 292.

Although a bill does not pray redemption, but a decree for redemption is issued upon it, it would seem that a subsequent dismissal of the bill operates as a foreclosure. *Cornwall* v. *Henriod*, 12 Chy. 338.

A mortgagee is not bound to produce his mortgage deed for the inspection of the mortgagor, when there is no question of title in dispute, the bill being for redemption, and the right to redeem being admitted by the answer. *Bell* v. *Chamberlain*, 3 Chy. Chamb. 429.—Taylor, *Referee*.

Where a second mortgagee files a bill of redemption, and makes default in paying at the time appointed, the mortgagor (as well as the first mortgagee) has, under the general order 466, the option of having a day thereupon appointed for redemption of the first mortgage by the mortgagor. *McKinnon* v. *Anderson*, 18 Chy. 684.

(b.) *Pleading.*

Where a mortgage vested in the mortgagee a life estate only, and he, after default, sold the interest of the mortgagor under execution in 1836, for more than the principal, interest and costs, and the purchaser afterwards sold, and his vendee went into possession, and afterwards conveyed to trustees of a settlement his interest in the property, but, with their assent, remained in possession, and it appeared that the trustees claimed the whole estate upon the trusts of the settlement :—Held, on a demurrer by one of the trustees to a bill filed by the mortgagors against the settlor and the mortgagee, together with the trustees, praying redemption, a re-conveyance by all parties, and general relief, that though the plaintiffs were not entitled to what they specifically prayed, yet they were entitled, under the general prayer, to a reconveyance of the life estate of the mortgagee, and an account of the rents and profits ; and that the bill was not multifarious. *Nelson* v. *Robertson*, 1 Chy. 530.

A third mortgagee filed his bill for redemption against the two prior incumbrancers and the mortgagor, but did not allege either that his own mortgage or that of the second mortgagee was past due. A demurrer on these grounds by the second mortgagee was allowed. *Parsons* v. *The Bank of Montreal*, 15 Chy. 411.

Held, that a bill to redeem need not contain an offer to redeem, because the form given in the orders contained no such offer. *Pearson* v. *Campbell*, 2 Chy. Chamb. 12.—Mowat.

A person having a second charge on land, filed a bill against the holder of a prior mortgage, and the owners of the equity of redemption, praying redemption and general relief :—Held, that the absence of a specific prayer as to the latter defendants did not disentitle the plaintiff to relief against them. *Long* v. *Long*, 17 Chy. 251.

See *Schram* v. *Armstrong*, 1 O. S. 327, p. 2372.

(c.) *Parties.*

Where one of several defendants has become bankrupt, his assignees are necessary parties, and the court will not proceed to make a decree in their absence. *Barnhart* v. *Patterson et al.*, 1 O. S. 321.—Chy.

The plaintiffs filed their bill to redeem, setting forth in a schedule the names of certain parties who had purchased portions of the mortgage premises, and charging them with notice of the defect in the title, but none of whom were made parties. One defendant put in a general demurrer for want of parties, which upon argument before the Vice-Chancellor was overruled, on the ground that the prayer of the bill was in the alternative, and to the relief prayed by one alternative the plaintiffs were entitled without those parties being present :—Held, on appeal, that if for any part of the relief prayed other parties are neces-

sary to be brought before the court, a demurrer to the whole bill will hold; but, as the defendant had, subsequently to the order overruling the demurrer, put in his answer:—Held, that he was too late in appealing from that order, and the appeal from the order was dismissed without costs. *Simpson* v. *Smyth*, 1 E. & A. 9; 2 O. S. 129. See, also, for judgment in privy council, 5 Chy. 104; 7 Moore, P. C. C. 205.

The owner of land sold and conveyed one acre thereof. Before the registration of the deed he mortgaged the whole estate, 200 acres, which mortgage was duly registered, and the purchaser of the acre then registered his deed. The assignee of the mortgagee proceeded upon default to sell and duly conveyed the whole estate. The purchaser of the acre filed a bill to redeem by virtue of his interest in the one acre, and alleging want of notice of the intention to proceed to sell under the power:—Held, that to obtain the relief prayed by the bill, the mortgagor was not a necessary party, although if the bill had sought for payment of the surplus, if any, of the purchase money over and above the amount due on the mortgage, it would be necessary to bring him before the court. *Daniels* v. *Davidson*, 9 Chy. 173.

G., a creditor of F., under a judgment recovered in 1856, filed his bill to redeem W., the alleged mortgagee, under a deed of conveyance to him from F., absolute in form. A creditor of W., under judgment recovered in 1859, and kept alive by fi. fa. lands, was made a party in the master's office, as an incumbrancer subsequent to plaintiff:—Held, that he could not properly be thus made a party; but the plaintiff was allowed to amend his bill by making him a party, in order that an opportunity might be afforded him of contesting the plaintiff's right to treat the conveyance from F. to W. as a mortgage as against him. *Glass* v. *Freckleton*, 10 Chy. 470.

The rule is that a bill can only be filed against a mortgagee for the purpose of redeeming his mortgage. *Rogers* v. *Lewis*, 12 Chy. 257; *S. C.*, *nom. Rogers* v. *Wills*, 2 Chy. Chamb. 13.—Mowat.

But this rule does not necessarily exclude the right of obtaining in the same suit against other parties relief consequent upon such redemption. *Rogers* v. *Lewis*, 12 Chy. 257.

When a mortgagor had assigned the mortgage property, and taken collateral security from the assignee for payment of part of the mortgage money, a bill by such assignee against the mortgagee and the mortgagor was held not to be improper. *Ib.*

But where such a bill did not offer to pay what was due to the mortgagee, or pray redemption, and prayed relief against the mortgagor only in respect of the collateral security, a demurrer was allowed. *Ib.*

Although the rule is that a prior mortgagee can be made a party only to redeem him, still if such prior security has been created by a deed absolute in form, a subsequent mortgagee is at liberty to bring him before the court for the purpose of shewing his interest to be redeemable, without offering to redeem him. *Moore* v. *Hobson*, 14 Chy. 703.

To a suit by a second incumbrancer to redeem the prior incumbrancer, the owners of the equity of redemption are necessary parties. *Long* *Long*, 16 Chy. 239.

Quære, in such a case if the prior incu brancer should afterwards put the judgme creditor to file a bill to redeem, whether he wou be entitled to his costs. *Crawford* v. *Meldru* 19 Chy; 165.

See also XI. 3, p. 2373, and XII. 2, p. 23

(d) *Costs.*

A mortgagee who takes a deed absolute in for and then fraudulently denies the right of reden tion, will be made to pay the costs of the su *Le Targe* v. *De Tuyll*, 3 Chy. 595.

Where a plaintiff moves for a summary ref ence, and seeks to deprive the mortgagee of costs, a case should be made for that relief up the pleadings, and the question of costs shou be included in the reference to the mast *Long* v. *Glenn*, 5 Chy. 208.

Where, after a mortgage debt had been duced to about £1 14s., the mortgagee, who h taken an absolute deed, distrained for £ claiming that to be due; the court, upon a l to redeem, refused the mortgagee his costs.

In answer to a bill for the redemption o mortgage alleging usury in the original trans tion, the mortgagee set up several defenc which were decided against him. The court, decreeing redemption, ordered the plaintiff pay the costs as of a common redemption su and defendant the costs of the issues fou against him. *Isherwood* v. *Dixon*, 5 Chy. 314

Although the general rule is, that if a balan is found due to defendant he will receive costs, still, under the special facts in this ca the court, upon a bill by the mortgagor agai the executors of the mortgagee, impeachi the whole transaction for fraud, ordered his tate to pay all the costs of the litigation. *Sou* v. *Burnham*, 10 Chy. 375.

Where a mortgagor subsequently executed lease for part of the mortgaged property, a one of the two owners of the lease mortgag his interest therein, such mortgagee was ma a party in the master's office to a suit by t original mortgagees for the foreclosure of th mortgage:—Held, on further directions, that, case the mortgagor redeemed the plaintif mortgage, he was not entitled to claim agai his co-defendants, or any of them, the co occasioned by the mortgage of the leasehol *McMaster* v. *Demmery*, 12 Chy. 193.

The plaintiff alleged several grounds for rel which he failed to establish, although he su ceeded in shewing a right to redeem, which rig defendant had contested. The court refused co to either party up to the hearing, and gave fendant the subsquent costs of a redemption s where the right to redeem is admitted. *Boo* v. *Gravley*, 16 Chy. 523.

Where defendant submitted by answer to redeemed on payment of costs, and made sta ments which, if true, would have entitled h to costs:—Held, that the plaintiff was justifi in going to a hearing to prove facts which titled him to costs against defendant. *Bram* *Martin*, 16 Chy. 566.

A suit for redemption having been compromised by payment into court of a sum of money for the benefit of those entitled to the equity of redemption, a decree was made in a suit subsequently brought by an execution creditor of the mortgagor, directing an inquiry as to other incumbrancers, and payment to them according to priority; and the defendants having made no improper defence were—Held, entitled to receive their costs out of the fund. *Robertson* v. *Beamish*, 16 Chy. 676.

A first mortgagee is entitled as against the owner of the equity of redemption to add to his debt the necessary costs of a suit to redeem brought by a second mortgagee, and dismissed with costs for default of the plaintiff therein. But where a first mortgagee had taken a decree for dismissal on the plaintiff's default, instead of giving to the owner of the equity of redemption a day to redeem under the general order 466, and a second suit became necessary in consequence, he was refused the extra costs thus occasioned. *McKinnon* v. *Anderson*, 17 Chy. 636.

Mortgagees having insisted on their right to consolidate two mortgages as against a purchaser of the equity of redemption in one of the properties, which claim was decided against them, were ordered to pay the costs up to the hearing, that being the only point raised thereat. *Dominion Savings and Investment Society of London* v. *Kittridge*, 23 Chy. 631.

XI. Foreclosure.

1. *When Decreed and at whose Suit.*

It seems that the plaintiff will not be entitled to the absolute order of foreclosure against a subsequent mortgagee and the mortgagor, unless he be in a situation to re-convey the legal estate in the mortgaged premises. *Ross* v. *Thompson*, 2 Chy. 624.

A mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot foreclose that mortgage with the others. *Thibodo* v. *Collar*, 1 Chy. 147.

Upon default in payment by a mortgagor of any instalment of, or of interest upon, mortgage money, the mortgagor has a right to a decree directing payment or to foreclose on default the whole amount secured by the mortgage. *Cameron* v. *McRae*; *Sparks* v. *Redhead*, 3 Chy. 311.

A mortgagee with power of sale, covenanted that no sale or notice of sale should be made or given, or any means taken to obtain possession of the mortgaged premises without three months' notice to the mortgagor, demanding payment:—Held, that such notice was unnecessary before filing a bill to foreclose. *Lamb* v. *McCormack*, 6 Chy. 240.

A mortgage was created by a trustee with the view of being sold to raise money for the creditors of the owner of the property, who had created the trust. The mortgagee had failed to sell it, and a suit was instituted by his representatives after his death, to foreclose the mortgage. The court ordered the mortgage to be delivered up to be cancelled; and the trustee having also filed a bill against the mortgagee's representatives, seeking relief on these grounds, was ordered to receive his costs of that suit, although the bill was not filed until after proceedings had been taken in the suit to foreclose. *Worthington* v. *Elliott*, *Elliott* v. *Worthington*, 8 Chy. 234.

A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default, but only to a decree to sell. *Paton* v. *Wilkes*, 8 Chy. 252.

Where the crown holds the equity of redemption no absolute order of foreclosure can be pronounced, but only that in default of payment the mortgagee be at liberty to enter into possession. *Dunn* v. *The Attorney General*, 10 Chy. 482.

It is no defence to a bill of foreclosure that the mortgage was given for the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title. *Cockenour* v. *Bullock*, 12 Chy. 138.

After the passing of the 27 Vict. c. 17, a municipal corporation invested, on mortgage, part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the securities:—Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain. *The Municipality of Oxford* v. *Bailey*, 12 Chy. 276.

C., the holder of two mortgages created by H., between whom and the niece of C. a marriage was about to take place, became party to the marriage settlement, which embraced, amongst other property, the lands mortgaged, and subsequently instituted a suit to reform the settlement so as to leave his mortgage unaffected thereby, and also to reform a mortgage made by H. with the assent of C., after the marriage, to one J. M., for the benefit of creditors, or to postpone it to his own, and prayed a foreclosure or sale, but did not offer to redeem. After the hearing of the cause the plaintiff paid off this mortgage and other claims upon the estate, and thereupon filed a petition setting forth these facts, and praying a declaration that he was entitled to recover the amounts so paid by him, and the amount due upon his two mortgages, and in default of payment a foreclosure of the mortgage premises:—Held, that all he was entitled to was a foreclosure against H., with the costs of an ordinary foreclosure suit, the plaintiff paying the costs occasioned by the other parts of his bill in which he was unsuccessful, as also the costs of the defendants appearing on the petition, the court being of opinion that he should, in the first instance, have drawn up a decree for redemption, and acted on it. Quære, whether the plaintiff could, if objected to, even enforce his mortgage against H., or whether the plaintiff was not in the position of a mortgagee who had represented to the wife before marriage that he held no incumbrance on the settled property. *Cornwall* v. *Henriod*, 12 Chy. 338.

A mortgagee, has a right to file a bill of foreclosure the day after default; and though such a course may be extremely sharp, he cannot be refused his costs. *Bennett* v. *Foreman*, 15 Chy. 117.

A purchaser of real estate mortgaged to the vendor securing a balance of purchase money, on the understanding that the vendor was to remove an incumbrance existing at the time of the sale. This mortgage was assigned, and the assignee thereof, though unaware of the terms upon which it was executed, had notice of the outstanding incumbrance; and it was not pretended that he supposed that the purchaser had bought subject thereto. Upon a bill by the assignee for the foreclosure of the mortgage:—Held, that the most he was entitled to was, that having reduced the prior incumbrance to a sum not exceeding that secured by the mortgage held by him, the purchaser was bound to pay that amount into court to be applied in clearing the title, or in default, his interest should be foreclosed, unless it was shewn that the existence of this mortgage prevented the purchaser from raising money upon the security of the land, in which case the plaintiff was bound to remove that incumbrance out of the way of the purchaser, who was declared entitled to three months after its being cleared off to procure the money; but that this protection was properly obtainable by an application in chambers. *The Church Society* v. *McQueen*, 15 Chy. 281.

A. lent B. $2000 and took two mortgages from the borrower, each for $1000, on separate property. The mortgagee foreclosed one of the mortgages, and then parted with the property:—Held, no bar to a foreclosure of the other mortgage. *Bald* v. *Thompson*, 16 Chy. 177.

Under the Insolvent Act of 1869, the jurisdiction of this court to decree foreclosure upon a mortgage is not taken away, and a mortgagee must still proceed in this court to obtain such relief against the official assignee of the mortgagor, there being no proper machinery in the Insolvent Court under which foreclosure can be obtained, or for serving parties out of the jurisdiction, or for calling in parties to establish their claims upon the mortgage premises. *Henderson* v. *Kerr*, 22 Chy. 91.

The rights of mortgagor and mortgagee are reciprocal, in so far as the right to redeem being shewn the right to foreclose is thereby established, although the identical conditions attached to the one right may not be attached to the other. *Parker* v. *The Vinegrowers' Ass.*, 23 Chy. 179.

By the terms of the proviso for redemption in a mortgage, the principal money was to remain unpaid so long as the interest reserved was paid at the days and times specified therefor; but in default of payment of the interest for a period of six months, then the whole of the principal money should become due and payable:—Held, that a bill to foreclose would not lie for any default in payment of interest for a shorter time than six months, although as it fell due the interest could be collected. And, Quære, whether in such a case the mortgagor would have the right to pay the principal money against the will of the mortgagee, by giving six months' notice, or paying six months' interest in advance; or whether he could take advantage of his own default in non-payment of interest for six months, and claim that as the condition on which he was at liberty to redeem. But, semble, he is bound to wait until the mortgagee insists on the default as giving him a right to foreclose, before the right to redeem arises in favour of the mortgagor. *Ib.*

2. *Bill.*

(a). *Form of.*

Where a party who had given a mortga
secure a debt for which he made himself lia
surety, and had received from his princi
mortgage on his own estate for the same
&c., afterwards filed a bill to foreclose the l
and redeem the first mortgage, and the prin
at the hearing objected to the bill on the gr
that it was multifarious:—Held, that the o
tion, if tenable, should have been taken b
murrer, and was too late at the hearing;
Quære, if such objection would have been sus
able under the circumstances of the case. *Sc*
v. *Armstrong*, 1 O. S. 327.—Chy.

A demurrer will not lie to a bill of foreclo
on the ground that the bill does not shew
the plaintiff had actually paid a money co
eration for the mortgage, or because it doe
offer to do equity. *Kingsmill* v. *Gardner*,
S. 325.—Chy.

A bill for foreclosure need not state the
perty or the parties to be within the jurisdi
of the court. If necessary that will be presu
in favour of the bill till the contrary appe
Duncan v. *Geary*, 10 Chy. 34.

A bill to foreclose filed by the executors o
mortgagee did not allege that probate had is
to them:—Held, defective on demurrer.
rence v. *Humphries*, 11 Chy. 209.

Where a testator devised his real and pers
estate to A., subject to a charge of $200 in fa
of B.; and A. after the testator's death, m
gaged the real estate to B. to secure a fur
sum, a bill by B. for payment of the two s
praying in default a foreclosure or sale, was
not to be multifarious. *Kelly* v. *Ardell*, 11
579.

An allegation that the defendant had
appointed executor by the will, was held in
cient in the absence of any allegation that he
proved the will, or had acted as executor.

The endorsement on an office-copy bill
specify distinctly which relief the plaintiff s
whether sale or foreclosure. *Drewry* v. *O'*
2 Chy. Chamb. 204.—Taylor, *Secretary.*

(b) *Amendment.*

In a suit instituted by an administrator
the will annexed upon a mortgage, the defe
produced a release for the mortgage money,
by the testator in his lifetime whereupo
plaintiff sought to be allowed to proceed a
the defendant as a creditor of the estate, b
this would involve such an amendment as
create an entirely different record; the
refused such permission, and dismissed th
with costs. *Barrett* v. *Crosthwaite*, 9 Chy.

After decree pronounced in a suit of
closure, the plaintiff discovered that porti
the mortgaged premises had been sold b
mortgagor before bill filed:—Held, in accor
with decisions by Esten, V. C., per Blake, C.
the purchasers of such portions might be br
before the court by amendment, and th
proper mode of proceeding was by pe
although but for those decisions he would

thought a motion for that purpose the proper proceeding. *Rumble* v. *Moore*, 1 Chy. Chamb. 59.

After decree and report in a foreclosure suit, the court refused to amend a mistake in the description of the property in the bill. *Lawrason* v. *Buckley*, 15 Chy. 585.

On an application ex parte for leave to amend after the decree by correcting the description of the mortgaged premises:—Held, that the application could not be granted ex parte. *Bank of Montreal* v. *Power*, 2 Chy. Chamb. 47.—Taylor, *Secretary*.

(d) *Dismissing.*

When a bill is filed to foreclose a mortgage payable by instalments, and defendant moves to dismiss on payment of the instalments and interest then due, the interest on mortgage money is only to be computed up to the day named for payment in the mortgage, and not to the time of making the application. *Strachan* v. *Murney*, 6 Chy. 378.

A bill of foreclosure on a mortgage by the churchwardens of a church at Brampton, claimed a lien for advances made by the mortgagee subsequent to the execution of the mortgage. One of the defendants, who had ceased to be a churchwarden, put in an answer disputing this claim, the other defendants allowed the bill to go pro confesso. At the hearing the plaintiffs abandoned their claim for the subsequent advances. The court dismissed the bill without costs, as far as it related to this claim. *Crooks* v. *Hughes*, 13 Chy. 485.

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3. *Parties.*

See also X. 5 (c), p. 2366, and XII. 2, p. 2390.

(a) *Assignees.*

T., one of the defendants, the assignee of the mortgagee, by his answer, stated that he was not interested in the mortgage, or at all events only by way of security, and that it belonged to A.; and that he and A. had concurred in an assignment of it to B.:—Held, that A. and B. were necessary parties; and that, notwithstanding the defendant consented to withdraw his answer, a decree could not be made in their absence. *Vankleek* v. *Tyrrell*, 8 Chy. 321.

(b) *Bankrupt Mortgagor.*

To a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party. *Torrance* v. *Winterbottom*, 2 Chy. 487.

A mortgagor of lands in this province, who afterwards becomes a bankrupt in England, is not a necessary party to a bill to foreclose by force of the English statutes relating to bankruptcy. *Goodhue* v. *Whitmore*, 7 L. J. 124.—Chy.

(c) *Creditors.*

To a bill brought by mortgagees, being trustees for the benefit of certain creditors of the mortgagor, such creditors are not necessary parties. *Fraser* v. *Sutherland*, 2 Chy. 442.

The judgment creditors of the mortgagee are necessary parties. *Sanderson* v. *Iuce*, 7 Chy. 383.

The plaintiff was execution creditor of one S., who became a mortgagee of the premises in question. To a suit instituted by a prior mortgagee the plaintiff was not made a party:—Held, that the plaintiff's position was that of a derivative mortgagee in invitum, and as such he ought to have been made a party. *Darling* v. *Wilson*, 16 Chy. 255.

(d) *Mortgagees.*

A mortgagee who has been in possession, and who has assigned his interest to his co-mortgagee, is not a necessary party in a suit of foreclosure. *Russell* v. *Robertson*, 5 L. J. 118.—Chy. Chamb.—Blake.

To a bill filed by the assignee of the mortgagee, the mortgagee is not a necessary party, even when the mortgagor alleges that the mortgagee has been paid in full. *Gooderham* v. *DeGrassi*, 2 Chy. 135.

Where a mortgagor subsequently leased part of the mortgaged property, and one of the two owners of the lease mortgaged his interest therein, such mortgagee was made a party in the master's office to a suit by the original mortgagees to foreclose their mortgage. *McMaster* v. *Demmery*, 12 Chy. 193.

P., a debtor of the plaintiff, deposited with him certain mortgages as security. The plaintiff filed a bill against the owners of the equity of redemption of one of the mortgages for payment or foreclosure. The defendants, at the hearing, objected that P. was a necessary party, but the court overruled the objection, as it had not been taken by answer, and P. might be ordered to be made a party in the master's office. *Jones* v. *The Bank of Upper Canada*, 12 Chy. 429.

(e) *Principal and Surety.*

Where there is only one principal and one surety, both must be made parties to a bill for foreclosure or sale. *Seidler* v. *Sheppard*, 12 Chy. 456.

Where a mortgage is given by a surety on his own property, the principal is a necessary party to a suit for a foreclosure of the mortgage. *Ib.*

(f). *Real and Personal Representatives.*

The representatives of a deceased tenant for life of an equity of redemption, are not necessary parties to a bill to foreclose. The representatives of the survivor of several joint mortgagees cannot, merely as such, sustain a suit to foreclose, without making the representatives of the other mortgagees parties. *Forsyth* v. *Drake*, 1 Chy. 223.

The heirs of a deceased mortgagee of an equity of redemption are not necessary parties to a suit of foreclosure by the prior mortgagee—the proper party being the personal representative of such mortgagee. *Grimshawe* v. *Parks*, 6 L. J. 142.—Chy.

Three partners took a conveyance of real estate, "as and for partnership property, for the purposes of the partnership," and one having left the province, and another died, a mortgagee of the property filed a bill to foreclose:—Held, that the personal representative of the deceased partner was a necessary party, and that the plaintiff must prove the absence from the jurisdiction of the non-resident partner, and perhaps the plaintiff's inability to serve him with process. *Baxter* v. *Turnbull*, 2 Chy. 521.

Where a mortgage is taken in the name of one partner to secure a partnership debt, and a bill is filed to enforce the security, the representatives, real or personal, of a deceased partner, are not necessary parties. *Stephens* v. *Simpson*, 12 Chy. 493.

On a bill filed by A. & B., as executors of the mortgagee, to foreclose:—Held, that the heirs of the deceased mortgagee, or the persons beneficially interested under his will, were not necessary parties. *Lawrence* v. *Humphries*, 11 Chy. 209.

A testator devised his real and personal estate to A., subject to a charge of $200 in favour of B.; and A., after the testator's death, mortgaged the real estate to B. to secure a further sum. To a bill by B. for payment of the two sums, praying in default, a foreclosure or sale, the personal representative of the testator was held to be a necessary party. *Kelly* v. *Ardell*, 11 Chy. 579.

Where a bill by a mortgagee against the infant heir of the mortgagor prays a foreclosure, and the court, for the protection of the infant, directs an inquiry whether a foreclosure or a sale is more for the benefit of the infant, it is not necessary to direct the master to make the executor of the mortgagor a party in his office, in case of the master's opinion being in favour of a sale. *Trust and Loan Co.* v. *McDonnell*, 12 Chy. 196.

Where a mortgagee proceeds to foreclose against the mortgagor, and the estate of a deceased mesne incumbrancer, the real representatives of such incumbrancer are not necessary parties. *Taylor* v. *Steal*, 1 Chy. Chamb. 74.—Blake.

(g) *Trustees and Cestuis que Trust.*

A mortgagor having devised his equity of redemption to trustees for his children in fee on their attaining twenty-one:—Held, that to a bill to foreclose against the cestuis que trust after they attain twenty-one, the trustees were not necessary parties. *Forsyth* v. *Drake*, 1 Chy. 223.

Until a deed, alleged to be fraudulent, is declared void, it must be deemed valid. Therefore, where at the hearing of a foreclosure suit it appeared that after the execution of the mortgage a voluntary deed had been executed by the mortgagee, purporting to vest all his property in trustees: that he alleged and had gone into evidence to shew this deed void, as obtained from him fraudulently: that some of the cestuis que trust had released their interest under the deed, and that the others had not any part in obtaining, and had not executed it:—Held, that such other cestuis que trust must, notwithstanding, be made parties to the suit; and l was given to the plaintiff to amend for that pose. *Rogers* v. *Rogers*, 2 Chy. 137.

(h) *Wife.*

To a suit for the foreclosure of a mortgag which the wife of the mortgagor has joine bar her dower, the wife is not a necessary pa and if made a defendant the bill as against will be dismissed with costs. *Moffatt* v. *Th son*, 3 Chy. 111. But see *Sanderson* v. *Ca* 1 Chy. 349.

A married woman is not in respect of dow necessary party to a bill for the foreclosure mortgage in which she has joined to bar do On an application, however, for a married wo so made a party to answer separately, an o will be granted, but the plaintiff will take the risk of having the costs of making her a p afterwards disallowed. *Davidson* v. *Boy* P. R. 27.—Chy. Chamb.—Holmested, *Refer*

(i) *Other Parties.*

Where, after a mortgage being given, equity of redemption is severed, so that diffe persons are entitled to redeem in respect of ferent parcels, these different persons mus made parties. *Buckley* v. *Wilson*, 8 Chy. 56

A final order of foreclosure was refused w a person entitled to a part of the equity of demption in a mortgage estate was mad party in the master's office; he should be m a defendant by the bill. *Whan* v. *Lucas*, 1 C Chamb. 58.—Esten.

The master at Whitby made the usual o making certain judgment creditors parties, the 26th of April, 1861; but they were served till the 3rd of June. They did not ap before the master, and, after he had made report, they applied by motion to be allowe come in and prove their claims:—Held, they were parties to the suit from the day the master made his order; that the applic by motion was regular, and need not be by tion; and that they might come in and p their claims on terms. *Sterling* v. *Camp* Chy. Chamb. 147.—Spragge.

In a foreclosure suit, the mortgagor being one of the heirs-at-law, who was originally fendant, appeared from the affidavit file obtain service by publication, to be dead, an bill was thereupon amended by striking hi The foreclosure was completed as against other defendants, and after decree (on som jection to the title, by an intended purch arising) a petition by the plaintiff for an foreclosing such party, and another pa whom one of the female defendants had married, and parted from, some fifteen previously, and who had not since been of, was refused. *Street* v. *Dolan*, 3 Chy. C 227.—Taylor, *Referee*.

To a bill upon a mortgage for relief by s foreclosure a tenant of the mortgagor is a p party, in order that he may redeem if he c to do so, or in case of default of payme ordered to deliver up possession. *Canad manent Loan and Savings Society* v. *Macd* 22 Chy. 461.

(j) *Practice in adding Parties.*

Where, under an order in chambers after decree, persons interested in the equity of redemption of mortgaged premises have been added as parties to a suit in the master's office, an application to set aside such an order must be made to the court upon petition. *Tice* v. *Myers*, 3 L. J. N. S. 102.—Chy. Chamb.—Taylor, *Secretary.*

After the final order had been obtained it was discovered that prior to the filing of the bill the mortgagor had sold a portion of the equity of redemption. An application for a fiat on a petition, praying that the purchaser might be made a party in the master's office was granted, the court, however, expressing an opinion that the prayer of the petition could not be granted. *The Municipality of Oxford* v. *Bayley*, 1 Chy. Chamb. 272.—VanKoughnet.

An order to make persons interested in the equity of redemption, parties in the master's office will not be granted ex parte. Notice should be served on the owners of the equity of redemption already before the court, but not on those proposed to be added. *Penner* v. *Canniff*, 1 Chy. Chamb. 351.—Mowat.

But such order was granted ex parte in *Cummings* v. *Harrison*, 1 Chy. Chamb. 369.—Spragge.

An application to amend after decree, under order 438, by adding a party interested in the equity of redemption need not be on petition, but is properly made on motion. Where such a motion was opposed on the grounds of irregularity, as not being by petition, the costs of opposing it were refused. *Harrison* v. *Greer*, 2 Chy. Chamb. 440.—Taylor, *Secretary.*

See *Rumble* v. *Moore*, 1 Chy. Chamb. 59, p. 2373; *Cameron* v. *Lynes*, 1 Chy. Chamb. 42, p. 2382.

See also PLEADING IN EQUITY.

4. *Decree.*

(a) *Form of.*

Where a mortgagor has executed several mortgages, in one only of which his wife joined; the proper decree on a bill for foreclosure against the widow and the devisees of the mortgagor, is one in the usual form against them all, with a declaration that upon payment of the mortgage executed by the widow, she shall, if she choose, be let into her dower. *Thibodo* v *Collar*, 1 Chy. 147.

Semble, when there are several judgment creditors, the decree should give the creditors successive rights of redemption, although very short periods must be fixed for that purpose. *Carroll* v. *Hopkins*, 4 Chy. 431.

V. executed a mortgage to A., then sold part of the property to H., then mortgaged the residue with other property to P., who obtained an assignment from A. of his mortgage, and filed a bill of foreclosure against V. & H. The proper form of the decree in such case stated. *Perkins* v. *Vanderlip*, 11 Chy. 488.

Where there is a dispute as to the ownership of the equity of redemption, the decree should usually contain a direction to the master to inquire as to the ownership before a day is appointed for payment. *Cayley* v. *Hodgson*, 13 Chy. 433.

A. and B. mortgaged to C., and afterwards sold and conveyed the same property to D., receiving back a mortgage for the purchase money, which exceeded the amount due to C. A., without B.'s authority, assigned this mortgage to C. by way of further security for the debt due to him by A. and B. On a bill by B. against all parties, it was—Held, that the proper decree was the same as if the purchaser had been the original owner, and had executed a first mortgage to C., and a second mortgage to A. and B. *Grahame* v. *Anderson*, 15 Chy. 189.

(b) *Foreclosure or Sale.*

Where a bill prays a foreclosure, and some of the parties interested are not before the court, a sale cannot be decreed. *Bethune* v. *Caulcutt*, 1 Chy. 81.

A bill of foreclosure having been taken pro confesso against some of the defendants under the general orders of the court, is not a reason for decreeing a sale as against those defendants. *Ib.*

The trustee of a mortgaged estate asking a sale in a suit for foreclosure, is not released from the payment of the usual deposit required on such a decree. *Machell* v. *Campbell*, 5 L. J. 117—Chy.

A mortgagee is entitled to a decree for a sale or foreclosure, at his option, as against the mortgagor. *Meyers* v. *Harrison*, 1 Chy. 449.

Where the prayer of the bill is for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and in the event of a sale failing to cover the claim of the plaintiff, order foreclosure. *Blachford* v. *Oliver*, 8 Chy. 391.

The orders of June 1861 do not entitle a defendant to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the court to grant the defendant that indulgence upon the consent of the plaintiff in cases where the plaintiff desired to bid at the sale. *Taylor* v. *Walker*, 8 Chy. 506.

In this case a reference was directed to the accountant to enquire whether a sale or foreclosure would be for the benefit of the infant defendant. By his report made under this decree the accountant did not certify specially as to this reference, but the accounts were taken and those of the incumbrancers who had proved were ordered to be paid in the usual manner under a decree for sale. An application was made for a final order for sale, but was refused. *Edwards* v. *Bailey*, 2 L. J. N. S. 302.—Chy. Chamb.—Taylor, *Secretary.*

Where the decree is for sale, the court will not on default grant an order of foreclosure, ex parte. *Garratt* v. *McDonald*, 1 Chy. Chamb. 335.—Mowat.

After a decree of foreclosure, defendant applied in Chambers for an order for sale, the property mortgaged being worth $1,000, and the mortgage being for $157; and that the usual deposit might be dispensed with. The Secretary considered the General Order imperative, and refused the application. *Thompson* v. *Macaulay*, 3 Chy. Chamb. 111.—Taylor, *Secretary.*

In suits for foreclosure or sale, motion for a decree is to be made in chambers under order 435 only when infants alone are concerned. If there be also adult defendants, the case should be regularly set down for hearing before the court. *Fullerton* v. *Keely*, 9 L. J. N. S. 54.—Chy. Chamb.—Holmested, *Referee*.

(c) *Amendment of.*

A summary reference for foreclosure had been made, and on proceeding in the master's office it was discovered that there were several registered judgments against defendants. On the plaintiff's motion the decree was amended by inserting a direction to the master to enquire and report upon the priorities, &c., of the judgment creditors, on payment of costs, and without a reservation of further directions. *Moffatt* v. *March*, 3 Chy. 163.

Where, on a bill praying foreclosure only, a decree for sale was drawn up, with a direction that the mortgagor should pay any deficiency, the court, at the instance of the mortgagor, four years afterwards, amended the decree by striking out this direction, but ordered him to pay the costs of the proceedings under the decree. *Cockenour* v. *Bullock*, 12 Chy. 138.

An incumbrancer, made a party in the master's office, under the general orders of the 6th of February, 1865, cannot, after fourteen days from the service of the decree, file a petition to vary it, without first obtaining leave in chambers. *Roe* v. *Stanton*, 15 Chy. 137.

(d) *Setting Aside.*

A decree of foreclosure absolute drawn up and entered, was set aside at the instance of a purchaser of the equity of redemption, whose interest was acquired after the institution of the suit to foreclose, but without notice of it. *Hilliard* v. *Campbell*, 7 Chy. 96.

(e) *Other Cases.*

Where a bill of foreclosure had been filed by the executor and devisees of the mortgagee, and the executor alone attended at the time and place appointed by the master for payment of the mortgage money to the plaintiffs; as it did not appear that the debts of the testator had been paid, the court considered the plaintiffs entitled to the absolute decree of foreclosure in default of payment. *Evans* v. *Parker*, 2 Chy. 555.

In January, 1841, an original decree of foreclosure had been made. In pursuance thereof the master made his report, and in May of the same year the cause was set down for hearing on further directions, but the decree then pronounced was not drawn up or any entry made thereof. A motion now made to allow the plaintiff to draw up and enter nunc pro tunc the decree on further directions, from minutes alleged to have been prepared by the registrar, was refused. *Drummond* v. *Anderson*, 3 Chy. 150.

A court will not grant a decree of foreclosure in the first instance, where the lands of the judgment debtor are not specifically set out and the value of them stated in the bill. *Glass* v. *Freckelton*, 8 Chy. 522.

Where a decree of foreclosure obtained up a mortgage payable by instalments has b stayed upon payment of the amount actua due, and a subsequent default occurs, the pro order to make is to direct the whole sum secu to be paid, with liberty to defendant to pay sum actually due, and stay proceedings there *Strachan* v. *Devlin*, 1 Chy. Chamb. 8.—Esten

A final decree of foreclosure had been obtai in a suit where the true position of parties not disclosed or material facts had been mis presented, and a bill was subsequently filed enforce a claim against the party beneficia interested as plaintiff in that suit. The co refused to make a decree other than would h been proper had the true position of the part to that suit been stated. *Wilson* v. *Hodg* 14 Chy. 543.

Where in a foreclosure suit a defendant answer admitted the making of the mortga but denied an alleged agreement to pay an creased rate of interest, and set up a tender the amount he contended was properly due, a claimed his costs, it was held not to be a c where the plaintiff was entitled to a pre decree. *Ross* v. *Vader*, 3 Chy. Chamb. 236 Taylor, *Referee*.

5. *Final Order and Decree.*

(a) *Practice on Application for.*

Where a mortgage was made to secure a pa nership debt, a final order was granted, althou one partner had not executed the power of torney to receive the mortgage money, or ma affidavit of non-payment, it appearing that su partner was and had been for some time resid out of the country, and had never interfered the mortgage transaction in any way. *Coo* v. *Wylde*, 1 Chy. 538.

A decree for foreclosure being erroneous, court refused to pronounce a final decree on fault of payment. *Commercial Bank* v. *Grah* 4 Chy. 419.

After a lengthy period has elapsed since day appointed for payment, it is necessary give notice of the motion for the final or *Kirchoffer* v. *Stafford*, 2 Chy. Chamb. 52.—T lor, *Secretary*.

Where a mortgagee had become bankrupt, he, with his assignees, had filed a bill to f close, a final order was granted, although on the assignees being absent had not executed power of attorney to receive the mort money, or made affidavit of non-payment. *Ly* v. *Kirkpatrick*, 2 Chy. 625.

A plaintiff who goes into possession of mortgaged premises and receives rents after day appointed for payment by the mortga is entitled to a final order of foreclosure wit a new account being taken and a new da payment given to the mortgagor. Semble plaintiff in such a case should serve the mo gor with notice of the motion for the final o *Portman* v. *Smith*, 2 L. J. N. S. 167.— Chamb.—Mowat.

Where by his report under a foreclosure cree the master appointed a time for all the

sequent incumbrancers who proved before him to redeem the plaintiff, one of whom at the time appointed paid the amount and took an assignment:—Held, that the incumbrancers who did not redeem were entitled to three months further time before the co-defendant could obtain a final foreclosure against them. *Ardagh* v. *Wilson*, 2 L. J. N. S. 270.—Chy. Chamb.—VanKoughnet.

Where a party entitled to a final order of foreclosure neglects to apply until nearly two years after his right to the order first accrued, the order will not be granted ex parte. *Ardagh* v. *Orchard*, 2 L. J. N. S. 303.—Chy. Chamb.—Taylor, *Secretary*.

On an application for a final order of foreclosure the affidavit of the attorney appointed by the mortgagee shewed an attendance of only a quarter of an hour at the appointed place, the solicitor's office. There was also another affidavit from the solicitor that no one attended during the two hours appointed by the master's report to pay the mortgage money. Order granted. *Mitchell* v. *Hayes*, 5 L. J. 232; 1 Chy. Chamb. 56.—Esten.

After the day appointed for payment the plaintiff entered into possession of the mortgage premises:—Held, that the plaintiff was entitled to a final decree of foreclosure without a new account being taken. *Greenshields* v. *Blackwood*, 1 Chy. Chamb. 60.—Blake.

In proceeding under a reference before the master, one of the defendants, after being served with the first warrant, absconded from the jurisdiction, and the subsequent proceedings in the master's office were left at his former place of abode. The court, under the circumstances, made the decree for foreclosure absolute for default of payment. *White* v. *Courtney*, 1 Chy. Chamb. 66.—Spragge.

On a motion for a final decree, it appeared that several unnecessary parties were added in the master's office. The motion was refused, and the costs thus caused were deducted from the plaintiff's bill; the amount then appearing due was ordered to be paid in two weeks, or in default foreclosure. *Rice* v. *Brooks*, 1 Chy. Chamb. 71.—Blake.

On application for a final order, the plaintiff should shew that he has not been in possession, or in the receipt of the rents and profits. *Scott* v. *McDonell*, 1 Chy. Chamb. 193.—Spragge.

The manager of the bank where mortgage money is directed to be paid should certify that the money has not been paid before, as well as on or since the day appointed. *Farrell* v. *Stokes*, 1 Chy. Chamb. 201.—Esten.

The bank certificate of non-payment should be made by the cashier, or other like officer. A certificate of the accountant, as such, is not sufficient. *Campbell* v. *Garrett*, 1 Chy. Chamb. 255.—Spragge.

Where the report appointing the time and place for payment has not been confirmed before the day appointed for payment, a final order will not be granted. *Mountain* v. *Porter*, 1 Chy. Chamb. 207.—Spragge.

Where the plaintiff resides out of the jurisdiction, the affidavit of non-payment being made by an agent of the plaintiff, it must be shewn where the custody of the mortgage has been. *Rae* v. *Shaw*, 1 Chy. Chamb. 209.—Spragge.

Where the plaintiff resides out of the jurisdiction, and the affidavit as to non-payment is made by his solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorized to receive the money. *Taylor* v. *Cuthbert*, 1 Chy. Chamb. 240.—Spragge.

Where co-mortgagees are made co-plaintiffs, the affidavit as to non-payment, to obtain a final order, should be made by all of them. *Annis* v. *Wilson*, 1 Chy. Chamb. 217.—Spragge.

Where the affidavit of non-payment is made by an agent of the plaintiff, it should state that he is authorised to receive the money. *Powers* v. *Merriman*, 1 Chy. Chamb. 225.—VanKoughnet.

On an application by a company for a final order for sale, the affidavit of the officer of the company as to non-payment should shew that he is the proper officer to receive the mortgage money. *The Western Assurance Co.* v. *Capreol*, 1 Chy. Chamb. 227.—Spragge.

Where the usual affidavit of the plaintiff shews that he has been in occupation of the property, it must be referred back to the master to take a new account, set an occupation rent, and appoint a new day for payment, although the plaintiff in his affidavit swears that he was in occupation merely as caretaker, and has received no rents or profits. *Cummer* v. *Tomlinson*, 1 Chy. Chamb. 235.—VanKoughnet.

A motion for a final order is an ex parte proceeding; it is unnecessary to serve notice thereof even on infant owners of the equity of redemption who have answered. *Henderson* v. *Cowan*, 1 Chy. Chamb. 297.—Mowat.

Where the usual affidavit of non-payment is made by the agent of the plaintiff his authority need not be produced. *Radcliffe* v. *Duffy*, 1 Chy. Chamb. 302.—Mowat.

The affidavit of non-payment should be made after the day the money is due. *Blong* v. *Kennedy*, 2 Chy. Chamb. 453.—Taylor, *Secretary*.

The Court of Chancery will not entertain a suit where the subject matter of litigation is a sum not exceeding £10. Where, therefore, after default was made in payment under a decree in foreclosure, in a suit in which the bill was filed to enforce a mortgage securing $18.53, a final order was refused. *Shaw* v. *Freely*, 8 L. J. N. S. 136.—Chy. Chamb.—Taylor, *Secretary*. See also, *Gilbert* v. *Braithwait*, 3 Chy. Chamb. 413.

(b) *Setting Aside.*

Seven months after the final order the mortgagor moved to set it aside, on the ground that several mesne incumbrancers had not been made parties, either before decree or in the master's office. The application was refused with costs, on the ground of laches and because the objection was not taken in the master's office. *Cameron* v. *Lynes*, 1 Chy. Chamb. 42.—Esten.

Where there were several plaintiffs in a suit, and a final order had been obtained by their solicitor:—Held, that their solicitor could not afterwards move on behalf of the defendants foreclosed to set aside the order, though two of the plaintiffs concurred in the application and

only the third objected. *Boulton* v. *The Don and Danforth Road Company*, 1 Chy. Chamb. 329.—Mowat.

Where mortgagors had been foreclosed, and the mortgagees had subsequently sold the property, it was held that the mortgagors could not several years afterwards move in the suit against the final order for irregularity, without having made the purchasers or their assignees parties to the suit. *S. C. Ib.* 335.—Mowat.

A purchaser from a party having a decree for final foreclosure has a right to presume that the court has taken the necessary steps to investigate the rights of the parties, and has properly decreed foreclosure. The court will not set aside a foreclosure after the estate has been acquired by a bonâ fide purchaser for value, on account of a slight irregularity in one of the papers on which the order was granted. Where therefore a party who was a second mortgagee and had been solicitor for the plaintiff, purchased the estate from one who had, for aught that appeared, purchased in good faith for value of the plaintiff, without notice of any irregularity, and the order for foreclosure was set aside by the secretary on account of the absence of a date in the bank manager's certificate, an application by the purchaser from the plaintiff, in which the subsequent purchaser joined, to set aside the secretary's order, was granted with costs. It was held that the joining in such application by the subsequent purchaser was not irregular, but surplusage at most. The defendant having, as it was alleged, sold his interest or equity of redemption to a third party, who was notified of this application, it was held that it was not necessary to notify the defendant, as the purchaser from him had been notified. *Collins* v. *Denison*, 2 Chy. Chamb. 465.—Spragge. See, also, *Gunn* v. *Doble*, 15 Chy. 655.

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6. *Foreclosure after Abortive Sale.*

Where at the hearing a sale instead of foreclosure had been asked for, and was directed by the decree, which omitted however to provide that in the event of the sale failing the defendant should stand foreclosed, the court, upon petition setting forth the facts, and that the attempted sale which had been made had proved abortive, ordered defendant to pay the amount which had been found due, within one month, or, in default, foreclosure. *Goodall* v. *Burrows*, 7 Chy. 449.

It is unnecessary to present a petition for foreclosure after abortive sale; it is sufficient to serve a notice of motion on the mortgagor; and the extra costs of a petition and service thereof on parties other than the mortgagor will be disallowed. *Odell* v. *Doty*, 1 Chy. Chamb. 207.—Spragge.

Where a foreclosure is asked after an abortive sale, the mortgagor must first be allowed three months to redeem. *Girdlestone* v. *Gunn*, 1 Chy. Chamb. 212.—VanKoughnet.

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7. *Opening Foreclosure.*

A foreclosure was opened eighteen months after the final order, where the mortgagor was illiterate, had had no solicitor in the ca misunderstood the object of the bill, wh the only paper served on him; the r bearing twelve per cent. interest, the appearing to be three times the value o cumbrance, and the whole or greater pa property being still in the possession of t gagor. *Platt* v. *Ashbridge*, 12 Chy. 105

Where the plaintiff can be replace same position he occupied before the and recompensed for any damage he n suffered, and where there appears a pr the amount of the mortgage money be within the period asked for, the court refuse to open the foreclosure. *Waddel Coll*, 2 Chy. Chamb. 62.—VanKoughnet

The court will not open foreclosure in defendant who has been guilty of lach shews no efforts to avoid foreclosure his estate. *Brothers* v. *Lloyd*, 2 Chy. 119.—VanKoughnet.

Suing at law for part of the mortgage for which the note of a third party h given as collateral security, will not o foreclosure if such suit is brought befo closure completed. *Mills* v. *Choate*, Chamb. 374.—Taylor, *Secretary*.

A defendant seeking to open foreclosur shew some reasonable excuse for not re at the proper time,—also that he has a of paying the mortgage debt if time h him, and that the property is of much value than the amount due. *Johnson bridge*, 2 Chy. Chamb. 251.—Taylor, *Se*

The plaintiff, being owner of land, af ing mortgaged it, emigrated to Austra subsequently remitted money to his age to pay off the incumbrance; but, they the money to their own use. Subseque assignee of the mortgage proceeded to f in which suit an answer was put in on h the plaintiff, but without his knowledg sent, admitting the allegations of the that the full amount of principal and was due; whereupon a final order of fo was, in due course, obtained; and the in that suit conveyed to defendant A. f the value of the property; and on the s defendants M. and S., as attorneys of t tiff, conveyed the premises to A., wh norant of any fraud in the matter. T tiff having returned to this country, a tained the frauds which had been upon him, filed a bill against his agents purchaser A.:—Held, that the plainti as the purchaser was concerned, wa his answer, and was not entitled to against him; that the fact of the purch ing heard before his purchase that t tiff had remitted money to pay the was not sufficient to charge him with n the foreclosure was wrongful; but, in the fraudulent conduct of the attorn court made a decree against them for th realized on the sale of the land, and them to pay the costs of the suit, incl costs of the purchaser. *McLean* v. Chy 76.

The recovery of a judgment against after a final order opens the foreclosur the defendant in to redeem. In such a

secretary made an order giving time for redeeming, that part of the order being acquiesced in; —putting the defendant on terms to pay subsequent interest and costs, and that writ of assistance issue without further order if default made in payment at time named. *Mills* v. *Choate*, 2 Chy. Chamb. 433.—Taylor, *Secretary.*

See *Read* v. *Smith*, 16 Chy. 52. p. 2364.

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8. *Order for Delivery of Possession.*

G. O. 464, for delivery of possession, applies only to mortgage cases. *Chisholm* v. *Allen*, 2 Chy. Chamb. 411.—Taylor, *Secretary.*

The court, after the final order had been made, and acted on by plaintiff, ordered the delivery up of possession of the mortgaged premises, though not asked for upon the order being obtained. *Lazier* v. *Ranney*, 6 Chy. 323.

An order for delivery of possession is only made against persons not parties, when they acquired possession pendente lite from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators. *The Bank of Montreal* v. *Wallace*, 13 Chy. 184.

Held, that under the orders of the 29th of June, 1861, a mortgagee is not entitled to an order for the delivery of possession as against the tenants of the mortgagor, although such tenancy may have begun after the mortgage was made. *Bank of Montreal* v. *Ketchum*, 1 Chy. Chamb. 117.—Spragge.

It must be shewn on moving that the defendant is in possession. No order will be made against a tenant or third party in possession not a party to the cause. *McKenzie* v. *Wiggins*, 2 Chy. Chamb. 391.—Taylor, *Secretary.*

After sale under a decree an order for delivery of possession will not, as a general rule, be made against a person not a party to the suit; and, quære, if there be any jurisdiction over strangers except in the plain case of parties taking possession, pendente lite, without any pretence of paramount title. *Trust and Loan Co.* v. *Start*, 6 P. R. 90.—Chy. Chamb.—Holmested, *Referee.*

An application for an order for possession cannot be made the means of trying the right to possession between a landlord and his tenant, or a trespasser. Where, therefore, a mortgagor's tenant had attorned to the mortgagee, and afterwards such tenant left the premises, and they fell into the hands of another party, an order for possession against such party was refused. *Scott* v. *Black*, 3 Chy. Chamb. 323.—Taylor, *Referee.*

Where the application is made by a purchaser for the delivery of possession, and of the title deeds, notice must be served on the plaintiff (the mortgagee), or, if he be paid off, to some other party interested in the proceeds of the sale. *Walker* v. *Matthews*, 1 Chy. Chamb. 232.—Spragge.

In moving to commit for a contempt in not delivering possession of mortgage premises in obedience to an order, to that effect it must be shewn that the possession was demanded. *Nowiens* v. *Labadie*, 1 Chy. Chamb. 13.—Esten.

Such order after final order of foreclosure will not be granted ex parte, notice must be served; it is not necessary, however, to demand possession. *Hotchkinson* v. *French*, 1 Chy. Chamb. 201. —Esten.

On such application it must be shewn that the mortgagor is actually in possession. *S. C., Ib.* 223.—Spragge.

The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession, but the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it. A delay of two years after the final order for foreclosure is no bar. *Moffatt* v. *White*, 1 Chy. Chamb. 227.—Spragge.

Where more than three years had elapsed since the final order, the court required an affidavit shewing the circumstances of the possession since the final order, and that defendant had never relinquished possession. *Irving* v. *Munn*, 1 Chy. Chamb. 240.—VanKoughnet.

The mortgagor, after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee. On a motion for that purpose an order was made for their delivery. *Stennett* v. *Arnyn*, 2 Chy. Chamb. 218.—Spragge.

On the motion the court will not, as a general rule, look behind the final order for foreclosure. *Mills* v. *Choate*, 2 Chy. Chamb. 374.—Taylor, *Secretary.*

Where costs were not asked for, by the notice or on argument, and no demand of possession was proved, the order was made without costs. *Ib.*

A motion for delivery of possession must be made on notice. *Buckley* v. *Ouillette*, 2 Chy. Chamb. 439.—Taylor, *Secretary.*

See *Imperial Loan and Investment Co.* v. *Boulton*, 22 Chy. 121, p. 2392.

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9. *Costs.*

In a foreclosure suit upon a mortgage for £250, and on which only £250 had been in fact advanced, the court disallowed the additional £109 and costs of the suit. The plaintiff, being the assignee of the mortgage, then claimed to recover these costs from defendant, his assignor, upon his covenant for the validity of the security, &c.:—Held, not recoverable. *Sturgess* v. *Bitner*, 11 C. P. 102.

A mortgagee is always entitled to his costs, and therefore where a subsequent mortgagee who has filed a bill to foreclose offers to consolidate his suit in that of the prior mortgagee, who has filed a bill after him, he will be allowed his prior costs in such suit. *Allan* v. *McDougall*, 6 L. J. 64.—Chy.

Where a mortgagee files a bill to foreclose, and a question arises at the hearing whether he has not received sufficient to pay off the incumbrance before the commencement of the suit, the costs will be reserved. *Gooderham* v. *DeGrassi*, 2 Chy. 135.

A mortgagee having omitted to give credit on the deed, or in his books, for payments to him

by the mortgagor, his executors, after his decease, claimed a large sum to be due on the foot of the mortgage. The mortgagor tendered a certain amount, saying that he was willing to pay any additional sum that might appear due after giving him credit for the alleged payments. A bill was afterwards filed to foreclose, and on taking the account a sum of between £2 and £3, over and above the amount tendered, was found due. The court ordered the plaintiff to pay costs. *Cornwall* v. *Brown*, 3 Chy. 633.

The court will not compel a mortgagee who holds several mortgages from the same party on the same land to proceed only on one bill filed for the foreclosure of one of the mortgages, as the decree for redemption and re-conveyance is at the mortgagee's risk; but his filing more than one bill may influence the discretion of the court as to costs. *Noble* v. *Line*, 5 L. J. 163.—Chy. Chamb.—Esten.

A special order will not be granted, directing the master to enquire as to the necessity of bringing two suits of foreclosure respecting two mortgages between the same parties, as the master has jurisdiction to make such enquiry and disallow the whole bill without any special direction, under the common order to tax. *In re Atkinson and Pegley, solicitors*, 1 Chy. Chamb. 193.—VanKoughnet.

Where a plaintiff in suits for foreclosure or sale asks for a reference to the master to enquire as to other incumbrances, he takes such reference at the peril of costs, if there are in reality no other incumbrances. *Hamilton* v. *Howard*, *Burnside* v. *Lund*, 4 Chy. 581.

Where a bill is filed to foreclose in respect of a demand not exceeding £50, the plaintiff will be entitled to his full costs if it appear that there is an incumbrance beyond that sum. *Hyman* v. *Roots*, 11 Chy. 202.

When a plaintiff files a bill in this court to foreclose a mortgage for a sum within the jurisdiction of the county court, no costs will be allowed him. *Connell* v. *Curran*, 1 Chy. Chamb. 11.—Spragge.

The fact that defendant is resident in a county other than where the land is situate, will not vary this rule. *Ib.*

A mortgage was vested in trustees. One of them sued at law on the mortgage as plaintiff's attorney. A bill was afterwards filed by another solicitor to foreclose the mortgage:—Held, that the plaintiffs were not entitled to the costs at law in addition to those in equity. *Ontario* v. *Winnaker*, 13 Chy. 443.

Where an appeal from the report in a foreclosure suit failed on the main point, and succeeded only in respect of a redemption, the court gave the respondents the costs of appeal. *Brownlee* v. *Cunningham*, 13 Chy. 586.

A mortgagee should not create unnecessary expense against the mortgagor, by executing several powers of attorney. *Goodhue* v. *Carter*, 1 Chy. Chamb. 13.—Blake.

Where it is shewn that a mortgagee has for the bonâ fide purpose of preserving the mortgage premises from destruction or delapidation, instituted proceedings at law to obtain possession, he will not be deprived of his costs in equity. *Dallas* v. *Gow*, 1 Chy. Chamb. 65.—Spragge.

Where a mortgagee proceeds both at law in equity, he cannot, in the absence of s circumstances to justify the proceedings, to take the Chancery costs instead of th law, if the defendant object. *Weir* v. *T* 1 Chy. Chamb. 371.—Mowat.

After the loss of a mortgage deed, the gagor offered to pay the overdue interest, affidavit being produced that the mortgage not parted with the mortgage. The affi was produced accordingly, but the mort did not make the payment, and a bill of closure was filed in respect of this and subse defaults:—Held that the plaintiffs must be expense of proof of loss and the expense o indemnity bond, but were entitled to the costs of the suit. *McDonald* v. *Hime*, 15 72.

Where a defendant had by answering w his right to security for costs, and the pla assigned his interest in the mortgage, the su of the suit, to a party resident out of the diction:—Held, that the defendant was en to security for costs against the new plai The fact that the suit was a foreclosure suit, held not to disentitle the defendant to the for security against the plaintiff, althou mortgagor, he disputing that any thing was and the master being directed to inquire "v if any thing was due." *Thompson* v. *Callag* Chy. Chamb. 15.—Taylor, *Secretary*.

The rule of this court, that when the su matter of a suit is settled by defendant b decree, the question of costs cannot be disp of on a summary application by plaintiff, u defendant consents, applies to mortgage s A defendant in such a case may insist on the going to hearing, as there may be groun which he may be relieved from costs. W under such circumstances the referee refuse application by plaintiff for the payment b fendant of the costs of the suit, an appeal such order was dismissed with costs. *Mc* v. *Cross*, 3 Chy. Chamb. 432.—Spragge.

Where a bill had been filed on a mortgag which only a small sum for interest had be due two days previously, and defendant's s tor had called at the plaintiff's solicitor's and left word that he was ready to pay money, the court refused the plaintiff his and—Held, that the bill was unnecessarily improperly filed. *Ib.*

See *Masson* v. *Roblin*, 2 O. S. 41, p. *Crooks* v. *Hughes*, 13 Chy. 485, p. 2373; *nett* v. *Foreman*, 15 Chy. 117, p. 2370.

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10. *Other Cases.*

Sec. 8 of G. O. 9 of June, 1853, does not to any cases other than those for foreclosu specific performance of an agreement. *Ba Montreal* v. *Hatch*, 1 Chy. Chamb. 57.—Spr

Where an order for sale has been taken parte by mistake, in lieu of an order for closure, the court will vacate the order fo and grant an order for foreclosure ex *McGillivray* v. *Cameron*, 1 Chy. Chamb. VanKoughnet.

Where the purchaser of mortgaged pre had perfected his title thereto by a convey

from a mortgagee who had obtained a final order of foreclosure, and it was sought by the mortgagor to impeach the title of such purchaser, by reason of irregularities in the foreclosure proceedings, of which, however, it was not shewn that the purchaser was aware; but the decree and final order on the face of them were regular: —Held, that the purchaser was not bound to inquire into the regularity of the proceedings upon which the decree and final order were founded, and the bill was dismissed with costs. *Gunn* v. *Doble*, 15 Chy. 655.

Although the fact of a mortgagee having obtained a final order of foreclosure does not preclude him from suing for the mortgage money, still it would seem that the mortgagor is not entirely helpless, as he may offer to pay the mortgage, and if the mortgagee declines receiving the money the court would restrain him from afterwards suing for the mortgage debt. If after a mortgagee has obtained a final order of foreclosure he has mortgaged the estate, that fact alone will not deprive him of the right to sue for the mortgage money, if, at the time of bringing the action, he has paid off the mortgage created by himself, and is in a position to re-convey the estate; neither does the fact of his having allowed the premises to fall into decay prevent him from so suing. Gowland *v.* Garbutt, 13 Chy. 583, observed upon. *Munsen* v. *Hauss*, 22 Chy. 279.

See *Cornwall* v. *Henriod*, 12 Chy. 338, p. 2365.

XII. Sale.

1. *When it will be Directed.*

Quære, whether a mortgagee praying a sale can have it when the subsequent incumbrancers or the mortgagor do not consent. *Bethune* v. *Caulcutt*, 1 Chy. 81.

Primâ facie, a mortgagor is entitled to six months to pay. To induce the court to direct an immediate sale, or a sale at an earlier day, some special ground must be shewn. *Rigney* v. *Fuller*, 4 Chy. 198.

A sale will not be ordered until the mortgagor has had the usual time to redeem. *Trust and Loan Co.* v. *Reynolds*, 2 Chy. Chamb. 41.—Mowat

An order for an immediate sale after the master has fixed a day for payment, and before it has arrived, will not be made in chambers. *Buell* v. *Fisher*, 9 L. J. N. S. 160.—Holmested, *Referee*.

Where a party interested in the equity of redemption is dead, and his heirs are out of the jurisdiction and unknown, the court has jurisdiction, in a suit by the first mortgagee against a subsequent mortgagee and the attorney-general, to direct a sale of the property; and the proceedings cannot afterwards be set aside by the heirs except for error or fraud. In such a case the conditions of sale must state these circumstances. *Smith* v. *Good*, 14 Chy. 444.

An order for an immediate sale will not be made in chambers, where the Master, pursuant to a decree made in court, has fixed a day for payment, and it has not arrived. The motion must be made to the court. *Buell* v. *Fisher*, 6 P. R. N. S. 51—Chy. Chamb.—Holmested, *Referee*.

See *Kerr* v. *Bebee*, 12 Chy. 204 p. 2306.

See also XI. 4, (b) p. 2378.

2. *Parties to the Bill.*

To a bill by an incumbrancer for the sale of the property, all other incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the master's office, and the proceeds of the sale will pay off all incumbrances according to their priorities. *White* v. *Beasley*, 2 Chy. 660.

To a bill by a mortgagee for a sale after the mortgagor's death, the personal representative of the mortgagor is a necessary party; but not to a bill for foreclosure. *White* v. *Haight*, 11 Chy. 420.

See *Clarke* v. *Best*, 8 Chy. 7, p. 2345; *Hoskins* v. *Johnston*, 6 P. R. 257, p. 2392.

3. *Decree.*

Where a decree is sought to be changed from a sale to a foreclosure, the cause must be set down to be re-heard, and notice served on defendant, although the bill has been taken pro confesso. *McClelan* v. *Jacobs*, 9 Chy. 50.

The owner of lots A. and B. sold A., but the conveyance was not registered; he afterwards mortgaged A. and B., and the mortgagee registered the mortgage without notice of the prior deed. The mortgagor subsequently sold B. in portions by three successive sales:—Held, in a suit by the assignees of the mortgage for a sale, that the decree should be for the sale first of B., and that if a sale of part of B. produced enough, the portion last parted with by the mortgagor should be first sold. *Barker* v. *Eccles*, 17 Chy. 277. *S. C.* affirmed on appeal, Gwynne, J., diss., 18 Chy. 440.

4. *Final Order for Sale.*

It must appear clearly that the master reports a sale to be beneficial for infants before a final order for sale will be made. *Edwards* v. *Burling*, 2 Chy. Chamb. 48; 2 L. J. N. S. 302.—Taylor, *Secretary*.

On moving for an order absolute to sell for default of payment of the sum found due by the master, it need not be shewn that any incumbrancer besides the plaintiff attended at the time appointed for payment of the several incumbrancers. *Irvine* v. *Whitehead*, 1 Chy. Chamb. 10.—Spragge.

In a suit at the instance of mortgagees resident in Scotland against defendants, formerly in Canada, but now in England or elsewhere, it is not sufficient on a motion for a final order for sale for the plaintiff's agent to negative payment. The plaintiff also must do so. Quære, would not service of notice on defendants in England be better. *McKechnie* v. *McKechnie*, 1 Chy. Chamb. 42.—Blake.

In applying for a final order for sale the usual affidavit of the plaintiff must negative possession and the receipt of rents and profits. *Burford* v. *Lymburner*, 1 Chy. Chamb. 275.—Spragge.

It is not sufficient for the plaintiff to swear merely that he has not been in possession or in receipt of rents and profits; he must also negative said possession and receipt by any one on his behalf. *Ford* v. *Jones*, 1 Chy. Chamb. 291.—Spragge.

Mortgage money had been ordered to be paid on the 19th December. Default being made, the usual bank certificate was obtained on the 20th December, and on the 10th February following an application was made for a final order for sale:—Held, that this bank certificate was too old for the court to act upon. *Hurd* v. *Seymour*, 1 Chy. Chamb. 332.—VanKoughnet.

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5. *Other Cases.*

In suits by judgment creditors for the sale of the debtor's property, the debtor is entitled, like a mortgagor, to six months to redeem before the sale takes place. The rule prescribed by the statute 43 Geo. III. c. 1, is not applicable to the practice of this court. *White* v. *Beasley*, 2 Chy. 660.

Where a sale has been asked for by defendant and granted, and has proved abortive, the proper course is to file a petition and have the decree carried out. *Goodhill* v. *Burrowes*, 6 L. J. 189.—Chy.

Where a suit is brought to enforce a sale against the mortgagor and his assignee, the order for payment of any balance due after such sale, must be against the mortgagor, and not the assignee. *Turnbull* v. *Symmonds*, 6 Chy. 615.

If the wife of the mortgagor join in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser. *Moore* v. *Shinners*, 1 Chy. Chamb. 59.—VanKoughnet.

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under a decree of the court. *Ross* v. *Steele*, 1 Chy. Chamb. 94.—Spragge.

A motion to dispense with payment of purchase money (and for a vesting order) in favour of a purchaser under a decree, who is also one of the plaintiffs, requires notice to be served on the mortgagor where he has appeared by solicitor. *McMaster* v. *Kempshall*, 1 Chy. Chamb. 329.—Mowat.

Where the plaintiff, who was the mortgagee in fee of lands sold under the decree, had become the purchaser thereof, an order vesting the lands in the plaintiff as such purchaser, although acquiesced in by the defendants, was refused. *Bowen* v. *Fox*, 1 Chy. Chamb. 387.—Mowat.

A bill for sale was filed by a puisne incumbrancer, and prior incumbrancers and mortgagees were made parties in the master's office and a decree on further directions made for payment according to priority. The proceeds of a sale proved insufficient to pay the first incumbrancer. An application by plaintiff to have his costs of suit and of sale paid out of such proceeds, in preference to the first incumbrancer, was refused with costs. *Grange* v. *Barber*, 2 Chy. Chamb. 189.—VanKoughnet.

Under a decree for the sale of land or a competent part thereof, the mortgagor must see to the parcelling out of the land directed to be sold, and if he consider that too much is offered he should object at the time of settling the advertisement, which should state that the unsold lots will be withdrawn from sale when the de realized, if that course is intended to be ta The confirmation of a sale may be opposed b the master, and the sale disallowed on gro which would afford material for a motion t it aside. Where the ground is there having an unnecessary number of lots sold, the chaser should be notified. Semble, the objec will not prevail against an innocent purch when urged against the confirmation of report on sale. *Beaty* v. *Radenhurst*, 3 Chamb. 344.—Boyd, *Master*.

Where a bill is filed to enforce a sale of m gage premises, the court, under the Adminis tion of Justice Act, will, in addition to the formerly given, grant an order for immed payment, on which a writ of fieri facias ma once issue; and will also order possession t given to the mortgagee, charging him with occupation rent. And where a mortgagee suing at law on the covenant, and in ejectm and was also proceeding on a power of sal the mortgage, the court refused to interfer complete justice could be done in the cou law. And, in like manner, where an action been brought by a second mortgagee to rec a surplus of purchase money, after payme the first mortgagee, the court refused to rest such action at the instance of the mortga although it was sworn that the second mort had been obtained by fraud and undue influe *The Imperial Loan and Investment Compa Boulton*, 22 Chy. 121.

The mortgagor in a suit for sale having bec insolvent after decree, but before the appointed for redemption, the plaintiff, with reviving the suit, took out a final order for s and the proceedings for having the sale v completed. On the motion of the assigne insolvency to make him a party, and to set a the proceedings for sale as irregular, and to the sale, an order was made adding this assi as a party, pursuant to the powers of amendm conferred by s. 50 of the Administration of tice Act, 1873, but without staying the sal it did not appear that any injury would re from its being allowed to proceed. *Hoskin Johnston*, 6 P. R. 257.—Blake, in appeal Holmested, *Referee*.

Observations on the policy of the court staying sales under decrees. *Ib.*

XIII. Proceedings in Mortgage Suits Equity.

1. *Taking Accounts.*

Where the money advanced on mortgage less than the sum mentioned as the considera money, the mortgagor is at liberty, in ta the account in the master's office, to shew true sum advanced, to reduce his liability, though he has not appeared to or answered bill. He cannot, however, shew that the tract was usurious. *Penn* v. *Lockwood*, 1 547.

Under the head of "just allowances," master may on taking the account of subseq interest, and taxing subsequent costs on a or subsequent foreclosure, allow a sum paid insurance since the last foreclosure and into

under a provision in the mortgage, although the decree simply directed him on each successive foreclosure to compute subsequent interest and tax subsequent costs. *Bethune* v. *Calcutt*, 3 Chy. 648.

A party in possession of land under an agreement in the nature of a Welch mortgage having refused to give any statement of rents received or information as to the amount due on the agreement, a bill was filed by the mortgagor for an account. Although on taking the account a balance was found still due to defendant, the court ordered him to pay the costs. *Morrison* v. *Nevins*, 5 Chy. 577.

A debtor executed a mortgage in favour of his creditors, reciting that he was indebted in a sum named, upon which a suit to foreclose was subsequently instituted. The master on a reference to take an account of what was due, required the production of the accounts on the foot of which the mortgage debt was created, and the usual four-day order had been issued for non-production:—Held, on a motion to set this order aside, that the parties were primâ facie bound by the amount stated in the mortgage as the true debt, and that the master, in the absence of evidence to impeach this, could not go behind it. *Pollock* v. *Perry*, 5 Chy. 591.

Where the usual affidavit proving a mortgage debt is made, the onus of reducing the amount lies upon the opposite party. *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Chy. 59.

Where a reference is directed to take an account on a mortgage, the parties may shew the real object for which it was made, if not apparent on its face; and when the bill has been taken pro confesso the master must require the mortgagee to shew how the money secured was advanced; and semble, that such a course would be desirable in all cases. *Sterling* v. *Riley*, 9 Chy. 343.

Two years after a mortgage had been in part paid, the mortgagor applied to the mortgagee to re-borrow the money, agreeing verbally to return the receipts for the money paid, so that there should not remain any evidence of payment; and that the amount so re-borrowed should be considered as of the original charge created by the mortgage. Some, but not all, of the receipts were returned to the mortgagee, and the money re-advanced by him upon the terms proposed. The master, in taking the accounts directed by the decree, allowed the mortgagee the full amount of the mortgage:—Held, correct, and that the mortgagor was estopped from proving the payment of any portion of the original sum advanced. (VanKoughnet, C., dub.) *Inglis* v. *Gilchrist*, 13 Chy. 301.

A decree for sale was directed at the suit of a surety of the mortgagor. In taking the accounts it appeared that the mortgagee had paid off several prior incumbrances, and the master allowed him credit for the sums so paid, although no direction to that effect was given by the decree. On appeal, by the surety, the master's finding in that respect was affirmed. *Teeter* v. *St. John*, 13 Chy. 85.

By an agreement entered into by the lender, borrower, and surety, that a judgment against the surety should "stand as additional or collateral security for the payment of such mortgages to pay and make up any deficiency that might arise or exist should it at any time become necessary to sell the said farms," &c.:—Held, that the surety was entitled to have an account taken, the property sold, and credit given on his judgment for the amount realized, before he could be called upon to pay anything; and that the surety was not bound in the first instance to pay off the creditor and take an assignment of the mortgages for the purpose of proceeding against his principal, the mortgagor. *Ib.*

To shew the balance due, the party proving the claim, in addition to swearing to the balance, produced certain books, and made affidavit that by these books the balance claimed on the mortgage could be discovered. Neither party asked him any questions in reference to or to explain them; and the master stated that from the books he could not understand the account:—Held, that the oath of the claimant standing unimpeached, though not supported by the partial statement furnished by him, but which he offered to make complete, if required, from the books, the master should have acted on it, and allowed the claim. *Hancock* v. *Maulson*, 10 Chy. 483.

Where the master had taken the account against the mortgagee with rests, and on appeal, it appeared that at the date of the mortgage a balance was due to the mortgagor, and that the mortgagee went into possession, part of the arrangement being that he should apply the rents, &c., to the paying off of two prior mortgages, but it was not shewn that they were due when the moneys were received, so that the holder of the incumbrances could have been compelled to accept payment, the court, if desired by the mortgagee, ordered a reference back to the master to ascertain this fact. *Williams* v. *Haun*, 10 Chy. 553.

Where a report was referred back at the instance of defendant, a mortgagee, to ascertain a particular fact, and the master, without being directed so to do, called upon defendant for an affidavit shewing what moneys he had received, &c.; and defendant filed his own affidavit shewing that the moneys with which he was chargeable had been received by him at dates subsequent to what the master had previously found by his report, and which he varied accordingly:

Held, that the master was wrong in thus proceeding. *Ib.*

Semble, (per VanKoughnet, C.,) that the account cannot be taken after the death of the party bound to pay. But the point being one of considerable importance to suitors, it was suggested that the opinion of the full court should be taken upon it. *Galbraith* v. *Armstrong*, 1 Chy. Chamb. 33.

On taking the account in foreclosure suits no more can be found due than the amount claimed by the endorsement on the copy of the bill served. *Boyd* v. *Wilson*, 1 Chy. Chamb. 258. Spragge.

The only evidence before the master, besides what was used at the hearing, was the affidavit of the personal representative of the mortgagee, which stated that he believed the whole amount to be due. An appeal from the master's report finding the whole amount due was allowed.

Semble, that the onus of proof under such a reference rests upon the holder of the mortgage. *Elliott* v. *Hunter*, 15 Chy. 640.

Where a judgment creditor filed a bill impeaching a mortgage created by the debtor in favour of his brother, a partner in business, and after evidence the usual decree was made:—Held, that the production of the ordinary affidavit by the holder of the mortgage stating the amount due, was sufficient primâ facie evidence, as in other cases; and that, if the party entitled to redeem desired to reduce the amount claimed, it rested on him to adduce evidence for that purpose. *Elliott* v. *Hunter*, 24 Chy. 430.

When a defendant desires to prevent the plaintiff from recovering interest for a longer period than six years, he must set up the defence of the Statute of Limitations; merely filing the usual disputing note is not sufficient for this purpose. *Wright* v. *Morgan*, 24 Chy. 457. Reversed on appeal, 16th June, 1877.

See *McMaster* v. *Hector*, 8 L. J. N. S. 284, p. 2333.

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2. *Order for Payment.*

An order granted, changing place for paying mortgage money. *Jones* v. *Bailey*, 1 Chy. 353.

Where mortgage money was ordered to be paid into an agency of the Bank of Upper Canada, and before the day appointed the agency was closed:—Held, on a motion to substitute another bank, that a new day for payment must be fixed, and the order served. *King* v. *Connor*, 1 Chy. Chamb. 274.—VanKoughnet.

Where the master's report, directing the payment on a day being six months from the date, is not dated, and the decree gives six calendar months, a new day must be appointed for payment. *Scott* v. *McKeown*, 1 Chy. Chamb. 186. —VanKoughnet.

Service of an order appointing a new day for payment will be dispensed with where the mortgagor is an absconding defendant, against whom the bill has been taken pro confesso after service by publication. *Ellwood* v. *Scott*, 1 Chy. Chamb. 190.—VanKoughnet.

On an application for an order appointing a new day for payment, it was asked that service of the order should be dispensed with, defendant being out of the jurisdiction; but the court declined to treat an affidavit of the plaintiff as evidence of the fact, and directed the order to be served if possible. *Adams* v. *Earner*, 1 Chy. Chamb. 260.—VanKoughnet.

Time enlarged for payment of mortgage money, on affidavit that defendant had sold the mortgaged premises for £300, the mortgage money being £250, and that he expected to receive payment in full in two or three months. *Ford* v. *Steeples*, 1 O. S. 282.—Chy.

A motion to enlarge the time appointed for payment of mortgage money must be made in chambers. *Anon*, 4 Chy. 61.

On the motion being made there, on an affidavit of defendants' solicitor, stating his belief that defendants had exerted themselves, and were still endeavouring to raise the money, and that the property was worth much more than debt, the motion was refused with costs. *I*

In opposing such a motion the mortgagee sw that in consequence of non-payment he had obliged to raise money to meet his liabilities rate much beyond that payable under the m gage. On granting the extension, the mortga was required to pay such a sum as would co the interest payable by the mortgagee. *How* v. *Macara*, 1 Chy. Chamb. 27.—Spragge.

Where through default of payment of m gage the mortgagee had to raise money by s rity on the land, and great delay took place, secretary refused to set aside a final order, extend the time for payment. *Waddell* v. *Coll*, 2 Chy. Chamb. 58.—Taylor, *Secretary*.

A judge in chambers, though not as a ma of right, extended the time for payment of m gage money where the money was for purch money and the vendor had made a prior m gage on the property, which he had not paid according to his covenant for title, and it peared that the existence of the first mortg prevented the plaintiff from raising money pay off the second. *G.* v. *V.*, 2 Chy. Cha 33.—Mowat.

Where the master appointed a time for all subsequent incumbrancers who proved be him to redeem the plaintiff, one of whom at time appointed paid the amount and took assignment:—Held, that the incumbranc who could not redeem were entitled to t months' further time before the co-defend could obtain a final foreclosure against th *Ardagh* v. *Wilson*, 2 Chy. Chamb. 70.—V Koughnet. See also *S. C.*, 1 Chy. Chamb. 3

The time for payment was extended where was shewn that defendant was hampered hindered in selling or raising money on the la in consequence of an advertisement signed circulated by the plaintiff's solicitors; and motion was granted without costs to the pl tiff. *Gilmour* v. *Myers*, 2 Chy. Chamb. 17 Taylor, *Secretary*.

Where the day to pay money reported on a mortgage was past, the court allowed mortgagor six months further time to redeem condition of paying the costs of the motion, interest on the whole sum found due, it app ing that the security was good, and the m gagor in a fair way to raise money. *Stre O'Reilley*, 2 Chy. Chamb. 270. — Taylor, *S tary*.

Six months further time was given for payn on an application made the day before the m was due, on payment of interest on princ and interest due, and the costs of the app tion, when it was shewn that the property w be greatly enhanced in value in the meantim the construction of a contemplated rail *Cameron* v. *Cameron*, 2 Chy. Chamb. 375.— lor, *Secretary*.

Where delay was shewn on the mortga part, but he shewed a reasonable prospe being able to pay in a few months the time extended, the principal and interest were dir to be capitalized, and interest on the whole and the costs of the application to be pai a week. *Cahuac* v. *Durie*, 2 Chy. Chamb —Taylor, *Secretary*.

The mortgagee need not remain at the place appointed by the master's report during all the time limited for payment of the mortgage money; his attendance so early as to allow a reasonable time for payment before the expiration of the hour named will suffice. *Saunderson* v. *Caston*, 2 Chy. 436.

Where the day appointed by the report for payment of the fund due fell on a Sunday, the court refused a final order of foreclosure. *Holcomb* v. *Leach*, 3 Chy. 449.

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption. *Hill* v. *Forsyth*, 7 Chy. 461.

After the advertisement of sale, it was discovered that the report had omitted to include two items of interest. Esten, V. C., held there was no necessity for appointing a new day for payment, and referred it to the master to take a fresh account of plaintiff's claim, and to amend his report; and leave was given to fix a new upset price and to postpone the sale if necessary. *Bessey* v. *Graham*, 9 L. J. 82.—Chy. Chamb.—Esten.

3. *Disclaimer.*

A person interested in an equity of redemption informed the mortgagee before suit that he was willing to release to him his interest in the property. The mortgagee, notwithstanding, made him a defendant to a bill for sale of the mortgaged premises, and he filed an answer setting forth his willingness to release, and that he had before suit informed the plaintiff of such willingness:—Held, that he was entitled to costs. *Waring* v. *Hubbs*, 12 Chy. 227.

Where a defendant, having an interest in the property in question in a foreclosure suit at the time of the filing of the bill, puts in a disclaimer, he will not be entitled to any costs. *Berrie* v. *Macklin*, 1 Chy. Chamb. 351.—Mowat. See *Hatt* v. *Park*, 6 Chy. 553.

To a bill of foreclosure, an assignee in insolvency filed an answer and disclaimer, admitting the statements of the bill, and alleging that he was willing, and offered before being served with the bill, to release his right to the property, but not alleging that he had made the offer to the plaintiff, or to whom he did make it:—Held, that he was not entitled to costs, *Drury* v. *O'Neil*, 15 Chy. 123.

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4. *Revivor.*

In a suit for sale of mortgaged property, an incumbrancer had proved a claim. The plaintiff (the mortgagee), who had been paid in full, having died:—Held, on an application by such subsequent incumbrancer for the usual order for redemption and foreclosure after an abortive sale, that it was unnecessary to revive the suit. *Coulson* v. *Sherchey*, 1 Chy. Chamb. 216.—Spragge.

Where a sole plaintiff in a foreclosure suit dies after decree, his devisee is entitled, on præcipe, to the common order to revive. *Geddes* v. *Allan*, 1 Chy. Chamb. 336.—Mowat.

5. *Practice.*

Where a mortgage was created by husband and wife upon lands of the wife, and the mortgagee, together with the husband, joined in a conveyance of all their interests to a purchaser, the court in a foreclosure suit refused an immediate reference under the orders of 1853, and directed the cause to be brought to a hearing in the regular way. *Wallis* v. *Burton*, 5 Chy. 352.

In proceeding under the orders of February, 1856, to make incumbrancers parties in the cause the plaintiff must serve the incumbrancers with office copies of the decree, duly stamped. *Elliott* v. *Helliwell*, *Feehan* v. *Hayes*, 1 Chy. Chamb. 6.—Esten, Spragge.

It is not necessary that the bill should be taken pro confesso against a husband before an order to answer separately can be obtained against his wife; it is sufficient that the time for the joint answer shall have elapsed. *Walker* v. *Tyler*, 1 Chy. Chamb. 189.—VanKoughnet.

In a foreclosure suit to which a married woman is a defendant, it is not necessary that the bill be taken pro confesso against either husband or wife; the proper practice is, when the time for answering by both has elapsed, to apply in chambers for a direction to draw up the decree on præcipe. *Ib.*

Husband and wife being defendants to a suit of foreclosure in respect of property belonging to the wife, the husband put in an answer alone, and the plaintiff moved to take the answer off the files for irregularity, and to take the bill pro confesso against the husband, which was refused with costs. *Elliott* v. *Hunter*, 1 Chy. Chamb. 158.—Spragge.

The fact that a married woman is a defendant to a foreclosure suit (the time for her separate answer having elapsed) does not render it necessary to apply to a judge for a direction to the registrar to draw up the decree on præcipe, as the registrar has power to do so without any direction. *Macfie* v. *McDougall*, 1 Chy. Chamb. 259.—VanKoughnet.

An order to take a bill pro confesso against a married woman is now unnecessary. *Hare* v. *Smart*, 1 Chy. Chamb. 316.—Mowat.

G. D., and H. D., his wife, incumbrancers, were made parties in the master's office, and not appearing on the day named in notice A.:—Held, by the master, that an order in chambers must be obtained, giving the wife liberty to come in and prove her claims separate and apart from her husband. The order in chambers was afterwards obtained. Service of a fresh notice A. dispensed with. *Marshall* v. *Wilder*, 3 L. J. N. S. 24.—Taylor, *Secretary*.

In a foreclosure suit a question was raised as to whether the equity of redemption in the principal portion of the mortgaged premises was in defendants, against whom the bill had been taken pro confesso, and who did not appear at the hearing, or in the other defendants, some of whom were infants. The court refused to decide this at the hearing, at the instance of the defendants who appeared. *Robinson* v. *Dobson*, 11 Chy. 357.

Under the orders of February, 1858, relative to foreclosure suits, when the bill is taken pro

confesso against the mortgagor, it is not necessary to serve him with the notice set forth in schedule B. to said orders. *Baby* v. *Woodbridge*, 5 L. J. 67.—Chy. *Murney* v. *McLellan*, *Ib.*

A mortgagee having filed a bill to foreclose against two rival claimants of the equity of redemption, the court directed the usual redemption by, and conveyance to, the person primâ facie entitled to the equity, with a right to the other claimant, at any time before the day appointed for payment, to shew himself to be entitled. *Ramsey* v. *Thompson*, 8 Chy. 372.

After a foreclosure suit had been at issue for more than three years, but no hearing or examination of witnesses had taken place, the Judge in Chambers allowed the personal representative of a deceased party to the cause, who had purchased from the mortgagor, and against whom the bill had been taken pro confesso, to put in an answer setting up what in the opinion of the learned judge was a meritorious defence. *Anonymous*, 12 Chy. 51.

Quere, whether this was not a matter of discretion for the Judge, and was therefore not the subject of appeal. *Ib.*

The plaintiffs filed a bill of foreclosure. Defendants set up that they were absolute owners by virtue of a tax sale and the proceedings in a foreclosure suit. Both defences failed; and the defendants therefore claiming at the bar that the plaintiffs should redeem the prior mortgage, the court granted a reference in such terms as would enable the defendants to establish that claim, if well founded, in the master's office. *Jones* v. *The Bank of Upper Canada*, 13 Chy. 201.

Where the mortgagor is the only defendant, and an immediate decree is taken against him, by consent, without any reference or day of payment, a reference cannot be directed as to other incumbrancers not named in the bill. *Taylor* v. *Ward*, 13 Chy. 590.

After decree in a foreclosure suit, defendant applied for leave to answer, which was ordered on his paying the costs, and answering in two weeks, in default the decree to remain in force. No action having been taken under this order for several weeks, an order to discharge it with costs was made, although the order already drawn up declared that under the circumstances which had occured the decree should remain in force. *Williams* v. *Atkinson*, 1 Chy. Chamb. 34. —Blake.

On proceeding in the master's office, upon a reference as to incumbrances in foreclosure cases, it is not necessary to search in the office of any deputy-registrar of the court to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed. *Grainger* v. *Grainger*, 1 Chy. Chamb. 241.—Spragge.

Where the account is changed in a foreclosure suit after the master's report, and a notice of credit is given under the order of 29th June, 1861, such notice should be given before the day appointed for the payment. *Knottinger* v. *Barber*, 1 Chy. Chamb. 258.—Spragge.

Where a judgment creditor in a mortgage suit proved for too much, and was paid in full, the mortgagor not appearing in the master's office, an application some months after to have the amount refunded was allowed, with costs. *Bank of British North America* v. *McDonald*, 2 Chy. Chamb. 88.—Esten.

As a general rule notice of the proceedings in the master's office should be served upon a mortgagor against whom the bill has been taken pro confesso, whenever the plaintiff proves a claim in addition to that alleged in his bill. *McCormick* v. *McCormick*, 6 P. R. 208.—Holmested, *Referee*.

On an application by the executor of a mortgagee, for the infant heir of a mortgagee to convey after the executor has obtained a final order for foreclosure, the petition and affidavit should be entitled, not in the cause, but in the matter of the infant. *Re Hodges* 1 Chy. 285.

Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his executor revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises, the infant heir is a person seised upon trust, within the meaning of the English Statute 11 Geo. IV., and 1 Will. IV. ch. 10 sec. 6, and may be ordered on petition without suit, to convey the estate to the executor, or to a purchaser from the executor. In such a case, however, the court will not make the order, unless it appear that the application of the estate in question is necessary for the satisfaction of the debts of the intestate; and a reference as to this will be directed. *Ib.*

After payment of what is due upon a mortgage payable by instalments, pursuant to the orders of 1853, it is irregular to take any further proceeding in the cause until another instalment falls due. *Carroll* v. *Hopkins*, 4 Chy. 431.

The solicitor of a mortgagee in a suit of foreclosure, after a decree of absolute foreclosure purchased the mortgagor's interest in the premises. The decree so pronounced was subsequently set aside, and a decree nisi directed to be drawn up directing, inter alia, a sale of the mortgaged premises, and that all judgment creditors should be served with the decree and made parties to the suit. Notwithstanding this, however, the solicitor, who was also judgment creditor of the mortgagee, proceeded upon his judgment and was about to sell the mortgage premises under execution. The court, upon a motion made in the cause, restrained the solicitor from proceeding with his execution, and ordered him to pay the costs of the application. *Goodwin* v. *Williams*, 5 Chy. 178.

In a suit by a prior against a mesne incumbrancer, on the argument of the cause, by consent, an affidavit was read which stated the agreement on the part of the prior incumbrancer to be postponed to the latter; when the court gave liberty to the plaintiff to cross-examine the deponent upon statements contained in his affidavit, which permission not being acted upon by the plaintiff, his bill was dismissed with costs. *Miller* v. *Start*, 10 Chy. 23.

When proceedings are taken against an absent defendant, a decree cannot be obtained on præcipe. *McMichael* v. *Thomas*, 14 Chy. 249.

In mortgage suits, where the bill has not been personally served, it is not the practice to mo

for allowance of service. An order pro confesso must be taken out, and the cause set down and heard pro confesso. The decree in such cases is now made in court, not upon precipe. *Glass* v. *Moore*, 2 Chy. Chamb. 327.—Taylor, *Secretary*.

A mortgagor who desires to stay an action brought against him by the mortgagee, cannot insist on the mortgagee's taxing his costs and staying the suit meanwhile, on the promise of the mortgagor to pay the amount when taxed. Where a tender of debt and interest had been made to a mortgagee, pending actions on the mortgage, and the mortgagee's solicitor sent to the mortgagor's solicitor his bills of costs incurred in the suits, and the latter considered them too large, but offered to pay any amount which the Master should tax, it was held that the mortgagee was entitled, as a matter of strict right, to go on with his actions notwithstanding such offer. *Nixon* v. *Hunter*, 17 Chy. 96.

A suit was instituted upon a mortgage against the assignee in insolvency of the mortgagor, and on proceeding in the master's office, it appeared that there were creditors of the mortgagor who had executions in the hands of the sheriff at the date of the assignment in insolvency:—Held, on appeal from the ruling of the master, that it was proper to add such creditors as parties in his office. *Canada Landed Credit Co.* v. *McAllister*, 21 Chy. 593.

Under a note disputing the amount of the plaintiff's claim filed in a mortgage suit questions as to the correctness of the account alone can be entered into. *Cattanach* v. *Urquhart*, 6 P. R. 28.—Chy. Chamb.—Holmested, *Referee*.—Blake. See *Wright* v. *Morgan*, 24 Chy. 457.

A motion to commit defendant or take the bill pro confesso, for non attendance of defendant for examination pursuant to a special order, was refused, where the order had not been previously served. *McAvilla* v. *McAvilla*, 12 L. J. N. S. 120.—Chy. Chamb.—Holmested, *Referee*.

A bill to enforce payment of a mortgage after the death of the mortgagee, where his estate remains interested therein, must be filed by the executor or other personal representative; his widow (as such) has no right to file such a bill. Where a bill stated that "H., the widow of the said C. (the mortgagee), and the person entitled by law to receive the moneys secured by said mortgage, exhibited her bill of complaint":—Held, bad, on demurrer, as not shewing with sufficient distinctness how she was entitled. *Garrett* v. *Saunders*, 23 Chy. 566.

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6. *Other Cases.*

A mortgagee whose mortgage was made before the registry laws required registration to insure priority, filed a bill to foreclose. The mortgage had not been registered:—Held, that subsequent mortgagees were bound to redeem him, his application being to fix a time for them to redeem; and that purchase for valuable consideration without notice could not be pleaded against him. *Vansickler* v. *Pettit*, 5 L. J. 41.—Chy.—*S. C. Ib.* 164.

After a decree for foreclosure, if the mortgagor in possession commits waste the court will enjoin him, though an injunction may not have been prayed for in the bill. *Cawthra* v. *McIlmire*, 5 L. J. 142.—Chy.

A party foreclosing subject to a prior mortgage cannot call the common mortgagor, if he has the equity of redemption, to give evidence as to the amount due upon the prior mortgage. *Warren* v. *Taylor*, *Ross* v. *Taylor*, 9 Chy. 59.

It is no defence to a bill of foreclosure that the mortgage was given to secure the purchase money of the mortgaged property, and that to part of it the vendor (now the mortgagee) had no title. *Cockenour* v. *Bullock*, 12 Chy. 138.

In a suit for foreclosure upon a mortgage for purchase money, damages or loss sustained by failure of title, or by incumbrances or charges on the property sold, cannot, under the covenants for title, form the subject of set-off to the amount secured by the mortgage, before the amount is ascertained by action or otherwise. *Hamilton* v. *Banting*, 13 Chy. 484.

A mortgagor, who has in the course of a foreclosure suit duly redeemed the property, is not obliged to accept a simple discharge of the mortgage, but may, at his option, have a vesting order of the property. *Ellis* v. *Ellis*, 1 Chy. Chamb. 257.—Spragge.

Where a mortgagee loses the mortgage he is bound, at his own expense, to furnish the mortgagor with such evidence of the loss as the mortgagor may require to produce in future dealings respecting the property; and with an indemnity against any demand of third persons, by deposit of the deed or otherwise, to the money or any part thereof. *McDonald* v. *Hime*, 15 Chy. 72.

A suit of foreclosure or for the sale of mortgaged premises in default of payment is not a suit for the recovery of land, but is a proceeding for a recovery of money due upon land, within s. 24 of C. S. U. C. c. 88. Where, therefore a mortgagor wrote to the mortgagee in answer to a demand for payment, "I will comply with your request as to the repayment of $500 I borrowed from you so many years ago, and until I pay the money I will execute anything you wish me to do for its security," and there was evidence shewing that the only money ever loaned to the mortgagor by the mortgagee was the sum so advanced on the mortgage, it was held sufficient to take the case out of the statute. *Barwick* v. *Barwick*, 21 Chy. 39.

In a bill for foreclosure, &c.:—Held, that evidence taken by the plaintiff to contradict statements made in the answer was admissible, though not put in issue by the bill. Evidence not read in the cause cannot be made use of by the defendant to shew that the suit is defective for want of parties; such defect must be apparent from the pleadings and evidence. *Schram* v. *Armstrong*, 1 O. S. 327.

When evidence affecting the amount represented as due by the second mortgage is taken in the absence of the personal representative of such second mortgagee (deceased) it cannot be read against the equitable holder of such mortgage, although such equitable holder was a party to the suit when the evidence was taken, and cross-examined the co-defendant whose evidence affected the mortgage. *Grimshawe* v. *Parks*, 6 L. J. 142.—Chy.

The C. S. U. C. c. 13, sec. 16, sub-sec. 4, as to giving additional security pending appeal, does not apply to mortgage cases. *The Bank of Upper Canada* v. *Pottruff*, 8 L. J. 328.—Chy. Chamb.—Spragge.

Mortgage of lease of nursery grounds—Mortgagor and Mortgagee—Redemption—Contract made in Ohio sought to be enforced in Canada—Rate of interest—Mortgagee in possession carrying on business and making advances and improvements, on the supposition that redemption will never be asked for—Subsequent charges for salary and remuneration for conducting business—Mingling of accounts—Report. See *Peck* v. *Custead*, 10 L. J. 302.—Chy.

It appearing on the evidence, though not mentioned in the pleadings, that the purchaser of land at a sheriff's sale for taxes was a mortgagee of the property:—Held, in dismissing a bill filed to set aside the purchase on the ground of undue practices at the sale, that it was unnecessary to reserve liberty to file a bill impeaching the sale on the ground that he was disqualified as mortgagee to effect the purchase for his own benefit. *Schofield* v. *Dickenson*, 10 Chy. 226.

In a suit by a judgment creditor to set aside a fraudulent settlement and to realize his judgment, praying a sale of the property on default in payment, if the sale should prove abortive: Semble, that the usual order for redemption, or in default foreclosure will be granted; at all events it would be so if the judgment debt was subject to a prior mortgage which the judgment creditor would be entitled to redeem. *Commercial Bank* v. *Cooke*, 1 Chy. Chamb. 205.—Spragge.

Since the passing of the order (435) of 20th December, 1865, the registrar has the power of issuing any decree on præcipe in mortgage cases that the court would, previously to that order, have made upon a hearing pro confesso. *Kirkpatrick* v. *Howell*, 22 Chy. 94. See also *Buell* v. *Towns*, *Ib.* 95.

The court will not countenance the unnecessary incurring of costs of filing a bill for the partition and sale of the estate of infants for the purpose of discharging a mortgage thereon, which object could be obtained as effectually in the ordinary way by proceedings being taken at the instance of the mortgagee; and where such a suit was brought in the name of infants, the court on dismissing the bill ordered the costs of the defendants to be paid by the next friend of the infants. *Carroll* v. *Carroll*, 23 Chy. 438.

XIV. Miscellaneous Cases.

Mortgagees are not trustees under 4 Will. IV. c. 1, sec. 48, so as to take jointly when the deed is silent as to the tenancy created. *Doe* d. *Shuter et al.* v. *Carter*, H. T. 2 Vict.

Neither the mortgagee, nor his assignee, can be disseized by the mortgagor continuing in possession. *Doe* d. *Carey et al.* v. *Cumberland*, 7 Q. B. 494.

"Sir,—Mr. J. informs me that you have a doubt respecting the validity of a mortgage from him to you for your claim for the sails and rigging. I am willing to become responsible to you that a good and valid mortgage shall be made to you in the course of this fall, provided you consent to the vessel being fitted for sea, or in default your not receiving it I will be responsible the payment of your debt in twelve months: Held, that offering a mortgage subject to prior mortgages, which were given moreov after the guarantee, was not such a valid mo gage as the guarantee imported. *Jenkins* v. *Ri tan*, 8 Q. B. 625.

The plaintiffs, having obtained letters of a ministration, brought an action of detinue for indenture of mortgage in fee, made to the int tate, and after his death in the possession of defe dant:—Held, that the title to the mortgage fo lowed the legal estate, and that it therefo belonged to the mortgagee's heir. *Riordon al.* v. *Brown*, 1 C. P. 199.

The term "valuable security," used in C. C. c. 92, s. 72, means a valuable security to t person who parts with it on the false pretence and the inducing a person to execute a mortga on his property is therefore not obtaining fro him a valuable security within the act. *Regi* v. *Brady*, 26 Q. B. 13.

A harbour and road joint stock company its charter, 16 Vict. c. 141, had power to le tolls on goods landed or shipped within certai prescribed limits; and the harbour, road wharves, and all the real estate were to vested in the company and their successors f ever. The company finding it necessary mortgage the harbour, tolls, &c., did so und authority of their charter, and the mortgage foreclosed the security, entered into possessio and leased to the plaintiff, who sued defendan owner of the wharf within the statutable limi of the harbour, for toll on goods shipped or lande on defendant's wharf:—Held, that the plainti could sue only in the corporate name, and a no suit was therefore directed. *Whiteside* v. *Be chamber*, 22 C. P. 241.

In a bill filed by the administrators with th will annexed and creditors of B., it was allege that on a sale of land by B. to K. the latt executed a mortgage to secure the purcha money, but that by the fraud and design of such mortgage was withheld from registratio and that the lands were subsequently sold K. to two purchasers—who, before the conve ances to them were executed, or, at all event before the payment of their purchase money had notice and were well aware that K. had n paid his purchase money and had given his mo gage therefor, and that they, fraudulently tending to cut out such mortgage, had caus the conveyances to themselves to be registere The bill further alleged that neither of the purchasers had yet paid their purchase mone and claimed that the mortgage to B. should fastened on the land as a charge prior to th conveyances, and failing that relief, that t amount payable by them to K. in respect their purchase money respectively might ordered to be paid to the plaintiffs on account the mortgage money due under the mortga from K. The purchasers demurred genera to such bill for want of equity, which on arg ment was overruled: the court holding th the plaintiffs were not bound to wait till t purchase money payable by the purchasers w over-due before taking proceedings; and that case of notice before the execution of these co veyances the mortgage would take preceden

thereof; or if only before payment the purchase money payable by the purchasers could be claimed by the plaintiffs. *Ferguson* v. *Kilty*, 10 Chy. 102.

A mortgage to creditors, to secure their debts, is a sufficient valuable consideration to give a prior registered conveyance precedence over a conveyance previously executed, but registered subsequently. *Fraser* v. *Sutherland*, 2 Chy. 442.

The executor of a mortgagee had not, under C. S. U. C. c. 87, s. 5, any power to convey the legal estate to a person purchasing the mortgage. *Robinson* v. *Byers*, 9 Chy. 572. See *Hunter* v. *Farr et al.*, 23 Q. B. 324. But see now 32 Vict. c. 10, O.

A mortgagee, after the death of the mortgagor, has a right in an administration suit to prove upon the general estate for his whole claim, and to hold his security for what the general estate cannot pay; and the fact that a simple contract creditor has obtained judgment against the personal representative, and an execution against lands, will not affect such right. *In re Stewart*, *Stewart* v. *Stewart*, 10 Chy. 169.

Where a wrong lot was mortgaged through error, the mortgagor owning only the land intended to be embraced in it, and having no title to that actually conveyed, and he subsequently sold the land to which he had the title, the court ordered him to account for the proceeds of the sale not exceeding the mortgage, secured with the interest and costs. *Lundy* v. *McKamis*, 11 Chy. 378.

Since the establishment of a government Dominion stock, the investment of infants' money by the court should, as a general rule, be in such stock, rather than, as formerly, in mortgages. *Kingsmill* v. *Miller*, 15 Chy. 171.

A mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of creditors under a trust deed excluding all preference and priority praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee, with the view of charging him with all payments made by him to simple contract creditors before satisfying the specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency. The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the right of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than a præcipe decree:—Held, as the trust deed excluded all preference and priority as to the payment of the debts, the rules applicable to the administration of the estates of intestates did not apply, and that the mortgagee, for anything beyond what his mortgage would realize, could claim only the same as other creditors. And as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe, he was declared entitled only to the costs of such a decree, and was ordered to pay to the trustee his costs of defending the trust estate. *Gore Bank* v. *Sutherland*, 11 L. J. N. S. 159.—Chy.

A mortgagor, after foreclosure, having retained the title deeds, delivered them to a third party to whom he had sold, whose solicitor claimed a lien as against such third party, and declined to deliver them to the mortgagee. On a motion for that purpose, an order was made for their delivery. *Stennett* v. *Araya*, 2 Chy. Chamb. 218. —Spragge.

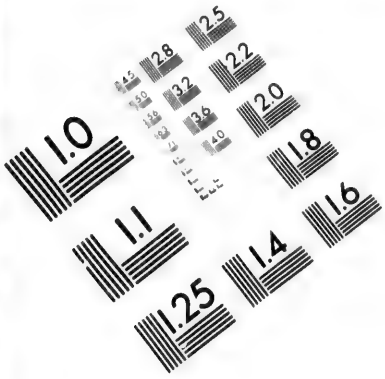
Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was Held per Spragge, V. C., that the devisee of the mortgaged property was entitled as against the legacies to have the property exonerated from the mortgage at the expense of the personal estate. *Lapp* v. *Lapp*, 16 Chy. 159.

In case of a purchase of a mortgage security recently given on all his real estate by an insolvent father to his son, the purchaser, if he has notice of his insolvency, should before completing his purchase satisfy himself by proper inquiries that the mortgage was bona fide and good against creditors. *Totten* v. *Douglas*, 18 Chy. 341; 16 Chy. 243.

A mortgage was created by D., in favour of two brothers, who executed an agreement apportioning the amount secured between them, and afterwards joined in an assignment of the security to M. in trust, as to the first instalment, to pay the same equally to the mortgagees, one of whom, J., subsequently conveyed his interest in the mortgage to H. (the plaintiff), for the benefit of creditors. The other mortgagee subsequently acquired the equity of redemption, went into possession of the premises, and succeeded in satisfying the amount of mortgage money other than the first instalment thereof. M. executed a discharge of the mortgage under the statute, declaring that D. had paid all moneys secured by the mortgage. In fact D. never paid any portion of the money, and the first instalment never was paid by any one, and J. was indebted to his co-mortgagee to a greater amount than his share of the first instalment would come to. M. died, and a bill was filed against his personal representatives by H. calling upon them to pay the share of the first instalment coming to J. Under these circumstances the court—Held, that the estate of M. was bound to make good the amount to which J. was proved to have been entitled, although no want of bona fides could be imputed to M. *Howland* v. *McLean*, 22 Chy. 231.

A trustee of lands authorized to sell, and, amongst other things, to retain and pay sums due and owing to himself by the settlor, and to pay the balance to the settlor, mortgaged his interest to the plaintiff, giving covenants for title and further assurance; and then by arrangement with the settlor the trustee was to be entitled to pay himself and his partners for goods and advances made after the mortgage; and afterwards becoming entitled to the whole partnership estate, it was—Held, that the further charge enured to the benefit of the mortgagee. *The Edinburgh Life Association* v. *Allen*, 23 Chy. 230.

A purchase of lands had been made by plaintiffs and one C. jointly, each to pay one-half the purchase money. The plaintiffs paid more than their share, and had a lien on C.'s interest for the excess; they also had lumber dealings together, the accounts of which were unsettled, and the balance thereon was claimed by each to



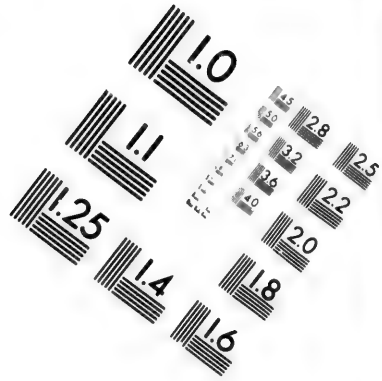
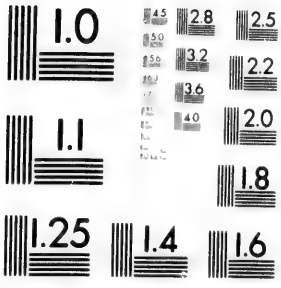
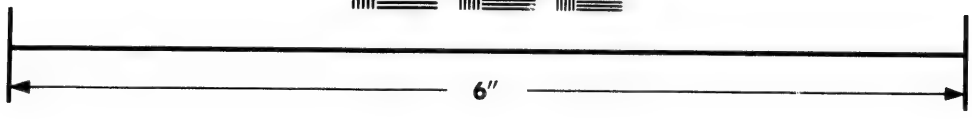
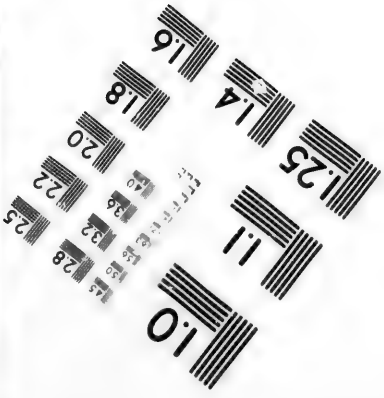
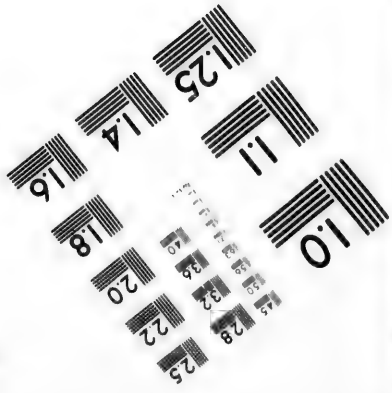


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be in his favour. In accounts of these lumber dealings the plaintiffs had charged C. with his share of the purchase money. They afterwards filed a bill claiming that the land account and the lumber account were unconnected: that they should be paid their advances for C. on the land, and that in default his mortgagees and assignee should be foreclosed:—Held, that as against the lien of the plaintiffs on the land these mortgagees were entitled to set off the amount, if any, due by the plaintiffs on the lumber dealings. *Cook* v. *Mason*, 24 Chy. 112.

The plaintiffs put in evidence that C. had, on a former occasion, filed a bill against them seeking an account of the lumber dealings, and charging that the land agreement had been cancelled; that it was after answer and before decree in that suit that C. had mortgaged his interest to M. &. W. (who were not made parties to the suit and had not any notice of it); and that the cause having been set down for examination of witnesses, and the plaintiff therein not appearing, the bill was dismissed with costs. The present plaintiffs, however, did not in their bill set up these proceedings. The court declined to hold the defendants the mortgagees concluded by them as res judicata. *Ib.*

MORTMAIN.

I. Deeds to Churches and Religious Institutions.—*See* Churches.

II. Statutes of as Affecting Devises and Bequests.—*See* Will.

The statute 9 Geo. II. c. 36, relating to charitable uses is in force in Upper Canada. *Doe* d. *Anderson* v. *Todd et al.*, 2 Q. B. 82; *Hallock* v. *Wilson*, 7 C. P. 28; *Mercer* v. *Hewston*, 9 C. P. 349; *Hambly* v. *Fuller*, 22 C. P. 141; *Corporation of Whitby* v. *Liscombe*, 22 Chy. 203; 23 Chy. 1, in appeal.

Municipal corporations are within the statute of mortmain. *Brown* v. *McNab*, 20 Chy. 179.

Under the provincial statute 9 Geo. IV. c. 2 sec. 3, a deed conveying land to trustees for the use of a religious society is invalid for want of registration. *Doe* d. *Bowman et al.* v. *Cameron* 4 Q. B. 155.

Registration held sufficient to make a deed valid under the Statutes of Mortmain, without enrollment in Chancery. *Hallock* v. *Wilson*, 7 C. P. 28; *Hambly* v. *Fuller*, 22 C. P. 141.

Quære, whether registration is necessary. *Mercer* v. *Hewston et al.*, 9 C. P. 349.

After the passing of 27 Vict. c. 17, a municipal corporation invested on mortgage part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the security:—Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain. *The Municipality of Oxford* v. *Bailey*, 12 Chy. 276.

Declaration, on a bond made by testator for payment of $2,000 to plaintiff, as treasurer of the board of trustees of the New York Baptist Union for ministerial education, or his successor in offic Plea, that the bond was made without conside ation; and that, so far as defendants, as exec tors, might be called to pay the same out of t realty, the said bond was void and contrary the Statute of Mortmain, and was of the natu of a bequest for charitable purposes, and was n a deed executed before two credible witnesse &c.; and that, as such executors, they oug not to pay the same out of realty; and that th had fully administered all the remainder of t personalty which had come to their hands executors:—Held, on demurrer, plea bad; for did not disclose any device on the part of t testator to evade the Statutes of Mortmain; the contrary, it admitted his bona fides in d posing of so much of his estate as personalt but asked that his lands might be protected fr the judgment to be recovered, which was a d fence in the nature of a quia timet, and alt gether unwarranted. *Paine* v. *Kilbourne et a Executors of Bearn*, 16 C. P. 64.

A voluntary bond to a charity, purporting bind the obligor and his heirs, and payable months after the obligor's death, cannot be e forced against the obligor's land. *Anderson Paine*, 14 Chy. 110.

A deed may be good in part, though void part. Where, therefore, a conveyance was ma of lands, and the grantees contemporaneous executed a declaration of trust in respect there as follows:—To lease the lands until sold, and sell them; to pay the annual proceeds to t settlor for life, and after the death of the sett to pay the same, or in the discretion of t trustees a portion thereof, to M. during his li and the trustees sold a portion of the estate, a after the death of the settlor a bill was fil impeaching the settlement as void under t Statute of Mortmain, which it admittedly w as respected the trusts declared of the corpus the estate:—Held, that the trusts declared favour of the settlor and M. were sufficient h ever, to support the sale which had been effect and the bill, as against the trustees, the p chaser from them, and M., was dismissed w costs. *McIsaac* v. *Heneberry*, 20 Chy. 348.

MOTIONS.

See Practice at Law—Practice in Equity

MULTIFARIOUSNESS.

See Pleading in Equity.

MUNICIPAL CORPORATIONS.

I. Municipal Organization.

1. *Corporate Name.*
   (a) *In By-laws*, 2412.
   (b) *Other Cases*, 2412.
2. *Formation of New Corporations.*
   (a) *Debts and Liabilities, how affec* 2413.
   (b) *Officials and their Sureties, affected*, 2415.

(c) *City of Toronto and County of York*, 2416.
(d) *Other Matters*, 2416.
(e) *Effect of Separation of Counties on Commissioners for Taking Affidavits*—*See* AFFIDAVIT.
(f) *Gaol Limits*—*See* BAIL.

II. MEMBERS OF COUNCILS.
1. *Qualification of.*
(a) *Property and Assessment*, 2417.
(b) *Other Cases*, 2421.
2. *Disqualification.*
(a) *As an Officer of the Corporation*, 2421.
(b) *As Lessee or Lessor of the Corporation*, 2422.
(c) *Contracts with the Corporation*, 2422.
(d) *As Innkeeper*, 2425.
(e) *Other Cases*, 2426.

III. MUNICIPAL ELECTIONS.
1. *Electors.*
(a) *Qualification of Voters*, 2427.
(b) *Errors or Omissions in Respect to Collectors' and Assessors' Rolls*, 2429.
(c) *Voters' Lists*—*See* PARLIAMENT.
2. *Elections.*
(a) *Generally*, 2431.
(b) *Time and Place for Holding*, 2431.
(c) *Returning Officer*, 2431.
(d) *Nomination and Withdrawal of Candidates*, 2432.
(e) *Oaths*, 2433.
(f) *Altering Vote Erroneously Entered*, 2433.
(g) *Casting Vote*, 2433.
(h) *Opening and Closing Poll*, 2434.
(i) *Disturbance or Misconduct at Poll*, 2435.
(j) *Corrupt Practices*, 2436.
(k) *Inspection of Ballot Papers*, 2437.
(l) *Vacancies in Council*, 2437.
(m) *Closing Taverns on Days of*—*See* TAVERNS AND SHOPS.
3. *Elections of Mayors, Wardens, and Reeves*, 2437.

IV. CONTROVERTED ELECTIONS.
1. *When Proceedings may be Taken under the Statute*, 2439.
2. *Who may be Relator*, 2439.
3. *Practice.*
(a) *Statement, Affidavit, and Recognizance*, 2441.
(b) *Writ of Summons*, 2442.
(c) *Disclaimer*, 2444.
(d) *Evidence*, 2444.
(e) *Costs*, 2445.
(f) *Other Cases*, 2447.
4. *When Relator or Other Candidate Entitled to Seat*, 2448.
5. *Other Cases*, 2450.

V. ACCEPTANCE AND DECLARATION OF OFFICE, 2450.

VI. MEETINGS OF COUNCILS AND CONDUCT OF BUSINESS, 2452.
1. *Elections of Mayors, Wardens, and Reeves*—*See* p. 2437.

VII. OFFICERS OF THE CORPORATION.
1. *Treasurer and his Sureties*, 2453.
2. *Other Officers*, 2458.
3. *Collectors and their Sureties*—*See* ASSESSMENT AND TAXES.
4. *Clerk of the Peace*—*See* CLERK OF THE PEACE.
5. *County Attorney*—*See* COUNTY ATTORNEY.

VIII. BY-LAWS.
1. *Construction and Effect of*—*Generally*, 2460.
2. *Voting on by Electors*, 2461.
(a) *To Aid Railways*—*See* RAILWAYS AND RAILWAY COMPANIES.
3. *Creating Debts*, 2462.
4. *Levying Yearly Rates*, 2467.
5. *Fines and Penalties*—*See* p. 2487.
6. *Repealing*—*See* p. 2488.
7. *To Aid or Take Stock in Railways*—*See* RAILWAYS AND RAILWAY COMPANIES.

IX. QUASHING BY-LAWS OR RESOLUTIONS.
1. *Who may Move*, 2468.
2. *Objections not Apparent on the By-law*, 2469.
3. *Other Cases*, 2469.
4. *Practice on Applications to Quash.*
(a) *Time for Moving*, 2471.
(b) *Affidavits*, 2473.
(c) *Proof of By-laws*, 2473.
(d) *Rule*, 2474.
(e) *Costs*, 2475.
5. *Necessity for Quashing before Action*, 2476.

X. CONTRACTS BY AND WITH—*See* CORPORATIONS.

XI. GENERAL POWERS AND DUTIES OF MUNICIPAL CORPORATIONS.
1. *To Remunerate or Indemnify Members*, 2476.
2. *Public Buildings*, 2478.
3. *Sewers and Local Improvements*, 2480.
4. *Drainage of Lands*, 2482.
5. *To Impose Tolls or Harbour Dues*, 2483.
(a) *Tolls on Roads*—*See* WAYS.
6. *Markets, Butchers, and Hucksters*, 2483.
7. *Impounding and Killing Animals*, 2486.
8. *Billiard Tables*, 2487.
9. *Nuisances*, 2487.

10. *Fines and Penalties*, 2487.
11. *Repealing By-laws*, 2488
12. *Other Powers and Duties*, 2489.
13. *Assessment*—*See* ASSESSMENT AND TAXES.
14. *As to Railways*—*See* RAILWAYS AND RAILWAY COMPANIES.
15. *Surveys*—*See* SURVEY.
16. *Roads and Bridges*—*See* WAY.
17. *Taverns and Shops*—*See* TAVERNS AND SHOPS.
18. *Under Temperance Act*—*See* TEMPERANCE ACT OF 1864.

XII. ACTIONS BY MUNICIPAL CORPORATIONS.
1. *Against Members*, 2493.
2. *Other Cases*, 2495.

XIII. ACTIONS AND PROCEEDINGS AGAINST MUNICIPAL CORPORATIONS.
1. *On Contracts or Debentures not Authorized by Law*, 2497.
2. *Other Cases*, 2500.
3. *Notice of Action*—*See* ACTION AND SUIT.
4. *Mandamus to*—*See* MANDAMUS—PUBLIC SCHOOLS.
5. *Negligence.*
(a) *Generally*—*See* NEGLIGENCE.
(b) *In Construction of Drains*—*See* WATER AND WATER COURSES.
(c) *Repair of Roads*—*See* WAY.

XIV. PERSONAL LIABILITY OF MEMBERS, 2504.

XV. CONTRACTS BY MEMBERS WITH COUNCILS, 2506.

XVI. COMMISSION OF ENQUIRY INTO FINANCES, 2506.

XVII. MATTERS REFERRED TO ARBITRATION, 2507.

XVIII. MISCELLANEOUS CASES, 2509.

XIX. SPECIAL MUNICIPAL ACTS.
1. *Brockville Police Act*—*See* BROCKVILLE POLICE ACT.
2. *Kingston*—*See* KINGSTON (TOWNSHIP OF).
3. *London*—*See* LONDON (TOWN OF).
4. *Ottawa*—*See* OTTAWA (TOWN OF).
5. *Peel*—*See* PEEL (COUNTY OF).
6. *Port Hope*—*See* PORT HOPE (TOWN OF).
7. *Sandwich*—*See* SANDWICH (TOWN OF.)
8. *Toronto*—*See* TORONTO (CITY OF.)

XX. ASSESSMENT AND TAXES—*See* ASSESSMENT AND TAXES.

XXI. SALE OF LAND FOR TAXES—*See* ASSESSMENT AND TAXES.

XXII. COURT HOUSES—*See* COURT HOUSE.

XXIII. DEDICATION OF LAND—*See* DEDICATION.

XXIV. JURORS' EXPENSES AS BETWEEN CITY AND COUNTY—*See* JURY.

XXV. MUNICIPAL LOAN FUND—*See* MUNICIPAL LOAN FUND.

XXVI. POLICE—*See* POLICE—TAVERNS AND SHOPS.

XXVII. REGISTRY OFFICES—*See* REGISTRY LAWS.

XXVIII. STATUTE LABOUR—*See* ASSESSMENT AND TAXES.

XXIX. APPLICATIONS FOR SURVEYS—*See* SURVEY.

XXX. TAVERNS AND SHOPS—*See* TAVERNS AND SHOPS.

XXXI. ROADS AND BRIDGES—*See* WAY.

XXXII. TEMPERANCE ACT—*See* TEMPERANCE ACT OF 1864.

I. MUNICIPAL ORGANIZATION.

1. *Corporate Name.*

(a) *In By-laws.*

[*The proper description now (except in the case of a Provisional Corporation) is The Corporation of the County, City, Town, Village, Township, or United Counties, or United Townships (as the case may be) of (naming the same). 36 Vict. c. 48 sec. 4.*]

The "municipal council of the district of Wellington":—Held, sufficient. *Flewellyn* v. *Webster*, 6 O. S. 586.

So "The warden and county council of the united counties of," &c. *In re Hawkins* v. *The Municipal Council of Huron, Perth, and Bruce*, 2 C. P. 72.

It was objected that a by-law was expressed on the face of it to be passed by the "municipality of Vaughan," there being no such corporate body:—Held, not a valid objection; and Semble, if it were, that the applicant recognized the by-law as one passed by the corporation intended, by moving against it as a by-law passed by that body. *Fisher* v. *The Municipal Council of Vaughan*, 10 Q. B. 492.

(b) *Other Cases.*

"Corporation of Toronto":—Held, insufficient in a rule nisi, to designate the corporation of the city of Toronto. *In re Sams* v. *The Corporation of Toronto*, 9 Q. B. 181.

Held, that the misdescription of the garnishees as "The City of Toronto," in the pleadings, could not be taken advantage of under the circumstances; but, Semble, that it might be waived or amended. *Gwynne* v. *Rees*, "*The City of Toronto*" *Garnishees*, 2 P. R. 282.—P. C.—Richards.

Held, that the municipal council was sufficiently designated in a plea as "the municipality." *Johnston* v. *Reesor et al.*, 10 Q. B. 101.

A rule nisi entitled as against "the municipal council" of a township, instead of "the municipality," Held, sufficient. *In re Barclay and the Municipal Council of Darlington*, 11 Q. B. 470.

The misnomer of the corporation in the rule to quash a by-law as "the municipality of the

incorporated village of Gananoque," was held immaterial. *Brophy and the Corporation of the Village of Gananoque*, 26 C. P. 290.

Inaccuracy in the corporate name in the declaration, &c., is immaterial after verdict, when the identity of the corporate body is clear. *Farrell* v. *The Mayor and Town Council of the Town of London*, 12 Q. B. 343.

Declaration, that B. became bound to the plaintiffs, by the name of "the Beverley municipal council," conditioned, &c. :—Held, on demurrer to the plea, that defendants by not pleading non est factum admitted that they made the bond to the plaintiffs, and therefore could not object that there was no such corporation. *The Corporation of the Township of Beverley* v. *Barlow et al.*, 10 C. P. 178.

"The provisional municipal county council of" &c., "The provisional corporation of" being the proper corporate name :—Held, sufficient in a bond. *The Provisional Corporation of the County of Bruce* v. *Cromar*, 22 Q. B. 321.

Upon an application for a mandamus to a railway company to register a transfer of stock in the company, it appeared that the stock had been sold under an execution recovered against "the mayor, aldermen, and commonalty of the city of Ottawa," as the corporation was then designated, and by C. S. U. C., c. 54, the name was changed to "the corporation of the city of Ottawa." The court, upon the objection of informality in the name :—Held, that the execution properly followed the judgment, under C. S. U. C. c. 1, s. 7, and was sufficient. *In re Goodwin* v. *The Ottawa and Prescott R. W. Co.*, 13 C. P. 254.

As to the proper designation of the warden of a county—See *Regina ex rel. McManus* v. *Fergusson*, 2 L. J. N. S. 19.

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2. *Formation of New Corporations.*

(a) *Debts and Liabilities how Affected.*

Where the plaintiff brought an action on the common counts, against the Huron district council, for compensation awarded to him by a jury for making a road across his premises before the formation of the Huron district, and while the land formed part of the district of London; and the Huron district had, after its erection, assumed the payment of the sum awarded :—Held, that the action would not lie against defendants at all; and if it would the declaration should have been special. *McKee* v. *The Huron District Council*, 1 Q. B. 368.

The testator having been appointed by the finance committee of the district council to collect the wild land tax :—Held, that his representatives were liable to the council for money received by their authority and not paid over. Where subsequently to the commencement of the action, one of the three united counties had been set off from the other two :—Held, that the suit was properly continued in the name of the three counties. *The Municipal Council of Lincoln, Welland, and Haldimand* v. *Thompson et al.*, 8 Q. B. 615.

By 14 & 15 Vict. c. 5, the county of Waterloo is made to consist of certain townships, including north Dumfries, which before formed part of the county of Halton. Sec. 8 provides that certain townships named, in which north Dumfries is not included, shall be responsible for their share of the debt for building the Guelph and Dundas road. This debt had been incurred by the former district of Wellington, which embraced all the townships mentioned in sec. 8, except Dumfries :—Held, that the municipal council of Waterloo could not impose a rate on Dumfries to pay such debt, the omission of that township in the 14 & 15 Vict., shewing clearly that it was not intended to be liable. *In re Municipality of North Dumfries and the Municipal Council of the County of Waterloo*, 12 Q. B. 507.

Action for work done upon a road in the township of Russell. Clarence, Cumberland, Cambridge, and Russell, had been united; Cumberland was separated in 1850, and Clarence in 1853. In January, 1851, the municipality (then consisting of Clarence, Russell, and Cambridge,) passed a by-law, enacting that their treasurer should receive from the county treasurer all moneys received by him as tilled lands assessment money due those townships; that the council for each township should decide where such moneys should be expended therein respectively, and should expend the same, making proper returns to the treasurer; and that on completion of such jobs the road surveyor should be associated with the councillor for examining the same, and, if approved of, the parties performing the work should be entitled to payment. In June, 1851, a resolution of the same municipality was passed, that the road surveyor should be associated with J. S., one of the councillors for Russell, to make contracts for opening the road from the boundary line of Cambridge and Russell to Louck's mill in Russell. In January, 1854, another by-law was passed by the municipality (then including only Cambridge and Russell) authorizing the treasurer to accept all orders drawn by the late municipality upon the late treasurer, that is, the treasurer of Clarence, Russell, and Cambridge. The plaintiff's tender was accepted in pursuance of the resolution of June, 1851, and the work was performed, examined, and approved of by the surveyor and J. S.; and under the by-law of January, 1851, Stewart gave an order for the sum agreed upon in favour of the plaintiff on the treasurer of Clarence, Russell, and Cambridge :—Held, 1. That under the by-law of 1854 the defendants (the municipality of Russell and Cambridge) had adopted the order on the treasurer of the former union, and therefore no difficulty was caused by the fact that the municipality sued was not that contracted with. 2. That it was no objection that H., the other councillor for Russell, had not acted with S., and if it were, his dissent was not sufficiently shewn. *Fetterly* v. *The Municipality of Russell and Cambridge*, 14 Q. B. 433.

Held, that the township of Waterloo was liable, under 14 & 15 Vict., c. 5, for its share of the debts of the Guelph and Dundas road incurred by the county of Waterloo, (of which it formed one township,) while that county was united to the counties of Wellington and Grey; notwithstanding, too, that an arbitration took place between those counties upon their separation, by which it was determined that Wellington should assume the liability of the former joint counties. Held, also, that interest on the

ascertained debt was recoverable, it being not interest upon interest, but interest on money paid, or to be paid, for defendants. *The Municipal Council of the County of Wellington* v. *The Municipality of the Township of Waterloo*, 8 C. P. 358.

Held, that under 14 & 15 Vict. c. 5 s. 8, and 12 Vict. c. 78, s. 15, the county of Wellington might maintain actions against the townships of Wilmot and Wellesley respectively for moneys paid on account of the Guelph and Dundas Road, as well by the united counties of Wellington and Grey before the dissolution as by Wellington afterwards. As to the first mentioned payments the 12 Vict. c. 78, s. 15, must be taken to allow such recovery notwithstanding the technical rule of law against assignment of debts:—Held, also, that on the special count any part of the debt actually due for such roads might be recovered, though it had not yet been paid. Quære, whether the county could have enforced payment by levying a rate on these townships. *The Municipal Council of the County of Wellington* v. *The Municipality of the Township of Wilmot*; *Same Plaintiffs* v. *The Municipality of the Township of Wellesley*, 17 Q. B. 82.

Under the Registry and Municipal Acts, 29 Vict. c. 24, and 29-30 Vict. c. 51:—Held, that the counties of York and Peel were jointly liable to the registrar of Peel for services rendered by him, under secs. 26 and 33 of the Registry Act, before the separation of these counties. *Campbell* v. *The Corporation of York and Peel*, 26 Q. B. 635; 27 Q. B. 138.

Quære, as to the proper party to sue in the case of assets belonging to a union of counties, and to recover which no suit is brought till after the dissolution of the union. *Corporation of Frontenac* v. *Corporation of Kingston*, 20 C. P. 49.

The plaintiff contracted under seal with the united counties of Huron and Bruce, to construct a gravel road in Bruce. The counties were separated on the 1st January, 1867:—Held, that the plaintiff could not afterwards sue the county of Bruce alone for work done in making the road. *Ekins* v. *The Corporation of the County of Bruce*, 30 Q. B. 48.

See *In re the Award between the Township of Howick and the Village of Wroxeter*, 12 L. J. N. S. 64, p. 2509.

(b) *Officials and their Sureties how Affected.*

Held, Burns, J., diss., that the sureties for a sheriff of the United Counties of Middlesex and Elgin, were not liable for him as sheriff of Middlesex only after the union had been dissolved. *Thompson et al.* v. *McLean et al.*, 17 Q. B. 495.

A bond was taken to "The Municipality of the township of Whitby," and afterwards the township was divided, by 20 Vict. c. 113, into Whitby and East Whitby:—Held, that the bond was properly sued upon in the name of the corporation of Whitby. *The Corporation of the Township of Whitby* v. *Harrison*, 18 Q. B. 603.

The 12 Vict. c. 78, which provided for the separation of a junior county from a union of counties, also provided for the formation of provisional councils in the junior county until the separation should be perfected, and empowered the provisional council to raise moneys for certain limited purposes, namely, the erection of court house and jail, and to appoint a provisional treasurer, whose duties were limited to the levying, collecting, and paying over such moneys. By 13 & 14 Vict. c. 24, it was provided that on the dissolution being perfected, and the new county formed, all the provisional officers were to continue the officers of the new county until their successors were appointed, and all the by-laws were to remain in force until altered, amended, or repealed. Under the first named Act, the provisional corporation passed a by-law appointing one P. treasurer, and defendants became his sureties for the faithful execution of his office. On the formation of the new county a by-law was passed repealing the by-law of the provisional corporation, under which P. had been appointed treasurer, and they thereafter appointed him treasurer of the new county:—Held, that defendants were not liable for P.'s acts as treasurer under such last-named appointment. Quære, whether, if the by-law had not been repealed, and P. had continued treasurer of the new county, defendants would have been liable. *The Corporation of the County of Ontario* v. *Paxton et al.*, 27 C. P. 104.

See *Corporation of Essex* v. *Park*, 11 C. P. 473 p. 2454.

(c) *City of Toronto and the County of York.*

In consequence of the separation of the city of Toronto from the county of York for judicial purposes, a deed was executed between the respective corporations, on which the city covenanted to pay the county a certain annual sum for the use of the court house. The deed also contained other agreements as to the use of the gaol. This arrangement was to continue in force until twelve months' notice to determine it should be given. By the Law Reform Act, which came into force in February, 1869, the city was reunited to the county for judicial purposes, and on 21st March, 1869, the city gave the county the stipulated notice as to intended discontinuance of the use of the gaol, stating that as to the court house the action of the legislature had virtually terminated the provision respecting it, and that no further payment would therefore be made:—Held, that the city had been released from its covenant to pay for the court house by the Law Reform Act, and also that there was no liability for an aliquot portion of the half-year's rent which would have become due on 21st March following. *The Corporation of the County of York* v. *The Corporation of the City of Toronto*, 21 C. P. 95.

Held, that since the passing of the Law Reform Act, 32 Vict. c. 6, s. 22, O., re-uniting the city of Toronto to the county of York for judicial purposes, the city is not liable to pay the county any compensation for the use of the court house. *The Corporation of the County of York* v. *The Corporation of the City of Toronto*, 22 C. P. 51.

(d) *Other Matters.*

Held, that the act abolishing districts did not take away from defendants the name given to them by their charter. *Hughes* v. *The Mutual Fire Insurance Co. of the District of Newcastle*, 6 Q. B. 387.

A summons was sued out before the separation of Ontario from York and Peel, directing defendants to appear in the united counties of York, Ontario and Peel; it was not served until after the separation, and the venue in the declaration was laid in the three united counties. The defendant demurred for this cause:—Held, not a frivolous demurrer. *Plaxton* v. *Smith, et al.*, 1 P. R. 228.—C. L. Chamb.—Robinson.

The town of Sandwich, incorporated under 20 Vict. c. 94, is only entitled to elect three councillors in addition to a mayor and reeve, to be elected by the people. *Regina ex rel. Arnold* v. *Wilkinson*, 5 P. R. 20—C. L. Chamb.—J. Wilson.

A by-law was passed by the united townships of Smith and Harvey to levy a certain sum on lands in H. to defray the expense of a re-survey of that township. The union having been dissolved:—Held, that an application to quash was properly made by a rule calling on the corporation of Harvey upon a certified copy obtained from the clerk of Smith, the senior township. *In re Scott and the Corporation of the Township of Harvey*, 26 Q. B. 32.

A sale of lands made before the 8 Vict. c. 22, in the district of Colborne, for arrears of taxes, part of which had accrued due before the division of the district of Newcastle, (of which Colborne was formerly a part), was held legal. McLean, J., diss. *Doe* d. *The Earl of Mountcashel* v. *Grover*, 4 Q. B. 23; followed in *Cotter* v. *Sutherland*, 18 C. P. 357.

Where taxes had accrued due on certain lands in the county of Bruce, before separation from Huron, which took place on 1st January, 1867:—Held, that the treasurer of Huron, after the separation, could not advertise and sell such lands for these taxes:—Held, also, that the sale was not made valid by 32 Vict. c. 36, s. 155, O., for it only applies to deeds given by the sheriff or treasurer authorized to sell. *The Canada Permanent Building and Savings Society* v. *Agnew*, 23 C. P. 200.

See *Smith* v. *The Municipal Council of Prescott and Russell*, 10 Q. B. 282, p. 2478; *Regina ex rel. Carroll* v. *Beckwith*, 1 P. R. 278, p. 2430.

See, also, XVII., p. 2507.

II. Members of Councils.

1. *Qualification of.*

(a) *Property and Assessment.*

It is not necessary under 9 Vict. c. 75, s. 13, that the property on which an alderman qualifies should be assessed in the name of the person possessed of it to his own use. A landlord is so possessed whose tenants occupy the premises, and he may put together real properties, some occupied by himself and some by tenants, to make up the assessed value required. *Regina ex rel. Shaw* v. *McKenzie*, 2 C. L. Chamb. 36.—Draper.

Under 12 Vict. c. 81, sec. 65, as amended by 14 & 15 Vict. c. 109, candidates for town councillors must be not only assessable but assessed for the necessary amount of property. *Regina ex rel. Metcalfe* v. *Smart*, 10 Q. B. 89; *S. C.*, 2 C. L. Chamb. 114. But see *Regina ex rel. Laughton* v. *Baby*, 2 C. L. Chamb. 130.—Burns.

The qualification necessary for a town councillor for Bytown at an election held in January, 1851, is that set forth in 10 & 11 Vict. c. 43, s. 5. He must be an inhabitant householder. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Chamb. 88.—Draper.

Defendant having been elected alderman of a ward in Toronto, relied for his qualification, under 16 Vict. c. 181, s. 18, upon three leasehold properties. The first was a house for which he had been rated in the collector's roll for the preceding year at £35 annual value, but in which he had ceased to have any interest since the June before the election:—Held, not available, for the qualification must be held at the time of election. *Regina ex rel. Dexter* v. *Gowan*, 1 P. R. 104.—Robinson.

The second was a house which he had taken after giving up the first, and for which he was assessed as occupant at £45 annual value:—Held, a good qualification to that amount; and that it was no objection that the defendant had not held this property for a year when elected, for the statute refers to the extent of the interest, and not to the time for which it must have been held:—Quære, whether there must be a year of the term yet to run at the time of election. *Ib.*

The third property consisted of rooms in the second story of a house, with a separate entrance from the street, rented by the defendant and one T. as partners, and occupied by them as a printing establishment, and for which they were rated as occupants at £65 annual value. It was sworn that by an agreement between defendant and T., made in November before the election, the whole assessment was allowed to be charged to defendant's account, and that he had assumed and was ready to pay it:—Held, that if defendant could be treated as separately rated at all, it could only be for half the annual value—and as this, added to the first property, would not make up the £80 required by the statute, he was disqualified. It was therefore unnecessary to determine whether the last mentioned property was of such a nature as to afford a qualification within the terms of the act. *Ib.*

An alderman elect, though rated for 1863 to the amount of $344 on leasehold property, yet since May, 1863, had ceased to hold part of the property to the value of $160 per annum:—Quære, whether the qualification set out was sufficient, Regina ex rel. Dexter *v.* Gowan being opposed to such a conclusion. *In re Kelly* v. *Macarow*, 14 C. P. 457.

Property owned by a candidate, but not mentioned in the assessment roll, cannot be made available as a qualification. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—C. L. Chamb.—Robinson.

The 14 & 15 Vict., c. 109, schedule A. 16, which requires the assessor to state in the roll how much of the amount assessed to each person is freehold and how much household property, is directory only; and the omission to comply with it is not necessarily a fatal objection. *Ib.*

Where more than two persons were rated on the collector's roll above £100 as freeholders, (and therefore qualified for township councillors,) but it appeared that they were not freeholders, but holders of location tickets from the Crown, and further that there were not in fact two per-

sons qualified to be elected :—Held, that the roll was not conclusive ; but as it was shewn that there were not two persons in the township qualified, the relator was precluded from objecting to the qualification of those elected. *Regina ex rel. Telfer* v. *Allan*, 1 P. R. 214.—C. L. Chamb.—Robinson.

The assessment roll is conclusive as to the rating of those mentioned in it. *Regina ex rel. Fluett* v. *Semandie*, 5 P. R. 19.—C. L. Chamb. —J. Wilson.

An administrator cannot qualify on real estate assessed in his own name but belonging to deceased. *Regina ex rel. Stock* v. *Davis*, 3 L. J. 128.—C. L. Chamb.—Richards.

Where, on the assessment roll, under the general heading, "Names of taxable parties, were entered the names of "Ker, William and Henry" for two separate parcels of land, in the proper columns were the letters "F." and "H.," and in the column headed "Owners and address" was entered opposite to the parcels of land and the names in the first column, "Wm. Ker & Bros." :—Held, 1. That "William Ker and Henry Ker," and not "William Ker & Bros.," were the persons in whose names the properties were rated. 2. That sec. 80 of the Municipal Institutions Act, C. S. U. C. c. 54, as to joint assessments, though placed in the act under the head "Electors," extends as well to candidates as to electors. *Regina ex rel. McGregor* v. *Kerr*, 7 L. J. 67.—C. L. Chamb.—Draper.

Where defendant in November, 1858, conveyed the real estate, which formed his qualification, to his father for £300, for which he took his father's notes payable at distant dates, and in February, 1860, purchased the property back, returning to his father all the notes, though the father did not re-convey the property to the son till 3rd of October, 1860, yet the son was held to have had at the time of the assessment "an equitable estate," within the meaning of sec. 70 of the Municipal Institutions Act. *Regina ex rel. Tilt* v. *Cheyne*, 7 L. J. 99.—C. L. Chamb.—Draper.

The town of Clifton was incorporated by special act (19 & 20 Vict., c. 63). It was subsequently divided into three wards ; thus entitling the town to nine councillors and a mayor. At the election in January last there were not more than seventeen persons in the town qualified under sec. 70 of the Municipal Act, C. S. U. C. c. 54, for Councillors, so that there was not, in the language of sec. 72, "at least two persons qualified to be elected for each seat in the council," though there were more than two persons qualified under sec. 70 to be elected mayor.—Held, that the mayor holds a seat in the council. Held also, that no greater qualification is required for mayor than for a councillor. Held also, that the only qualification requisite for a person to be elected councillor, owing to the peculiar circumstances of the place, being that of elector, a person elected mayor, and possessing the last mentioned qualification, was sufficiently qualified under sec. 72. *Regina ex rel. Bender* v. *Preston*, 7 L. J. 100.—C. L. Chamb.—Burns.

On quo warranto, to test defendant's right to the office of reeve :—Held, that a person having the mere possession of a lot vested in the crown, determinable at any moment, has not such an estate in it as will qualify him under the municipal act; but he is, nevertheless, rightly assessed under 32 Vict. c. 36, sec. 9, sub-sec. 2, O. *Regina ex rel. Lachford* v. *Frizell*, 6 P. R. 12.—C. L. Chamb.—Dalton, *C. C. & P.*

A lot was assessed thus : "No. 25, H. B. Yeoman, &c.," under the head "name of taxable party," and then under the heading "name and address of the owner, where the party named in column 2 is not the owner," appeared the name of the respondent. His name was not bracketed with that of H. B., neither was it stated in any way to be a separate assessment :—Held, that the roll shewed that the respondent was assessed for this lot, and could qualify upon it. *Ib.*

On 1st May, 1859, J. D. leased certain premises to E. B. D. for five years, with a covenant that the lessee should not assign without leave. The lessee, with the assent of the lessor, assigned the lease to defendant for the remainder of the term. Defendant then verbally assigned his right to the term, and sublet to one P., who entered into possession :—Held, that the assignment of and by defendant to P. being by parol, and being without the knowledge of the lessor J. D., defendant was notwithstanding it properly assessed in respect of the demised premises. *Regina ex rel. Northwood* v. *Askin*, 7 L. J. 130.—C. C.—Wells.

Held, that the real property in respect of which a candidate for the office of alderman in a city qualifies, may be of an estate either legal or equitable, and it need not be free from incumbrances. *Regina ex rel. Blakeley* v. *Canavan*, 1 L. J. N. S. 188.—C. L. Chamb.—Morrison.

Held, that the fact of a property on which a candidate seeks to qualify being incumbered cannot be taken into consideration for the purpose of reducing the amount for which he appears to be rated on the roll, which must be taken to be conclusive as to his property qualification. The distinction between real and personal property discussed. *Regina ex rel. Flater* v. *VanVelsor*, 5 P. R. 319 ; *Regina ex rel. Philbrick* v. *Smart*, 5 P. R. 323.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, that notwithstanding the use of the word "estate," in the declaration of a candidate under the Consolidated Municipal Act, 1873, he is, nevertheless, qualified, if the rating of the value on the roll is sufficient in amount. No change has been made in the law that incumbrances are not to be considered in ascertaining the amount of qualification. *Regina ex rel. Bole* v. *McLean*, 6 P. R. 249.—C. L. Chamb. —Dalton, *C. C. & P.*

On an application to unseat one E., sitting as an alderman for a city, it appeared that E. was only rated in the last revised assessment roll as householder to the extent of $160. It was, however, contended that no qualification at all was necessary, but even if so, it was sufficient that the qualification should be that of a councilman under the former act :—Held, that it was necessary that candidates for the office of alderman should, at the time of the election for cities in 1867, have had the qualification required by C. S. U. C. c. 54, notwithstanding the 29 & 30 Vict. caps. 51, 52, and that a qualification as councilman under the old law was insufficient for an alderman under the new act. *Regina ex rel. Tinning* v. *Edgar*, 4 P. R. 36.—C. L. Chamb. —A. Wilson.

B. and A. were partners occupying premises as co-tenants under a yearly tenancy, on the terms of an expired lease. Before the nomination day they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from the same landlord :—Held, that B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.—C. L. Chamb.—J. Wilson.

A person cannot qualify as town councillor on personal property. When a candidate was assessed on the roll for real property to $750 ($50 less than the qualification required) :—Held, that he could not supplement it by an addition of $400 assessed to him on personal property. *Regina ex rel. Fluett* v. *Semandie*, 5 P. R. 19.—C. L. Chamb.—J. Wilson.

(b) *Other Cases.*

Whether, in disputing the validity of an election of a deputy reeve of a village, on the ground that the village did not contain the requisite number of freeholders and householders, they could go behind the assessment, was not determined; but the court granted a quo warranto that the question might be formally raised. *Regina ex rel. Hart* v. *Lindsay*, 18 Q. B. 51.

Sec. 70 of the Municipal Act of 1859 required that a person, to be qualified to be elected a member of a city council, must be a resident within the city limits :—Held, that a person whose family resided without the city limits, and with whom for weeks continuously he lived, could not, although occasionally boarding with an inhabitant of the city, be deemed a resident of the city. *Regina ex rel. Blasdell* v. *Rochester*, 7 L. J. 102.—C. C.—Armstrong. *Regina ex rel. Fleming* v. *Smith*, 7 L. J. 66.—C. L. Chamb.—Draper.

[Now by s. 71 of the Act of 1873, it is sufficient to reside within two miles of the municipality.]

A defective declaration of qualification of a candidate at an election is not a ground for unseating him by the summary process under the Municipal Act. *Regina ex rel. Halsted* v. *Ferris*, 6 L. J. N. S. 266.—C. L. Chamb.—Dalton, *C. C. & P.*

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2. *Disqualification.*

(a) *As an Officer of the Corporation.*

[*By C. S. U. C. 54, s. 73, "No officer of any municipality" was qualified to be a member of the council. Now by the act of 1873, s. 75, the particular officers disqualified are specified, as they were also by the act of 1866, s. 73.*]

Under the old law a local superintendent of schools, entitled to a salary to be paid by the county treasurer, was not disqualified. *Regina ex rel. Arnott et al.* v. *Marchant*, 2 C. L. Chamb. 189.—Burns.

The mayor of a town for the year 1858, is not ineligible for mayor for 1859. *In re Sawers* v. *Stevenson*, 5 L. J. 42.—C. C.—Boucher.

A mayor is not an officer of the municipality within the meaning of 22 Vict. c. 99, s. 73. *Ib.*

A solicitor who is acting in defence of suits for a corporation is disqualified for a seat in the corporation. *Regina ex rel. Coleman* v. *O'Hare*, 2 P. R. 18.—C. L. Chamb.—Burns.

An overseer of highways was held disqualified. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 128.—C. C.—Gowan.

Proof of the mere fact of defendant being a road commissioner appointed by county by-law, to expend moneys raised in and for 1861, for the improvement of roads and bridges, was Held, not necessarily to imply that he was an "officer" of the corporation, so as to make him ineligible to be elected in 1862, unless clearly shewn that his duties continued. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290.—C. L. Chamb.—Richards.

A county clerk Held disqualified under s. 73 of 29-30 Vict. c. 51, from sitting as mayor of the same or any other municipality. *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195.—C. L. Chamb.—J. Wilson.

(b) *As Lessee or Lessor of the Corporation.*

A lessee of a municipal council was disqualified from sitting in such council; so a person holding a contract for a lease, though executed only by himself, and not by the corporation. *Regina ex rel. Stock* v. *Davis*, 3 L. J. 128.—C. L. Chamb.—Richards.

[But now a lessee for twenty-one years or upwards is not disqualified under the Act of 1873, s. 75.]

Defendant granted a lease to the corporation for five years, which lease, with the premises therein mentioned, and the benefit therefrom, he conveyed to R. a few days before the election. The assignment was, however, encumbered with a condition to refund the consideration money on certain contingencies, and no reversion was conveyed by the assignment :—Held, that defendant was disqualified. *Regina ex rel. Ross* v. *Rastal*, 2 L. J. N. S. 160.—C. L. Chamb.—Hagarty.

Where a lease for twenty-one years was originally made to a third person for the benefit of the beneficial lessee, and afterwards, during the term, it was surrendered, and a new lease made directly to the beneficial lessee for the remainder of the term, which was for less than twenty-one years, it was—Held, looking at the real nature of the transaction, that the lessee was not disqualified. *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.—C. L. Chamb.—Morrison.

See also *Regina ex rel. Patterson* v. *Clarke*, 5 P. R. 337, p. 2425.

(c) *Contracts with the Corporation.*

Before the election defendant, an alderman, had tendered for some painting and glazing required for the city hospital. His tender was accepted, and he had completed a portion of the work for which he had not been paid. A written contract had been drawn up by the city solicitor, but not signed by defendant; and he swore that before the election he informed the mayor that

he did not intend to go on with the work:—Held, that defendant was disqualified; that it was immaterial whether the contract would be binding on the corporation or not; and that his disclaimer could have no effect. *Regina ex rel. Moore* v. *Miller*, 11 Q. B. 465.

Where defendant, when elected as councillor, had a claim upon the city for certain work done by him under a contract with the corporation:—Held, disqualified. *Regina ex rel. Davis* v. *Carruthers*, 1 P. R. 114.—Robinson.

Where it was shewn that the firm, of which defendant was a member, dealt in coal and wood, and, during 1864 supplied large quantities of both coal and wood to the corporation of the city of Toronto, without any agreement as to price or terms of payment, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city:—Held, that the defendant was disqualified. So where it was shewn that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the coal furnished, but the price remained unpaid at the time of the election. Where it was shewn that the price was paid before defendant took his seat, he was still, Held to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office. *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357.—C. L. Chamb.—Hagarty.

A claim by defendant against the corporation, bonâ fide assigned to a third party, before the election, does not disqualify. *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.—C. L. Chamb.—Morrison.

A member of the corporation, being a baker, who supplied bread to fill a gaol contract held by another person in his own name and for his own benefit:—Held, not disqualified. *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.—C. L. Chamb.—Morrison.

A person is not disqualified, if he be plainly acquitted in equity from the contract, and a sealed instrument is all that is required to perfect his discharge at law. The rights of the candidate must be looked upon as they are in substance and effect at the time of the election. *Regina ex rel. Hill* v. *Betts*, 4 P. R. 113.—C. L. Chamb.—A. Wilson.

The trustees of a common school in a town being about to erect a school house, the defendant offered to supply a certain quantity of brick to them for that purpose. They told him that if the town council would agree to pay him for the bricks they would take them. He then said that he would take payment for them by letting the amount go against his taxes in each year, with interest at eight per cent. upon the whole amount unpaid. This proposition was made by defendant in person to the town council, and was accepted by them, and defendant furnished the bricks:—Held, that defendant was disqualified. *Regina ex rel. Fluett* v. *Gauthier*, 5 P. R. 24.—C. L. Chamb.—J. Wilson.

A township councillor being a contractor with the county, and having been elected a deputy reeve, was—Held disqualified for the county council. *Regina ex rel. Lutz* v. *Williamson*, 1 P. R. 94.—C. L. Chamb.—Burns.

A dispute arose between a township council and the treasurer, who was paid by salary in lieu of perquisites of office, as to his duty to fund certain percentages for seven years, for the benefit of the township, during which he held office. He paid the percentages for two years under protest, and refusing to pay more was dismissed, and afterwards was elected councillor, and became reeve. Having, while in office, given a bond to the corporation, as treasurer, for the due performance of his duties, it was Held, 1. That the dispute was a matter of contract in the legal sense of the term. 2. That although defendant was not treasurer at the time of the election, there then being a dispute in good faith between him and the council, arising out of matters connected with his administration of that office, he was disqualified. *Regina ex rel. Bland* v. *Figg*, 6 L. J. 44.—C. L. Chamb.—Hagarty.

Held, that the mayor of a town, though not now elected by the town councillors, is equally subject with them to the disqualifications of the Act, but that under the circumstances of this case defendant could not be said to be interested by himself or partner in any contract with the corporation. *Regina ex rel. Forsyth and Dolsen*, 7 L. J. 71.—C. C.—Wells.

Where defendant had been appointed a commissioner for the expenditure of municipal funds upon the roads and a certain commission was to be paid to him for his services, of which some portion remained unpaid at the time of his election as a member of the council, he was held disqualified. *Regina ex rel. McMullen* v. *De-Leslie*, 8 L. J. 291.—C. L. Chamb.—Richards.

On 27th June, 1861, a by-law was passed by the county council of Essex appropriating $2,543 for the improvement of roads and bridges in the county, and that the defendant and C. be commissioners to expend the same, and that such commissioners should receive three per cent. upon all contracts entered into by them, under the by-law. On 1st December, 1861, defendant received all the money he was entitled to in respect of his services under the by-law:—Held, that any contract which the corporation made with him having been fully performed by the payment of his commission in 1861, he was not disqualified. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290.—C. L. Chamb.—Richards.

A shareholder in a company in which the council holds stock, and which had borrowed money from the council and secured the repayment by mortgage, was disqualified. *Regina ex rel. Coleman* v. *O'Hare, and other cases*, 2 P. R. 18.—C. L. Chamb.—Burns.

So also a stockholder in a gas company which has a contract with a municipal corporation. *Regina ex rel. Ranton* v. *Counter*, 1 L. J. 68.—C. C—Mackenzie. But see now the Municipal Act of 1873, sec. 75.

A surety by bond to a corporation for their treasurer, and to the treasurer for the collector of taxes, is disqualified, as is also a party who is acting as their solicitor in the defence of suits. *Regina ex rel. Coleman* v. *O'Hare, and other cases*, 2 P. R. 18.—C. L. Chamb.—Burns.

Where defendant was surety for the treasurer for the municipality for 1858, and the same treasurer was re-appointed from year to year during 1859 and 1860, the acceptance of fresh

bonds by the municipal corporation for the latter years did not release the sureties to the bond of 1858, and that it being a continuing security was not necessarily released by the acceptance of new bonds. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.—C. C.—Leggatt.

Where defendant at the time of his election to the office of mayor for a town was shewn to be a party, as surety, to a bond given to the corporation for the due performance of his duties by one of its officers, he was held disqualified. *Regina ex rel. McLean* v. *Watson*, 1 L. J. N. S. 71.—C. L. Chamb.—Morrison.

The treasurer of a township was appointed by annual by-laws, which were silent as to time, in 1859, 1860, and 1861. In 1861 the defendant became his surety by bond, which, however, did not state the duration of the liability. In 1863 the same treasurer was also appointed by a similar by-law. In 1864, the by-law limited his liability to the year 1864. From thence to 1868 no time was specified, but his term was then limited to that year. In 1869 the treasurer's accounts were audited and found correct:—Held, that this bond was only a continuing security until the expiration of the treasurer's term of office, and that the liability ceased on his re-appointment in 1863, and that therefore the defendant had not a contract with the corporation so as to disqualify him as a councillor. *Regina ex rel. Ford* v. *McRae*, 5 P. R. 309.—C. L. Chamb. —Morrison.

An agent of an insurance company paid by salary or commission, who both before and since the last municipal election in the city of Toronto had, on behalf of his company, effected insurances on several public buildings, the property of the corporation, and on several common school buildings within the city, and who at the time of the election had himself rented two tenements of his own to the board of school trustees for common school purposes:—Held, not disqualified. *Regina ex rel. Bugg* v. *Smith*, 1 L. J. N. S. 129. —C. L. Chamb.—Hagarty.

The statute disqualifying a contractor from sitting as a councillor of a municipality does not require that the contract should be binding on the corporation. *Regina ex rel. Fluett* v. *Gauthier*, 5 P. R. 24.—C. L. Chamb.—J. Wilson.

The corporation by by-law granted to defendant, upon certain conditions, a right to build a dam and bridge across a river, in consideration of which he agreed to keep it in repair for forty years at his own expense, but if he should make default the privilege granted by the corporation was to cease. The dam and bridge were built, and duly kept in repair by defendant:—Held, 1. That the defendant was interested in a contract with the corporation; 2. But that he was not disqualified as a municipal councillor, the contract amounting to a lease from the corporation of upwards of twenty-one years. *Regina ex rel. Patterson* v. *Clarke*, 5 P. R. 337.—C. L. Chamb.—Dalton, *C. C. & P.*

(d) *As Innkeeper.*

Defendant, being an innkeeper, on the eve of the election leased the inn to a person who was formerly his bar-keeper, and notwithstanding the lease himself and family continued to live in the inn, occasionally attending bar as before the lease:—Held, 1, That if the transfer of the business was in good faith, it was no valid objection that the object of it was to enable defendant to be legally elected town councillor. 2. That the parties to the transaction having expressly negatived collusion or want of good faith, the boarders in the house, and those who had dealings with defendant before the transfer, and those who were in the habit of visiting the house frequently, and had opportunities of knowing if there had been any change in the business, having expressed their belief under oath that defendant had nothing to do with the business of the inn, that the transaction must be taken to have been bonâ fide, and the defendant, therefore, was entitled to his seat. *Regina ex rel. Crozier* v. *Taylor*, 6 L. J. 60.—C. L. Chamb.—Richards.

A man may be an innkeeper though he take out a license in the name of another, and if he does so fraudulently he is disqualified to be a municipal councillor. *McKay* v. *Brown*, 5 L. J. 91.—C. C.—Mackenzie.

Held, not necessary under C. S. U. C. c. 54, s. 73, to constitute an innkeeper that he should be licensed:—Held, also, that where a candidate for councillor was an innkeeper, but sold his interest as such the day on which the election took place, but there was no actual change of possession, he was still an innkeeper, and as such disqualified. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.—C. C.—Leggatt.

(e) *Other Cases.*

Held, that the objection of alienage taken to the relator in this case, was not sustained. *Regina ex rel. Coleman* v. *O'Hare*; *Regina ex rel. Padwell* v. *Stewart et al.*, 2 P. R. 18.—C. L. Chamb.—Burns.

Sec. 73 of the act of 1866 provided for the "disqualification" of members; other sections for their "qualification." The act was to take effect on the 1st January, 1867, except, among other things, so much as relates to the qualifications of electors and candidates, which was postponed till 1st September:—Held, that s. 73, came into force on the 1st January—"disqualification" not being included in "qualification." *Regina ex rel. Mack* v. *Manning*, 4 P. R. 73.—C. L. Chamb.—Morrison.

The non-payment of taxes by a candidate before the election disqualified him, under 29 & 30 Vict. c. 52, s. 73. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.—C. L. Chamb.—J. Wilson. But see now the act of 1873, ss. 77, 109.

An Indian, who is a British subject, and otherwise qualified (in this case by holding real estate in fee simple to a sufficient amount,) has an equal right with any other British subject to hold the position of reeve of a municipality, even though not enfranchised, and though receiving, as an Indian, a portion of the annual payments from the common property of his tribe. *Regina ex rel. Gibb* v. *White*, 5 P. R. 315.—C. L. Chamb. —Dalton, *C. C. & P.*

The respondent, who had been returned as reeve at a previous election for 1874, upon a trial on a writ of quo warranto was found guilty of bribery indirectly, by other persons on his be-

half, within the meaning of 36 Vict. c. 48, s. 153, O., and his election was declared void. He was again elected, the relator being the opposing candidate. The relator sought 1. To have the election of the respondent declared void, and 2. To have himself declared to be duly elected:—Held, 1. That indirect bribery was within the meaning of s. 157 of the act, and that in consequence the respondent was rendered ineligible by the finding at the first trial as a candidate for two years; 2. That the respondent being ineligible, the fact being well known to the electors, all votes given for him were thrown away, and the relator, having the next highest number of votes, was duly elected. *Booth* v. *Sutherland*, 10 L. J. N. S. 287.—C. C.—Gowan.

III. Municipal Elections.

1. *Electors.*

(a) *Qualification of Voters.*

The copy of the collector's roll, which by 14 & 15 Vict. c. 109, sch. A. No. 12, should be furnished to the returning officer, is not conclusive upon a judge when objections are made to the qualification of voters. A party (the gaoler) who lived in apartments in the county gaol, paying no rent, and being lessee of land rated at the annual value of £10 4s., was—Held not entitled to vote, as not being a householder within 14 & 15 Vict. c. 109, sch. A. No. 12. *In re Charles* v. *Lewis et al.*, 2 C. L. Chamb. 171.—Burns.

A. had his dwelling-house at Bowmanville, where his wife and family resided, but he had a saw-mill and store and was postmaster in the township of Cartwright, which occasioned him frequently to visit that place, and while there he used to board with one of his men in a house owned by himself. After voting at Bowmanville he went down to Cartwright, and voted there also at the election for the township councillor, which was being held at the same time. It appeared that the relator, one of the candidates for Cartwright, objected to A.'s vote there, but said that it should be accepted if he would swear that he was a resident; and that A. took such oath, and his vote was thereupon recorded:—Held, that A.'s vote should have been rejected, for he was a resident of Bowmanville, and entitled to vote there only, and his conduct in voting there first shewed that he regarded that as his home. *Regina ex rel. Taylor* v. *Cæsar*, 11 Q. B. 461.

The inclination of the courts is to favour the franchise. Where the votes of householders were attacked as not being householders resident for one month next before the election, and the fact of non-residence was not clearly shewn, the votes were sustained. *Regina ex rel. Ford* v. *Cottingham*, 1 L. J. N. S. 214.—C. L. Chamb.—Morrison.

A person otherwise duly qualified to vote at a municipal election is not disqualified by the simple fact of a change of residence from one ward to another in the same township. Quære, as to the distinction between mere "householders" and "tenants," for the purpose of voting at a municipal election. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

In the case of a city divided into wards, where a voter is entitled to vote in the ward in which he resides, he is not entitled to vote in any other ward. *Anon.* 8 L. J. 76.—C. C.—McKenzie.

[Now the law is otherwise, by the Act of 1873, s. 80.]

In the case of a householder, residence for one month next before the election is an essential to qualification as a voter. *Ib.*

It is necessary that a voter, whether freeholder or householder, should not only be rated as such, but at the time of the election hold the property in respect of which he is rated *Ib.*

Held, that where a party slept and lived during the week days in a house with other parties having one common entrance, while his wife and family resided at a village a few miles distance, he was entitled, under the Municipal Act of 1849, to vote as a resident householder in the village where he lived during the week. *Regina ex rel. Forward* v. *Bartels*, 7 C. P. 533.

Held, that under an assessment of "Thomas Burrell & Sons" the Returning Officer did wrong in receiving the votes of the father and the three sons, as the latter could not be said to be "severally rated" on the roll within the meaning of C. S. U. C. c. 54, sec. 75:—Held, also, that the returning officer did wrong in receiving the vote of Thomas Burrell who at the time of the election was not either a freeholder of the municipality or a householder resident therein for one month next before the election:—Held, also, that in the case of a householder, residence in the particular ward where the party tenders his vote is not essential—residence in any part of the township being for the purposes of voting sufficient:—Held, also, that a person born in New York in 1830, the son of a British subject who had emigrated from Ireland a short time previous, and a year or two after his birth came to Upper Canada when he was only about two years old, and where he has ever since lived, is himself a British subject within the meaning of sec. 75 of the act:—Held, also, that a person living with his father on the land of his father, having no interest of any kind in the land, is not entitled to be assessed in respect of the land either as a freeholder or householder. *Regina ex rel. McVean* v *Graham*, 7 L. J. 125.—C. L. Chamb.—Robinson.

The mere entry of a person's name on the assessor's and collector's roll, with F. or H. set opposite, does not entitle such person to vote. Besides being properly rated on the roll, a person to be entitled to vote must be in fact a freeholder or a householder, and also living in the ward at the time of election. *Regina ex rel. Totten* v. *Benn et al.*, 4 L. J. 262.—C. C.—Chewett.

The assessment roll as to the qualification of electors held conclusive. *Regina ex rel. Ford* v. *Cottingham*, 1 L. J. N. S. 214.—C. L. Chamb.—Morrison. *Regina ex rel. Chambers* v. *Allison*, *Ib.* 244—C. L. Chamb.—J. Wilson. *Anon.* 8 L. J. 76.—C. C.—Mackenzie.

[It is now expressly made so by the statute of 1873, s. 77.]

A township council cannot declare the qualification of voters. A by-law enacted for such a purpose was quashed with costs. *In re Bell and the Municipality of the Township of Manvers*, 3 C. P. 399.

Held, that in a municipality divided into wards, a voter cannot vote in a ward in which he is not assessed for real property lying in the ward:—Held, that a municipal council has no authority to place names on the assessment roll, after it is finally passed by the revising tribunal:—Held, that it is wrong in a municipal clerk to add a name after the commencement of an election, to the copy of the roll furnished by him to the returning officer. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.—C. C.—Mackenzie.

Where a voter had parted with the property in respect to which he voted before the time of the election:—Held that he had no legal vote. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

See also *Regina ex rel. Wallis* v. *Bostwick*, 2 L. J. 164.

(b) *Errors or Omissions in respect to Collector's and Assessor's Roll.*

Held, per Burns, J., (and confirmed on appeal to Q. B.) that under 12 Vict. c. 81, persons on the collector's roll, though omitted accidentally or otherwise from the verified copy of the roll required to be furnished to the returning officer at the opening of the election, are legally entitled to vote:—Held, also, that persons in the copy of the roll, though not on the roll, are not entitled. *Regina ex rel. Helliwell* v. *Stephenson*, 1 C. L. Chamb. 270.—Burns.

Where the returning officer was not furnished with a copy of the collector's roll, as required by 14 & 15 Vict. c. 109, sch. A., No. 12:—Held, an irregularity for which the election might be avoided, when the objection was taken by one qualified to urge it, although it might not ipso facto render the election void. *In re Charles* v. *Lewis et al.*, 2 C. L. Chamb. 171.—Burns.

Where the returning officer used the original collector's roll instead of a copy, as directed by the act, having first announced that he intended to do so, and no one having objected:—Held, that the election was valid. *Regina ex rel. Hall* v. *Grey et al.*, 15 Q. B. 257.

The 16 Vict. c. 181, s. 10, enacts, that the returning officer of each township or ward shall procure a true copy of the collector's roll for the year preceding the election, verified by the affidavit of such collector, and of the returning officer, to be taken before any justice of the peace for the county, &c. In this case the roll used by the returning officer was a true copy of, and taken from the assessor's roll, not from the collector's, but it was sworn that the collector's roll itself was a true copy of the assessor's roll:—Held, sufficient. *Regina ex rel. Ritson* v. *Perry et al.*, 1 P. R. 237.—C. L. Chamb.—Robinson.

Held, that an election cannot be set aside because the returning officer had no copy, or an incorrect copy, of the roll, unless it be shewn that the absence or inaccuracy of such roll has prejudiced the election, or that some candidate or voter refused on that ground to proceed, and relied upon the objection. It must perhaps also be shewn that the candidates returned were not all eligible, or that they had not in fact a majority of legal votes. *Ib.*

Neither is it any objection that the copy of the roll was not verified, as required, at least unless the exception be taken before or during the election, or some variance be shewn between the copy used and the original. *Ib.*

Previous to 14 & 15 Vict. c. 109, it need not appear on the collector's roll whether the persons therein named were freeholders or householders. *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Chamb. 182.—Sullivan.

The village of Smith's Falls was incorporated by proclamation in September, 1853, and for that year the property in the village was assessed in the roll for North Elmsley, of which it formed part. The 14 & 15 Vict. c. 109, sch. A, part 11, repeals 12 Vict. c. 81, s. 57, and requires that the returning officer shall procure a correct copy of the collector's roll for the village for the year next preceding the election; making no provision, as the repealed clause did, for the case of villages incorporated after the rolls have been made up. In this case the roll of the township for the preceding year was used at the election. The want of a village roll was objected to on the argument and discussed, but it was not set forth in the statement as an objection, and the chief justice therefore refused to entertain it. Quære, as to the effect of such objection if properly taken. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—C. L. Chamb.—Robinson.

Held, that reading 16 Vict. c. 182, s. 17, in connection with the Municipal Act, non-resident freeholders, whose names do not appear on the last revised assessment roll, are not entitled to vote. *Regina ex rel. Johnston* v. *Murney et al.*, 5 L. J. 87.—C. C.—Fairfield.

Held, where a township councillor was unseated, a new election ordered and the returning officer supplied for the purposes of the new election by the township clerk with a second copy of the assessment roll of the township, that the returning officer was at liberty to use the copy of the roll supplied to him for the purposes of the first election. *Regina ex rel. McVean* v. *Graham*, 7 L. J. 125.—C. L. Chamb.—Robinson.

A court of revision has no power by mere motion, at the instance of a member of the court, to order any names that they think are omitted or wrongly inserted to be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try. Names improperly added to an assessment roll by a court of revision will, in the event of a scrutiny after an election, be struck off. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

The franchise ought not to be lost to any one really entitled to vote, if it can be sustained on a reasonable view of the requirements of the statute. The rating of electors under C. S. U. C. c. 54, s. 75, is sufficient if in the surnames of the electors, although the Christian names be erroneous. Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified. So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified.

"Thomas Sanderson" was held to be idem sonans with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating. *Regina ex rel. Chambers* v. *Allison*, 1 L. J. N. S. 244.—C. L. Chamb.—J. Wilson.

Held, that the assessment roll as to the qualification of municipal electors is conclusive. *Ib.*

See also *Regina ex rel. Wallis* v. *Bostwick*, 2 L. J. 164.

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2. *Elections.*

(a) *Generally.*

At a township meeting for the election of township officers, the first duty of the meeting is to elect a district councillor, and the town clerk ex officio may preside as chairman of the meeting until such councillor be chosen. *Small ex rel. Walker* v. *Biggar*, 4 Q. B. 497; *In re Biggar*, 3 Q. B. 144.

An election under the municipal act is commenced when the returning officer receives the nomination of candidates, and it is not necessary to constitute an election that a poll should be demanded. *Regina* v. *Cowan*, 24 Q. B. 606.

Municipal elections commence with the nomination day, and the disqualification of a candidate has reference to that day. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.—C. L. Chamb.—J. Wilson.

(b) *Time and Place for Holding.*

One Robert Gillis had a farm, through which ran the division line between wards 2 and 3, his house was in ward 2, but his barn in ward 3. The township municipality passed a by-law that the election of township councillors for 1852 for ward no. 3 should be held at Robert Gillis's:—Held, 1. that the by-law must be read as meaning on some part of his property in ward 3, as otherwise it would be void; 2. That as the election took place in the house it was null, being out of the ward; 3. That the relator was not by his quasi acquiescence precluded from subsequently raising the objection. *Regina ex rel. Preston* v. *Preston*, 2 C. L. Chamb. 178.—Draper.

A municipal council by by-law, under 12 Vict. c. 81, s. 5, appointed a place for holding the election of township councillors, and afterwards by resolution appointed another place. An election held there was set aside, as the change could be made only by by-law. *Regina ex rel. Allemaing* v. *Zoeger*, 1 P. R. 219.—C. L. Chamb.—Sullivan.

(c) *Returning Officer.*

Duty of the returning officer respecting the votes received and recorded considered, and his conduct in this case strongly censured. Costs. *Regina ex rel. Dundas* v. *Niles*, 1 C. L. Chamb. 198.—Burns.

The courts will presume that a returning officer acts properly and honestly until the contrary is shewn, and where it is intended to charge that officer with unfairness and partiality, the case should be plainly stated and clearly made out. In this case it was held that the charges made, which were general, were met as broadly as they were made. *Regina ex rel. Walker* v. *Hall*, 6 L. J. 138.—C. L. Chamb.—Richards.

He should literally observe the directions of the statute as to keeping a poll book, though his failing to do so will not in all cases vitiate the election. *Regina ex rel. Bulger* v. *Smith et al.*, 4 L. J. 18.—C. L. Chamb.—Robinson.

(d) *Nomination and withdrawal of Candidates.*

In the list of candidates for the office of township councillors given to one returning officer out of five for the township, previous to the election, the name of A. H., a candidate who had been duly nominated, was accidentally omitted, and was not inserted until half-past one o'clock of the first day of the polling, whereby he certainly lost six votes, and possibly more. The relator and one Stubbs being equal, the returning officer voted for Stubbs, who, with two other candidates, having a larger number of votes, were declared elected as the three councillors. The relator and A. H. protested against the election, contending that the whole result of the election had been affected injuriously to one or both of them by the omission of the name. Upon an application to set aside the election, it was held, that it is not every irregularity that will vitiate an election, and that in this case the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had upon the final result; and that as it did not appear that the result would have been different if the name of A. H. had been properly entered on the list, the election should not be set aside. Quære, as to the right of the returning officer to add the omitted name to the list of candidates. *Regina ex rel. Walker* v. *Mitchell et al.*, 4 P. R. 218.—C. L. Chamb.—A. Wilson.

A candidate for reeve, who is proposed and seconded at the nomination, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature. *Regina ex rel. Coyne* v. *Chisholm*, 5 P. R. 328.—C. L. Chamb.—Dalton, *C. C. & P.*

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection, cannot afterwards insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book. *Ib.*

Held, That the name of a candidate who has been nominated, but who withdraws (with the consent of the electors) before the close of the nomination, need not be placed upon the ballot paper. *Regina ex rel. Harris* v. *Bradbury et al.*, 6 P. R. 308.—C. L. Chamb.—Harrison.

The omission of the name of a candidate from the ballot paper is not per se a ground for setting aside an election, if it is not shewn that it has in some manner affected the result of the election. *Ib.*

See *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114, p. 2443; *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41, p. 2435.

(e) *Oaths.*

The swearing falsely by a voter, at an election of aldermen or common councilmen for the city of Toronto, that he is the person described in the list of voters entitled to vote, is not perjury by any express enactment; and a plea of justification, to a declaration on the case for imputing perjury to the plaintiff, on the ground of such false swearing, is bad on demurrer. *Thomas* v. *Platt*, 1 Q. B. 217.

The refusal of voters to take the oaths required by the returning officer, and the reception of such votes notwithstanding, is a good ground for setting aside an election if the relator would otherwise have had the majority. *Regina ex rel. Dillon* v. *McNeil*, 5 C. P. 137.

An agent of a candidate at an election, though not an elector himself, may object to voters and require the returning officers to administer the qualification oaths. *Regina ex rel. Gordanier* v. *Perry et al.*, 3 L. J. 90—C. L. Chamb.—Hagarty.

(f) *Altering Vote Erroneously Entered.*

A vote which the returning officer received and entered in the poll book appeared subsequently to have been wrongly received, and he struck it out, which produced an equality of votes, and gave the casting vote. It appeared that other votes had been improperly received, which being struck out the candidates would still be equal:—Held, that he had no right to strike out a vote he had entered: that there should be a new election; and that the returning officer should pay the relator his costs. *Regina ex rel. Mitchell* v. *Rankin et al.*, 2 C. L. Chamb. 161.—Burns.

At the close of the poll the returning officer declared the relator duly elected, but afterwards he received an affidavit from one M. that his vote had been entered by mistake for the relator, on which he altered this vote in the poll-book; and the numbers being then equal, he added his own casting vote for defendant, and returned that he was duly elected:—Held, that the returning officer had no power thus to alter the poll-book; that the defendant's election was illegal; and that the relator should be seated:—Held, also, that the evidence of the defendant, and of the returning officer, was properly rejected. *Regina ex rel. Acheson* v. *Donoghue et al.*, 15 Q. B. 454.

If a returning officer, upon discovering an error in the entry of a vote has the power to make the necessary correction he must make it promptly, and only where the mistake is beyond a doubt. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

See *Regina ex rel. Arnott et al.* v. *Marchant*, 2 C. L. Chamb. 189, p. 2434.

(g) *Casting Vote.*

[*Now, by the Act of 1873, sec. 114, the Clerk of the Municipality has the casting vote, not the Returning Officer.*]

A returning officer cannot, after the close of the poll, add his vote for a candidate, although he then for the first time discovers a tie between some of them. *Regina ex rel. Bulger* v. *Smith et al.*, 4 L. J. 18.—C. L. Chamb.—Robinson.

It is his duty at the close of the election, to declare publicly that the candidate standing highest on the roll is duly elected. If there be an equality of votes, he ought there and then to give his casting vote. Where, in ignorance of his duty on the second day of the election, he closed the poll, and on a subsequent day gave his casting vote in favour of one of the candidates, the election was held to be void. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89.—C. L. Chamb.—Hagarty. See, also, *Regina ex rel. Lutzer* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

A returning officer accepting a vote which he knows to be bad, in order to create an apparent equality of votes so as to give a casting vote, may be rendered liable to costs. *Regina ex rel. Totten* v. *Benn et al.*, 4 L. J. 262—C. C.—Chewett.

See, also, previous Sub-head (f).

(h) *Opening and Closing Poll.*

Where the returning officer improperly closed the poll, both candidates being then equal; and when in the act of recording his own vote a vote was tendered by an elector, who had been present a long time without voting, for the candidate against whom the returning officer voted, which he refused to record:—Held, that there should be a new election, and that the returning officer should pay the relator's costs, and also defendant's, if he chose to exact them:—Quære, whether a judge in chambers, under the above circumstances, should have ordered the name of the voter rejected to be entered on the poll-books, instead of ordering a new election. *Regina ex rel. Arnott et al.* v. *Marchant*, 2 C. L. Chamb. 189.—Burns.

If a voter in good time present himself at the poll to vote, he has a right to have his vote recorded, though by the delay of the opposite party in obstructing his purpose it may be a minute after the hour appointed for the close of the poll when the vote is recorded. *Regina ex rel. Lutz* v. *Hopkins*, 7 L. J. 152.—C. C.—Logie.

Where the watch of the returning officer was used on the first day to open and close the poll, and again to open it on the second day, without objection as to its correctness, the time marked by his watch may be properly taken as correct at the close of the poll. *Ib.*

At a township election, after the nomination of several candidates, the returning officer adjourned to another room to receive votes. No votes were tendered for any one, all parties holding back from some unexplained reason, and he therefore closed the election at about three o'clock, and declared the defendants elected by acclamation:—Held, that the election was void. *Regina ex rel. Smith* v. *Brouse et al.*, 1 P. R. 180.—C. L. Chamb.—Draper.

The meaning of the 12 Vict. c. 81, s. 159, was that the poll should be kept open on the first day till four, and if no votes came up for an hour after the last vote on that day, and if the returning officer saw that all the electors had had a fair opportunity of voting, the election might then be closed. *Regina ex rel. Greely et*

al. v. *Gilbert et al.*, 16 Q. B. 263. See, also, *Regina ex rel. Lawrence* v. *Woodruff et al.*, 1 C. L. Chamb. 119.—Draper.

[Now the poll continues open for one day only. Act of 1873, s. 106.]

Semble, that where more persons are proposed than are to be elected, and all afterwards retire but the members to be elected, polling having begun, the returning officer cannot close the poll unless under the circumstances stated in sec. 97 of the Municipal Act, C. S. U. C. c. 54. *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114.—C. C.—Armstrong.

At a meeting called to receive nominations for councillors, one party, as they alleged, made their nominations at twelve, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. He did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards, as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At one o'clock, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates, he declared the persons nominated at the opening of the meeting duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested, and desired to nominate the opposition candidates (of whom the relator was one), which the returning officer, however, refused to receive as being late:—Held, 1. That the election must be set aside, and a new election ordered; 2. that the relator was a candidate and voter within the meaning of sec. 130 of the Municipal Act, although he had not been nominated or voted, for the returning officer could not by his illegal acts divest him of his rights in that respect; 3. That the names of the candidates should have been submitted to the meeting seriatim after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there could not be said to have been an election by acclamation; 4. That the returning officer had acted improperly, and he was therefore ordered to pay the costs. *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41.—C. L. Chamb.—J. Wilson.

See *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89, p. 2434.

See, also, TEMPERANCE ACT OF 1864.

(i) *Disturbance or Misconduct at Polls.*

Where there was great noise and confusion at the polling place, but no personal violence offered to the voter, the allegation of intimidation was held to have failed in the proof. *Anon.*, 8 L. J. 76.—C. C.—Mackenzie.

Where there was a great riot and disturbance at an election so that defendant's voters could not get to the poll:—Held, that there ought to be a new election. *Regina ex rel. Kirk* v. *Asselstine*, 1 L. J. 49.—C. C.—Mackenzie.

Where it was sworn that intending voters for an unsuccessful candidate were obstructed in approaching the polling place by a crowd controlled by one of the successful candidates, and this was not unequivocally denied by that candidate, the election was set aside as to him, with costs. *Regina ex rel. Gibbs et al.* v. *Branighan et al.*, 3 L. J. 127.—C. L. Chamb.—Richards.

The electors must have full access to the polling place. The fact that a large number could not cast their votes is a sufficient reason for setting aside an election, if the result would have been affected by the unpolled votes. *Regina ex rel. Davis et al.* v. *Wilson et al.*, 3 L. J. 165.—C. L. Chamb.—Richards.

A municipal election will not be set aside on account of an official having disregarded or neglected some direction of the Ballot Act, if the election has been conducted in a manner substantially fair, and the mistake or misconduct has not affected the result of the election. *Regina ex rel. Preston* v. *Touchburn*, 6 P. R. 344.—C. L. Chamb.—Harrison.

The objections that persons were improperly allowed to enter and remain in the polling booth; were held not fatal to the election under the circumstances. *Ib.*

See *Regina ex rel. Beaty* v. *O'Donaghue et al.*, 3. L. J. 75, p. 2439.

(j) *Corrupt Practices.*

Quære, as to the effect of bribery at municipal elections. *Regina ex rel. McKeon* v. *Hogg*, 15 Q. B. 140.

The respondent on the polling day was invited by K., a supporter of his, to take a drive in his sleigh. When passing a cab-stand (after respondent had left the sleigh), K. called out to the cabmen, "Boys, follow me;" and some six of the cabs did so, and were said to have been employed during the remainder of the day in taking voters to the poll. They never received anything, and respondent denied K.'s agency, and disavowed any knowledge of his act:—Held, that there was not sufficient evidence of agency on the part of K. to affect respondent with his acts. *Regina ex rel. Thompson* v. *Medcalf*, 11 L. J. N. S. 248.—C. L. Chamb.—Dalton, *C. C. & P.*

Held, that an application under 35 Vict. c. 36 s. 14, for an enquiry as to corrupt practices in procuring the passage of a by-law, must be by summons, and if an order be obtained in the first instance it will be set aside. The enquiry must be confined to the particulars finally given by applicant. *Re Credit Valley Railway & County of Peel Bonus*, 6 P. R. 62.—C. L. Chamb.—Galt.

The respondent, who had been previously elected reeve, was found guilty of indirect bribery under 36 Vict. c. 48, s. 153. He was re-elected, the relator being the opposing candidate:—Held, under sec. 157, he was ineligible as a candidate for two years, and the relator was entitled to the seat. *Booth* v. *Sutherland*, 10 L. J. N. S. 287.—C. C.—Gowan.

In giving notice submitting a by-law, granting aid to a Railway Co. for the approval of the rate-

payers, the officers whose duty it was to give such notice had not posted up the clauses of the Municipal Act in reference to bribery, in the manner required by the act:—Held, no ground for quashing the by-law. *West Gwillimbury* v. *Simcoe*, 20 Chy. 211.

(k) *Inspection of Ballot Papers.*

Upon an application for a judge's order for the inspection and production of ballot papers used in the election of a reeve, such application being made under s. 28 of 38 Vict. c. 28, O., and neither a prosecution for an offence in relation to ballot papers nor proceedings for the purpose of questioning the election on return having been instituted:—Held, that the order could not be granted. *In re The Election for Reeve of the Township of Edwardsburgh for 1877*, 13 L. J. N. S. 44.—C. C.—Macdonald.

(l) *Vacancies in Council.*

An application for an injunction in the nature of a quo warranto against a reeve for usurping the office, on the ground that a fi. fa. against him had been returned nulla bona, was founded only on an affidavit that one D. had recovered a judgment against him on which a fi. fa. issued, and was placed in the sheriff's hands, and returned by him nulla bona:—Held, insufficient; for it should have been shewn how and to whom the return had been made, and the writ and return should have been produced or proved. The rule nisi was, therefore, discharged with costs. *In re Wood*, 26 Q. B. 513.

3. *Elections of Mayors, Wardens, and Reeves.*

As to the election by the councillors of reeves and deputy reeves in towns, under 22 Vict. c. 99. See *Regina ex rel. Pollard* v. *Prosser*, 2 P. R. 330—C. L. Chamb.—Richards; *Regina ex rel. Hume* v. *Lutz*, 7 L. J. 103.—C. C.—Miller.

[By the Act of 1873 these officers are now elected by vote of the people. Sec. 102 et seq.]

The person who acted as returning officer for one of the five wards in a township was not the person appointed, but one of the same name. Afterwards, when the five councillors elect assembled to choose a reeve, the councillor from this ward was objected to as not being duly elected. The other four councillors then, without taking the oath of office, proceeded to elect the reeve:—Held, that the fifth councillor should have been allowed to vote with the others, for it was not for them to determine the validity of his election. Held, also, that the oath of office should have been taken by the councillors before proceeding to elect the reeve, such election being within the meaning of the Municipal Council Act, an "entry upon their duties." A mandamus applied for by the reeve thus elected was therefore refused. *In re Hawk and Ballard*, 3 C. P. 241.

Held, that a majority of the whole number forming the provisional municipal council of a county must vote at the election of warden. *Regina ex rel. Evans* v. *Starratt*, 7 C. P. 487.

Sec. 130 of the Municipal Act, C. S. U. C. c. 54, enacts, that the members of every municipal council (except county councils) shall hold their first meeting at noon on the third Monday of the same January in which they are elected, or on some day thereafter at noon. Sec. 132 enacts, that the members elect of every council (except a city or town council) being at least a majority of the whole number of the council when full, shall at their first meeting after the yearly elections, and after making the declarations of office and qualification when required to be taken, organize themselves as a council by electing one of themselves to be the warden or reeve of the corporation. The incorporated village of Streetsville is represented by a council of five members. On 21st January (being the third Monday of January) two members of the council met at the town hall and qualified, but in the absence of the three remaining members of the council were unable to proceed to business. On the 23rd of January the three remaining members met, and having qualified organized themselves as a council, in the absence of the other two of the council, by electing one of themselves to be reeve:—Held, that the election was legal, and in the absence of proof of fraud could not be set aside. *Regina ex rel. Hyde* v. *Barnhart*, 7 L. J. 126.—C. L. Chamb.—McLean.

Held, that the mayor of a town not withdrawn from the jurisdiction of the county or united counties within which it was situated, though the head of the council and chief executive officer of the corporation, is not a member of the council within the meaning of sec. 135 of the Municipal Institutions Act, so as to be eligible, if chosen, to hold the office of reeve; in other words, that the offices of mayor and reeve cannot in such case be holden by one and the same person. *Regina ex rel. Doran* v. *Haggart*, 1 L. J. N. S. 74.—C. L. Chamb.—J. Wilson.

Held, that where a vote is improperly rejected in a county council on the election of warden, and it does not appear that the reeve or deputy reeve whose vote was rejected tendered it for the complaining candidate, though his vote if recorded might and probably would have influenced the result of the election, the proper course is to order a new election instead of seating the complaining candidate. *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19.—C. L. Chamb.—Richards.

Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held duly elected. *Regina ex rel. Heenan* v. *Murray*, 3 P. R. 345.—C. L. Chamb.—Hagarty.

Though the C. S. U. C. c. 54 s. 130 declares that the members of every municipal council shall hold the first meeting at noon, and at such meeting organize themselves as a council by electing one of themselves as a reeve, an election at six o'clock p.m. on the same day is sufficient. *Ib.*

See *Regina ex rel. Beaty* v. *O'Donaghue et al.*, 3 L. J. 75, p. 2439; *Regina ex rel. Bender* v. *Preston*, 7 L. J. 100, p. 2419; *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195, p. 2459.

IV. Controverted Elections.

1. *When Proceedings may be taken under the Statute.*

A private relator, under 12 Vict. c. 81, could not either attack by writ of summons the township council by name, upon grounds which, if sustained, must necessarily lead to a dissolution of the body, or attack the whole council in one proceeding, through the individual names of every member of it. *Regina ex rel. Lawrence* v. *Woodruff et al.*, 1 C. L. Chamb. 119—Draper; 8 Q. B. 336.

[But see now secs. 135, 143, of the Act of 1873.]

Elections can only be contested in the summary way provided by 12 Vict. c. 81, as amended by 13 & 14 Vict. c. 64, by a candidate or person having a right to vote at such election. A voter of another ward, if he desire to complain, must apply for a quo warranto as in ordinary cases. *Regina ex rel. Coleman* v. *O'Hare, and other cases*, 2 P. R. 18.—C. L. Chamb.—Burns. See, also, *Regina ex rel. Hart* v. *Lindsay*, 18 Q. B. 51.

The legislature having provided a cheap, speedy, and convenient remedy to try contested elections, the court will not, in general, allow parties to resort to the more expensive one by quo warranto; the general practice is to confine parties aggrieved to the relief to be obtained under the statute. *In re Kelly* v. *Macarow*, 14 C. P. 313, 457; *Regina ex rel. White* v. *Roach*, 18 Q. B. 226.

Where a candidate is declared elected on the nomination day, as being the only candidate proposed, his election cannot be questioned on a quo warranto summons under 29 & 30 Vict. c. 51, s. 130, there being no other "candidate at the election, or any elector who gave or tendered his vote thereat," who could be a relator. *Regina ex rel. Bugg et al.* v. *Bell*, 4 P. R. 226.—C. L. Chamb.—Hagarty.

A summons under the Municipal Act is not an appropriate proceeding to unseat a defendant who has forfeited his seat by an act subsequent to the election, the election having been legal. *Regina ex rel. McGouverin* v. *Lawlor*, 5 P. R. 208.—C. L. Chamb.—Dalton.

Held, that the legality of an appointment of aldermen and councillors for a ward in which there had been no election owing to a riot, made by the aldermen and councillors chosen for the other wards, could not be tried under the 12 Vict. c. 81, s. 146. *Regina ex rel. Beaty* v. *O'Donaghue et al.*, 3 L. J. 75.—C. L. Chamb.—Robinson.

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2. *Who may be Relator.*

Acquiescence.]—Acquiescence of a candidate in an irregular election, how far it disqualifies him from becoming a relator. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Chamb. 203.—Burns.

The court will not set aside an election on the relation of a party who concurred in it, and voted for the person elected. *Regina ex rel. Rosebush* v. *Parker* 2 C. P. 15.

Held, that the acquiescence of the candidates in the election being proceeded with where the returning officer was not furnished with a proper roll, though it might not preclude them from disputing the election on that ground, could not affect the right of a voter who was no party to such acquiescence. *In re Charles* v. *Lewis et al.*, 2 C. L. Chamb. 171.—Burns.

Held, that the relator's conduct, in stating that if the voter objected to would swear that he was a resident his vote should be accepted, could not estop him from afterward objecting to the vote. *Regina ex rel. Taylor* v. *Cæsar*, 11 Q. B. 461.

An elector who takes part in an election will not be allowed afterwards, if dissatisfied with the result, to say that the election was wholly void. *Regina ex rel. McLaughlin* v. *Hicks et al.*, 5 L. J. 89.—C. C.—Fairfield.

A party cannot complain of the election of a candidate whom he has himself voted for, unless he can shew that he was ignorant of the objections which he desires to urge. *Regina ex rel. Coleman* v. *O'Hare, and other cases*, 2. P. R. 18.—C. L. Chamb.—Burns.

A defendant having acquiesced in an irregular election cannot afterwards be permitted to object to it on that ground. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.—C. C.—Mackenzie.

An elector who, at a nomination meeting, acquiesces in a statement of fact by the returning officer, which, if true, would entitle the defendants to sit, and himself becomes a candidate on the strength of that statement, will not, when defeated at the polls, be heard, as relator, to object that in fact the statement was incorrect, and that the defendants were therefore disentitled. *Regina ex rel. Regis* v. *Cusac et al.*, 6 P. R. 303.—C. L. Chamb.—Harrison. Followed in *Regina ex rel. Harris* v. *Bradburn et al.*, 6 P. R. 308.—C. L. Chamb.—Harrison.

Other Cases.]—Held, under 22 Vict. c. 99, that the reeve of the Gore of Toronto, being a member of the county council of Peel, to which the village of Brampton sent members, had sufficient interest in the election of a deputy-reeve for that village to enable him to question it. *Regina ex rel. Hart* v. *Lindsay*, 18 Q. B. 51.

The court refused leave to file an information to disturb a person in the exercise of an office to which he was elected for one year, without opposition; the applicant having been present at such election, and made no objection, and this application being after the time prescribed by the Municipal Act. *In re Kelly* v. *Macarow*, 14 C. P. 313, 457.

The C. S. U. C., c. 54, s. 127, has rather limited than increased the number of persons allowed to be relators by 12 Vict. c. 81, s. 146. *Ib.*

It is not desirable that clerks of municipal councils, having the custody of papers of the corporation, should be relators to unseat members of the council, of which they are clerks. *Regina ex rel. McMullen* v. *DeLisle*, 8 L. J. 291.—C. L. Chamb.—Richards.

Where through the improper conduct of the returning officer a candidate was not nominated at an election, and did not vote, and other persons having been declared elected by acclamation:—Held, that he was nevertheless a candidate and voter, within the meaning of sec. 130 of the

Municipal Act of 1866, and therefore qualified to be a relator. *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41.—C. L. Chamb.—J. Wilson.

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3. *Practice.*

(a) *Statement, Affidavit, and Recognizance.*

A relator, who is a candidate, need not shew in his application to oust the defendant that he himself was qualified for the office. *Regina ex rel. Mitchell* v. *Adams*, 1 C. L. Chamb. 203.—Burns.

The affidavits sustaining the relator's case need not state that defendant has either accepted or acted in the office. *Regina ex rel. Helliwell* v. *Stephenson*, 1 C. L. Chamb. 370.—Burns.

The statement of facts placed before a judge, when a municipal election is questioned, need not contain all the grounds on which the relator relies to entitle him to the seat, if the election should be set aside. *Regina ex rel. Clark* v. *McMullen*, 9 Q. B. 467.

A relator's statement of an objection, supported by his affidavit, is looked upon as a material traversable allegation in a declaration; and if defendant omit to answer it, he admits its truth. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Chamb. 88.—Draper.

A distinct rule or order for the allowance of the recognizance is unnecessary. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Chamb. 18.—Draper.

Semble, that the relator's attorney may act as commissioner to take the recognizance and affidavit. *Regina ex rel. Blaisdell* v. *Rochester*, 12 Q. B. 630.

The affidavit of the relator, though not intituled in any court, followed and referred to his statement, which was properly intituled:—Held, sufficient. An objection that the recognizance was not entitled in any court, was disallowed upon similar grounds. *Regina ex rel. Bland* v. *Figg*, 6 L. J. 44.—C. L. Chamb.—Hagarty.

Where a relator declares that he has an interest in the election as a voter for said ward, this, coupled with a previous complaint that defendant was unduly elected alderman, &c., sufficiently identifies him as declaring himself to be a municipal voter, though he does not use the precise term "municipal voter," required by the 12 Vict. c. 81 s. 146. An objection that, though the relator's interest is sufficiently alleged, there is no sufficient proof of it to authorize the issue of the writ, cannot be urged on the return of the writ, where such allegation is not denied, and no proof offered to shew that relator had not the interest claimed. The interest of the relator is not established by the ordering of the writ. *Regina ex rel. Shaw* v. *McKenzie*, 2 C. L. Chamb. 36.—Draper.

The relator must shew clearly that he was a candidate, or voted. Semble, it is insufficient to state "that he protested and voted against" the election of the person chosen. *Regina ex rel. White* v. *Roach*, 18 Q. B. 226.

A relator's statement that "he has an interest in the election as a municipal voter," need not be verified by affidavit. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.—C. C.—Mackenzie.

The statement of a relator in a quo warranto matter alleged that he had "an interest in the said election as a voter," and his affidavit stated that he had voted "at said election, but not for said William Rastal:"—Held, that his interest sufficiently appeared. *Regina ex rel. Ross* v. *Rastal*, 2 L. J. N. S. 160.—C. L. Chamb.—Hagarty.

Held, that the proper proof of the right of an elector to be a relator is the production of the roll, or an authenticated copy. His own statement on oath is insufficient. *Regina ex rel. Campbell* v. *O'Malley*, 10 L. J. N. S. 250.—C. C.—Hughes.

The relator in his relation failed to state that he was a candidate or a voter, as required by 36 Vict. c. 48, s. 131, but the fact that he was so appeared in one of the affidavits:—Held, that as the fact was before the court, an amendment of the relation, under sec. 50 of A. J. Act of 1873, might be allowed. *Regina ex rel. O'Reilly* v. *Charlton*, 6 P. R. 254.—C. L. Chamb.—Dalton, *C. C. & P.*

The writ of summons must be applied for as the practice directs, within six weeks, and therefore, where there was no written motion paper, and the statement was not signed, as required by the rules of court, the application was held too late. *Regina ex rel. Telfer* v. *Allan, and other cases*, 1 P. R. 214.—C. L. Chamb.—Robinson. See, also, *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114.

The signature to the statement was held not to be dispensed with by the affidavit of the relator endorsed, that he believed the objections stated within to be well founded. *Regina ex rel. Telfer* v. *Allan, and other cases*, 1 P. R. 214—C. L. Chamb.—Robinson.

Where alienage is taken as an objection, it must be shewn particularly how the parties complained of are aliens; a general affidavit of the fact is insufficient. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—C. L. Chamb.—Robinson.

The power of a judge under C. S. U. C c. 54, s. 128, as to the issue of a quo warranto summons is to be exercised upon a relator shewing reasonable grounds for supposing that the election was not legal, or that the person elected thereat was not duly elected, but where the relator admitted a qualification in fact, and made no complaint as to the legality of the election, contenting himself with attacking the declaration of qualification subsequently made by the candidate, the writ was refused. *Regina ex rel. Grayson* v. *Bell*, 1 L. J. N. S. 130.—C. L. Chamb.—Hagarty.

(b) *Writ of Summons.*

Semble, that it was no part of the design of the 12 Vict. c. 81, to give any greater or more extensive right to parties suing out under it a writ of summons, than they before possessed at common law or under the British statute. *Regina ex rel. Lawrence* v. *Woodruff et al.*, 1 C. L. Chamb. 119.—Draper.

A summons having been obtained, the relator, finding his proceedings irregular, notified defendant not to appear, and that it was his intention to proceed de novo:—Held, the objection urged being material, that the relator was not precluded

from a second application by his first ineffectual proceeding. *Regina ex rel. Metcalfe* v. *Smart*, 10 Q. B. 89; *S. C.*, 2 C. L. Chamb. 114.

A summons not tested on the day it is issued, is waived by appearance. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Chamb. 18.—Draper.

Semble, that the 12 Vict. c. 81, sec. 146, as amended by 13 & 14 Vict. c. 64, sched. A. No. 23, did not require the writ ordered by the court to be sued out in term time; but that if the application was made in term the court should give the order for the writ; if in vacation a fiat should be given by a judge. *Ib.*

Personal service of the writ cannot be dispensed with, except when provided for by the 12 Vict., c. 81, sec. 148. *Regina ex rel. Arnott* v. *Marchant et al.*, 2 C. L. Chamb. 167.—Burns.

A county judge issued his fiat for a quo warranto, and the papers remained with him, but were handed to defendant's solicitor, before the return day, for perusal:—Held sufficient, and that it was not necessary that they should have been filed with the deputy clerk of the crown before the summons issued. *Regina ex rel. Blaisdell* v. *Rochester*, 12 Q. B. 630.

Where one of three candidates, of whom two were to be elected, announced on the second day between 10 and 1 o'clock his retirement from the contest, whereupon the returning officer immediately closed the poll, and declared the others elected, one of whom then thanked the electors and declared his acceptance of office, and afterwards at the first meeting of the council made the declaration of office; and a writ of summons was issued, not within six weeks after the election, or within one month after the declaration at the close of the poll by the defendant of his acceptance, but within one month after making the declaration of office:—Held, it not being shewn that the relator was present at the close of the poll, or had ever learned what then took place, that the application for the writ had been made in time. *Regina ex rel. Horne* v. *Clark*, 6 L. J. 114.—C. C.—Armstrong.

Held, that the writ of summons, signed by the clerk of the process, and under the process seal, though in fact issued by the clerk of the crown in the Court of Queen's Bench, was sufficiently issued by the clerk of the process under Consol. Stat. U. C., cap. 54, sec. 128, sub-sec. 5. *Regina ex rel. Blaisdell* v. *Rochester*, 7 L. J. 101. C. L. Chamb.—Burns.

A county court judge may direct the writ to be made returnable before the judge in chambers at Toronto, and in that case the relator must see that the papers are transmitted. *Regina ex rel. Lutz* v. *Williamson*, 1 P. R. 94.—C. L. Chamb.—Burns.

Held, 1, that the proper designation of a warden in a quo warranto summons, is "warden of the corporation of the county of——;" 2, that "warden of the county of——," is not improper, as there is no particular name or designation in the Municipal Institutions Act; 3, that "warden of the county council of the county of Simcoe" might, if deemed necessary, be amended by striking out the words, "of the county council" after the word "warden," in the writs to be issued in pursuance of the judgment in a quo warranto matter; 4, that after appearance by defendant, the 18th rule of court applicable to such proceedings is against holding any proceeding irregular or void, which does not interfere with the just trial of the matter on the merits. *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19.—C. L. Chamb.—Richards.

(c) *Disclaimer.*

Where defendant personally contested the election, but on its being moved against sent in a disclaimer, praying to be relieved from costs, because being duly elected he was obliged to accept the office under a penalty:—Held, no ground for such relief. *Regina ex rel. Featherstone* v. *McMonies*, 2 C. L. Chamb. 137.—Sullivan.

On the 4th of March the relator obtained a summons, and the writ and statement were served on that day. On the 9th defendant sent a written disclaimer to the judge in chambers, which was received on the 10th, and on the 13th the relator's affidavit was filed, stating that the defendant consented to his own nomination and had taken his seat, &c. No proof of the grounds taken in the statement was ever filed, and the case was then allowed to drop. On the 27th of April the relator filed a further affidavit, stating that after the disclaimer the reeve had ordered a new election, at which he (the relator) was duly elected, but that defendant persisted in retaining his seat, contending that it had not become vacant by his disclaimer. The chief justice, under these circumstances, refused to give judgment as if the matter were still pending on the summons, there being no proof of any of the objections taken; but held that the disclaimer could not nullify the election, as the parties seemed to have supposed; and that if the council should support the relator in his suit, defendant or some one else must move against his election on the ground that it was illegally ordered; or that the judge who was in chambers at the return of the summons might perhaps enter an adjournment to a certain day, and call for proofs as to the first election, and give judgment. *Regina ex rel. Freeman* v. *Jones*, 1 P. R. 306.—C. L. Chamb.—Robinson.

Held, that the effect of filing the disclaimer after the issue of the writ is much the same as doing so before its issue, notwithstanding the 35 Vict. c. 36, and so operates as a resignation and puts an end to the suit, and defendant avoids the reference to the county judge and the penalties under the act. *Regina ex rel. Hannah* v. *Paul*, 9 L. J. N. S. 238.—C. L. Chamb.—Dalton. *C. C. & P.*

See *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Chamb. 182, p. 2446; *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89, p. 2446.

(d) *Evidence.*

A relator is not necessarily bound to prove his interest unless defendant question it by denying it, and shewing, or at least alleging some ground for his denial. *Rex ex rel. Bartliffe* v. *O'Reilly*, 8 Q. B. 617.

If there be a disqualification rendering a candidate ineligible, proper notice of it must be given at the time of election. No new evidence

will be received by the court on the examination of a decision of a judge in chambers as to a contested election. *Regina ex rel. Clark* v. *McMullen*, 9 Q. B. 467.

The affidavit of the relator in support of the objections may be sufficient to obtain the writ, but he is incompetent as a witness under 16 Vict. c. 19, sec. 1, and therefore, to establish the case at the trial, some other evidence is required. *Regina ex rel. Carroll* v. *Beckwith et al.*, 1 P. R. 278.—C. L. Chamb.—Robinson.

A defendant named in a quo warranto summons is an interested party trying an issue, and therefore was not competent to give evidence on his own behalf. *Regina ex rel. McGregor* v. *Ker*, 7 L. J. 67.—C. L. Chamb.—Draper.

Oral examination of parties refused. *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.—C. L. Chamb.—Morrison.

See *Regina ex rel. Acheson* v. *Donoghue*, 15 Q. B. 454, p. 2433

See ◗ IV. 3 (a), p. 2441.

(e) *Costs.*

To or Against Returning Officers.]—The returning officer having by order of a judge become a party, but being acquitted and discharged, and the relator's statement not being strictly correct:—Held, that the relator should pay the officer his costs. *Regina ex rel. Hawke* v. *Hall*, 2 C. L. Chamb. 182.—Sullivan.

Held, that although the conduct of a returning officer in some particulars be irregular, in consequence of which he is made a party to a quo warranto summons, yet if his motives were pure, and his conduct free from corruption or partiality, he is entitled to his costs. *Regina ex rel. McLean* v. *Graham*, 7 L. J. 125.—Robinson.

A returning officer having acted bonâ fide, and defendant having procured a written legal opinion to be sent to him, by which means he obtained his seat:—Held, that defendant must pay the costs of making the returning officer a party to the suit. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.—C. C.—Mackenzie.

The returning officer in ignorance of his duty closed the poll, there being an equal number of votes for each candidate. On the subsequent day he gave a casting vote for one of the candidates, the election was held void, but as he appeared to have acted in good faith costs were not given against him. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89.—C. L. Chamb.—Hagarty. See *Regina ex rel. Arnott et al.* v. *Marchant*, 2 C. L. Chamb. 189.

A returning officer who receives illegal votes not on the assessment roll may be made to pay costs. *Regina ex rel. Johnston* v. *Murney et al.*, 5 L. J. 87—C. C.—Fairfield.

Where in the county court the returning officer was ordered to pay the costs, and it appeared by affidavits filed on appeal that he was insolvent, and had acted at defendant's instance, the judgment below was altered so as to make the defendant also liable for costs. *Regina ex rel. Acheson* v. *Donoghue et al.*, 15 Q. B. 454.

See *Regina ex rel. Mitchell* v. *Rankin et al.*, 2 C. L. Chamb. 161, p. 2433; *Regina ex rel. Totten* v. *Begum* 4 L. J. 262, p. 2434: *Regina ex rel. Corbett* v. *Jull*, 5 P. R. 41, p. 2435.

Other Cases.]—Where a new election is ordered, the relator must recover his costs. *Regina ex rel. Kirk* v. *Asselstine*, 1 L. J. 49.—C. C.—Mackenzie.

Defendant filed a disclaimer, but a day too late:—Held, that he must pay the relator's costs. *Ex rel. Hawke* v. *Hall*, 2 C. L. Chamb. 182.—Sullivan.

Defendant having duly disclaimed, and not in any manner taken his seat, costs were not imposed upon him. *Regina ex rel. Coupland* v. *Webster*, 6 L. J. 89.—C. L. Chamb.—Hagarty.

A by-law passed by a township council, levying money to pay the costs of a contested election is illegal, and will be quashed with costs. *In re Bell* v. *The Municipality of the Township of Manvers*, 2 C. P. 507; 3 C. P. 400.

The power of a judge, under 13 & 14 Vict. c. 64, sched. A., No. 23, to award costs for or against the relator or defendant, or returning officer, "in disposing of" every case, extends only to the final determination of each case. *Regina ex rel. Arnott* v. *Marchant et al.*, 2 C. L. Chamb. 167.—Burns.

The tendency of modern decisions is not to compel a party to pay costs unless it be shewn that he participated in the improper conduct for which the election is set aside. *Regina ex rel. Davis et al* v. *Wilson et al.*, 3 L. J. 165.—C. L. Chamb.—Richards.

Held, that under 16 Vict. c. 181, s. 27, the judge might in his discretion withhold costs altogether from either side. Draper, J., diss. *Regina ex rel. Swan* v. *Kowat*, 13 Q. B. 340.

Or might order each to pay his own costs. *Regina ex rel. Gordanier* v. *Perry et al*, 3 L. J. 90.—C. L. Chamb.—Hagarty.

Held, that a candidate who consented to this nomination, and was illegally declared elected, and who afterwards sat and voted as a councillor and was elected reeve, may be made liable for costs. *Regina ex rel. Johnston* v. *Murney et al.*, 5 L. J. 87.—C. C.—Fairfield.

A relator having acted in good faith in bringing forward the matter was not amerced in costs, though unsuccessful. *Regina ex rel. Crozier* v. *Taylor*, 6 L. J. 60.—C. L. Chamb.—Richards.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals by the peril of having to lose the costs necessarily incurred. Therefore where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified costs were given against him. *Regina ex rel. Rollo* v. *Beard*, 3 P. R. 357;—C. L. Chamb.—Hagarty. *In re Charles* v. *Lewis et al.*, 2 C. L. Chamb. 171, 177.

The master on taxing costs to the successful party should consider whether he produced affidavits unnecessarily numerous or diffuse, and act accordingly. *Regina ex rel. Walker* v. *Hall*, 6 L. J. 138.—C. L. Chamb.—Richards.

Notice of disqualification having been given to the electors at the time of the election, and defendant having declared that he would run his risk and if the election was declared invalid would pay the costs, the relator was held entitled to be seated, and was allowed costs as against defendant. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 128.—C. C.—Gowan.

Where defendant, while denying any interest in the contract with the road company, by which he was alleged to be disqualified, admitted that he was employed as a salaried agent for the contractor, costs were refused to him. *Regina ex rel. Armor* v. *Coste*, 8 L. J. 200.—C. L. Chamb. —Richards.

It is not desirable that the clerks of municipal councils having the custody of papers of the corporation, should be relators in quo warranto cases to unseat members of the councils to which they are clerks. In this case, in order to discountenance such a practice, costs were refused to relator, clerk of the county council, to which defendant had been elected a member, although the application to unseat defendant was successful. *Regina ex rel. McMillen* v. *DeLisle*, 8 L. J. 200.—Richards.

As this case presented very strong presumptions against defendant in the absence of explanation, costs were not given. *Regina ex rel. Piddington* v. *Riddell*, 4 P. R. 80.—C. L. Chamb.—Morrison.

See *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19, p. 2451.

(f) *Other Cases.*

An information in the nature of a quo warranto may issue to shew cause by what authority a municipal councillor for any district in the province claims to be a member of such council. *In re Biggar*, 3 Q. B. 144.

As to the mode of enforcing the judgment under 12 Vict. c. 81. *Regina ex rel. Gibbons* v. *McLellan*, 1 C. L. Chamb. 125.—Draper.

Where the summons under the 12 Vict. c. 81, s. 146, was to shew cause wherefore defendant had usurped the office of councillor, &c. :—Held, per Draper, J., that the authority of a judge in chambers extended only to an adjudication of the validity of the election complained of, and that he could not further decide upon the validity of the relator's election. *Ib.*

The judge's order is not defective because it does not award that a new election be held. *Regina ex rel. Bartliffe* v. *O'Reilly*, 8 Q. B. 617.

When a vote had been rejected by the judge who decided the case, upon erroneous grounds, but upon further enquiry by the court it was found to be a bad vote on other grounds, they refused to allow it. *Regina ex rel. Forward* v. *Bartels*, 7 C. P. 533.

The judgment of a county judge in a contested election, upon a question of fact depending on conflicting testimony, will not be overruled. The intention of the statute was not to allow this, but to provide an appeal upon any legal question on which the case may have turned. Quære, as to the effect of bribery at municipal elections. *Regina ex rel. McKeon* v. *Hogg*, 15 Q. B. 140.

A judge of a county court cannot, in determining the validity of a contested election, decide incidentally the validity or invalidity of a township by-law abolishing wards. The by-law, if illegal, must be quashed by the superior courts. *Regina ex rel. McLaughlin* v. *Hicks et al.*, 5 L. J. 89.—C. C.—Fairfield.

Where an information in the nature of a quo warranto is asked for on behalf of an individual, it must be exhibited, if allowed, in the name of the master of the crown office ; but where the rule in such a case was to shew cause why the Attorney-General should not be allowed to file the information—Held, that the mistake was not fatal. *Regina ex rel. Hart* v. *Lindsay*, 18 Q. B. 51.

Semble, mere formal objections, such as that the recognizance was not entitled in any court, cannot be urged by defendant after appearance. To raise them he should move. *Regina ex rel. Bland* v. *Figg*, 6 L. J. 44.—C. L. Chamb.—Hagarty.

The judge declined to withhold his judgment, upon the allegation that there was a prior relation at the instance of a different relator against the same defendant for same cause pending before county judge, which relation, it was sworn, was collusive, and intended to protect defendant in the enjoyment of the office, contrary to law. *Regina ex rel. McLean* v. *Watson*, 1 L. J. N. S. 71. —C. L. Chamb.—Morrison.

A stranger to the proceedings may, if otherwise qualified, attack them on the ground that they have been initiated in collusion with defendant, but he cannot set up irregularities, as such, unless indeed the relator has committed them purposely, as, for example, to secure the failure of his own proceedings. *Regina ex rel. Patterson* v. *Vance*, 5 P. R. 334.—C. L. Chamb.—Dalton, *C. C. & P.*

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4. *When Relator or Other Candidate Entitled to Seat.*

Notice to Electors.]—Where it does not appear that the voters at an election had notice of any objection to the candidate for whom they voted, though a valid one existed, a new election will be granted ; but the relator, though next in order to him, will not be seated. *Regina ex rel. Hervey* v. *Scott*, 2 C. L. Chamb. 88.—Draper.

Held, that notice of the disqualification having been given to the electors at the time of the election, the relator, who claimed the seat, was entitled to be seated. *Regina ex rel. Richmond* v. *Tegart*, 7 L. J. 128.—C. C.—Gowan.

Held, that to entitle a relator (who was a candidate) to a seat declared vacant, he must have notified the electors that the defendant was disqualified, and the grounds of such disqualification. *Regina ex rel. Flanagan* v. *McMahon*, 7 L. J. 155.—C. C.—Leggatt.

In this case the next candidate could not be declared duly elected, as the notice to the electors of defendant's want of qualification was not sufficiently explicit. *Regina ex rel. Dexter* v. *Gowan*, 1 P. R. 104.—C. L. Chamb.—Robinson.

On application to set aside an election, it is no answer to say that the relator did not object at

the election to the qualification of the person elected; this is only necessary to entitle the relator, if a candidate, to the vacant seat. *Regina ex rel. Coleman* v. *O'Hare, and other cases*, 2 P. R. 18.—C. L. Chamb.—Burns.

A candidate claiming to be seated at the nomination owing to his opponent's disqualification, should, besides claiming a seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate. *Regina ex rel. Adamson* v. *Boyd*, 4 P. R. 204.—C. L. Chamb. —J. Wilson.

To entitle a candidate to the seat claimed by him on the ground of his opponent's disqualification, it must be shewn that the qualification was objected to at the nomination, so that the electors might have an opportunity of nominating another candidate. *Regina ex rel. Ford* v. *McRae*, 5. P. R. 309—C. L. Chamb.—Morrison.

On an application to unseat an alderman, elected in 1866, as not being duly qualified, and to seat another candidate in his place:—Held, that notice of the disqualification should have been given at the nomination, as under sec. 101, sub. sec. 6 of 29 & 30 Vict. c. 51, no candidates could be voted for who had not been proposed and seconded at the nomination; that an exception taken to the qualification should be of such a plain character that the electors can easily form an opinion as to its correctness. *Regina ex rel. Timming* v. *Edgar*, 4 P. R. 36.—C. L. Chamb. —A. Wilson.

Other Cases.]—Semble, Per Robinson, C. J., that whether the court or a judge will go further than declare the election void, or will also seat the relator, is a matter of discretion not to be interfered with on appeal. *Regina ex rel. Clark* v. *McMullen*, 9 Q. B. 467.

Where a relator, who was himself a candidate, alleges, not only that the person declared elected was illegally elected, but that he, the relator, was duly elected, the latter cannot be deprived of his seat by the resignation of the former. *Regina ex rel. Johnston* v. *Murney et al.*, 5 L. J. 87.—C. C.—Fairfield.

Held, that when a voter having an interest in an election is the relator, claiming the seat for an opposing candidate, and after a scrutiny it is found that the opposing candidate has a clear majority of the legal votes polled, the seat will be awarded to such candidate, notwithstanding that he voted for the defendant whose right to the seat is disputed. *Regina ex rel. Clint* v. *Upham*, 7 L. J. 69.—C. C.—Mackenzie.

Twenty-six persons voted twice for defendant. The judge subtracted twenty-six from the gross amount of votes recorded for defendant, whereby the relator had a majority of nine, and he was accordingly declared entitled to the seat. *Regina ex rel. Pomeroy* v. *Watson*, 1 L. J. 48.—C. C. —Mackenzie.

When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right. *Regina ex rel. Forward* v. *Detlor*, 4 P. R. 198.—C. L. Chamb.—J. Wilson.

When voters perversely throw away their votes the minority candidate has a right to the seat. *Ib.*

See *Regina ex rel. Gibbons* v. *McLellan*, 1 C. L. Chamb. 125, p. 2447; *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19, p. 2438; *Booth* v. *Sutherland*, 10 L. J. N. S. 287, p. 2427.

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5. *Other Cases.*

Where a mandamus was applied for, to be directed to the warden of the London district, to swear in a person who claimed to be duly elected a councillor, under the Municipal Council Act, the court discharged the rule, it appearing that a councillor had been returned and sworn in for the township, which return had been contested; the proper remedy in such case being by quo warranto. *In re Brennan*, 6 O. S. 330.

The refusal of voters to take the oaths required by the returning officer, and the reception of such votes notwithstanding, is a good ground for setting aside an election, if the relator would otherwise have had the majority. *Regina ex rel. Dillon* v. *McNeil*, 5 C. P. 137.

An application may be made to unseat a person elected as mayor, though he be not sworn into office. *In re Sawers* v. *Stevenson*, 5 L. J. 42.—C. C.—Boucher.

After appearance by defendant in a quo warranto matter the 18th rule of court applicable to such proceedings is against holding any proceeding irregular and void which does not interfere with the just trial of the matter on the merits. *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19.—C. L. Chamb.—Richards.

It is not every irregularity that will vitiate an election; and where it was objected that in the list of candidates, given to one out of five returning officers for the township the name of one candidate, H., was omitted and not inserted until past one on the first day of polling:—Held, that the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had on the final result of the election. *Regina ex rel. Walker* v. *Mitchell*, 4 P. R. 218.—C. L. Chamb. —A. Wilson. See also *Regina ex rel. Preston* v. *Touchburn*, 6 P. R. 344.—C. L. Chamb.—Harrison.

V. Acceptance and Declaration of Office.

A public declaration of acceptance of office, made in presence of the returning officer and the electors directly after the returning officer has published the result, is a sufficient acceptance under 13 & 14 Vict. c. 64, sched. A., No. 23. *Regina ex rel. Linton* v. *Jackson*, 2 C. L. Chamb. 18.—Draper.

Five township councillors were elected in January. At their first meeting, on the 17th, only one made the declaration of qualification, and a doubt having been raised as to the other four in consequence of some employment held by them under the corporation, they delayed in order to consult the County Court judge. On the 19th they met again and organized themselves, but on the same day the reeve for the previous year issued his warrant to elect four other councillors, who were returned; and on the 31st these four, with the man who had first

qualified, met and claimed to be the council:—Held, under 22 Vict. c. 99, that the second election was invalid, for the parties first elected not having refused to qualify, but only delayed, and having done so within the twenty days allowed, there was no ground for a new election. A mandamus was ordered to the clerk to deliver up the papers to the council first chosen. *In re Corporation of the Township of Asphodel and Sargant et al.*, 17 Q. B. 593.

The neglect of a person elected mayor, within twenty days after knowing of his election or appointment, to make the declaration of office and qualification under sec. 183 of the C. S. U. C. c. 54, does not work a forfeiture of office in addition to the pecuniary penalty by that sec. imposed. *Regina ex rel. Forsyth* v. *Dolsen*, 7 L. J. 71.—C. C.—Wells.

Where an alderman elect made a declaration of office, inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the quo warranto summons against him, qualified in respect of other property, his election was upheld. *Regina ex rel. Hartrey* v. *Dickey*, 1 L. J. N. S. 190.—C. L. Chamb.—Morrison.

Held, that a reeve of a township who was duly elected, and had made and subscribed the declarations of office and qualification, had not a right, under sec. 67 of the C. S. U. C. c. 54, to take his seat in the county council, when the certificate of the township clerk did not state that he "had made and subscribed the declarations of office and qualification," but only that he had "taken or made the declaration of office." *Regina ex rel. McManus* v. *Ferguson*, 2 L. J. N. S. 19.—C. L. Chamb.—Richards.

Held, that where reeves and deputy reeves who had filed defective certificates were notwithstanding allowed by the clerk to take their seats in the county council, their votes therein could not be challenged for such defective certificates, sec. 67 being only directory and not imperative; that the certificate is only evidence that what is contained in it was done, if it have not been done, or the reeve or deputy reeve have not been duly elected, the mere certificate would not give the party holding it a right to sit and vote in the council. *Ib.*

Held, that where the clerk properly refused to allow a reeve to take his seat, but allowed several reeves and deputy reeves whose certificates were equally if not more defective to take their seats and vote, the proper course was to order a new election. *Ib.*

Held, that no costs should be given against the sitting member, although he accepted office and was sworn in and his seat was afterwards vacated on the ground of the improper decision of the county clerk, unless shewn that he in some manner directly interfered with the decision of the clerk or otherwise misconducted himself. *Ib.*

A defective declaration of qualification of a candidate at a municipal election is not a ground for unseating him by the summary process under the Municipal Act of 1866. *Regina ex rel. Halsted* v. *Ferris*, 5 P. R. 241.—C. L. Chamb.—Dalton, *C. C. & P.*

VI. Meetings of Councils and Conduct of Business.

Upon a motion to quash a by-law to revise the wards of a township, it appeared that at a meeting at which the by-law was passed there were present four councillors: that the motion was put by the reeve; two of the councillors voted for the by-law, the third made no objection, and the reeve declared it passed:—Held, that the passing of the by-law having been put from the chair, and no dissent expressed, that it was duly passed in accordance with 12 Vict. c. 81, sec. 8. *Mallough* v. *The Municipality of Ashfield*, 6 C. P. 158.

The reeve being opposed to a by-law regularly passed while he was present and presiding, refused to sign it or affix the seal. By direction of the council the deputy-reeve then took the chair, and signed and sealed the by-law:—Held, valid; and the court discharged with costs a rule obtained by the reeve to quash it. *Preston and the Corporation of the Township of Manvers*, 21 Q. B. 626.

At a meeting of a township council the reeve, who was in the chair, refused to put a motion which had been duly made and seconded, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favour of the motion:—Held, that the reeve had no right to refuse to put the motion, and that the vote was proper and effectual. *The Municipality of the Township of Brock* v. *The Toronto and Nipissing R. W. Co.*, 17 Chy. 425.

A municipal by-law for issuing debentures which had been submitted to the rate-payers and approved by them, contained a clause stating that the debentures were to be signed by the reeve:—Held, that the council had power to appoint another person to sign the debentures in place of the reeve. *Ib.*

The court refused a rule nisi to quash by-laws of a township council on the ground that the said by-laws were passed at a special meeting called by a member of the council, and not by the town-reeve or other authorized officer. *In re Hill and the Municipal Council of the Township of Walsingham*, 9 Q. B. 310.

A county by-law was passed at St. Catharines, Niagara being the county town, but a by-law had been passed in 1862 to authorize the meetings at St. Cathorines. Secs. 130 and 131 of the Municipal Act C. S. U. C. c. 54, direct the first meeting of the council to be on the fourth Tuesday in January at the county hall, and by sec. 136, subsequent meetings may be held elsewhere:—Held, that the meeting was authorized. *Paffard and The Corporation of the County of Lincoln*, 24 Q. B. 16.

Held, upon the facts stated in the case, that the by-law was not invalid as not having been passed at a legal meeting of the council, or signed by the reeve. *In re Slavin and the Corporation of the Village of Orillia*, 36 Q. B. 159.

See *Small ex rel. Walker* v. *Biggar*, 4 Q. B. 497, p. 2431.

See, also, III., 3, p. 2437.

VII. Officers of the Corporation.

1. *Treasurer and his Sureties.*

Liability of Sureties.]—A. became surety to B., the treasurer of the united counties of Essex, &c., for the due accounting, &c., by C., as deputy treasurer, while he, B., continued in his office. C. received moneys for which he did not account, and B. sued A. upon the bond. B. held his commission as treasurer from the government, from the execution of the bond to the 10th of October, 1846; and from that time to the 16th of August, 1849, in consequence of a change made in the mode of appointment, he held his office under an election of the municipal council of the western district:—Held, upon these facts, that B. could sustain his action against the surety, A., without proof in the first instance that he had actually paid the money himself which his deputy, C., had mis-spent; and, 2. That the surety was liable during the whole time the deputy was serving in the treasurer's office, without reference to the mode of the treasurer's appointment. *Baby* v. *Baby*, 8 Q. B. 76.

Declaration, that defendants became bound to the plaintiffs by the name of "the Beverley Municipal Council," conditioned that B., who had been chosen the plaintiffs' treasurer, should duly account, &c. Plea, that the appointment was an annual one, terminating at the end of the year, and that B. duly accounted for the year. On demurrer to the plea and exceptions to the declaration—Held, that defendants, by not pleading non est factum, admitted that they made the bond to the plaintiffs, and therefore could not object that there was no such corporation; and that the plea was bad, for under 12 Vict. c. 81, the appointment of B. as treasurer was not annual, but during pleasure, and the condition covered the whole period of his holding office. Held, also, that the imposition of additional taxes to those assessed at the time of taking the security, and the increase of the risk thereby, did not vitiate a bond given for the general performance of duties, and payment of all moneys. *The Corporation of the Township of Beverley* v. *Barlow et al.*, 10 C. P. 178.

A confession was given to secure a second set of sureties of a county treasurer, but on an arbitration, it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On motion to retain moneys in the the sheriff's hands which had been made on the confession, it was ordered that the whole amount be paid into court, and that the subsequent judgment creditors should wait. *Leonard* v. *Black*, 4 L. J. 260.—Chy.

A treasurer having been duly appointed for three counties (while united), upon the separation of one from the other two counties—Held, that a new appointment was not necessary under C. S. U. C. c. 54. An action being brought by a corporation against the sureties of their treasurer, defendants contended, that because money which had been collected by the treasurer and fraudulently charged as paid by him was not demanded by the parties (the government) entitled thereto, they were not responsible therefor:—Held, that the liability of the treasurer was between the municipality and himself, he having received the money as their officer, and his responsibility was not altered by the government not demanding the money. *Corporation of Essex* v. *Park*. 11 C. P. 473.

In an action upon the covenants contained in a mortgage of land executed to the municipal corporation by a surety of their treasurer, to secure payment of a judgment recovered against such surety, for the treasurer's liability:—Held, on demurrer, that there was nothing to prevent the plaintiffs from giving time to defendant for payment, or from taking from him a covenant to pay at the expiration of that time. *The Corporation of the Town of Belleville* v. *Judd*, 16 C. P. 397.

A township treasurer had in his hands a large balance belonging to the township, when he gave to the corporation new sureties:—Held, that subsequent payments by the treasurer were applicable first to the discharge of that balance. *The Municipal Corporation of the Township of East Zorra* v. *Douglas*, 17 Chy. 462.

A township council tacitly permitted the treasurer of the township to mix the township money with his own:—Held, that this conduct was wrong, but did not discharge the treasurer's sureties. *Ib.*

A county treasurer had, through a misapprehension of what was the proper course, been allowed for many years to mix all county money with his own, and had used for his private purposes a large sum received in that way. In this state of things he had occasion to give to the corporation a new bond with two new sureties, shortly after giving which it was ascertained that he was unable to pay his balance to the corporation; and the sureties filed a bill to be relieved from their bond on the ground of the treasurer's misconduct, and of the uncommunicated knowledge of that misconduct by the representatives of the corporation at the time the bond was given. But the court, being of opinion that most of the facts relied on as proving misconduct were known to the sureties, and that no information had been withheld from them fraudulently, held the bond to be valid. *Peers* v. *Oxford*, 17 Chy. 472.

One of the sureties for the treasurer of a municipal corporation desiring to be relieved from his suretyship, the treasurer offered a new surety in his place; and the council thereupon passed a resolution approving of the new surety, and declaring that on the completion of the necessary bonds the withdrawing surety should be relieved. No further act took place on the part of the council, but the treasurer and his new surety, omitting the second surety, joined in a bond conditioned for the due performance of the treasurer's duties for the future, and the treasurer executed a mortgage to the same effect. The clerk on receiving these gave up to the treasurer the old bond, which the treasurer destroyed. Eight years afterwards, a false charge was discovered in the accounts of the treasurer of a date prior to these transactions:—Held, that the sureties on the first bond were responsible for it. *County of Frontenac* v. *Breden*, 17 Chy. 645.

The mortgage was on property which the treasurer had previously mortgaged to the sureties for their indemnification. The mortgage to the sureties had not been registered, but had been

left with the clerk of the council for safe keeping. On receiving the new bond and mortgage, the clerk gave up to the treasurer the unregistered mortgage as well as the old bond, and the treasurer destroyed both :—Held, that the old sureties were entitled to a first charge on the property for their indemnification in respect of the newly discovered defalcation. *Ib.*

A surety to a municipal corporation for the due performance of the treasurer's duties is not relieved from his responsibility by the negligence of the auditors in passing the treasurer's accounts. *Ib.*

The fact of the treasurer having become reduced in his circumstances after the auditing and passing of his accounts and before the discovery of an error in them, is no bar to a suit against the surety. *Ib.*

Other Cases.]—The municipal council act, 4 & 5 Vict. c. 10, does not enable the municipal councils of districts to sue upon bonds given by collectors of assessments to the treasurer of the district after that act was passed, but the treasurer can sue in his own name. *O'Connor* v. *Clements et al.*, 1 Q. B. 386.

It invests in the municipal council of each district the power of suing on a bond given to the treasurer of the district for the due payment over to him of the rates received by the collector, and it is sufficient to aver in the declaration that the moneys collected are due and payable to the treasurer. *Eastern District Council* v. *Hutchins*, 1 Q. B. 321. But see *O'Connor* v. *Clements et al.*, *Ib.*, 386.

At a session, in October, 1846, A. was elected by the district council treasurer of the midland district, being then himself a district councillor. B. then was holding the same office of treasurer of the district, having been long previously appointed by royal commission. A. requested B. to to give him the books, &c., of the office, and on his refusal applied for a mandamus :—Held, 1. That A. had been elected at the proper time ; 2. That the two offices of district councillor and treasurer were incompatible ; 3. That A. was ineligible for election, the council having no power to receive his resignation as councillor ; 4. That, nevertheless, he, as treasurer de facto, under 9 Vict. c. 40, had a legal right to the books, &c., of his office, and that a mandamus might go to B. for the delivery of the books, &c., to A., he being since A.'s election under the act a mere stranger to that office. *Regina* v. *Smith*, 4 Q. B. 322.

Quære, whether the release given by the warden to the principal and one of the sureties, as stated in this case, was binding at law. *Municipal Council of Essex, Kent, and Lambton* v. *Baby*, 9 Q. B. 34.

A bond by a collector to the "treasurer of a town and his successors in office" :—Held, valid, without naming any individual therein. *Judd* v. *Read*, 6 C. P. 362.

Semble, that a treasurer may be indicted for making any payment which is a clear misappropriation of the public money, though sanctioned by resolution of the council. *Municipality of the Township of East Nissouri* v. *Horseman*, 16 Q. B. 576; *Daniels* v. *The Municipal Council of the Township of Burford*, 10 Q. B. 478.

Semble, that moneys paid by a treasurer on the order of the reeve, which the municipal council had no authority to direct to be paid, will be considered township moneys still in his hands. *Municipal Council of East Nissouri* v. *Horseman*, 9 C. P. 189.

The reeve of a township received moneys for license fees which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash, and a note for the balance. The treasurer denied having received the note or balance, and at his instance the municipality by resolution allowed an action to be brought for it in their name against the reeve. They afterwards rescinded this resolution, but the action went on, and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his accounts for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer :—Held, that the action could not be maintained by the municipality, and that if it could, the treasurer would not have been admissible as a witness. *The Municipality of the Township of King* v. *Hughes*, 17 Q. B. 253.

The Municipal Act does not authorize the acceptance by the treasurer of orders for school teacher's salary, although permitted to pay such orders on presentation, nor can the treasurer bind the corporation by his acceptance of orders. *Munson* v. *Municipality of Collingwood*, 9 C. P. 497.

Held, that an action would not lie against a municipal corporation by a school teacher, upon an order made upon and accepted by the treasurer in the plaintiff's favour for his salary, the treasurer having no power to bind the corporation by such acceptance. *Smith* v. *The Corporation of the Village of Collingwood*, 19 Q. B. 259.

In an action by a municipal corporation against their treasurer on his bond, charging him with not having paid over moneys received, it appeared that the corporation had a contract with one E. to build bridges for them ; and that E. wanting money got the reeve to endorse his note for $600, which was discounted by defendant at the Niagara District Bank, of which he was agent, as well as treasurer of the municipality. A few days after another note for $400, made by E. and endorsed by others, one a member of the corporation, was discounted at the same bank. When these notes were about to fall due, a meeting of the council took place, at which defendant was present, and the reeve swore that it was then understood that the council should assume these two notes, and he thought defendant was authorized to charge them to the corporation ; but other councillors did not agree with the reeve in their recollection of what took place, and the only resolution or minute in writing was that the council should give their note for $700, to be used in the Niagara District Bank by defendant. This note was accordingly made by the reeve, and endorsed by the other members :—Held, that under these facts, the treasurer had no right to charge the council with the remaining $300. In an account rendered to the council by defendant, this $1,000 was charged as paid to E., and it was asserted that they had made subsequent payments to him, assuming the account to be correct. The facts did not shew

this to be the case, but Semble, that the council would not have been bound by omitting to notice or object to this item, whatever might be the effect if the account had been regularly audited. A treasurer of a municipality should not be permitted to act also as agent of a bank. *The Corporation of the Village of Ingersoll* v. *Chadwick*, 19 Q. B. 278.

The first count was upon the bond given by the treasurer, alleging moneys received and not paid over; the second count for money had and received. Defendant pleaded on equitable grounds, to the first count, that while he was treasurer the corporation owed one E. a large sum of money, and thereupon, at a meeting of the council duly held, the reeve, in the presence and hearing of the council, and without objection, and with the verbal assent of the councillors, or a majority of them, gave defendant, as treasurer, verbal orders to pay E. £250 on account of said debt, which defendant thereupon paid; that afterwards the council ordered defendant to render them an account of moneys paid and received by him for the corporation, which he did, charging the corporation in it with the money so paid to E.; that said council being aware of such account and of said payment, charged the said sum against E., and afterwards by resolution directed the reeve to pay E. $112. 35c. on account of their debt due to him, after crediting themselves with such payment; and the reeve thereupon required defendant in writing to pay said $112.35c., which defendant accordingly paid; and defendant alleged that the money claimed in said count as received by him and not paid over, was the sum so paid by him to said E. as aforesaid. To the second count the same facts were pleaded, but the allegation at the end of this plea was, that the money so paid to E. as first aforesaid was the money in the count and in the introductory part of this plea mentioned: —Held, on demurrer, first plea good, being an averment that the money sued for was the $112.35c. paid by defendant on the resolution. Second plea, bad, for the money there alleged to be sued for was the $1,000, for the payment of which no sufficient authority was shewn. Quære, this action being by the council of the year after that in which the payment pleaded was made, whether the facts would have afforded any defence against the council who thus sanctioned the payment. *S. C.* 19 Q. B. 286.

In an action on a bond given to T., the plaintiff, describing him as treasurer of the municipality of F., for the performance by defendant P. of his duties as collector:—Held, affirming Judd *v.* Read, 6 C. P. 312, that the action might be maintained by the plaintiff as treasurer, though the statute directs that the bond shall be taken to the municipality. *Todd* v. *Perry et al.*, 20 Q. B. 649.

A municipal council elected B. as their treasurer on the 25th of January, and by a by-law passed on the 28th appointed him, and directed that he should enter on his duties as soon as he should have executed the necessary bond. On the same day they passed a resolution accepting his bond, which was dated on the 26th:—Held, that no objection would lie to such a bond, as having been executed before his appointment. Held, also, that the treasurer was clearly liable for defalcations in the wild land tax, being the proper person to receive it. *Corporation of the County of Essex* v. *Strong*, 21 Q. B. 149.

The condition was, that a treasurer, his executors or administrators, at the expiration of his office, upon request to him or them made, should give a just account of all moneys received, and should pay and deliver over all balances due:—Held, that the words "upon request to him or them made" applied both to the giving an account and to the paying over. *Provisional Corporation of the County of Bruce* v. *Cromar*, 22 Q. B. 321.

Where a by-law was passed by a township council for raising a loan for a special purpose, it was held, to be contrary to the duty of the township treasurer to apply the money to any other corporate purpose. *Grier* v. *Plunkett*, 15 Chy. 152.

But where before the filing of a bill by a ratepayer complaining of the application, such application had been made in good faith, in discharge of a legal liability of the township, and the council approved of and adopted the payment, a bill to compel the treasurer to repay the amount and personally bear the loss, was dismissed. *Ib.*

County money should be deposited to a separate account, and should not be unnecessarily mixed up with the treasurer's private money. *Peers* v. *Oxford* 17 Chy. 472.

A bill for an account was held to lie at the suit of a municipal corporation against their treasurer and his sureties. *The Municipal Corporation of Township of East Zorra* v. *Douglas*, 17 Chy. 462.

It is culpable neglect of duty on the part of municipal officers not to see that separate accounts for special rate, sinking fund, and assessments for general purposes, are kept as directed by the statute. *Wilkie* v. *Corporation of the Village of Clinton*, 18 Chy. 557.

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2. *Other Officers.*

A., upon being appointed clerk of the market to the Board of Police of London, entered into a bond for the payment of a certain sum of money in compensation for the market tolls which the board allowed him to receive. Being sued on his bond for the non-payment of the money, he pleaded "that he discovered after the execution of the bond that the plaintiffs had no legal right to erect a market, or make by-laws respecting fees to be taken thereat;" he then avered that the plaintiffs had no such authority, and that on this account the bond was void:—Held, plea bad, in not shewing that no market was erected or existed, and in not averring that fees were not in fact received by him. *The Board of Police of London* v. *Talbot*, 3 Q. B. 311.

The clerk of a district council can only charge the council by acts within the scope of his general authority, or by such as they directed beforehand, or sanctioned afterwards, either expressly or by availing themselves of such acts to their advantage. *Ramsay et al.* v. *The Western District Council*, 4 Q. B. 374.

The court refused an information in the nature of a quo warranto with a view of placing a party

in the office of a township clerk, who, in making his application, shewed that he could not write. *Regina* v. *Ryan*, 6 Q. B. 296.

The testator having been appointed by the finance committee of the district council to collect the wild land tax:—Held, that his representatives were liable to the council of 1850 for money received in 1847-8-9, by their authority, and not paid over. *The Municipal Council of Lincoln, Welland, and Haldimand* v. *Thompson et al.*, 8 Q. B. 615.

Held, that the 12 Vict. c. 81, makes it not only the duty of a town council to pay their police magistrate, but creates a debt the payment of which the magistrate may enforce in an action of debt, not as founded upon a contract express or implied, but on the statute and the right which it confers:—Held, also, that under the statute the action may be maintained without the aid of a by-law of the municipality to confer it. Quære, is debt the only remedy. *Wilkes* v. *The Town Council of Brantford*, 3 C. P. 470.

Under C. S. U. C. c. 54, s. 402, it is for the city council, not for the commissioners of police, to determine the remuneration to be paid to the police force. Where, therefore, the commissioners, thinking the salary of the chief constable fixed by the council insufficient, had estimated a higher rate, the court refused a mandamus to the city to pay it. *In re Prince and the Corporation of the City of Toronto*, 25 Q. B. 175.

The council by resolution appointed one B. assessor, who was sworn into office, and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose. Under these circumstances, the court granted a quo warranto to determine the validity of the last appointment. *In re McPherson and Beeman*, 17 Q. B. 99.

Held, that a county clerk is disqualified, under sec. 73 of 29 & 30 Vict. c. 51, from sitting as mayor of the same or any other municipality. *Regina ex rel. Boyes* v. *Detlor*, 4 P. R. 195.—C. L. Chamb.—J. Wilson.

The property of the Grand River Navigation Co. having passed to defendants, a municipal corporation, plaintiff was appointed manager thereof under their common seal, at an annual salary, from 1st January, 1866, an appointment to which he had been previously recommended in a report of a committee of council, and by a resolution the mayor was authorized to execute the necessary bonds between plaintiff and defendants:—Held, a valid appointment, and not necessary to have been made by by-law. Defendants having dismissed the plaintiff in September, 1867—Held, that such dismissal, before the end of the year, was wrongful, defendants having recognized plaintiff as their officer after and during the second year; and until removed he was to be considered as in office under his original appointment under the corporate seal, and that he was entitled to compensation in like manner as if employed by an individual. Held, also, that the plaintiff was an officer of the corporation under the Municipal Act. *Broughton* v. *Corporation of Brantford*, 19 C. P. 434.

Held, that a new county council may, before recognition on their part, dismiss the officers appointed by the preceding council, and that such officers have no right of action against the municipality for their year's salary. *Hickey* v. *Corporation of the County of Renfrew*, 20 C. P. 429.

A by-law, passed on the 21st July, 1874, appointed an officer, under 36 Vict. c. 34, s. 8, O., to enforce the provisions of said act, and the acts therein recited, and the by-laws of the corporation respecting shop and tavern licenses. This by-law was passed to fill a vacancy in the office, caused by the resignation of the person appointed under a by-law passed in February previous. The 36 Vict. c. 34 had been repealed when the by-law was passed by the 37 Vict. c. 32, which gave power to fill a vacancy in such office:—Held, that the by-law was not invalid, because not passed in February, under sec. 9 of the last mentioned act, nor for not defining the duties, &c., of the officer appointed, which might be done by another by-law. *In re Slavin and the Corporation of the Village of Orillia*, 36 Q. B. 159.

Where assessors or other officers of municipalities omit to follow the plain directions in acts of parliament, and any loss thereby arises to the municipality, it would seem that the party causing such loss would be answerable therefor to the municipality. *Christie* v. *Johnston*, 12 Chy. 534.

See *Dempsey* v. *The City of Toronto*, 6 Q. B. 1, p. 2236; *In re DeLaHaye and The Municipality of the Gore of Toronto*, 3 C. P. 23, p. 2467.

VIII. By-Laws.

1. *Construction and Effect of Generally.*

It is not necessary to recite in a by-law all that is requisite to shew the authority of the council, or the regularity of their proceedings; these will be presumed, until the contrary is proved. *Fisher* v. *Municipal Council of Vaughan*, 10 Q. B. 492. See, also, *Tylee* v. *The Municipal Council of the County of Waterloo*, 9 Q. B. 590.

If a by-law be not void on the face of it without being quashed, all proceedings duly had under it while it remained in force may be justified under it. *Barclay* v. *The Municipality of the Township of Darlington*. 5 C. P. 432. See now sec. 246 of the Municipal Act of 1873.

In construing a by-law the court will not intend that the municipality are trying to evade compliance with a statute, but will give every reasonable help of construction to bring the by-law within it. They will also look at the whole by-law to ascertain its meaning, and construe one part with another or other parts, so as if possible to give full effect to the whole. *In re Cameron and The Municipality of East Nissouri*, 13 Q. B. 190.

Semble, that a by-law enacting that certain animals shall not run at large, does not impliedly allow others not named to do so, contrary to the common law. *Jack* v. *Ontario, Simcoe, &c. R. W. Co.*, 14 Q. B. 328.

If for all that appears a by-law may be legal it will be upheld, and in this case, where it was not clear upon the face of the by-law or otherwise shewn that the money to be raised by it was for services not belonging to the current year, the omissions of recitals and provisions which would in that case have been essential, was Held no objection. *Gibson and The Corporation of the United Counties of Huron and Bruce*, 20 Q. B. 111.

All persons in a municipality, whether permanent residents or not, are bound to take notice of its by-laws. *Regina* v. *Osler*, 32 Q. B. 324.

On an application to quash a conviction for something done contrary to a by-law the legality of the by-law may be questioned, though it has not been quashed. Sec. 205 applies only to actions brought for acts done under an illegal by-law. *Ib.*

See *Fletcher* v. *Municipality of the Township of Euphrasia*, 13 Q. B. 129, p. 2470; *In re Smith and The City of Toronto*, 10 C. P. 225, p. 2470; *Secord and The Corporation of the County of Lincoln*, 24 Q. B. 142, p. 2471.

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2. *Voting on by Electors.*

By-laws for prohibiting the sale of spirituous liquors, &c., which, under 16 Vict. c. 184, s. 4, are required to be submitted to the electors, must be adopted and approved of by a majority of all the qualified municipal electors of the municipality, not merely by a majority of those who may attend at the meeting called to consider such by-law. [See on this point, as to by-laws to aid railways, Jenkins *v.* The Corporation of the County of Elgin, 21 C. P. 325; Erwin *v.* The Council of Townsend. *Ib.*, 330.] Where the by-law which provided for calling such meeting assumed that the approval of the majority of the voters present would be sufficient :—Held, that it was nevertheless proper to move against the then proposed by-law, after it had been passed on such approval, and not against that which laid down the improper course of proceeding. *In re McAvoy and the Municipality of Sarnia*, 12 Q. B. 99.

A by-law to change the county town of Lincoln, under 25 Vict. c. 30, was not to be valid unless assented to as in the case of a by-law to take stock in a railway company. It was published in all the local papers except one, for the proper period prescribed by C. S. U. C. c. 66 :—Held, that the omission rendered it void. *Simpson* v. *The Corporation of the County of Lincoln*, 13 C. P. 48.

Held, that in every case in which it is necessary to submit a by-law to the electors for assent, the requirements of sec. 196 of 29 & 30 Vict. c. 51, as regards notice, must be followed, and that sec. 228 only applies where county councils can raise money by by-law without submitting the same to the electors. In this case the publication of the by-law was objected to as insufficient under sub-s. 2 of sec. 196, the first publication being on the 8th, and the last on 29th October; but it was subsequently inserted on the 19th and 26th November, and also on the 3rd December, and every effort appeared to have been made to give the by-law publication. The court, in its discretion, refused to quash the by-law on this ground. *In re Gibson* v. *The Corporation of the County of Bruce*, 20 C. P. 398.

Held, that the list which the 29 & 30 Vict. c. 51, s. 196, sub-s. 7, requires the clerk of the municipality to furnish the returning officer with, is a list containing the names of all freeholders and tenants of realty assessed on the roll to an amount sufficient to entitle them to vote at any municipal election. *Erwin* v. *Township of Townsend*, 21 C. P. 330.

A by-law fixed the sum to be paid for a license for billiard tables in a town at $300, and enacted that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold :—Held, that such a by-law was properly submitted to the electors under 37 Vict. c. 32, s. 23, O., which was not confined to tavern licenses. *In re Neilly et al. and the Corporation of the Town of Owen Sound*, 37 Q. B. 289.

This court has jurisdiction to restrain a municipal corporation from obtaining the vote of the ratepayers in favour of a by-law which, if passed, would be illegal without legislative sanction, and which sanction such vote was intended to aid in obtaining in an informal and unauthorized manner. *Helm* v. *The Corporation of the Town of Port Hope et al.*, 22 Chy. 273.

Where a municipality has legally a right to pass a by-law granting a sum of money, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve of the by-law. The previous case distinguished. *Vickers* v. *The Municipality of Shuniah*, 22 Chy. 410.

See *Paffard and The Corporation of the County of Lincoln*, 24 Q. B. 16, p. 2466; *In re Cunningham* v. *The Corporation of the Village of Almonte*, 21 C. P. 459, p. 2489.

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3. *Creating Debts.*

The court refused a rule nisi to quash by-laws of a township, on the ground that having passed a by-law to contract a loan they had exceeded their powers in afterwards modifying the said by-law; it appearing that such alteration could not affect the security of creditors. *In re Hill and the Municipal Council of the Township of Walsingham*, 9 Q. B. 310.

Where a by-law had been passed by a municipal corporation, creating a debt, and before the debt had been paid it was by a subsequent by-law repealed :—Held, that under 36 Vict. c. 48 s. 254, the repealing by-law was invalid, and must be quashed. *Smith and The Municipal Corporation of the Township of Oakland*, 24 C. P. 295.

Under 4 & 5 Vict. c. 10, land must have been taxed at so much in the pound on its assessed value; and it was not necessary that a by-law should charge upon land separately a distinct proportion of the sum authorized to be levied. *Tylee* v. *The Municipal Council of the County of Waterloo*, 9 Q. B. 588.

A by-law under 4 & 5 Vict. c. 10, for raising a rate, stated that the money was required to pay off £1,500 due to the Gore Bank, and £500

due by the district to D.:—Held, sufficient, and that it was not necessary to state for what services the money was due; for the court would intend that the debts were legally contracted, and for a legal purpose. *Ib.*

Held, under 12 Vict. caps. 78, 81, 13 & 14 Vict. caps. 64, 67, 14 & 15 Vict. caps. 109, 110, not necessary that a by-law to raise money for county purposes should contain all the provisions required to perfect the measure; and, therefore, the same by-law which provides for raising the loan and imposing the rate need not apportion the sums to be paid by each municipality, for that may be provided for by a subsequent by-law. *Grierson* v. *Provisionial Council of the County of Ontario*, 9 Q. B. 623.

A by-law for payment of a debt must contain on the face of it the rate authorized to be levied for making up the sum granted. Such by-law is illegal if it direct a gross sum to be raised for the payment of the current general expenses of the county, and the liquidation of the debt due, not stating what debt, or of what amount. Quære, whether the 4 & 5 Vict. c. 10, s. 41, applies to by-laws passed under 12 Vict. c. 81, or whether the court must determine on their validity according to other statutes in force, and the common law. *Canada Company* v. *Municipal Council of the County of Middlesex*, 10 Q. B. 93.

By-law quashed because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vict. c. 81. *In re Billings and The Municipal Council of the Township of Gloucester*, 10 Q. B. 273.

The by-law in this case for raising a loan was held clearly bad, the rate directed to be levied in the first year being insufficient. *Perry* v. *Town Council of the Town of Whitby*, 13 Q. B. 564.

Municipal corporations, under 12 Vict. c. 81, might, by a subsequent by-law, impose an additional rate to provide for any deficiency in the sum levied under a previous by-law for payment of debts incurred previous to the 1st of January, 1849. *Mellish* v. *Town Council of the Town of Brampton*, 2 C. P. 35.

Under 12 Vict. c. 81, any by-law passed for payment of a debt or creating a loan, must settle and direct to be levied a special rate for such purpose. *Ib.*

Sec. 177 relates to all debts and interest lawfully incurred and becoming payable within the year. *Ib.*

The 14 & 15 Vict. c. 109, sec. 4, prescribing what by-laws creating debts, &c., shall recite, is only directory, and does not declare that the omission of any of the prescribed recitals shall render the by-law invalid. The rate to be levied by any municipal council for the payment of a debt or liquidation of a loan, &c., must, under the municipal acts, be equal in each successive year, and not fluctuating according to the arbitrary discretion of the municipality. *In re Sells and the Municipality of the Village of St. Thomas*, 3 C. P. 286.

Where a by-law recited that the amount of the whole ratable property of the township, according to the last assessment returns, was £114,756, and that it would require the annual rate of 2½d. in the pound, as a special rate, for payment, &c.; and then enacted that a special rate of 2½d. should be levied to pay the principal and interest of the loan to be raised under the by-law, and that the proceeds of such special rate should be applied solely to the payment, &c., until the same be fully paid and satisfied:—Held, that the recital as to the amount of ratable property and the assessment returns was sufficient, and that it sufficiently appeared that the rate was to be levied in each year. In one part of the by-law the reeve was empowered to issue debentures for such sums as should be, from time to time, required for the purposes mentioned, but not to exceed in the whole £10,000: in subsequent clauses a special rate was imposed to pay "the said sum of £10,000," and the application of "the said sum of £10,000," was pointed out; and the debentures were directed to be made payable "within twenty years of the time that this by-law shall come into operation":—Held, that the amount of the loan, and the time when the debentures were to be made payable, was stated with sufficient certainty. *In re Cameron and the Municipality of East Nissouri*, 13 Q. B. 190.

The by-law provided for raising $22,500, and authorized the issue of debentures payable in from one to ten years, with interest half-yearly, but no greater sum than $3,200 to be payable in any one year; and it imposed a special rate of half-a-mill in the dollar, in addition to all other rates, until the debentures and interest should be paid in full. This was objected to as not shewing when or in what proportions the debt or debentures were to be payable, or how much each year; but Held, good, for the rate not being unequal or insufficient, it was a matter of calculation so to make the debentures payable that it would meet the principal and interest falling due in each year. *Secord and the Corporation of the County of Lincoln*, 24 Q. B. 142.

Municipal corporations cannot by by-law raise money at a rate of interest exceeding six per cent. *Wilson and The Municipal Council of the County of Elgin*, 13 Q. B. 218.

A by-law to authorize a loan having been duly passed, another by-law was proposed, not dispensing with it, but shewing clearly that the rates imposed by the first by-law were meant to be dispensed with, and other provisions made for the payment of the principal:—Held, that the last by-law was bad, for it must be considered as a new and independent by-law, not as a mere supplement to the previous one, and it should therefore have contained the usual recitals and enactments required in by-laws for creating a loan. *In re Bryant and the Municipality of Pittsburgh*, 13 Q. B. 347.

Where the municipality of a township, intending to act under 13 & 14 Vict. c. 48, for common school purposes, declared a rate upon the resident inhabitants of a school section only:—Held, that under 13 & 14 Vict. c. 48, as well as the U. C. Assessment and Municipal Acts, the by-law was invalid, because the rate should be levied on the taxable property within the section, whether of residents or non-residents:—Held, also, that in such case the court has no discretion, but must quash the by-law with costs. Quære, whether in the present case the rate and assessment to be

levied were stated in the by-law with sufficient certainty. *In re DeLaHaye* v. *The Municipality of the Township of, and the Gore of Toronto*, 2 C. P. 317.

The by-law in this case provided that any money above the proceeds of the old town hall, required for the erection of the new one, should be levied on the ratable property of the township, but did not fix the amount or rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad. *In re Hawke and The Municipality of Wellesley*, 13 Q. B. 636.

A by-law to raise a loan for the construction of an esplanade under 20 Vict. c. 80, which authorizes the city to raise a loan for such an amount not exceeding £75,000, as *may* be necessary, &c. :—Held bad, because while it authorized the raising of a loan to the full extent of £75,000, it did not shew that that sum was necessary, nor for what amount the contractors had engaged to do the work. *Ex parte Hayes* v. *The City of Toronto*, 7 C. P. 255.

The 16 Vict. c. 219, authorizes the issuing by the city of Toronto of $120,000 of debentures for esplanade purposes. A by-law having been passed on the 7th of May, 1860, intituled, "To provide for the issue of additional debentures for $54,000, for esplanade purposes," upon objection taken that on its face it did not shew any authority in law for raising the sum :—Held, that inasmuch as the by-law in its recital referred to the statute, which was a public act, it could not be said that it shewed no authority, and a primâ facie case of an excess of authority; in the amount authorized by statute not being proved, the court refused a rule to quash. *In re Grant and the City of Toronto*, 12 C. P. 357.

By-law passed to raise money for a school house, Held, bad, for non-compliance with the requisites under 14 & 15 Vict. c. 109, s. 4, of all by-laws creating a debt or contracting a loan. *Hart and the Municipality of Vespra and Sunnidale*, 16 Q. B. 32. See, also, *McIntyre and the Corporation of the Township of Elderslie*, 27 C. P. 58.

The by-laws for contracting a debt for taking stock in and constructing a road, having been passed by the district of Gore before the 12 Vict. c. 81 :—Held, that it was not necessary that such by-laws should impose a special rate as required by that act. *The Municipal Corporation of Wellington* v. *The Municipality of the Township of Wilmot*, 17 Q. B. 82.

A by-law authorizing the reeve to issue a debenture, to be paid out of the taxes of the year following, thereby creating a debt :—Held, bad, the requirements of C. S. U. C. c. 54, s. 223, not having been complied with. *Clapp* v. *The Corporation of the Township of Thurlow*, 10 C. P. 533.

If, for all that appears, a by-law may be legal, it will be upheld; and in this case, where it was not clear upon the face of the by-law, or otherwise shewn, that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions, which would in that case have been essential, was held no objection. *Gibson* v. *The Corporation of Huron and Bruce*, 20 Q. B. 111.

A by-law to contract a loan should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact: but the court refused to quash on this objection, holding that the words "may quash," was permissive, and gave them a discretion. *In re Michie and The Corporation of the City of Toronto*, 11 C. P. 379.

A by-law to raise a loan, which required the assent of the electors, was, on the 11th of February, signed by the warden, and sealed with the corporate seal, but it recited that the assent of the rate-payers to it was necessary, and contained full provisions for taking their votes. It was published, with a notice, stating it to be a proposed by-law to be taken into consideration on the 15th of March, and naming the times and places for voting on it. On the 15th of March the council passed another by-law, reciting verbatim that of the 11th of February as a by-law adopted on that day, and that it had been voted upon, and approved of, and enacting that the said by-law be finally passed, and be a by-law of the corporation :—Held, that notwithstanding the signing and sealing, the by-law, under these circumstances, was not illegal as passed on the 11th of February, before the assent of the electors, but that it should be treated as finally passed on the 15th of March. Held, also, that the by-law of the 15th of March did not impose a rate, but had the effect only of finally passing the previous by-law, and, therefore, did not require the assent of the electors. The introduction of the word "said" in the first by-law as recited in the second, which was not in the original, was treated as immaterial. *Paffard and The Corporation of the County of Lincoln*, 24 Q. B. 16.

It was stated in an affidavit filed in support of a motion to quash a by-law to raise a loan, that the true amount of the ratable property was not $6,434,773, as stated in the by-law, but $7,565,468. The clerk of the council, in answer, positively denied this, stating the true sum to be $6,435,475 :—Held, that in the face of the clerk's affidavit the objection could not prevail, and that the difference between the sum in the by-law and that sworn to by him was unimportant. *Ib.*

Remarks by Wilson, J., as to the practice of omitting to levy in each year for the full amount of the sinking fund required for loans, and its effect upon the rights of creditors, taken in connection with the doctrine against rating for debts past due. *Corporation of the County of Frontenac* v. *Corporation of the City of Kingston*, 30 Q. B. 584. As to rating for past debts, See, also, *Haynes* v. *Copeland*, 18 C. P. 150, p. 2481.

The limit of two cents in the dollar imposed by the Municipal Act of 1866 as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Wilkie* v. *The Corporation of the Village of Clinton*, 18 Chy. 557.

The deposit of the interest and sinking fund required for the payment of debentures of a municipal corporation in a bank at interest, is a temporary investment of such money under sec. 248, sub-s. 4, of the Municipal Act of 1873; and the corporation has no power by resolution to appropriate interest arising from such investment to any other purpose than the sinking

fund. Galt, J., sitting in vacation. *Re Barber and the Corporation of the City of Ottawa*, 39 Q. B. 406.

See, *In re Montgomery and The Corporation of the Township of Raleigh*, 21 C. P. 381, p. 2483; *The Edinburgh Life Assurance Co.* v. *The Municipality of the Town of St. Catharines*, 10 Chy. 379, p. 2479.

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4. Levying Yearly Rates.

By-laws quashed—1. As contrary to 4 & 5 Vict. c. 10, in not limiting the sum to be raised, and in imposing a tax on wild lands alone; 2. As exceeding the authority given to the district councils by sec. 48 of that act; 3. As inconsistent with the requirements of 12 Vict. c. 81, in not specifying the sum required, or the purpose to which it was to be applied. And, semble, that it is necessary under this act, (s. 41, sub-sec. 22,) as it was under 4 & 5 Vict. c. 10, that the sum to be raised should be specified in the by-law, and then a rate authorized for raising it; 4. For taxing certain townships for specified sums, without shewing for what purpose the money was required. *Tylee* v. *The Municipal Council of the County of Waterloo*, 9 Q. B. 572.

A by-law passed by a township, authorizing the levy of a rate to realize £100 for school purposes, having been quashed, the municipality then, without a second meeting having been called, passed another by-law (set out in the report) for the same purpose, which was also moved against on several grounds:—Held, on the several objections taken—1. That the discretion to apportion the sum required rested as much with the council as with the school meeting or trustees. 2. That the rate was not declared on the property assessed in 1852 (the preceding financial year), but only determined by reference to the assessed value of the taxable property in that year. 3. That the rate not being complained of as excessive, its being calculated to realize more than the precise sum of £100 did not render the by-law void. 4. That the meeting was not indispensable. 5. That the duty imposed upon the clerk of the municipality to furnish a list to the secretary of the school trustees of the persons assessed in the school section, was not unreasonable, or inconsistent with the statutes. 6. That the rate was properly assessed upon the whole ratable property of the school section. 7. That the proviso of the by-law sanctioning the receipts pro tanto from those who had paid under the invalid by-law did not render the second by-law void. *In re DeLaHaye and the Municipality of the Gore of Toronto*, 3 C. P. 23.

A by-law imposing a rate for county purposes, to be levied on the actual value of taxable property in the county, is not objectionable, though in villages, &c., the taxes are directed to be levied on the annual value, for such direction is intended only to apply to rates imposed for their own purposes. *Grierson* v. *Provisional Municipal Council of the County of Ontario*, 9 Q. B. 623.

A township by-law was quashed as to so much of it as related to the raising a sum of money to defray the demands of the county council of the township, and as an equivalent to the government school grant, &c., it not appearing on its face that it was directed to meet a deficiency, nor even that there was any, if that would have authorized the by-law. Semble, however, that a township council has not power to pass a by-law imposing a rate in aid of any county rate. *Fletcher* v. *Municipality of the Township of Euphrasia, and White* v. *The Municipality of Collingwood*, 13 Q. B. 129.

A by-law for the construction of a new town-hall, passed on the 22nd May, 1867, was moved against, on the ground that it authorized expenditure for a purpose not under the head of ordinary expenditure, without having money in hand or making the necessary provision by rate or otherwise to meet the demand. It appeared, however, that the sum required was included in the annual by-law for the year, passed on the 19th August, 1867, upon an estimate previously made, also including it, which the applicant had voted to adopt; that the town-hall had been completed, accepted, and paid for, and the land on which it stood conveyed to the corporation. A rule to quash the by-law was discharged with costs. *Gibb and the Corporation of the Township of Moore*, 27 Q. B. 150.

A by-law was passed on the 15th June, 1867, providing for the purchase of a site for and the erection of a town-hall, but not for meeting the expenses, for which it did not appear that there were surplus moneys on hand. On the 31st of August they passed the annual by-law for ordinary expenditure, and, in addition to the sum required therefor, provided by the same by-law for raising the amount required for the site and building. The site had been conveyed to the corporation and paid for, and the hall completed, and there were funds in the treasurer's hands to pay for it:—Held, that although the corporation might not have been strictly regular the by-laws should not now be quashed, and the rule was discharged, but without costs. *Grant and the Corporation of the Township of Puslinch*, 27 Q. B. 154.

As to what is "ordinary expenditure" as used in the Municipal Acts. See *Cross* v. *Corporation of the City of Ottawa*, 23 Q. B. 288; *Wright* v. *Corporation of the County of Grey*, 12 C. P. 479; *McMaster* v. *Corporation of Newmarket*, 11 C. P. 398; *Corporation of Wentworth* v. *Corporation of Hamilton*, 34 Q. B. 585.

Where for the purpose of erecting a market house a municipal council would require to levy a rate exceeding the two cents in the dollar allowed to be imposed by sec. 225 of the Municipal Act of 1866, it was—Held, that a ratepayer was entitled to an injunction restraining the erection of the building by the council. *Wilkie* v. *Corporation of the Village of Clinton*, 18 Chy. 557.

The limit of two cents in the dollar demanded by the Municipal Act of 1866, as the maximum of assessment, includes the special sinking fund rate to be levied in respect of past debts. *Ib.*

See *McMaster* v. *Corporation of Newmarket*, 11 C. P. 398, p. 2479; *Corporation of Lincoln* v. *Corporation of Niagara*, 25 Q. B. 578, p. 225.

See, also, XIII. p. 2497.

IX. Quashing By-laws or Resolutions.

1. Who may Move.

Where on application to quash a township by-law it was objected that the applicant was a

non-resident—Held, that as a freeholder of the township he had an interest in all its by-laws, sufficient to enable him to move. *In re DeLa Haye* v. *Municipality of the Township of, and the Gore of Toronto*, 2 C. P. 317.

An owner of real estate which has been assessed is entitled to move against a by-law, though his name does not appear on the roll. *Boulton and the Town Council of the Town of Peterborough*, 16 Q. B. 380.

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2. *Objections not Apparent on the By-law.*

Under secs. 155 and 192 of 12 Vict. c. 81, this court has the power of quashing a by-law, not only for some illegality appearing upon the face of it, but also where it has been made in such a manner as it is enacted by sec. 192, it shall not be lawful for any municipal corporations to make it, e. g., without proper notice in the case of a by-law to change a road. *In re Lafferty* v. *Municipal Council of Wentworth and Halton*, 8 Q. B. 232.

Semble, that it is doubtful whether the court, under 12 Vict. c. 81, s. 155, would quash a by-law for an irregularity in the manner of its passing, though they might hold it void if relied upon in support of something done under it; and that if they should quash for such an irregularity, it would rather be under the principles of the common law. *In re Hill and the Municipal Council of the Township of Walsingham*, 9 Q. B. 310.

The court is not bound under the act to quash a by-law, unless illegal on the face of it. Where it is attempted to be proved so by extraneous evidence, it may be discretionary with the court, upon such evidence, when acting under their common law jurisdiction, to say whether the by-law shall stand or not. *Grierson* v. *Provisional Municipal Council of the County of Ontario*, 9 Q. B. 623. Affirmed in *Secord and the Corporation of the County of Lincoln*, 24 Q. B. 142.

The court has no authority to quash a by-law, on application, except for something illegal appearing upon the face of it, or except, perhaps, where it is shewn to have been passed under circumstances which, by the express terms of the statute, make it illegal. *Sutherland* v. *The Municipal Council of the Township of East Nissouri*, 10 Q. B. 626.

The court refused a rule nisi to quash a by-law on the ground that it was passed at a special meeting called by a member of the council, and not by the town-reeve or other authorized officer. *In re Hill and the Municipal Council of the Township of Walsingham*, 9 Q. B. 310.

The court refused to quash a by-law, on the ground that a quorum of the council was not present at its passing as required by 12 Vict. c. 81, s. 168. *Sutherland* v. *Municipal Council of the Township of East Nissouri*, 10 Q. B. 626.

Quære, as to the power of the court to quash for objections not appearing on the face of the by-law. *Standley* v. *Municipality of Vespra and Sunnidale*, 17 Q. B. 69.

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3. *Other Cases.*

A judge in practice court has no authority to quash a by-law of the corporation. *In re Sams and the Corporation of Toronto*, 9 Q. B. 181.

The court discharged, with costs, a rule for quashing a by-law of a district council, which had been absolutely repealed before the 12 Vict. c. 81. *In re McGill and the Municipal Council of the County of Peterborough*, 9 Q. B. 562.

Where the operation of a by-law or resolution is spent, it will not be quashed. *Daniels and the Municipal Council of the Township of Burford*, 10 Q. B. 478. See *Terry and the Municipality of the Township of Haldimand*, 15 Q. B. 380.

The court will not quash a by-law repealed after it has been moved against. *In re Coleman* 9 C. P. 146. See *In re Coyne and the Municipal County of Dunwich*, 9 Q. B. 309.

The court had no jurisdiction under 12 Vict. c. 81, over resolutions of municipal corporations, to set them aside summarily in the same manner as by-laws. *In re Cæsar and the Municipality of the Township of Cartwright*, 12 Q. B. 341. But see now 36 Vict. c. 48, s. 240.

Held, that market regulations made by the council might be quashed, as orders or resolutions under sec. 198 of the Municipal Act of 1866. *Snell* v. *Corporation of the Town of Belleville*, 30 Q. B. 81.

It does not appear necessary that a township by-law should set forth the estimates on which it is founded, and the court will intend that proper estimates have been made in the absence of evidence that they are wanting; nor that the by-law should state that the rates are calculated at so much in the pound on the actual value; and in the absence of anything to the contrary the court will intend that the council has followed the directions of the statute. *Fletcher* v. *Municipality of the Township of Euphrasia, and White* v. *Municipality of Collingwood*, 13 Q. B. 129.

The 14 & 15 Vict. c. 51, s. 18, directs that a copy of the by-law (to take stock in a railway) shall be inserted at least four times in each newspaper printed within the limits of the municipality; but the court refused to quash a by-law under which a large sum had been borrowed, because it had been published three times only in one of two papers. A full copy of the by-law was not published, but at the time of passing a clause was added appointing a day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates. The court, however—Held, that whether the 14 & 15 Vict. c. 51, s. 18, sub-sec. 3, or 16 Vict. c. 22, s. 2, sub-sec. 4, were to govern, this was an irregularity for which they were not bound to quash. *Boulton* v. *Town Council of the Town of Peterborough*, 16 Q. B. 380.

The court refused to quash a by-law for want of a seal, as without the seal it could not be treated as a by-law. *In re Croft and the Municipality of the Township of Brooke*, 17 Q. B. 269; *In re Mottashed and the Corporation of the County of Prince Edward*, 30 Q. B. 74.

The court will only quash a by-law for illegality, not for want of clearness of expression or a difficulty in construing or applying its provisions. *In re Smith and the City of Toronto*, 10 C. P. 225.

Remarks as to how far the court are bound to quash by-laws, even when moved against pro-

perly and found bad. *In re Simmons and the Corporation of the Township of Chatham*, 21 Q. B. 75.

If for all that appear a by-law may be legal it will be upheld; and in this case, where it was not clear upon the face of the by-law, nor otherwise shewn, that the money to be raised by it was for services not belonging to the current year, the omission of recitals and provisions which would in that case have been essential was held no objection. *Gibson and the Corporation of the United Counties of Huron and Bruce*, 20 Q. B. 111.

The statute does not make it strictly imperative upon the court to quash defective by-laws, even where the defect appears on their face. *Hodgson* v. *Municipal Council of York and Peel and the Municipal Council of Ontario*, 13 Q. B. 268; *In re Michie and the Corporation of the City of Toronto*, 11 C. P. 379.

Where errors in computation only are shewn in a by-law, though extensive, the court will lean strongly to support it, especially where it has been acted upon, and where a previous ineffectual application to quash it has been made upon other objections. Grierson *v.* The Municipality of Ontario, 9 Q. B. 623, affirmed, as to the extent to which the court is bound to give way to objections not apparent on the face of a by-law. *Secord and the Corporation of the County of Lincoln*, 24 Q. B. 142.

Where the county council, in equalizing the assessments under sec. 70 of the Assessment Act, C. S. U. C. c. 55, had intentionally capitalized the personal property in towns and villages at ten per cent. instead of six, contrary to the express directions in sec. 32, the court refused to quash the by-law on motion, though they intimated that it might be held insufficient if relied upon for protection. *Ib.*

There being room for doubt as to the objection taken, and reason to believe that many convictions might have taken place under similar provisions in other by-laws, the court refused to quash upon it. *In re Fennell and the Corporation of the Town of Guelph*, 24 Q. B. 238.

See *Grant and the Corporation of the Township of Puslinch*, 27 Q. B. 154, p. 2468; *Re Platt and the Corporation of Toronto*, 33 Q. B. 53, p. 3482.

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4. *Practice on Applications to Quash.*

(a) *Time for Moving.*

[*By the Municipal Act of 1873, sec. 241, no application to quash any by-law shall be entertained unless made within one year from its passing, except in case of a by-law requiring the assent of the electors, which has not been obtained. By sec. 242 where a by-law imposing a rate has been promulgated in the manner specified, the application must be made before the lapse of the next term after such promulgation.*]

The court refused to quash a by-law altering school sections, nearly fourteen months after its passing, it being on its face legal and having been acted upon. *Hill* v. *The Municipality of Tecumseth*, 6 C. P. 297; followed in *Cotter* v. *The Municipality of Darlington*, 11 C. P. 265. See, also *Walton* v. *The Corporation of the Township of Monaghan*, 13 C. P. 401.

By-law regarding the appointment of a harbour master. Application after two years:—Held, too late. *Bogart* v. *The Town Council of Belleville*, 6 C. P. 425.

A spent by-law or resolution will not be quashed. *Daniels* v. *The Municipal Council of the Township of Burford*, 10 Q. B. 478; *Terry* v. *Municipality of the Township of Haldimand*, 15 Q. B. 380.

An application to quash a by-law establishing a road, after two years had elapsed:—Held, too late. *Standley* v. *Municipality of Vespra and Sunnidale*, 17 Q. B. 69.

Semble—Such application should be prompt, especially in respect of matters not apparent in the by-law; and if two terms are allowed to pass, redress might well be refused on account of laches. *Scarlett* v. *Corporation of York*, 14 C. P. 161.

A rule nisi to quash a by-law to stop up a road was refused, where the relator was aware of the intention to pass it, and allowed two years and three months to elapse before moving. *In re Drope and the Corporation of the Township of Hamilton*, 25 Q. B. 363.

The court refused a rule nisi to quash a by-law passed eighteen months before, for licensing and regulating houses of public entertainment, the objection being that it was not, before the final passing, approved by the electors. *In re Sheley and the Corporation of the Town of Windsor*, 23 Q. B. 569.

A by-law passed in February, 1875, under the 37 Vict. c. 32, specifying the fees to be paid to the municipality for every certificate for a shop or tavern license, was not moved against until 14th of March, 1876, and the licenses granted under it would expire on 30th of April, 1876:—Held, that on the ground of delay the court would have refused to quash. *In re Richardson and the Board of Commissioners of Police for the City of Toronto*, 38 Q. B. 621.

A resolution granting a petition for separation from a school section passed on 7th December, 1867; motion to quash it in M. T. 1868:—Held, too late. *Leddingham and the Corporation of the Township of Bentinck*, 29 Q. B. 206.

The objections urged to a by-law to divide a school section being technical:—Held, that they should have been taken promptly, without allowing a term to elapse. *Taylor and the Corporation of the Township of West Williams*, 30 Q. B. 337.

Where parties complaining of the illegality of a municipal by-law or resolution, permit a term of the courts of common law to pass without moving to quash it, this court will refuse an injunction to restrain the municipality from enforcing the by-law. *Carroll* v. *Perth*, 10 Chy. 64.

Where a bill was filed to restrain proceedings of a township council, on a resolution, which named, it was alleged, a higher rate than was necessary to raise the sum required for county purposes, and the plaintiff allowed a term of the common law courts to pass before moving for an injunction—Held, (following Carroll *v.* Perth, 10 Chy. 64), that he came too late, the proper course in such a case being to move at law to

quash the resolution or by-law. The Consolidated Assessment Act of Upper Canada as affecting the question considered. *Grier* v. *St. Vincent*, 12 Chy. 330.

(b) *Affidavits.*

The affidavit of the applicant stated him to be a ratepayer, and a resident householder:—Held, not necessary to give any further addition of deponent. *Baker* v. *Municipal Council of Paris*, 10 Q. B. 621.

An affidavit in support of a motion to quash a by-law is sufficient, though not entitled in any court, if it appear by the jurat to have been sworn before a commissioner of this court. *Fraser* v. *The Municipal Council of the United Counties of Stormont, Dundas and Glengary*, 10 Q. B. 286; *Kinghorn* v. *The Corporation of the City of Kingston*, 26 Q. B. 130.

But not unless this appears. *In re Hirons et al., and the Municipal Council of Amherstburg*, 11 Q. B. 458.

The commissioner styling himself merely "A commissioner, &c.:"—Held, insufficient. *Ib.*

The applicant should state that he is a resident in the township, or has an interest in the provisions of the by-law. The commencement of an affidavit, "I, J. B., of the township of B.," is not sufficient. *Babcock* v. *The Municipal Council of the Township of Bedford*, 8 C. P. 527.

Held, that on the affidavits stated in the report of this case, it sufficiently appeared that the applicant, to quash a by-law of the city of Kingston, was a resident of the city. *Kinghorn and the Corporation of the City of Kingston*, 26 Q. B. 130.

(c) *Proof of By-Laws.*

Held, that a by-law was sufficiently authenticated for the purpose of a motion against it, by an affidavit of the relator that the copy produced was received by T. from the clerk of the council, and delivered by him to the deponent. *Fisher* v. *The Municipal Council of Vaughan*, 10 Q. B. 492.

Where the seal of the corporation was not mentioned in the clerk's certificate, but was on the same page with the certificate, just above it, and opposite to the signatures of the reeve and clerk—the by-law was held sufficiently proved. *Baker* v. *Municipal Council of Paris*, 10 Q. B. 621.

On the application to quash, a paper was put in purporting to be a copy of the by-law, authenticated by the seal of the corporation, and certified by the township clerk to be a true copy of a by-law passed on, &c., (corresponding in date with that moved against); also the applicant's affidavit that the annexed copy of the by-law, describing it accurately by title and date) was a true copy of the by-law received by him from the township clerk. On shewing cause against the rule, it appeared, and was objected, that the by-law was not annexed to the affidavit, and there was no appearance of any paper having been attached thereto; but—Held, that the objection could not prevail. *Bessey and the Municipal Council of Grantham*, 11 Q. B. 156.

The court will discharge a rule moved on a copy of the by-law verified in a manner different from that pointed out by the statute, unless the reasons for such variance are satisfactorily explained. *Buchart* v. *The Municipality of the United Townships of Brant and Carrick*, 6 C. P. 130.

On application for a mandamus two copies of by-laws put in not being proved under sec. 190 of the Municipal Act, C. S. U. C. c. 54, could not be read, but the same by-laws were set out at length in affidavits filed, the deponent swearing that a by-law was passed by the town council "in words following," which was held sufficient for the purposes of this application. Sec. 190 provides for the proof of by-laws in general cases, sec. 195 for the special case of an application to quash. *In re the Board of School Trustees of the Town of Sandwich and the Corporation of Sandwich*, 23 Q. B. 639.

The certificate was under the corporate seal of the township, but there was no seal to the copy of by-law, nor anything but the certificate to shew that it had been sealed:—Held, sufficient. *In re Scott and the Corporation of the Township of Harvey*, 26 Q. B. 32.

The copy of the by-law filed was under the seal of the municipality and sworn to have been received from the clerk, and opposite the seal was the signature, "M. Flanagan, City Clerk," with the words, "a true copy," above:—Held, sufficiently verified. *Kinghorn and the Corporation of the City of Kingston*, 26 Q. B. 130.

Held, that the by-law, upon the facts stated in this case, was sufficiently certified under the seal of the corporation. *In re Miles and the Corporation of the Township of Richmond*, 28 Q. B. 333.

(d) *Rule.*

The rule to quash a by-law need not be entitled "The Queen *v.* The Council," but may be "In the matter of A. and the council." *In re Conger and Peterbororough Municipal Council*, 8 Q. B. 349.

The rule nisi was entitled "In the matter of ——appellant, and —— respondent:"—Held, no objection. *McLean and the Corporation of the Town of St. Catharines*, 27 Q. B. 603.

By 12 Vict. c. 81, s. 155, corporations had not less than eight days to answer the rule nisi; therefore a rule granted and served on the first Saturday in term was not returnable within that term. *In re Sams and the Corporation of Toronto*, 9 Q. B. 181.

[Now by the Act of 1873, s. 240, the court may quash "after at least four days' service" of the rule nisi.]

The rule, obtained near the end of the term, was made returnable eight days after service. Defendants appeared, and objected that it should have been to shew cause on a day certain:—Held, that this objection, if fatal, was waived by the appearance. *Perry* v. *The Town Council of the Town of Whitby*, 13 Q. B. 564.

Defendants did not support their by-law to take stock in a railway, and the court refused to

hear counsel on behalf of the railway company, as the rule was not directed to them. *In re Billings and the Municipal Council of the Township of Gloucester*, 10 Q. B. 273. But see *Re McKinnon and the Corporation of the Village of Caledonia*, 33 Q. B. 502.

A by-law was passed by the united townships of Smith and Harvey, to levy a certain sum on lands in H., to defray the expenses of a re-survey of that township. The union having been dissolved—Held, that an application to quash was properly made by a rule calling on the corporation of H., upon a certified copy obtained from the clerk of S., the senior township. *In re Scott and the Corporation of the Township of Harvey*, 26 Q. B. 32.

See *In re Holden and the Corporation of the Town of Belleville*, 39 Q. B. 88, p. 2476.

(e) *Costs.*

When the council, on being served with a rule nisi, repealed the by-law complained of, they were still obliged to pay the costs of the application. *In re Coyne and the Municipal Council of Dunwich*, 9 Q. B. 309; *In re Coleman*, 9 C. P. 146.

The 14 & 15 Vict. c. 109, s. 35, giving costs on application to quash by-laws, has not a retrospective operation; and the court therefore refused to make defendants pay the costs of an application on which a by-law had been quashed before that act. *Brown* v. *The Municipal Council of the County of York*, 9 Q. B. 453.

Where a by-law was defective only in part, and the rule asked to quash the whole, costs were refused. *Patterson and the Corporation of the County of Grey*, 18 Q. B. 189.

The corporation not having appeared to the rule to quash a by-law, which was held valid, it was discharged without costs. *Kelly and the Corporation of the City of Toronto*, 23 Q. B. 425.

In the copy of the rule nisi first served to quash a by-law establishing a road, the applicant's name was by mistake written James instead of Joseph Thompson. The road also passed through the land of one James Thompson, with whom an arbitration had taken place, and the corporation supposing him to be the applicant, prepared affidavits in answer. Afterwards the mistake was discovered, and a correct copy of the rule served. The court, in making it absolute with costs, directed the costs incurred by the corporation in consequence of the error to be deducted. *In re Joseph Thompson and the Corporation of the United Townships of Bedford et al.*, 21 Q. B. 545.

On application to quash a by-law passed on 21st December, 1869, under the Temperance Act of 1864, and submitted to the electors on 2nd February 1870, it appeared that no seal had been attached to the by-law until after the 2nd March, 1870:—Held, that being no by-law it could not be quashed; but the rule to quash it was discharged without costs. *In re Mottashed and the Corporation of the County of Prince Edward*, 30 Q. B. 74.

A rule nisi having been obtained to quash a by-law, the legislature by a statute declared the by-law valid, and the rule was afterwards argued on the various objections taken, in order to decide who should pay the costs of the application. The municipality were ordered to pay them, on the ground that the debt of the town was not truly stated in the by-law. Per Wilson, J.—In future in such cases the rule should not be argued; and it would be well to direct in the statute that the petitioners to confirm the by-law should pay all proper costs incurred in any application to quash it. *In re Thomas Holden and the Corporation of the Town of Belleville*, 39 Q. B. 88.

See *Re Morrell* v. *The City of Toronto*, 22 C. P. 323, p. 2482.

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5. *Necessity for Quashing before Action.*

Semble, that a party is not necessarily restrained by sec. 155 of 12 Vict. c. 81, from bringing an action till the by-law, under which the defendant assumed to act and justifies, has been quashed, where the by-law, if legal, would not warrant the act done. *Dennis* v. *Hughes et al.*, 8 Q. B. 444. See also *Black* v. *White et al.*, 18 Q. B. 362.

Held, under 22 Vict. c. 99, s. 201, that before an action can be maintained for anything done under a by-law a month's notice of action must be given, and a month allowed to elapse after the quashing or repealing of such by-law. The action must also be against the corporation itself, not against any person acting under the by-law. *Carmichael* v. *Slater*, 9 C. P. 423.

Action for illegally depriving plaintiff of his tavern license. Plea, that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited. Demurrer, that defendants had no power to pass such a by-law:—Held, that no action could be brought for anything done under the by-law till one month after it has been quashed; and the plea therefore was good. *Smith* v. *The Corporation of the City of Toronto*, 11 C. P. 200.

22 Vict. c. 99, s. 201, which prevents actions being brought for anything done under a by-law until it has been quashed, applies only to suits for the recovery of damages, not to replevin. *Wilson* v. *Corporation of the County of Middlesex et al.*, 18 Q. B. 348.

Where the rate on the face of the by-law does not appear to be retrospective, though retrospective in fact, replevin will not lie against the officers who enforce it; it must be quashed first, and then the remedy is against the corporation. *Haynes* v. *Copeland, et al.*, 18 C. P. 150.

See *Municipality of East Nissouri* v. *Horseman*, 16 Q. B. 576, p. 2494; *Corporation of the County of Lincoln* v. *Corporation of the Town of Niagara*, 25 Q. B. 578, p. 225.

XI. General Powers and Duties of Municipal Corporations.

1. *To Remunerate or Indemnify Members.*

Semble, that under 4 & 5 Vict. c. 10, and 9 Vict. c. 40, a salary might be granted to the warden of a district council as warden, but by a by-law only, not by a vote or resolution merely.

Regina v. *The District Council of the District of Gore*, 5 Q. B. 357.

Under 12 Vict. c. 81, township councils could not provide for the remuneration of their own members, they not being "township officers." *In re Wright and the Municipal Council of the Township of Cornwall*, 9 Q. B. 442; *Daniels* v. *Municipal Council of the Township of Burford*, 10 Q. B. 478.

A by-law to indemnify a councillor for the costs of a contested election:—Held, illegal, and quashed with costs. *In re Bell* v. *Municipality of the Township of Manvers*, 2 C. P. 507; 3 C. P. 400.

At a meeting of a council in 1856, defendant being in the chair, it was resolved that the treasurer should pay defendant a specified sum for salary as councillor for 1856, and for other things:—Held, that any payment to defendant for such attendance was clearly illegal, and could be recovered from him in an action for money had and received by the council for the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. *Municipality of the Township of East Nissouri* v. *Horseman*, 16 Q. B. 576. See the case in full, post p. 2493.

Under 22 Vict. c. 99, s. 262, municipal corporations could not remunerate their members for travelling expenses in attending the council; but only for attendance in council. *In re Patterson and the Corporation of the County of Grey*, 18 Q. B. 189.

A by-law directing payment of $30 to each councillor, "being $20 for services as councillor, and $10 for services for letting and superintending repairs of roads:"—Held, bad, as not within the power given by C. S. U. C. c. 54, s. 269. *Elaikie and the Corporation of the Township of Hamilton*, 25 Q. B. 469.

On a bill by a ratepayer, filed in the same year that the by-law in the last case was quashed, the court ordered the members who were defendants, to repay to the corporation the $10 a year they had respectively received; but, Held, that the ratepayers were not entitled to a decree restoring the sums actually paid for the years between 1859 and 1865, under similar by-laws, except to the extent that such payments exceeded the statutory limit. *Blakie* v. *Staples*, 13 Chy. 67.

The corporation of a town, at their last meeting in the year, passed a resolution to present a complimentary address to the mayor, who had held the position for several years, and was about to retire, and to grant him $1600 as a small token of their appreciation of his long and faithful services, and authorizing the chairman to sign an order upon the treasurer for that sum. On the same day they passed a by-law for the payment of accounts passed for the year, giving a list of them, which the treasurer was directed to pay, and including this sum to be paid to the mayor, "as per order of council." It appeared that the whole taxes of the town for the year amounted only to $3324:—Held, that the by-law and resolution, so far as regarded the said payment, were beyond the power of the corporation, and must be quashed. *McLean and the Corporation of the Town of Cornwall*, 31 Q. B. 314.

A councillor or reeve of a township is entitled as compensation for his services to the per diem allowance provided for by the Statute only; and any over-payments may be recovered back by the municipality; the word "officer" used in the statute not applying to the reeve or a councillor. He will be entitled, however, to receive from the municipality payment for moneys out of pocket, advanced by him on account of the business of the municipality. *Corporation of St. Vincent* v. *Grier*, 13 Chy. 173.

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2. *Public Buildings.*

The municipal council of Prescott and Russell passed a by-law to raise money for building a registry office in Russell, and enacted that the rate should be levied only on the townships in that county. This by-law was quashed, on the ground that as the office when built, would continue the property of the united counties until a separation, the expense of erecting it must be borne by both counties. *Smith* v. *The Municipal Council of the United Counties of Prescott and Russell*, 10 Q. B. 282.

The municipality of a township can dispose of the town hall when they think another situation would be more convenient. The by-law provided that any money above the proceeds of the old hall required for the erection of the new one, should be levied on the ratable property of the township, half in the present and the other half in the next year, but it did not fix the amount or the rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad. *In re Hawke and the Municipality of Wellesley*, 13 Q. B. 636.

The court, under the circumstances of this case, refused to quash a by-law for the erection of a town hall, the objection being that they had already by previous by-laws selected another site, and contracted to build it there. *Forester and the Corporation of the Township of Ross*, 24 Q. B. 588.

The court has not the power of restraining councillors of an incorporated village, in the due exercise of their constitutional power, from changing the site of a proposed town hall and market, although the site first selected had been acquired by the corporation for the purpose, it not being shewn that any change of circumstances had been made by parties on the faith of it, or that any corrupt or improper motive actuated the members of the council in making such change. *Little* v. *Wallaceburgh*, 23 Chy. 540.

A by-law to raise money wherewith to build a town hall and market, approved of by the vote of the ratepayers, did not specify any site on which the buildings were to be erected:—Held, that this left the councillors unfettered in their choice of site, although at the time there was a resolution on the minutes of the council adopting a particular one, and which had been purchased by and conveyed to the corporation for the purpose. *Ib.*

The corporation of a village, on the 5th of August, 1861, passed two by-laws. The first provided that the corporation should purchase a site for a town hall for $250, and that the reeve should issue his draft for said sum, payable 1st November, 1861. The second, after reciting that

the inhabitants were desirous of erecting a town hall, and that there would be a large surplus in hand after paying for the site, and the ordinary expenses of the village for the year, enacted that $750 be appropriated for the erection, and that the reeve should issue his drafts, payable 1st of November, 1861. A by-law authorizing a loan for the same purpose, payable in fourteen years, had been submitted to the electors in June previous, and rejected by a large majority, and when these by-laws were passed there had been no by-law passed to provide for the ordinary expenditure of the year, and no existing surplus was shewn:—Held, that no by-law should be passed authorizing an expenditure for extraordinary purposes, unless out of unappropriated money in hand, or unless the by-law provides expressly for raising the necessary money, or is not to come into effect until some other by-law is passed for the purpose. Both by-laws were therefore quashed. *McMaster* v. *The Corporation of Newmarket*, 11 C. P. 398.

As to the obligation to provide offices for the county attorney and clerk of the peace. See *Lees and the Corporation of the County of Carleton*, 33 Q. B. 409.

There is no obligation upon a municipality to provide an office for the Clerk of the Division Court. *Griffin* v. *Corporation of the City of Hamilton*, 37 Q. B. 519.

The town of St. Catharines was authorized by statute to issue debentures to £45,248, for which a special rate was directed, the proceeds to form a sinking fund. By the same act the town was prohibited from passing any by-law to create any new debt extending beyond the year in which such by-law was passed, until the debt was reduced to £25,000. The special rate authorized had been duly levied, but it was alleged that it had been applied to the general purposes of the town, and the debt had not been reduced. Defendants denied the misapplication of the fund, but did not shew how it had been applied; and with a view of inducing the county council to remove the county town to St. Catharines, the town council of St. Catharines, without any by-law, contracted with certain builders to erect a gaol and court house for the county at an outlay of £3,000, to be completed in two years. Upon an application, at the instance of certain of the holders of said debentures, the court restrained the town from proceeding with the buildings. On appeal to the full court, the injunction was dissolved, it appearing that the contract had been cancelled, and no liability incurred extending beyond the year. On production of the contract, it appeared that the rescission had been effected by cancelling the signatures to the document, which being objected to as not legally discharging the corporation from liability, the court, as a condition of dissolving the injunction, required a formal cancellation of the contract to be made. VanKoughnet, C., dubitante as to any necessity therefor. *The Edinburgh Life Assurance Co.* v. *The Municipality of the Town of St. Catharines*, 10 Chy. 379.

See *Gibb and The Corporation of the Township of Moore*, 27 Q. B. 150, p. 2468; *Grant and the Corporation of the Township of Puslinch*, 27 Q. B. 154, p. 2468; *Wilkie* v. *Corporation of the Village of Clinton*, 18 Chy. 557 p. 2468.

3. *Sewers and Local Improvements.*

A municipal council, under 12 Vict. c. 81, s. 31, cannot appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township to the improvements of the public streets, and to other purposes within the limits of such part. *In re Richmond* v. *The Municipality of the Township of the Front of Leeds and Lansdowne*, 8 Q. B. 567.

Under 12 Vict. c. 81, and 16 Vict. c. 181, a by-law imposing one uniform rate for draining into the common sewers of a city of 5s. per foot frontage, to be charged upon the proprietors of real property for each and every foot frontage of property draining into the said sewers:—Held, invalid, as being an arbitrary rate, not taxed in proportion to the assessed value of the property, and not maintainable under the 16 Vict. c. 181, s. 15. *Ex parte Aldwell* v. *City of Toronto*, 7 C. P. 104.

Replevin. Defendants avowed under a by-law of the city of London, passed under the 19 & 20 Vict. c. 97, on the 11th of January, 1858, averring that the amount of real property benefited by certain sewers mentioned in the by-law and statute was £29,508, "according to the assessment returns for the same and the said by-law": that a rate was directed to be levied on the proprietors, of whom plaintiff was one, and that for it the plaintiff's goods were seized. The plaintiff demurred, on the ground that the rate imposed by the by-law was for 1858 upon the assessment returns of 1857, whereas it should have been upon the assessment of 1858; but:—Held, that the plea was good. *McCormick* v. *Oakley*, 17 Q. B. 345.

The Municipal Act C. S. U. C. c. 54, authorizes the clerk of the council to "examine and finally determine" whether petitions are signed by the requisite number of owners of property to be benefited by the improvements asked for, and a certificate being given by the clerk the court has no power, except in a case of fraud or mala fides, to interfere. *In re Michie and the Corporation of the City of Toronto*, 11 C. P. 379.

Held, that the 22 Vict. c. 99, s. 290, sub-secs. 18, 20, giving power to municipal corporations relating to sewers, applied to sewers already constructed by general taxation, not to those only which might afterwards be built. Sub-sec. 18 authorizes a by-law to compel the draining "of any grounds, yards, vacant lots, cellars, private drains, sinks, cess-pools, and privies," and to assess the owners with the cost thereof if done by the council on their default; and sub-sec. 20 "for charging all persons who own or occupy property which is drained," or required to be drained into a common sewer, with a reasonable rent for the use of the same. The by-law in question enacted that "all grounds, yards, vacant lots, or other properties abutting on any street," should be drained, and fixed the rent to be paid:—Held, not objectionable, as including other properties than those mentioned in the statute, for if the word "property" in sub-sec. 20 could include only the kinds of property mentioned in sub-sec. 18, it might receive the same construction in the by-law. *In re McCutchon and the Corporation of the City of Toronto*, 22 Q. B. 613.

The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorizing such an arrangement. The sewer rent not being a charge upon the land :—Held, that payment of it could not be enforced by the same means as the ordinary assessments. *Ib.* See also *Moore* v. *Hynes et al.*, 22 Q. B. 107.

A by-law passed in 1865 to levy a rate for certain local improvements in the pavement of sidewalks—after reciting a previous resolution accepting a tender for the work, and authorizing a by-law to levy a certain rate per foot frontage on the owners of real estate on the parts of several streets named, and that the required sum should be raised by local taxation upon the proprietors of the several lots of land adjoining said sidewalks immediately benefited thereby, "except that part of James street opposite the market place, and those parts of Church street opposite the several churches and school-houses;" and that the persons named in the first column of the schedule annexed to the by-law were proprietors of the lands adjoining said sidewalks, not before excepted, and were immediately benefited thereby; and that the whole of the said property so benefited was by the assessment roll of 1865 rated at $12,554, &c.—provided that there should be raised from said proprietors 22½ cents in the $, and that the collector for 1865 should collect the rate in the usual way. It then repealed a by-law of 1864, authorizing the levying of the frontage rate above referred to. The work in question had been begun, finished, and paid for in 1864, with the exception of $659, which was paid before the passage of the by-law of 1865. It further appeared that persons were rated as proprietors whose names did not appear on the assessment roll: that all the streets affected were grouped together and rated at the said sum, instead of being assessed separately; and that the whole of plaintiff's property at the corner of two streets was assessed, whereas the flagging extended over only a portion of it:—Held, that replevin would not lie against defendants (the collector and his bailiff) for enforcing the rate: that assuming the by-law to be defective in providing for a debt of the previous year, it was merely providing in 1865 for a debt contracted and provided for by the by-law of 1864, but provided for imperfectly, which, semble, was not a violation of the rule against retrospective debts, but a mere repeal of a defective, doubtful or invalid rate, imposed within the jurisdiction of the council, for another free from all objection. Held, also, that it was no objection to the by-law that certain proprietors were rated for the special rate who were not on the general assessment roll; nor that the assessment value of 1864 was taken instead of that of 1865, as this did not appear on the face of the by-law and could not therefore be taken in this action; and that the grouping the streets was legal, and was at all events an objection on motion to quash the by-law, and not open to plaintiff in this action. Held, also, that the whole of the plaintiff's property, as assessed, was liable, though the flagging extended over a portion only, as no doubt the whole was benefited by the partial improvement. *Haynes* v. *Copeland et al.*, 18 C. P. 150.

There must be a by-law for the necessary assessment for the watering of a street, passed subsequently to, and consequent upon the presentation of the required petition therefor, and after the fullest opportunity given to any ratepayer to object to its passage; and a resolution for that purpose, passed by a municipal corporation under a by-law antecedently made, and which authorized this mode of proceeding, instead of by by-law, was therefore quashed, but without costs, as the applicant had been one of the petitioners, was well aware of its object, had enjoyed the benefit of the resolution, and had been dilatory in complaining. *In re Morrell* v. *The City of Toronto*, 22 C. P. 323.

Sub-sec. 2 of sec. 340 of the Municipal Act, 1866, authorizes a by-law to water a portion of a street only. Such by-law need not name a day when it shall take effect. Where such a by-law provided that a special rate should be levied to be estimated on the contract price for such watering, without naming the sum to be raised, but the work had been done, the court refused, in their discretion, to quash the by-law. *Re Platt* v. *The Corporation of the City of Toronto*, 33 Q. B. 53.

Where the by-law ordered a special rate on a portion of a street to pay for watering "said street:"—Held, that "said street" referred to only said portion of that street. *Ib.*

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4. *Drainage of Lands.*

To a by-law, passed under 32 Vict., c. 43, O., was annexed a schedule (declared to be part of the by-law), entitled, "Schedule shewing the benefit to be derived by each lot from the drainage to be performed under the by-law":—Held, that such a by-law, containing such a schedule, sufficiently indicated that the lands so assessed were assessed as the only lands within the municipality regarded as benefited by the proposed work, and that it was not necessary that the by-law should specify the mode of ascertaining and determining the property to be benefited under sub-sec. 4 of sec. 2 of the said act. Held, also, that, supposing the question open for the consideration of the court whether or not the lands assessed were the only lands benefited, which it was objected the by-law did not shew, the onus of proving that other lands were also benefited, which should have been assessed, lay upon the applicants against the by-law, and that in this they had failed. But—Held, that the objection that all the lands which would be benefited had not been assessed, or that the assessments upon the respective lots were overcharges, or that the by-law did not provide properly for determining what lands were benefited, were not grounds for moving to quash the same, as by the said 4th sub-sec. an appellate tribunal is appointed. Held, also, that an objection that the petition mentioned in the by-law was not signed by a majority of the resident owners of property assessed, &c., was not open to the applicants upon the motion, but if it were the onus of proof was upon them, and in this also they had failed. Held, also, that the 3rd sec. of the by-law, set out in the case, was not open to the objection that it did not properly provide for a special rate sufficient to include a sinking fund for payment of the debentures therein mentioned, but provided for levying and raising certain instalments, with interest. Held,

also, that the by-law need not name a day in the financial year from which it was to take effect, as this was not required by the statute which authorized it. *In re Montgomery et al. and the Corporation of the Township of Raleigh*, 21 C. P. 381.

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5. *To Impose Tolls or Harbour Dues.*

Held, that under the 12 Vict. c. 81, s. 60, sub-sec. 7, a town corporation had power to impose a tax on timber and sawlogs, in order to pay the salary of the harbour master, and to fine or imprison the owners in default of payment. Quære, as to their power to detain the timber therefor; but the court refused to quash that part of the by-law, under the circumstances. *Bogart* v. *The Town Council of Belleville*, 6 C. P. 425.

A municipal corporation by by-law authorized individuals to erect wharves, and to remunerate themselves by charging tolls on goods, part of which were directed to be paid to the treasurer of the municipality. The harbour master was empowered to detain any vessel having on board any goods on which these tolls were unpaid, or any such goods; and a fine of not less than $1 nor more than $50, was imposed on any master or owner of a vessel refusing to comply with these conditions, to be enforced by distress and sale:—Held, that the by-law was illegal. *In re Hagaman et al. and the Corporation of the Town of Owen Sound*, 20 Q. B. 583. But see 24 Vict. c. 63, since passed.

Held, that a clause in a by-law which imposed tonnage dues on scows, craft, rafts, railway cars, &c., coming into the city of Kingston, containing firewood, to be exposed or offered for sale, or marketed for consumption within the city, was illegal, and not authorized by sub-sec. 15 of sec. 294, of the Municipal Act, C. S. U. C. c. 54; the toll or duty must be imposed upon the vehicle in which anything is exposed for sale in any street or public place. Sub-sec. 4 of the same section only authorizes the imposition of reasonable tolls on vessels and other craft, for the purpose of cleaning and repairing harbours, and paying a harbour master, and does not sanction the levying such dues for the revenue purposes of the municipality to which the harbour belongs. *In re Campbell and The Corporation of the City of Kingston*, 14 C. P. 285.

The corporation of a town has, under 36 Vict. c. 48, s. 378, sub-ss. 1, 3, 4, O., no power to impose harbour dues on the shippers or consignees of goods shipped or landed at the harbour, but only on vessels. Clauses of a by-law authorizing such charges, and the seizure and sale of goods therefor, the recovery thereof by action, and the punishment of persons evading them, were therefore quashed. *Re McLeod et al. and the Corporation of the Town of Kincardine*, 38 Q. B. 617.

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6. *Regarding Markets, Butchers, and Hucksters.*

The corporation of the town of London has power, under their special act, 3 Vict. c. 31, to make a by-law prohibiting the sale of butchers' meat within certain hours, except at the public market. *Peters* v. *The President and Board of Police of London*, 2 Q. B. 543.

A by-law enacting "that no butcher or other person shall cut up or expose for sale any fresh meat in any part of the city, except in the shops or stalls in the public markets, or at such places as the standing committee on public markets may appoint":—Held, good, under C. S. U. C. c. 54, as being clearly within the powers given to the corporation. *Kelly and The Corporation of the City of Toronto*, 23 Q. B. 425.

Defendants leased to plaintiff the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. Twenty years previously they had passed a by-law, giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to M., who obstructed a portion of the same with building materials. The plaintiff thereupon sued defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market:—Held, that such action was not maintainable: that the by-law was one which the defendants had authority with a view to public improvement and convenience to pass, and that the plaintiff must be taken to have been cognizant of it when he became their tenant: that M. might, without the license of the defendants, have occupied a reasonable portion of the highway, the by-law apparently merely restricting without expressly conferring the right of occupation: that the market being fixed on a public highway, which is primâ facie for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway: that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him. *Reynolds* v. *The Corporation of the City of Toronto*, 15 C. P. 276.

A by-law prohibiting any person bringing produce, articles, commodities or things to a city market, from selling or offering the same for sale within the city limits, on their way to market, or without having paid market toll, and before offering such things for sale in the market:—Held, illegal, and quashed, as beyond the power of the corporation, under C. S. U. C. c. 54. *Kinghorn and the Corporation of the City of Kingston*, 26 Q. B. 130.

The corporation of a town by by-law enacted that no person should expose for sale any meat, fish, poultry, eggs, butter, cheese, grain, hay, straw, cordwood, shingles, lumber, flour, wool, meal, vegetables, or fruit (except wild fruit), hides or skins, within the town, at any place but the public market, without having first paid the market fee thereon, as therein provided, except all hides and skins from animals slaughtered by the licensed butchers of the corporation holding stalls in the market:—Held, bad, as beyond the power of the corporation. Also, that meat, fish, *poultry, eggs, cheese, grain*, hay, straw, cordwood, *shingles*, lumber, *flour, wool, meal, vegetables*, or *fruit*, except wild fruit, should not be exposed for sale within the municipality, except in the market, before twelve o'clock, noon:—Held, bad as to the articles printed in italics, power being given as to the others only, by C. S. U. C. c. 54, s. 294, sub-sec. 10. Also, that

before 10 a.m. during May, June, July, and August, and before 11 a.m. during the other months, no huckster, butcher, dealer, trader, runner, agent, or retailer, or any other person purchasing for export or to sell again, should buy, bargain for, engage or offer to buy any article of household consumption brought to the market, excepting pork, grain, flour, meal, or wool:—Held, bad, except as to hucksters and runners, they only being included in sub-sec. 12. Also, that all persons exercising the trade of a butcher within the town should be licensed each year, as provided, the fee for each license to be 5s. Held, clearly bad, under secs. 217, 294, sub-sec. 31. *In re Fennell and the Corporation of the Town of Guelph*, 24 Q. B. 238.

The corporation of a town by by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c., such as were usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant therefrom, between certain hours in the day:—Held, clearly unauthorized, for their power (under 29 & 30 Vict. c. 57, s. 296, sub-s. 12. as amended by 31 Vict. c. 30, s. 32), extends only to butchers living in the town or within a mile of its limits. *McLean and the Corporation of the Town of St. Catharines*, 27 Q. B. 603.

A by-law purporting to be passed under 29 & 30 Vict. c. 51, s. 296, sub-ss. 11 and 12, and 31 Vict. c. 30, s. 32, O., prohibiting any huckster, butcher, or runner, from buying or contracting for any kind of fresh meat or provisions on the roads, streets, or any place within the town on any day before the hour of 9 o'clock, a. m., between 1st April and November, or before 10, a. m., during the remainder of the year, was held bad, as not being confined to purchases, &c., in the way of their trade. *Wilson and the Corporation of the Town of St. Catharines*, 21 C. P. 462.

Held, that C. S. U. C. c. 54, does not authorize the imposition of a tax per cord upon wood brought into town and not placed in the public wood market for sale. *Farquhar et al.* v. *The Corporation of the City of Toronto*, 10 C. P. 379.

A by-law of a town for the regulation of the market enacted; 1. That only butchers and persons occupying shops or stalls in the market, or in two specified wards of the town, for the sale of fresh meat, should sell, or expose for sale, in any less quantity than by the quarter; that such butchers and persons might so sell at these places, but not otherwise; and that no person should sell any fresh meat in the town except in the market stalls or such place as the council should appoint, not less than 400 yards from the market, and within certain specified limits in the two said wards:—Held, valid. 2. That no person should buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed in the town, until the seller had paid the market fees, or obtained a ticket from the collector of market tolls, as provided in a by-law referred to, and before a specified hour of the day; that no person should forestall, regrate, or monopolize any of the articles mentioned, within the town; and that before noon no butchers' meat, fish, hay, or straw, should be bought or sold in the town except at the market and in the shops or stalls in the two said wards:—Held, valid, under the Municipal Act of 1866, sec. 296, sub-sec. 9, and sub-sec. 10, as amended by 33 Vict. c. 26, s. 6, O., and sub-sec. 11; 3. That before 10 a. m., no huckster or runner within the municipality, or within one mile of its limits, should purchase any meats, fish, or fruit brought to the public market:—Held, bad, as not confined to those *living* within the municipality or a mile therefrom; and Quære, whether it should not exclude persons buying for their own use, not to resell. 4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights, and measures, but no spring balance, spring scale, spring steelyards, or spring weighing machine, should be used for any market purpose:—Held, valid, under sub-sec. 10, above mentioned, and C. S. U. C. c. 58. Held, also, that market regulations made by the council might be quashed as orders or resolutions, under sec. 198. By these regulations, it was provided that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in either of the two wards above mentioned, should apply to the market committee, stating the annual sum above $40 which he was willing to pay for a certificate authorizing him to sell for a year. Held, bad, both by the general law, and as opposed to sec. 220 of the act of 1866. It was also provided that persons obtaining certificates should give a bond with sureties to obey the by-laws relative to the sale of fresh meat at stalls and shops where it was sold. Held, good, for that it applied of course only to valid by-laws. *Snell and the Corporation of the Town of Belleville*, 30 Q. B. 81.

The name of the seller or his agent must appear in a contract of purchase by a municipal corporation. Where the municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase, but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken, it was—Held, that the contract could not be enforced by the vendor against the corporation. *Houck* v. *Town of Whitby*, 14 Chy. 671.

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7. *Impounding and Killing Animals.*

Under the 4 Will. IV., c. 26, incorporating the town of Port Hope, the corporation had power to enforce regulations preventing cattle, swine and other animals from running at large by impounding and selling them, as well to liquidate damage occasioned by their so doing, as a fine imposed. *Smith* v. *Riordan*, 5 O. S. 647.

The corporation of the city of Toronto had power under 4 Will. IV., c. 23, s. 21, to make by-laws by which dogs found running at large within the limits and liberties of the city, after proclamation of such by-laws, might be shot. *McKenzie* v. *Campbell*, 1 Q. B. 241.

Semble, that a by-law enacting that certain animals shall not run at large does not impliedly allow other animals not named to do so, contrary to the common law. *Jack* v. *The Ontario, Simcoe and Huron R. W. Co.*, 14 Q. B. 328.

8. *Billiard Tables.*

A by-law fixing the sum to be paid for a license for billiard tables in a town at $300, and enacting that it should be unlawful to have any internal means of communication between a room in which a billiard or bagatelle table was kept, and any place in which spirituous liquors might be sold:—Held, valid; that the sum charged was not excessive; that such a by-law was properly submitted to the electors under 37 Vict. c. 32, s. 23, O., which was not confined to tavern licenses; and that the enactment as to means of communication was within the power to regulate and govern, and was not unreasonable. *Re Neilly et al. and the Corporation of the Town of Owen Sound*, 37 Q. B. 289.

A provision that no billiard table or bowling alley should be licensed or kept in any tavern inn, or house of entertainment:—Held, authorized by the power given to the corporations to regulate billiard tables and bowling alleys: 36 Vict. c. 48, s. 379, sub-ss. 3, 35, 36, O. *In re Thomas Arkell and the Corporation of the Town of St. Thomas*, 38 Q. B. 594.

See also BILLIARD TABLES.

9. *Nuisances.*

The 16 Vict. c. 35, does not authorize the passing a by-law to prevent a nuisance not in itself unlawful, e.g.: to prevent persons called runners or guides from exercising their calling in a town. *In re Davis and the Municipality of Clifton*, 8 C. P. 236.

A municipality, under 29 & 30 Vict. c. 51, s. 296, sub-secs. 20, 21, may pass by-laws relating to nuisances not of a public character. By-law No. 502 of the city of Toronto relative to the public health of the city, secs. 10, 12, 27, 28, 29, 30:—Held, valid. *Regina* v. *Osler*, 32 Q. B. 324.

A by-law that "no person shall keep a slaughter house within the city without the special resolution of the council":—Held, not within the power given to the corporation by the Municipal Act of 1866, s. 296, sub-sec. 23, which was to prevent or regulate the erection or continuance of slaughter houses, &c., which may prove to be a nuisance; because it permitted favouritism by the council, and might be exercised in restraint of trade or used to grant a monopoly; and all persons therefore were not placed, or might not be placed, or were liable to be not placed, on the same footing who followed or desired to follow the said trade. *In re Nash and McCracken*, 33 Q. B. 181.

10. *Fines and Penalties.*

Where a corporation is empowered by statute to enact by-laws and to enforce a penalty for their infraction, not exceeding a certain amount, a by-law is bad which annexes a penalty to an offence, but does not declare its amount. *Peters* v. *The President and Board of Police of London*, 2 Q. B. 543.

The 6th section of the by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week; the seventh section imposed a penalty on any one of not less than $1 nor more than $10 for each month he should omit to do so; and the eighth provided for enforcing payment by distress or imprisonment not exceeding thirty-one days:—Held, that these sections must be quashed, for sub-sec. 18, shewed how the parties should be compelled to drain, i. e., by the council doing the work and assessing them for the costs; and the infliction of a penalty for each month, and imprisonment for thirty-one days, were wholly unauthorized. A subsequent by-law added to the eighth section above mentioned a proviso, that any person thereby required to construct a drain, who should not do so, but should be willing to pay the same rent as if he did use the sewer, should be exempt from the penalties:—Held, that as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed. *In re McCutchon and the Corporation of the City of Toronto*, 22 Q. B. 613.

A by-law for the regulation of markets, &c., provided that any person breaking any of the provisions should, upon conviction before the mayor or any other magistrate of the town, forfeit and pay a fine not exceeding $50, nor less than $1 and costs, and in default thereof, and of distress out of which to levy, should be committed, with or without hard labour, for not more than 21 days. Quære, taking together sec. 243, sub-ss. 6, 7. 8, and secs. 206, 207, 360, 366, of C. S. U. C. c. 54, whether the statute authorizes a discretion as to the amount of fine and term of imprisonment to be thus given to the magistrate, or whether it must not be fixed by the by-law. *In re Fennell and the Corporation of the Town of Guelph*, 24 Q. B. 238.

A similar by-law provided that persons offending against the by-law should, on conviction by a magistrate, be fined not less than $1 nor more than $20, and in default of payment be imprisoned for not less than two nor more than twenty days, which fines should be applied to the uses of the municipality:—Held, that leaving the fine in the magistrate's discretion was clearly authorized by sec. 209 of the Act of 1866; but that it was invalid for not awarding a moiety of the fine to the informer, under sec. 211. *Snell and the Corporation of the Town of Belleville*, 30 Q. B. 81.

A provision that any person encumbering, injuring, or fouling any public wharf, should be liable to a penalty named, and in default of payment or sufficient distress to imprisonment "for not less than ten nor more than thirty days:"—Held, bad, twenty-one days being the limit authorized by sec. 372, sub-sec. 13, of the Act of 1873. *In re McLeod et al. and the Corporation of the Town of Kincardine*, 38 Q. B. 617.

11. *Repealing By-laws.*

A district council passed a by-law imposing a tax on certain lands, but limiting no sum to be raised. By two subsequent by-laws this was repealed and again revived:—Held, that the last by-law must be quashed, notwithstanding that the applicants had paid part of the tax imposed by the first. *The Canada Company* v. *The Municipal Council of the County of Oxford*, 9 Q. B. 567.

The corporation of the township of North Cayuga, having power by 33 Vict. c. 33, s. 18, O., "An Act to incorporate the Canada Air Line Railway Co.," to exempt the property of the company from taxation, passed a by-law providing that all the real property of the company in the township should be rated at $12 per acre (the then average rate) for fifty years. This by-law was subsequently repealed, but it did not appear that upon the faith of it the applicants had in fact altered their position, or done anything which they otherwise would not have done, and the railway was being constructed through the township before it was passed:—Held, on an application to quash the repealing by-law, that the court under the circumstances could not interfere. *In re Great Western R. W. Co. and the Corporation of the Township of North Cayuga*, 23 C. P. 28.

Held, that the municipal council of a village, incorporated in, and separated from, a township, in which before and at the time of said incorporation a by-law existed prohibiting the sale of intoxicating liquors in shops and places other than houses of public entertainment within said township, could not, by a by-law not submitted for the approval of the electors of the village corporation, repeal the prohibiting by-law so far as it affected the village municipality, but that the by-law must be passed upon by the electors under 32 Vict. c. 32, s. 10, O. *In re Cunningham* v. *The Corporation of the Village of Almonte*, 21 C. P. 459.

See *Smith and the Municipal Corporation of the Township of Oakland*, 24 C. P. 295, p. 2462.

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12. *Other Powers and Duties.*

As to the power of district councils, under 4 & 5 Vict. c. 10, with regard to the preparation of assessment rolls, and statute labour lists. See *Baby* v. *Baby*, 5 Q. B. 510.

The district council had no power to authorize their clerk or agent to make any contract for the purchase of books for their several common schools throughout the district, such a contract not being necessary for the exercise of their corporate functions. *Ramsay et al.* v. *The Western District Council*, 4 Q. B. 374.

A municipal council, under 12 Vict. c. 81, s. 31, could not appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township, to the improvements of the public streets and to other purposes within the limits of such part. *In re Richmond* v. *The Municipality of the Township of the Front of Leeds and Lansdowne*, 8 Q. B. 567.

A township council has no authority to declare the qualification of voters. A by-law enacted by them for such a purpose must be quashed with costs. *In re Bell* v. *The Municipality of the Township of Manvers*, 3 C. P. 349.

The 12 Vict. c. 81, secs. 6, 7, as to by-laws dividing townships and wards, applied only to by-laws of district or county councils. A township by-law dividing the township into wards, and appointing places for the elections, was—Held, therefore, not necessary to be published. *Regina ex rel. Woodward* v. *Ostrom et al.*, 2 —C. L. Chamb. 47.—Burns.

Upon an application to quash a by-law dividing a township into rural wards, where neither the township sought to be divided, nor the union of townships of which it formed one, were before the by-law divided into wards, and the by-law was not passed within the first nine months of the year in which the junior townships had 100 resident freeholders and householders on its collector's roll:—Held, that the by-law was invalid. *Loucks* v. *The Municipality of Russell*, 7 C. P. 388.

Defendant gave his bond to a municipality to put up a mill on his own land, and being sued upon it pleaded performance, which at the trial he failed to prove, and a verdict was rendered against him for £12 10s. The court, under the circumstances, refused to interfere. Semble, however, that if the objection had been taken in time, no action could be maintained by the municipality on such a bond, without shewing on the record something to warrant them in taking it, the contract being apparently one wholly without the scope of their charter. *The Municipality of the Township of Kinloss* v. *Stauffer*, 15 Q. B. 414.

Held, that the selection of a county town for Peel, authorized by 19 Vict. c. 66, was sufficiently made by resolution, a by-law not being indispensable; and that a by-law passed afterwards appointing another place was illegal. *Ibson and the Provisional Corporation of the County of Peel*, 19 Q. B. 174.

Held, that a by-law of the county of Perth, passed before 22 Vict. c. 7, authorizing county councils to raise moneys to assist persons to sow their land, &c., was not ratified thereby. Said statute is not retroactive, except in the case of the by-law of the county of Bruce, thereby specially provided for. *Campbell* v. *The Corporation of Elma*, 13 C. P. 296.

Held, that municipal corporations are not restricted, any more than individuals, as to the rate of interest to be received upon money loaned by them, but that they may take any rate of interest agreed upon. *The Corporation of North Gwillimbury* v. *Moore et al.*, 15 C. P. 445.

A promissory note, made payable to the treasurer of and endorsed by him to a municipal corporation, to secure a balance due to the corporation on a past transaction, is not void under the municipal acts. *The Corporation of Belleville* v. *Fawcy*, [illegible] N. S. 73.—C. C.—Sherwood.

Sec. 44 of 31 Vict. c. 30, O., empowers municipal corporations to exempt from taxation for not more than five years manufacturers of woollen, cottons, glass, paper, and such like commodities. Under this a by-law was passed, enacting that every person or firm thereafter commencing any new manufacture of the nature contemplated by the section, who should employ therein more than $1000, and pay to operatives more than $30 weekly, should be exempt for five years as to such property. It was provided that the property should nevertheless be assessed, but entered in a separate page of the assessment roll, and that the clerk was to post up a list of such property, and the Court of Revision should hear and determine complaints against such exemptions, and if they were sustained should place the property on the roll in the ordinary column. The persons claiming exemption were also re-

quired to file yearly a statement, verified under oath, shewing the capital employed and the sum paid for wages:—Held, that the by-law was bad, for exempting new manufactures only in preference to those of the same kind already established, and for exempting only those persons doing a specified amount of business. Semble, however, that all manufacturers of the same trade might be exempted, so as to give them an advantage over other trades. Held, also, that the by-law would not have been bad for exempting manufactures instead of manufacturers, nor for requiring the oath, nor on account of the provisions as to the assessment of the property and the reference to the court of revision. Quære, whether it would have been objectionable to empower the mayor or the clerk to decide upon applications for exemption. *Pirie and the Corporation of the Town of Dundas*, 29 Q. B. 401.

A city by-law passed on the 26th of October, 1863, providing that no persons other than the chimney inspectors appointed by the municipal council (of whom there were to be three), should sweep or cause to be swept, for hire or gain, any chimney or flue in the city, was Held to be beyond the power of the corporation, under the authority given to them to enforce the proper cleaning of chimneys; and a conviction under it was quashed. It is not the practice to give costs on quashing a conviction. *Regina* v. *Johnston*, 38 Q. B. 549.—Harrison, sitting alone.

Held, that a municipal corporation has no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, that being then a matter in dispute. *Ex rel. McMullen* v. *Corporation of Caradoc*, 22 C. P. 356.

A by-law granting $1000 to an individual in consideration of his having at the instance of the corporation advanced the amount in aid of a railway:—Held, bad, for it was not a grant to a railway, and it had not been assented to by the electors. *In re Bate and the Corporation of the City of Ottawa*, 23 C. P. 32.

Quære, whether without such assent the corporation could grant a bonus to a railway out of surplus funds in hand. *Ib.*

Held, by Gwynne, J., and affirmed by the full court, that township municipalities have no power to expend any portion of their funds in payment of rewards for the apprehension of felons. Where, therefore, a township corporation offered and promised to pay a reward of $500 for the arrest and conviction of the persons guilty of a murder, it was held that such promise was not binding upon them. *Cornwall* v. *The Corporation of the Township of West Nissouri*, 25 C. P. 9.

Held, that the 32 Vict. c. 31, O., which requires municipalities to provide compensation to the owners of sheep killed by dogs, for the damage they have thereby sustained, is not confined to county municipalities and to municipalities within their jurisdiction, but applies also to towns which have withdrawn from the jurisdiction of the county. *Williams* v. *The Corporation of the Town of Port Hope*, 27 C. P. 548.—A. Wilson, sitting alone.

Quære, whether the license to a hawker and pedlar, granted under the Municipal Acts, is confined to the licensee only, or whether it extends to a servant employed by him. Semble, that it is personal only; but the point being doubtful, a certiorari was granted to remove the conviction of the servant, in order that it might be moved against. *In re Ford* v. *McArthur, Mayor of the Town of Bowmanville*, 37 Q. B. 542.—A. Wilson, sitting alone.

By the Municipal Act of 1866, the corporations of cities may pass by-laws to prevent the erection of wooden buildings within specified parts of the city. A by-law prohibiting the erection of any building within certain limits other than of stone, brick, iron, or other material of an incombustible nature:—Held, void, as beyond the power, in prohibiting buildings of combustible materials other than wood. *Attorney-General* v. *Campbell*, 19 Chy. 299.

The Cobourg harbour company was authorized by statute to construct a harbour, and to erect all moles, piers, wharves, buildings, and erections useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering the harbour; and this right was by subsequent legislation vested in the town council of Cobourg:—Held, that this did not authorize the company or the town council in building a storehouse and fence on land formed by crib-work constructed by the company and by gradual accretions from the lake in front of the plaintiff's land, which went "to the water's edge," in such a manner as to prevent the plaintiff having free access to the waters of the lake. *Standly* v. *Perry*, 23 Chy. 507.

On the 26th September, 1844, one LeB. conveyed certain land to the municipal council of the district of Dalhousie, on condition of their erecting within a year a school house thereon. The deed did not state that it was to be a model school house, but that was the only school they could then establish, and the council had on the 16th May previous, acting under 7 Vict. c. 29, which authorized the establishment of model schools, passed a resolution and by-law reciting the statute, and directing the establishment of a model school, which, within the time limited, was erected on this land. The land formed part of what was afterwards incorporated as the town of Bytown, and subsequently the city of Ottawa while the district of Dalhousie became the county of Carleton. The evidence shewed that up to 1851 the school was used as a model school, and that the plaintiffs had always asserted their right thereto, and had ejected one S., who got into possession as a private and afterwards as a common school teacher; and up to 1868, the defendants, the public school board at Ottawa, had admitted the plaintiffs' right to it. The 37 Vict. c. 28. O., empowered the public school board of any city to take possession of all public school property, and to hold, as a corporation, all such property acquired or given at any time for public school purposes in the city by any title whatsoever. Defendants took possession, claiming the land as being vested in them under this act, and the plaintiffs then brought ejectment:—Held, that plaintiffs were entitled to recover, for that under DeB.'s conveyance the property vested in them, and the subsequent School Act had not had the effect of divesting it:—Held, also, that there was no objection to the county owning land

so acquired, and subsequently included in the city. *The Corporation of the County of Carleton* v. *The Public School Board of the City of Ottawa*, 25 C. P. 137.

See *Lewis* v. *The Corporation of the City of Toronto*, 39 Q. B. 343, p. 2503.

See also XIII. 2, p. 2500.

XII. Actions by Municipal Corporations.

1. *Against Members.*

The plaintiffs, the municipal council of East Nissouri for 1858, sued defendants, who were councillors during 1856, alleging in substance that in that year a commission was issued under 12 Vict. c. 81, to enquire into the financial affairs of the township, and that defendants wickedly and maliciously conspired and contrived together to obstruct and delay, and to increase the costs of such enquiry to the plaintiffs, and for that purpose refused to attend and give evidence and produce documents as required, and procured the clerk to absent himself, and had the documents concealed, whereby the enquiry was delayed, and the expenses thereof to the plaintiffs was increased by £300 beyond what it would otherwise have been:—Held, that the action was maintainable, and the declaration sufficient. *The Municipality of the Township of East Nissouri* v. *Horseman et al.*, 16 Q. B. 556. See the pleadings and objections stated more fully in ante p. 2205.

In an action for money had and received by the municipality of a township for 1857, against the defendant, who had been reeve in 1856, it appeared that at a meeting of the council in that year defendant being in the chair, it was resolved, 1. That the treasurer should pay defendant the sum of £129, "for moneys advanced, attending commission, salary as councillor for 1856, for defending chancery suit, &c."; 2. That the defendant should be authorized to sign an order on the treasurer to pay certain witnessess called by the council their expenses attending the commission, and paying other township officers, &c., not already paid by orders on the treasury; 3. That the reeve should give an order on the treasurer for £10 10s., in favour of N., for services as township clerk. It was proved that the treasurer paid the £129 to defendant: that the commission mentioned was held under 12 Vict. c. 81, s. 181, to examine into the financial affairs of the township: and that the suit referred to had been brought by one C. respecting the affairs of the township: but the clerk swore that no documents had come to his possession shewing for what the moneys paid to defendant had been expended, and no evidence was given to shew what portion of the £129 had been received for his attendance in the council. There had been no by-law to authorize any of these payments:—Held, that upon this evidence it should have been left to the jury to say how much, if not all, of the £129 was an illegal payment; and that the resolution, though not quashed, would be no defence. With regard to the different items mentioned in the resolutions—Held, as to the "moneys advanced," that nothing could be recovered without shewing that the payment made by defendant was illegal. As to the charge for "attending commission," that it was primâ facie illegal, and defendant should have shewn his right to it. That any payment to defendant for attendance at council was clearly illegal, and could be recovered in this form of action by the council of the succeeding year. Semble, also, that the treasurer might be indicted for making such payment. As to the money paid for defending the suit, that it should have been shewn that there was some reasonable ground of defence, and authority by by-law to defend. As to the second resolution, that the moneys drawn under it must be proved to have been paid to defendant, and not to the witnesses and officers. As to the third resolution, that as there was no evidence of illegality in the payment nothing could be recovered. *S. C.*, 16 Q. B. 576.

In an action against three members of a municipal corporation, one being the reeve, for combining to delay and obstruct the proceedings of commissioners appointed to enquire into the affairs of the township, under 12 Vict. c. 81, s. 181:—Held, 1. That one defendant, who had suffered judgment by default, could not be called as a witness on behalf of the others. 2. That the jury were properly told, that it was the duty of defendants, and more especially of the reeve, to direct the clerk to produce before the commissioners his books, and to facilitate the enquiry. 3. There being evidence to go to the jury to shew that the clerk had absented himself and kept back the books, &c., in collusion with defendants, and that in consequence the costs of the commission, which otherwise would not have exceeded £75 or £100, were increased to £328, that £250 damages was not excessive. *S. C.*, 18 Q. B. 31.

The reeve of a township received certain license fees, which, as he alleged, he paid to the treasurer, whose receipt he produced for part of the sum in cash and a note for the balance. The treasurer denied having received the note or balance, and at his instance the municipality, by resolution, allowed an action to be brought for it in their name against the reeve. They afterwards rescinded this resolution, but the action went on; and at the trial it appeared that the whole sum had been charged by the treasurer to himself in his accounts for the year, which, as well as the accounts for three subsequent years, had been audited and passed, shewing a general balance for that and the other years due by the treasurer:—Held, that the action could not be maintained by the municipality; and that if it could, the treasurer would not have been admissible as a witness. *The Municipality of the Township of King* v. *Hughes*, 17 Q. B. 253.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges: that he falsely and fraudulently represented to them that he had caused work to be done, and in collusion with the persons alleged to have done such work, and by drawing false orders in their favour containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and the plaintiffs thus lost the money. Common counts were added. It appeared that the corporation by one resolution directed that $300 should be granted to each councillor, defendant being one, to be by them expended on the roads; and by another that $100 should be placed to the credit of each councillor, to be expended by them on the roads

and bridges in their respective divisions. This was in accordance with an established practice, by which the councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the treasurer to different persons as for "work done," which were paid, and it appeared that such work, though contracted for, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended. The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action: —Held, that though giving orders false in fact might raise a prima facie case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs. Held, also, that there could be no recovery on the common counts, for defendant had received no money. Quære, whether this action would lie by the corporation against one of its members, or whether the proper remedy was not in equity, against defendant as a trustee. Quære, also, whether it could be said that the money was obtained by means of the untrue orders for defendant, having the control of the money by the resolutions, might legally make payments in advance, and the orders would equally have been paid if they had shewn that the work was only in progress or contracted for. *Corporation of the Township of Chatham* v. *Houston*, 27 Q. B. 550.

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2. *Other Cases.*

Under the Municipal Councils Act, 4 & 5 Vict. c. 10, a municipal council can in their corporate name enforce payment of debts due to the district where neither the magistrates nor their treasurer could have sued formerly, but they cannot vary the rights of the parties, nor alter any contract. *Ottawa District Council* v. *Low et al.*, 6 O. S. 546.

One district council may sue another for a cause of action connected with their public duties; e. g., for the balance of district revenue which one district holds for another. *Huron District Council* v. *The London District Council*, 4 Q. B. 302.

Under 12 Vict. c. 81, secs. 175, 176, the township councils, and not the county councils, are entitled to receive moneys due to the old district councils where the debt is due to the locality, as for making roads in a township, &c. *The Municipal Council of the United Counties of Northumberland and Durham* v. *Bull et al.*, 8 Q. B. 375.

Declaration by a county against a city corporation, for compensation for the care and maintenance, by the plaintiffs, in the county gaol, of prisoners, under sec. 403 and following sections of the Municipal Act of 1866, alleging an agreement made on the 6th of June, 1867, by which, after deducting the amount paid from the administration of justice fund, the balance of the expenses were to be paid equally by plaintiffs and defendants; that the sums payable for the food and clothing of the prisoners committed to said gaol by some competent authority in the city, during the years 1867 to 1870, inclusive, amounted to $5,429, and, though defendants had paid part of it, and their half of the other expenses, as agreed on, yet they had not paid the residue, although they had in each of said years sufficient money belonging to the city applicable to municipal purposes generally, and still hold moneys not specially appropriated to other purposes more than enough to meet plaintiffs' demand, and although defendants levied in each of said years for the purposes of said demand moneys out of which they might and ought to have satisfied it. A common count was added for food furnished by plaintiffs at defendants' request to the prisoners sent to said gaol from defendants' municipality. Defendants pleaded to each count, that the alleged agreement was not under their seal; and to the whole declaration, that the claim under both counts was the same, and that said cause of action, if any, arose for a debt alleged to be incurred and falling due during the said years, which was not within the ordinary expenditure of defendants during said years, and for which no estimate was made by defendants, nor any by-law passed for the creation of such debt, nor for imposing a special rate for payment of it. On demurrer—Held, 1. that the first two pleas were bad, because the agreement was one which defendants might enter into without deed; and the sixth plea, that the contracts alleged were not under defendant's seal, was Held bad, because, the common counts cannot be founded upon a deed, and the plea was therefore inappropriate: 2. that the declaration was good; that it was unnecessary to allege defendants' contract to be by deed, and that it was not requisite that the sum payable should be a fixed annual amount: 3. that the last plea was bad; that the plaintiffs' inability to enforce payment was no reason why they should not recover a judgment; and that the claim for support and maintenance of the prisoners was within defendants' ordinary expenditure; that no estimate, by-law or rate might have been necessary, for there might have been other means for satisfying the demand; the averment that defendants had sufficient money applicable to general purposes, and not specially appropriated, was not denied; and the allegation that defendants levied in each year for the demand moneys out of which they should have paid it, was a sufficient averment that the demand was, in each year, specially provided for, so that the fund could not rightfully be devoted to other purposes. The first count referred in two places to prisoners committed to the gaol by competent authority, "within" instead of "of" the city, but this not being a ground of demurrer an amendment was allowed, and judgment given for plaintiffs. *The Corporation of the County of Wentworth* v. *The Corporation of the City of Hamilton*, 34 Q. B. 585. —A. Wilson, sitting alone.

Where a corporation leased property to a tenant, taking a covenant to pay taxes, VanKoughnet, C., and Spragge, V. C., held, in the Court of Appeal, dissenting from the judgment of the court, that though they might sue on the covenant to pay, they could not distrain. *Scragg* v. *The Corporation of the City of London*, 26 Q. B. 263.

To a bill filed by the municipal council of an incorporated town to prevent an injury to the property of the municipality, the attorney-general is not a necessary party. *The Municipality of the Town of Guelph* v. *The Canada Company*, 4 Chy. 632.

The municipality of B., being authorized by statute to lend £40,000 to a navigation company in the debentures of the municipality, payable in twenty years, issued debentures to that extent, of which debentures to the amount of £16,500 were deposited by the navigation company in the bank. The municipality with the consent of the navigation company, redeemed the debentures so deposited, and then instituted proceedings against the company to compel payment or foreclose the interest of the company under their act of incorporation. The court refused this relief, but granted a receiver of the tolls, &c., of the company, which he was to apply in maintaining the works and payment of salaries of the servants of the company, and then in payment of the arrears of interest paid, and payment of interest on outstanding debentures. *Brantford* v. *The Grand River Navigation Company*, 8 Chy. 246.

After the passing of the 27 Vict. c. 17, a municipal corporation invested on mortgage part of the surplus clergy reserve moneys in their hands, and the mortgagors made default in payment, whereupon the municipality filed a bill to foreclose the securities :—Held, that the municipality were entitled to a decree of foreclosure, and were not restricted to a sale of the property only, notwithstanding the statutes of mortmain. *Municipality of Oxford* v. *Bailey*, 12 Chy. 276.

Where a mortgage on land was executed to a municipal corporation to secure a debt due to the corporation by its treasurer, and by the mistake of both parties the mortgage did not cover a part of the land which it was intended to mortgage :—Held, that the corporation was not entitled to a decree rectifying the mortgage, though a private person under the circumstances would have been so entitled. *Brown* v. *McNab*, 20 Chy. 179.

Where the owner of property had executed a mortgage and release thereof to a municipal corporation, and the corporation afterwards sold the property with the knowledge of such owner and without objection by him until, as was alleged, (though as to this the affidavits were contradictory), the purchaser had had seven years' quiet possession, during which time he had improved the property, the case was held a proper one for granting an injunction to the hearing restraining an action of ejectment against the purchaser. *Ib.*

XIII. Actions and Proceedings against Municipal Corporations.

1. *On Contracts or Debentures not Authorized by Law.*

Contracts.]—A plea that the cause of action, if any, arose for and concerning a debt incurred and falling due during the preceding year to that in which action brought, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed, cannot be allowed on an application to plead several matters, with other pleas going to the merits of the cause of action. *McGinnis* v. *The Corporation of the Village of Yorkville*, 7 L. J. 98.—C. L. Chamb.—Robinson.

To an action against a municipal corporation on their covenant to renew a lease, defendants pleaded that they had no authority to make the lease, as defendant, who was an inhabitant of the town, well knew when he took it; and that before the term expired a decree was obtained against them in Chancery, of which defendant had notice before this action, declaring that the land in question was dedicated for a market square only, and that this lease had been granted without authority, and should not be renewed :—Held on demurrer, no defence. *Wade* v. *The Corporation of the Town of Brantford*, 19 Q. B. 207.

Declaration against the corporation of the town of Peterborough for 1860, for work and materials, and for goods and money supplied "to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough." Pleas 1. That the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed. 2. That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorized by any by-law, nor any rate provided therefor. 3. That the bridge was not on the bounds of the said town of Peterborough :—Held, on demurrer, that the first and second pleas shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not within the town, though that was not negatived by the plea. *Scott et al.* v. *The Corporation of the Town of Peterborough*, 19 Q. B. 469.

The first count claimed the right under an implied contract to furnish the grading, grubbing, and ditching of a certain number of miles of road for the defendants in their county, alleging that defendants prevented the plaintiff from completing the same. Defendants pleaded, 3. Setting out the agreement between the parties and a by-law referred to therein, which authorized the issue of debentures for £50,000, and stated that work under this agreement, and extra work under the power to order extra work, was done to the extent of $200,010; that the work contracted to be done by the plaintiffs was reduced in quantity, as the contract permitted, and as reduced was permitted to be done; that the work to be done was not part of defendants' ordinary expenditure; that there was no rate or by-law authorizing the work or payment other than the one referred to in the plea; and that the debentures issued under this by-law are paid or required for the payment of work actually done. Upon demurrer, the plea was held good, as well as other pleas, setting up a defence similar in substance, on the authority of Mellish *v.* The Town Council of the Town of Brantford, 2 C. P. 35, and Scott *v.* The Corporation of the Town of Peterborough, 91 Q. B. 469. *Wright et al.* v. *The Corporation of the County of Grey*, 13 C. P. 479.

The fourth count stated that in consideration that the plaintiffs would grade, &c., certain roads for defendants, they agreed to pay $200,010 in debentures; that although defendants did deliver to the plaintiffs certain pretended deben-

tures, yet such debentures at the time of delivery thereof were, to the knowledge of defendants, and in fraud of the plaintiffs, illegal and void, whereby, &c. To this the defendants pleaded, That the agreement was contained in the deed set out in the third plea, and the debentures were issued under the by-law set out in that plea, and were in all respects as authorized by the by-law, and were as good and valid as by law they could be made under that authority: that defendants were a municipal corporation; that the debentures were delivered to the plaintiffs in the year 1861, for work done by the plaintiffs in that year under the agreement, and were no part of the ordinary expenditure of any municipal year: that the by-law under which they were issued, was the only by-law passed in respect to this matter; and no rate was imposed for the expenditure, except under that by-law: that defendants had no authority but that by-law to make the deed, and have no moneys or debentures applicable to the payment of the plaintiff for work, except the debentures issued under that by-law:—Held, bad, on demurrer, as admitting the illegality of the debentures, and not denying that they were given to the plaintiffs with full knowledge of their illegality and in fraud of the plaintiffs, for which fraud defendants would be liable. *Ib.*

The plaintiff, in December, 1860, entered into a contract under seal, with the corporation of a city, to construct a main drain and macadamize a street, to be completed by the first of August, 1861, at a cost of $4000. Having done the work he sued for it, and the jury found that there was no by-law, but that the work was within the ordinary expenditure:—Held, reversing the judgment of the County Court, and affirming Scott *v.* The Corporation of Peterborough, 19 Q. B. 469, that this was clearly a matter not within the term "ordinary expenditure" as used in the Municipal Corporations Act: that the jury should have been so directed; and that the plaintiff could not recover. Held, also, that the fact of plaintiff having been allowed to go on without any intimation that no by-law had been passed could make no difference, for it was his part to see that defendants were duly authorized to make the contract. *Cross* v. *The Corporation of the City of Ottawa*, 23 Q. B. 288.

The plaintiffs sued defendants for lumber supplied to them for building an engine house, &c. Defendants pleaded that the claim was for a debt falling due in 1874, and was not within their ordinary expenditure during that year: that no estimate was made by them, nor an assessment or levy made to pay the debt, nor any by-law passed to create such debt or to impose a rate to pay it; and defendants had not in 1874, nor at the commencement of this suit, any moneys out of which to pay the same. It appeared that by by-law passed on the 13th July, 1874, defendants appropriated $9,300 received from the municipal loan fund for certain specified works to be done in the municipality, including that for which this lumber was supplied, but the expenditure was over $12,000, and there was in that year a deficiency of $5,000, and more than two cents in the dollar would be required to meet this debt, with the other liabilities:—Held, that the plaintiffs could not recover. *Potts et al.* v. *The Corporation of the Village of Dunnville*, 38 Q. B. 96.

See *Corporation of the County of Wentworth* v. *Corporation of the City of Hamilton*, 34 Q. B. 585, p. 2496; *Houck* v. *Town of Whitby*, 14 Chy. 671, p. 2486.

Debentures.]—A debenture under the corporate seal for payment of a debt due or loan contracted under a by-law which does not provide by special rate for the payment of such debt or loan, does not estop the council from setting up as a defence to an action on the debenture the invalidity of such by-law. *Mellish* v. *The Town Council of the Town of Brampton*, 2 C. P. 35.

The fact that a debenture had been stolen before being issued—Held, no bar to the claim of a bonâ fide holder for value without notice. A plea that such debenture was not issued "under the formalities required by law," because the by-law under which it was issued did not settle a special rate, and was therefore void:—Held, bad, for not averring distinctly that such debenture was issued in pursuance of a by-law, and for not pointing out wherein it was defective. *The Trust and Loan Co. of Upper Canada* v. *The City of Hamilton*, 7 C. P. 98.

The plaintiff sued on two debentures issued by defendants. Defendants pleaded that the debentures were issued under a by-law, which was illegal for want of compliance with the directions of the statute, and that the debentures therefore were not binding on them. The plaintiff replied that he was a bonâ fide holder for value, and without notice of the illegality; and upon the issue the jury in the county court found in the plaintiff's favour. The judge refused to grant a re-pleader, and upon appeal—Held, that he was right, for a re-pleader is granted only to advance substantial justice. *Anglin* v. *The Municipality of the Township of Kingston*, 16 Q. B. 121.

Action on Cobourg harbour debentures issued under 13 & 14 Vict. c. 83,—Effect of 22 Vict. c. 15, making such debentures valid—Plea, that the debentures were not issued for the harbour, but for a different purpose:—Held, no defence as against bonâ fide holders, for value without notice—Form of debentures—Pleading. *Crawford et al.* v. *The Corporation of the Town of Cobourg*, 21 Q. B. 113.

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2. *Other Cases.*

An action of debt held maintainable against a municipal council upon a contract entered into with the building committee for building the gaol and court house of the district before the district was set apart; and that it was sufficient in the declaration to describe the building committee as such, without naming the persons of which it was composed. *Keating* v. *The Council of the District of Simcoe*, 1 Q. B. 28.

The District Council Act, 4 & 5 Vict. c. 10, did not subject a district council to be sued upon an implied assumpsit by reason of any transaction between the plaintiffs and the justices in Quarter Sessions, or the treasurer of the district, before the existence of the council. *Low et al.* v. *Ottawa District Council*, 4 Q. B. 194.

A district council cannot be sued upon the common money count on account stated, unless at least the subject matter of the account be

averred, and it is seen to be such as can by law create a debt from defendants to plaintiffs to be satisfied out of the funds of the district. Semble, that it was not necessary before action to give a notice to the treasurer of the London District of the claims of the plaintiffs against the district. Semble, also, that it was necessary, in order to a right of action, to aver a request from the plaintiffs to the defendants to pay over the money due. Semble, also, that in suing for a debt due by the district under sec. 43 of 4 & 5 Vict. c. 10, it should be averred that defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference. *Huron District Council* v. *The London District Council*, 4 Q. B. 302.

Action against district council under 10 & 11 Vict. c. 6, for injury resulting in death in walking up the court house steps:—Held, not maintainable. The council have not the duty of keeping the court house in repair, but the district surveyor, on whose report they have to pass a by-law. Quære, would the council be liable to an individual for not passing such a by-law after the report of the surveyor had been submitted. *Hawkeshaw* v. *The District Council of the District of Dalhousie* 7 Q. B. 590.

Held, that a teacher could not maintain an action against the corporation for refusing to levy a rate for his salary, upon an estimate furnished to them for that purpose by the trustees. *Smith* v. *The Corporation of the Village of Collingwood*, 19 Q. B. 259; *Munson* v. *Municipality of Collingwood*, 9 C. P. 497.

There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. *Lazarus* v. *The Corporation of the City of Toronto*, 19 Q. B. 9.

Defendants owning land in the city, leased it to H. upon certain conditions as to building, and he erected a house upon it under the directions of their architect. The lower story was occupied by one S. as lessee of H., and the upper story and garret by defendants. There was no evidence of any faulty or negligent construction of the house or roof, nor of any by-law passed by defendants to regulate the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof:—Held, that defendants were not liable. *Ib.*

C., a servant living in the township of London, was travelling to Komoka with a load of trees, and was injured on the way by the waggon upsetting. He was taken to the tavern of M., in the township of Lobo, where his leg was amputated, and he remained several months at M.'s expense, destitute and helpless:—Held, that the court had no power to compel the township corporation to provide for his relief. *In re McDougall and the Corporation of the Township of Lobo*, 21 Q. B. 80.

Agreement by corporation to give debentures in payment for work. Action for fraud in knowingly giving the plaintiffs illegal and invalid debentures. See *Wright et al.* v. *The Corporation of the County of Grey*, 12 C. P. 479, p. 2498.

Defendants leased to plaintiff the market fees of a wood market established in one of the streets of the city, covenanting against their own interference, or that of any one by their license. Twenty years previously they had passed a by-law giving the right to deposit materials for building purposes on the highways of the city, and they subsequently demised certain premises adjoining the market to M., who obstructed a portion of the same with building materials. The plaintiff thereupon sued defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market:—Held, that such action was not maintainable; that the by-law was one which the defendants had authority, with a view to public improvement and convenience, to pass, and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without defendants' license, have occupied a reasonable portion of the highway, the by-law apparently merely restricting, without expressly conferring, the right of occupation; that the market being fixed on a public highway, which was primâ facie for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway; and that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him. *Reynolds* v. *The Corporation of the City of Toronto*, 15 C. P. 276.

Held, in appeal, Richards, C. J., Wilson, J., and Mowat, V.C., diss. That a party aggrieved by an act of a municipal council is not bound to commence his action within six months from the committing of the act complained of. *Hodgins* v. *The Corporation of the United Counties of Huron and Bruce*, 3 E. & A. 169.

Section 126 of the Assessment Act, 32 Vict. c. 36, O., directs that when the county treasurer is satisfied there is distress upon any lands of non-residents in arrear for taxes, he shall issue a warrant under his hand and seal to the collector of the municipality to levy. The warrant was tested "Given under my hand and seal, being the corporate seal;" and the seal bore the same form, emblem, legend, &c., as the county seal. The collector sold the plaintiff's goods under it, but it was not shewn to have been authorized by the county council, nor had they received the proceeds of the sale:—Held, that they were not liable in trespass or trover. *Snider* v. *The Corporation of the County of Frontenac*. 30 Q. B. 275.

Held, that the fact of a municipal council having undertaken to indemnify an officer for lawful acts done in his official capacity, does not entitle him to look to them for indemnity against the consequences of unlawful acts, as for instance, in this case, of a wrongful distress; and that the plaintiff could not be allowed to impeach the judgment of a competent court by which he was held to be a wrongdoer. *Irwin* v. *The Corporation of Mariposa*, 22 C. P. 367.

In trespass against a municipal corporation for the act of their path-master, in causing statute labour to be performed on certain land of the plaintiff, alleged by defendants to be an original allowance for road, it appeared that the path-master acted under an order written by the clerk, by the direction of the council while in session:—Held, sufficient to render the corporation liable, and that a by-law was not neces-

sary. *Neville* v. *The Corporation of Ross et al.*, 22 C. P. 487.

The defendants contracted with B. and A. for the construction of a brick sewer on Yonge street, under a contract which provided that the work should be done according to the directions and to the satisfaction of defendants' engineer, who had power, if the contractors should not proceed according to the contract or to his satisfaction, to complete the work at their expense. During the work the city engineer visited it frequently, superintending, and two inspectors for defendants were there constantly, to see that the specifications were carried out. In order to get rid of the water coming down, it was damned back to raise it to the level of another sewer which was used as an outlet, and in consequence of heavy falls of rain the water thus penned back overflowed into the plaintiffs' cellar. It was contended that the work being carried on by independent contractors defendants were not liable; but, Held, otherwise, for the work was done under defendants' control and supervision; and, Quære, whether the defendants could transfer such a work, so as to escape liability. *Grassick et al.* v. *The City of Toronto*, 39 Q. B. 306.

Under the orders of the city commissioner of the city of Toronto, large quantities of rubbish and offal, offensive and injurious to health, were during the summer deposited in a lane adjoining the plaintiff's cottages, by which the lane was raised three or four feet, coming up to the windows, and the filth ran over it into the basement; the well attached to the houses was rendered unfit for use, so that the plaintiff was compelled to dig a new one, and he had also to raise one of the houses, and remove the kitchen, to suit the level of the lane; the tenants refused to remain, and he was obliged to lower the rent:—Held, that the defendants were liable for the acts of the commissioner, without any by-law being shewn; but that the expense of raising the house and removing the kitchen could not be recovered. When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. Remarks as to the form of the second count in this case. *Lewis* v. *The Corporation of the City of Toronto*, 39 Q. B. 343.

The power given by sec. 425, sub-s. 1, of the Municipal Act of 1873, to improve, repair, widen, and alter streets, includes the power, when necessary for these purposes, to level, raise, or lower the streets. *Ib.*

Where a corporation having a debt to pay, which it was to their advantage to discharge immediately, being a balance due upon their subscription to a railway, raised money upon an accommodation note of an individual, under sanction of a resolution, and applied the money to the payment of the debt, promising to protect the note or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. *Burnham* v. *Peterborough*, 8 Chy. 366.

The mayor of Cobourg was ex officio a member of the commissioners of the Cobourg town trust when certain acts complained of were done, but ceased to be such before the institution of a suit by a party injured by such acts to be relieved in respect thereof:—Held, notwithstanding, that he was a proper party to the bill. *Standly* v. *Perry*, 23 Chy. 507.

A municipal corporation, after raising money on the credit of the Municipal Loan Fund for a purpose specified in the by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of the Bank of Upper Canada:—Held, that a bill would lie, by a ratepayer on behalf of himself and all other ratepayers of the municipality, against the bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the attorney-general was not a defendant, was over-ruled. *Broydin* v. *Bank of Upper Canada*, 13 Chy. 544.

XIV. Personal Liability of Members.

Case against the mayor of a municipal council, alleging that the council in session had resolved and determined (not under seal) to demise certain land to the plaintiff, and that he was willing and offered to accept, &c.; and that the council while in session, defendant being mayor, did instruct and order him as such mayor, on behalf and in the name of the council, to make and execute the lease, of which he had notice, but which he maliciously refused to do, though thereunto requested:—Held, action not maintainable. *Fair* v. *Moore*, 3 C. P. 484.

Indictment charging that defendants, H., C., and D., were township councillors of East Nissouri, and F. treasurer; and that defendants intending to defraud the council of £300 of the money of said council, falsely, fraudulently and unlawfully did combine and conspire unlawfully and fraudulently to obtain and get into their hands, and did then, in pursuance of such conspiracy, and for the unlawful purpose aforesaid, unlawfully meet together, and fraudulently and unlawfully get into their hands £300 of the moneys of said council, then being in the hands of said T. as such treasurer as aforesaid:—Held, bad, on writ of error. *Horseman et al.* v. *Regina*, 16 Q. B. 543.

Defendant was sued as mayor of a town for refusing to sign an order to enable plaintiff to obtain a saloon license. The notice of action was signed by plaintiff, with the name of plaintiff's attorney endorsed thereon:—Held, 1. That as it must be presumed defendant, in refusing to sign the order, intended to act in the discharge of his official duty, he was entitled to notice. 2. That the question of the bona fides of defendant in refusing to sign the order, not having been raised at the trial, could not be raised in term. *Moran* v. *Palmer*, 13 C. P. 528.

The treasurer having paid four orders on him, signed by the reeve of the municipality under the authority of resolutions passed by defendants (three out of five of the council), sitting as reeve and council:—Held, that moneys paid by the treasurer on the order of the reeve which the municipal council has no authority to direct to be paid, will be considered township money still in his hands. Held, also, that although the debt may be one which the municipality are not liable to pay, it does not thence follow that the

members of the municipal council would be personally liable to pay such debt, so that it could be said to be such a payment of their own debt out of the township funds as would enable the plaintiffs to maintain an action for money had and received. *The Municipal Council of East Nissouri* v. *Horseman et al.*, 9 C. P. 189.

Defendants were a committee of the city council to inspect and superintend the building of a gaol. It was determined at a meeting of the committee that there should be a ceremony on the occasion of laying the corner stone, and a luncheon given in St. Lawrence Hall; and one of the defendants, the chairman, gave an order addressed to the plaintiff as "commission merchant," for the supply of certain wines specified, to be sent to the St. Lawrence hall, directing him to render his account to the board of gaol inspectors. The plaintiff sent his bill to the chamberlain's office, headed "K. T., chairman, board of gaol inspectors, bought of G. T., agent." The council, however, refused to sanction the expenditure, and he then sued the members of the committee who were present at the meeting when the order was given:—Held, that they were personally liable, and that the plaintiff might sue in his own name. One of the defendants, the mayor, was present at the meeting referred to, and at first objected to the expense, but when told that it would be less than he had heard he did not persevere in his opposition. He afterwards wrote to the chairman to say that he would attend the ceremony, but would not be at the luncheon, because he was obliged to leave town on business, and because he disapproved of so great and unsatisfactory an expenditure by the committee. Held, not sufficient to exempt him from liability with the others. *Thomas* v. *Wilson et al.*, 20 Q. B. 331.

A bill will lie by some of the inhabitants of a municipality alleging an illegal application of the funds by the mayor, which the council refused to interfere with. The Attorney-General is not a necessary party to such a suit. *Paterson* v. *Bowes*, 4 Chy. 170.

A ratepayer filed a bill in September, 1871, complaining of certain acts of the treasurer and certain township councillors, done by them in the years 1867, 1868, 1869, and 1870, some of them under by-laws which the bill charged to be illegal, but which until the filing of this bill had never been objected to by anyone. Amongst other acts complained of, the bill charged that the defendants had loaned the funds of the township upon improper and insufficient securities. After the bill was filed the moneys so loaned were all repaid, together with the interest, and the evidence in the master's office established that these loans were the only instances of misapplication of the funds of the municipality. The Court, in view of the fact that the by-laws had never been moved against; that the defendants had not received any benefit under them peculiar to themselves, and they had not been guilty of any fraud or impropriety in passing them, but, on the contrary, had acted with ordinary care and good faith, refused to make them answerable for the moneys expended under such by-laws, and directed the plaintiff to pay the defendants their costs of suit, less the sum of $150, which amount was to be borne one-half by the treasurer, the other half by the township councillors; as on account of the nature of the questions in which the plaintiff had succeeded against them the court could not absolve them from paying any portion of the costs. *Baxter* v. *Kerr*, 23 Chy. 367.

XV. Contracts by Members with Councils.

B., being a member of the town council and employed by them as their solicitor, sued for services rendered as such:—Held, under C. S. U. C. c. 54, s. 219, that being a trustee for the corporation, he could not recover. *Burnham* v. *The Corporation of the Town of Peterborough*, 12 C. P. 103.

A member of a municipal corporation agreed with another person to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between them:—Held, to be in contravention of the municipal act (16 Vict. c. 181), and the court refused to enforce the agreement for a partnership; but defendant having denied the partnership, which was established by the evidence, the bill was dismissed without costs. *Collins* v. *Swindle*, 6 Chy. 282.

Semble, that the mayor of a town or city cannot purchase at a tax sale of lands in his municipality, his duties under the statute conflicting with his interest as an intending purchaser. *Greenstreet* v. *Paris*, 21 Chy. 229.

See *The City of Toronto* v. *Bowes*, 4 Chy. 489, p. 2509.

XVI. Commission of Enquiry into Finances.

The authority of the executive government to appoint a commission to enquire into the financial affairs of a municipal corporation, does not prevent such corporation from suing for money due to them, or referring the claim. *In re Arbitration between the Corporation of the Township of Eldon and Ferguson et al.*, 6 L. J. 207.—P. C.—Richards.

Sec. 243, of the Municipal Institutions Act of 1866, as amended by 34 Vict. c. 30, s. 15, O., authorizes the Governor in Council to issue a commission to enquire into the financial affairs of the corporation, in case thirty duly qualified electors of the municipality petition therefor; and sec. 244 enacts that the expense of the commission shall be determined and certified by the minister of finance, and shall then become a debt due to the commissioner by the corporation. In an action by the commissioner for such expenses:—Held, 1. That evidence was properly admitted to shew that the petitioners, who were described only as ratepayers, were electors as well; and, 2. That defendants could not in this action dispute the validity of the commission, by shewing that one of the thirty, though on the electors' roll, was not in fact a duly qualified elector. Quære, whether, if there had been no petition, the plaintiff could have recovered. Quære, also, as to how far the roll is conclusive, beyond the right to vote, except for the purpose of an election. *Bristow* v. *The Corporation of the Town of Cornwall*, 36 Q. B. 225.

See *Municipality of the Township of East Nissouri* v. *Horseman et al.*, 16 Q. B. 556, p. 2493.

XVII. Matters Referred to Arbitration.

Arbitrators were appointed by agreement, dated 28th of December, 1855, to settle certain differences recited as pending between the city of London and the county of Middlesex, respecting the compensation to be paid by the city to the county for the use of the county court house and goal, and certain financial affairs then depending between them. On the same day they awarded that the stock held by the county in certain railways mentioned should be divided, in the proportion of one-fifth to be transferred to the city, the remaining four-fifths to belong still to the county; 2. That the city should pay the county £2,675 on account of the county roads, and should keep such roads in repair within the city limits; 3. That the city should pay the county £1,966 in full for their portion of the county debt; 4. That in future each of the municipalities should pay the expense of all prisoners committed to the county gaol by each of them respectively, and the portion of such expense incurred by the city should be paid over by them in January of each year; 5. That in future the city should pay the county one-third of all incidental expenses connected with the county court-house and gaol, including repairs and insurance, together with one-third of all expenses connected with the administration of justice not paid by government, such payment to be made in the month of January in each year; 6. That the city should pay the county the sums mentioned in the 1st, 2nd, and 3rd clauses, with interest, in twelve months from the 1st of January, 1856, except that the city council should pay their share of the railway stock at the time the county debentures given therefor should become payable; 7th. That the award should take effect on the 1st of January, 1855, and remain in force until the 1st of January, 1860:—Held, that the giving to the award a retrospective effect to the 1st of January, 1855, being the time when London was declared a city, was not objectionable, but proper: that the arbitrators had authority to give time for payment, as in the 6th clause: that the limiting the continuance of the award to the 1st of January, 1860, was inconsistent with the 12 Vict. c. 81, s. 200, and rendered the award bad as to the 4th and 5th clauses, respecting the court house and goal; that the 4th clause of the award was also bad, because the act directs that the arbitrators shall settle a sum to be paid and does not authorize a ratable division of the expenses; that the 4th and 5th clauses might be separated from the rest, and the award set aside as to them only. *In re The Municipal Council of the County of Middlesex and the Mayor, &c., of the City of London*, 14 Q. B. 334.

Quære, can the reeve of the township affix the seal of the township to a submission to arbitration as to property of the township, without being specially authorized by a resolution of the council to do so. *In re the Corporation of the Township of Eldon and Ferguson et al.*, 6 L. J. 207—P. C.—Richards.

Arbitrators appointed by a municipal corporation as above mentioned may examine the accounts of the corporation, though previously audited as the municipal law directs. *Ib.*

Under the special circumstances of this case, it was held that the arbitrators might well make their award against the father of the township treasurer, who was really but not nominally treasurer, and who was a party to the submission as to the state of the township treasurer's accounts. *Ib.*

Corporations, sole or aggregate, if not disabled, may submit disputes relating to corporate property to arbitration, and their successors will be bound thereby. *Ib.*

Quære, whether a resolution passed by the council, that arbitrators chosen under 16 Vict. c. 181, to determine what should be paid to the plaintiff, for opening a road across his property, should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled, was binding upon the council as a reference. *Hodgson* v. *The Municipality of the Township of Whitby*, 17 Q. B. 230.

Municipality of Wellington and Wilmot—Debt for Guelph and Dundas road—Liability of Wilmot—Right of action—Award under 14 & 15 Vict. c. 5, s. 7—Effect of upon provisions of sec. 8. *The Municipal Council of the County of Wellington* v. *The Municipality of the Township of Wilmot*, 17 Q. B. 71.

Upon motion to set aside an award made under C. S. U. C. c. 54, s. 26, on the withdrawal of a town from a county—Held, that it was not necessary that such award should direct the town to pay any portion of the existing debt of the county, and that the arbitrators, finding that the whole debt had been incurred for making roads which had been of no benefit to the town, were justified in awarding that the town should pay nothing on account of such debt, and that the county should refund what the town had paid towards the construction of such roads. The arbitrators did not take or file any oral or documentary evidence (under sec. 358, sub-sec. 13), but relied upon the knowledge which two of them had of the position of the municipalities towards each other with relation to money matters, and obtained the specific sums on which their award was based from the books of the county treasurer. These sums were shewn to the warden at the last meeting of the arbitrators, and their correctness was not disputed:—Held, sufficient. Held, also, that the arbitrators had no power to award as to costs, and that part of the award was set aside. *In re the Corporation of the United Counties of Northumberland and Durham and the Corporation of the Town of Cobourg*, 20 Q. B. 283.

Two municipalities on separation having failed to agree as to the disposition of certain property and liabilities between them, an arbitration was had pursuant to the Municipal Act of 1873, sec. 25, sub-sec. 5. The arbitrators decided that the principle expressed in sub-sec. 4 of sec. 25, that the amount to be paid by one corporation to the other should be "such sum of money as may be just," had reference only to a fair equalization of the assessment of the municipalities, and that no other consideration should be regarded:—Held, 1. That although by the general law this award could not be impeached, as there was nothing wrong either of fact or of law on the face of the award, the court must, nevertheless, when its interference is invoked under sec. 295, enter into the merits of the matters submitted. 2. That

the arbitrators should have taken into consideration such other circumstances as they might have thought just, so as to arrive at an equitable settlement between the municipalities. The award was therefore remitted to the arbitrators to award what they might find to be under all the circumstances just between the parties, upon a liberal and comprehensive interpretation of the statute. *In re the Award between the Township of Howick and the Village of Wroxeter*, 12 L. J. N. S. 64.—P. C. —A. Wilson.

XVIII. Miscellaneous Cases.

Semble, although the statute enacts that all by-laws shall be authenticated by seal, and signed by the person presiding, yet it is not necessary to set out these facts in pleading a by-law, but it is sufficient to aver that it was duly made and passed. *Wilson* v. *Municipal Council of the Town of Port Hope*, 10 Q. B. 405.

The municipal year, under 12 Vict. c. 81, begins on the 1st of January, and ends on the 31st of December, and not from the day appointed for the municipal elections of one year to the same day of the next year. *Mellish* v. *The Town Council of the Town of Brantford*, 2 C. P. 35.

The mayor of Toronto secretly contracted to purchase, at a discount (from persons to whom the debentures were to be assigned by the railway company, in whose favour they were to be issued, a large amount of the debentures of the city, which were expected to be issued under a future by-law of the city council; and was himself an active party afterwards in procuring and giving effect to the by-law, which was subsequently passed:—Held, that he was a trustee for the city of the profit he derived from the transaction. *The City of Toronto* v. *Bowes*, 4 Chy. 489. Affirmed on appeal, Robinson, C.J., and McLean, J., diss. *Bowes* v. *The City of Toronto*, 6 Chy. 1. Afterwards affirmed on appeal to the Privy Council, 11 Moore P. C. C. 463.

A person negotiating the sale of a municipal debenture is not answerable that the municipality will pay. Where, therefore, a township municipality passed a by-law to grant a loan to a road company, and issued debentures thereunder, which were declared illegal because the company had not been properly constituted, the court, there being no proof of fraud, refused to order one of the directors of the company to refund the amount paid to him upon the sale of one of such debentures. *Scully* v. *McCallum*, 9 Chy. 434.

Municipal corporations are within the statutes of Mortmain. *Brown* v. *McNab*, 20 Chy. 179.

Trustees of a municipality are entitled, under the general provisions of the act of 1874 (37 Vict. c. 9, O.), to a commission on moneys passing through their hands as compensation for their care and trouble in the management of the trust. The Commissioners of the Cobourg Town Trust, were therefore held so entitled. *In re the Commissioners of the Cobourg Town Trust*, 22 Chy. 377.

MUNICIPAL LOAN FUND.

The united counties of Northumberland and Durham obtained, under the Municipal Loan Fund Act, 16 Vict. c. 22, a loan of £115,000, for the purpose of constructing certain roads of the united counties, in which roads the town of Port Hope was not directly interested. Afterwards the town itself raised a large sum, under the same fund, to aid in the construction of certain railways, and for the improvement of the Port Hope harbour:—Held, that the town, in addition to its direct liability on the last mentioned loan, continued liable for its proportion of the debentures issued by the united counties. *The Town of Port Hope* v. *The United Counties of Northumberland and Durham*, 7 L. J. 20.—Chy.

Where a township municipality advanced a large sum of money to a railway company under the provisions of the consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an act of the legislature passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent acts of the legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result:—Held, reversing the judgment of the court below, that the municipality was not released from their liability to the crown. Spragge, V. C., diss. *Norwich* v. *The Attorney-General*, 2 E. A. 541.

A municipal corporation, after raising money on the credit of the municipal loan fund for a purpose specified in the by-law, passed another by-law diverting the debentures to another purpose; and under this second by-law the debentures passed into the hands of the Bank of Upper Canada:—Held, that a bill would lie by a ratepayer on behalf of himself and all other ratepayers of the municipality, against the bank and the municipal corporation, for the restoration of the debentures to the corporation; and a demurrer, on the ground that the attorney-general was not a defendant, was over-ruled. *Broglin* v. *The Bank of Upper Canada*, 13 Chy. 544.

MURDER.

See Criminal Law.

MUTINY ACT.

See Criminal Law.

MUTUAL INSURANCE COMPANIES.

See Insurance.

NAME.

See Misnomer.

NATURALIZATION.

See Alien.

NAVIGATION AND NAVIGABLE WATERS.

I. Navigable Rivers—*See* Water and Water Courses.

II. Fishing in Navigable Waters — *See* Fishery.

III. Harbour Companies—*See* Harbour Companies.

IV. Navigation of Vessels—*See* Ships.

V. Marine Insurance—*See* Insurance.

VI. Canals—*See* Canal—Desjardins Canal—Rideau Canal—St. Lawrence Canal—Welland Canal.

NAVY.

See Army, Navy, and Militia.

NE EXEAT REGNO.

I. Writ of in Cases of Alimony—*See* Husband and Wife.

M. having by fraud induced H. to advance money on mortgage upon the assurance that the title was correct, although well aware that the mortgagor had no title, a writ of ne exeat was issued against him. A motion to discharge the writ on the ground that the claim was not a debt but a demand founded on the fraudulent conduct of defendant, was refused with costs. *Hunter* v. *Mountjoy*, 6 Chy. 433.

NEGLIGENCE.

I. Principles of Law.

1. *In General*, 2512.
2. *Contributory or Conducive*, 2514.

II. Parties Entitled to Sue, 2518.

III. Parties Liable.

1. *Public Bodies and Officers*, 2519.
2. *Other Cases*, 2521.
3. *Master for Negligence of Servant*—*See* Master and Servant.
4. *Municipalities*—*See* Municipal Corporations—Water and Water-Courses—Way.

IV. In Care and Construction of Buildings, 2521.

V. In Driving Horses, 2522.

VI. Proof of Negligence, 2523.

VII. Pleadings.

1. *Declarations*, 2524.
2. *Pleas*, 2525.

VIII. Damages Recoverable.

1. *Actions by Representatives of Persons Killed by Negligence*, 2526.
2. *Other Cases*, 2526.

IX. Of Attorneys — *See* Attorney and Solicitor.

X. Of Banks—*See* Banks.

XI. In Presentment of Bills or Notes, or giving Notice of Dishonour—*See* Bills of Exchange and Promissory Notes.

XII. In Conveyance of Persons or Goods — *See* Carriers—Railways and Railway Companies—Ship.

XIII. Of Contractors—*See* Contractor.

XIV. Delay—*See* Laches.

XV. Negligent Escape—*See* Criminal Law.

XVI. By Fire—*See* Fire.

XVII. Of Harbour Companies—*See* Harbour Companies.

XVIII. Injury to Horses—*See* Horse.

XIX. Of Masters and Servants—*See* Master and Servant.

XX. By Medical Men—*See* Medical Profession.

XXI. New Trial in Actions for—*See* New Trial.

XXII. Of School Trustees—*See* Public Schools.

XXIII. Of Sheriff—*See* Sheriff.

XXIV. By Railways — *See* Railways and Railway Companies.

XXV. Management of Vessels—*See* Insurance—Ship.

XXVI. Of Telegraph Companies—*See* Telegraph.

XXVII. By Water—*See* Water and Water-Courses.

XXVIII. In not Keeping Roads in Repair—*See* Way.

I. Principles of Law.

1. *In General.*

Semble, per Draper, C. J. That when the tort alleged is the non-performance of a joint duty, if the joint duty be not proved the plaintiff must fail in toto. *Woods* v. *the Municipality of Wentworth and the Corporation of Hamilton*, 6 C. P. 101.

Where the unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill-dam) is to injure his neighbour, an action lies for such injury; but not if such act per se would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. Negligence must then be proved to render a defendant liable. *Peters* v. *Devinney*, 6 C. P. 389.

Declaration, that defendants had dug a ditch in the highway near and extending across plaintiff's land, through which water flowed; and defendants so negligently constructed and continued said ditch, and permitted so much water

to run in it, that it overflowed upon plaintiff's land. The plea set out a by-law passed by defendants to construct a drain through plaintiff's land, and an award of compensation, which was duly tendered, and alleged that in cutting the ditch defendants unavoidably injured and threw water on the lot, doing no unnecessary damage: —Held, on demurrer, that the plea was no answer to the declaration, which complained of injury caused by defendants' negligence. *Stonehouse* v. *Corporation of the Township of Enniskillen*, 32 Q. B. 562.

The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into plaintiffs' cellar, and damaged their goods there. The jury found, upon the evidence set out in the case, and which held by the court to warrant their finding, the defendants had reason to believe the drains might be choked, and remained negligently ignorant of their condition; and a verdict for the plaintiffs was therefore sustained. There were gratings and trap-doors in the sidewalk opening into the cellars of one P., whose premises adjoined the plaintiffs, and which the jury found had been placed there many years before without defendants' permission. Semble, that if the water had got into the plaintiffs' premises through the plaintiffs' own gratings, defendants would not have been liable; but that as between them and the plaintiffs they were responsible, as they would be if any one had been injured by such gratings, though the person who placed them there might be liable also. *Scroggie et al.* v. *The Corporation of the Town of Guelph*, 36 Q. B. 534.

The plaintiff, with a waggon and a load of bricks, was coming down a hill on the road, by side of a precipice. He had stopped to speak me one, when on starting again the horses way, and when they came to an opening in ence or railing along the road, near the foot of the hill, they bolted through it, and down the precipice. At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting beyond the plaintiff's control, not the defect in the fence: —Held, that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering, unless he had been guilty of want of reasonable care or skill, which was a question for the jury; and the nonsuit was therefore set aside. Toms et ux. *v.* Corporation of Whitby, 35 Q. B. 226, 37 Q. B. 100, considered—the decisions in the State of Maine, New Hampshire, and Massachusetts reviewed, and the rule in New Hampshire adopted, as being in accordance with the weight of authority, and with the views expressed in that case. The rule is, that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. *Sherwood* v. *Corporation of the City of Hamilton*, 37 Q. B. 410.

In an action for collision between two sailing vessels, owned by the plaintiffs and defendant respectively, it appeared that both vessels were running to windward close-hauled, the plaintiffs' vessel on the starboard, and the defendant's vessel on the port tack. Defendant's vessel, it was admitted, did what was best as soon as the plaintiffs' lights were seen, but the complaint was, that he should have seen them sooner. This was explained by alleging that there was a haze on the water, which the plaintiffs' witnesses denied. The jury were directed that if defendant used every means in his power to avoid a collision after he saw the plaintiffs' lights he would not be liable, nor if they believed it was simply an accident without negligence on the defendant's part:—Held, under the circumstances, not a misdirection; but the jury having found for defendant a new trial was granted, on affidavits shewing the discovery of new evidence to prove that there was no haze at the time. *Downey et al.* v. *Patterson*, 38 Q. B. 513.

In order to a party recovering damages against one who has been guilty of deceit, it is not necessary to shew that the person practising it has benefited thereby; but no action will lie for a false representation, unless the person making it knows it to be untrue, and makes it with the intention of inducing the party to whom it is made to act upon it, and he does act upon it and sustains damage in consequence. In order to facilitate an intending borrower obtaining a loan of money the defendant, who was well known to the plaintiff, the proposed lender, gave a certificate in the following words: "I beg to state that I know the farm belonging to Mr. James Wheelen, of Brudenell, situate opposite the church and in a thriving settlement. I consider it worth at least $1,200; and have reason to believe that it has cost him a much larger sum, and I am sure the investment of $400 will prove a safe one." At this time the property was not worth more than $400 or $500, and on a sale under execution at the suit of the plaintiff it realized only $130:—Held, that in the absence of mala fides the defendant, being an unpaid valuator, was not liable to make good the loss sustained by the plaintiff by reason of this erroneous valuation. Spragge, C., dissenting, who considered that the defendant had been guilty of such gross neglect in reference to the matter as rendered him liable to indemnify the plaintiff. *French* v. *Stead*, 24 Chy. 179.

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2. *Contributory or Conducive.*

When a waggon is left standing in the highway, the owner cannot defend himself by shewing that the person injured thereby was drunk. *Ridley* v. *Lamb*, 10 Q. B. 354.

In an action for negligence against the owners of a steamboat, for injuries sustained by the plaintiff in consequence of one of the fenders having broken loose from the steamboat while leaving a wharf, and striking and injuring the plaintiff, who was standing on the wharf, where it appeared that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff, and granted a new trial on payment of costs. Macaulay, J., diss. *Grieve* v. *Ontario Steamboat Co.*, 4 C. P. 387.

Declaration by the plaintiff, as administratrix of J. M., that defendant was possessed of a certain lot on the highway, on which there was a

cellar, which he negligently and wrongfully suffered to remain open, whereby said J. M., being an infant under twelve years, and owing to his youth incapable of exercising and not responsible for the want of ordinary care and caution, and ignorant of the risk, went upon the beams across said cellar, fell in, and was killed. Plea, that the said J. M. improperly and unlawfully went upon said premises, and by his own unlawful conduct and negligence, and not through any default of defendant, slipped and fell in: —Held, on demurrer to the plea, declaration good, shewing sufficiently that the cellar was upon the highway: plea bad, as not denying the youth of J. M., or its alleged effect. *McIntyre* v. *Buchanan*, 14 Q. B. 581.

The plaintiff being in a cab, approached a railway crossing, where a train could be seen at a distance of three-quarters of a mile. The driver, however, who knew the crossing well, did not look out at all until within about twenty yards of the track, and then only straight in front of him. He did not see the train, which was a very long one, consisting of twenty passenger cars and two engines, until the horses' feet were on the rails, and it was within seventy feet, and he then tried to cross in front of it, but the cab was struck and overturned. The plaintiff, from within, had seen the train approaching, and called to the driver to stop, but a man sitting on the box with him urged him to go on which he did:—Held, that the driver's negligence was so far the cause of the accident that the plaintiff could not recover, notwithstanding the defendants' neglect of their statutory obligation to have a fence and gate at the crossing, with an attendant to watch it. A nonsuit was therefore ordered. *Nicholls* v. *The Great Western R. W. Co.*, 27 Q. B. 382.

In this case also, upon substantially the same evidence as the last, it was held, that the plaintiff could not recover. The jury were directed, that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff: —Held, a misdirection, for that if the driver by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed. *Rostrick* v. *The Great Western R. W. Co.*, 27 Q. B. 396.

In an action by plaintiff against a railway company, in his own individual right, for injury sustained from an accident, the judge at the trial at first directed the jury that, assuming defendants to have been guilty of neglect in not fencing, they must determine whether plaintiff did or did not so far contribute to the accident by his own negligence or want of ordinary care and caution, that, but for such negligence or want of care, the accident would not have happened:—Held, that this direction was right. But afterwards, at the request of plaintiff's counsel, who did not wish the question of contributory negligence to be left to the jury, the judge, as he took the same view, did not charge them to find specially on the question of negligence generally as applicable to the state of the road, when defendants' counsel objected; so that in the confusion which arose, the question of community of default being understood to be withdrawn from the jury, they were led to believe that because defendants were in default, plaintiff must recover. On this ground, therefore, the court, Richards, C. J., diss., granted a new trial without costs. *Winckler* v. *The Great Western R. W. Co.*, 18 C. P. 250.

Action against defendants as owners of a macadamized road, which it was alleged they allowed to get out of repair at its point of intersection with another road, whereby the plaintiff was thrown out of his waggon, and broke his leg, &c. It appeared that the plaintiff was driving a high load of empty barrels, in a rack unfastened to the waggon, and that on coming to this spot, where the road was lower on one side than the other by 18 inches, so as to carry on the incline of a cross road, and which had deeper ruts on the lower side than on the higher, the plaintiff got on the high side of the load to steady it; the load upset, and the plaintiff was thrown down and broke his leg. The jury, in answer to the questions submitted, found: 3. That it was not prudent for the plaintiff to have driven over the spot in question on the top of the load; 4. That the plaintiff, sitting as he did, contributed to the causing of the accident; 5. That it was imprudent not to fasten the rack, and the omission to do so contributed to the accident:—Held, that the answers to the third and fourth questions, though shewing some negligence on the plaintiff's part, did not amount to a finding of contributory negligence, so as to prevent his recovery; but that the answer to the fifth question was a finding of contributory negligence, which would bar the action. *Bradley* v. *Brown et al.*, 32 Q. B. 463.

In an action against a railway company for killing the plaintiff's horses by collision at a crossing, the weight of evidence went strongly to shew that the plaintiff was intoxicated, and the accident caused by his own negligence and bad driving. The jury, however, found in his favour. The judge, who tried the cause, being dissatisfied with the verdict, and there being reason to believe that it arose from mistaken sympathy on the part of the jury for a poor man as against a railway company, the court granted a new trial with costs to abide the event. *McGunigal* v. *Grand Trunk R. W. Co.*, 33 Q. B. 194.

In an action for the death of H., caused by falling into an excavation for a drain under the sidewalk, alleged to have been negligently left uncovered by defendants, the deceased having passed over the place half an hour before, when it was light and the state of the sidewalk could be seen:—Held, that there was evidence of contributory negligence on his part. Remarks as to the nature of obstructions which would make defendants liable, and the care required from persons with defective sight, &c. *Hutton* v. *Corporation of the Town of Windsor*, 34 Q. B. 487.

The plaintiff had been employed by defendants to cut down the trees on his own land within 100 feet of the centre of the track, under the C. S. U. C. c. 66, s. 4, and he had felled them lengthwise with the track and left them there. In an action for fire caused by defendants' locomotive, which extended to plaintiff's land:—Held, that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land. *Holmes* v. *The Midland R. W. of Canada*, 35 Q. B. 253. See also *Jaffrey* v. *Toronto, Grey, and Bruce R. W. Co.*, 24 C. P. 271.

Defendants, under the authority of 12 Vict. c. 196, and 16 Vict. c. 51, had constructed a wharf at Collingwood, and laid three tracks thereon for the purposes of their business. The wharf was much frequented, and the only means of access to vessels lying at it. The tracks were so close together that it was difficult to distinguish between the tracks and the spaces between them. No portion of the wharf was fenced off for foot passengers, nor was there any railing to prevent them from falling into the water, and they had either to walk upon the tracks or spaces between them. A woman carrying the dinner of her husband, who was working at a vessel, was walking down the wharf on the outside of the western track, and on meeting some men coming up, she, apparently to avoid them, stepped across on to the centre track, not observing a gravel train backing down along it. Just as the train was upon her, one of these men observing her danger, jumped on to the track and pushed her off, but for some reason hesitating for a moment was himself struck by the train and killed. It appeared that there was no lookout man on the last car, and the evidence was contradictory as to whether the defendants were going more than six miles an hour, and whether the whistle was sounded or the bell rung. In an action by the administratrix of the deceased the jury found that defendants were guilty of negligence, and that neither the woman nor the deceased was guilty of contributory negligence, and that she would have been killed had not deceased pushed her off, which was the only means of saving her:—Held, in the Common Pleas, that the administratrix could not recover, for the deceased was guilty of contributory negligence, his own direct and wilful act, however praiseworthy, being the cause of the accident. Per Hagarty, C.J.—Semble, that the woman was also guilty of contributory negligence, and could not have recovered. Per Gwynne, J.—Without deciding as to her right, the defendants were bound to exercise a much greater degree of caution in running their trains in such a place than on their ordinary line of railway. A nonsuit was therefore ordered. On appeal, the court being equally divided, the judgment of the court below was affirmed, with costs. Per Draper, C. J. of Appeal.—The deceased was guilty of contributory negligence; and semble, that there was also contributory negligence on the woman's part, and no evidence of negligence on defendants' part. Per Strong, J.—1. The defendants were guilty of negligence as regarded the woman, but such negligence was too indirectly the cause of the injury to deceased. 2. The woman could not have recovered, if injured, by reason of her contributory negligence, and, if so, neither could deceased. Per Burton and Patterson, JJ.—There was clearly negligence on defendants' part, in going at excessive speed, and in omitting to have a look-out man in the rear car, contrary to the requirements of C. S. C. c. 66, secs. 144, 145. The jury were warranted in finding that there was no contributory negligence on the part of the woman, or of the deceased, for his act was one which a man of ordinary care and prudence might have done under the circumstances. *Anderson* v. *The Northern R. W. Co.*, 25 C. P. 301.

Action for accident caused by neglect to repair a sidewalk. Quære, whether the question of contributory negligence, upon the evidence set out in the report, was for the judge at the trial, or should have been submitted to the jury. The authorities reviewed. *Boyle et ux.* v. *The Corporation of the Town of Dundas*, 25 C. P. 420.

On the second trial of the case above the jury, in answer to questions submitted to them, found in substance, that though the defendants had generally performed their duty as to the repair of the sidewalks, yet in this case the sidewalk was not in a reasonably sufficient state of repair; and that though plaintiff by watching her steps, &c., might have avoided the hole, yet that she exercised that due care and caution which a person would ordinarily use, under the circumstances:—Held, that on this finding the plaintiff was entitled to recover. *S. C.*, 27 C. P. 129.

Telegraph poles, intended for the construction of their line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by one F. along the road in a sulky in the day time; they had passed several of the poles safely, but both were at the moment looking at an object off the road, and the sulky running against a pole upset and injured the plaintiff. It was proved that the pathmaster knew of the poles being there. The court being left to draw inferences as a jury:—Held, that the driver was guilty of contributory negligence, and that the plaintiff therefore could not recover, although the defendants would otherwise have been liable. *Castor* v. *The Corporation of the Township of Uxbridge*, 39 Q. B. 113.

The plaintiff, standing on the front platform of one of defendants' cars, which was crowded, was thrown off by a jolt and injured, but it did not appear whether, at the time of the accident, he was holding on to the iron rail on the platform or not:—Held, that the fact of the plaintiff not proving affirmatively that he was so holding on, was not a ground for nonsuit. *Cornish* v. *The Toronto Street R. W. Co.*, 23 C. P. 355.

The plaintiff was lessee of premises which were drained by a sewer made by the landlord in the street, with the assent of the corporation, who paid half the cost of constructing it. The corporation used it with the landlord's consent as part of the drainage system of the city, and connected it with two large drains of more than double its capacity. In consequence of the accidental bursting of a water pipe near it, a greater quantity of water was discharged into it than it could carry off, and the plaintiff's cellar was flooded and his goods damaged:—Held, on appeal, affirming the judgment of the county court, that defendants were guilty of negligence; and that the plaintiff's contributory negligence in not using sufficient exertions to save his goods, could at most only affect the quantum of damages. *Coghlan* v. *The Corporation of the City of Ottawa*, 1 App. R. 54.

See *Blackmore* v. *Toronto Street R. W. Co.*, 38 Q. B. 172, p. 2519; *Devlin* v. *Bain*, 11 C. P. 523, p. 2522; *Humphrey* v. *Wait*, 22 C. P. 580, p. 2522.

See also RAILWAYS AND RAILWAY COMPANIES—WAY.

II. PARTIES ENTITLED TO SUE.

A contractor with a corporation to supply hydrants at certain points with water for public

use, in the event of fires, is not liable for damages occasioned to the property of an individual rate-payer of the city by fire, owing to their not being a sufficient supply of water; there being no sufficient privity between such rate-payer and contractor. *Cunningham* v. *Furniss*, 4 C. P. 514.

Declaration, under C. S. U. C. c. 78, by the administrator of A., alleging that A. was lawfully on the platform at a station on defendants' railway, and defendants so negligently managed and drove an engine and carriages, loaded with timber, along the line near said station, that a piece of timber projecting from said carriages struck and killed the said A. Plea, that A. was a newsboy in the employ of C. & Co., vending papers on defendants' trains, under an agreement between C. & Co. and defendants, which agreement provided that defendants should carry C. & Co., their newsboys, and agents, on their trains, and should not be liable for any injury to the persons or property of said C. & Co., their newsboys or agents, whether occasioned by defendants' negligence or otherwise:—Held, in appeal, affirming the judgment of the Queen's Bench, Draper, C. J., diss., plea, good, without alleging that A. was a party to or aware of the agreement. *Alexander* v. *Toronto and Nipissing R. W. Co.*, 35 Q. B. 453; 33 Q. B. 474.

The deceased, a boy selling newspapers, got on a street railway car at the rear end, and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the trial stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged:—Held, in the Queen's Bench, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not. Held, also, Morrison, J., diss., that there was evidence for the jury of negligence on the part of defendants in the absence of the step, and no such contributory negligence on the part of deceased as should, as a matter of law, prevent the plaintiff's recovery. A nonsuit was therefore set aside. Upon appeal, this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that upon the evidence he must be taken to have been a licensee only. *Blackmore* v. *The Toronto Street R. W. Co.*, 38 Q. B. 172.

III. Parties Liable.

1. *Public Bodies and Officers.*

An action will lie against a post master for not sending a letter, but the plaintiff in his declaration must aver that the letter was his. *Campbell* v. *McPherson*, 6 O. S. 34.

A postmaster is liable to the party injured for loss caused by his negligence in the transmission of letters. *Carey* v. *Lawless*, 13 Q. B. 285.

Action against a harbour company, the plaintiff's vessel having been wrecked upon a sand bar about 200 feet outside of the piers, and the cargo lost. It appeared that this sand bar was of a shifting nature, disappearing and forming at different times, but defendants, some weeks before the accident, had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendants' negligence:—Held, that defendants were liable, and a verdict for the value of plaintiff's cargo was upheld. McLean, J., diss. *Webb* v. *Port Bruce Harbour Co.*, 19 Q. B. 615; affirmed on appeal. *Ib.* 623, and,

Per Draper, C. J.—By beginning to receive tolls, the company must be taken to assert that their harbour is capable of receiving and sheltering vessels of such size as it is fitted for. This includes the approach to the harbour; and if afterwards an obstruction renders it within their knowledge unsafe to attempt an entrance, they are bound either to remove the obstruction, or to close the harbour, by giving notice to the public that it cannot be safely approached. Hagarty, J., thought the weight of evidence strongly against the plaintiff, but concurred in the judgment, holding that to be no ground of appeal. He considered, however, that the verdict could be sustained only upon that part of the evidence which tended to shew that defendants had undertaken to remove the bar in question; and that if it were a known natural obstruction, outside of their harbour, which they had never professed to interfere with, then they would not be liable. *S. C.* in appeal, 19 Q. B. 623

Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect. *Berryman* v. *President, Directors, &c., of Port Burwell Harbour*, 24 Q. B. 34.

Quære, as to the liability of a deputy clerk of the crown for damages arising from neglect in his duties. *Moore* v. *Simons*, 1 L. J. N. S. 183. —C. L. Chamb.—J. Wilson.

The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured:—Held, that the company were liable. Quære, whether the corporation were bound to repair this part of the highway; but, held, that if so, that would not relieve the defendants. *Fairbanks* v. *The Great Western R. W. Co.*, 35 Q. B. 523.

Municipal corporations are responsible for damage caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge; and the road is out of repair when, by the existence of such obstructions, it is rendered unsafe or inconvenient for travel. *Castor* v. *The Corporation of the Township of Uxbridge*, 39 Q. B. 113.

As to the liability of the wrongdoer to the corporation. See *The Corporation of the Township of Vespra* v. *Cook*, 26 C. P. 182.

Defendants were incorporated to build a drawbridge over a river, and authorized to take tolls; and their charter empowered them to let and farm the tolls. They leased the tolls accordingly, and the lessee covenanted to open and close the drawbridge, and cause it to be properly attended to. The plaintiff's horses, while going down a hill, ran away and threw out the driver, and then ran on to the bridge. The draw had just been opened to let a vessel pass, and there being no bar or gate to close the bridge, the horses went over the opening into the water and were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found that gates would have prevented the accident, and that there was no negligence on the driver's part:—Held, that the plaintiff's right of action, if any, was against the lessee, and that defendants were not liable. Per Wilson, J.—The plaintiff was entitled to recover, though not against defendants. Per Richards, C. J., and Morrison, J., he was not entitled, for defendants would have done enough if they had had persons stationed to give warning when the draw was open, and they were not bound to have gates to stop runaway horses. *Price* v. *The Cataraqui Bridge Co.*, 35 Q. B. 314.

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2. *Other Cases.*

In an action against four, the declaration stated that the defendants were proprietors of a common stage coach for carrying passengers from T. to B.; that they received the plaintiff as a passenger for certain reward in that behalf; and by reason thereof it became and was the defendants' duty to use due care and diligence in conveying the plaintiff; yet they, not regarding their duty, did not use due diligence, &c., but by reason of the carelessness and improper conduct of defendants, by their servant, in conveyance of the plaintiff, he was thrown off of the said coach and injured, &c.:—Held, that upon this declaration a verdict might be given against three of the defendants, and for the other. Held, also, that negligence and improper conduct were sufficiently shewn by the evidence. *Gunn* v. *Dickson et al.*, 10 Q. B. 461.

Special action—Securities given up by judgment debtor for collection—Duty of judgment creditor to collect—Action thereon for negligence—Pleading—Liability. See *Hall* v. *Moss et al.*, 25 Q. B. 263, p. 1960.

After the commencement of an action for injury occasioned by negligence and improper conduct of defendant in the management of a vessel, defendant died:—Held, that the action could not be revived against his executor. *Cameron* v. *Milloy*, 22 C. P. 331.

IV. In Care and Construction of Buildings.

A person sending goods to be warehoused has a right to expect that the building in which they are placed shall be reasonably fit for the purpose, but he has no right to expect more than ordinary and average care in that respect, and it is only in the absence of such care on the warehouseman's part that he will be liable. *Wilmot* v. *Jarvis*, 12 Q. B. 641.

The fact of the building having fallen from a defect in the foundation is not conclusive evidence against the warehouseman, for that might happen without any negligence on his part. *Ib.*

Defendant, the owner of a house, leased to plaintiff a room in it, the only mode of access to which, and to the other rooms on the same story, was by a certain passage, in which there was an uncovered stovepipe hole. The plaintiff having agreed with defendant to change into an adjoining room, was in the act of moving her furniture, when she slipped into this hole and was injured:—Held, that defendant was not liable, for in the absence of express contract he was under no legal obligation to keep the premises in repair. The plaintiff was aware of the existence of this hole when she took the room. Quære, whether such knowledge, and her omission to cover it, was not evidence of contributory negligence which would have prevented her recovery. *Humphrey* v. *Wait*, 22 C. P. 580.

See *Kinney* v. *Morley*, 2 C. P. 226, p. 2526.

V. In Driving Horses.

In an action for negligent driving, when the fact of negligence goes fully to the jury and they find for defendant, and no misdirection is complained of, the court, unless it appear that the evidence is conclusive in favour of the plaintiff, will not grant a new trial. *Kenny* v. *Cook et al.*, 4 Q. B. 268.

In case of damages done to a verandah on a street by runaway horses, the question of negligence is for the jury, but what facts may by them be considered is a question of law. *Sandilands* v. *Bathgate*, 9 L. J. 328.—C.C.—Macdonald.

Action for negligence in driving a sleigh and horses against the plaintiff. It appeared that the driver, to get better sleighing, had turned off the road to follow a track along the ditch at one side; and that in coming up again the sleigh upset, and the horses running away overtook and ran against the plaintiff. The passengers in the sleigh which was upset acquitted the driver of any negligence; but another witness, who was near at the time, said that he thought, if more care had been used in coming up, the accident would not have happened. The jury having found for the plaintiff, a new trial was granted. *Robinson* v. *Bletcher et al.*, 15 Q. B. 159.

In an action for damages occasioned by the defendant driving against the plaintiff's sleigh, which he had overtaken and was endeavouring to pass on the highway:—Held, that under sec. 2 & 3 of C. S. U. C. c. 56, it should be left to the jury to decide whether the damage was occasioned by the misconduct of defendant, or partly by the default of the plaintiff, as he, in this case, not being able to turn out, did not stop as required by the statute. *Devlin* v. *Bain*, 11 C. P. 523.

Defendant's horse being baulky, defendant struck it with a whip to start it, his servant boy being on it. The horse started off, and knocked

down and injured the plaintiff in a lane along which the horse ran. The boy tried to stop the horse and called to the plaintiff. The plaintiff was nonsuited :—Held, that the nonsuit was right. *Brown* v. *Heather*, 8 L. J. N. S. 86.—C. C.—Dennistoun.

See *Ridley* v. *Lamb*, 10 Q. B. 354, p. 2514.

VI. Proof of Negligence.

In an action against the owners of a steamboat for damage done to the plaintiffs' bridge, it appeared that the steamer was found drifting against the bridge one morning after a storm, and that the injury complained of was thus caused :—Held, sufficient primâ facie proof of negligence, and that it lay upon defendants to account for the accident. *The Cataraqui Bridge Co.* v. *Holcomb et al.*, 21 Q. B. 273. See, also, *Wilmot* v. *Jarvis*, 12 Q. B. 641.

In an action for negligence, where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury. *Jackson* v. *Hyde*, 28 Q. B. 294. See, also, *Dererill* v. *Grand Trunk R. W. Co.*, 25 Q. B. 517 ; *Storey* v. *Veach*, 22 C. P. 164 ; *Blackmore* v. *Toronto Street Railway Co.*, 38 Q. B. 172.

The defendant having charge of the plaintiff's colt, took it to a blacksmith's shop to be shod for the first time, and having tied it there went out. The colt pulling back threw itself, and received injuries of which it died. The plaintiff sued defendant for negligence in so tying the colt instead of having it held while being shod ; and several witnesses were of opinion that what defendant had done was improper, while others thought he had adopted the proper plan :—Held, not a case in which there should be a nonsuit, on the ground that the evidence was consistent either with the existence or non-existence of negligence ; but that the question was for the jury. Cotton *v.* Wood, 8 C. B. N. S. 568, and Jackson *v.* Hyde, 28 Q. B. 294, distinguished. *Henderson* v. *Barnes*, 32 Q. B. 176.

Action against the defendants for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at a wharf, and the plaintiffs' lumber and mills there were burned. The alleged negligence consisted in leaving the screens of the steamer open ; and on the part of the plaintiffs evidence was received, though objected to, that on other occasions, at different times and places, the screens were open, and cinders had escaped. The engineer and firemen on the boat, being afterwards called for the defendants, swore that the screens were closed, and had never on any occasion been left open. The learned judge ruled, at the close of the case, that the evidence objected to was admissible, particularly as touching the credit of defendants' witnesses :—Held, that such evidence was inadmissible either to support the plaintiffs' case when it was tendered and received, or for the purpose for which it was afterwards admitted ; and the jury having found for the plaintiffs, a new trial was granted without costs. *Edwards et al.* v. *Ottawa River Navigation Co.*, 39 Q. B. 264.

The deceased was a passenger in defendants' railway for W. station, and was, as the conductor said, "pretty drunk" when he got on the train. He went out of the car door at that station, and next morning was found about 100 yards beyond it, about four feet from the rail, with his legs cut through at the knee-joints and his left foot crushed, of which injuries he died that afternoon. There was contradictory evidence as to whether the train stopped long enough at the station, for which there were only two passengers, to enable persons to alight ; but the other passenger said he got off leisurely, and the person to whom deceased had been talking on the car said he thought deceased had left the train, and that he told the conductor so after the train started. The conductor and baggage-master also got off there to see the station-master and returned to the cars. There was no further proof of the manner in which deceased met with the accident :—Held, that there was no evidence of negligence on defendants' part to go to the jury, and a nonsuit was ordered : Richards, C. J., doubting, (but not dissenting), on the ground that deceased having been taken on the train while intoxicated with the conductor's knowledge, and the very short stoppage at the station, afforded some evidence of negligence. *Giles* v. *Great Western R. W. Co.*, 36 Q. B. 360.

VII. Pleadings.

1. *Declarations.*

The plaintiff sued defendant, as the agent of an insurance company, alleging that the plaintiff had employed defendant to effect an insurance on his property, according to the rules of the company, but that defendant had so carelessly and negligently effected such insurance, that a loss by fire having occurred the plaintiff was prevented, by reason of such conduct of defendant in effecting the insurance, from recovering the amount thereof, and was put to trouble and expense in bringing an action therefor. Defendant pleaded an assignment of the policy by plaintiff to one G. before the fire. On demurrer to the plea, defendant took exceptions to the declaration on the following grounds : 1. The amount and duration of the policy are not shewn ; 2. No negligence by defendant is shewn; 3. That no reason is stated why the policy was bad, or that the defect was within defendant's undertaking ; 4. No agency between plaintiff and defendant shewn, the latter being agent for the company, nor any reward or consideration averred for the undertaking ; 5. That the breach is larger than the promise :—Held, 1. That the plea was clearly bad, for plaintiff, notwithstanding the assignment, was the proper person to sue ; 2. That the declaration (set out above) being for a misfeasance, did not require an allegation of a consideration or reward to support the action ; but the defendant having undertaken to do, and having done an act gratuitously, was liable for his misfeasance in the performance of his undertaking ; 3. That the defendant, after pleading over, could not object to the want of an allegation of the amount or duration of the insurance ; and lastly, that defendant was entitled to judgment for the insufficiency of the count because negligence generally, which was charged, is different from negligence to insure according to the rules of the company, which was what defendant was employed to do. *Johnston* v. *Graham*, 14 C. P. 9.

Declaration: that defendant was possessed of a wild, vicious, and mischievous horse, and it was unsafe and improper to permit the said horse to go or run at large on any public highway, yet defendant wrongfully and negligently permitted and suffered the horse, so being vicious, &c., to go at large on the public highway, where the plaintiff then lawfully was, whereby the horse ran at and jumped upon the plaintiff, and broke his leg:—Held, bad, for knowledge of the animal's vicious nature was not averred; and the allowing it to be at large on the highway was not a breach of any duty due from defendant to plaintiff. *Chase* v. *McDonald*, 25 C. P. 129.

The first count of a declaration, after averring defendants' duty to keep a street in repair, alleged that they so negligently preserved and kept the same, and so wrongfully, negligently, and improperly permitted a waggon to be and remain thereon for a long time, to wit, for the space of one month, contrary to their duty, that thereby the street became and was unsafe for the liege subjects, &c., to drive, pass, and repass, with their horses, carriages, &c., and the plaintiff lawfully passing with his carriage and horses, the horses became frightened by the said waggon and ran away, and the plaintiff was injured, &c. The second count alleged that defendants wrongfully and negligently permitted a certain waggon to be and remain on the said highway for a long space of time, to wit, for the space of one month, so as to obstruct the same, whereby the plaintiff's horses, while she was lawfully passing along the said street in her carriage, were frightened and ran away, &c.:—Held, both counts bad, in not shewing in what respect the corporation were negligent, or what duty they neglected, for it was not stated whether the waggon was defendant's, or that it was allowed to remain an unreasonable time, or that there was not sufficient room left to pass, or in what way such an object, not of itself likely to frighten horses, caused the injury. *Rounds* v. *The Corporation of the Town of Stratford*, 25 C. P. 123.

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2. *Pleas.*

Under a plea of not guilty, in an action against a bailiff, by the sheriff, for allowing a negligent escape, defendant can only prove that he was not guilty of negligence; he cannot give in evidence any special contract of service. *Ruttan* v. *Shea*, 5 Q. B. 210.

In an action under 10 & 11 Vict. c. 6, by an administratrix for negligently causing the death of her husband, the declaration stated that the defendant was possessed of a close, and one A. was possessed of another close adjoining defendant's; that upon defendant's close a wall was standing, which was, to defendant's knowledge, in a dilapidated and dangerous state, and leaning toward the close of A., by reason whereof it became the duty of defendant to take reasonable precautions to prevent the wall from falling; but that he wrongfully permitted the wall to remain in that state, and that afterwards, by reason of such neglect, the wall fell upon the close of A., and in falling killed deceased, who was then lawfully in said close. Defendant pleaded not guilty:—Held, that the declaration disclosed a legal liability in defendant, and that the evidence (which is set out in the report) warranted a verdict for the plaintiff. Semble, that under this issue defendant was at liberty to shew that the accident was caused either wholly or in part by the negligence of deceased, or of others for whom defendant was not responsible, and that a reasonable time for repairing the wall had not elapsed before the occurrence; and that supposing the state of the wall as alleged to be admitted in the pleadings, yet defendant might, in evidence, shew its actual condition, as bearing upon the question of negligence. *Kinney* v. *Morley*, 2 C. P. 226.

A declaration stated that the plaintiffs were in possession of a certain warehouse, and that defendant so carelessly and unskilfully dug an excavation or cellar on the adjoining close that said warehouse became injured, and the wall of it sunk, and fell in, by reason whereof plaintiff's goods were destroyed, &c.:—Held, that the plea of not guilty merely puts in issue the wrongful act alleged, which in substance was the excavating so near the plaintiff's close without using proper precautions that thereby the plaintiff's wall fell down; and that if defendant meant to assert a right to excavate up to the division line between the two closes he should have pleaded it specially. *Mitchell* v. *Harper*, 4 C. P. 147.

Semble, the plea of not guilty puts in issue the negligence only, and not the duty alleged. *Sweeney* v. *President, Directors, &c., of the Port Burwell Harbour Co.*, 17 C. P. 574.

Where, in the inducement of the declaration, it was alleged that defendants were proprietors of the railway, not saying at the time of the negligence complained of:—Held, that under plea of not guilty defendants might shew that at such time it was not their property. *Van Natter* v. *The Buffalo and Lake Huron R. W. Co.*, 27 Q. B. 581.

VIII. Damages Recoverable.

1. *Actions by Representatives of Persons Killed by Negligence.*

In actions under 10 & 11 Vict. c. 6, (C. S. C. c. 78,) the court will interfere if the damages are clearly excessive; but it was held, under the circumstances of this case, that £3,000 was not exhorbitant for the widow and three children of deceased. Semble, that the mother in this case could have no claim. *Secord* v. *Great Western R. W. Co.*, 15 Q. B. 631.

New trial granted, where the jury gave £5000, to be distributed, £500 to the widow, and the rest in unequal sums among five infant children, the deceased having been a blacksmith, 35 years of age, the patentee of an invention for an improved plough, and of careful, industrious habits, &c. *Morley* v. *Great Western R. W. Co.*, 16 Q. B. 504.

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2. *Other Cases.*

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $600 prior to that which the plaintiff purchased, supposing it from the certificate to be a first incumbrance. The first mortgagee obtained a decree for sale and the plaintiff purchased the land

at less than would satisfy the two mortgages, but he soon afterwards sold at a considerable advance so that in the end he would receive all that he paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages:—Held, that the damages were moderate, the plaintiff having in fact, sustained loss to the full amount of the first mortgage. *Harrison* v. *Brega*, 20 Q. B. 324.

The plaintiffs had undertaken to carry a cargo of stone in their schooner from C. to P., and had got as far as K., where she was injured by the negligence of defendants' servants in towing her. The stone was forwarded by defendants to P. In an action brought by the plaintiffs for the injury:—Held, that they could not recover as damages any part of the freight, for they might adopt defendants' act, and recover the whole from the consignees. *Stevenson et al.* v. *Calvin et al.*, 25 Q. B. 102.

In an action against a harbour company, charging that it was their duty to keep a sufficient light upon the end of one of their piers, as they had been in the habit of doing, to enable vessels to enter with safety, and that they had wrongfully removed such light without giving sufficient public notice, by reason of which the plaintiff's vessel while endeavouring to enter the said harbour had been lost:—Held, that in addition to the value of his vessel, the plaintiff was entitled to recover a further sum expended by him in good faith, and with a reasonable expectation of success, in attempting to raise the vessel for the purpose of repairing her. *Sweeney* v. *The President, Directors, &c., of the Port Burwell Harbour* 17 C. P. 574.

The deceased, who came by his death from falling into a ditch under the sidewalk, which it was alleged that defendants had neglected to cover, was insolvent at the time of his death, and in failing health, not capable of much labour, but there was evidence that he was able to superintend his business, which was that of an innkeeper, and went to market. The jury having given $4,000 apportioned among the children:—Held, that the damages were excessive. *Hutton* v. *The Corporation of the Town of Windsor*, 34 Q. B. 487.

The damages ($2,500) being in the opinion of the court excessive, for injuries to plaintiff's wife, caused by defendants' neglect to protect an embankment on the highway, a new trial was granted on payment of costs, unless the plaintiffs would consent to reduce the verdict to $1,250. *Toms et ux.* v. *The Corporation of the Township of Whitby*, 35 Q. B. 195.

The authorities as to remote and proximate causes of damage reviewed. *Ib.*

In an action by the plaintiff, an architect, on the common counts, for services in preparing plans and superintending the erection of a house for defendant:—Held, that defendant was entitled to deduct from the amount which the plaintiff could otherwise claim any loss which defendant had sustained through the plaintiff's negligence, in certifying too much for contractors who afterwards failed, in consequence of which defendant was compelled to have the work done by others at a much higher price. *Irving* v. *Morrison*, 27 C. P. 242.

In an action for injury to plaintiff's vessel caused by collision with defendants' steamboat:—Held, that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs; but not for the sum expended in the hire of another vessel to take her place, or for the profits which he would have earned by her employment. Semble, that in an action of trover for a vessel; the loss of profits may be recovered. *Brown* v. *Beatty et al.*, 35 Q. B. 328.

An agent had not answered for some months urgent letters received from his principal in England. The principal thereupon, being alarmed, employed solicitors here to see to his interests in the matter; but the agent, though repeatedly applied to by such solicitors during nearly three weeks, gave the solicitors no information, or even an interview, and they consequently filed a bill for an account and injunction:—Held, that the defendant by reason of his neglect must pay the costs up to the hearing, though the court was satisfied his neglect did not proceed from any dishonesty on his part, or any intention of withholding information from his principal. *Douglass* v. *Woodside*, 11 Chy. 375.

NEVER INDEBTED.

See PLEADING AT LAW.

NEW ASSIGNMENT.

See PLEADING AT LAW—TRESPASS.

NEWSPAPERS.

I. ADVERTISEMENTS—*See* ADVERTISEMENT.

II. LIBELLOUS—*See* DEFAMATION.

III. INSERTING APOLOGIES—*See* DEFAMATION.

IV. CRIMINAL INFORMATION AGAINST—*See* DEFAMATION.

S. & C., the proprietors of a weekly newspaper, seeing in another paper an advertisement of defendants' company inviting subscriptions for stock, and stating that the share lists would close on the 10th December, 1874, on the 3rd November telegraphed H., the defendants' managing director, to ask if they might insert it in their paper, to which H. replied, "Yes. In the meantime send terms, must be low." The advertisement accordingly appeared in the paper on the 5th November, and was continued till 21st January, 1875, with an alteration made on the 26th November by B., defendants' agent at Toronto, being twelve insertions, for which plaintiff claimed at the rate of 10 cents per line, or $32 for each insertion. On the 10th December, S. & C. drew on defendants for $160, the sum then due at that rate, at 30 days, which was paid; and this action was brought to recover the balance $224. There was no express contract to pay at such rate, but S. said that in answer to H.'s telegram, he wrote to him, that their charge was 10 cents a line; and a notice to

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